

IN DEFENSE OF CONSTITUTIONAL
REPUBLICANISM: A REPLY TO
CRITICISMS OF *OUR REPUBLICAN
CONSTITUTION*

OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE. By Randy E. Barnett. New York: HarperCollins Publishers. 2016. Pp. xiv + 283. \$26.99 (cloth).

*Randy E. Barnett*¹

I am supremely grateful to the University of Illinois College of Law's Program in Constitutional Theory, History, and Law, directed by my friend Kurt Lash, and to *Constitutional Commentary* and its editor Jill Hasday, for the honor of convening and publishing this symposium on my book, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People*.² I am also enormously appreciative to the authors of the papers that appear in this volume: Jud Campbell, Jack Balkin, Jason Mazzone, Amy Coney Barrett, Sanford Levinson, and my colleague Lawrence Solum. Their commentaries are uniformly insightful, constructive, and stimulating. They have caused me to think more deeply about the many issues they have raised—so many issues that this reply can only touch on the highlights. Rather than attempt to be comprehensive, I aim instead to use their critiques as a springboard to clarify the claims I make in *Our*

1. Carmack Waterhouse Professor of Legal Theory; Director, Georgetown Center for the Constitution. An early version of these remarks were presented at the "Symposium on *Our Republican Constitution*," which was held at the University of Illinois College of Law, in Champaign, Illinois on March 18, 2016. The symposium was jointly-sponsored by Illinois' Program in Constitutional Theory, History, and Law, and the Georgetown Center for the Constitution. Permission to reprint or distribute this essay for nonprofit educational purposes is hereby granted.

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

Republican Constitution and, where possible, to look for common ground.

JUD CAMPBELL

There is much to admire and like in Jud Campbell's article *Republicanism and Natural Rights at the Founding*.³ I found his treatment of Founding Era sources discussing natural rights and social contractarianism to be nuanced and fascinating. And I agree with large swaths of what he says. Where I may disagree, however, would require an exegesis of Founding Era sources that would necessitate a deeper dive into those sources than I am prepared to make or could present here if I was. So let me confine myself to two points he may want to think about for his future work, and a general observation about the qualified nature of his thesis.

First, while he admirably presents a wide diversity of sources in a remarkably coherent way, he never attempts to resolve some of the fundamental differences in approaches to which he alludes. While I share his view that, when it came to first principles, the Founding generation agreed on much and that their disagreements should not be exaggerated, disagree they did: especially on the scope of the implied powers of the federal government. That was what the debate over the first bank was all about.

And yet, at the end of his paper, Campbell is seemingly able to reach a unitary conclusion regarding their views of the status of natural rights. As he concludes, “[m]ost retained natural rights were therefore *individual* rights that could be *collectively* defined and exercised by legislatures, with virtually no room for judicial oversight. In the end, Founding-Era natural rights were not really ‘rights’ at all”⁴ I think his conclusion is a little too confident, even in light of the discourse he so admirably summarizes, but also in light of some items he does not mention.

I will limit myself to one set of statements from Madison. In a footnote of his essay, Campbell quotes Madison's Bill of Rights speech where he said that “it is for [Congress] to judge of the

3. Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85 (2016).

4. *Id.* at 111–12.

necessity and propriety” of laws.⁵ And Madison does make this statement in the context of discussing why certain means—like the use of general warrants as a means of raising revenue—should be restricted by adding certain positive rights, which Campbell calls “constitutional rights.” Here, the end of “raising revenue” is undoubtedly a proper one as it was enumerated.

Yet, in his bank speech delivered to that very same Congress, Madison invokes the Ninth Amendment “as guarding against a latitude of interpretation”⁶ of the Necessary and Proper Clause, with respect to whether a monopoly grant to a bank was properly within the power of Congress. One possible way to reconcile these positions is that, as these statements were made during a congressional debate, whether or not a monopoly is “proper” is solely for the Congress to debate and decide, and not for the courts.

Years later, however, in a letter to Spencer Roane responding to Chief Justice Marshall’s opinion in *McCulloch* upholding the National Bank Act that Madison had signed into law as president, Madison condemned “the high sanction given to a latitude in expounding the Constitution,” and in particular to “a legislative discretion” as to the means “to which no practical limit can be assigned.”⁷ And he then expressly criticized Marshall for his assertion of judicial restraint: “Does not the court also relinquish, by their doctrine, all control on the legislative exercise of unconstitutional powers?” Equating “necessity” with mere convenience, wrote Madison, would place the matter “beyond the reach of judicial cognizance. . . . By what handle could the court take hold of the case?”⁸

So Madison apparently saw an important role for courts in holding Congress to its enumerated powers—a role so important that it could be cited against an interpretation of the Necessary and Proper Clause that was not judicially administrable. And he took issue with Marshall’s reasoning on this question in a case that reached an outcome with which he agreed!

Further, it is revealing that, when Marshall later sought in his series of pseudonymous newspaper essays to defend himself

5. *See id.* at 108, n. 113 (quoting James Madison).

6. 1 ANNALS OF CONG. 1951 (Joseph Gales ed., 1791) (Rep. J. Madison).

7. Letter from James Madison to Judge Roane (Sept. 2, 1819), in 3 LETTERS & OTHER WRITINGS OF JAMES MADISON, at 143 (New York, R. Worthington 1884).

8. *Id.* at 144.

210 *CONSTITUTIONAL COMMENTARY* [Vol. 32:207]

from this charge, he *denied* (perhaps disingenuously) equating “necessary” with “convenience”: “The court does not say that the word ‘necessary’ means whatever may be ‘convenient,’ or ‘useful.’”⁹ He then specifically rejects the view that the Court should have exercised judicial restraint or “modesty” and deferred to Congress’s own assessment of the scope of its powers:

Would Amphycion himself be content with the declaration of the Supreme Court that, on any question concerning the constitutionality of the act, It is enough to say “it is not consistent with judicial modesty” to contradict the opinion of Congress, and “thus to arrogate to themselves the right of putting their *veto* upon a law” . . .?¹⁰

To the contrary, Marshall maintained, it “was incumbent on them to state their real opinion and their reasons for it.”¹¹

In a later essay, Marshall doubled down on the Court’s assertion that it would fall to the judiciary to assess whether Congress was exercising an enumerated power in good faith, or is instead acting pretextually:

In no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the Constitution. Not only is the discretion claimed for the legislature in the selection of its means, always limited in terms, to such as are appropriate, but the court expressly says, “should congress under the pretext of executing its powers, pass laws for the accomplishment of objects, not entrusted to the government, it would become the painful duty of this tribunal . . . to say that such was not the law of the land.”¹²

Marshall also implicated the concept of good faith in defense of using “convenient” as a synonym for “necessary”: “When so used, they signify neither a *feigned* convenience nor a strict

9. John Marshall, *A Friend to the Union*, PHILA. UNION, Apr. 28, 1819, reprinted in JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND 100 (Gerald Gunther ed., 1969). This seems a positively bizarre claim in light of McCulloch’s oft-quoted passage: “the word ‘necessary’ . . . frequently imports no more than that one thing is convenient, or useful, or essential to another.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819). Any attempt to reconcile these statements is beyond the scope of this reply.

10. Marshall, *A Friend to the Union* (Apr. 28, 1819), in GUNTHER, *supra* note 9, at 105.

11. *Id.*

12. John Marshall, *A Friend of the Constitution*, ALEXANDRIA GAZETTE, July 5, 1819, reprinted in JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND 100 (Gerald Gunther ed., 1969) 186–87.

2017]

A REPLY TO SIX CRITICISMS

211

necessity; but a reasonable convenience, and a qualified necessity”¹³

A judicial willingness to invalidate pretextual assertions of power for the common good is exactly what I am advocating in *Our Republican Constitution* (pp. 231-245). While I would not want to place too much weight on particular statements by Madison, Marshall, or anyone else, I think the matter of the judicial role in holding legislatures to their “just powers” was, at minimum, more contestable, or at least in flux, at the founding than Campbell’s unqualified conclusion seems to assert.

My second point concerns the role that the concept of “presumed consent” played in discussions of consent, which Campbell addresses only in passing. For me, this was a key discovery that I believe has long been overlooked in discussions of the role played by natural rights in limiting legislative power. As Justice Samuel Chase explained in *Calder*, the only way implied consent of the individual to legislative power can be “presumed” or *deemed* to be unanimous, is if legislatures of general powers are limited by the unenumerated “great first principles.”¹⁴ For example, a law “that punished a citizen for an innocent action,” or “a law that destroys, or impairs, the lawful private contracts of citizens,” or “a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B” is merely an “ACT of the legislature (for I cannot call it a law).”¹⁵

Why not? Given the consent of the governed to legislatures of general powers, why are such “acts” not “laws”? Because, said Chase, “[i]t is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, *it cannot be presumed that they have done it.*”¹⁶ In other words, because the unanimous consent of the people is merely “presumed,” such consent is by its nature limited, even without expressed limitations on powers being included in a written constitution.

In a like manner did Attorney General Edmund Randolph use such reasoning to conclude that a national bank was beyond the power of Congress to enact. In his opinion to President

13. *Id.* at 168 (emphasis added).

14. *Calder v. Bull*, 3 U.S. 386 (1798).

15. *Id.* at 388.

16. *Id.* (emphasis added).

Washington, Randolph contended that even a textually unqualified grant of legislative power “does not affect any of those paramount rights, which a free people *cannot be supposed* to confide *even to their representatives*.”¹⁷

In short, the fact that the consent of each individual can, at best, only be presumed provides a limit on the powers that can be claimed by legislatures who presume to govern on his or her behalf. Although the role that judges may play in enforcing such a limit is a separate question, the inherently bounded nature of presumed consent is an important conceptual prerequisite to the judicial duty to nullify ultra-vires statutes.

Finally, Campbell couches his critique carefully in ways that make it more difficult to rebut, but also potentially consistent with the portrait of natural rights and presumed consent that I present in *Our Republican Constitution*. Here are a few examples (with my emphases added):

In short, natural rights called for good government, not *necessarily* less government.¹⁸

Inalienability undergirded the American stance about *who* could collect taxes and regulate property, but labeling something as a “natural right” did not suggest *well-defined* limitations on governmental power.¹⁹

By contrast, retained natural rights did not impose *strict* limits on the powers of representative bodies.²⁰

[T]he historical record shows that they preserved retained natural rights principally through constitutional structure, giving legislators, not judges, *nearly* complete responsibility for determining their proper scope.²¹

In this way, the Founders’ “anti-democratic” efforts did not reflect an understanding of “natural rights” as *rigid* constraints on governmental power.²²

17. Edmund Randolph, *Opinion of Edmond Randolph, Attorney General of the United States, to President Washington*, in *LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES* 86 (M. St. Clair Clarke & D.A. Hall, ed., 1932) (emphasis added).

18. Campbell, *supra* note 3, at 87.

19. *Id.* at 98.

20. *Id.* at 101.

21. *Id.* at 104.

22. *Id.* at 105.

The combination of these principles meant that, both in theory and in practice, legislatures had *virtually* unfettered authority over *most* retained natural rights.²³

Campbell is to be commended for his care in formulating these conclusions from the evidence he presents. But the qualifiers he employs leave much room for judges to have *some* role in curbing legislators who exceed what the Declaration of Independence referred to as their “just powers.”

True, natural rights may not have been thought to provide “rigid” restraints on legislative power, or be legally enforceable *as such*. I do not claim otherwise in *Our Republican Constitution*. But the continued existence of such rights after the formation of civil society—which Campbell acknowledges that some, if not most, of the Founders believed—nevertheless can justify *some* outer boundary on the powers of legislatures to restrict the liberties of the people—even if such limitations were neither “strict” nor “well defined.”

What then is the proper role of the judiciary in a constitutional republic in which the people retain their natural rights? Campbell tells us that “the historical record shows that they preserved retained natural rights principally through constitutional structure. . . .”²⁴ In *Our Republican Constitution*, I propose that judges are needed to ensure that this structure is preserved—in particular the limitations on federal power that defines the reserved powers of the states (in chapters 6 and 7), and the separation of powers within the federal government (in chapter 8). Presumably, Campbell has no objection in principle to these types of judicially-enforceable limits on legislative power as a means of protecting the natural rights retained by the people.

Only in Chapter 9 do I discuss another outer boundary on legislative power: no individual can be presumed to have consented to their liberty being restricted by irrational and arbitrary edicts, which cannot properly be considered to be laws. Of course, where one draws the line on what is irrational and arbitrary is not always obvious (though sometimes it is pretty clear, as Sandy Levinson concedes²⁵), and we can employ various presumptions to reach results in actual litigation. But it seems

23. *Id.* at 108.

24. *Id.* at 104.

25. See *infra* text accompanying note 70.

plain from *Calder* and other sources that the judiciary had *some* role to play in protecting the individual sovereign from his agents acting towards him in such a manner.

True, the abstract nature of natural rights themselves do not specify which restrictions do not serve the common good because they are irrational or arbitrary. What is needed is constitutional law or implementing doctrine to cash out these limits in a judicially-administrable way. In Chapter 9, I propose that, as was suggested by Chief Justice Marshall in *McCulloch v. Maryland*, we are looking to smoke out “pretextual” assertions of power that were actually enacted to serve the interests of the few over the common good of everyone (pp. 231-245).

I do not propose, however, that courts directly examine the motives of legislators. Instead, I suggest they approach laws with a “realistic” appreciation that statutes and regulations are not always enacted in good faith, but are often enacted to dispense benefits to a selected few, or even many, at the expense of others—as well as other objectives that are beyond the just powers of any republican legislature. For example, restrictions on liberty are also enacted simply because legislators do not approve of the liberty being exercised.

Moreover, at the founding it might have been reasonable to assume that legislators might deliberate about the constitutional scope of their powers—as the first Congress did when debating a national bank—a deliberation of which judges might well be respectful. Today, however, if legislators pay any attention to the Constitution at all—and they typically pay none—they merely debate whether or not the courts will uphold their acts. When courts, in turn, are deferring to legislatures about the scope of their own powers, while legislatures are deferring to the court’s willingness to uphold their laws, we have what I call the problem of “double deference,” where no one is assuring that legislatures are remaining within their just powers (pp. 128-129).

When devising implementing doctrine, courts should be mindful of this reality. I propose that, to protect the rights retained by the people, judges should require legislatures to articulate the proper end they seek to accomplish—a seemingly reasonable demand—and then examine the fit between the means adopted and the stated end. And simply helping out a favored interest group at the expense of either a minority of the people or

2017]

A REPLY TO SIX CRITICISMS

215

the people as a whole is not a proper end of a legislature in a republic in which the people themselves retain their natural rights.

By the same token, where different persons are being treated differentially, courts should ask how this differential treatment of individuals or groups is justified. What judges should not do, I maintain, is adopt highly unrealistic and formalist “presumptions” in favor of legislative power that cannot be rebutted by any argument or evidence presented by a member of the sovereign people to an independent and neutral magistrate.

In this way, irrationality and arbitrariness review provides an outer boundary or guard rails within which legislatures are entirely free to regulate the exercise of natural rights or liberty in good faith for the common good. Such an outer boundary of good faith would seem to fall within the qualifiers that Campbell attaches to the discretion he says legislatures were thought to have at the founding: It is not “rigid,” it does not “necessarily” lead to “less government,” and it “principally” relies on reinforcing the structure of our Republican Constitution.

But this approach does deny that legislatures have “*complete* responsibility for determining” the proper scope of their delegated powers or that, as servants, they have “*unfettered* authority” over the retained liberties of their masters. In short, such an approach seeks to effectuate what Campbell accurately calls “the philosophical pillars of republican government.”

JACK BALKIN

Jack is entirely right. This is not an originalist book.²⁶ If it had been, I would have used evidence in an entirely different way. But neither is it an historical work that purports to capture the full meaning of “republicanism.” Rather it is an antidote; an antidote to an overly-democratic reading of the Constitution and our “ethos” while imputing that reading and ethos back to the Founding. (In contrast, it is to Sandy Levinson’s great credit that he has always had the intellectual integrity to describe the Constitution as it is, and not as he would like it to be, and then to judge it accordingly.)

26. See Jack M. Balkin, *Which Republican Constitution?*, 32 CONST. COMM. 38 (2016).

For this reason, focusing solely on the “undemocratic” and even “antidemocratic” aspect of “republicanism”—while setting to one side the anti-monarchical or anti-aristocratic aspects of republicanism—has great value. So too is forgoing discussion of the other eight features he identifies with “classical republicanism” to focus on one persistent tension that runs from the Founding up to the present: the tension between “popular government” to secure the rights of the people and democratic majoritarianism that can undermine these rights. It is this tension that Madison set out to examine in his *Vices* essay.²⁷

That this was not the only issue confronting the Founders, the generations between them and us, or that confronts us today does not make it any less important to identify and focus on this single issue. I chose to do so because it is this issue—as opposed to the other aspects of republicanism that Balkin identifies—that underlies much of our present-day thinking of the proper role of courts.

I admit my book was written for a popular audience and therefore was limited in how nuanced it could be. Ask my editor who demanded a complete rewrite *after* buying the book and paying a substantial advance for it. But when they move outside their doctrinal sub-specialties, the political theoretic as well as historical views of most law professors are pretty much at the level of the general public. In my experience, nothing reaches law professors more effectively than a treatment that is written to be accessible by a first-year law student.

Of course, this would be a problem if my book gets our “ethos” wrong. Balkin suggests mine does, primarily due to sins of omission rather than commission, but by sinning nonetheless. As might be expected, I disagree. The sharp line Balkin draws between “republicanism” and “classical liberalism” may well be anachronistic. As Gordon Wood warned, it “is important to remember that the boxlike categories of ‘republicanism’ and ‘liberalism’ are essentially the inventions of us historians, and as such they are dangerous if heuristically necessary distortions of a very complicated past reality.”²⁸

27. See pp. 52–58 (discussing Madison’s *The Vices of the Political System of the United States*).

28. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* xi (2d ed. 1998).

2017]

A REPLY TO SIX CRITICISMS

217

When discussing “a complicated past reality,” there is nothing wrong with isolating one particular—and selectively neglected—feature of that reality. In *Our Republican Constitution*, I focus on the fact that the tension between majoritarianism and fundamental rights does go all the way back. And what passes for modern notions of majoritarian rule were rejected by the Founders when they wrote the text of our Constitution. So recapturing this aspect of republicanism is independently valuable to supporting a proper appreciation for our “undemocratic Constitution,” which is necessary to seeing it accurately interpreted and enforced.

Balkin makes a very useful observation about the methodology of the book that is worth quoting at length:

Although Barnett quotes the Founders at many points in the book, his argument is not really an argument about the original meaning of the Constitution. At least, it is not an argument from original meaning according to Barnett’s own theory of how to interpret the Constitution. That theory distinguishes between discovering the original communicative content of the Constitution—the task of constitutional interpretation—and constitutional “constructions,” which fill out, make sense of, and apply the constitutional text.

Much of the argument of the book is not constitutional interpretation in the sense described above, because it is not an exegesis of the original communicative content of the text of the Constitution. In fact, the document on which Barnett lavishes the most attention is the Declaration of Independence, and he takes us through several of its key passages with a focus that is almost Talmudic in its attentions. Barnett uses the Declaration to elaborate what he regards as the essential ethos of the Constitution. According to Barnett’s theory of constitutional interpretation, this argument is a construction of the Constitution—albeit the best and most appropriate construction. Similarly, his “presumption of liberty” is not an account of the original communicative content of the Constitution’s text. Rather, it is an important construction directed at judges and designed to fulfil the Constitution’s larger purposes.²⁹

This is all exactly right. The only “originalist” claim I might have made concerns the original public meaning of “We the People.” But I do not present enough evidence to establish that

29. Balkin, *supra* note 26, at 38.

the individualist conception of popular sovereignty I identify was the prevailing view. At best, I have shown that it was an available view that was sufficiently fundamental and well known—as evidenced by its expression in the Declaration of Independence—to render “We the People” irreducibly ambiguous in this regard and therefore in need of construction.

Balkin then asks, “What kind of argument is Barnett making then?”³⁰ I like the answer given by my colleague Larry Solum: “In my view, Barnett and his critics are engaging in what philosophers of language call ‘metalinguistic negotiation’—the process by which the meaning of words like ‘republican’ and phrases like ‘republican constitutionalism’ are contested (adversarially) or negotiated (cooperatively),” the former of which he calls “metalinguistic contestation.”³¹ A central aim of *Our Republican Constitution*, he says, “is to engage in metalinguistic contestation . . . by articulating a normative constitutional theory and showing the connections between that theory and various uses of the words ‘republican’ and ‘republicanism’ in both American history and contemporary constitutional politics.”³²

I believe Solum is right to say that I am “entering into contemporary constitutional politics from a perspective rooted in constitutional theory and history,” but am speaking “to a contemporary audience from a contemporary perspective” by means of a “republican narrative”³³: “a story about American constitutional development that associates [my] normative theory of constitutionalism with the idea of a ‘republic’ in the sense in which a republic is contrasted with ‘majoritarian democracy.’”³⁴ If the argumentative strategy succeeds, “the political identity of being a ‘Republican’ [today!] will come to be associated with endorsing the ‘republican constitution’ and opposing the ‘democratic constitution.’”³⁵

Balkin characterizes my “description of republicanism [as] a remarkable act of historiographical chutzpah.”³⁶ To this, Solum quite trenchantly responds:

30. *Id.* at 39.

31. Lawrence B. Solum, *Republican Constitutionalism*, 32 CONST. COMM. 175, 178 (2016).

32. *Id.* at 178.

33. *Id.* at 179.

34. *Id.*

35. *Id.*

36. Balkin, *supra* note 26, at 54.

2017]

A REPLY TO SIX CRITICISMS

219

Barnett is not trying to unearth the historical meaning of the phrase “republican constitution” in the early republic or later—rather, his aim is to engage in metalinguistic contestation that creates new meaning for that phrase. Structurally, Barnett’s move is similar to the attempt by progressive constitutional scholars to associate “civic republicanism” with a contemporary progressive constitutional theory.³⁷

Precisely! As I mention below in responding to Sandy Levinson, having successfully captured the flag of “civic republicanism” in the 1980s for themselves, progressives are distressed by any narrative that threatens their ownership of the label “republicanism™.”³⁸

Given all this, Solum finds it unsurprising that I did not choose the phrase “Our Liberal Constitution” as the title for his book—as I was urged to do by both Balkin and Sandy Levinson when they commented on an earlier draft:

Given the contemporary political valence of the term “liberal,” that title would have been counterproductive, a laughable error of authorial judgment. Indeed, it seems unlikely that any members of the intended audience for the book would bother to read it, if it had that title, whereas a book entitled “Our Republican Constitution” might grab their attention. Members of the Republican Party will not endorse “Our Liberal Constitution”—because the contemporary meaning of the word “liberal” in political contexts is diametrically opposed to their political commitments.³⁹

In addition to being right about the fact that my analysis is not originalist, Balkin is also right that this is a book about today, and that I did not anticipate the rise of Trumpism when I wrote it. Indeed, when I began writing the book two years ago, I might have imagined a clean electoral battle between a Ted Cruz (or a Rand Paul, for whom I worked as a campaign advisor) against a Hillary Clinton, in which case, I would have wanted the Republican Party’s vision of the Constitution to be superior to that of John Roberts’.

Is this still a worthwhile argument to make in the face of Trumpism? I think so, but time of course will tell. Trumpism—

37. Solum, *supra* note 31, at 178.

38. See *infra* at pp. 18–26.

39. Solum, *supra* note 31, at 178.

which is a mixture of Populism and Caesarism—represents about 35-40% of those who voted in open primaries, which includes a lot of Democrats. Under the voting rules put in place by the Republican National Committee, perhaps to assist “insider” Jed Bush against a divided field of “outsiders,” that plurality turned out to be enough to secure the Republican nomination for a candidate who had, until recently, been a New York socially-liberal Democrat reality television personality and relentless self-promoter.

Yet a significant part of the Republican Party—call it the conservative Republican intelligentsia—was bitterly, and in the case of the #NeverTrump folks possibly irredeemably, opposed to this remaking of the Republican Party. Perhaps it is no coincidence that conservative commentator George Will, who wrote the Foreword for *Our Republican Constitution*, recently changed his registration from Republican to unaffiliated.⁴⁰

Moreover, in the final chapter, I also recommend an Article V convention of the states to propose amendments to restore or bolster the republican features of our Constitution that have been undermined by the political processes I describe in my book. Indeed, eight of the requisite thirty-four state legislatures have now called for such a convention, and a simulated Article V convention—drawing commissioners from all fifty states—was held in Williamsburg, Virginia in September. And, after the 2016 elections, thirty-three state legislatures are now completely in Republican hands.

Of course, with the election of Trump, I would have expected many progressives suddenly to rediscover the “republican” nature of our undemocratic Constitution. Given the liberal use of the “undemocratic” filibuster by Democrats since they lost control of the Senate, this is a pretty safe bet. As Balkin puts it, “Trump is a nightmare version of Barnett’s Democratic Constitution, not because he is a good-government progressive, but because he is at heart a Schmittian.”⁴¹ While this seems a reasonable bet, only time will tell if Trump governs as he campaigned. But if he does, as with the New Dealers who had second thoughts about judicial self-restraint when the Republicans gained control of Congress in

40. See Maggie Haberman, *George Will Leaves the G.O.P. Over Donald Trump*, N.Y. TIMES (June 25, 2016) http://www.nytimes.com/2016/06/26/us/politics/george-will-leaves-the-gop-over-donald-trump.html?_r=0.

41. Balkin, *supra* note 26, at 58.

2017]

A REPLY TO SIX CRITICISMS

221

1946, I expect progressives to be less than enthusiastic about a Trumpian expression of the Rousseauian General Will that was embraced by the Democratic Party in the 1830s, which called itself “the Democracy” (pp. 158-160, 87-88).⁴²

With the result in 2016, Schmittian Trumpism within the Republican Party will need to be dealt with. Either the limited-government, constitutionist wing prevails, or a new “constitutional freedom party” must arise to supplant the Republican Party the way the Republicans emerged to replace the Whigs. Although the platform of such a party would have much more to it than a stance on the Constitution, it would be nice if the part that deals with the Constitution echoes the themes of my book.

JASON MAZZONE

Our Republican Constitution presents an argument about how democratic majoritarianism is not the answer to the problem of constitutional legitimacy, but the problem that a republican constitution is needed to solve. Call it “the majoritarian difficulty.” Constitutional limits on government power are one way to temper majoritarian abuses of the liberties of We the People—each and every one. And these liberties include, but are not limited to, the economic liberty to pursue a lawful occupation free from irrational or arbitrary restrictions. By enforcing these limits, as agents of We the People, judges play an important role in legitimating whatever restrictions on liberty survive meaningful scrutiny.

In his pithily-entitled, “Me the People,”⁴³ Jason Mazzone’s principal objection to this proposal is that a single Supreme Court is not capable of micromanaging a legal system whose doors are open to florists, hair braiders, casket-making monks, horse massagers, tour guides, and any other member of We the People who seeks to earn an honest living in occupations that are not inherently unlawful. But I confess that I do not entirely understand the complaint.

42. See also GERALD LEONARD, *THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS* 39 (2002) (“Van Buren’s concept of democracy was close to Rousseau’s”).

43. Jason Mazzone, *Me the People*, 32 *CONST. COMMENT.* 143 (2016).

How much extra work would it have taken for the Supreme Court to have refused to grant cert in *Lee Optical of Oklahoma vs. Williamson*⁴⁴ than to grant cert and rule in *Williamson v. Lee Optical*⁴⁵? True, that would have left it to other federal district courts to take evidence and fairly decide these cases locally, but that would seem to be the sort of project they could do—as they did do in the case itself—and which Mazzone seems to favor with respect to state courts enforcing federal constitutional rights. So what’s his beef?

If the issue is that we don’t have enough lower courts to handle the work, he does not say so. My response to this concern is the same as Justice Bradley’s retort in his *Slaughter-House* dissent to Justice Miller invoking the specter of a flood of litigation to justify his narrow reading of the Privileges or Immunities clause:

[E]ven if the business of the National courts should be increased, Congress could easily supply the remedy by increasing their number and efficiency. The great question is, What is the true construction of the amendment? When once we find that, we shall find the means of giving it effect. The argument from inconvenience ought not to have a very controlling influence in questions of this sort.⁴⁶

Or we could free up immeasurable federal court resources simply by repealing the Controlled Substances Act.

Mazzone posits my claim is “that the Republican Constitution will be saved if our Supreme Court . . . *aggressively* reviews laws and government action for their rationality.”⁴⁷ But, as I make clear, such review need not be “aggressive”—an issue to which I will return when discussing Sandy Levinson’s critique.⁴⁸ It just needs to be *real*, not fictitious; *actual*, not hypothetical. All the sovereign members of We the People want and deserve as sovereigns is their day in court in which their judges do not reflectively side with their servants over them.

But I confess that my biggest disappointment with Mazzone’s paper is that he fails to deliver on the critique embedded in his catchy title, “Me the People.” He seems to let that label do all the

44. 120 F. Supp. 128 (W.D. Okla. 1954).

45. 348 U.S. 483 (1955).

46. 83 U.S. 36, 124 (1873) (Bradley, J. dissenting).

47. Mazzone, *supra* note 43, at 152 (emphasis added).

48. See *infra* text accompanying notes 94–97.

2017]

A REPLY TO SIX CRITICISMS

223

work. “Me” implies a certain selfishness, or even atomistic individualism. But I do not deny that legislatures should regulate in the public good. I merely claim that this is what they *must* be doing to be consistent with the presumed consent of We the People, and sometimes they aren’t.

Recognizing the individual as the ultimate sovereign is no more or less empowering than recognizing monarchs as the ultimate sovereign of their nations. Within their own domains monarchs are free to exercise their will, as well as to enter into compacts or treaties with other monarchs. The law of nations then regulates their relations with other sovereigns.

So, too, in the United States where the people themselves are monarchs. They are presumably free to use what is theirs and enter into contracts with one another. Domestic law is then there to stop them from invading the rights of others and to regulate their actions to prevent such wrongs from occurring.

As I have argued in other places, few progressives would outlaw private property or private contracts. Instead, they argue that government should do *more*.⁴⁹ Whether or not it should to more, it seems like a relatively modest proposal, in light of our republican heritage—not to mention sound moral theory—to include the rights of property and contract among those that are to be protected from either majoritarian abuses, or far more commonly, abuses by entirely unaccountable regulatory boards that are often captured by the very industries they purport to regulate—often by legislative design.

AMY CONEY BARRETT

Like Jack Balkin, Amy Coney Barrett is entirely right that I am not making an originalist case for the Republican versus the Democratic constitutions.⁵⁰ Perhaps an originalist case can be made that the public meaning of “We the People” was

49. See Randy E. Barnett, *Afterword: The Libertarian Middle Way*, 16 CHAP. L. REV. 349, 358 (2013) (“[B]ecause proponents of social justice and legal moralism typically propose superimposing their schemes onto existing structures of private property and freedom of contract, rather than supplanting them altogether, these stances are necessarily more ambitious than simply limiting legal coercion to the libertarian core that must still be ascertained and enforced.”).

50. See Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMM. 61, 66 (2016) (“The book is less about what the Constitution’s original public meaning requires than about what is normatively attractive.”).

individualist, but Jud Campbell’s article shows how challenging it would be to establish this. There is one sense, however, in which originalism does figure into my analysis: The “republican” conception of the Constitution I identify explains and justifies certain features of our written Constitution that Levinson and others have condemned as “undemocratic.”

Put another way, if the original meaning of the text of the Constitution is undemocratic, the narrative I present helps bolster the case for adhering to these features rather than treating them like inkblots. It may well be that the very features of our Constitution that lead American law professors like Levinson to prefer Euro-style parliamentary systems—and recommend them to other countries—is what makes the original meaning of our Constitution “republican” and therefore good, rather than “undemocratic” and therefore bad.

Barrett begins by focusing on my claim that courts need to “realistically assess whether restrictions on liberty were *truly* calculated to protect the health and safety of the general public, rather than being the product of ‘other motives’ beyond the just powers of a republican legislature.”⁵¹ This is necessary, I wrote, because “[r]equiring the government to identify its *true purpose* and then show that the means chosen are actually well suited to advance that purpose helps to smoke out *illicit motives* that the government is never presumed by a sovereign people to have authorized.”⁵²

To this she responds with a series of questions:

Barnett’s emphasis on the importance of recovering the legislature’s true purpose understates the complexity of identifying legislative intent. It is extraordinarily difficult [. . .] for a court to glean what was “really” going on behind the scenes of a statute. A legislature is a multimember body, and different members may have different motives. Perhaps some legislators enacting a ban on filled milk were concerned about its health effects and others were beholden to a powerful dairy lobby. Whose intent controls? Is such a statute *truly* calculated to promote health and safety or is it the kind of rent-seeking statute that rational individual sovereigns would not countenance? Do the rent-seeking motives of some legislators

51. BARNETT, p. 125 (her emphasis) (praising the late-18th and early 19th-century courts that took this approach).

52. P. 232 (my emphases).

2017]

A REPLY TO SIX CRITICISMS

225

corrupt the statute if other legislators act with the public welfare in view?⁵³

Given how I expressed myself in the book, this is a point well taken. Despite my assertion that courts should identify the “true purpose” of a measure, I do not propose an inquiry into the subjective motives of a multimember body like the legislature. What I meant—and wish I had stated more precisely—is that courts should be cognizant that legislators and regulators sometimes, and even often, impose restrictions on the liberties of some of the people for reasons other than the protection of the health and safety of the public, or some other power they justly exercise.

Instead, elected legislatures and unelected regulators alike sometimes invoke the health and safety of the public as a pretext for channeling special benefits and privileges to a politically well-connected few. As Barrett notes, in the book, I give several examples. Indeed, most of the most famous constitutional cases about economic regulation involve measures enacted for such illicit reasons.

What I propose is that when restrictions on the liberties of We the People are challenged, courts should be realistic rather than formalist about the possibility that such laws were enacted for what Justice Rufus Peckham described as “other motives.”⁵⁴ But this is a conclusion he reached not by inquiring directly into the motives of New York state legislators, but after realistically assessing and debunking the purported health and safety rationale for a maximum hours laws just for bakeshop employees—but neither the bake shop employers who worked in the same conditions nor employees in other occupations with comparable working conditions.

So, rather than inquire into the subjective motives of legislators, courts should require that legislatures commit themselves to a proper end they claim to be achieving, and then assess whether the means chosen to meet that end were “irrational” or “arbitrary.” Although courts do not do so now, it is not too much to ask legislatures to include the purpose for their measures in the enactment itself, rather than rely on lawyers to

53. Barrett, *supra* note 50, at 70 (footnotes omitted).

54. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

make up the purposes after the fact in litigation, as courts currently permit.

Then, courts should examine whether the means chosen bears a sufficient relation to the stated end. This is an inquiry that courts make routinely in cases involving judicially-favored “fundamental rights” or “suspect classes” of persons.⁵⁵ Again, in the book, I provide examples of this inquiry in practice, including the lower court opinion in *Lee Optical v. Williamson*. And I contrast this with the Court’s uncritical deference to legislative assertions of public purpose in *Bradwell v. Illinois*⁵⁶ and *Plessy v. Ferguson*.⁵⁷

The search for sufficient means-ends fit is simply too common a judicial inquiry to be dismissed as impractical for some liberties and but not for others. The reason for disparate treatment of different liberties is due to a judicial determination that some liberties are more worthy of judicial protection than others. Those who, like Barrett, question placing one’s “faith in courts” need to explain why judges get to choose some rights as “fundamental” and some classifications as “suspect” but not others.

Denying a judicial duty to hold legislatures to within their just powers in *all* cases or in *no* cases would eliminate the reliance on judicial discretion to identify which rights and liberties deserve protection. But putting one’s “faith in judges” to choose meaningful scrutiny in *some* cases, and fictitious “rational basis” scrutiny in others, is inconsistent with a professed skepticism of the “institutional capacity” of judges. I do not see how you can have it both ways.

Barrett characterizes “the normal functioning of the legislative process” this way:

The legislature is not an idealized body that acts with one mind, but a multimember body that produces legislation through a complex and even chaotic process. Any bill that runs the gamut of this process represents compromises made along the way, sometimes to resolve the competing desires of different

55. See Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008).

56. 83 U.S. (16 Wall.) 130 (1872).

57. 163 U.S. 537 (1896).

2017]

A REPLY TO SIX CRITICISMS

227

constituencies and sometimes because the legislature has drawn a line somewhere.⁵⁸

But “resolving the competing desires of different constituencies” is not, standing alone, a proper legislative purpose in a constitutional republic in which the liberties of each and every person merits protection. To this description of the “complex and even chaotic process,” Barrett might have added that bills are very often written by industry representatives for staffers, and then are logrolled past legislators who typically know nothing of their contents.

Without transparency, how are we supposed to know whether these “compromises” among the “competing desires of different constituencies” are proper or improper? In a constitutional republic in which We the People are the ultimate sovereign, the persons who are on the coercive end of such “compromises” have a right to know. And the due process of law requires them to have the opportunity to contest the necessity and propriety of such compromises before a neutral magistrate.

Nor are legislators realistically “accountable” for most of what they do. No legislator has ever been defeated because they voted for a licensing bill that irrationally or arbitrarily restricted the liberty of Americans to braid hair, arrange flowers or furniture, make caskets, or drive a limo. And this is not because such restrictions have been approved by the general public. It is because the electorate is ignorant of these acts, has insufficient interest in them to care, and is only allowed to choose between two competing parties, each of whom favors an amalgam of policies, only a handful of which are particularly salient (pp. 176-178).⁵⁹

In light of this, to imagine that these liberties are somehow “balanced” in the legislative process by legislators who are held to account by the voters is to engage in magical thinking. The only time where legislators *do* consider the constitutionality of their actions is when restricting a right such as the freedom of speech that the courts will protect. Only when legislators know that individual citizens may challenge their actions in court and judges

58. Barrett, *supra* note 50, at 73.

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

will be looking over their shoulders do they even discuss the question of a measure's constitutionality.

In every other area, legislators employ the artifice of “double deference”: Courts will defer to the legislature's assertion of power and then, when asked if what they do is constitutional, legislators say “yes, because the courts will uphold us” (pp. 128-29). This is as big a fraud on the public as anything that economic regulation is supposed to prevent.

Barrett asks a very good question: “Would *Prigg*, *Dred Scott*, and *Plessy* have come out differently if courts had only applied the standard Barnett proposes? Was it really a misguided attachment to judicial restraint that drove those cases, or did the Court see through the same discriminatory lens as the legislature?”⁶⁰ To answer this, consider three cases.

The first is the *Slaughter-House Cases*⁶¹ where there was an extensive record in the Louisiana legislature that the slaughter-house bill was a good faith public health measure.⁶² The only constitutional issue was whether a monopoly given to a private company was an appropriate means of pursuing a legitimate legislative purpose. But after the Supreme Court's ruling refusing to recognize the right to pursue a lawful occupation as protected from state abridgement by the Fourteenth Amendment, the entire legislative record was constitutionally irrelevant. Although the majority in *Slaughter-House* cited this record, the law would have been equally constitutional without a single witness being sworn.

You need not take my word for this. The proof is that the very next day, in *Bradwell v. Illinois*,⁶³ the Court relied on its ruling in *Slaughter-House* to turn away Myra Bradwell's claim that denying her the right to practice law was arbitrary or irrational. And the Court did so without any examination into the irrationality or arbitrariness of this restriction. True, three of the dissenters in *Slaughter-House* concurred in the judgment.⁶⁴ So Barrett is correct to suggest that, for these three justices, the

60. Barrett, *supra* note 50, at 79 (footnotes omitted).

61. 83 U.S. 36, 124 (1872).

62. See Randy E. Barnett, *The Three Narratives of Slaughter-House*, 41 J. SUP. CT. HIST. 295 (2016).

63. 83 U.S. (16 Wall.) 130 (1872).

64. *Id.* at 139 (Bradley, J. concurring).

2017]

A REPLY TO SIX CRITICISMS

229

outcome would have been the same under the standard that I propose.

But, unlike Justice Miller, Justice Bradley was forced to explain *why* Myra's exclusion was not arbitrary, and the reasons he articulated provided women's rights advocates with a rallying cry. In contrast, according to the majority's approach, a court need not even inquire into the basis of the law. So, while the case would likely have come out the same under either approach, with mine, Myra Bradwell had a *chance* of success. And, even if she lost, the court's reasoning could have been criticized and used as a basis for change in the future.

Furthermore, in *Bradwell*, Chief Justice Chase dissented not only from Miller's majority opinion but "from all the opinions" in the case,⁶⁵ including Justice Bradley's. Even in 1873, when opinions of women were highly sexist, the Chief Justice would have upheld Myra Bradwell's challenge as an irrational or arbitrary restriction on her right to pursue a lawful occupation. So, under the standard I propose, one justice would have reached a different result.

In *Plessy*, the Court asserted that: "[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable."⁶⁶ Most likely, like the majority in *Bradwell*, they would have upheld segregation regardless of what record was developed below. But relying on *Slaughter-House*, the Court needed no such record to reach its conclusion. Consequently, the Court did not even have to consider whether the state's claim to be preserving the public order was plausible. How convenient for them. The judicial restraint of the Democratic Constitution took them completely out of the picture.

As with Chief Justice Chase's dissent in *Bradwell*, in *Plessy*, the more realistic assessment of this exercise of the police power justified a solo dissent by Justice Harlan. So here too, the different standard made a difference; the difference between a unanimous decision and one accompanied by a contemporaneous dissenting opinion to explain to the public and posterity why the majority was wrong.

65. *Id.* at 142 (Chase, C.J., dissenting).

66. 163 U.S. 537, 550–51 (1896).

The fact that such a law *would* get scrutiny today shows that courts are quite capable of supplying it. So, where there is the will to ensure that the liberty of We the People is not irrationally or arbitrarily restricted, there is a way—provided that courts appreciate their essential role as servants of the sovereign people, including individual citizens like Myra Bradwell and Homer Plessy.

Finally, like other authors, Barrett mentions my “presumption of liberty”: Under “Barnett’s Republican Constitution . . . [r]ather than treating legislation as presumptively constitutional, they must treat the citizen’s challenge as presumptively correct.”⁶⁷ As she acknowledges, however, in this book, I say very little about putting the thumb on the scale for the citizen against the state: just two paragraphs. Indeed, after a long discussion of the lower court opinion in *Lee Optical*, I note that “who bears the formal burden of proof may be less important for preserving the sovereignty of the people than that courts *realistically* assess the rationality and arbitrariness, even if the legislature is given the benefit of the doubt” (p. 243).

Given the professed sympathy of modern law professors for so-called “legal realism,” ironically, in my book I am merely advocating realism over formalism. I am skeptical that the legal realists were really all that interested in realism. In the end, as soon as they had the votes, they replaced realist “Brandeis briefs” with a formal presumption of constitutionality, which eventually was deemed to be irrebuttable, and therefore ceased to be a true “presumption.”

In my jaundiced opinion, assertions of “realism” and “restraint” were merely useful arguments to advance the progressive political agenda of the Legal Realists. Likewise, today’s progressives are interested in “judicial restraint” and deference to the majoritarian branches only when the laws they like are being challenged as unconstitutional.

Like others, Barrett refers to my approach as “libertarian,”⁶⁸ yet all I am asking for is realism. If such realism cuts in a “libertarian” direction, then that is more a reflection on

67. Barrett, *supra* note 50, at 62.

68. Barrett, *supra* note 50, at 76 (referring to “Barnett’s generally libertarian approach”).

2017]

A REPLY TO SIX CRITICISMS

231

legislatures and what they are “really” up to most of the time than it is on my priors.

SANFORD LEVINSON

While it was still in manuscript, I delivered talks on my book at Yale and Harvard. Jack Balkin commented on my book at Yale, and Sandy Levinson commented at Harvard. Both Balkin and Levinson expressed objections to my use of the term “republican,” saying pretty much what they now say in greater depth in their contributions to this symposium. Having responded to Balkin’s objection above, let me now further elaborate in response to Levinson’s.

Progressives are highly possessive of the term “republican.” Around the time of the bicentennial they relished the historical claim that the Founders were more communitarian and less “liberal” than most Americans then believed. And they did so under the rubric “civic republicanism.” Balkin’s paper presents the relevant literature, and I am not in a position to challenge that historiography. I do recall, however, that when I read Gordon Wood’s *Creation of the American Republic*, it was my impression that many of the quotes he included in the footnotes did not completely align with the characterizations in the text.

So I was not at all surprised that my use of the term “republican” would raise some hackles among those who felt they had trademarked the term. And in the final version of the book, I responded to this objection with a defense of my using the term “republican,” in contrast with the term “democratic.”⁶⁹ A portion of this defense is so basic that it could be characterized as syllogistic:

In his book, *Our Undemocratic Constitution*, Levinson insisted that the U.S. Constitution is “undemocratic”;

In my book, I explain how the Founders quite consciously rejected the forms of state governments as “too democratic”;

The Founders called their “undemocratic” constitution “republican”;

69. See pp. 26–28 (section discussing “Reclaiming the Label ‘Republican’”).

Ergo, it is fair of *me* to call the U.S. Constitution “republican” in contrast with a democratic constitution of the sort that Levinson favors.

It is really that simple. Levinson’s beef is with the Founders who called their newfangled “undemocratic” constitution “republican”—not with me.

In responding to Balkin’s objection above, I defended my claim that identifying the Constitution as republican *because* it was undemocratic is fair. So let me now move on to the substance of Levinson’s critique, which perhaps is more accurately called a “list of grievances.” I can only consider a few.

Levinson disputes my historiography of the Republican Party:

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.⁷⁰

This charge is in tension, however, with his acknowledging that I label Republican Teddy Roosevelt a progressive and that “readers may be surprised to discover” from my book “that Herbert Hoover was also a dangerous progressive.”⁷¹ To this he adds the entirely accurate description of Republican Robert Bork as adhering to the stance I call the Democratic Constitution, as did John Roberts. Of course, I make clear throughout the book that many Republicans have long accepted the Democratic Constitution, and were also progressives. That was the point of my discussion of Roosevelt and Hoover. Indeed, the “progressive” and “democratic” judicial philosophy of Republicans Bork and Roberts is the principal target of my book!

Of course, if readers are surprised to read that Hoover was a progressive, it is because he has for so long been demonized as a laissez-faire “conservative.” As Levinson concedes, “One can certainly argue that [Hoover] has been unfairly typecast as a

70. Sanford Levinson, *Randy Barnett’s Critique of Democracy (and John Marshall?)*, 32 CONST. COMMENT. 113, 118 (2016).

71. *Id.* at 119.

2017]

A REPLY TO SIX CRITICISMS

233

simple-mindedly reactionary villain jousting against the heroic Franklin Roosevelt and his New Deal.”⁷² Indeed. In a book for a popular audience, counteracting that “typecasting” is an important step in developing an alternate narrative.

My alternative narrative is one that seeks to counter balance the narrative to which the general audience at whom this book is aimed is unrelentingly subjected today in both schools and in the popular culture. Not only do today’s readers need to be reminded that Roosevelt and Hoover were progressive Republicans who adhered to the Democratic Constitution and appointed justices like Republican Oliver Wendell Holmes Jr., they need to be reminded just how egregiously wrong were the Nineteenth-century Progressives, with whom latter-day Progressives so proudly identify.⁷³

Today’s readers also need reminding

that the Republican Party was founded in opposition to the democratic vision of majoritarian “popular sovereignty” advanced by the Democratic Party in defense of slavery in the territories;

that it was the Republican Congress which repeatedly passed civil rights acts in the 1860s and 70s, which were then nullified by majoritarian Republican-nominated justices;

that it was a Republican, Justice John Marshall Harlan, who dissented from these decisions;

that it was Republican administrations who continued to enforce the laws that remained on the books until the election of Democrat President Grover Cleveland;

that progressive Democrat Woodrow Wilson segregated the federal government by race; and

that a Republican President, Dwight Eisenhower, nominated a Republican Governor, Earl Warren, to be Chief Justice.

To this list of reminders, I might also have added that it was a Republican President who sent federal troops to Little Rock to enforce the Supreme Court’s desegregation rulings against a

72. *Id.* at 120.

73. See THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA* (2016).

recalcitrant Democratic governor; that Martin Luther King, like most blacks then, was a Republican; and that, due to opposition by Democrats, the Civil Rights Acts of the 1960s would not have passed without Republican support in Congress; indeed, that such measures garnered a higher proportion of Republican than Democratic support. The voting breakdown by party was:

The original House version:

Democratic Party: 152–96 (61–39%)

Republican Party: 138–34 (80–20%)

Cloture in the Senate:

Democratic Party: 44–23 (66–34%)

Republican Party: 27–6 (82–18%)

The Senate version:

Democratic Party: 46–21 (69–31%)

Republican Party: 27–6 (82–18%)

The Senate version, voted on by the House:

Democratic Party: 153–91 (63–37%)

Republican Party: 136–35 (80–20%)⁷⁴

Perhaps none of this is news to academic readers of this scholarly article.⁷⁵ But do these readers present these facts to their students when conveying *their* narratives in class or in their writings? Not when I was a law student, they didn't, and I doubt any but a few do today.

I can assure Levinson that most readers of my book are well aware of the self-congratulatory stance that today's Democrats

74. See DESMOND KING, *SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE US FEDERAL GOVERNMENT* 311 n.1 (1995).

75. On the crucial role that Republicans played in enacting the Civil Rights Act of 1964, see 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 121 (2014) ("Liberal Democrats could not supply the sixty-seven votes needed to stop the filibuster [by southern Democrats] without Republican support; only Dirksen, the party's leader in the Senate, could supply the extra votes for the requisite supermajority.").

2017]

A REPLY TO SIX CRITICISMS

235

take towards the role some Democrats played in securing passage of the Civil Rights acts of the 1960s, dismissing Democrat opponents of such measures as “Dixiecrats” and highlighting the opposition to the passage of the 1964 Act by Republicans such as Barry Goldwater. In my book, I offer these countervailing facts, not to make Republicans heroes but to provide a “republican narrative” that modern-day Republicans can and should embrace.

As the title of his essay suggests, Levinson contends that my real target is not the Progressives but John Marshall. And I admit that, after Oliver Wendell Holmes Jr., Marshall is among my least favorite justices. But, while I cannot contest modern historians’ claims about civic republicanism, I can contest the Progressives’ claims merely to be following the lead of “the Great Chief Justice.”⁷⁶ They have accomplished this by selectively reading out of the Marshall opinions the parts that Levinson complains I quote.

So in his reply, he reiterates the famous parts of Marshall’s opinions that law professors stress. To his credit, he concedes: “It is not that one *cannot* read *McCulloch* more restrictively.”⁷⁷ But this restrictive reading, he insists, “is not in fact the message that has been drawn from the case over its now almost-200-year history.”⁷⁸ And he is “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.”⁷⁹

Levinson then reiterates the expansively-worded passages of *Gibbons* that law professors have long emphasized: The commerce power of Congress extends to “commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state” if that commerce “affect[s] other states” and that “[c]omprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more states than one.”⁸⁰

Levinson concludes his exegesis of *McCulloch* and *Gibbons* by accusing me of “construct[ing] a fictitious history of unbroken constitutional fidelity” by failing “to recognize the responsibility of Marshall himself for the [capacious] constitutional vision

76. Levinson, *supra* note 70, at 132.

77. *Id.* at 134.

78. *Id.*

79. *Id.*

80. *Id.* at 137 (his emphasis).

that . . . Marshall instantiated.”⁸¹ Oh, I recognize it all right. Both *McCulloch*, *Gibbons*, and Marshall himself are grist for my mill in *Restoring the Lost Constitution*.⁸²

Yet the point I make in *Our Republican Constitution* is that neither case goes as far as the Progressives maintained when they used these opinions of the Great Chief Justice to assert their fidelity to the written Constitution. Indeed, as I noted above,⁸³ this was the publicly-expressed view of John Marshall when defending himself from the charge that *McCulloch* was latitudinarian.

Seriously, if *Gibbons* plus *McCulloch* were really taken *at the time* to have been as “capaciously” read as the Progressives later claimed—and Levinson still claims—about the scope of federal power, would there have been any need for the Thirteenth Amendment? Would not Congress have had the power to abolish the economic activity of slavery “which is completely internal, which is carried on between man and man in a state,” for surely this commerce “concerned more states than one” and “affect[ed] other states?”⁸⁴

Yet, to my knowledge, even the most creative antislavery lawyers—including my own personal favorites Lysander Spooner and Salmon Chase—did not imagine Congress had such a power, much less that *Gibbons* and *McCulloch* had already so ruled!⁸⁵ True, some employed the precedent of Story’s egregious (and very modernly-reasoned) reading of the Necessary and Proper Clause in *Prigg v. Pennsylvania*⁸⁶ to contend that Congress had a sweeping power to enforce various rights guarantees in the original Constitution on behalf of slaves.

For example, Joel Tiffany relied on *Prigg* in support of his contention that “all the rights and immunities guaranteed by the Constitution to the citizen of the United States, can be secured by

81. *Id.* at 138.

82. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 171–80 (2d ed. 2014) (discussing *McCulloch*); *id.* at 294–97 (discussing *Gibbons*).

83. See *supra* text accompanying notes 8–12.

84. 22 U.S. (9 Wheat.) 1, 194–95 (1824).

85. See Randy E. Barnett, *The Continuing Relevance Of The Original Meaning Of The Thirteenth Amendment*, GEO. J.L. PUB. POL’Y (forthcoming 2016); Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment* 3 J. LEGAL ANALYSIS 165 (2011) (chronicling the arguments that antislavery constitutionalists *did* make).

86. 41 U.S. (16 Pet.) 539 (1842).

the Federal Government, and for this end they have a right to pass all the laws necessary for the enforcement of those guarantys.”⁸⁷ But I know of no antislavery constitutionalist who thought *Prigg* was a defensible extension of *McCulloch*, or that either case justified Congress to use its commerce power to prohibit slavery within a state.

Even after emancipating most of the slaves in a variety of ways and winning the Civil War, the most radical Republicans in Congress did not believe they had a power to abolish slavery under the Commerce and Necessary and Proper Clauses. In James Oakes’ extensive examination of the myriad legislative devices employed by Republicans to restrict slavery prior to the Thirteenth Amendment, the commerce power is not even mentioned.⁸⁸ To gain the power that past and present Progressives claim already existed, Republicans believed a constitutional amendment was both necessary and worth fighting strenuously for.

Indeed in the wake of the Civil War, the Chase court adhered to what I have contended was the original meaning of the Commerce Clause.⁸⁹ But if the Republicans and the Chase Court were right, then the Progressives were wrong, and remain wrong. And so too is Levinson wrong to claim an “almost-200-year” pedigree for the Progressives’ reading of *Gibbons* and *McCulloch* that renders mine “idiosyncratic in the extreme.” While I am quite prepared to take on the bitter of John Marshall’s loosey goosey opinions and to criticize him for it, I am entitled to quote the sweet parts of these canonical cases—even the parts that don’t fit the narrative of the “New Deal Constitution.”

Like Barrett and Mazzone, Levinson seems to be imputing what he knows are my libertarian politics and policy preferences

87. JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT 100 (1849); *see also id.* at 138–41.

88. *See* JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES 1861–1865 (2013).

89. *See* U.S. v. Dewitt, 76 U.S. (9 Wall.) 41, 43–44 (1869) (invalidating a lamp oil prohibition as beyond both the taxing and commerce powers of Congress) (“[T]his express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some *other* power expressly granted or vested.” (emphasis added)).

to what I am claiming that courts should do. But, in what is probably my favorite passage of his essay, he says:

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 by the most austere version of “minimum rationality”).⁹⁰

I entirely agree with this. Both ideally and in practice, most laws and regulations would pass a realistic rationality and arbitrariness reviews. Mine is actually a very modest proposal that would yield modest results. At its core, it merely requires that legislatures exercise their powers in good faith and with a modicum of care. Perhaps it is a measure of just how extreme is the formalism of today’s “rational basis” review, that even a proposal as modestly realist as mine seems radical.

For me, there is a difference between what is constitutional under our Republican Constitution and every particular of what I might favor as public policy. I understand how, in a day and age in which everything that is “good” must *ipso facto* be constitutional, that might be a difficult claim to credit. Levinson asks skeptically: “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?”⁹¹

If my answer to this question is “yes,” do I win the debate? Can I still win if laws that are not “ridiculous” on their face—like Hialeah’s ordinance banning animal sacrifice⁹² or Texas’s restrictions on abortion clinics⁹³—turn out, upon examination, to be “arbitrary”? What about laws that may not seem “ridiculous”

90. Levinson, *supra* note 70, at 127–28.

91. *Id.* at 128.

92. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 561 (1993) (citing Michael McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 35 (1989) (“[A] regulation is not neutral in an economic sense if, whatever its normal scope or its intentions, it arbitrarily imposes greater costs on religious than on comparable nonreligious activities.”)).

93. *See Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2316 (2016) (“[T]his record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court’s conclusion that [m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary.”).

2017]

A REPLY TO SIX CRITICISMS

239

when enacted, but come later to be seen as irrationally based on prejudice or junk science?

Many of Levinson's grievances about my reading of our Republican Constitution involve, not a claim that we need to impose restrictions on liberty, but claims about the need for income redistribution and other uses of the tax and spending powers. About these I say nothing in my book. Like my last book, *Restoring the Lost Constitution*, this new one is about restrictions on our liberty, or freedom of action — on our ability to do what we will with what is ours. I assume that, in our constitutional order, general taxation and government spending is constitutional, however unlibertarian that may be. As Levinson does to his credit with the Second Amendment, I take the Sixteenth Amendment as I find it. While elsewhere I do advocate its repeal in favor of a national sales tax,⁹⁴ I do not advocate that judges ignore or “interpret” away the text to reach libertarian ends.

So both because I don't talk about taxing and spending, and because irrationality and arbitrariness review would be rather modest in its effects on regulations, Levinson is right when he says, “Barnett might complain that I am overestimating the degree to which he is a radical individualist.”⁹⁵ But this is because, as already mentioned, there is a difference between how radical an individualist I might be *as a policy matter*, and how I read the original meaning of the Constitution we have.⁹⁶

Far more “radical” in its effect would be for courts to enforce the structural constraints on Congress's power that Levinson and Balkin call “hardwired.” This includes its enumerated powers, as well as its power to delegate its legislative powers to the executive branch. But even here, this proposal should be more acceptable to a small “d” democrat like Levinson than he is prepared to acknowledge.

As he notes with respect to health care laws, limiting the power of Congress does not eliminate the power *of government*. It simply says *which governments* should address a policy problem. State governments are government too, and are at least as democratic as is the Congress, and arguably far more

94. See BARNETT, *supra* note 82, at 416.

95. Levinson, *supra* note 70, at 128.

96. See Randy E. Barnett, *Is the Constitution Libertarian?*, 2009 CATO SUP. CT. REV.

accountable to their people. On democratic grounds, then, why not let Brandeis's laboratories of regulatory experimentation operate there?

To this, Levinson asserts that federalism provides an inadequate check on potentially tyrannical state governments:

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're mad as hell and will not take it anymore as they move to a more compatible state.⁹⁷

But, under the approach of our Republican Constitution, we need not take this on faith. In this part of his article, Levinson seems to have forgotten the part of my thesis he criticizes earlier in his: that federal courts should police state exercises of their police powers by invalidating irrational or arbitrary – and therefore "tyrannical" – state regulations under the Fourteenth Amendment. See how coherently our Republican Constitution can operate?

By the same token, on democratic grounds, why does he not demand that our elected Congress make its own laws, rather than pass vague aspirational policy objectives, and then let unelected, unaccountable executive branch regulators make the rules that actually bind We the People? If that is too much work for our 535 servants, then that is all the more reason to let the fifty democratically-elected state legislatures in on the action.

Of course, we all know the answer to why everything must be moved to the national level. It is precisely because foot voting by individuals and companies is indeed a greater constraint on the exercise of government power by states than is "democratic" ballot voting at the federal level.

Moreover, I never proposed to abolish elections—indeed my Bill of Federalism proposal for constitutional amendments includes a call for term limits.⁹⁸ You don't get rotation in office without elections. The claims that foot voting is a more effective means for individuals to protect their own interests than ballot voting, and that, when most power is exercised by competing state governments, foot voting provides a more potent check on the

97. Levinson, *supra* note 70, at 136.

98. See BARNETT, *supra* note 82, at 415.

2017]

A REPLY TO SIX CRITICISMS

241

scope of government power, is not to claim that ballot voting has no value at all. As I say in the Introduction, “those who hold a republican or individualist vision of popular sovereignty will acknowledge that popular elections provide a vital constraint on the exercise of power by the agents or servants of the people” (pp. 25-26).

The debate is not, therefore, over *whether* to have elections, but over *what elections mean*. For adherents to the Democratic Constitution, elections express the “will of the people” who are entitled to rule. Except in extraordinary circumstances, thwarting this majoritarian will is deemed to be illegitimate. The problematic nature of allowing unelected, unaccountable, judges to invalidate expressions of the will of the people even has its own technical name: the “counter-majoritarian difficulty.”⁹⁹

For adherents to the Republican Constitution, elections serve as a vital check on the power of the servants of the people by their masters. In agency law, an agent must act on behalf of the principal and subject to his or her control.¹⁰⁰ Elections provide a semblance of such control. But, under a Republican Constitution, judges too are servants of the people, whose job it is to fairly adjudicate claims made by a jointly-sovereign individual citizen, that his or her agents have acted *ultra vires* or beyond the proper scope of their just powers.

So not only do I embrace elections, as explained above, but my proposal that judges fully enforce our Republican Constitution’s structural constraints of federalism and separation of powers, would result in *more* decision-making by democratically-elected state legislators and fewer by unelected federal functionaries in the executive-administrative state.¹⁰¹ Consequently, if elected legislators in fifty states are making more of the laws (subject to the judicial guardrails provided by the Fourteenth Amendment), and Congress is stopped by the courts from offloading its law-making duties to unelected executive branch bureaucrats, there would be more, not less, electoral accountability than we have today.

99. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

100. See Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CAL. L. REV. 1969, 1981 (1987).

101. See PHILIP HAMBURGER, *IS THE ADMINISTRATIVE STATE UNLAWFUL?* (2014) (criticizing the prerogative powers of the executive administrative state).

So, for a true democrat like Sandy Levinson, what's not to like?

LAWRENCE SOLUM

I have already noted Larry Solum's defense of my project against critics who may accuse it of historical inaccuracy when employing the label "republican." Like Monsieur Jourdain's discovery that he had "been speaking prose all my life, and didn't even know it,"¹⁰² I now discover that I have been engaged in "metalinguistic contestation" without realizing it.

But this was just a preface to his article presenting "a republican theory of constitutionalism" that "explains the ways in which republican virtue and republican liberty might provide a normatively attractive constitutional vision that supplements, extends, and enriches the vision offered in *Our Republican Constitution*."¹⁰³ In his rich essay, Solum defends the following propositions.

Republican liberty requires that society be organized in such a way that individuals and their communities will flourish; hence, peace and prosperity are perquisites for freedom.

Republican liberty requires that society be organized in such a way that individuals develop the capacity for self-government; the formation of virtuous character should be a central aim of legislation, especially in the realm of the family and the educational system.

Republican liberty requires the creation of conditions under which individuals can become economically self-reliant and independent of others, masters of their own lives, and not depend on either government or a private entity to the degree that they become mastered by others.¹⁰⁴

As someone with an Aristotelian-Thomist background and bent, I am quite attracted to his account. In the limited space I have here, I cannot provide a full evaluation of its merits, but wish to stress one point in particular. We hear a lot about "self-government" by those who adhere to the Democratic

102. MOLIÈRE, *THE BOURGEOIS GENTLEMAN*.

103. Solum, *supra* note 31, at 182.

104. *Id.* at 199.

Constitution. For it is supposedly by elections and referenda that “the people govern themselves.” However, as I have contended in both *Our Republican Constitution* and *Restoring the Lost Constitution*, this is a myth and a potentially pernicious one.

For, in the name of “self-government,” the Democratic Constitution licenses the exercise of power by a majority of a handful of individuals designated “legislators” and even, in our current system, the faceless individual bureaucrats to whom these “legislators” have delegated their powers. Because an individual can consent to nearly anything—from entering a boxing ring to having sex with another person—when it is fictitiously claimed that you have to have consented to delegate power to a group of strangers, these strangers can then assert this faux-consent to justify their authority to do pretty much anything to you that they like. Consent is simply too powerful a mechanism to be fictitiously allocated to others.

Solum correctly distinguishes this collective conception of self-government from the Republican conception of “self-governance” as literally *the government of one’s own self*: “Republican constitutionalism emphasizes government of the individual by the individual.”¹⁰⁵ That is what individual sovereignty means.

As I explain in *The Structure of Liberty*, natural rights define the boundaries within which persons should be free to make their own choices—to truly govern themselves—subject to the like liberty of their fellow citizens and joint sovereigns.¹⁰⁶ Or as Solum puts it: “For a republican constitution on Barnett’s account, the fundamental institutions of self-government are judicially-enforceable, liberty-protecting rights and institutional arrangements of executive and legislative power that aim to minimize the rights violations and thereby preserve individual self-government.”¹⁰⁷

How one should live his or her own life within these boundaries is not a political question, but a moral or ethical one. (The 1960s leftie catch phrase “the personal is political” denies this.) The Aristotelian natural law conception of the virtues

105. *Id.* at 186.

106. RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 15 (2d ed. 2014) (“[N]atural law ethics purports to instruct us on how to exercise the liberty that is defined and protected by natural rights.”).

107. Solum, *supra* note 31, at 186.

instructs how one is to exercise the liberty that natural rights defines. The Aristotelian conception of vices instructs us on what behavior to avoid.

For an Aristotelian, however, the matter of virtue and vice is not merely a way of behaving. It is a way of being. To *be* virtuous is to habituate the virtues so they become, as it were, one's "second nature." For example, most of us do not refrain from shoplifting because we see a security camera or fear being caught and punished. For most of us, the very idea of shoplifting never enters our thoughts. We have been habituated to respecting the rights of others to the degree that violating another's rights is not even considered an option.

Of course, there is a minority of law-abiding persons who must consciously consider and reject the option of shop-lifting each time they enter a store. While such persons are to be commended for their behavior—indeed their self-restraint requires far greater self-control on their part than if respecting the rights of others had become their "second nature"—they are not virtuous. If they were, the decision to refrain from shoplifting would require no effort at all, since the very idea would not even be present in their thoughts as an option.

But habituating one's self to act virtuously and avoid vice requires years of practice. The same holds for how one treats others morally in ways that do not violate their rights. Is one kind, generous, honest (though not to a fault), caring, empathetic, or considerate of their feelings? All these describe how a truly virtuous person would behave without thinking much about it.

One implication of this approach to self-governance is that to live virtuously, to pursue happiness in the truest sense, is a do-it-yourself affair. Virtue is an internal state and cannot be commanded by others. I do not deny that compelling others to act as they should might cause some to become virtuous out of habit. But it can have the opposite effect on others.

As the great Aristotelian-Thomist philosopher—and my mentor—Henry Veatch explained:

[N]o human being ever attains his natural end or perfection save by his own personal effort and exertion. No one other than the human individual—no agency of society, of family, of friends, or of whatever can make or determine or program an individual to be a good man, or live the life that a human being

ought to live. Instead attaining one's natural end as a human person is nothing if not a "do-it-yourself" job.¹⁰⁸

Veatch readily acknowledged "that one can be helped in a variety of ways in attaining one's natural perfection. Friends, family, the various institutions of society—even good fortune—can all contribute mightily to a person's attaining his goal or natural end."¹⁰⁹ Nevertheless, however, "the actual business of attaining the end—living wisely and intelligently—is something that only the individual can do."¹¹⁰ (I might mention that Henry was no political conservative or libertarian, but was a conventional liberal Democrat.)

It does no good to undermine the necessary prerequisite to the pursuit of happiness that is the individual liberty defined by our natural rights to provide the other material goods that happiness also requires. A well-crafted system of private property, freedom of contract, self-defense, and restitution secures that liberty.¹¹¹ If a free market system is not enough to provide material well-being by means of voluntary exchanges that also benefit others as well as oneself—or by means of private charity—these ways to acquire material goods can be supplemented by tax and spending programs.

As mentioned briefly above, I freely acknowledge that, under our Republican Constitution, government has the power to tax and spend; and I distinguish this from its power to regulate rightful and prohibit wrongful behavior. Further, I assume that the use of the tax and spending powers to redistribute wealth is constitutional—at least at the state level.¹¹² But such a system

108. HENRY B. VEATCH, *HUMAN RIGHTS: FACT OR FANCY?* 84 (1985).

109. *Id.*

110. *Id.* at 84–85. For more on Veatch's account of Aristotelian ethics, see HENRY B. VEATCH, *RATIONAL MAN: A MODERN INTERPRETATION OF ARISTOTELIAN ETHICS* (2003); see also HENRY B. VEATCH, *ARISTOTLE: A CONTEMPORARY APPRECIATION* (1974) (explicating Aristotelian philosophy more generally).

111. See generally BARNETT, *supra* note 106 (defending the social function and necessity of these fundamental rights).

112. As Sandy Levinson notes in his paper, the debate over whether federal tax revenues can be spent for purposes or objects that are not enumerated in the Constitution dates back to the debates between Hamilton and the federalists, and their republican opponents on the constitutionality of so-called "public improvements." See Levinson, *supra* note 70, at 138 (discussing Madison's veto of a federal public improvements act on the ground that it was unconstitutional). See also Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003). But, once again, this is not a debate over *whether* government can tax and spend for this purpose but *which* government in our federal system is empowered to do so.

must be designed and administered with great care, lest it actually be counterproductive.

In discussing the role that virtue plays in the pursuit of happiness—and the nature of virtue—I have perhaps said too much on a subject about which I claim no professional expertise. But to fully appreciate the reasons why the individual popular sovereignty that recognizes and protects individual self-governance is a vital means to the end of a free and virtuous people, it is worth at least identifying this approach to virtuous self-governance.

True, although such individual sovereignty is necessary to the pursuit of happiness, it is not sufficient to its attainment. But whatever else may be required must be achieved consistently with the individual sovereignty or “republican liberty,” without which virtue and happiness are impossible.

Which is yet another reason to favor our Republican Constitution that is based on the sovereignty of We the People, each and every one.