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1-5-2013

January 5, 2013: Restoring the Lost Constitution

Bruce Ledewitz

Duquesne University, ledewitz@duq.edu

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Repository Citation

Ledewitz, B. (2013). January 5, 2013: Restoring the Lost Constitution. Retrieved from <https://dsc.duq.edu/ledewitz-hallowedsecularism/798>

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Title: Restoring the Lost Constitution

Date: 2014-01-05T05:21:00.000-05:00

1/5/2013—Greetings from the Annual Convention of the American Association of Law Schools. In the next few days, I will have a blog entry concerning the contraception mandate RFRA litigation program at the Law and Religion Section. For now I will just note that you would not know that the RFRA litigation is regarded as an illegitimate partisan attack on policy by a large number of Americans and if RFRA really means what the program suggested, government in America is essentially at an end.

Here I want to honor a presentation made by Georgetown Law Professor Randy Barnett. Randy was a large part of the intellectual firepower behind the Commerce challenge to the Affordable Care Act that succeeded before the US Supreme Court. He was part of a panel addressing the general question whether the Constitution has succeeded in achieving the goals of its Preamble.

This question led to a rorschach test like response. The question became one of loyalty to the Constitution itself. Sanford Levinson presented one contemporary liberal response—the Constitution is illegitimate because largely undemocratic and this lack of democratic rule prevents the people from legitimately ruling due to minority gridlock in Washington.

Randy presented a classically liberal response—hence conservative in our current terms. Majoritarian rule is not the proper norm by which to judge the Constitution because a large part of the purpose of the Constitution is to restrain majorities. By this measure, the Constitution has done a fairly good job until recently. This argument is made in his book, *Restoring the Lost Constitution*.

Randy returned specifically to the Declaration of Independence to characterize the legitimate purpose of government—that is, the justification of the use of coercive power against unconsenting adults. Government is instituted to achieve the inherent right to individual self-government—the original pursuit of happiness. Government achieves its proper purpose by maximizing individual freedom, though it must do so by restraining illegitimate uses of power by foreign enemies and would-be distorters of the economic market.

There are two important assumptions in Randy's view. First, rights are real. This is an ontology that is no longer self-evident in the framers' sense. Second, the use of private property is presumed to be legitimate. But in an interconnected world in which driving my car melts the icecaps and thereby raises the sea level and steals land from coastal dwellers, this assumption is no longer unproblematic either. Basically, the private power of capitalism is not a political issue for Randy.

The great thing about Randy's presentation is that he is grateful for the Constitution while most legal academics are not. CS Lewis used to say that it was unbecoming for Christian clerics to maintain their posts when they could no longer endorse the basic tenets of Christianity. I had something of the same feeling listening to Randy. If we teaches of the Constitution cannot fundamentally affirm the constitutional project, why are we teaching the Constitution?