
FALLACIES OF *FALLACIES*

MICHAEL S. GREVE*

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INTRODUCTION

One need not read *The Fallacies of States' Rights* and *The Upside-Down Constitution*¹ in their entirety or with any great attention to perceive the gulf that separates the authors' views on constitutional theory and federalism. Professor Sotirios Barber thinks in terms of constitutional aspirations, derived from the Constitution's capacious Preamble.² I am more concerned with who can do what to whom under the Constitution's operative provisions, and skeptical of Marxist-Brennanist theorizing that mows down the legal text and structure.³ Professor Barber champions a "positive constitutionalism," which

* Professor of Law, George Mason University School of Law. A version of this Article was originally presented at a Boston University School of Law Symposium, *America's Political Dysfunction: Constitutional Connections, Causes, and Cures*, 94 B.U. L. REV. 575 (2014), on a panel that invited Professor Sotirios Barber and me to critique each other's recent books on federalism (cited below). I am grateful to James Fleming for inviting me to the event, to Sotirios Barber for his good cheer and constructive engagement, and to the other panelists for their comments. Larry Yackle's perceptive critique of my work, Larry Yackle, *Competitive Federalism: Five Clarifying Questions*, 94 B.U. L. REV. 1403 (2014), merits careful consideration, and a reply elsewhere. Thanks to Eric Claeys, Robert Faulkner, Robert R. Gasaway, and Jeremy Rabkin for helpful comments on earlier drafts and to Cynthia Hernandez for capable research assistance. All errors of facts, law, or judgment are mine and subject to de novo review.

¹ SOTIRIOS A. BARBER, *THE FALLACIES OF STATES' RIGHTS* (2013); MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012).

² See discussion *infra* notes 18-21 and accompanying text.

³ Cf. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting) ("'The Act must do everything necessary to achieve its broad purpose' is the slogan of the enthusiast, not the analytical tool of the arbiter."). The same holds, I believe, with respect to interpreting a limited Constitution. The "Marxist-

holds that “constitution makers establish governments chiefly to do good things for people”⁴ – in contradistinction to a “negative constitutionalism” of rights and institutions, which seeks to restrain government and which is the province of nihilists, nitwits, and intellectual thugs.⁵ I believe that empowering and limiting purposes and mechanisms go hand-in-hand in a limited Constitution; that Madison et al. sort of got that; and that a constitutional theory that starts with an exuberant commitment “to do good things for people” – qualified by a grudging concession to some negative “functions”⁶ – is better suited to an autocracy than to America. Professor Barber envisions a Constitution of “leaders” and a “benighted mass” of “followers”;⁷ I suspect that Americans are more comfortable in thinking of themselves as citizens and of politicians as their agents, and that the Constitution enshrines that model. Professor Barber hankers for (though he despairs of) a politics of “secular public reasonableness”;⁸ to my mind, what he advocates is the dictatorship of relativism.⁹ I am concerned about a politics that, in “do[ing] good things for people,” has left the nation’s finances in ruins and future generations deep in debt. *The Upside-Down Constitution* engages the federalism aspects of that problem;¹⁰ *Fallacies* ignores it.

Short of someone rising from the dead, there is no bridging this chasm. The more limited subject of this Essay is the constitutional structure of American federalism and, more briefly, its present state and utility. While that is also the ostensible ground of *Fallacies*, the book operates at too high a level of

Brennanist” moniker is too clever to be mine. I owe it to Robert R. Gasaway & Ashley C. Parrish, *Structural Constitutional Principles and Rights Reconciliation*, in *CITIZENSHIP IN AMERICA AND EUROPE* 206, 211 (Michael S. Greve & Michael Zöller eds., 2009).

⁴ BARBER, *supra* note 1, at 32.

⁵ *Id.* at 179 (“[R]eferences to ‘negative constitution’ or ‘constitution of negative liberties’ flow either from moral skepticism, a failure of thought, or ulterior motives.”).

⁶ *Id.* at 54 (“The U.S. Constitution combines positive and negative functions, but Marshall joined *The Federalist* in viewing the Constitution as fundamentally a positive instrument of collective aspirations.”).

⁷ *Id.* at 32 (“[A] constitutional consciousness that emphasizes rights can be functional to the pursuit of constitutional ends, but only if those asserting constitutional rights accept the leadership of those devoted to pursuing constitutional ends.”); *id.* at 201 (propounding a “solution that involve[s] a public-spirited and enlightened elite and a self-interested, benighted mass”); *id.* at 207.

⁸ *Id.* at 86-88 (defining “secular public reasonableness” as “a disposition to exchange reasons in justification of questionable beliefs and policies”); *id.* at 172-209 (concluding that secular public reasonableness is the Constitution’s ultimate end).

⁹ Cardinal Joseph Ratzinger, *Mass Pro Eligendo Romano Pontifice* (Apr. 18, 2005), archived at <http://perma.cc/EV3Z-X9DD> (“We are building a dictatorship of relativism that does not recognize anything as definitive and whose ultimate goal consists solely of one’s own ego and desires.”).

¹⁰ GREVE, *supra* note 1, at 381-84 (arguing that fiscal stress may compel a renegotiation of federalism).

abstraction to have much useful to say on those subjects. What little it does have to say is mostly wrong.

I. OF MARSHALL AND *M'CUCCLOCH*

Professor Barber distinguishes three forms of federalism. He makes a first-order distinction between “states’ rights or dual federalism,” which insists on separate, judicially cognizable federal and state “spheres”; and “nationalist” federalism, which rejects the two-spheres model.¹¹ He then makes a second-order distinction between two forms of nationalist federalism: “Marshallian federalism,” which Professor Barber invents and propounds; and “process federalism,” which he rejects.¹² The two hang together in their rejection of any enforceable states’ right to protect enclaves of power.¹³ They differ in that Marshallian federalism propounds substantive national ends, whereas process federalism seeks to deny them.¹⁴ The foundational decision for Professor Barber’s Marshallian federalism is *M’Culloch v. Maryland*¹⁵ – or rather, a highly idiosyncratic version of that celebrated opinion.

In Professor Barber’s view, *M’Culloch* stands for a “positive,” “ends-oriented,” instrumentalist constitutionalism, as distinct from a “negative” “constitutionalism of institutions and rights.”¹⁶ “Let the end be legitimate,” Chief Justice Marshall famously wrote, “let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”¹⁷ The ends, Professor Barber says, we get from the Constitution’s Preamble, at least as a first approximation.¹⁸ They are limited in number but very broad: the general welfare, justice, and the common

¹¹ BARBER, *supra* note 1, at 30-31.

¹² *Id.* at 30-32 (“Marshallian federalism deserves to win the intellectual debate with [process] federalism . . . , [but process] federalism may be the best that the nation can hope for.”).

¹³ *Id.* An important qualification is that Marshallian federalism – but not process federalism – recognizes a right against pretext. *Id.* at 163-64. See discussion *infra* notes 29-34 and accompanying text.

¹⁴ BARBER, *supra* note 1, at 47-49.

¹⁵ *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

¹⁶ BARBER, *supra* note 1, at 51-52, 175-76 (“Marshallian federalism represents positive constitutionalism.” *Id.* at 175.).

¹⁷ *M’Culloch*, 17 U.S. (4 Wheat.) at 421.

¹⁸ BARBER, *supra* note 1, at 3 (“[T]he preamble lists substantive goods – good things, like ‘the common defence,’ ‘the general Welfare,’ and ‘the Blessings of Liberty.’”). Elsewhere, Professor Barber seems to treat the text of the Preamble as merely illustrative of more loosely defined ends – “pursuing good things,” *id.* at 4, or “promoting national prosperity,” *id.* at 6, 118. Eventually, even those ends prove contingent and collapse into an overarching commitment to “secular public reasonableness.” *Id.* at 86-88.

defense.¹⁹ The powers, in turn, are “great” and “vast.”²⁰ Thus, *M’Culloch* embraces a national power over “all the external relations” of the union.²¹ The powers follow the end (common defense), and states’ rights cannot stand in the way. For example, Professor Barber says, if the national defense requires better science and math education (recall the Sputnik threat), Congress may make provisions to that effect, regardless of the states’ traditional powers over the field of education.²² And what’s fair and constitutional abroad, Professor Barber continues, is fair and constitutional at home. On his reading, “the general Welfare” of the Preamble – and presumably not of Article I, where the term appears as a limitation on the power to tax – empowers Congress to do “all that it reasonably can to promote the nation’s prosperity.”²³

The conventional term for that power is the “general police power”; and if there is any fixed star in our constitutional universe, it is that Congress has no such power.²⁴ A general power of Congress to do “all that it reasonably can” to advance the nation’s prosperity would comfortably accommodate a health insurance mandate, and very probably a broccoli mandate.²⁵ A majority of Justices in *National Federation of Independent Business v. Sebelius*, however, explicitly rejected any general, unlimited federal power to solve national problems.²⁶ More to the point, the Government denied that it was asserting any such power, and the dissenters in the case protested likewise.²⁷ Now, as in

¹⁹ *Id.* at 3.

²⁰ *M’Culloch*, 17 U.S. (4 Wheat.) at 407-08.

²¹ *Id.* at 407.

²² BARBER, *supra* note 1, at 56 (“[P]lenary and supreme power to defend the nation could eventually shape the nation’s religious and moral beliefs to fit the perceived needs of a national security establishment.”).

²³ *Id.* at 118.

²⁴ See *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2578 (2012) (“Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the ‘police power.’”).

²⁵ I recognize the impolitic nature of this observation. Nevertheless, in over two years of litigation, neither the constitutional experts at Yale Law School nor the U.S. government could think of a Commerce Clause line that would render a health insurance mandate “in” and a broccoli mandate “out.” JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (2013).

²⁶ *NFIB*, 132 S. Ct. at 2589 (“While Congress’s authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have ‘always recognized that the power to regulate commerce, though broad indeed, has limits.’” (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968))); *id.* (“Although the [Necessary and Proper] Clause gives Congress authority to ‘legislate on that vast mass of incidental powers which must be involved in the constitution,’ it does not license the exercise of any ‘great substantive and independent power[s]’ beyond those specifically enumerated” (second alteration in original) (quoting *M’Culloch*, 17 U.S. (4 Wheat.) at 411, 421)).

²⁷ See *id.* at 2623 (Ginsburg, J., dissenting) (“Underlying the Chief Justice’s view that the Commerce Clause must be confined to the regulation of active participants in a commercial

1819, then, “[t]his government is acknowledged by all to be one of enumerated powers.”²⁸

Professor Barber, too, respects the axiom – in a fashion. Marshallian federalism, he protests, does not mean “that whatever any congressional majority might call a national problem is, in fact, a national problem.”²⁹ *M’Culloch* stands for a “national federalism,” but it is still a *federalism* opinion. Crucially, it contains a no-pretext rule:

[S]hould 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.³⁰

The no-pretext rule, Professor Barber says, is the states’ judicially enforceable right against Congress.³¹ It differs from a dual or states’ rights federalism that seeks to divine separate, inviolate “spheres” of federal and state action because it looks to ends (in and beyond the Constitution’s Preamble), not to the forms and powers in the Constitution’s operative text, as the touchstone of congressional authority.³² In Professor Barber’s rendition, the no-pretext rule serves to screen out federal enactments at variance with the Preamble’s overriding commitment to “secular public reasonableness.”³³

market is a fear that the commerce power would otherwise know no limits. . . . This concern is unfounded.” (emphasis omitted)); Reply Brief for Petitioners (Minimum Coverage Provision) at 6, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 748426 (“The minimum coverage provision is, of course, consistent with the commerce power limits this Court articulated in *Lopez* and *United States v. Morrison*.” (citation omitted)); *id.* at 14-15 (“Respondents wrongly assert that upholding the minimum coverage provision as necessary and proper for the Act’s insurance reforms would confer a limitless power on Congress.”).

²⁸ *M’Culloch*, 17 U.S. (4 Wheat.) at 405.

²⁹ BARBER, *supra* note 1, at 192.

³⁰ *M’Culloch*, 17 U.S. (4 Wheat.) at 423.

³¹ BARBER, *supra* note 1, at 53 (“Marshall thus implies that the states have at least one judicially enforceable right against Congress, namely, a right against pretexts.”). I am not sure I would call the no-pretext rule a *states’* right. The rule is equally enforceable by individuals, even when most states maintain that Congress had a permissible reason for its enactment. See *United States v. Morrison*, 529 U.S. 598, 653-54 (2000) (Souter, J., dissenting) (observing that thirty-six states defended the Violence Against Women Act in an amicus brief). It is more accurate to say that the antipretext rule is a federalism principle that is judicially enforceable in cases or controversies arising under the Constitution.

³² BARBER, *supra* note 1, at 91 (“[A] no-pretext rule will not satisfy a dual federalist conception of ‘limited national power.’ A no-pretext rule is merely the negative side of a focus on positive constitutional ends, and a positive focus defeats any notion of substantive states’ rights.”).

³³ See *id.* at 205.

Coincidentally, that commitment translates into the platform of the left wing of the Democratic Party.³⁴

Professor Barber wisely refrains from freighting John Marshall with that particular program.³⁵ Throughout, however, he invokes Marshall as a principal source of constitutional reasoning that produces “energy in Government”³⁶ to do “good things,” subject only to antipretext inquiries and a handful of rights that meet with the approval of the *New York Review of Books* and its audience. As Professor Barber himself recognizes, the enterprise is suspect.³⁷

Certainly, the Chief Justice looked to constitutional ends. But he *never* viewed the Preamble as a source of powers – not in *M’Culloch*, and not in any of his other 500-plus opinions.³⁸ What he looked to instead was the operative

³⁴ The no-pretext rule, Professor Barber writes, should weed out enactments that threaten the fundamental commitment to “secular public reasonableness” and reflect tendencies:

[L]ike the rise of the Religious Right, faith in “market forces” that is blind to the lessons of experience, unreflective moral skepticism in the social sciences and law, populist depreciation of science and scientific “elites,” racism masked as color-blindness, homophobia masked as tradition, and dogmatism of all varieties – moralistic and scientific.

Id. at 192.

³⁵ *Id.* at 65 (“Marshall’s [theory] saw the Constitution’s substantive ends as the ends of Lockean liberalism . . . [including] secular public reasonableness . . .”).

³⁶ *Id.* at 177 (commenting on “the great emphasis in *The Federalist* on ‘energy in Government’”). Unable to find that expression anywhere in the *Federalist Papers*, I suspect the reference is to Hamilton’s oft-quoted sentence: “Energy in the executive is a leading character in the definition of good government.” THE FEDERALIST NO. 70, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (emphasis added). To Hamilton, that “leading character” went well with a legislature constructed for deliberation rather than energy and a judiciary that possesses only judgment, not force or will. *Id.* at 422 (“[A] numerous legislature . . . [is] best adapted to deliberation and wisdom . . .”); THE FEDERALIST NO. 78, *supra*, at 464 (Alexander Hamilton) (“[The judiciary] may truly be said to have neither FORCE nor WILL but merely judgment . . .”). In Professor Barber’s mind, those nuances partake of a thoroughly misguided “constitutionalism of rights and institutions.” BARBER, *supra* note 1, at 21. Professor Barber is the Friedrich Wilhelm Joseph Schelling of American constitutional law, seeking to palm off his constitutional universe as the night in which all institutional cows are black. Cf. G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT § 16 (A.V. Miller trans., Oxford Univ. Press 1977) (1807).

³⁷ BARBER, *supra* note 1, at 6-7.

³⁸ Only two Marshall opinions mention the Preamble: *M’Culloch* and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 335 (1821). Both opinions use the Preamble to expound the nature of the instrument, not as a source of powers. That latter notion was anathema to Marshall, as it was to Joseph Story. See 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462, at 351 (Melville M. Bigelow ed., Boston, Little, Brown & Co. 5th ed. 1891) (“The preamble never can be resorted to to enlarge the powers confided to the general government . . . Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them.”). An extraordinary case decided long after Marshall’s death does appear to treat the Preamble as a source of power and of legally binding limitations on the states: *Texas v. White*, 74 U.S. (7

text – that is, the powers of Congress. Broad though they are, they must have limits. In *Gibbons v. Ogden*,³⁹ for example, the Chief Justice drew a line between commerce among states – “that commerce which concerns more States than one” – and the “internal” commerce within states.⁴⁰ There must be some such distinction because “[t]he enumeration [of powers] presupposes something not enumerated.”⁴¹ Acknowledging the point, Professor Barber writes that between *M’Culloch* and *Gibbons*, “Marshall speaks on both sides of the states’ rights debate.”⁴² Professor Barber then labors to minimize the “contradictions”⁴³ between *M’Culloch* and *Gibbons*. Having drawn on *M’Culloch*’s expansive “external relations” *dicta* as the embodiment of an ends-oriented federalism, he laments that “Marshall declined to go as far with power over domestic matters [involved in *Gibbons*] as he did with power over foreign and military affairs.”⁴⁴ Moreover, Professor Barber suggests, the categorical *Gibbons* distinctions do not protect much at all. Intrastate activity “concerns” other states when Congress or some other federal actor becomes concerned, in which event Congress may regulate.⁴⁵

I disagree. I doubt that John Marshall used “concern” in its modern, extended sense, as a purported license to meddle (as in “concerned citizen” or “equal concern and respect”). 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. Besides, there are potent reasons to resist

Wall.) 700, 724-25 (1868) (reading the “more perfect union” language of the Preamble as a substantive provision to declare that Texas’s secession from the Union was unconstitutional). Professor David P. Currie describes this as “an act of considerable audacity” and adds a snarky footnote:

One might as persuasively argue that the preamble’s recitation of the purpose to “promote the general Welfare” empowered by [sic] Congress, in the teeth of the enumeration of limited powers emphasized by the tenth amendment and confirmed in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), to take any steps appropriate to achieving that goal.

DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 312 & n.179 (1985). One is unlikely to find a finer summary of Professor Barber’s Marshallian federalism.

³⁹ 22 U.S. (9 Wheat.) 1 (1824).

⁴⁰ *Id.* at 194-95.

⁴¹ *Id.* (“Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.”).

⁴² BARBER, *supra* note 1, at 59.

⁴³ *Id.* at 59-60 (“Though Marshall deserves no authority beyond the quality of his arguments, we might still want to reconcile his contradictions in behalf of his dominant thrust, which, by all accounts, was nationalist.”).

⁴⁴ *Id.* at 58.

⁴⁵ *Id.* at 60 (“[N]o federalism issue could arise unless an intrastate matter were of some concern to agent of the nation or a private party claiming a right under the nation’s laws.”).

the Schmittian slide from foreign affairs and armed conflict to domestic arrangements. The fact that we must and will do awful things in self-defense is no reason to read the entire Constitution as a warrant for a peacetime garrison state.⁴⁶ Most important, I doubt that John Marshall became confused about the central issue of the Founding and antebellum politics in a span of five years between *M'Culloch* and *Gibbons*.

Contrary to Professor Barber, *M'Culloch* and *Gibbons* are of one piece on the states' rights versus dual federalism issue.⁴⁷ Both embody James Madison's famous account of the "compound republic" – his term for what we now call "federalism" – in *Federalist* 39. The general government's powers are *federal* in their extent, and *national* in their operation.⁴⁸ "Federal" means enumerated

⁴⁶ Professor Barber does not share this inhibition. He illustrates the implications of reading domestic powers as we construe (in his mind) foreign affairs powers as follows: "As we grant that the nation does not have to rely on a voluntary army, we would grant that the nation does not have to rely on voluntary purchases of health insurance." *Id.* at 93. On that theory, the government and the dissenters in *NFIB* could have and perhaps should have cited the *Selective Draft Law Cases*, 245 U.S. 366 (1918) (upholding military conscription in the United States), and maybe even *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding a federal affirmative order to report for detention), in support of the health insurance mandate. They did not.

⁴⁷ The "contradiction" between *M'Culloch* and *Gibbons* did not occur to John Marshall: he relied on both cases in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446-49 (1827). Nor has any such contradiction occurred to any Supreme Court since. A Westlaw search of "advanced: (Mcculloch M'culloch) & (Gibbons & Ogden) & DA (aft 12-31-1823)" turned up sixty-one such Supreme Court cases (sixty excluding *Gibbons v. Ogden* itself). As far as I have been able to determine, not one case suggests any conflict or "contradiction." What is remarkable about the list is the prevalence of landmark cases. *See, e.g., NFIB*, 132 S. Ct. 2566, 2577 (2012) (citing *M'Culloch* and *Gibbons* for the proposition that ours is a government of enumerated powers); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Commerce Clause did not authorize a law prohibiting guns in school zones); *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the Commerce Clause authorized imposition of intrastate agricultural production quotas); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (finding the statute was within Congress's Commerce Clause power using a rational basis review test, but suggesting the need for a heightened standard of review in other cases); *Champion v. Ames*, 188 U.S. 321 (1903) (holding that trafficking lottery tickets could be regulated by Congress as interstate commerce); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) (holding that unapportioned income taxes under the Income Tax Act of 1894 were unconstitutional); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) (holding that the Fourteenth Amendment does not protect "privileges and immunities" incidental to state citizenship); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870) (affirming the constitutionality of paper money). A cautious hypothesis is that at each critical juncture, the Supreme Court has sought to assure itself of constitutional continuity by placing its rulings in the context of both decisions.

⁴⁸ THE FEDERALIST NO. 39, *supra* note 36, at 242-43 (James Madison) ("[I]n the operation of [ordinary governmental] powers, [the Constitution] is national, not federal; in the extent of them, again, it is federal, not national . . .").

and limited.⁴⁹ “National” means federal supremacy: the Constitution, laws enacted “in Pursuance thereof,” and treaties break (trump, preempt) any conflicting state law.⁵⁰ It further means that the general government’s powers, so far as they extend, operate *directly* on citizens.⁵¹ This is “dual” federalism: separate spheres; federal supremacy; dual and direct enforcement authority.

“Commerce,” says *Gibbons*, is “intercourse.”⁵² It encompasses navigation across the majestic Hudson, and (Marshall observed in a later case) it “must reach into the interior” of each state.⁵³ Where exactly the power ends, we do not know for sure. But it must remain *federal* in extent and therefore end someplace. And so far as the power extends, state law and monopolies must give way, because federal powers are *national* in operation: “[T]he government of the Union, *though limited in its powers*, is supreme *within its sphere of action*.” That sentence encapsulates *Gibbons*. But it does not appear in the opinion. It is from *M’Culloch*.⁵⁴

“It is a constitution we are expounding,”⁵⁵ and there are different ways of doing so. But one must still *expound*, and expound the *Constitution*. Political philosophers are free – as free as Tea Party activists – to fabricate their own constitution. They are *not* free to peddle their inventions as the actual Constitution, or to dragoon John Marshall into their enterprise.

II. FEDERALISMS: DUAL, STATES’ RIGHTS, COMPETITIVE

Professor Barber contrasts his unprecedented Marshallian federalism with states’ rights or dual federalism.⁵⁶ He treats those terms – and the theories that underpin them – as substantially congruent.⁵⁷ That, too, is unprecedented, and not in a helpful way.

⁴⁹ *Id.* at 241-42 (“[T]he proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.”).

⁵⁰ *Id.* at 241 (“The idea of a national government involves in it not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government.”).

⁵¹ *Id.* (stating that in the *national* government, the powers operate “on the individual citizens composing the nation in their individual capacities.”).

⁵² *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824) (“Commerce, undoubtedly, is traffic, but it is something more: it is intercourse.”).

⁵³ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446 (1827) (“The power [to regulate commerce] is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior.”).

⁵⁴ *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 316 (1819) (emphasis added).

⁵⁵ *Id.* at 407.

⁵⁶ BARBER, *supra* note 1, at 31 (“States’ rights federalism is the familiar two-spheres conception of federalism; it takes seriously the idea of a line between the spheres. Marshallian federalism recognizes no such line, at least none that restrains the nation.”).

⁵⁷ *E.g.*, *id.* at 30 (defining “states’ rights or dual federalism”); *cf.* John Dinan, *The Fallacies of States’ Rights*, 43 *PUBLIUS* 2 (2013), archived at <http://perma.cc/ZU9Z-UBJ4>

“States’ rights” federalism has always been associated with the notion of the Constitution as a “compact” or “contract” among states, with “interposition,” and with the defense of slavery and Jim Crow.⁵⁸ “Dual federalism” is the common term for James Madison’s “compound republic,”⁵⁹ operating over the extended sphere of a commercial republic. “Dual” federalists insist that ours is a Constitution of limited and enumerated powers, but they *reject* compact theory and interposition.⁶⁰ This fundamental divide runs through the messy debates of the nineteenth century – between Jeffersonians and Hamiltonians; between Roger Taney and John Marshall; between Jacksonians and defenders of Henry Clay’s “American system”; between the plantation system and insurgent corporate capitalism.⁶¹

Why propound a federalism taxonomy that confuses an ancient, well-understood, and universally accepted federalism distinction? In the conventional taxonomy, Roger Taney was a states’ rights federalist, John Marshall a dual federalist.⁶² That latter proposition, Professor Barber will not admit. To mobilize John Marshall for his constitutional vision, Barber must put all the actual combatants into one camp. The maneuver divorces Professor Barber from John Marshall and from the entire history of American federalism. It also separates him from the contemporary federalism debate.

The contemporary debate is more attenuated than the foundational disputes over secession or the New Deal. Still, the “dual versus states’ rights” divide persists. Many “dual” federalists now call themselves “competitive” federalists, and they firmly renounce any association with “states’ rights”

(discussing Professor Barber’s failure to distinguish states’ rights and dual federalism); Ernest A. Young, *The Puzzling Persistence of Dual Federalism* 10 (Aug. 1, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156351.

⁵⁸ See generally GREVE, *supra* note 1, at 45-55 (contrasting dual federalism and states’ rights federalism).

⁵⁹ Cf. THE FEDERALIST NO. 51, *supra* note 36, at 320 (James Madison) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.”).

⁶⁰ See, e.g., Young, *supra* note 57, at 10 (“Dual federalism held that [constitutional] ends are confined to a distinct sphere of governmental activity, but because that sphere is exclusive, the states could not have reserved powers to get in the way.”).

⁶¹ See, e.g., Roderick M. Hills, Jr., *Is the Fostering of Competition the Point of American Constitutional Federalism?*, 48 TULSA L. REV. 339, 347-53 (2012). In the course of a forceful critique of *The Upside-Down Constitution*, Hills explicates an antebellum tradition of “anti-corporate federalism,” which is antithetical to competitive federalism and which runs from the Antifederalists through the Jacksonians to Louis Brandeis to his modern heirs. See, e.g., ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* (2008). Professor Hills favors that side of the long-running debate; *The Upside-Down Constitution*, the other. The debate altogether eludes Professor Barber.

⁶² See GREVE, *supra* note 1, at 145.

federalism.⁶³ “States’ rights” advocates are still searching for a more suitable label, and they hail from different political camps; but they all oppose dual, competitive federalism and instead seek to make room for a more local, authentic politics.⁶⁴ In the law reviews, the debate plays out in scholarly controversies over the *Erie* doctrine, the spending power, and the interplay between international and U.S. law.⁶⁵ In the Supreme Court’s decisions, the debate surfaces in dozens of cases over federal preemption, the dormant Commerce Clause, and the Federal Arbitration Act.⁶⁶ In politics and in litigation, corporate interests on the “dual” federalism side confront state attorneys general and trial lawyers on the “states’ rights” side.⁶⁷

If Professor Barber were aware of this debate, he might worry that his Marshallian federalism puts him in proximity of the Chamber of Commerce and squarely against Brandeisian efforts to resurrect democratic control over corporate power on a localist basis. Unaware and therefore unperturbed, Professor Barber instead inveighs against “something called ‘competitive federalism.’”⁶⁸ Its three musketeers (Randy Barnett, Richard Epstein, and me)⁶⁹ variously appear as corporate shills⁷⁰ or as “false federalists”⁷¹ who

⁶³ See, e.g., *id.* at 45-62.

⁶⁴ See, e.g., CHEMERINSKY, *supra* note 61, at 241 (“I argue for a dramatically different way of looking at federalism: seeing it as empowerment, not limits.”); Young, *supra* note 57, at 2-3 (lamenting “the use of dual federalist notions to limit *state power*”).

⁶⁵ On *Erie* and federalism see, for example, Symposium, *Erie Railroad at 75*, 10 J.L. ECON. & POL’Y 1 (2013). On the spending power see, for example, Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861 (2013); James F. Blumstein, *Enforcing Limits on the Affordable Care Act’s Mandated Medicaid Expansion*, 2011-2012 CATO SUP. CT. REV. 67; Michael S. Greve, *Coercion, Conditions, and Commandeering: A Brief Note on the Medicaid Holding of NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL’Y 83 (2013). On federalism and foreign policy see, for example, Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380 (2006); Jeremy Rabkin, *Off the Track or Just Down the Line? From Erie Railroad to Global Governance*, 10 J.L. ECON. & POL’Y 251 (2013); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999).

⁶⁶ See, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012) (preempting a state law relating to immigration); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that the Federal Arbitration Act preempts state common law doctrine); *Wyeth v. Levine*, 555 U.S. 555 (2009) (preempting state law relating to drug safety); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (preempting state law relating to auto safety); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (holding that the dormant Commerce Clause preempted a state tax exemption statute).

⁶⁷ See generally Michael S. Greve, *Government by Indictment: Attorneys General and Their False Federalism* (Am. Enter. Inst., Working Paper No. 110, 2005) (arguing that state attorneys general engage in activism through extraterritorial regulation of corporations while masking as “states’ rights” federalists).

⁶⁸ BARBER, *supra* note 1, at 1.

⁶⁹ *Id.* at 101.

evidently fail to comprehend the nationalist content of their position.⁷² Which is it to be?

I understand Professor Barber's principal argument to be as follows: Either competitive/dual federalism collapses into states' rights federalism. Or else, it is Marshallian federalism in disguise because it acknowledges that "states' rights" are good not in themselves but for advancing substantive ends. Those substantive ends must be *national* goals or policies, to be defended in a national forum.⁷³ Professor Barber has a point. What he identifies, however, is a constitutional tension, not an intractable dilemma.⁷⁴

A. *States' Rights?*

Why might dual federalism collapse into states' rights federalism? The key problem lies in circumscribing enumerated powers without resorting to states'-rights-ish notions. If "great" powers draw lesser powers in their wake, it is hard to know the stopping point. And if the commerce power must "reach into the interior" of each state, it is likewise hard to tell where it will end. It seems that no workable line can be drawn for all ages without invoking inviolable "states' rights."⁷⁵ If John Marshall's landmark opinions suggest the problem, however, they also suggest the answers.

⁷⁰ *Id.* at 1 ("[S]omething called 'competitive federalism' is part of the present campaign of corporate forces to deregulate the nation's economic life.").

⁷¹ *Id.* at 22 ("The owners of this false federalism are economic libertarians who call it 'competitive federalism' or 'fiscal federalism.'").

⁷² *Id.* at 102 ("[C]ompetitive federalism turns out to be a species of national federalism, not states' rights federalism.").

⁷³ *E.g., id.* at 9, 223 n.76 ("[S]tates' righters cannot defend themselves in a national forum without invoking a controlling national standard whose existence states' righters cannot admit and remain states' righters.").

⁷⁴ To his credit, Professor Barber notes that Marshallian federalism suffers from a very similar dilemma arising from *M'Culloch's* rule against pretext. Without that rule, Marshallian federalism would collapse into process federalism. *Id.* at 163 ("The no-pretext rule separates Marshallian from process federalism."). Professor Barber urges that the rule against pretext should serve to advance preambular commitments, not to circumscribe constitutional powers or to mark off enclaves of state power. *See supra* notes 30-32 and accompanying text. Even so, common law adjudication entails a risk that the no-pretext rule will metastasize into a "dual or states' rights" federalism. *See id.* at 165-67, 191-92. To avert that threat, Professor Barber proposes that "normative status and weight should attach only to cases that can be construed to advance justice and liberty" and assures his readers that such a canon "could not produce a corpus that functioned as categorical states' rights." *Id.* at 206. Indeed not. What it would produce instead is a Supreme Court that acts as a vanguard for progressive causes. Many and perhaps most constitutional scholars share that view; most have less laborious ways of getting there.

⁷⁵ The problem is readily discernible in Supreme Court decisions that lurch from enumerated powers into Tenth Amendment arguments. *See, e.g.,* *United States v. Butler*, 297 U.S. 1, 62-64, 68-69 (1935) (holding processing taxes assessed under the Agricultural

First, the federalism axiom of *Gibbons* – “the enumeration presupposes something not enumerated” – suggests an intelligible, workable rule of decision: If the government, in a given case and in defense of a given federal statute, cannot articulate a principled line that would save the statute and yet leave something on the other side, the government loses. I take this to be the true ground of *Lopez*,⁷⁶ *Morrison*,⁷⁷ and the “broccoli horrible” of *NFIB* notoriety.⁷⁸

Second, enumerated powers jurisprudence can make do without sacrosanct enclaves of state power so long as it maintains and observes a meaningful distinction between the federalism axiom and the doctrines that *make it operational*. The principle of limited, enumerated powers is a constitutional axiom; the abstract-concrete rules that make the principle applicable will change over time depending on “the various *crises* of human affairs.”⁷⁹ We adjust search-and-seizure rules to profound social and technological change;⁸⁰ we can and should do likewise with structural federalism rules. There is no insoluble problem here, provided one does not mistake the mid-level doctrines for the Constitution itself.⁸¹

Third, in addition to the “pretext” constraint emphasized by Professor Barber, *M’Culloch* says (in the very same paragraphs) that federal laws outside the corners of enumerated powers must be “necessary and proper,” in the sense of conforming to the letter and spirit of the Constitution.⁸² Perhaps the most

Adjustment Act unconstitutional based on Congress’s enumerated powers and the Tenth Amendment); *Hammer v. Dagenhart*, 247 U.S. 251, 269, 274 (1918) (justifying the decision to strike down a congressional act as unconstitutional with both an “interstate commerce” argument and a Tenth Amendment argument). I share Professor Barber’s position to the extent that there can be no Tenth Amendment enclaves from enumerated powers. GREVE, *supra* note 1, at 76. In concert with the great majority of constitutional scholars, I take that to be the teaching of *M’Culloch*.

⁷⁶ See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (“[I]f we were to accept the Government’s arguments, we would be hard pressed to posit any activity by an individual that Congress is without power to regulate.”).

⁷⁷ *United States v. Morrison*, 529 U.S. 598, 613-16 (2000).

⁷⁸ Professor Barber might view this approach as a way of operationalizing a Marshallian “pretext” inquiry; and in fact, that is not a bad way of understanding the cases. Nevertheless, Professor Barber is bound to disagree with the outcomes. His “pretext” inquiry may cut only one way. BARBER, *supra* note 1, at 205-06. One is tempted to call it pretextual.

⁷⁹ *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

⁸⁰ See *United States v. Jones*, 132 S. Ct. 945 (2012) (holding that the use of a Global Positioning System (GPS) tracking device to monitor a vehicle’s movements on public streets qualified as a Fourth Amendment “search”).

⁸¹ For a good discussion, see Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

⁸² See *M’Culloch*, 17 U.S. (4 Wheat.) at 421 (“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 are not prohibited, but consist with the letter and spirit of the*

important application of this principle is what the modern Supreme Court calls the “anti-commandeering” rule: the national government may *preempt* the states, but it may not *order* them to do anything at all.⁸³ The rule creates no “states’ rights” enclave; it operates in domains that are plainly within the general government’s enumerated powers. It is part and parcel of a “dual” federalism that connotes not only separate state and federal “spheres” but also, within those spheres, separate authorities, each with direct authority over its citizens. When Congress preempts states, states have no right to interpose or nullify; the Supremacy Clause settles that question. Unlike member-states of other unions (including the European Union), however, states have no affirmative duty to implement federal commands (as opposed to obeying federal prohibitions).⁸⁴ They have a right to refuse cooperation.

Professor Barber acknowledges the anti-commandeering principle; notes that even its proponents have called it “controversial”; and challenges them to come up with reasons.⁸⁵ By good fortune those reasons appear in *Federalist Nos. 15 and 16*. The argument hangs on what we now call “agency costs” and “monitoring costs” (or “transparency”). A “government over governments”⁸⁶ that relies on state governments to do its bidding, Hamilton explains, will be feckless and ineffectual.⁸⁷ Moreover, it will provide ample room for shirking, subterfuge, and conspiracies among different levels of government, to the detriment of citizens.⁸⁸ The point of the Constitution and the Supremacy Clause is to cut through the mess and to make citizens directly subject to the general government, and the general government directly accountable to citizens.

constitution, are constitutional.” (emphasis added)).

⁸³ See *Printz v. United States*, 521 U.S. 898, 935 (1997) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”); *New York v. United States*, 505 U.S. 144, 167 (1992).

⁸⁴ A few constitutional provisions envision “commandeering.” See, e.g., U.S. CONST. art. I, § 4, cl. 1 (allowing Congress to alter state regulations regarding the elections of senators and representatives); U.S. CONST. art. I, §§ 15, 16 (federal control over the militia). Those provisions, however, are so few and conspicuous that they confirm the general rule: unless specifically provided for, commandeering is prohibited. See GREVE, *supra* note 1, at 67-68, 349-54.

⁸⁵ BARBER, *supra* note 1, at 62 (“Scalia and Lawson will need to show what good for the nation as a whole is served by reading the word *proper* their way.”).

⁸⁶ THE FEDERALIST NO. 20, *supra* note 36, at 134 (Alexander Hamilton & James Madison).

⁸⁷ THE FEDERALIST NO. 15, *supra* note 36, at 71-74 (Alexander Hamilton) (discussing the “delinquencies of the states” and the tendency for each state to “successively withdraw its support” from the national government).

⁸⁸ *Id.* at 78-80 (arguing that, to be effective, the national government must have a direct relationship with citizens).

The anti-commandeering principle is foundational. It spells the difference between the Articles of Confederation and the Constitution; between a “government over governments” and Madison’s “compound republic”; between Europe’s federalism and ours.⁸⁹ It is a dual federalism principle *par excellence*.⁹⁰ And it has nothing whatsoever to do with states’ rights.⁹¹

B. *Nationalism (in Disguise)?*

Unless dual/competitive federalists retreat into states’ rights, Professor Barber maintains, competitive federalists must give reasons why their objectives (choice, competition, and discipline in government) should trump other values. Once they admit that, they have already accepted the true and overriding commitment of the Constitution: “secular public reasonableness.” Competitive federalism’s commitments *may* survive that discourse, or not. In any event, states do not have any trump to play in the national debate.⁹² “Federalism” is what we decide, at the national level, to leave to the states. On this account, competitive federalism is a version of Marshallian federalism.

I have some sympathy with the original, Habermasian version of you-have-already-accepted-my-premises-by-talking argument.⁹³ In its latter-day, trashed-down versions, however, it is a last resort of progressive thought and, at this point, difficult to comprehend as anything but a debater’s point. The difficulty with the argument (in all its versions) is that, in real life, the public discourse must have a beginning and an end. Thus, one wants to know on what terms it starts and ends. Professor Barber notwithstanding, the Constitution structures our public debate as a *federal* debate, not as a grand national exercise.

Professor Barber argues that we must “give and exchange reasons in community with each other,”⁹⁴ lest we cease to be Americans. They the people

⁸⁹ See *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting) (observing that European federalism relies on commandeering to protect member states’ autonomy); *id.* at 921 n.11 (“[O]ur federalism is not Europe’s.”).

⁹⁰ See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813 (1998).

⁹¹ States “as states” would rather be commandeered than preempted. Neil Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1646 (2006) (“When states are commandeered, they retain (often significant) discretion to determine how to implement the federal mandate. Preemption, by contrast, bypasses state regulatory authority.”). For example, thirteen states supported the federal government’s position in *Printz*. Brief of the States of Maryland et al. as Amici Curiae in Support of Respondent, *Printz*, 521 U.S. 898 (Nos. 95-1478, 95-1503), 1996 WL 590921.

⁹² BARBER, *supra* note 1, at 104.

⁹³ See generally JÜRGEN HABERMAS, *REASON AND THE RATIONALIZATION OF SOCIETY* (Thomas McCarthy trans., 1984). To my mind, the most tenable (neo-Kantian) version of the argument is HERBERT SCHNÄDELBACH, *REFLEXION UND DISKURS: FRAGEN EINER LOGIK DER PHILOSOPHIE* (1977).

⁹⁴ BARBER, *supra* note 1, at 105.

must “connect their authentic selves to a desire for truth that all in the debate could come to see.”⁹⁵ That debate, Professor Barber insists, must be *national* and *secular*. At some level of generality, it is hard to quarrel with his position. Unlike in Europe, there is an American sovereign, an American demos, and an American public. And the debate must be “secular” to the extent that religious tests for office are prohibited and Congress may not monopolize or cartelize the religious marketplace.⁹⁶ That, though, is hardly the end of the matter.

Foremost, the Constitution ensures that our national political debate will have a prominent federalism dimension. In Bruce Ackerman’s felicitous phrase, the Constitution makes popular sovereignty problematic.⁹⁷ No institutional actor can speak unambiguously for “the people.” And “the people,” while undoubtedly sovereign, cannot speak authoritatively with a single, unfractured national voice. They can only speak through their various institutional agents, prominently including the states. There is no national plebiscite to elect the president or even to amend the Constitution. And because the expression of our political will is federally structured, so is our “exchange [of] reasons in community with each other.”⁹⁸

Importantly, the federal structure shapes not only the contours of the national debate but also its (temporary) suspension. What happens when authentic selves across the country discover that they cannot talk forever but must get on with their lives? May they reasonably conclude that at times when the other side is not reasonably persuadable, it might be best to compartmentalize the debate and handle disagreements in more limited forums? The Constitution provides for that option. Professor Barber does not: his subjects must keep talking.

Professor Barber is equally wrong in insisting that our debate must be secular. The Constitution does take theocracy off the table, just as it takes slavery off the table and, for that matter, the option of stealing other people’s stuff and of treating the world as one vast common pool.⁹⁹ (You can, of course, argue for these things, but you will have to do so in the teeth of the Constitution.) And yet, the Constitution extends special protection to the free exercise of religion. Professor Barber would confine that exercise to houses of worship; as for public debate, he would exclude religious reasons and apparently even exclude any discussion over whether such reasons should or should not count for public purposes.¹⁰⁰ That move is not obviously

⁹⁵ *Id.*

⁹⁶ See U.S. CONST. art. VI, § 3 (“[N]o religious Test shall ever be required as a Qualification to any Office”); *id.* amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

⁹⁷ 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 181-86 (1991).

⁹⁸ BARBER, *supra* note 1, at 105.

⁹⁹ Professor Barber does not believe this. See *id.* at 208-09.

¹⁰⁰ Professor Barber cannot permit a debate about the limits of reason: his *secular* debate might never get started.

reasonable.¹⁰¹ It is also at odds with a Constitution whose authors seemed to have no great aversion to religious argument; with a long line of Presidents (including Abraham Lincoln) whose commitment to exclusively secular public reasoning is open to serious doubt; and with a country whose politics and social movements very often and to this day have been religiously inspired. In a word or two, Professor Barber's insistence is at odds with the Constitution – and with America.

It is fair to acknowledge that, in some domains, we have in fact conducted our public reasoning in accordance with Professor Barber's precepts. On abortion and gay rights, for example, the debate became national by judicial fiat. Religious reasons are excluded from the debate not because they are not accessible to reason, but again by judicial *ipse dixit*.¹⁰² On those national and secular terms, we the peasants then get to talk – provided it does not make a difference.¹⁰³ “We the Volk” will be tested by following “them the justices,” in the interest of – of all things – the rule of law.¹⁰⁴ That model of democratic government and “public reasonableness,” however, strikes me as more Friedrich Nietzsche than Juergen Habermas. I doubt its good sense, as well as its constitutionality.

III. FEDERALISM AND POLITICAL DYSFUNCTION

In the context of a conference and symposium volume on “political dysfunction” and “[c]onstitutional connections,”¹⁰⁵ the question arises whether federalism – in one of its versions – is a cause of, or perhaps a cure for, the poor performance of our political institutions. Professor Barber does not say whether and how his Marshallian federalism might help in that regard. He does not care about results, only about aspirations and the tone of our politics. He is confident, however, that nothing can be said for dual or states' rights

¹⁰¹ Professor Barber insists that the people must “connect their authentic selves to a desire for truth that all in the debate could come to see.” BARBER, *supra* note 1, at 105. The staunchest advocate of that position gave his life for it on a cross (and on some accounts rose again) some 2000 years ago. To exclude Him and his followers from the debate is not reason but unblinking dogma.

¹⁰² See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013) (explaining that religious arguments against same-sex marriage reflect impermissible “animus”).

¹⁰³ See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional referendum and amendment).

¹⁰⁴ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867-68 (1992) (plurality opinion) (“An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast”); *id.* at 996 (Scalia, J., dissenting) (criticizing the plurality's “Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be ‘tested by following’”).

¹⁰⁵ Symposium, *America's Political Dysfunction: Constitutional Connections, Causes, and Cures*, 94 B.U. L. REV. 575 (2014).

federalism.¹⁰⁶ As to “states’ rights” federalism, I agree. While our politics suffers from excessive centralization in some respects, it suffers from excessive *de*-centralization and an exaggerated solicitude of the “states as states” in others.¹⁰⁷ The perennial quest to restore an ill-defined federal “balance” strikes me as constitutionally suspect and, in any event, ill-suited to alleviating the dysfunctions of our institutions.¹⁰⁸

As explained, however, “dual” competitive federalism is a very different beast. Its advocates (including this Author) seek to rehabilitate federalism’s constitutional *structure*, not some mystical balance. That structure – the structure of the compound republic – implies a constitutional baseline of horizontal competition among states and, in federalism’s vertical dimension, a separation of powers and functions between the states and the general government.¹⁰⁹

Powerful institutional and political forces cut against those constitutional commitments, and it is fair to ask whether competitive federalism is a realistic, sustainable arrangement under current political and socioeconomic conditions.¹¹⁰ Grant, though, that it *might* be: There are plausible reasons to think that competitive federalism would improve not only the performance of our institutions but also, and closer to Professor Barber’s heart, the level of our public debate.¹¹¹

A. *Competition Among States*

Competition among states can serve a variety of objectives: discipline in government; the discovery of what policies do and do not work; and (in economists’ bloodless language) preference satisfaction.¹¹² Under competitive conditions, citizens can “vote with their feet” and sort themselves into states that reflect their widely varying tastes. Professor Barber will have none of it.

¹⁰⁶ BARBER, *supra* note 1, at 208 (“[S]tates’ rights federalism is indefensible . . .”).

¹⁰⁷ See GREVE, *supra* note 1, at 262-63, 383-84 (“The proliferation of uncoordinated, semiautonomous power centers, and in particular the judicial empowerment of state legislatures . . . to regulate the commerce of the United States fifty times over, is a federalism problem.”).

¹⁰⁸ See *id.* at 381-85.

¹⁰⁹ See *id.* at 66-71.

¹¹⁰ The general consensus among federalism scholars is that competitive, “market-preserving” federalism can preserve itself only under unusual conditions. See, e.g., Jonathan Rodden & Susan Rose-Ackerman, *Does Federalism Preserve Markets?*, 83 VA. L. REV. 1521, 1546 (1997) (“[I]f we consider political goals and institutions, [market-preserving federalism] is a highly unstable institutional equilibrium.”).

¹¹¹ The broad-brush considerations sketched in the text are not intended as a (conclusive) demonstration. I simply suggest that Professor Barber is far too cavalier in dismissing the possibility that competitive federal arrangements might foster objectives that he professes to cherish.

¹¹² See Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1498-1500 (1987).

The “promise of diversity,” he writes, “cannot be serious. The communities of [Greve’s competitive federalism] system will not differ significantly from each other in terms of the issues that have historically divided Americans.”¹¹³

That confident averment strikes me as both disingenuous and empirically wrong. Professor Barber’s fear is precisely that the differences *will* matter: why else labor so hard to discredit competitive federalism? The Justices of the Supreme Court share the apprehension: they would not otherwise seek to “settle” so many controversies by *diktat*.¹¹⁴ Surely, the weight of the empirical evidence strongly suggests that choice and state competition do matter to large numbers of citizens. While competitive federalism may be most useful and consequential on “social,” conflictual issues,¹¹⁵ Americans have also been sorting themselves, with a vengeance, over issues that – unlike conflicts over God, guns, and gays – should in principle be amenable to ordinary interest group bargaining. By all appearances, that process has a great deal to do with a very basic disagreement about the role of government.¹¹⁶ State politics reflect the disagreement: Texas and New York offer radically divergent social models.¹¹⁷

There are reasons to lament the polarization of American politics, but I can see no reason to deny or trivialize it. The question is how we deal with the fact, and there are many good reasons to think that competitive “sorting” is preferable to an all-or-nothing contest in Washington, D.C. Among them are considerations that coincide with Professor Barber’s ostensible desire for public reasonableness. Reasoned, informed debate is often easier when it is compartmentalized and bounded; when the outcome is not an “all or nothing” proposition; and when the losers have an exit.¹¹⁸ A more federalized debate under competitive conditions may not satisfy Professor Barber’s rarified standards, but it would be a more civilized, informed, and productive debate. Most Americans would consider that to be progress.

¹¹³ BARBER, *supra* note 1, at 103.

¹¹⁴ See, e.g., ROBERT NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 99-111 (2001) (arguing that fear of “open conflict and legal chaos” has driven the Court’s federalist decisions on controversial social issues).

¹¹⁵ Cf. Dennis C. Mueller, *Federalist Governments and Trumps*, 83 VA. L. REV. 1419, 1426-27 (1997).

¹¹⁶ See, e.g., Dan Balz, *Red, Blue States Move in Opposite Directions in a New Era of Single-Party Control*, WASH. POST, Dec. 29, 2013, at A1.

¹¹⁷ See Dan Balz, *Between California and Texas, There’s a Grand Canyon*, WASH. POST, Dec. 29, 2013, at A10 (comparing the state government models of the two “nation-states within the United States”).

¹¹⁸ For extended discussion and empirical evidence, see ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 119-54 (2013).

B. *Federal-State Relations*

Dual, competitive federalism means that the general government's powers are federal in extent and national in operation. "National operation" implies, among other things, the anti-commandeering rule: states may be preempted but not ordered about. The anti-commandeering rule spent many decades in hibernation because the Constitution permits the levels of government to bargain around the constitutional entitlements: Congress may give states money to do what it may not tell them to do, and states are free to accept (or reject) those bargains. Such "conditional spending" statutes have been a central feature of American federalism since the New Deal, and they have mushroomed over time. Experts have counted over 800 such programs, and federal transfer payments to state and local governments now amount to over \$600 billion per year.¹¹⁹ Of late, however, the "cooperative" federalism bargain has begun to crack. We are rediscovering just how potent – and useful – the states' right to refuse cooperation can be.

The national government has attempted to implement one part of the Affordable Care Act (ACA),¹²⁰ a substantial expansion of Medicaid, in the usual fashion – by promising states a truckload of money. Amazingly, twenty-plus states have refused, notwithstanding the federal government's promise to pay virtually all of the attendant costs. They know that Medicaid is ruinous as it is, and they do not trust the federal government's promises. And on account of the anti-commandeering principle, Congress cannot compel the dissident states' cooperation.

The federal government has attempted to implement another part of the ACA by means of conditional preemption: If a state fails to establish a healthcare exchange, the federal government will do so. That arrangement, too, is a consequence of the anti-commandeering rule: Congress may not tell a state to create a healthcare exchange. About two-thirds of the states have left the exchanges and their operation to the federal government. And lo: In well over three years, the American public has learned, the U.S. government cannot build a website, let alone operate the actual program. The lessons of this teaching moment are altogether salutary, and they reach well beyond the Affordable Care Act.

Professor Barber's notion of a general power of Congress to do "what it reasonably can" is not only at war with the Constitution but is also a source of institutional dysfunction. The supposed power will generate boundless demands that, more often than not, will exceed government's capacity. In particular, in a large-ish country, Congress cannot do all that much at a local

¹¹⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-1016, GRANTS TO STATE AND LOCAL GOVERNMENTS: AN OVERVIEW OF FEDERAL FUNDING LEVELS AND SELECTED CHALLENGES (2012), *archived at* <http://perma.cc/W24Z-89ZE> ("[F]ederal outlays for grants to state and local governments totaled more than \$606 billion in fiscal year 2011.").

¹²⁰ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. II, 124 Stat. 119 (2010).

level. The federal government cannot enforce its marijuana laws, immigration laws, or gun control laws. It cannot police the streets or run schools. It nonetheless promises to do all those things and many, many more – often, for no better reason than that politics rules the true and reasonable answer (“we cannot do much”) out of bounds. Thus, Congress responds by talking a good game, shoveling money the states’ way, and building an impenetrable intergovernmental apparatus. The results of this “cooperative” federalism are charitably described as dispiriting.¹²¹ Nonetheless, it takes a monumental train wreck to impress the point. The spectacularly botched intergovernmental response to Hurricane Katrina made no lasting impression: the ACA may.

Even by Professor Barber’s exalted standards, dual federalism’s state entitlement to say “no” may end up doing considerable good. Among the minimum requirements of public reasonableness is candor, including the acknowledgment of a capacity constraint in doing “what we reasonably can.” Political promises should include a commitment to political responsibility – a willingness to perform on the promise and to accept the consequences. Few Americans of any political persuasion believe that their government is performing well on this margin. And yet, the general government keeps promising the blue sky. The prospect of recruiting state volunteers and of diffusing responsibility is not the only source of that disposition, but it has been a very significant factor. Inasmuch as states are now exercising their constitutional entitlement to say “no,” they are contributing willy nilly to a more enlightened, reasoned debate. Behold the blessings of dual, competitive federalism.

CONCLUSION

Professor Barber concludes on a despairing note. The only serious intellectual dispute, he writes, should be between Marshallian and process federalism, and Marshallian federalism should win. Unlike process federalism, Marshallian federalism can explain its purpose. In real life, alas, “the only likely debate is between process federalism and states’ rights federalism.”¹²² I have suggested that Professor Barber entirely misses the vibrant debate between dual and states’ rights federalists. Perhaps, though, that controversy is just a distraction, and the real question is Professor Barber’s: Why should Marshallian federalism find itself so impotent?

Marshallian federalism’s weakness, Professor Barber says, is that “secular public reasonableness” does not go by itself. It presupposes “a relationship between leaders and followers that may have obtained at the founding but now seems utopian.”¹²³ The Founders’ and Marshall’s federalism requires a cadre of wise, patriotic leaders who enjoy the people’s confidence – an ends-oriented, “public-spirited and enlightened elite” to guide a “self-interested,

¹²¹ For a brief discussion and further references, see GREVE, *supra* note 1, at 278-80.

¹²² BARBER, *supra* note 1, at 208.

¹²³ *Id.* at 207.

benighted mass”¹²⁴ and to lend a higher purpose to their low ends. We seem incapable of producing, recruiting, and supporting such a leadership stratum and thus of sustaining a high-toned, ends-oriented politics. The fault, ultimately, is the Founders’. “Marshallian federalism would be hard to maintain” today, Professor Barber writes, “especially against the multiple fallacies of the rights-oriented constitutionalism *that the framers themselves installed* as central to their hopes for a politics of reason.”¹²⁵

I am more charitably inclined towards the Founders’ “fallacies.” For reasons mentioned, I believe that observance of constitutional forms might well yield both a more effective government and a more realistic, reasoned debate. And in accord with Bruce Ackerman, I am inclined to think that the Founders drew a sharper distinction between constitutional debate and ordinary politics than Professor Barber’s discussion would suggest.¹²⁶ Still, Professor Barber is right to observe the tension between the Founders’ democratic (republican) commitments and their desire to “refine” our politics. But it may be *that* part of their constitutional thought – not the “negative” Constitution of rights, federalism, and checks and balances – that is open to doubt.

It was not the rights-oriented, “benighted mass” that pumped up the money supply and created a fantastic real estate bubble; it was the Federal Reserve Board. It was not the unwashed who decided to “roll the dice” on the American economy; it was Barney Frank and Chris Dodd.¹²⁷ Nor did the “benighted mass” insist that the entire financial system be run through bailouts and bargains among plutocrats: that was accomplished by Larry Summers and Timothy Geithner.¹²⁸ The American people never demanded an incomprehensible “affordable care” scheme that turns vast sectors of the American economy upside down. It was brought to them by people who are smarter than the rest; whose confidence in their own ability to micromanage the planet knows no bounds; and who insist that their schemes would work if only politics would not interfere.¹²⁹ All this is pure Barberism: ends-oriented, ordained in defiance of constitutional forms, promoted in a “we-know-what’s-

¹²⁴ *Id.* at 201.

¹²⁵ *Id.* at 208 (emphasis added).

¹²⁶ See ACKERMAN, *supra* note 97, at 175-79; GREVE, *supra* note 1, at 28-36.

¹²⁷ *The Secondary Mortgage Market Enterprises Regulatory Improvement Act: Hearing on H.R. 2575 Before the H. Comm. on Fin. Servs.*, 108th Cong. 3-5 (2003) (statement of Barney Frank, Former Chairman, H. Comm. on Fin. Servs.), archived at <http://perma.cc/Z8JH-KS4F>.

¹²⁸ See DAVID SKEEL, *THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES* 44-46 (2011).

¹²⁹ Dan Farber, *Obama: We Can’t Back off Healthcare Reform*, CBS NEWS (Feb. 7, 2010, 3:35 PM), <http://www.cbsnews.com/news/obama-we-cant-back-off-healthcare-reform>, archived at <http://perma.cc/T96P-JMMN> (“I would have loved nothing better than to simply come up with some very elegant, academically-approved approach to health care, and didn’t have any kinds of legislative fingerprints on it and just go ahead and have that passed. But that’s not how it works in our democracy.”).

good-for-you” spirit, and calculated to do what we “reasonably can” to promote prosperity. In that spirit and to that end, our leaders have legislated unsustainable commitments, produced massive policy train wrecks, and left our descendants – “posterity” to use the Founders’ word – with a horrendous pile of debt.

Constitutional federalism is a theory of limits and discipline and humility – limits to what we think we can accomplish through collective action, discipline in going about the tasks, and humility in what we think we can know. Those intuitions are reflected in the Constitution’s federal structure, which Professor Barber seeks to bury under the Preamble. That project is misguided; but those who would embrace it should at least reflect upon *all* of the Preamble.

“We the People,” the Preamble says, seek to “secure the Blessings of Liberty to ourselves *and our Posterity*.”¹³⁰ Showing no more respect for the text of the Constitution’s Preamble than for the remainder of the document, Professor Barber has not one word to say about the posterity “clause.” I will hazard a guess as to why.

We can know to a moral certainty that a concern for posterity is a necessary condition of any constitutional project.¹³¹ And we can know with reasonable certainty that posterity will not be pleased to be saddled with unpayable debts because earlier generations did what they “reasonably could” to advance their own prosperity. But we do not know much beyond that. In fact, there is no obvious reason why we should care about posterity in the first place; and in light of our general ignorance about future generations’ preferences, it is very hard to build for their “various crises.” The constitutionalism that attempts to do so nonetheless – the Founders’ constitutionalism, John Marshall’s, and perhaps still ours – is inaccessible to the secular public reason Professor Barber champions. It is an act of constitutional faith.

¹³⁰ U.S. CONST. pmbl.

¹³¹ For discussion and references, see GREVE, *supra* note 1, at 32.