
RIGHT SIDE UP THE EX ANTE HEURISTIC: A REPLY TO MICHAEL GREVE

SOTIRIOS A. BARBER*

I am grateful for the effort Michael Greve put into his review of my book on American federalism.¹ I cannot return the favor, however, for I know little of the modern public choice theories that guide his analysis of constitutional issues. I enjoyed and profited from what I did understand of Greve's book, *The Upside Down Constitution*;² it confirms my view of the Constitution and the libertarian strain of the American Right. Greve's word craft is especially clever: he calls views like mine "Marxist-Brennanis[m]."³ We will be hearing that one again. A lasting contribution to the polexicon of the Federalist Society.

I was turned off at first, especially by Richard Epstein's appearance in the book's dust jacket. The last time I saw Epstein, he was insulting the intelligence of an American Constitution Society audience by claiming that Chief Justice Marshall's opinion in *Gibbons v. Ogden*⁴ was unambiguously states' rights all the way – this despite Epstein's published recognition to the contrary.⁵ I also felt Greve's book was an imposition on the reader's neck and shoulders. I appreciated the artistry in matching physical format to intellectual content, but – come on! – printing a book upside down went too far, or so I thought. It took me two or three pages to realize that it was the dust jacket that was printed upside down, not the book. Of course, I felt stupid. But Greve would not have expected more from someone who is dumb enough to think the New Deal was a good thing, that deregulation and greed were more responsible for the Great Recession than Barney Frank and Chris Dodd,⁶ and that the American Right engineered the deficit crisis to substitute for an unsuccessful moral argument against what it calls the "welfare state," as if there were some other kind of state.

* Professor of Political Science, University of Notre Dame.

¹ SOTIRIOS A. BARBER, *THE FALLACIES OF STATES' RIGHTS* (2013).

² MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012).

³ Michael S. Greve, *Fallacies of Fallacies*, 94 B.U. L. REV. 1359, 1359 (2014).

⁴ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

⁵ See RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* 25 (2006) ("On balance, Chief Justice Marshall took the position that the [Commerce] [C]lause gave substantial reach of federal power . . ."). For a nationalist reading of *Gibbons*, see GREVE, *supra* note 2, at 97-98.

⁶ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 31 U.S.C.).

Anyway, I turned the book right side up and things went better, or somewhat better, for a while. But not for long. I hit a wall at page eight. There, Greve tells the reader that the truth about federalism and its history “emerges if one recasts the ex ante heuristic into an analytic narrative that clarifies the institutional actors’ ‘in-period’ incentives.”⁷ Good thing I read *that* right side up; I would have had a stroke reading it upside down. Then admiration set in: It takes real self-assurance to put a sentence like that in an introductory chapter, where most writers try to make readers feel comfortable before hitting them with the heavy stuff. Manhood challenged, I said, “Hell, if Greve can recast the ex ante heuristic, I can too.” So I worked at the sentence and finally figured it out. What Greve is saying, I think, is that if we look at the Constitution in the manner that the Founding Fathers did before ratification, we can better understand both what they sought to accomplish and the Constitution’s subsequent fate. Pumped up by this interpretive achievement, I slogged ahead, and though there was much that I did not have time to work through – this is a book to be studied carefully, not just read – I found much with which I could agree.

First, I agree that we have to understand the Constitution from a framer’s perspective (that is *a* framer’s perspective, not necessarily *the* Framers’ perspective). Viewed from any other perspective, the Constitution makes no sense. Viewed from some other perspective, we would have to see the Constitution as we see the word of God – something to obey whether it makes sense or not. I do not see the Constitution as the word of God, and neither does Greve. From the Framers’ perspective, the Constitution was a mere proposal, to be voted up or down, as likely or not to facilitate progress toward public goods. Greve realizes that, as a means to an end, the Constitution will ultimately be judged by its results.⁸ This makes Greve an ends-oriented constitutionalist. Greve and I both follow James Madison in *Federalist 45*, where the Constitution’s leading end is described as “the real welfare of the great body of the people.”⁹ Greve holds the leading constitutional end to be maximizing choice, which both constitutes and serves the people’s welfare.¹⁰ Greve and I seem to agree that well-being consists largely in the capacity and the opportunity to live by “reflection and choice.”¹¹ My reasons have to do with history, but mostly with the fact that living by reflection and choice is a good that neither an individual nor a community can choose to reject. Though Greve occasionally pokes fun at the truth-seeking aspirations and processes

⁷ GREVE, *supra* note 2, at 8.

⁸ Greve, *supra* note 3, at 1375 (manuscript at 14) (“[Professor Barber] does not care about results, only about aspirations and the tone of our politics.”).

⁹ THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961).

¹⁰ GREVE, *supra* note 2, at 6-7, 31-32.

¹¹ *Id.* at 13, 181 (describing “the citizens’ ex ante perspective (‘reflection and choice’) as the constitutional baseline,” *id.* at 181).

integral to a politics of reflection and choice,¹² he thinks the commitment to such a politics is as important as I do. I see this in his argument for competitive federalism. Competitive federalism, he claims, is the true federalism precisely because it secures the broadest scope for citizen reflection and choice.¹³

I also agree with Greve's method of constitutional interpretation. He and I both perform a three or four step operation: figure out what the best interpretation of our institutions might be; see whether the founding debate affirms the premises of that best interpretation; and if the premises are there, draw the conclusion for the Framers, and attribute it to them, whether they saw the conclusion or not. Jim Fleming and I have defended a similar method, gratefully acknowledging our debt to Ronald Dworkin.¹⁴ For undisclosed reasons, Greve disclaims a Dworkinian approach, but there is little daylight between that for which Fleming and I have argued and what the reader finds in Greve's book.¹⁵

Greve and I agree that the Constitution is committed to a commercial order.¹⁶ I add only that this commitment is a contingent one. It is a this-worldly commitment, not a religious commitment. Commercialism is not something to which we piously submit as Abraham submitted to God regarding Isaac; or the way the old Marxists submitted to History, even as their skies collapsed; or the way zealous free marketeers submit to The Market, even after the Great Recession, which of course they blame on Marxist-Brennanists. The worldly science that discovered the advantages of a commercial order in the seventeenth century may yet reject commercialism as world conditions change. I doubt that Greve disagrees with any of this, for I do not see how he can. I even doubt that he wants to; witness his anger at being thought a corporate shill.¹⁷ I am confident that Greve will acknowledge, if only eventually, that commercialism is but a contingent commitment, whereas a politics of reflection and choice – a politics of secular public reason – is fundamental.

¹² Greve, *supra* note 3, at 1373-74.

¹³ GREVE, *supra* note 2 at 56, 60, 67.

¹⁴ SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION 35-55 (2007).

¹⁵ See GREVE, *supra* note 2, at 63 (“I aim to show that competition is neither a federalism ‘value’ or advantage that we have discovered ex post nor a Dworkinian abstraction that makes the Constitution appear in its ‘best light.’”); *cf. id.* at 14-15, 17, 56 (describing the Constitution as “deliberately minimalist” in order to “confidently leave[] its shapes and outcomes to future generations,” *id.* at 14).

¹⁶ *Id.* at 36 (“The United States Constitution is a thoroughly economic document, and its central guarantees of free internal trade, hard money, and the sanctity of contract benefit identifiable constituencies – merchants, investors, creditors, [and] manufacturers.”).

¹⁷ Greve, *supra* note 3, at 1370 n.70 (bristling at the accusation of being “part of the present campaign of corporate forces to deregulate the nation’s economic life”).

Finally, Greve and I *may* agree that states' rights federalism is indefensible. After all, he explicitly denies Tenth Amendment limitations on national power.¹⁸ The question is whether he really means it.

I should have thought that these points of agreement would have indicated theories of federalism whose differences are resolvable. But Greve's reaction to my position indicates otherwise, and so I will try to defend my position even as I am open to changing it.

Greve criticizes my equating dual federalism and states' rights federalism.¹⁹ I can see why a libertarian like Greve wants to distinguish dual federalism from states' rights federalism, but I cannot see why anyone else should want to do so. Greve recognizes that an older generation of scholars and jurists equated dual and states' rights federalism.²⁰ This one theory with two names held that the states' reserved powers limit national power.²¹ This theory also assumed that if Congress lacked a specific power, say, over education, this specific power was reserved to the states, and that the combined powers held by the national and state governments exhausted the field of social activity subject to governmental regulation.²² This traditional understanding is useless to a libertarian who would restrain *all* government, state as well as national. This uselessness of the traditional understanding, together with the unworkability of its famous distinctions (production and commerce, direct and indirect effects, and so forth)²³ and its central theoretical weakness (the act of justifying states' rights is self-defeating because it presupposes national standards and agencies that states' righters, by definition, deny)²⁴ all should move corporate libertarians to reject states' rights federalism, as Greve claims to do.²⁵ This is not to deny the proposition that the American system is a dual system. What

¹⁸ GREVE, *supra* note 2, at 70 (referring to "supposed Tenth Amendment guarantees").

¹⁹ Greve, *supra* note 3, at 1379 ("I have suggested that Professor Barber entirely misses the vibrant debate between dual and states' rights federalists.").

²⁰ GREVE, *supra* note 2, at 174-75. For "dual federalism" as the idea that the states' reserved powers constitute limits on Congress's delegated powers, see ALFRED KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 238-39, 398, 459-60, 493 (6th ed. 1983); C. HERMAN PRITCHETT, *THE AMERICAN CONSTITUTION* 72-73, 197, 239, 262 (2d ed. 1968); 1 LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 861-62 (3d ed. 2000). The only commercial casebook on American federalism also follows the traditional usage. See ANTHONY J. BELLIA, JR., *FEDERALISM* 183-85 (2011).

²¹ Cf. Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental "States' Rights,"* 46 WM. & MARY L. REV. 213, 243-44 (2004) (describing dual federalism as characterized by states and the central government occupying "exclusive spheres of power").

²² Cf. Edward C. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

²³ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

²⁴ See MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 25-26 (2011).

²⁵ See GREVE, *supra* note 2, at 70.

corporate libertarians find useless is a *juridical principle* regarding policy clashes between state and national governments. This principle holds that unspecified or reserved states' rights limit national power. Corporate libertarians reject this principle because weakening one regulator and strengthening fifty would be an insane mistake for supporters of a national market.

Why corporate libertarians should want to be known as "federalists" of any sort is another matter. Why not come out of the closet and stand tall for what they are – national (better, global) free marketeers? The answer lies in the doctrines and agencies they need to restrain both national and state power. They can restrain the states through judicially enforceable doctrines of national supremacy, national preemption, and individual and corporate rights.²⁶ But they want also to restrain the nation, and they can't do that without states' rights – that is, reserved states' rights against what would otherwise be unquestioned national power. Proof of this conclusion in the abstract is a simple matter of practical reason, famously recognized by Alexander Hamilton in *Federalist 23*: there is no telling what an actor may have to do in changing circumstances to achieve ends like national security and prosperity.²⁷ Grant power to achieve any such end and attach supremacy to its good faith exercise, and conflicting state policies must fall. Sooner or later the quality of life in the several states would depend on the will of national majorities. Judicially enforced states' rights against the nation would be the only way to avoid this result. Evidence for this conclusion lies in Greve's own inability to avoid appeal to states' rights. Though he emphasizes that he does not recognize Tenth Amendment limits on national power, he also recognizes an "axiom" that national power over commercial activity must be limited somewhere even if no one can say where.²⁸ I show in *Fallacies* that there are two ways to be a states' righter. One way exempts specified states' rights from admitted national power; the other narrows the breadth of national power to avoid clashes with states' rights.²⁹ Greve disclaims the first while adopting the second way.³⁰ Yet these two ways are practically equivalent. For judges who say they're concerned with principle, not policy, narrowing national power or carving exemptions from it flow from the same concern: states' rights. Thus, Greve's

²⁶ *Id.* at 92-95 (describing the Dormant Commerce Clause as a "*federalism doctrine*").

²⁷ THE FEDERALIST NO. 23, *supra* note 9, at 153 (Alexander Hamilton) ("[I]t is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.").

²⁸ GREVE, *supra* note 2, at 70; Greve, *supra* note 3, at 1371 n.75 ("I share Professor Barber's position to the extent that there can be no Tenth Amendment enclaves from enumerated powers."); *id.* at 1371 ("The principle of limited, enumerated powers is a constitutional axiom . . .").

²⁹ BARBER, *supra* note 1, at 33-36.

³⁰ Greve, *supra* note 3, at 1372 ("The general government's powers are *federal* in their extent, and *national* in their operation. 'Federal' means enumerated and limited." (citation omitted)).

“rule of decision” for locating the limit of national power vis-à-vis the states is requiring the Solicitor General to “articulate a principled line that would save the statute and yet leave something on the other side” as the Supreme Court did in “*Lopez, Morrison*, and the ‘broccoli horrible’ of *NFIB* notoriety.”³¹

Greve’s retreat to states’ rights is thus clear as a bell. For reasons I’ll take up momentarily under what I call “Greve’s Law,” he can’t maintain his competitive system without relying on courts, and courts can’t get started unless someone claims a right. Until Greve can separate his dual federalism from states’ rights federalism, he shouldn’t insist that others do so. Others should stick to the old equation of dual and states’ rights federalism in the meantime, for they in fact are the same. I wonder in any event why all the fuss. If, as Greve insists, dual federalism is best called competitive federalism,³² and if I discuss competitive federalism,³³ why not comment on what I say about competitive federalism? Why raise questions of typology? Does my typology exclude a substantive question that should be discussed? Does it cause me to miss an insight that warrants our attention? If so, what might it be? The root issue between Greve and me is not typological, it’s political, even moral. I’d phrase the issue in terms of whether the nation will keep the promise it made to itself in the Civil War Amendments – whether the nation is committed solely to what Greve calls its “productive citizens”³⁴ or also to those of its citizens who want to be productive and who would be productive if they had what Lincoln called “a fair chance[] in the race of life.”³⁵

Greve charges that my typology is calculated to enlist or rather impress Chief Justice John Marshall to the cause of Marxist-Brennanism. Yet the issue regarding Marshall is interpretive, not typological. Whether Marshall was a states’ righter or a nationalist has been a question for almost two centuries.³⁶ Now comes Greve and the new dual federalists to claim that Marshall is both a states’ righter *and* a nationalist, together – just as Greve is both a nationalist and a states’ righter. I treat Marshall’s stance as a matter of interpretation – that is, as a matter of reconciling the tensions in his thought on behalf of his dominant thrust, which is clearly nationalist. Greve wants to deny tensions in Marshall’s thought, but he can’t quite do so. He recognizes the nationalism of

³¹ Greve, *supra* note 3, at 1370-71 (footnotes omitted) (referring to *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012); *United States v. Morrison*, 529 U.S. 598 (2000); and *United States v. Lopez*, 514 U.S. 549 (1995)); *see also* GREVE, *supra* note 2, at 342-47.

³² Greve, *supra* note 3, at 1368 (“Many ‘dual’ federalists now call themselves ‘competitive’ federalists . . .”).

³³ *See* GREVE, *supra* note 2, at 101-06.

³⁴ *Id.* at 6.

³⁵ Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *reprinted in* THE WRITINGS OF ABRAHAM LINCOLN 334, 345 (Stephen B. Smith ed., 2012).

³⁶ *Cf.* Paul D. Moreno, “*So Long As Our System Shall Exist*”: *Myth, History, and the New Federalism*, 14 WM. & MARY BILL RTS. J. 711, 723-24 (2005) (describing Marshall’s early nationalism and later “greater recognition to state power”).

Marshall's opinion in *McCulloch v. Maryland*,³⁷ but he also emphasizes the states' rights reading of *Gibbons v. Ogden*³⁸ while not denying the nationalist reading of *Gibbons*.³⁹ Marshall's position was mixed, and Greve's mixed interpretation of Marshall may be more faithful to the man than my nationalist interpretation. No one can be certain about this because a desire to shield slavery from Congress probably explains Marshall's hedge on the scope of national power, and one can only speculate what Marshall would say today. But then I'm not talking about Marshall the man. I'm talking about Marshall the jurist. Marshall's authority as a maker of precedent depends in large part on the coherence of his position. I'll accept Greve's interpretation of Marshall in the present context (constitutional theory, not judicial biography) as soon as Greve shows how anyone can guide his or her conduct by a rule that contradicts itself – as soon as Greve shows how one can follow a John Marshall who acknowledges plenary power while declaring limitations on that power.

Now we turn to what Greve would declare the national vegetable: broccoli. I've argued that where national power exists, it's plenary: no Tenth Amendment exemptions.⁴⁰ I reach this conclusion mainly by arguing that it's the only one that makes sense. I argue further – that is to say, I give reasons for concluding – that national power must be nothing short of national defense and national prosperity.⁴¹ Well, says, Michael Greve, these arguments fall to an eight-letter word: *broccoli*.⁴² And, oh yes, they also fall to the fact that no member of the Supreme Court agrees with the position I support.⁴³ Surely, my response to this last point should go without saying. We shouldn't reject Greve's support for *Hammer v. Dagenhart*⁴⁴ just because a professional consensus opposes it.⁴⁵ We should accept or reject Greve's position after examining his premises and the way he connects them, for no one will deny that in academe it should take an argument to beat an argument. Let's start, then, with my argument, the one that Greve says chokes on broccoli.

³⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

³⁸ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

³⁹ Greve, *supra* note 3, at 1360-67.

⁴⁰ BARBER, *supra* note 1, at 63.

⁴¹ *Id.*

⁴² See Greve, *supra* note 3, at 1371 (decrying the “broccoli horrible”).

⁴³ *Id.* at 1362 (“A majority of justices in *National Federation of Independent Business v. Sebelius*, however, explicitly rejected any general, unlimited federal power to solve national problems. More to the point, the Government denied that it was asserting any such power, and the dissenters in the case protested likewise.” (footnote omitted)).

⁴⁴ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁴⁵ GREVE, *supra* note 2, at 175-76. Greve also argues that employment trends nationwide made the Child Labor Act of 1916 unnecessary. *Id.* at 186-88.

In *Federalist 23*, Hamilton appeals to common sense and argues for an unlimited power of national defense.⁴⁶ The least that this can mean is power unlimited by states' rights. Marshall follows suit in *McCulloch*, endorsing plenary national power over "all the [nation's] external relations."⁴⁷ Greve has reservations about Marshall's dictum, the specifics of which he saves for another occasion.⁴⁸ For this occasion he argues that plenary power to pursue national security doesn't mean plenary power to pursue national prosperity. He says that because we might have to do "awful things in self-defense is no reason to read the entire Constitution as a warrant for a peacetime garrison state,"⁴⁹ presumably like a state that would fine you for skipping the broccoli or, worse, the health insurance. From what Greve says, and if you haven't read my book, you might think that I argue that *because* the states have no reserved rights against the pursuit of national security, they have no rights against the pursuit of national prosperity. Greve also says that I derive these grand ends from the Preamble while ignoring Article I, Section 8, whose enumeration of powers he takes to imply limits on the powers enumerated.⁵⁰

Greve reads much too fast. I do not ignore the enumeration of specifics in Section 8. Nor do I say that plenary power over defense implies or in any way justifies plenary power over the economy. My method is as follows: I look at the several specific defense powers, and I propose that granting these several specific powers to the government makes sense only in light of the Preamble's reference to national defense.⁵¹ Then I turn away from the foreign affairs powers – put them altogether out of mind – and look at the several specific economic powers.⁵² I then propose that granting these several specific powers makes sense only in light of the Preamble's reference to the general welfare.⁵³ Then I look at all of Section 8 and see no power to promote the nation's moral health (a crucial mistake of the Founding, in my view).⁵⁴ And from this mix of omission and commission I conclude that by the general welfare the Constitution means national prosperity.⁵⁵ Marshall performs similar inductions in *McCulloch*, albeit with hedges to protect slavery and allay the states' rights reaction to *McCulloch*, which came anyway. Greve may have done the same

⁴⁶ THE FEDERALIST NO. 23, *supra* note 9, at 153 (Alexander Hamilton) ("The authorities essential to the common defense . . . ought to exist without limitation.").

⁴⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

⁴⁸ Greve, *supra* note 3, at 1365 ("I also doubt that Marshall held the broad view of external affairs, effectively severed from textual grants of powers, which Professor Barber attributes to him.").

⁴⁹ *Id.* at 1365.

⁵⁰ *Id.* at 1361.

⁵¹ BARBER, *supra* note 1, at 55-56.

⁵² *Id.* at 58-59.

⁵³ *Id.* at 60.

⁵⁴ *Id.* at 65.

⁵⁵ *Id.* at 64-65.

when he concluded that the Constitution is committed to a commercial order,⁵⁶ for though the document doesn't say so explicitly, that conclusion does make sense of what the Constitution explicitly does say, together with what it omits. In any event, a reasonably careful reader of *Fallacies* will find the induction I've described, not the deduction from the Preamble or the analogy with foreign affairs that Greve alleges. Did I say that it should take an argument to beat an argument in this place? I say it again, adding this time that the argument should be an honest one.

Back to the broccoli. Actually not just broccoli, but broccoli with puree of herring – red herring. First the broccoli. In *National Federation of Independent Business v. Sebelius*,⁵⁷ the Roberts Court did not say government cannot force people to purchase broccoli; it said the national government can't act under the Commerce Clause to make state residents buy broccoli.⁵⁸ Nothing the Court said would prevent the national government from forcing Washington, D.C. residents and armed forces personnel to buy or be served broccoli. Nothing the Court said would prevent the states from forcing their people to buy broccoli. Now the herring. The broccoli horrible is a diversion. To impose a limit on national power, right wingers shanghai the public's yearning for personal autonomy and privacy, all on behalf of forces, the states and the corporations, that don't have especially good records on autonomy and privacy. And in the process, right wingers go bananas by implying that the states can force you to buy broccoli for any number of reasons, but the national government couldn't force you to buy broccoli if everyone's life depended on it. Broccoli, herring, and bananas! Hold the Emetrol; no need for it. Shall I say again, about the need for an argument?

But I'm being unfair to Michael Greve. He does offer a reason against a broad national responsibility for the nation's economic health. His reason is a kind of Boyle's Law⁵⁹ of constitutional power, only this time instead of the container controlling the volume of the gas, the gas controls the volume of the container. I'll call this Greve's Law. It holds that public demands will expand progressively beyond the formal limits of government's capacity, generating progressive increases in the formal limits, to a point beyond the real limits, and thus eventually to government's collapse. Broad power in the national government means more demand that the power be exercised, and "[m]ore often than not, the demands exceed government's capacity," bringing the steady decline in public confidence in government that Americans have

⁵⁶ GREVE, *supra* note 2, at 31.

⁵⁷ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

⁵⁸ *See id.* at 2589 ("The Framers gave Congress the power to regulate commerce, not to compel it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now.").

⁵⁹ OXFORD AMERICAN DICTIONARY AND THESAURUS 145 (2d ed. 2009) ("[A] law stating that the pressure of a given mass of an ideal gas is inversely proportional to its volume at a constant temperature.").

registered over the last thirty years.⁶⁰ This may be a good argument. Indeed, I fear that it is. I fear it because of what it implies about the Constitution as a whole and democracy itself, at least modern democracy – democracy committed to economic and technological growth.

If Greve's Law is valid, there's no way for a democracy to avoid doom without restraining popular demand, which may explain and justify Greve's belief that religion has a place in American politics.⁶¹ But Greve should tread carefully here. Religion in politics would pose problems for personal liberties and for the level and range of consumption on which a commercial order depends. It would also pose problems for Greve's division of the population into the productive and the unproductive and the right of the productive to leave the unproductive behind either to their misery or to their sins, depending on one's view of the unproductive.⁶² If Greve's Law holds, liberal democracy can't survive. Greve's Law thus indicates that the Constitution, even as Greve understands it, may have been a mistake. The time has come for constitutional theory to reopen this question as a precondition both for reaffirming the Constitution and, if reaffirmation fails, for seeking a path to constitutional change. Whether Greve will agree depends on how serious he is about an *ex ante* heuristic.

In this connection Greve is right about a "blessing" of states' rights federalism.⁶³ Its refusal to cooperate with Obamacare has reopened a much-needed debate about the role and capacity of government. I've argued that states' rights federalism is an inherently anticonstitutional force.⁶⁴ By anticonstitutional I mean ultimately antiliberal – opposed to the idea that the best regime is committed to security, commodious living, experiential knowledge, and equal opportunity.⁶⁵ But I've not argued that liberalism is a viable regime long-term. Viability depends on circumstances, and one can easily doubt that circumstance will favor liberalism much longer than they have for the last two centuries, a small fraction of recorded history. The recrudescence of dual federalism has reminded us of liberalism's limitations, and these reminders are essential to any hope for the survival of government by reflection and choice. I add, however, that the debate that dual federalists have

⁶⁰ Greve, *supra* note 3, at 1379; *Public Trust in Government: 1958-2013*, PEW RESEARCH, <http://www.people-press.org/2013/10/18/trust-in-government-interactive> (last visited Feb. 16, 2014), archived at <http://perma.cc/M3V4-795K> (indicating that public trust in the federal government has declined from around forty percent in the mid-1980s to nineteen percent in October 2013).

⁶¹ Greve, *supra* note 3, at 1374 ("Professor Barber is equally wrong in insisting that our debate must be secular.").

⁶² For a use of the term "productive citizens," see GREVE, *supra* note 2, at 6, 93, 170, 186.

⁶³ See Greve, *supra* note 3, at 1379 ("Behold the blessings of dual, competitive federalism.").

⁶⁴ BARBER, *supra* note 1, at 11-13.

⁶⁵ *Id.* at 204-06.

prompted is not one in which reflective dual federalists can participate, for they deny the presuppositions of any such debate, as *Fallacies*, to Greve's annoyance, points out again and again.

One path to constitutional change – woefully unrealistic yet not mathematically impossible – would be to revive the idea behind the national university that Washington, Madison, Jefferson, and others proposed in the Founding period: namely, that the country needs to cultivate a leadership community.⁶⁶ Madison envisioned the members of this community spread across the nation, not concentrated in the nation's capital. They would be our friends and coworkers, not just our elected officials. A consensus of this community on issues like the federal deficit might command more of the public's trust than the opinion of, say, the Chamber of Commerce or the AFL-CIO. And, if the deficit were not a product of partisan engineering, it might easily garner this consensus.

I suggest something like this in *Fallacies*,⁶⁷ only to have Greve scorn me as an elitist who ignores the way Washington elites have betrayed ordinary Americans by pumping up the money supply, bailing out the plutocrats, and reforming health insurance.⁶⁸ Greve's populist outburst is most confusing. How can suspicion of elites be consistent with Greve's Law and reliance on unelected judges? According to Greve's Law, the process of government decline begins in popular demand, not elitist imposition.⁶⁹ This law explains Greve's reliance on unelected federal judges to counter the popular demands that both state and national policy makers have found so irresistible. Greve's populist outburst also amuses me. Michael Greve hardly writes for ordinary Americans. They can understand the language of Madison, Lincoln, and Roosevelt. They wouldn't know what to do with Greve's ex ante heuristic. The working people who raised me would have walked away from it.

⁶⁶ See James Madison, Seventh Annual Message (Dec. 5, 1815), *reprinted in* 2 JOINT COMM. ON PRINTING, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 547, 553 (James D. Richardson ed., New York, Bureau of Nat'l Literature, Inc. 1897) (calling for the establishment of a national university in Washington, D.C., "as a central resort of youth and genius from every part of their country, diffusing on their return examples of those national feelings, those liberal sentiments, and those congenial manners which contribute cement to our Union and strength to the political fabric of which that is the foundation"). For the history and an analysis of Madison's proposal, see GEORGE THOMAS, CONSTITUTING THE AMERICAN MIND: THE FOUNDERS AND THE IDEA OF A NATIONAL UNIVERSITY (forthcoming 2014).

⁶⁷ BARBER, *supra* note 1, at 207.

⁶⁸ Greve, *supra* note 3, at 1380 ("All this is pure Barberism: ends-oriented; ordained in defiance of constitutional forms, promoted in a 'we-know-what's-good-for-you' spirit, and calculated to do what we 'reasonably can' to promote prosperity.").

⁶⁹ *Id.* (arguing that the American people did not create the real estate bubble, bailout the banks, or demand the Affordable Care Act).