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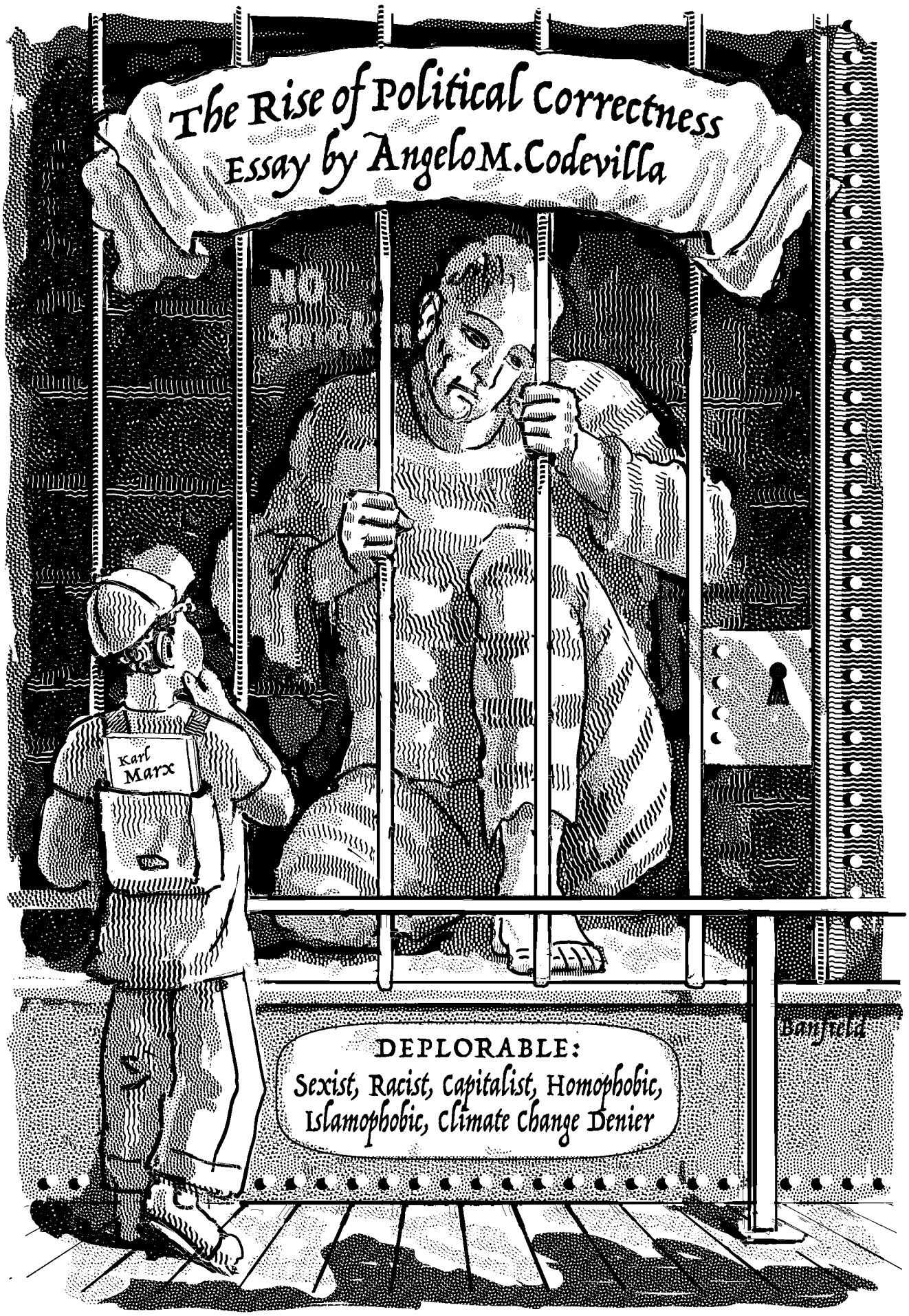

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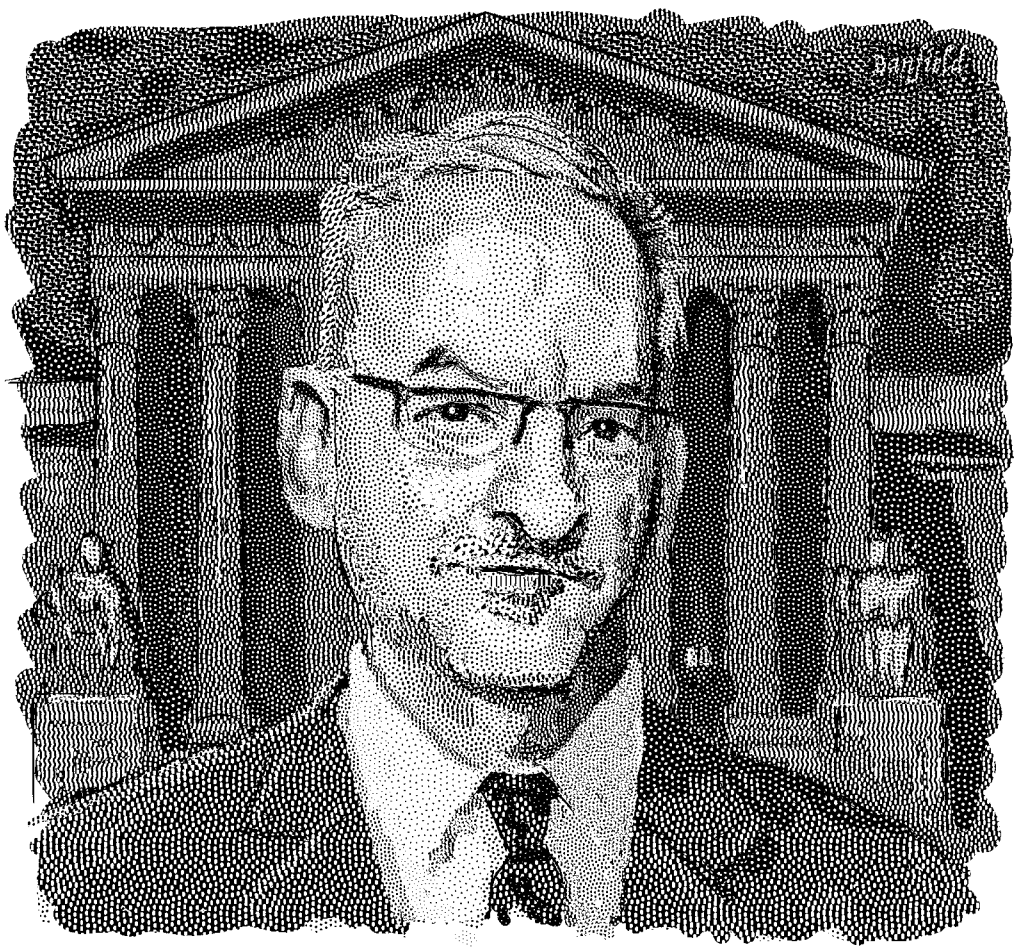
Book Review by Jeremy Rabkin

Liberty or Death

Our Republican Constitution: Securing the Liberty and Sovereignty of We the People, by Randy E. Barnett.
Broadside Books, 320 pages, $26.99



Randy E. Barnett

Randy Barnett is now among the most prominent constitutional scholars on the Right. Though he has taught law at Georgetown for many years (and before that at Boston University), he started his career as a criminal prosecutor. He once told me it was excellent preparation for constitutional advocacy: to persuade jurors, a prosecutor has to keep them focused on a compelling story.

In *Our Republican Constitution*, Barnett tells a number of related stories that are quite compelling. Although they won't, by themselves, derail legal advocates or judges who are inspired by different stories, they should give heart to believers in limited government—in a season when they have much reason to be disheartened.

Barnett starts with a personal story. In the constitutional debate over the Affordable Care Act ("Obamacare"), most commentators took for granted that this far-reaching legislation would easily withstand any constitutional challenge. Barnett was one of the very few constitutional lawyers to notice that requiring every person to buy health insurance—even someone not employed, nor engaged in buying or selling—went beyond the current loose judicial interpretation of Congress's power to "regulate commerce among the states." After articulating his analysis in a variety of political forums, Barnett helped write the brief for the Supreme Court appeal by the National Federation of Independent Business, the main challenger to the ACA. Five Supreme Court Justices endorsed these arguments, holding that the Affordable Care Act couldn't be justified as a regulation of commerce.

That wasn't enough to end the Obamacare project, alas. Chief Justice Roberts joined with four liberal Justices to uphold the measure as a tax—an interpretation that had not been argued before the Court nor seriously briefed, because no one had thought to rely on that justification. Evidently, the Chief Justice was determined to avoid a confrontation with the Obama White House on its signature legislative achievement.

Still, five Justices had affirmed that when the Constitution says Congress can "regulate commerce among the states" it means Congress can control activities with some fairly direct connection to commerce across state lines—and not intervene in any private activity at all that some people may regard as linked vaguely to the economy. Even today, it can matter what the Constitution actually says and what it is most reasonably interpreted to mean.

The larger story Barnett wants to tell in his book is about the Constitution itself. He wants to anchor the Constitution in the doctrine of natural rights, and makes a compelling case that Thomas

Jefferson's elegant but sketchy phrasing in the Declaration of Independence—"endowed by their Creator with certain unalienable rights"—was not just a nod to famous European texts of the previous century but a deliberate abridgement of a longer exposition in George Mason's draft of the Virginia Declaration of Rights, which Mason had penned a few weeks earlier.

The language of Mason's draft provided a fuller, more emphatic statement of natural rights—so much so that in Virginia, slave-owning delegates insisted on toning down the final text published in June 1776. But, as Barnett shows, the language of Mason's draft was incorporated into various state constitutions—in Northern states, where the anti-slavery implications took root. Two generations later, anti-slavery advocates rediscovered the logic of natural rights, invoking them to show that the Constitution could not bar anti-slavery measures. These arguments were then embraced after the Civil War by drafters of the 14th Amendment.

Barnett's main point is that earlier generations put the emphasis on individual rights. The founders presented their project as "republican." A competing view, which Barnett calls the "Democratic Constitution," has emphasized the right of the majority to get its way (government by "consent of the governed"). Progressives in the late 19th century were even more eager to equate justice with majority rule. That is part of the reason, Barnett argues, they were so indifferent to courts diluting the post-Civil War Amendments; they were not prepared to stand up for the rights of black citizens against local majorities in the South. By the 20th century, Progressives embraced a "living Constitution" on the more or less explicit premise that the Constitution should mean what current majorities, or in some cases future majorities, would find most acceptable.

Barnett champions the original understanding of the Constitution. He doesn't engage in technical disputes about whether 18th-century dictionaries or other sources are the best way to identify the "original meaning" of particular words or phrases in the text. He wants to identify the overall spirit behind the Constitution—what it was meant to accomplish. And he emphasizes the efforts of the framers (and their successors) to protect personal liberty and private property. In quick strokes, he explains why and how these earlier constitutional understandings served these aims. First, limiting Congressional power to enumerated objects left room for states and localities to accommodate local preferences—an approach that would leave individuals with more personal choice, even today (if we still tried to endorse such limits). Second, "all legislative powers" were to be exercised by legislators who could be held accountable, not unelected administrative officials in commissions, boards, or agencies. Finally, Barnett argues, private rights would be more secure if courts were more serious about their constitutional duties to protect them, by deciding cases rather than deferring (as official doctrine now counsels) to administrative officials' legal interpretations.

Before the mid-20th century, all this would have struck most people as common sense. Barnett's story does have some problems, though, or at least omissions. At the most theoretical level, you can agree that government is instituted to "secure" natural rights and still acknowledge that government will do this more effectively if it does other things to reinforce communal bonds. The Constitution's framers established a "Senate," and deployed pseudonyms like "Publius" and "Brutus" when debating their work, in order to give the Republic a Roman sense of solidity, as something more than a collection of individuals. At the Philadelphia Convention, George Mason himself urged that Congress be given power to enact sumptuary laws, restrictions on excessive consumption of luxury goods. By the 1850s, many anti-slavery advocates were also concerned about the "enslaving" threat of alcohol dependence. Abraham Lincoln's running mate in 1860, Hannibal Hamlin of Maine, was best known for his support of the "Maine law" forbidding sales of alcoholic beverages. The 1860 Republican platform demanded action against (Mormon) polygamy as well as slavery, equating them as "twin relics of barbarism."

Barnett tries to distinguish a "Democratic Constitution," which identifies sovereign authority with the electoral majority, from the framers' "Republican Constitution," which protects the "individual sovereignty" of each citizen. These phrases do not appear in debates of the founding era, nor (so far as I'm aware) in any European works touching on sovereignty. Barnett's one source—some offhand comments from a 1795 Supreme Court ruling on "sovereign immunity" of state governments does not establish a consistent usage, let alone a coherent concept. If you say there is "sovereignty" in individuals but it is somehow limited, you haven't done much to explain how and why and to what extent such limits are justified. You have not improved on saying, "These are natural rights…though subject to limits and restrictions." Barnett has his own differences with 19th-century authorities. At one point he says that states have a "police power" that extends to the protection of citizens' "health and safety"; the classic 19th-century treatises spoke of "health, safety and public morals."

Apart from philosophical or theoretical difficulties, there is the political challenge. Barnett argues that judges have been too hesitant to enforce limits that are actually in the Constitution, if they would still try to grasp its original understanding. But the problem may not be primarily one of understanding. Perhaps judges fear that if they challenged too many laws or administrative policies, they would provoke a populist revolt, or see an indignant president and Congress try to mobilize one.

Barnett acknowledges that judges may need help. At the end of his book, he proposes a "Bill of Federalism"—a sort of bill of states' rights—which would, among other things, seek to restore constitutional limits by allowing a qualified majority of state legislatures to repeal acts of Congress. He also proposes to replace the 16th Amendment (which authorized a federal income tax) with a "uniform consumption tax" to raise revenue less intrusively. Is there reason to hope enough people would favor amending the Constitution? People might rally to the cause of constitutional principle, Barnett argues, with the right sort of political advocacy. The one example he offers is a speech from President Calvin Coolidge, rather a long time ago.

Toward the end of *Our Republican Constitution*, Barnett reminds readers of the constitutional dispute over the Affordable Care Act, in which a "Republican-nominated, conservative chief justice snatched defeat from the jaws of victory." The experience, he suggests, "may prove to be a political inflection point," leaving "[m]ore people…open to the tenets of our Republican Constitution than have been in generations."

Or not. Pessimists may note that neither of the two major parties nominated presidential candidates in 2016 with any commitment to the original Constitution's limited government principles. Optimists may console themselves that the next president's inevitable legacy of disasters is unlikely to define the outlook of the next generation. If you want to be optimistic, you might recall, too, that liberty is an old story and every generation has found advocates to retell it. Randy Barnett offers a succinct, informed, and compelling version of one of the best such stories.

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