

## WHICH REPUBLICAN CONSTITUTION?

**OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE.** By Randy E. Barnett.<sup>1</sup> New York: HarperCollins Publishers. 2016. Pp. xiv + 283. \$26.99 (cloth).

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### I. RANDY BARNETT, MEET INIGO MONTOYA

Reading Randy Barnett's new book *Our Republican Constitution*,<sup>3</sup> one feels like Inigo Montoya in *The Princess Bride*: "You keep using that word, 'republican.' I do not think it means what you think it means." Randy Barnett and I agree that we have a republican constitution. The problem is that we disagree about what that entails.

Barnett's Republican Constitution has relatively little to do with the historical tradition of republicanism, a tradition that celebrates the common good; seeks to inculcate civic virtue; opposes aristocracy, oligarchy, and corruption; understands liberty not as mere negative freedom but as non-domination; connects civil rights to civic duties; and demands a government that derives its powers from and is ultimately responsive to the great body of the people.

In fact, Barnett's "republicanism" is far closer to what most historians of the Founding era would regard as the *opposite* or *complement* of the republican tradition. This is the tradition of natural rights liberalism, which begins with John Locke and evolves into classical liberalism in the nineteenth century. This tradition celebrates individual autonomy, views the state as

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

organized to protect the natural rights of individuals, fears the tyranny of majorities, and treats liberty as a negative freedom—a protected space in which individuals, free from state control, may accumulate property and pursue happiness (pp. 49-50).

The classical liberal tradition is an important part of the American political tradition; but it is not the republican tradition. The American political tradition is a blend of liberal and republican ideals, which reappear in ever new guises as historical circumstances and political alliances change. Barnett has obscured the historical republican tradition by lifting the term and applying it to its opposite number. In fact, Barnett's vision of Our Republican Constitution is perhaps closest to an idealization of the classical liberal constitution of the late nineteenth century, which combined dual federalism with police powers jurisprudence.<sup>4</sup>

This late nineteenth-century version of classical liberalism is the hero of Barnett's story. Every hero needs an adversary to compete with, and so Barnett constructs an opposite tradition, which he calls the Democratic Constitution; it seems to be an amalgam of Rousseau and early twentieth-century progressivism. Barnett pronounces our true Constitution to be the Republican (i.e., classical liberal) version. Barnett concedes that the Democratic Constitution is part of our history, but argues that it is not the best and truest version of our political selves. The Democratic Constitution (i.e., progressivism) is actually inconsistent with the basic premises of the American constitutional order. Indeed, as Barnett shows us—more in sorrow than in anger—following the perfection of the constitutional system in the nineteenth century, the Democratic Constitution has been ascendant. As a result, things have tended to fall apart, leading to the depredations of the New Deal, the Administrative State, and the Welfare State. To redeem Our Republican Constitution, we must remedy the fall that came in

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4. On police powers jurisprudence, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) (describing the late nineteenth-century attempt to distinguish laws that served the public interest in health, safety, and welfare from laws that imposed unjustified special burdens or benefits or otherwise had secretly redistributive purposes). The classic treatment of dual federalism is Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (describing the nineteenth-century model of distinct competences of federal and state regulatory authority, which largely operated in separate spheres).

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the early twentieth century. We must renounce progressivism and all its works.

The disagreement between Barnett and me about the meaning of republicanism is not merely semantic. By taking the word “republican” and pasting it onto the classical liberal tradition, he has buried a truly important tradition in American constitutional thought—the actual historical republican tradition, which is not the same as Barnett’s “Democratic Constitution.” The historical republican tradition crosscuts Barnett’s opposition between Republican and Democratic Constitutions, and includes features of both. More to the point, the historical republican tradition is especially relevant today, and it stands as a valuable critique of the limitations of late nineteenth-century classical liberalism.

In saying this, however, I am *not* advocating that we simply ignore the lessons of Barnett’s book and hew to the historical republican tradition. Like the classical liberal tradition, the historical republican tradition is flawed and compromised in its historical context. Only some parts of these two traditions are worth preserving and bringing forward into the present.

Classical liberals have often been too complacent about threats to republics that stem from inequalities of wealth and coercive aspects of market economies. The historical tradition of republicanism, by contrast, insisted that economic self-sufficiency was central to participation in republican government. This demand, however, produced both conservative and egalitarian versions of republicanism.

Conservative versions of republicanism sought to limit political freedoms to those (male) heads of households who were not dependent on others and therefore were free to pursue the public good. This excluded women, slaves, and persons who did not own much property. In fact, older and more conservative versions of republicanism, while opposing hierarchies or distinctions of rank *among* male heads of households, were either complacent about or actually defended hierarchies *within* households.<sup>5</sup> These versions of republicanism assumed that in order for men to be independent and self-governing, they had to

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5. Linda K. Kerber, *Making Republicanism Useful*, 97 *YALE L.J.* 1663, 1668 (1998) (“Patriarchy was comfortably compatible with classical republicanism: the head of the family represented the family (and its servants and slaves) in its relationship to the state.”).

be supported by women, slaves, and servants who were economically dependent on them. A similar argument justified property qualifications for the suffrage—if landless workers were dependent on their employers, they would simply vote their employers’ interests and would fail to promote the public good.<sup>6</sup>

The egalitarian version of republicanism, by contrast, has argued that government should work to dismantle hierarchies of domination and dependence. Government should create the conditions for a broad base of middle-class voters who are financially independent and therefore could rule themselves. These were the ambitions of the founders of the nineteenth-century Republican Party, who sought both to eliminate slavery and to secure the conditions of economic self-sufficiency for a broad base of the public.<sup>7</sup> The egalitarian strand of republicanism was influenced by liberalism, because liberalism has historically been willing to disrupt and transform existing social arrangements in order to realize the freedom and equality of individuals.<sup>8</sup> It is this egalitarian version of republicanism, together with the liberal tradition of respect for individual dignity and freedom, that we should carry forward with us into the present.

My disagreement with Barnett is not a disagreement about the importance of natural law and liberalism to the American

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6. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 8–9 (2009).

7. See Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37, 38–40 (1990) (describing exclusionary and inclusionary versions of republicanism, and identifying the inclusionary version with the early Republican Party). Nevertheless, inegalitarian features of republican ideology were present even here. As Hendrik Hartog has pointed out, “Because of their republican inheritance,” the members of the early Republican Party “could not imagine how to accomplish th[e] enfranchisement [of blacks] without constituting black men as possessors of domains of women and children, without making freedmen into ‘householders.’” Hendrik Hartog, *Imposing Constitutional Traditions*, 29 WM. & MARY L. REV. 75, 81 (1987).

8. That is why republicans can no more do without liberalism than liberals can do without republicanism. To counteract the conservative and preservationist tendencies of republicanism, egalitarians have drawn on critical features of the liberal tradition, which emphasizes the equal freedom of every individual and the transformation of social relations to achieve this end. See Kerber, *supra* note 5, at 1669 (“When Elizabeth Cady Stanton and her colleagues wanted to demand a place in the republican polity, republican discourse helped them little. To sustain the proposition that all are created free, equal, and independent, they needed Locke, not Machiavelli.”); see also Hartog, *supra* note 7, at 82 (arguing that in embracing the republican tradition, one should not forget “the disruptiveness and transformative characteristics that are a part of a liberal constitutional tradition”).

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constitutional tradition. My point, rather, is that by emphasizing the classical liberal tradition to the exclusion of the historical republican tradition, he has given us an impoverished account of American constitutionalism. The American constitutional tradition, understood in its best sense, has always drawn on elements of *both* the republican and liberal traditions, and applied them to the problems and circumstances of the present. It has employed the best parts of each tradition to critique and transcend the blindnesses and limitations of the other. That is as true of the Founding period as it is of the present. No reconstruction of the American constitutional tradition can afford to discard one-half of this dialectic.

*Our Republican Constitution*, however, is not written as—or intended to be—a historical tome. It is an argument about present-day constitutionalism directed to a popular audience. For that reason, it might make sense for Barnett to write this book in the way he has, labeling the classical liberal tradition he celebrates as “Republican.” The reasons, however, have little to do with historical fidelity, and everything to do with how Barnett imagined we would structure debates about the direction of the Constitution and the country in the near future.

When Barnett set down to write this book, fresh from his partial victory in the *Health Care Case*,<sup>9</sup> libertarians and constitutional conservatives might have hoped that the contemporary Republican Party might finally come to its senses. It might embrace Barnett’s constitutional ideas about limited government in order to hold off the forces of progressive social democracy championed by the Democratic Party (p. 10). But, to everyone’s amazement, the terms of political debate have shifted radically in the interim. In the world we now inhabit, the argument of Barnett’s book risks being shoved rudely aside. The only political party that might embrace his ideas about the Constitution has descended into internal bickering and has been captured by a demagogue, the very sort of demagogue the Founders warned us about. Before the Republican Party can embrace *Our Republican Constitution*, it must first fight off the populist insurgency within its own ranks. The irony then, is that a book written to intervene in a contemporary debate about the

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9. *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

Constitution may be most important for a political future whose contours are still uncertain.

## II. BARNETT'S REPUBLICANISM

What does Barnett mean by a republican constitution? First, Barnett's republicanism is the opposite of direct democracy and simple majority rule. It embraces an *individual* conception of popular sovereignty in which each and every one of us is a sovereign (p. 23). It opposes a *collective* conception of popular sovereignty, which, Barnett believes, leads to the view that the government should respect the will of the majority (pp. 97, 126). The problem with majority rule is that majorities always threaten to violate the rights of individuals or minority groups. When majorities do not respect rights, they are little more than a faction in control of government (pp. 56, 97).

Second, the purpose of government is to protect the natural rights of individuals. Natural rights preexist government and governments are instituted for their protection (pp. 23, 41-44). They include the right to acquire and possess property, to choose a calling, and to pursue happiness (pp. 24, 25, 33, 39, 66-69, 107). Natural rights are negative liberties against majority compulsion. When government secures natural rights, they create a space in which people may pursue their own visions of happiness (pp. 49-50).

In order to protect natural rights, it is not enough to enumerate rights. The enumeration of rights is no more than a fail-safe to prevent the worst excesses of majority tyranny (pp. 167-168). To prevent majorities from behaving like factions, we must impose structural limits on government, through devices such as the separation of powers and federalism (pp. 167-171).

Third, one should never confuse what government officials do with some Rousseau-ian fantasy of "the Will of the People." Government officials are not the people. They are merely servants or agents of the people and they must always exercise their agency consistent with their duty to protect natural rights (pp. 22-23). The point of a constitution is to govern the agents who govern the people.

These considerations apply with special force to judges, who have an important role to play in a constitutional republic. Judges must exercise judicial review to ensure that laws and executive

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actions do not overstep the just powers of government and violate people's natural rights. Judicial review is not simply a power—it is the duty of judges to ensure that government agents adhere to limits on government (p. 25, 128). Therefore courts should not assume that legislation is constitutional, as they often do. Instead of a presumption of constitutionality, courts should engage in a presumption of liberty (p. 243). They should ask whether a law unduly limits liberty, regardless of whether the liberties affected are specifically enumerated in the Constitution (pp. 244-245). Liberty is not simply a collection of enumerated rights; it is the very purpose of government, and courts should stand ready to hold government officials to account and require them to explain why restraints on liberty are justified. It follows that judicial restraint is not a virtue. It is an abdication of the duty of judges to enforce constitutional limits that are necessary to protect individuals' natural rights (pp. 24, 225, 245).

Barnett identifies each of these positions with the Founders. They believed that the purpose of government was to secure natural rights, and they had experienced the excesses of democracy in the period immediately following the American Revolution. In order to secure individuals' natural rights, they created the Constitution's system of federalism, separation of powers, and checks and balances. These structural features—and not the enumeration of specific rights—were the most important devices for securing liberty from the tyranny of majority factions (pp. 209-210).

To be sure, the Founders accepted slavery, and this was a defect in the original conception of the Constitution. But this defect was cured by the adoption of the Reconstruction Amendments (pp. 60-61). With the adoption of these amendments in the nineteenth century, Our Republican Constitution was completed as a vehicle for the defense of individual natural rights.<sup>10</sup> The only question was whether Americans could keep such a republic. In Barnett's view, the country failed miserably during the Progressive Era and the New Deal, and despite occasional successes, the failures have only accumulated.

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10. BARNETT p. 62 (“[T]he text of the Constitution was amended by a new Republican Party to complete our Republican Constitution.”).

## III. WHAT KIND OF ARGUMENT IS BARNETT MAKING?

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.<sup>11</sup>

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 fulfill the Constitution's larger purposes.<sup>12</sup>

Nor is Barnett really making an argument about original intentions. His account of history is deliberately schematic and it picks and chooses certain features of the thought of the Founders, while leaving many others out—including, most notably, elements that reflect the actual republican tradition. It is also a telltale sign that Barnett spends so much effort expounding the Declaration, which is not part of the Constitution. (Like many scholars, including myself, he nevertheless believes that the Declaration

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11. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89–130 (2004) (distinguishing between interpretation and construction); Randy E. Barnett, *The Gravitational Force of the New Originalism*, 82 *FORDHAM L. REV.* 412, 419–20 (2013) (same); Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POL'Y* 65 (2011) (same).

12. Barnett, *Interpretation and Construction*, *supra* note 11, at 70 (“[A] ‘presumption of liberty’ that places the burden on the government to justify its restrictions on liberty as necessary and proper. . . . is a constitutional construction.”).



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should serve as the Constitution’s guiding star.) Barnett collapses different groups of people and different generations together and speaks of the Founders as a single entity with a single consciousness. This rhetorical practice signals that he engaged in a special kind of argument that is not well captured by the conventional categories of original intention or original meaning.<sup>13</sup> It is, however, a very common style of argument in American law and politics.

What kind of argument is Barnett making then? Understood in its best light, his book is an argument about the *ethos* of the Constitution and about the American political *tradition*. In my categorization of historical modalities of argument, it is an argument from ethos and from political tradition, which draws on examples of the thought and actions of honored authorities during the Founding, the Antebellum Era, and Reconstruction.<sup>14</sup> Such arguments are often treated as “originalist” in a broad sense, and they sometimes look like arguments from original meaning or original intention. But they have a special quality.

First, they are often narrative arguments that offer a broad perspective on history. To show us what he means by a Republican Constitution, Barnett takes us from the American Revolution through the twentieth century.

Second, these arguments marry the descriptive and the normative through the use of storytelling. Through appeals to selected statements and moments from the past, these arguments explain the kinds of values that Americans *have been* committed to and *should be* committed to.

Third, arguments from ethos and political tradition inevitably simplify history because the values of a tradition have not always been embraced or fully put into effect. It is always possible to list many examples—and indeed entire periods—in which the tradition’s values are not honored. For example, governments have not always protected natural rights or the equality of persons, and Barnett would argue that this is true of much of contemporary American governance. But when Americans have

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13. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 677 (2013) (“Arguments that appeal to the Founders or the Framers as an undifferentiated whole, or that conflate different generations (revolutionaries, Framers, politicians of the early federal period) are likely to be arguments from tradition or ethos.”).

14. *Id.* at 676–87 (describing arguments from ethos, tradition, and honored authority).

been true to their traditions, Barnett would say, they have protected natural rights and equality. Thus, arguments from ethos and political tradition select strands of history that best reflect the most valuable features of our history and assert that these strands reflect the true or authentic practices of the tradition, even if they have been honored in the breach as much as in the observance.

Fourth, because these arguments are narrative in conception, they trace the history of ideas through the clash of peoples and groups. Some of these people are the heroes of the story, and their opponents are people we are supposed to root against.<sup>15</sup>

Accordingly, Barnett constructs a counter-tradition, which he calls the Democratic Constitution. He argues that this tradition, although present throughout American history, does not reflect the truest and best parts of our tradition. To some extent we have even been led astray by this tradition. Barnett generally identifies this tradition with persons and groups he does not particularly admire, like the Jacksonians who apologized for slavery, Woodrow Wilson, and Justice Oliver Wendell Holmes.<sup>16</sup> He especially identifies it with progressives in the late nineteenth and early twentieth centuries. Progressives treated rights as an object of democratic deliberation and majority control. They denied natural rights or argued that they had to give way to the requirements of the common good.

Arguments from ethos and tradition inevitably simplify history, because these arguments use history to show us what is most valuable. They are didactic rather than merely descriptive. For this reason, these arguments inevitably pick out heroes and villains, people to root for and people to root against. In Barnett's account, the heroes of our constitutional tradition are the Founders, the abolitionists, and the founders of the Republican Party. Their modern heirs, he insists, are classical liberals and libertarians. The villains (or at least adversaries) in the story are the defenders of slavery, Jacksonian Democrats, the Progressives, the defenders of the New Deal, and liberals. Their contemporary heirs are political progressives and liberals in the Democratic Party, and majoritarian conservatives in the Republican Party.

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15. *Id.* at 684–85 (describing strategies of selective identification and dis-identification in arguments from ethos and tradition).

16. BARNETT p. 89 (apologists for slavery); pp. 136–37 (Wilson), 138–44 (Holmes).

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It is true that most of the followers of the “Republican Constitution” find themselves in the contemporary Republican Party, and most of the adherents of the “Democratic Constitution” find themselves in the contemporary Democratic Party. But this, Barnett insists, is merely an accident of history, because some conservative Republicans also argue for majoritarianism and judicial restraint. Conversely, some Democrats believe in strong judicial review to protect (some) natural rights, although, unfortunately, not on questions of national power and economic regulation (pp. 18-19).

Because Barnett is not making an argument from original intention or original meaning in a technical sense, criticizing him for failure to make these arguments correctly misses the point of his argument.<sup>17</sup> To take arguments from ethos and tradition seriously on their own terms, one must recognize that these arguments obtain their normative weight from interpretations of the past premised on a narrative about the history and trajectory of the nation. It follows that the most appropriate way to respond to arguments from ethos and political tradition is to: (1) complicate the narrative; (2) offer counter-narratives and counter-traditions that better describe the nation’s values and path; and (3) show how a fuller account of history suggests different normative lessons.<sup>18</sup>

That is why the question of whether Barnett is correctly using the term “republican” is not and should not be merely a semantic dispute. The real question is whether he has adequately captured the traditions of American constitutional thought from which he wishes to draw normative conclusions, and whether a fuller account of history would point to different normative commitments.

As I noted in the introduction, Barnett has misdescribed an important tradition in American political thought that is properly called republican. Although he borrows a few strands from that tradition, his account is better described as the opposite or the complement of the republican tradition—the tradition of classical liberalism. This version of liberalism flowers in the late nineteenth

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17. Balkin, *supra* note 13, at 678–82 (explaining that arguments of this type simplify historical narratives for presentist, didactic purposes).

18. *Id.* at 689 (arguing that critiques of arguments from ethos and political tradition “offer counternarratives. . . . complicate history. . . . [and] draw competing normative lessons from history”).

century in theories of dual federalism and police powers jurisprudence designed to preserve individual liberty, and especially economic liberty.

Although Barnett identifies his theory with the Founders, it is really a sympathetic restatement of late nineteenth-century (and early twentieth-century) classical liberalism. He reads the nineteenth century back onto the eighteenth, making it more classically liberal—and less republican—than it actually was. Conversely, his “Democratic Constitution” is really a restatement of early twentieth-century progressivism which arises in opposition to the Gilded Age. He reads progressive ideas back into the eighteenth century to construct the historical adversary of his favored account of the Constitution.

In short, the opposition that Barnett wants to draw between the Republican and Democratic Constitutions is really a schematic or idealized version of the struggle between classical liberalism and progressivism at the beginning of the twentieth century. This is an important clash of values, and it had momentous consequences for the way we understand constitutional law today. But this struggle is not really a Founding-era tension in the way that Barnett portrays it. It is about two different interpretations of the Founding offered over a century later, by people who found themselves in what I call constitutional modernity—facing a world very different from the Founders and asking what the correct way forward should be.<sup>19</sup>

At the turn of the twentieth century, classical liberals and progressives took very different lessons from the past. Progressives saw a Constitution increasingly unable to deal with plutocracy. The Civil War had taught them that our constitutional system could fail and had failed. They were therefore drawn to constitutional reform, leading to a series of constitutional amendments during the first three decades of the twentieth century. Classical liberals, drawing on Jacksonian and abolitionist ideas of free labor and natural rights, increasingly identified the Constitution with judicial protection of economic liberties and they developed constitutional doctrines to protect these rights.<sup>20</sup> Barnett’s book is less an account of the actual values of the

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19. On constitutional modernity and responses to it, see Jack M. Balkin, *Why Are Americans Originalist?*, in *LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL* (David Schiff & Richard Nobles eds., 2014).

20. See GILLMAN, *supra* note 4.

Founders than an account of one interpretation of the constitutional tradition, designed to deal with problems of modernity, and developed a century after the Founders.

At various points in his narrative Barnett lumps modern liberals together with progressives.<sup>21</sup> This is somewhat unfair. Although many of the heirs of progressivism are called liberals today, modern liberalism—at least the mid to late twentieth-century version—is actually a synthesis of classical liberalism and progressivism. Modern liberals agreed with classical liberals that government must protect both enumerated and unenumerated rights and that judges must enforce these rights. To this day liberals and libertarians often agree about many civil liberties issues. Modern liberals broke from classical liberalism, however, on issues of economic and property rights, and on the scope of federal power.<sup>22</sup> Here they borrowed from the progressive critique of classical liberalism. Modern liberals continued to believe that the purpose of government was to secure the rights to life, liberty, and the pursuit of happiness. But modern liberals argued that in economic circumstances completely different from the Founding, it was necessary to regulate markets and property to give ordinary people as well as wealthy people a genuine shot at pursuing happiness. Similarly, modern liberals took from the Whigs and the early Republican Party the lesson that federal power was necessary to promote economic development and economic opportunity, and that the federal government should invest in infrastructure and public goods to achieve these ends. By contrast, late nineteenth-century classical liberals increasingly rejected the views of the Whigs and the early Republican Party on federal power; they embraced what were essentially Jacksonian ideas about formal equality of opportunity and Jacksonian arguments for limited national power. Barnett must omit these details from his narrative because they complicate his central

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21. See p. 129 (noting that by 1929, “Progressives . . . were calling themselves liberals”).

22. See, e.g., ARTHUR M. SCHLESINGER, JR., *THE POLITICS OF HOPE AND THE BITTER HERITAGE: AMERICAN LIBERALISM IN THE 1960S* 89 (2007) (noting the redefinition of liberalism to meet the needs of the early twentieth century); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 55 (2011) (“Modern ‘liberal’ constitutional jurisprudence, rather than being descended solely from the ideas of early-twentieth century Progressive jurists, is a synthesis of Progressive fondness for government regulation, and the classical liberal . . . support for individual rights and skepticism of government power.”).

point that the founders of the Republican Party were heroes because they ended slavery and sought to protect natural rights. But they did so by rejecting not only Jacksonian ideas about slavery but also Jacksonian conceptions of limited federal power.

#### IV. WHAT IS THE REPUBLICAN TRADITION?

As I have noted, Barnett's account of republicanism would be unrecognizable to historians of the republican tradition in the United States. In fact, in many ways it is the opposite or complement of what historians would call the republican tradition. This section explains why.

Beginning in the 1960s and 1970s historians of the American Revolution began a revival of the republican tradition in American politics and constitutionalism. The key players were Bernard Bailyn,<sup>23</sup> J.G.A. Pocock,<sup>24</sup> and Gordon Wood,<sup>25</sup> and they developed what came to be known as the Republican Synthesis.<sup>26</sup> They argued that the Founding generation owed as much to the ideas of James Harrington, Baron de Montesquieu and "Country Party" ideology, as they did to the work of John Locke and the liberal tradition of natural rights. The latter tradition is the ancestor of the classical liberal tradition that Barnett mislabels as "republican."

These historians did not agree in all respects—Pocock, for example, emphasized the influence of Niccolo Machiavelli and the classical humanist tradition. But together they pointed to a vibrant tradition of republicanism that played an important role in Founding-era thought. Scholars like Joyce Appleby,<sup>27</sup> Isaac

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23. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1968).

24. J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

25. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1991); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

26. See Robert Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 *WM. & MARY Q.* 49 (1972); see also LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* (1978); Robert Shalhope, *Republicanism and Early American Historiography*, 39 *WM. & MARY Q.* 334 (1982).

27. JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICANISM OF THE 1790S* (1984) (arguing that Jefferson's commitments to agrarian capitalism and free trade made him as liberal as he was republican); JOYCE APPLEBY, *LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION* (1992).

Kramnick,<sup>28</sup> and John Patrick Diggins,<sup>29</sup> critiqued the civic republican historians. They pointed out that the Founders held both liberal and republican ideals, and that their ideas constantly evolved as they confronted the growth of commercial society and the problems of governing the new republic.<sup>30</sup> During the 1980s and 1990s, when Barnett and I began our academic careers, the law reviews were full of discussions of the civic republican tradition and its potential relevance to American constitutional law.<sup>31</sup>

Today most historians believe that the Founding era was a pragmatic mix of both republican and liberal themes and that this ideological mixture was continually evolving throughout the Revolution and the early years of the republic.<sup>32</sup> Liberalism increasingly dominates as America moved into the nineteenth century, but republican ideas—like belief in the public good, opposition to oligarchy, and concerns about political corruption—have always remained in the American political and constitutional tradition. We can find different elements of republicanism on both sides of key political controversies, like those between Federalists and Jeffersonians, Whigs and Jacksonians, early Republicans and post-bellum Democrats, and so on into the present. Indeed, many republican themes appear in political discourse on both the left and the right today. When both left and

28. Issac Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982) (emphasizing the importance of Lockean liberalism in the Founding); ISSAC KRAMNICK, *REPUBLICANISM AND BOURGEOIS RADICALISM: POLITICAL IDEOLOGY IN LATE EIGHTEENTH-CENTURY ENGLAND AND AMERICA* (1990) (same).

29. JOHN PATRICK DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS* (1984) (emphasizing the influence of Locke and Calvinism and arguing that republicanism is a surface gloss on a deeper liberal political tradition).

30. See also Daniel T. Rogers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992) (examining and critiquing the Republican Synthesis as a Kuhnian research paradigm); RICHARD C. SINOPOLI, *THE FOUNDATIONS OF AMERICAN LIBERALISM, THE CONSTITUTION AND CIVIC VIRTUE* (1992) (pointing out that eighteenth-century liberalism included many features of civic republicanism, and vice-versa).

31. See, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1992); Symposium, *Classical Philosophy and the American Constitutional Order*, 66 CHI.-KENT L. REV. 3 (1990); Symposium, *Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory*, 84 NW. U.L. REV. 1 (1989); Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); Morton J. Horowitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

32. Alan Gibson, *Ancients, Moderns and Americans: The Republicanism-Liberalism Debate Revisited*, 21 HIST. POL. THEORY 261, 261–62 (2000).

right argue that Washington is corrupt, that government has been taken over by an elite oligarchy and that the little guy can't catch a break, they are summoning elements of the republican tradition.

What are the themes of the historical republican tradition? We might identify seven of them.<sup>33</sup>

First, the framers opposed republicanism not merely to direct popular rule, but also to monarchy, aristocracy, and oligarchy.<sup>34</sup> In the American version of republicanism, a republic is an anti-monarchical, anti-aristocratic, and anti-oligarchical form of government.<sup>35</sup>

Second, republicanism requires that citizens must work for the public good. A republic is a *res publica*, a “public thing,” or the “public good,” and citizens have a duty to further and defend

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33. The description of republican themes in the next nine paragraphs is drawn from Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 TEX. L. REV. 1427, 1432–37 (2016).

34. Thus, when Barnett quotes Richard Beeman as noting that all of the Founders were republicans, *see* p. 27 (quoting RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* xi (2009)), Beeman is actually emphasizing the Founders' opposition to monarchy and aristocracy as much as their opposition to direct democracy. *See, e.g.*, Beeman, *supra*, at xi–xii (arguing that “the vast majority of the Founding Fathers” were republicans because “they had rejected monarchy and hereditary rule and had embraced unequivocally the idea of representative government,” although they differed on the nature of representation); *id.* at 81 (“In the wake of their revolution against monarchical rule, all Americans embraced the idea that legislatures—composed of representatives answerable to the people—were the heart and soul of any system of truly ‘republican’ government); *id.* at 122 (noting that at the time of the Founding, “republican” meant opposition to “hereditary monarchy” and support for “some form of representative government,” but not “unmediated democracy”) (emphasis in original); *id.* at 344–45 (noting that the American Revolution was not only waged against “a tyrannical King and Parliament,” but was “also a struggle of virtue against vice, of republican simplicity against the dissipation that extravagance of frivolity inevitably encouraged”); *id.* at 412 (arguing that the 1787 Constitution “was in many respects unmistakably republican” in that “[i]t emphatically rejected notions of hereditary monarchy and aristocracy” while “stopping well-short” of democracy).

35. *See* THE FEDERALIST NO. 39 (James Madison) (“It is *essential* to [republican] government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic.”) (emphasis in original); THE FEDERALIST NO. 84 (Alexander Hamilton) (describing the Constitution's ban on titles of nobility as “the corner stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.”). *See generally* WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION*, *supra* note 25 (describing how republicanism sought to disestablish monarchy and aristocracy in politics and culture).



it through their efforts in politics.<sup>36</sup> The public interest is not identical with the private interest of any individual or group. People may disagree about what is in the public interest—indeed, in a democracy they often do. But they must direct their efforts and politics as a whole toward the realization of the public interest and the promotion of the *res publica*.<sup>37</sup> Moreover, because republicanism is grounded on belief in the common good and the public interest, many republican rights include duties which are connected to the defense of the republic and republican values. The right to keep and bear arms is an example. A purely liberal conception of the right to keep and bear arms is a right of individual self-defense. But a republican conception of the right to keep and bear arms is a public duty of citizens to take up arms and, if necessary, to give their lives, to defend the republic against tyranny and corruption.<sup>38</sup>

Third, republicanism includes a principle of civic equality. Because republicanism opposes monarchy, aristocracy, and oligarchy, all citizens are equal as citizens and the state may not elevate some special class of citizenry above the rest.<sup>39</sup> This idea is finally enshrined in the text of our Constitution during Reconstruction in the Thirteenth and Fourteenth Amendments, but it is implicit in the concept of republican government.<sup>40</sup> The prohibition against class and caste legislation, recognized in antebellum state constitutional law as well as in the Fourteenth Amendment, follows from the republican commitment to the equality of citizens.

Fourth, republicanism includes a principle against domination.<sup>41</sup> Republican liberty includes formal freedom from

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36. Thomas Paine, *The Rights of Man*, in COLLECTED WRITINGS 565 (Eric Foner ed., 1995) (“RES-PUBLICA, the public affairs, or the public good; or literally translated, the public thing . . . refers to what ought to be the character and business of government.”).

37. See WOOD, THE CREATION OF THE AMERICAN REPUBLIC, *supra* note 25, at 55–56.

38. WOOD, EMPIRE OF LIBERTY, *supra* note 6, at 7–8.

39. *Id.* at 8.

40. Melissa Saunders, *Equal Protection, Class Legislation and Colorblindness*, 96 MICH. L. REV. 245, 254 (1997) (arguing that antebellum state courts believed that class legislation “threatened true republican government and with it, personal liberty”).

41. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 6, 12 (1997) (arguing that the distinctively republican conception of freedom is non-domination). Pettit is the most prominent defender of the classical tradition of republican liberty in contemporary political philosophy.

restraint but it also requires non-domination.<sup>42</sup> Mere freedom from interference or restraint does not guarantee non-domination either in civil society or in politics.<sup>43</sup> In republican ideology, people who are dominated by others are not free but slaves.<sup>44</sup> Slavery is the condition that occurs when people lack republican liberty and cannot rule themselves.

The republican opposition of slavery to freedom is political as well as economic.<sup>45</sup> Chattel slavery is only a special case of slavery. At time of the American Revolution, the Founding generation sometimes spoke of themselves as slaves because they had no representation in Parliament.<sup>46</sup> The colonists were not arguing that they were chattel slaves; rather they argued that they lived under the domination of a distant government.

Fifth, republicanism includes a commitment to self-rule.<sup>47</sup> In order for the people as a whole to be free, the government must respect their freedom. But a mere grant of civil freedom at the sufferance of the state is not enough, because the state can take it away. Therefore, in order for people to be their own masters, the government must respect the rights of the public *and* it must be responsive to the public's views over time.<sup>48</sup> Hence the principle

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42. *Id.* at 21 (“[T]he conception of freedom as non-domination, not the negative conception of freedom as non-interference . . . was embraced among writers in the republican tradition.”).

43. *Id.* at 31 (“[T]here may be loss of [republican] liberty without any actual interference.”).

44. *Id.* at 31–32 (arguing that republican liberty is premised on the distinction between free citizens and those persons, like slaves, who are subject to the arbitrary power of another).

45. *Id.* at 32–33, 71–72 (distinguishing political liberty from political slavery—dependence on others).

46. Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1481–88 (2013).

47. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 759–60 (1994) (arguing that “[t]he central pillar of Republican Government . . . is popular sovereignty” and that the “deepest spirit of republicanism” is democratic self-rule).

48. See THE FEDERALIST NO. 37 (James Madison) (“The genius of Republican liberty, seems to demand on one side, not only that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people . . .”). The idea that the preservation of republican liberty requires popular control of government is not central to the classical republicanism of Machiavelli but develops in the eighteenth century with the rise of democracy. PETTIT, REPUBLICANISM, *supra* note 41, at 30–31. This is the republicanism of the American Revolution and of the American Constitution. AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 278–81 (2005) (describing how republicanism was equated with popular sovereignty in late eighteenth-century thought).

of non-domination not only guarantees personal liberty; it also requires self-rule, and a representative form of government.<sup>49</sup>

Sixth, republicanism includes an anti-corruption principle. Corruption is the central enemy of republics, and it is a feature of both individuals and political systems. Corruption occurs when government officials lose their devotion to the public good and are no longer responsive to and dependent on public opinion. Then officials promote their private interest or the private interest of some elite faction or oligarchy over the public interest and the public good.<sup>50</sup> To maintain a viable republic, one must prevent the corruption of the political process. However, the problem of corruption is ever-present.<sup>51</sup> As time goes on, individuals and groups, motivated by self-interest, disregard the common good, strive for power, attempt to preserve and extend their status, and in general, invent ever new ways to dominate each other.<sup>52</sup> Therefore, in order to preserve a republic, citizens must be eternally vigilant in discovering the emerging sources of corruption within the political system and to nip them in the bud before they have a chance to undermine republican government. The best way to guard against corruption is to create institutions that will preserve and promote civic virtue and cause individuals and groups to work for the common good.<sup>53</sup>

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49. THE FEDERALIST NO. 39 (James Madison) (“[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.”).

50. PETTIT, REPUBLICANISM, *supra* note 41, at 210 (explaining that in the republican tradition corruption occurs when people “make their decisions by reference not to considerations of the common good but rather to more sectional or private concerns”).

51. WOOD, EMPIRE OF LIBERTY, *supra* note 6, at 8 (“[R]eliance on the moral virtue of their citizens, on their capacity for self-sacrifice and impartiality of judgment, was what made republican governments historically so fragile.”).

52. PETTIT, REPUBLICANISM, *supra* note 41, at 210 (arguing that the basic problem of republican governance is to promote resilience and stability in the face of continual sources of temptation and corruption).

53. *Id.* at 212 (noting that “however much it may have insisted on the importance of virtue,” the republican tradition “has embraced the need . . . for a regime of checks and balances.”). The Founding generation also emphasized the development of institutions of learning to promote republican virtue. WOOD, EMPIRE OF LIBERTY, *supra* note 6, at 476–77. Dr. Benjamin Rush famously argued that education should “convert men into republican machines . . . to perform their parts properly in the great machine of the government of the state.” Benjamin Rush, *Of the Mode of Education Proper in a Republic*, in THE SELECTED WRITINGS OF BENJAMIN RUSH 88, 90 (1798) (Dagobert D. Runes ed., 1947).

Seventh, as a result, republicanism includes a principle against political self-entrenchment.<sup>54</sup> Today's majority must not be able to entrench itself so as to prevent the development of a future majority.<sup>55</sup> If constitutional structure allows self-entrenchment, the system will be corrupted, and the people will cease to become their own rulers, violating basic principles of republican self-government.

To sum up: republicanism includes seven principles: (1) opposition to monarchy, aristocracy, and oligarchy; (2) duties to further the public good and act for the public interest; (3) equality of citizenship with no special classes, privileges or disabilities that might create a new aristocracy; (4) freedom as non-domination; (5) individual and political self-rule; (6) a principle against corruption (including individual and systemic corruption); and (7) a principle against political self-entrenchment.

As you can see from this list, Barnett captures only a small part of these republican themes in his version of Our Republican Constitution. In fact, some of these themes are actually in tension with his individualist, libertarian conception.

I do not mean to suggest that there is nothing republican in Barnett's account of the Founders' beliefs. The Founding

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54. JACK M. BALKIN, *LIVING ORIGINALISM* 243 (2011) ("The principle of republican government prohibits political incumbents and temporary majorities from trying to entrench themselves in power."); see also Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 *HARV. L. REV.* 28, 44–45 (2004) (arguing that many different features of the Constitution are designed to prevent self-entrenchment); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 *HARV. J.L. & PUB. POL'Y* 103, 114–16 (2000) (arguing that the Republican Government Clause is designed to prevent political self-entrenchment).

55. Political self-entrenchment violates the republican principle of majority rule. See *THE FEDERALIST* NO. 22 (Alexander Hamilton) ("[A] fundamental maxim of republican government . . . requires that the sense of the majority should prevail."); *THE FEDERALIST* NO. 58 (James Madison) (describing majority rule as "the fundamental principle of free government"); 10 *THE PAPERS OF JAMES MADISON* 206, 212 (Robert A. Rutland & Charles P. Hobson eds., 1977) (letter from James Madison to Thomas Jefferson (Oct. 24, 1787)) ("[T]he republican principle . . . refers the ultimate decision to the will of the majority."); Thomas Jefferson, *First Inaugural Address*, available at [http://avalon.law.yale.edu/19th\\_century/jefinau1.asp](http://avalon.law.yale.edu/19th_century/jefinau1.asp) ("[A]bsolute acquiescence in the decisions of the majority [is] the vital principle of republics."). In his *Vices of the Political System* Madison argues that "According to Republican Theory, Right and power being both vested in the majority, are held to be synonymous." James Madison, *Vices of the Political System of the United States*, in *THE MIND OF THE FOUNDER* 57, 59 (Marvin Meyers ed., 1981). But if a minority uses superior force and property, "one third only may conquer the remaining two thirds," and "[w]here slavery exists the republican Theory becomes still more fallacious." *Id.*

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generation did believe in natural rights. They did believe that the purpose (but not the only purpose) of government was to secure these rights. Many of the Founders were quite concerned about the dangers of direct democracy and they sought to adopt structural guarantees of liberty. But Barnett's account leaves out much of the context in which these beliefs were situated. He makes the Founders sound too much like late nineteenth-century classical liberals or mid-twentieth-century members of the Mont Pelerin Society.

For example, Barnett correctly points out that the Framers were worried about the excess of democracy in state legislatures following the American Revolution. What he misses is that these concerns flowed from eighteenth-century republican ideology—concerns about civic virtue and devotion to the public good. The Founders doubted that state legislatures would uphold “their republican responsibility to promote a unitary public interest distinguishable from the private and parochial interests of individuals.”<sup>56</sup>

There is no discussion of corruption or civic virtue in Barnett's account. Indeed, there is no mention of Bailyn, Pocock, or Wood in either the text or the footnotes; nor does he discuss the vast literature that qualifies and critiques their accounts. He opposes republicanism to democracy rather than to monarchy, aristocracy and oligarchy—which, for many of the Founders, would have been the natural opposites of republican government. He emphasizes the protection of natural rights and downplays the Founders' commitment to the public good.<sup>57</sup>

This is not an adequate account of the Founding generation's views. Surely they sought to protect individual liberty. But they also believed that government had obligations to promote the public interest (i.e., the public good).<sup>58</sup> Doing so benefited

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56. WOOD, *EMPIRE OF LIBERTY*, *supra* note 6, at 17.

57. *See, e.g.*, p. 75 (equating the common good with “the protection of each person's life, liberty, and property”).

58. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, *supra* note 25, at 55. It is worth emphasizing that although the Founders had many beliefs that we would today call liberal, they were not nineteenth-century classical liberals and it is anachronistic to read back nineteenth-century classical liberal ideas onto the eighteenth century. William Michael Treanor, *Taking the Founders Seriously*, 55 U. CHI. L. REV. 1016, 1035–36 (1988) (reviewing WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* (1987)). Jefferson, for example, believed in a common good that transcended individual interests and did not

individuals in allowing them to pursue happiness, and also promoted civic virtue, good citizenship, and the good of all.

Many of the Founders also believed that it was important for governments to maintain a particular political economy in which economic inequality was kept within reasonable bounds in order to prevent the development of aristocracy and oligarchy.<sup>59</sup> The Founding generation, Gordon Wood explains, “took for granted that a society could not long remain republican if a tiny minority controlled most of the wealth and the bulk of the population remained dependent servants or poor landless laborers.”<sup>60</sup>

In fact, one of the reasons why Founders like Madison and Jefferson sought to promote a republic dominated by small farmers is that they believed that an agrarian republic would prevent vast inequalities of wealth and forestall the inequality and corruption they associated with monarchies and aristocracies.<sup>61</sup> The restrictions on primogeniture that Jefferson placed in the Northwest Ordinance of 1787 were designed to break up large landholding estates and prevent the growth of economic and hereditary aristocracy. Similar reforms occurred at the state level. Gordon Wood notes that “all the states in the decades following the Revolution abolished both entail and primogeniture where they existed.”<sup>62</sup> The justifications were republican. As the North Carolina legislature explained in a 1784 statute, these ancient legal doctrines worked “only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances the source of great contention and injustice.”<sup>63</sup> Reforming the laws governing the most important source of wealth at the time—ownership of land—would “tend to promote that equality of property which is of the spirit and principle of a genuine republic.”<sup>64</sup>

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celebrate the unrestrained pursuit of economic self-interest. Joyce Appleby, *Republicanism in Old and New Contexts*, 43 *WM. & MARY Q.* 20, 33 (1986).

59. See JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* (forthcoming 2017).

60. WOOD, *EMPIRE OF LIBERTY*, *supra* note 6, at 8.

61. See DOUGLASS G. ADAIR, *THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY: REPUBLICANISM, THE CLASS STRUGGLE, AND THE VIRTUOUS FARMER* 52 (1964 republished 2000).

62. WOOD, *EMPIRE OF LIBERTY*, *supra* note 6, at 498.

63. *Id.*

64. *Id.*

When Jefferson and Madison created the first Republican Party, the name reflected the belief that the policies of the Federalists, led by Alexander Hamilton, were pushing the country toward monarchy, aristocracy, and corruption, while the Republicans were the true inheritors of the virtuous politics of the Revolution.<sup>65</sup> Madison explained that his new party would be called “Republican” because it sought to prevent the growth of aristocracy and privilege.<sup>66</sup> Whether or not it is consistent with Barnett’s conception of natural rights of property, the use of government to proactively forestall the creation of vast inequalities of wealth is characteristically republican.<sup>67</sup>

Years later, when the Republican Party was formed in 1854, its founders sought to resurrect several of Jefferson’s and Madison’s ideas about political economy. The name “Republican” was chosen not because the new party was particularly opposed to direct democracy, but because it opposed the Slave Power that had dominated American politics for more than a generation. In the antebellum South, a small number of plantation owners owned almost all of the wealth in the region through their control over land and slaves. Republicans feared that these men were attempting to use their economic and political power to impose a new oligarchy on Americans.<sup>68</sup> The Republican demand for “free land” and “free soil” sought equitable distribution of western land; Republicans argued that the plantation system allowed wealthy slave owners to buy up ever more property, crowding out small farmers and destroying their economic independence.<sup>69</sup> Once in power, Republicans sought to prevent the accumulation of huge, landed estates and to ensure economic independence for a broad spectrum of

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65. WOOD, *EMPIRE OF LIBERTY*, *supra* note 6, at 151–52; ADAIR, *INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY*, *supra* note 61.

66. James Madison, *A Candid State of Parties*, *NAT. GAZETTE*, Sept. 22, 1792.

67. HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY* xii, 4, 9 (2015).

68. *Id.* at 6–7; ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 87–91 (1995).

69. RICHARDSON, *supra* note 67, at 3–4; Andrew Shankman, *Introduction: Conflict for a Continent: Land, Labor, and the State in the First American Republic*, in *THE WORLD OF THE REVOLUTIONARY AMERICAN REPUBLIC: LAND, LABOR AND THE CONFLICT FOR A CONTINENT* 17 (Andrew Shankman ed., 2014); *see also* FONER, *supra* note 68, at 46–50, 59–60, 63–65 (1995) (describing Republican and Free Soil critiques of Southern society, which blamed the expansion of slavery for impoverishing whites who did not own slaves, undermining social mobility, and perpetuating aristocracy).

Americans—regardless of color—through distribution of government-owned lands in the West and the creation of land-grant colleges and universities.<sup>70</sup> One will find none of these ideas in Barnett’s description of *Our Republican Constitution*, and the distributional concerns of historical republicanism—and the early Republican Party—are in some tension with his account of the constitutional purposes of government.

Barnett’s description of republicanism, in short, is a remarkable act of historiographical chutzpah. He takes a few features of republican ideology, staples them onto classical liberalism, and then calls the result “republicanism.” It is a little like creating a fantasy baseball team that takes a few of the Yankees’ best players, adds most of the Boston Red Sox, and calls the team “the New York Yankees.” You can call your fantasy baseball team whatever you like. But the people in New York and Boston, at least, will not be fooled.

Of course, we no longer live in the Founders’ world. In today’s political context, people often oppose republics to direct democracies, and they associate republicanism with protection against majoritarian excess. So the title of the book will likely communicate Barnett’s message more directly to a modern audience that knows little about the ideology of the Founders. Barnett could have called his book “Our Lockean Constitution,” or “Our Natural Rights Constitution,” or “Our Classical Liberal Constitution,” but these titles might not have sold as well to a general audience, or—in the case of the last one—were already taken.<sup>71</sup> In fact, the title “Our Republican Constitution” *was* already taken. A book with that name was written in 2005 by Adam Tomkins, a British public law scholar.<sup>72</sup> Tomkins argues that despite the persistence of the monarchy, the U.K. has essentially become a republic and should be governed according

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70. RICHARDSON, *supra* note 67, at 21, 34–36. *See, e.g.*, Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862) (granting settlers 160 acres of government land); Land-Grant Agricultural and Mechanical College Act of 1862 (Morrill Act), 12 Stat. 503 (1862) (establishing system for land-grant colleges and universities to teach agriculture and engineering); *see also* Amar, *Forty Acres and a Mule*, *supra* note 7, at 40 (1990) (noting how the distributive goals of early Republicans aimed at securing the economic independence necessary for republican government).

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

72. ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (2005).



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to republican principles. His account of republicanism largely tracks the historical account I have described in this Essay.

#### V. REPUBLICANISM IN THE PRESENT

What is at stake in recalling the historical republican tradition? First, the historical tradition of republicanism contrasts markedly with Barnett's version of Our Republican Constitution. It is also not identical with Barnett's "Democratic Constitution." Therefore the choice he offers between the "Republican" and "Democratic" constitutions is a false choice.

Second, the historical republican tradition—or parts of it, at any rate—is a more attractive account of America's constitutional values than Barnett's version of "Our Democratic Constitution," which largely serves as a rhetorical foil for his preferred version of the Constitution.<sup>73</sup>

Third, the Founders were neither simply republican nor liberal. They were creative thinkers who employed many different strains of thought to solve the problems of their day. Therefore, if our goal is to offer a sympathetic account of the American constitutional tradition that we might use today, we should take the best elements of *both* traditions. We cannot simply leave republicanism on the cutting room floor.

Fourth, and perhaps most important, the historical republican tradition may be far more relevant to understanding our current predicament than Barnett's classical liberal account, because it speaks directly to fears of growing oligarchy, aristocracy, and corruption, and because it values a public good that is separate from the ambitions and strivings of individuals and groups. Viewed sympathetically, the historical republican tradition helps explain many of the contemporary concerns of liberals and conservatives, populists and progressives; we can find its themes in both the contemporary Democratic and Republican parties.

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73. I say "parts of it" because the historical tradition has both conservative and radical/egalitarian versions and elements, as described *supra* text at notes 5–8. Moreover, as noted above, liberal and republican elements can balance and critique each other. The best parts of the liberal tradition, for example, can help us critique inegalitarian features of the republican tradition: its complacency about slavery, property qualifications for voting, and the domination of women within families.

Start with conservatives and Republicans. Many of them are deeply concerned about the promoting the public good (especially social and religious conservatives). They are also concerned about corruption in government, which they identify with liberal and secular elites. At the same time, many conservative Republicans also believe that establishment Republicans and Republican elites have repeatedly treated them like dupes and sold them out to benefit the economic interests of the wealthy.

Meanwhile, many liberals and Democrats believe that government has been hijacked by an economic oligarchy that has used government to exacerbate inequalities of wealth, to enrich itself at the expense of ordinary Americans, and to block sensible reforms in the public interest.

Both people on the left and on the right, in short, have come to the conclusion that government is for sale, that the political system is rigged against them, and that politicians are being bought and sold by powerful economic interests who have formed a new oligarchy and aristocracy. The wealthiest and most powerful people and businesses have entrenched their allies in power so that ordinary people can't catch a break. This economic and cultural aristocracy has turned government into a device for protecting its own wealth and political power, and shifted the economic risks of globalization and change onto the middle class and the poor. There are both left-wing and right-wing versions of these concerns, with somewhat different villains and culprits. Yet the left- and right-wing versions of this complaint have many similarities.

These concerns about aristocracy, oligarchy, self-entrenchment, and corruption have led to angry populist mobilizations, with groups on both the left and the right demanding their country back. The historical republican tradition is of two minds about these developments. On the one hand, these protests speak to core republican concerns. On the other, they create the real risk that our politics will fracture into powerful factions that are uninterested in promoting the public good, or that will degenerate into authoritarianism, despotism, and tyranny.

The historical republican tradition teaches us that we must organize our politics to preserve a broad middle class of citizens who have a stake in governance, and that we must work continuously to prevent corruption, oligarchy, and political self-

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entrenchment from undermining our politics. Because change in political and economic circumstances is constant, we must be eternally vigilant in asking where the sources of oligarchy and aristocracy now exist in our system, and rethink the problems and obligations of republican government anew.

Barnett himself might agree with many of these sentiments, although he and I might disagree about the particular sources of the problem and about the most appropriate solutions. But his version of *Our Republican Constitution*—which is essentially an idealization of nineteenth-century classical liberalism—seems to me altogether too thin to recognize and meet these contemporary concerns. By insisting that the central, if not sole, purpose of government is to protect natural rights—including, most prominently, the right to acquire and accumulate property—his account seems to talk past what concerns many people today about our political and constitutional system, not only on the left, but also on the right. In fact, Barnett’s account of the purposes of government actually disables us from talking about the problems of political economy that the historical theory of republicanism was centrally concerned with.

Barnett’s book was designed both to promote and intervene in a particular kind of political conversation about the country and the Constitution. Barnett states candidly that “*Our Republican Constitution* will not be restored in our two-party system until one of the two major political parties embraces it as a central plank of its political platform” (p. 252). And he is equally clear about which party that would be: “The natural home of the Republican Constitution is the modern Republican Party” (p. 252).

Accordingly, Barnett hoped that the Republican Party would shed its cronyism and become a party devoted to the restoration of *Our Republican Constitution*. Thoughtful politicians like Senators Rand Paul and Mike Lee might forge a new Republican coalition devoted to a rigorous constitutional conservatism (pp. 252-253). This would present a clear choice between a Republican party devoted to libertarianism and limited government and a Democratic Party committed to progressive social democracy and environmentalism (p. 253). While this book was being written, there was a genuine possibility—at least among conservative intellectuals—that this development might occur and that it would frame the 2016 election.

Yet by the middle of 2016, Americans seem to be having a very different political conversation about the country and the Constitution. The political base of the Republican Party—as opposed to its political elites, wealthy donors, and intellectuals—seems remarkably uninterested in Barnett’s vision. The party’s 2016 presidential nominee, Donald Trump, cares little for civil liberties and even less for limited government. Indeed, to the extent that Trump has any consistent positions at all, he seems to stand for the opposite of everything that Barnett holds dear.

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. In Carl Schmitt’s vision of popular sovereignty, the dictator rules through a collective shout or affirmation by the mass of the people.<sup>74</sup> In the same way, Trump insists that he speaks for the people collectively—he calls them a great “silent majority”<sup>75</sup>—and he asserts that he is authorized to act because the great mass of the people are behind him. The irony is that at the very moment Barnett’s book is published, the Republican Party risks becoming the natural home not of Our Republican Constitution but Our Schmittian Constitution.

Just as important as the rise of Trumpism, however, is a remarkable shift in political conversation on both the left and the right. Both sides of the political spectrum seem to be raising historical republican themes—concerning corruption, oligarchy, and abandonment of the public good. This conversation is sometimes ill-formed, ugly, and even idiotic, but it raises many of the central questions that historical republicanism was concerned with. How can we restore public virtue and devotion to the public good? How can we restore trust in public and private institutions that have proven themselves corrupt and have been undermined by the naked pursuit of self-interest and self-dealing? How can we prevent our government from being taken over by new forms of oligarchy and aristocracy? How can we keep the republic—the *res publica*, the public thing that belongs to us all—viable in a world

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74. CARL SCHMITT, *CONSTITUTIONAL THEORY* 131 (1928) (Jeffrey Seitzer trans., 2008).

75. Sam Sanders, *Trump Champions the ‘Silent Majority,’ But What Does That Mean in 2016?*, NPR (Jan. 25, 2016), <http://www.npr.org/2016/01/22/463884201/trump-champions-the-silent-majority-but-what-does-that-mean-in-2016>.

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of globalization, threats to our national security abroad, and self-seeking hucksterism at home?

In this swirling conversation of hope, despair, anger, and frustration, Barnett's attempt to restate the natural rights tradition seems curiously beside the point. The only party that might put his ideas into practice has imploded and broken into a war between angry populists and establishment Republicans desperate to maintain their political influence. For the moment, at least, the proud Republican Party has been taken over by an anti-republican demagogue. For classical liberals like Barnett, the only hope is that Trump—in order to keep peace within his party—will appoint judges whose views are closer to those of constitutional conservatives than to his own. One suspects that this was not the world Barnett imagined when he sat down to write his book.

Events are moving quickly, however. Just as we cannot make sense of our political traditions by neglecting or suppressing historical republicanism, so too we cannot make sense of them by neglecting or suppressing the historical traditions of liberalism, including Barnett's classical liberal brand. Whether or not the Republican Party abandons its libertarian promise for a revanchist populism, this book will remain a statement of a powerful dissenting tradition within American conservatism. One writes books not simply for the moment, but for an indefinite future. Even though they may be mislabeled as "republican," history is far from finished with the ideas in this book.