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TAKING STATES (AND METAPHYSICS) SERIOUSLY

Sanford Levinson*

THE FALLACIES OF STATES' RIGHTS. By Sotirios A. Barber. Cambridge and London: Harvard University Press. 2013. Pp. 209. \$39.95.

INTRODUCTION

Sotirios A. Barber¹ has written many incisive and important books,² in addition to coediting an especially interesting casebook on constitutional law and interpretation.³ He is also a political theorist. An important part of his overall approach to constitutional theory is his philosophical commitment to “moral realism.” He believes in the metaphysical reality of moral and political truths, the most important of which, for any constitutional theorist, involve the meanings of justice and the common good. He not only believes in the ontological reality of such truths—that is, that these truths are more than mere human conventions or social constructions—but he also believes that humans have the epistemological equipment to discern and act on them, including designing political institutions that will instantiate them and make possible their progressive realization in what we often call the “real world.” All of these aspects of his scholarship are brought to bear in his most recent work, *The Fallacies of States' Rights*.

One can summarize Barber's book quite briefly. As the title suggests, it is nothing less than a fallacy to argue that states within the United States have rights protected against congressional override. But the word “fallacies” also has the overtone of philosophical—especially logical—argument. Circular reasoning, for example, is fallacious not because of empirical errors but because the conclusions are built into the primary assumptions. Similarly, Barber wants to demonstrate that the proposition that states have rights rests on a mistake in reasoning that is demonstrable in just the same way as other fallacies in reasoning. Most of this Review will, of course, focus on this aspect of Barber's argument. I begin, though, by pointing to one potential

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2. SOTIRIOS A. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* (1975); SOTIRIOS A. BARBER, *THE CONSTITUTION OF JUDICIAL POWER* (1993); SOTIRIOS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984); SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* (2003) [hereinafter BARBER, *WELFARE AND THE CONSTITUTION*]; see also SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* (2007).

3. *AMERICAN CONSTITUTIONAL INTERPRETATION* (Walter Murphy, James E. Fleming, Sotirios A. Barber & Stephen Macedo eds., 4th ed. 2008).

problem that he does not address, which is the presence in the text of the Constitution of unequivocal assignments of rights to the states.

I. BARBER AND THE “CONSTITUTION OF SETTLEMENT”

It is simply implausible—perhaps even incorrect—to argue that the Constitution, correctly understood, supports *no* entrenched states’ rights that might hinder the common good. This is the case even if one agrees, as I do, with Barber’s general critique of federalism and his concomitant support of an empowered national government. It *is* telling that there is a remarkable lack of explicit assignment of reserved powers to the American states, whatever the cryptic language of the Tenth Amendment might otherwise suggest.⁴ One might easily contrast this with several federal systems around the world that specify the exclusive authority of subnational units to regulate such important matters as language, religion, education, or the disposal of certain natural resources, to name only four hot-button issues likely to provoke conflict between center and periphery.⁵

Within the United States, though, it is important to realize that almost all ostensible protections of state autonomy running through contemporary Supreme Court opinions are based on distinctly unenumerated “penumbras and emanations”⁶ from the Constitution, not to mention the “high politics” of particular judges who have their own understandings of how the American political system *should* operate.⁷ That they believe federalism to be more worthwhile and deserving of protection than Barber does is not evidence of the proposition that Barber is wrong; rather, it is only evidence that important contemporary political and judicial elites (largely but not exclusively

4. See U.S. CONST. amend X.

5. See, e.g., Constitution Act, 1867, 30 & 31 Vict., c. 3, §§ 92–93A (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.), available at <http://laws.justice.gc.ca/eng/const/page-4.html#h-17> (seemingly granting greater plenary authority to Quebec than to other provinces with regard to education in sections 93 and 93A); India Const., art. 345, available at http://india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf (“Subject to the provisions of articles 346 and 347, the Legislature of a State may by law adopt any one or more of the languages in use in the State or Hindi as the language or languages to be used for all or any of the official purposes of that State . . .”); BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 70, para. 2 (Switz.), available at http://www.servat.unibe.ch/icl/sz00000_.html (dealing with cantonal autonomy regarding official language); *id.* art. 72 (dealing with regulation of church–state relations). Interestingly enough, article 347 of India’s constitution provides that

[o]n a demand being made in that behalf the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify.

India Const., art. 347. India’s constitution lists twenty-two official languages. *Id.* sched. 8, available at http://india.gov.in/sites/upload_files/npi/files/coi-eng-schedules_1-12.pdf.

6. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

7. On “high politics,” see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

conservative) have a different vision. The point is that the text of the Constitution is rarely truly useful in understanding judicial opinions; indeed, if anything, close attention to constitutional text can only confuse the reader.⁸ Still, this does not establish the proposition that there are *no* states' rights that are clearly spelled out in the text of the Constitution.

Consider the likely response to an argument that one way to begin dismantling the normatively indefensible allocation of voting power in the Senate⁹—by which, for example, Wyoming has the same weight as California, which has almost seventy times its population¹⁰—would be to combine a number of smaller states into larger ones. Thus one might create a new state out of the two Dakotas, Wyoming, and Nebraska; other candidates for amalgamation might well be Maine, Vermont, and New Hampshire. Immense population disparities would still remain—this new “Grand Prairie” state would have approximately 4 million people, while “Upper New England” would only have around 3.3 million.¹¹ These are still pittance compared with California's population of approximately 38 million people.¹² But at least the disproportion is well under that between Virginia and Delaware in 1790 (about 13 to 1),¹³ which we might take as establishing the outer limit for disproportionate representation in the Senate. (We will obviously never know what the Framers might have thought about a 65-to-1 population disparity, although we can be confident that Madison and other opponents of the Senate would have become ever more apoplectic.) In India, there would be no problem with such consolidation, for Article 3 of that country's constitution explicitly provides that

Parliament may by law—

- (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;

8. This is most obviously the case with the Eleventh Amendment and the broader issue of so-called sovereign immunity against suit. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Hans v. Louisiana*, 134 U.S. 1 (1890). On the nontextual basis of these decisions, see John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *YALE L.J.* 1663 (2004).

9. Described by James Madison in *The Federalist No. 62* as an “evil,” albeit a “lesser” one, to the state of affairs that would exist were the Constitution, however imperfect, to be rejected. *THE FEDERALIST NO. 62* (James Madison).

10. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 6 (paperback ed. 2008).

11. *See List of U.S. States and Territories by Population*, WIKIPEDIA (Oct. 6, 2013, 10:33 PM), http://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population (compiling 2012 U.S. Census Bureau population estimates for the United States by state and territory).

12. *See id.*

13. *See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE & LABOR, BUREAU OF THE CENSUS, HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790*, at 8 (1908) [hereinafter *FIRST CENSUS*], available at <http://www2.census.gov/prod2/decennial/documents/1790m-02.pdf>.

- (b) increase the area of any State;
- (c) diminish the area of any State;
- (d) alter the boundaries of any State;
- (e) alter the name of any State¹⁴

However meritorious such proposals might be in the United States, there is a fatal problem with relying only on a congressional statute to achieve them. Unfortunately, Article IV, Section 3 of the U.S. Constitution provides that “no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, *without the Consent of the Legislatures of the States concerned* as well as of the Congress.”¹⁵ It is, I presume, impossible to imagine that the Wyoming or Vermont legislatures, whatever their partisan differences might be, would consent to their amalgamation into a brand new state and the concomitant loss of political power within the Senate. Indeed, one can imagine that such a change might feed the nascent secessionist movement in Vermont!¹⁶ And, of course, Article V grants each state the equivalent of a death-ray veto over any proposal to more equitably apportion votes in the Senate.¹⁷ One might well believe that these proposals would be conducive to achieving a truly “more perfect Union,” but I strongly suspect that such a defense would be unpersuasive, with regard to their constitutionality, to almost all lawyers and judges. Defending these proposals would require dismissing the power of the text.

14. INDIA CONST., art. 3, *available at* http://india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf. To be sure, the section provides as well

that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.

Id. A right to express a view is obviously far weaker than the legal ability to prevent such proposed actions.

15. U.S. CONST. art. IV, § 3 (emphasis added).

16. *See generally* THOMAS H. NAYLOR, SECESSION: HOW VERMONT AND ALL THE OTHER STATES CAN SAVE THEMSELVES FROM THE EMPIRE (2008); MOST LIKELY TO SECEDE: WHAT THE VERMONT INDEPENDENCE MOVEMENT CAN TEACH US ABOUT RECLAIMING COMMUNITY AND CREATING A HUMAN-SCALE VISION FOR THE 21ST CENTURY (Ron Miller & Rob Williams eds., 2013); Christopher Ketcham, *Disunion Now!*, AM. PROSPECT, Mar.–Apr. 2013, at 48, *available at* <http://prospect.org/article/us-out-vermont>.

17. For such a proposal, see LARRY J. SABATO, A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY 23–32 (2007).

In his book, Barber is really addressing what I have taken to calling “the Constitution of Conversation,” by which I mean those parts of the Constitution that are sufficiently indeterminate to be the subject of interpretive debate and litigation.¹⁸ I contrast this concept with “the Constitution of Settlement,” or those parts of the Constitution (like Article IV, Section 3; Article V; or the “Inauguration Day Clause” of the Twentieth Amendment) that present no serious questions of interpretation, however much they might (and should) generate debates about *wisdom*.¹⁹ Although he teaches in the political science department at Notre Dame, Barber reflects the professional pathology of law professors in his basically exclusive interest in the Constitution of Conversation. Fortunately, his book is a valuable contribution to that conversation, even if it does not address the Constitution of Settlement. So, once we recognize the status of the book as taking place within the Constitution of Conversation and the concomitant, seemingly endless debates about the best way to interpret the Constitution, the question turns to Barber’s particular take on such matters.

II. BARBER AND THE “CONSTITUTION OF CONVERSATION”

The Fallacies of States’ Rights can be read as part of an ongoing debate about how best to interpret one particular constitution, that of the United States. Barber has not written a primer for constitutional designers around the world who might be wrestling with the issue of whether to adopt a federal system that, by definition, accords subnational entities constitutionally guaranteed autonomy that is protected against negation by the central government.²⁰ Nor does he seem interested in how other national constitutions—those of Germany or India, to take two examples—approach federalism as a political and constitutional reality in their countries. Finally, Barber exhibits no interest in the political science literature that considers the prevalence of various forms of constitutional federalism in many other countries or that explains as an empirical matter the adoption of the U.S. Constitution with its own features involving states, including the egregious allocation of power in the Senate.²¹ Instead, this book is devoted exclusively to understanding *our* national Constitution as an interpretive enterprise.

18. See SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 18–19 (2012) (emphasis omitted).

19. *Id.* (emphasis omitted).

20. On the all-important difference between “federalism,” a legal concept, and “decentralization,” an institutional–political one, see *id.* at 287–90.

21. For works on these topics, see, for example, MIKHAIL FILIPPOV ET AL., *DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS* (2004), and JENNA BEDNAR, *THE ROBUST FEDERATION: PRINCIPLES OF DESIGN* (2008). A far more critical perspective is provided by MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* (2008). For background information, see *THEORIES OF FEDERALISM* (Dimitrios Karmis & Wayne Norman eds., 2005).

A. *The Centrality of the Preamble*

For Barber, a central reality of the Constitution is its announcement in its Preamble of the purpose of the entire enterprise: it is to form a “more perfect Union,” which will be defined by its ability to promote “the common defence,” “the general Welfare,” and “the Blessings of Liberty,” not to mention the establishment of “Justice.”²² What is crucial for Barber is not only the importance of these substantive commitments but also that “with the possible exception of ‘Union,’ the Preamble mentions no ideas relating to the arrangement of governmental offices and powers.”²³ “‘Federalism,’ ‘separation of powers,’ ‘democracy’—no such terms appear in the Preamble” (p. 3). Institutions, including even those directly linked to protecting democratic choice, are only the means to the great ends set out in the Preamble. Thus, Barber writes, “The chief purpose of constitution making as a *rational enterprise* can *only* be some substantive good like happiness, security, prosperity, or liberty—liberty, that is, mostly from third parties, not from government, and therefore liberty that all men share under government” (p. 16; emphases added).

As already suggested, Barber approaches constitutional analysis almost as a Euclidean would approach geometry because of his confidence about what rationality requires. It is a fallacy, at least within the Euclidean world, to believe that two parallel lines will ever meet. Similarly, the Preamble allows us to speak with similar confidence about fallacious understandings of what follows in the Constitution’s main text, which, Barber argues, can only be viewed as a *means* to achieving the great *ends* set out in the Preamble. This means–ends relationship “therefore suggests that the *mere* maintenance of constitutional institutions, including federalism, is not an end for which the Constitution was established” (p. 3; emphasis added). There are few more powerful uses of the word “mere” to frame an argument.²⁴ Similarly, “[f]or the Constitution to *make sense*, maintaining institutions and securing constitutional rights are best seen not as fundamental constitutional commitments but [only] as strategies for pursuing constitutional ends” (p. 16; emphasis added). It is one thing to suggest that justice must be maintained although the heavens fall; this notion, among other things, recognizes the primacy of justice as an overarching normative value. It is quite another to say, for example, that separation of powers or even, for that matter, the recognition of a particular but relatively unimportant constitutional right,

22. U.S. CONST. pmb.

23. P. 3. This is also true, incidentally, of the Declaration of Independence, which speaks of the importance of the “consent of the governed” and protecting certain “unalienable Rights” but says absolutely nothing about what kinds of political institutions are most conducive to achieving these ends. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

24. Although, see Alexander Hamilton’s remarkable speech to the Constitutional Convention on June 18, 1787, in which he reminded his more legalistic colleagues that “[t]o rely on & propose any plan not adequate to these exigencies, *merely because it was not clearly within our powers*, would be to sacrifice the means to the end.” 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 283 (Max Farrand ed., 1937) (emphasis added).

must be maintained although the heavens fall. Professor Shklar notably argued almost a half century ago that only committed legalists who ignore questions about the degree to which legal forms overlap with substantive justice can be happy with such arguments.²⁵ It may be that even nonlegalists believe, as a prudential matter, that people ought to comply with unfortunate and even “dysfunctional” features of the Constitution in less dire circumstances, given the general utilitarian advantages of “playing by the rules.”²⁶ But justice must ultimately be able to assert its own claims.

B. Enter James Madison

In many ways, the linchpin of Barber’s entire argument, as was the case with his previous book *Welfare and the Constitution*,²⁷ is what he calls a “neglected passage” from *The Federalist No. 45* (p. 3). To help sell the Constitution to those who doubted its merits, Madison wrote, “[T]he public good, the real welfare of the great body of the people is the supreme object to be pursued; and . . . no form of government whatever, has any other value, than as it may be fitted for the attainment of this object.”²⁸ Madison assures his audience that if he believed that the text drafted by the delegates to the Philadelphia Convention were “adverse to the public happiness,” he would forthrightly advise that the American people, in whose name the Constitution ostensibly speaks, “reject the plan.”²⁹ Indeed, “[w]ere the Union itself inconsistent with the public happiness,” he imagines himself saying, “abolish the Union. In like manner *as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, let the former be sacrificed to the latter.*”³⁰ These are powerful words, and they are the basis of a powerful argument that is developed throughout the rest of the book. It is a clear entailment of Barber’s argument that state sovereignty, the predicate condition for any serious argument about states’ rights, should have no purchase at all among serious students of the Constitution, unless such sovereignty—and concomitant limitations on national power—is conducive to public happiness, which he

25. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (1964).

26. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991) (defending the social utility of rule following even when it produces “suboptimal” results).

27. See BARBER, *WELFARE AND THE CONSTITUTION*, *supra* note 2, at 16, 93.

28. THE FEDERALIST, *supra* note 9, No. 45, at 250 (James Madison) (J.R. Pole ed., 2005). For most readers, the easiest access to *The Federalist* is through one of several websites, including <http://thomas.loc.gov/home/histdox/fedpapers.html> (Library of Congress) and http://avalon.law.yale.edu/subject_menus/fed.asp (Yale Law School). For those readers who like old-fashioned print, my own favorite source is that edited by the distinguished English historian J.R. Pole, which has both an excellent introduction and historical notes throughout the text. ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST* (J.R. Pole ed., 2005).

29. THE FEDERALIST, *supra* note 9, No. 45, at 250–51 (James Madison) (J.R. Pole ed., 2005).

30. *Id.* (emphasis added).

obviously doubts. And it should be clear that happiness for Barber in particular is more than a psychological state; Barber, like Socrates, would surely argue that it is delusionary to believe that one can be *truly* happy if one is committed to a life that rejects the importance of the “public good.”³¹ Similarly, a society committed to the “pursuit of [true] Happiness”³² would reject mere preference satisfaction as the target of our pursuits.

C. Enter John Marshall

Once we recognize the overarching importance of both the Preamble and Madison’s emphasis on the public good, what follows for anyone tasked with interpreting the Constitution? The answer is deceptively simple: “I claim,” Barber writes, “that Marshallian federalism, not states’ rights federalism, is the true constitutional federalism” (p. 6). That is, the former allows us to realize the *ends* announced in the Preamble for which everything else is merely instrumental, whereas the latter does not.

What is “Marshallian federalism”? Not surprisingly, it is the vision of the Constitution set out in Marshall’s most important—and rhetorically magnificent—opinion, *McCulloch v. Maryland*.³³ Most modern lawyers and judges read *McCulloch* as basically granting the national government near-plenary power to do whatever is conducive—that is, “necessary and proper”—to providing for the public happiness, or “general Welfare,” of the polity.³⁴

To quote what is almost certainly one of the most cited paragraphs in our constitutional tradition (particularly, one must add, following the New Deal transformation of the powers of the national government),

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which

31. In the Platonic dialogue *Gorgias*, for example, Socrates tries to demonstrate that an all-powerful tyrant, whatever his ability to realize his desires, could not be pronounced *truly* happy, as true happiness requires living in accordance with the demands of justice. PLATO, *GORGAS* (Walter Hamilton trans., Penguin Books 1971) (n.d.).

32. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

33. 17 U.S. (4 Wheat) 316 (1819).

34. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966), *abrogated by* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *United States v. Darby*, 312 U.S. 100, 118–19, 124 (1941). One will, of course, recognize these cases as part of a greatest hits collection of the distinctly liberal Supreme Court from the post–New Deal years through the end of Chief Justice Warren’s tenure.

are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.³⁵

The first sentence of this passage from *McCulloch* acknowledges the common mantra that the Constitution establishes a “limited government.” Yet as Professor Raphael shows in his valuable book *Constitutional Myths*,³⁶ it is fallacious to believe that “[t]he framers of the Constitution opposed a strong federal government”³⁷ or “were guided by clear principles of limited government.”³⁸ Neither is remotely true. Raphael tellingly quotes the *Pennsylvania Gazette*, which on September 5, 1787 (twelve days before the Constitution would be signed in Philadelphia and then released to a public that had been kept completely in the dark about what was happening) stated, “The [y]ear 1776 is celebrated for a revolution in favor of *Liberty*. The year 1787, it is expected, will be celebrated with equal joy, for a revolution in favor of *Government*.”³⁹ The decidedly weak government established by the Articles of Confederation had proved, in the minds of most observers, woefully ill suited to achieve the public happiness, however defined. Thus the Founders unceremoniously scrapped the Articles and replaced them with a new structure of governance that did indeed empower the national government. Some, including Alexander Hamilton and the 1787 version of Madison, would gladly have obliterated the states and established an even stronger national government than emerged from Philadelphia. But when all was said and done, the new government was still more than powerful enough to charter a Bank of the United States under the broadly permissive doctrine that Marshall announced for a unanimous Court. Similarly, the national government is more than powerful enough today to do whatever Congress might reasonably believe will serve the public happiness.

Perhaps Barber’s most clever argument is that even proponents of states’ rights against Marshallian permissiveness must themselves, if they are to gain real purchase among the relevant audience, make their arguments from a *national*—one might even say a “preambular”—perspective.⁴⁰ That is, they must attempt to justify what Barber regards as a clearly implausible argument that recognizing protected domains of state decisionmaking authority protected against national interference in fact serves the purposes set out in the Preamble and *not*, for example, the merely parochial and counternational interests of the state in question. One must, at the end of the day, accept the reality of membership in a Union and the aspiration that the Union become steadily “more perfect.” And, Barber argues, the very attempt by advocates of states’ rights to defend their position against Marshallian

35. *McCulloch*, 17 U.S. at 421.

36. RAY RAPHAEL, *CONSTITUTIONAL MYTHS: WHAT WE GET WRONG AND HOW TO GET IT RIGHT* (2013).

37. *Id.* at 1.

38. *Id.* at 57.

39. *Id.* at 2 (internal quotation marks omitted).

40. *See* p. 17.

nationalists in fact “assumes what states’ righters implicitly deny: that Americans are united in a common good or in the quest for a common good” (p. 17).

Professor Greve has published perhaps the most interesting recent defense of federalism, developing a theory that he calls “competitive federalism.” This theory relies in part on the Supreme Court’s strong willingness to enforce the Dormant Commerce Clause doctrine against state regulations that touch on interstate commerce in the name of achieving the best overall American economic system.⁴¹ Whatever one thinks of Greve’s argument, it is most definitely *not* proffered in the name of the abstract value of “state autonomy,” where such autonomy serves as an occasion for states exhibiting their own “factional propensities” with regard to allowing states to impose costs on each other.⁴² For example, I think it accurate to say that Greve loathes *Erie Railroad Co. v. Tompkins*,⁴³ often defended as a valuable acknowledgment of a state’s right to construct its own system of civil procedure by eliminating the ability of federal courts, in diversity cases, to impose their own preferred norms.⁴⁴ Barber certainly disagrees with the specifics of Greve’s arguments, such as his criticism of Congress’s power to “cartelize” the national economy by virtue of the power of one group of states to essentially capture national power to prevent less powerful states from engaging in the kind of competition that Greve believes would enhance the overall health of the American economic order.⁴⁵ But the central point for Barber is that Greve argues that his notion of competitive federalism is “necessary and proper” to the “general Welfare.” That is, according to Greve, *all* of us benefit from the competition among states. Thus, for Barber, Greve emerges as a quasi ally inasmuch as he consistently adopts a *national* perspective that is also linked to a substantive conception of public happiness.⁴⁶ As Barber insightfully notes, Greve ultimately endorses “an odd kind of federalism, for its central promise—‘citizen choice’ [as the autonomy of the citizenry to pick and choose which states to move to on the basis of those states’ policies]—is a right achieved through and maintained by national power, historically at the expense of state power” (p. 103). Greve, as a good American, is really arguing that his ideas are “the right thing for the country as a whole” (p. 104).

41. MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 91–92 (2012). To call it the “dormant commerce clause,” of course, is to beg an important question, insofar as the power of the Court—rather than Congress alone—to regulate state regulation of interstate commerce is itself a “penumbra and emanation” drawn from the text of the Commerce Clause. *See id.* at 92–94; *see also* note 6 and accompanying text.

42. GREVE, *supra* note 41, at 287–89.

43. 304 U.S. 64 (1938).

44. *See* GREVE, *supra* note 41, at 221–42, 303–07.

45. *See* pp. 101–06. Greve’s *The Upside-Down Constitution* was published after Barber finished his own book, and Barber focuses on an earlier iteration, MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* (1999). *See* pp. 101 & 219 n.18.

46. *See* pp. 101–06.

III. FEDERALISM AND PEOPLE OF “[F]UNDAMENTALLY
[D]IFFERING [V]IEWS”⁴⁷

Assume that we adopt the perspective of Barber and Madison (in *The Federalist No. 45*). What then has to be explained is why a sensible country would adopt a *federal* system at all. Federalism is quite different from a *unitary* political system—one directed from the center—that nonetheless adopts, simply because it is so sensible, a great deal of *decentralization* in creating and implementing public policy. In a federal system, the constituent subnational units have constitutionally guaranteed rights to some degree of autonomous decisionmaking with regard to matters of certain significance.⁴⁸ By definition, these decisions can trump contrary preferences from the central government. In a unitary regime, in contrast, decentralization can always be reversed if those at the center believe that the country would be better off with more centralized decisionmaking. A secondary question is what maintains a federal system, assuming a decision to establish one in the first place.⁴⁹ Neither question, as a matter of fact, seems of particular interest to Barber.

One answer to the first question, though, is that federalism—and the attendant assignment in a written constitution of states’ rights—is a cogent response to societies that are “deeply divided,” at least along geographical lines, but that wish nonetheless to construct some common polity instead of embarking on being a truly sovereign, independent state within the international system.⁵⁰ What often lies behind such wishes is the realization that as sovereign states they would almost invariably be too small to defend themselves against predators in the international system. As Montesquieu laconically put it, “If a republic be small, it is destroyed by a foreign force.”⁵¹ Indeed, Hamilton’s early *Federalist* essays especially emphasize the necessity of American unification to stave off a variety of enemies. Thus he concludes *The Federalist No. 6* by citing the French philosopher L’Abbé de Mably, who wrote that “NEIGHBOURING NATIONS . . . are naturally ENEMIES of each other, unless their common weakness forces them to league in a CONFEDERATE REPUBLIC, and their constitution prevents the differences that neighbourhood occasions, extinguishing that secret jealousy, which disposes all states to aggrandize themselves at the expence of their neighbours.”⁵² In

47. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

48. See *supra* note 5 (discussing Canada, India, and Switzerland).

49. See the excellent overview of this important question in Daniel Halberstam, *Federalism: Theory, Policy, Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 576, 595–97 (Michel Rosenfeld & Andrés Sajó eds., 2012).

50. See, e.g., FEELEY & RUBIN, *supra* note 21, at 38; *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES* (Sujit Choudhry ed., 2008).

51. Montesquieu, *Combining the Advantages of Small and Large States*, in *THEORIES OF FEDERALISM*, *supra* note 21, at 55.

52. *THE FEDERALIST*, *supra* note 9, No. 6, at 27 (Alexander Hamilton) (J.R. Pole ed., 2005) (internal quotation marks omitted).

the absence of the move to unity, then, one can expect only continued warfare and the fear, even in ostensible times of “peace,” of renewed hostilities. This, of course, privileges the “common defence” over a wider collective vision of what constitutes the “general Welfare.”

Still, the essence of all federal systems is that they forgo the apparent ease of establishing a single common government and instead opt for a more complex system that, under some formulations, requires dual sovereignty of both national and state governments. Even Marshall referred to Maryland, sarcastically or not, as a “sovereign state” in his initial “statement of the facts” in *McCulloch*.⁵³ A central paradox of federalism is therefore that its most cogent explanation—and perhaps normative justification as well—involves the reality of Justice Holmes’s famous observation that “a constitution is . . . made for people of fundamentally differing views.”⁵⁴ From one perspective, this treats a constitution, at least in a Holmesian society, as the equivalent simply of a *modus vivendi* by which quarreling parties enter into the equivalent of a peace pact that can provide an acceptable level of stability and, importantly, defense against foreign enemies.⁵⁵ Almost by definition, this entails a dissensus with regard to the ultimate aspirations of any political union or the meaning of the common good and what a commitment to its achievement might mean.⁵⁶ This dissensus, especially if geographically distributed among subnational units that have significant degrees of political autonomy (as well as a state militia willing to fight), generates the specter of secession should the national government not conform to the deals made at the time of the initial constitutional settlement.

No American can view this only as a theoretical possibility, even if one hopes that it is no longer a live issue today, 150 years after a remarkably bloody war killed 750,000 combatants struggling over the meaning of the Constitution.⁵⁷ One might, of course, ask *why* exactly it was a good thing and conducive to the “public happiness” to maintain the Union. It presumably goes without saying, however, that opponents of secession *did* believe that the public good required rejection of the secessionists’ claims.

As in his discussion of Greve, Barber demonstrates a similarly paradoxical aspect of the South’s premier theorist of secession, John C. Calhoun: far from being a free-wheeling state-autonomy buff, Calhoun was sharply critical of the states that paid insufficient attention to the deal struck in Philadelphia that required national recognition of the rights of slaveholders.⁵⁸ *Those*

53. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 377 (1819).

54. *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

55. See, e.g., DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* (2003).

56. See Sanford Levinson, *Consensus, Dissensus, and Constitutionalism*, in *ISRAELI CONSTITUTIONAL LAW IN THE MAKING* 59, 59–63 (Gideon Sapir et al. eds., 2013).

57. See, e.g., Akhil Reed Amar & Sanford Levinson, *What Do We Talk About When We Talk About the Constitution?*, 91 TEX. L. REV. 1119 (2013) (reviewing AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* (2012), and LEVINSON, *supra* note 18) (discussing secession and the U.S. Constitution).

58. Chapter Five. Think only of the Fugitive Slave Clause. U.S. CONST. art. IV, § 2, cl. 3.

states, in effect, were taking the lead in challenging the premises of the Union by refusing to live up to the constitutional bargain. In this context, consider that South Carolina's justification of its secession from the Union emphasized the bad faith of states that refused to adhere to their duty to comply fully with the Fugitive Slave Clause.⁵⁹ "The General Government, as the common agent, passed laws to carry into effect these stipulations of the States," noted the South Carolinians, and "[f]or many years these laws were executed" (and, presumably, the Union prospered).⁶⁰ This development was succeeded, however, by "an increasing hostility on the part of the non-slaveholding States to the institution of slavery" and a concomitant "disregard of their obligations."⁶¹ No fewer than thirteen states are specifically said to "have enacted laws which either nullify the Acts of Congress or render useless any attempt to execute them."⁶² One might be astonished to see South Carolina speak critically of attempts of its fellow states to nullify federal laws, but this only underscores the complexity of understanding the nature of the Calhounite arguments that his fellow South Carolinians drew on. Nullification is presumably proper if and only if it in effect serves *national* purposes, such as assuring the vindication of the original constitutional plan. It most certainly does not license states to assert their own rights to attack that plan.

Barber points out that Calhoun's "argument for slavery was a *nationalist* argument, and his final theory of the Constitution was a *nationalist* theory" (p. 126; emphases added). Thus, for Barber, Calhoun "illustrates the futility of defending states' rights in a national forum," whatever may have been Calhoun's subjective "intentions" (p. 126). Barber quotes Professor Read, the author of a recent study of Calhoun's thought: "In the end, for Calhoun protecting slavery was a higher principle than states' rights."⁶³ For Calhoun and later South Carolinians, the Constitution, correctly understood, was a proslavery Constitution imposing genuine duties on antislavery states that they were not free to disregard; William Lloyd Garrison essentially agreed, describing it as a "covenant with death" and an "agreement with hell."⁶⁴

59. See DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION (1860), reprinted in JOHN AMASA MAY & JOAN REYNOLDS FAUNT, SOUTH CAROLINA SECEDES 76–81 (1960) [hereinafter SOUTH CAROLINA DECLARATION]. The text of South Carolina's declaration of secession is easily accessible at *Confederate States of America – Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, AVALON PROJECT, http://avalon.law.yale.edu/19th_century/csa_scaresec.asp (last visited Jan. 16, 2014).

60. SOUTH CAROLINA DECLARATION, *supra* note 59, at 79.

61. *Id.*

62. *Id.*

63. P. 129 (quoting JAMES H. READ, MAJORITY RULE VERSUS CONSENSUS: THE POLITICAL THOUGHT OF JOHN C. CALHOUN 106 (2009)) (internal quotation marks omitted).

64. Letter from William Lloyd Garrison to Elihu Burritt (July 16, 1845), in 3 THE LETTERS OF WILLIAM LLOYD GARRISON 298, 301 (Walter M. Merrill ed., 1973) (quoting *Isaiah* 28:15) (internal quotation marks omitted); see also WILLIAM LLOYD GARRISON AND THE FIGHT AGAINST SLAVERY 36 (William E. Cain ed., 1995).

The difference between Garrison and Calhoun was that Calhoun believed that slavery was a “positive good,” not only for those who were enslaved but also for the nation that was well served by the existence of a slave-based economy throughout much of the Union (p. 98). Ironically or not, the principal defenders of chattel slavery took little refuge in moral relativism or skepticism; many were more than happy to accept the challenge of demonstrating that slavery accorded with the demands of natural law, Christianity, or other standards of abstract justice. This might suggest, of course, that abstract commitment to moral realism or some other “foundationalist” premise has relatively little purchase for the settlement of concrete controversies.⁶⁵ The Devil, after all, can quote scripture.

Perhaps the principal aspiration of liberal political theory, especially as represented in the thought of John Rawls, probably the most important liberal political theorist of the past century (who goes unmentioned in Barber’s book), is to figure out what might constitute a theory of political justice and sound constitutional design in the *absence* of universal agreement on any comprehensive view of the good. This is precisely why such theorists have emphasized the “priority of the right over the good.”⁶⁶ Rights are assigned to individuals who disagree quite sharply about the meaning of a model life or the common good of a social order beyond the supply of those goods that will enable all its members the maximum opportunity to achieve their own visions of a good life. The task is to design structures of decisionmaking that can provide a way for people with very different comprehensive views (begin only with adherents of one or another “revealed religion” as against, say, relentless secularists) to live together. It is also why one of Rawls’s most famous essays about the nature of justice is subtitled *Political Not Metaphysical*,⁶⁷ as he wanted to avoid any commitment to disputed views about the purported foundations of moral reality.

Of course, there are many who criticize Rawls’s (and other liberal) views of what constitutes the project of political theory; for at least some critics, it should be the identification, through a variety of sometimes conflicting epistemological pathways, of normative views of “the good” that a well-designed government should then realize.⁶⁸ In any event, it should be clear that Barber—although undoubtedly a “political liberal” in the sense that that term is usually used within contemporary American political discourse (I suspect that hell would freeze over before Barber would vote for any contemporary Republican candidate for national office)—is *not* a liberal insofar as that

65. For a recent version of this argument that criticizes such abstractions, see RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

66. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

67. John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 *PHIL. & PUB. AFF.* 223 (1985).

68. For the classic critique of Rawls, see MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998). Sandel is very much a proponent of the politics of the “common good” and a critic of exclusive reliance on what he calls “procedural justice.” See also ROBERT P. GEORGE, *MAKING MEN MORAL* (1993), which, far more than Sandel’s work, is predicated on traditional Catholic natural-law thinking.

position is often identified with one or another variety of moral skepticism or simply with an emphasis on the priority of individual rights over notions of the common good.⁶⁹

Holmes not only emphasizes the reality of value pluralism within the American political system (and, most likely, within *any* moderate complex system). He is also famous (or notorious) for being a relentless critic of what he regarded as the pretensions of natural law theory. Holmes reduced his most fundamental commitments to a congeries of “can’t helps” that cannot ultimately be subjected to conclusive rational assessment. “Men,” wrote Holmes, “to a great extent believe what they want to—although I see in that no basis for a philosophy that tells us what we should want to want.”⁷⁰ Justice Iredell issued an important earlier dismissal of the claims of natural law in the 1798 case *Calder v. Bull*:

The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.⁷¹

Holmes was almost certainly an ontological skeptic, doubtful of the reality of moral notions other than as creations of the humans expounding them.⁷² Iredell might be better described as only an epistemological skeptic, as he used the fact that “the ablest and the purest men have differed upon the subject” as evidence for the proposition *not* that “natural justice” does not exist as a metaphysical reality but rather that we poor human beings have no ascertainable way of demonstrating the meaning of those “abstract principles” when faced with concrete dilemmas.

Barber can have little sympathy with either Iredell’s or Holmes’s views. Indeed, he explicitly notes that Marshall “did *not* believe the Constitution was ‘made for people with fundamentally different views.’”⁷³ Instead, “Marshall saw the Constitution dedicated to the ends of Lockean or bourgeois

69. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (advocating the priority of rights over social goals). Barber’s stance with regard to Dworkin’s jurisprudence is quite complicated and well beyond the scope of this Review. Barber’s book with James E. Fleming, *Constitutional Interpretation: The Basic Questions*, *supra* note 2, for example, overlaps with Dworkinian approaches in many respects—even though Dworkin systematically denies that his position, for all of its emphasis on “moral readings” of the Constitution, is truly equivalent to any classical natural law theories. See, e.g., Sanford Levinson, *Hercules, Abraham Lincoln, the United States Constitution, and the Problem of Slavery*, in RONALD DWORKIN 136, 136–37, 149 (Arthur Ripstein ed., 2007).

70. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 43 (1918), available at <http://teachingamericanhistory.org/library/document/natural-law/>.

71. 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.).

72. See LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 61–64 (2001).

73. P. 55 (emphasis added) (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

liberalism, ends like security, social peace, liberty conceived largely as the right to acquire and enjoy property, and freedom from sectarian imposition" (p. 55). It is worth emphasizing that this view does not generate a notion of plenary national power; one might be able to imagine merely "pretextual uses of national power"⁷⁴ that are not linked to any of the substantive ends to which the United States is dedicated. To that extent, at least, the national government is limited, but the crucial point is that the limits, for Barber (or, one suspects, for Marshall as well), have nothing to do with maintaining the institutional integrity of state sovereignty as such and everything to do with his concern that government in fact acts for the common good.

IV. HOW IMPORTANT IS METAPHYSICS, ANYWAY? ENTER "PROCESS FEDERALISM"

One essential question is how much the metaphysics matters to assessing claims of national priority over assertions of state autonomy. Is agreement with Barber's central argument about the fallacies of states' rights predicated on also accepting his philosophical views about the nature of moral reality and the concomitant relationship between the Constitution, correctly understood, and the reality of the common good? Barber surely realizes that most of his readers are the intellectual children of Holmes and other far more distinguished philosophical critics of natural law. So how does the book speak to *them* (or, more likely, *us*), beyond criticizing what Barber regards as self-imposed intellectual limitations? After all, as Barber emphasizes, there is available in the arsenal of contemporary approaches to ascertaining the meaning of constitutional federalism what has come to be called "process federalism" as an alternative to the Marshallian variety. Process federalism, a view that Barber identifies with the "late twentieth century," developed as a result of "academic value skepticism that was foreign to the constitutionalism of John Marshall" (p. 48). It "implicitly denies moral truth and assumes that the absence of moral truth supports democracy" (p. 48). In turn, Congress is associated with democracy, which entails, for most process theorists, the conclusion that Congress can basically do whatever it wants (p. 48). Congress would conscientiously weigh the *political* interests of states (which have few, if any, interests that are judicially protectable) against the presumptive public interest in limiting state autonomy, say,

74. P. 68. As Marshall put it in *McCulloch*,

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 423 (1819).

to set the salaries of their employees. The major problem facing process theorists has to do with the optimistic assumptions about Congress's ability to aggregate accurately majoritarian preferences and identify the public interest.⁷⁵

The apogee of process federalism within the Supreme Court is Justice Blackmun's opinion in *Garcia v. San Antonio Metropolitan Transit Authority*,⁷⁶ although its principal academic articulation almost certainly remains John Hart Ely's classic *Democracy and Distrust*.⁷⁷ Marshallian and process federalism often achieve identical results, inasmuch as both tend, with very few exceptions, to exalt national power and express indifference, if not disdain, for protected realms of state autonomy. So, from a thoroughly instrumental point of view, it is certainly better, from Barber's perspective, to adopt process federalism than to take seriously the states' rights federalism identified with the Kentucky and Virginia Resolutions, Calhoun, and, ultimately, Jefferson Davis.⁷⁸ In the contemporary era, this states' rights federalism is reflected in the views of the conservative majority of the Supreme Court, which, in the name of protecting states' "dignity interests," protects states against a legal duty to behave with elemental compensatory justice toward those they have wronged, regardless of a congressional statute imposing waiver of sovereign immunity.⁷⁹ This is not, however, because of any intrinsic respect that Barber possesses for the intellectual arguments underlying process federalism insofar as they must rely on a basically unanalyzed notion of democracy.

Indeed, for Barber, "process federalism faces collapse, which it can avoid only by connecting itself to some substantive good" other than "democracy" because "[d]emocracy derives support *not* from skepticism but from the belief (and ultimately therefore an argument) that justice is good, people are morally equal, and that the moral equality of persons makes it unjust for any one to rule another without the other's consent" (p. 48; emphasis added). All these arguments, Barber believes, require the rejection of "moral skepticism," which "supports no normative conclusion" (p. 48). Thus he argues

75. See J.M. Balkin, *The Footnote*, 83 Nw. U. L. REV. 275 (1989) (providing a deconstructive analysis of Footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)).

76. 469 U.S. 528 (1985) (upholding congressional imposition of minimum-wage requirements on states), *overruling* *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (striking down same).

77. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

78. See generally pp. 130–36.

79. For the most egregious example of patent injustice, see *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 367–68, 374 (2001), which articulates a belief that it can be "rational" for states to discriminate against the disabled and that Congress is without Fourteenth Amendment power to waive sovereign immunity against suits for damages for wrongful treatment in the absence of "a pattern of discrimination by the States which violates the Fourteenth Amendment." See also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 849 n.3, 855 (1995) (Thomas, J., dissenting), in which the four dissenters in effect opted for the Kentucky and Virginia Resolutions—as against Marshall's opinion in *McCulloch* (or, for that matter, Lincoln's First Inaugural Address)—as stating the correct foundational theory of the Constitution.

that “process federalism must eventually claim that the aggregation of private preferences, reflective or not, just *is* the political good” (p. 48). But, he argues, “this proposition is either false or untenable” (p. 48).

I suspect that most of us agree that the proposition is false because it suggests that *any* aggregation of a majority’s private preferences necessarily counts as the public good. All Americans are taught, perhaps even overtaught, to be fearful of tyranny of the majority—that is, the ability of what Madison denounced as “faction[al]” interests, defined in terms of their antagonism to the “public good,” to oppress a subordinated minority.⁸⁰ One can easily criticize this concern of tyranny of the majority *not* because it addresses the problem of tyranny but rather because it pays insufficient attention to the minority tyranny that can arise. In a system like our own, the existence of multiple veto points allows those who benefit from an unjust status quo to maintain their privilege.⁸¹ The most important example, historically, is surely that of slaveowners; one can scarcely be confident that President Lincoln and his party would have been successful in achieving their antislavery agenda had eleven states (and, therefore, twenty-two senators) not chosen to leave the Union and then to attack Fort Sumter, giving Lincoln far greater political authority than he might otherwise have had. I assume that readers can summon up contemporary examples of well-entrenched minorities whose prerogatives seem impervious to diminution. But the point is that any such discourse involves the notion of tyranny and the presumed presence of illegitimate domination of one group over another.

I am therefore in the position, embarrassing or not, of both rejecting Barber’s philosophy of moral realism *and* nonetheless wishing to retain a political language that allows us to denounce certain political acts as tyrannical and not simply, for example, a rejection of majority preferences. After all, it is all too likely that majorities will happily consent to the mistreatment of vulnerable minorities or, for a variety of reasons, will consent to their own mistreatment as well. In my own book *Framed*, I note the crucial moment in Western intellectual thought when Hobbes—the greatest of all English-language political philosophers—supplanted Aristotle’s distinction between *six* forms of government with a new taxonomy consisting of only three forms.⁸² Aristotle distinguished between kingship, aristocracy, and polity, on the one hand, and tyranny, oligarchy, and democracy, on the other. The distinctions involve not only the number of rulers—both kings and tyrants are sole rulers—but also, and at least equally as important, the commitments of the rulers. The denizens of the first group are all genuinely committed to achieving what they consider to be the public good. Those of

80. THE FEDERALIST, *supra* note 9, No. 10 (James Madison).

81. See LEVINSON, *supra* note 10, at 203–05.

82. LEVINSON, *supra* note 18, at 78–80.

the latter, on the other hand, are simply involved for their own selfish interests.⁸³ Madison's critique of factions is drawn from this older Aristotelian tradition.⁸⁴

What, though, does Hobbes say? He says that there really are only three forms of government: monarchy, aristocracy, and democracy. "*Other names of government are but these same forms disliked.* They that are discontented under monarchy call it tyranny; and they that are displeased with aristocracy call it oligarchy: they which find themselves grieved under a democracy call it anarchy."⁸⁵ These names simply stand for distinctly private preferences or, in the age of Facebook, "likes" or "dislikes." They do not rest on the basis of a well-founded political argument that allows us to say that X (say, George III) "really is" a tyrant rather than merely someone not sufficiently liked by American colonists. Professor Tribe, in his own critique of his then-colleague Ely, pointed to the impossibility of criticizing any given process of governance without smuggling in *substantive* theories of justice.⁸⁶

Still, it is not clear that rejection of the most radical version of proceduralism—the identification of the outcome of a procedure with a substantive value itself, such as justice—automatically leads to support of any given role for the judiciary. Consider the Court's statement about what counts as a taking for a public use. "Subject to specific constitutional limitations," the Court wrote in *Berman v. Parker*, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation"⁸⁷ This position requires no rejection per se of the notion that there is some kind of truth as to what constitutes the public interest. Instead, it is an argument about institutional design: given the inevitable debates about the meaning of the public interest, the task is to determine what institution we are willing to accept as offering provisional answers. We certainly need not believe that our favorite institution will generate no false positives (that is, identifying something that is really unjust as just), only that, overall, we think that we are likely to get fewer such false positives (or false negatives—identifying something as unjust that is really just) than would be the case if we relied on a different set of institutions. And we must recognize as well that scarcity both of time and resources requires us to accept as determinative what are inevitably imperfect systems. (This may suggest, of course, that one ought to be wary of adopting any policy that prevents correction of what is later discovered to be a mistake, such as capital punishment; but for better or worse, it is difficult

83. *Id.* at 79.

84. *See id.* at 80.

85. *Id.* at 79 (quoting THOMAS HOBBS, *LEVIATHAN* (1651)).

86. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980).

87. 348 U.S. 26, 32 (1954); *see also* *Kelo v. City of New London*, 545 U.S. 469 (2005) (reaffirming *Berman*).

to know what other kinds of public policies are truly comparable to inflicting death on possibly innocent persons.)

But even the acceptance of one or another process-based theory, if it is not to escape Barber's (or Tribe's) critique, must be accompanied by various attempts to try to test the actuality of the claims that are made in favor of one or another process. Even if, for example, we are inclined to take state autonomy more seriously than Barber does—perhaps because of the belief that it promotes the civic republican value of actual participation in making decisions that affect our lives—we may still ask whether, all things considered, it is better to leave the weighing of such values against other values that suggest national solutions to Congress, presidents, and administrative agencies, or whether we believe that courts can play a genuinely productive role in promoting local governance by limiting national power.

If we do believe that civic republican participation is valuable and that courts have a role to play in enforcing that value, we might note that the size of many contemporary American states is now so large—California is ten times the population of the entire United States in 1790, Texas is seven times⁸⁸—that decisionmaking from their respective state capitals is little more “republican” than that emanating from Washington, D.C. Should we desire a declaration by the Supreme Court that the Constitution requires forms of home rule that would, for example, protect Austin from the deprivations of the Texas State Legislature? What would such a declaration be based on? Whatever dignity the Supreme Court wishes to recognize in the Texas State Legislature often legitimizes trampling on the dignity of those who live in Austin. (Trust me: I do not need to provide a footnote for this!) There is, we should recognize, an element of brute positivism in stating that we must accept as a given the fifty states we have. We must also accept the fact that those states possess undoubted veto power over the creation of a truly more perfect Union, which in some cases might require melding together a number of existing states while at the same time dividing others, like California and Texas, into more efficaciously sized new states.

CONCLUSION

One need not like federalism to realize that it is an ineluctable part of our political and constitutional order. For better or worse, Barber is a brave voice in the wilderness not only in the degree to which he carries the banner for moral realism and antiskepticism but also in his unabashed contempt for the notion of states' rights. That may be a fallacy, but it is one that is unlikely to go away in at least my lifetime and, perhaps, the lifetime of even the youngest reader of this Review. But Barber provides a variety of valuable arguments that must be wrestled with by any would-be devotee of constitutionally protected state autonomy.

88. Compare *List of U.S. States and Territories by Population*, *supra* note 11 (listing 2012 U.S. Census Bureau population estimates for California and Texas), with *FIRST CENSUS*, *supra* note 13, at 8 (listing the total population of the United States as of 1790).