

Sotirios A. Barber, *The Fallacies Of States' Rights*. Cambridge, MA: Harvard University Press, 2013, 256 pp. (\$39.95 cloth).

In his seminal 1908 work titled *Constitutional Government in the United States*, then-Princeton University President Woodrow Wilson wrote that “the relation of the states to the federal government is the cardinal question of our constitutional system” which has confronted the Nation at “every turn of our national development....” Wilson concluded that this issue “cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question” (p. 173).

Referring to federalism as “America’s oldest constitutional debate” (p. 1), Notre Dame Political Science professor Sotirios A. Barber, in his 2013 book, *The Fallacies of States’ Rights*, echoes Wilson’s sentiments but believes that, notwithstanding its passionate presence in the 21st century, the states’ rights debate has been resolved. Asking, “What’s so good about states’ rights”? (p.28), Barber concludes that this perspective has little constitutional or practical policy justification.

Barber maintains that federalism can only be understood within a larger theory of constitutional government. His 1984 book titled *On What The Constitution Means*, addressed this question, and Barber revisits the subject almost three decades later with penetrating insights.

How, he asks, is one to read the Constitution? Is it to be construed simply as an allocation of responsibilities within a framework of separation of powers, checks and balances, and federalism? This, he argues, is the view of dual federalism: the Constitution establishes two separate and distinct sovereignties, which expressly limit powers given to the central government and confer a vast reservoir of reserved and implied powers to the states. Barber’s strongest criticism is directed to this position. He also focuses on Marshallian federalism, cultivated during the thirty-four years’ tenure of Chief Justice John Marshall (1801-1835), and process federalism, where states’ policy preferences can be better expressed by their representatives in Congress than in fifty separate state legislatures.

Barber emphasizes that federalism must be construed in the context of original intention. States’ rights advocates have maintained that the states, as separate sovereign entities, voluntarily conferred in Article I enumerated powers to the central government and that powers not specified are reserved to the states in the 9th and 10th Amendments. Barber rejects this on several grounds. This suggests that the twelve states present at the 1787 Philadelphia Convention were essentially in accord as to what was given to the new government. However, deep commercial, banking, religious and property differences among the states precluded consensus on what might have been conferred. Moreover, the states met not as twelve separate entities but with a mandate from Congress to convene for “the sole and express purpose of revising the Articles of Confederation,” giving the Constitution a national as opposed to separate state vision. Thus, while states’ rights figured in many of the delegates’ debates, the states convened not individually but as a united entity, which, for Barber, undercut the 1787 underpinnings of dual federalism.

Barber meticulously and evenhandedly discusses pre-Civil War dual federalism with the Virginia and Kentucky Resolutions of 1798 and John Calhoun’s theories of states’ rights and nullification. While the question of whether the Civil War was fought mainly over slavery or states’ rights will never be conclusively answered, Barber explains that this was a watershed event in the evolution of federalism.

His further examination of industrialization in the late 19th century, the Populist and Progressive movements around the turn of the 20th century, and the New Deal and Great Society initiatives illustrates that public policy evolved into a national focus. In the post-Reagan years, globalization of the domestic economy and proliferation of electronic communication greatly accelerated the scope of social policy away from the local and regional arenas. Thus, the evolving nature of public policy since the Civil War has, for Barber, made states' rights less viable, if not obsolete.

Barber also presents an intellectually rigorous examination of how the wording of the Constitution and key rulings of the Marshall Court gave far greater momentum toward nationalism. The Constitution, Barber emphasizes, is far more than a delineation of powers and responsibilities among branches of government; it is a charter embodying the aspirations of civilized society.

Barber heavily focuses on the Preamble: "We the People of the United States" have established the Constitution "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty..." These are substantive responsibilities given to the national government to be viewed as an embellishment on the powers conferred in Article I.

Rather than simply look at enumerated powers as encompassing what is given to the central authority, Barber believes that fulfilling the Preamble's mission is the collective goal of all three branches. Congress, he explains, can legislate on any subject area which it believes will enhance the general well-being of the American people, and the Court should construe constitutional provisions with this objective. Thus, the powers given to Congress in Article I, and unlimited means to implement them by the Necessary and Proper Clause, viewed in the context of Preamble enable the federal government to legislate on virtually any policy area it chooses. States are free to experiment with social welfare policy and seek to fulfill federal directives.

Barber anticipates dual federalism arguments that this leaves little policy discretion with states by addressing Justice O'Connor's five claims on the advantages of states' rights in *Gregory v. Ashcroft* (1991). O'Connor writes that two sovereigns will enhance federalism with a greater sensitivity "to the diverse needs of a heterogeneous society"; more opportunities for "citizen involvement in democratic processes"; more "innovation and experimentation in government"; government which is "more responsive by putting States in competition for a mobile citizenry"; and a greater "check on abuses of government power" (pp. 94-95).

Barber meticulously responds with rigorous constitutional analysis from dissenters' arguments and support from *The Federalist*. Citing numerous examples from slavery and civil rights policies to 21st century initiatives with national health care and medical marijuana, Barber insists that states' innovation has often diminished human dignity and thus undermine arguments for experimentation and more intimate responsiveness to local needs. He also argues that citizen involvement will be more meaningful in a national setting and that opportunities for citizens to relocate to states with more desirable policy innovations are not economically realistic alternatives.

Barber buttresses his enhancement of national policymaking initiatives with an examination of contemporary constitutional scholars who have written both in support of states' rights and uniformity at the federal level. A key individual omitted from his book is Raoul Berger. Author of over one hundred law review articles and seven books on original understanding, Berger, who died at the age of 99 in 2000, emphatically emphasized that the

original understanding of key constitutional provisions on federalism mandated a far weaker federal government from what has evolved and a preeminent role for states' rights. Berger advocated dual federalism as fervently as Barber opposes it, and his 1987 book titled, *Federalism: The Founders' Design*, examined the same clauses as Barber with equally fervent rigor. Berger's name does not even appear in the index, and the reader would welcome Barber's response to Berger's conclusions.

Barber's work is first rate scholarship. While one may take a different interpretation of the Preamble, Necessary and Proper Clause, 9th and 10th Amendments, and the enforcement clause of the 14th Amendment, the strengths of this book cannot be exaggerated. Barber clearly articulates his constitutional perspective and supports it with a cogent analysis of original intention, applicable Court rulings, key portions of *The Federalist*, evolving American social and legal history, and arguments of leading scholars. He acknowledges that states' rights will remain prominent as new social issues confront the American people and expresses optimism that Marshallian nationalism will endure and prevail.

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