



PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS

EDITED BY JOHN OBERDIEK

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Reviewed by Christopher C. Faille

Discussions of the philosophical bases of tort law come inevitably and quickly to the distinction between consequences and duties—in technical terms, between teleological ethics and deontological ethics. Take a sample question from substantive tort law: Do “squatters” who have been in a certain place over a long period of time acquire a right to title, or do they acquire instead some more limited right of possession or use, or do they acquire no right at all?

Teleological theorists, looking at consequences, plausibly explain that answering “no right at all” may give absentee owners of title the right to forever lock up valuable land in unproductive ways, to the detriment of society. A family of squatting farmers, by contrast, is making use of that land to the benefit of society.

The potential benefits are even starker, the potential costs more hypothetical, in instances where the trespass at issue is less dramatic than actual possession. Thus, teleologists in ethical philosophy might be expected to support the result that a continuous history of open trespass over a certain path on someone else’s land for purposes of passing through it eventually becomes a defense to a lawsuit charging those who use that path with that purpose with tortious trespass.

Some would go further. Does a starving person have a right to take possession of food in ways that, for anyone not in the direst distress, would be theft? Does need create right? Teleologists will have differing responses based on the consequences they foresee from allowing such a right.

Deontology, on the other hand, is about following rules. It is about doing one’s duty, though the heavens may fall. The first deontological theorist you encounter may well hold that the whole idea of an adverse possession defense to the tort of trespass is misguided, that the duty to refrain from

using someone else’s land without its owner’s permission knows no expiration date.

Questions are never simple, in philosophy or in law, and a second deontologist may believe that an absentee landlord, too negligent to know over a period of seven years what is happening on his property, has breached a duty, and that some loss of rights or remedies may be an appropriate response to that breach. The point remains: Deontologists and teleologists will look at the nest of questions involved in adverse possession law in very different ways.

Undergraduates with any interest in philosophy quickly learn that Jeremy Bentham, and the utilitarianism of which he is the avatar, is the paradigm of teleology in ethics. Immanuel Kant, on the other hand, and the moral philosophy conveniently known as Kantianism, is the paradigm of deontology.

A Brief Digression on Typology

Please excuse a brief digression on the taxonomy of utilitarianism in the two centuries since Bentham’s day. On the one hand, there is a common distinction between act-based and rule-based utilitarianism. An act utilitarian (a pure Benthamite, if you will) evaluates an act, including presumably a judge’s decision, by the balance of happy versus unhappy consequences that he or she expects the act to have. A rule utilitarian, by contrast, will judge an act by whether it follows a general rule that in its total operation produces the best possible balance of happy versus unhappy consequences. If the act follows such a rule, then the consequences of the act in the particular instance are immaterial. John Stuart Mill wrote that, in certain matters, “it would be unworthy of an intelligent agent not to be consciously aware that the action is of a class which, if practiced generally, would be generally injurious, and that this is the ground of the obligation to abstain from it.”

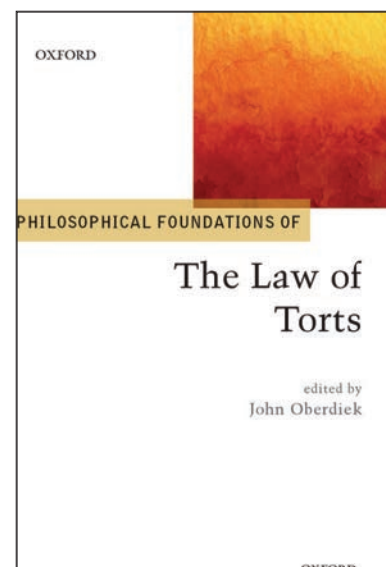
Rule utilitarianism is a concession to the fact that humans are creatures of habit and precedent. In jurisprudence, it is a recognition that a legal system always acts at a level of generality greater than that which the pure Benthamite would prefer, and it is an effort to accommodate that fact.

An even more pregnant distinction within utilitarian ranks concerns the curren-

cy of goodness or happiness: how utilitarians understand what exactly it is that they want every act or rule to maximize. The dichotomous labels here are hedonic utilitarianism and preference utilitarianism. The hedonic utilitarian works from the physiological and commonsense notions of pleasure and pain. He wants to increase the amount of pleasure in the world and to decrease the amount of pain. This raises various difficulties, because on the one hand some people do not want pleasure, and on the other hand some pleasures fail important tests (such as the test of reality—how much value should we assign to pleasant delusions?).

Preference utilitarianism (sometimes called desire-satisfactionism) seeks to finesse such issues by redefining the good outcome in any given situation as *the outcome that someone wants*. In some formulations this can be the outcome that a competent adult human being wants—allowing for the contention that children, people who are mentally ill, and animals don’t know what they want. But, in principle, preference utilitarianism can apply to all sentient beings.

The idea is that, if some sentient being has gotten what he or she wants, then something good has happened. Maybe bad things have also happened, because the desires of other sentient beings may have been frustrated to allow for the satisfaction of the first. The ultimate goal suggested by preference utilitarianism is reconciliation, so that everybody can be satisfied. So long as that remains impossible



on this small planet, trade-offs have to be made, and preference utilitarianism gets us thinking about how to make them.

Back to Tort Law

John Oberdiek, the editor of and a contributor to *Philosophical Foundations of the Law of Torts*, begins his introduction by saying that the law and economics school of thought of the 1960s and 1970s represented a crude but powerful strain of teleology. In his view, it is unfortunate that teleologists wielded such influence over tort law through such works as Richard Epstein's article "A Theory of Strict Liability" (1973) and Richard Posner's book *Economic Analysis of Law* (1973).

By the late 1970s, however, a deontological countertrend was under way, and that trend has continued long enough to have become a rich heritage of jurisprudential thought. Oberdiek's introduction calls *Philosophical Foundations of the Law of Torts* a "testament" to the best work done from that time to this.

The free-market orientation of Epstein, Posner, and others isn't Bentham's only juridical heir. Another is the more eclectic orientation of the great tort law scholar William Lloyd Prosser, whose treatise on the subject was known to every law student for years after his death in 1972. He told us clearly that a recovery for tortious negligence requires a duty of care, a breach of that duty, causation, injury, and damages.

Of those elements, the most Kant-friendly is duty. And it is precisely here that Prosser played a historically significant role. For his critique of the duty component of negligence undermined its deontological underpinning. As Oberdiek puts it in his introduction, "William Prosser famously contended that the duty element is just a placeholder for the multifarious public policy considerations that should inform a judge's determination of whether to allow a negligence suit to go forward."

One of the contributors to *Philosophical Foundations of the Law of Torts*, Stephen Perry, a philosophy professor at the University of Pennsylvania (so stop singing songs from the Journey catalog please), seeks to counter Prosser's influence through his own essay. Specifically, Perry believes that Benjamin Cardozo was philosophically astute when he wrote in his famous *Palsgraf* decision that duty is inherently relational. "What the plaintiff must show," wrote Cardozo, "is a 'wrong'

to herself, i.e. a violation of her own right, and not merely a wrong to someone else, nor conduct 'wrongful' because unsocial, but not a 'wrong' to anyone."

By remaining focused on the relationship between defendant and plaintiff, Cardozo kept his inquiry rights-based rather than letting it become policy-based. Alas, Perry writes, "For all intents and purposes, modern American tort law has abandoned this traditional understanding of the duty of care."

My Own Views

With due respect to the authors and editor of this volume, I will ignore them for a bit and state my own views on the underlying moral questions. For many years I held to a variant of preference utilitarianism. The variant was one I derived from William James's essay, "The Moral Philosopher and the Moral Life" (the text of which is available on the Web). James emphasized not the weighing and balancing of competing preferences, but the historical process by which, in his view, they are slowly reconciled. Thus, his morality, mingled as it was with his reflections on the activity of moral philosophy itself—his meta-morality, if you will—did service also as a philosophy of history, and I accepted all three. I'll treat you, dear reader, to just one brief quotation from that fascinating essay:

The philosopher ... knows that he must vote always for the richer universe, for the good which seems most organizable, most fit to enter to complex combinations, most apt to be a member of a more inclusive whole. But which particular universe this is he cannot know for certain in advance; he only knows that if he makes a bad mistake the cries of the wounded will soon inform him of the fact.

I continue to believe that there is much of value to be found in James's view. Recently, though, I experienced a breakthrough. It came to me that James's account was incomplete, that it is in essence an inspiring eschatological vision presented as if it were an analysis of what good is. It needs an underlying conception of that good that it doesn't quite supply.

Eschatology is the study of final matters, such as the Day of Judgment or the heat death of the universe. James's eschatology, sometimes explicit but always implicit in his work, was that we humans shall resolve our conflicts with one another in time, and shall

even resolve our conflicts with the planet, scoring a victory in the process for the universe itself. We are perhaps playing a part in the birth of the universe's self-consciousness. James's writing is inspiring because one can grasp that vision and see the various parts of his work—the psychology, the epistemology, the ethics—as various expressions of it.

The problem is not with teleology (I continue to believe that a rational ethic must be a teleological ethic). The problem is with utilitarianism as a straitjacket for teleology. The proper goal of morality cannot be described fairly as either pleasure or preference satisfaction. The goodness for which teleological ethics should strive is something different.

I have decided that it was G.E. Moore who has come closest to a clear statement of what this goodness—this proper goal of morality—really is. Further, although some philosophical topologists have sought to bring Moore within the utilitarian fold, I think that they are mistaken. For the nonce, let us call his view "teleological intuitionism."

Moore says that the list of intrinsic goods is a short one. To paraphrase him a bit, his list includes the pleasures of social relations, the enjoyment of the beautiful in art, the appreciation of the sublime in nature. That's it. Those particular satisfactions inherently possess the direct and observable, though non-natural, property of goodness, and everything else (all "instrumental" goods) are for their sake. We can acknowledge this and still bring in the historical element that James rightly emphasized, creating a teleological intuitionism that is also progressive and pragmatic.

The human race has developed many different types of society, and many different moral codes, largely in order to try to achieve these intrinsic goods. Individual humans have adopted particular social roles—clan matriarch, sitting judge, community activist, art connoisseur—and people in these roles see their own activity both as right and as conducive to the good. Thus, they see frustrations of their activities as wrong.

Unfortunately, these societies, these codes, and these roles can put us in conflict with one another. For example, the cramped circumstances of our planet may put settled communities at odds with nomads. On the level of tort law, abstract claims of title may come into conflict with the settled and productive habits of squatters.

With respect to tort law, I am afraid that all this leaves me with a point of view much like Prosser's, and therefore uninterested in

efforts to discredit him. Duty has no meaning for me apart from the policies that may enter into it—the policies that may help us humans to reconcile with one another over time and to expand our ability to satisfy, in our very different ways, our common interest in what is intrinsically good.

Back to the Book

Whatever your philosophical or jurisprudential orientation, you may find much to value in *Philosophical Foundations of the Law of Torts*. Eric R. Claeys, of the George Mason University School of Law, contributes an especially stimulating discussion of the relationship between tort law and property law—it was his chapter that inspired me to begin this review with the question of adverse possession of land—and it is worth reading even by those who have little interest in the underlying philosophical questions behind tort law.

But then, if you, dear reader, didn't have a certain amount of patience for philosophical wool-gathering, you would not have made it to the end of this review. ☉

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THE FALLACIES OF STATES' RIGHTS

BY SOTIRIOS A. BARBER

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Reviewed by Bentley J. Anderson

How should judges think about federalism questions? In founding the country, did the framers view the Constitution as a compact among the original 13 states, into which they entered as separate sovereigns, retaining plenary authority to act in their respective sovereign capacities? Or did the framers believe that the Constitution was a national charter that the people entered into as a whole, to create a central government authorized to take actions to advance “the general Welfare?” These questions, which have been debated since the founding of the country, are at the heart of *The Fallacies of States' Rights*, by Sotirios Barber, a professor of political science at the University of Notre

Dame. This debate has engaged some of the most important figures in U.S. history, including Thomas Jefferson, James Madison, John Marshall, and John C. Calhoun. But the vintage of the debate has done little to lessen the passion of those who today argue over such federalism questions as whether the minimum wage should be raised, whether the Patient Protection and Affordable Care Act of 2010 is constitutional, whether the Constitution protects the right to same-sex marriage, or whether Texas (as its governor, Rick Perry, claims) may lawfully secede from the United States.

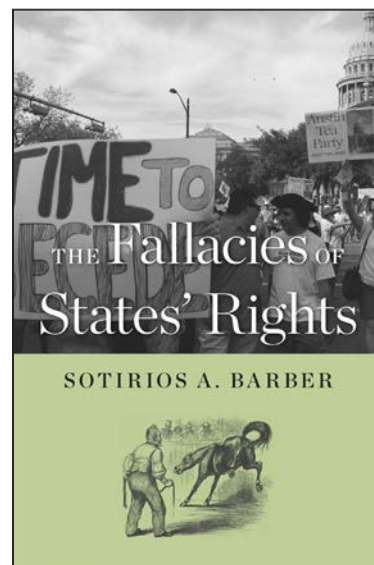
In this fascinating study, Barber sees three principal versions of federalism: states' rights federalism, “Marshallian” federalism (derived from John Marshall's opinion in *McCulloch v. Maryland* (1819)), and “process” federalism. Barber focuses, however, on states' rights federalism, and, as the title of the book suggests, is critical of it. He sees states' rights federalism as having played, in many cases, a tragic role in American history, largely due to its association with numerous anti-liberal, anti-democratic, and pernicious causes, including slavery and, in the second half of the 19th century, institutionalized racial segregation in housing, education, voting, and even eating and drinking. States' rights federalism also served as the theoretical framework on which the 19th-century theory of nullifying federal legislation and the secession movements were based. These positions were fundamental in creating the conditions for the Civil War, which resulted in the deaths of 750,000 combatants.

Barber seeks to demonstrate that there is no historical, logical, or constitutional reason why the states' rights position should continue to figure in the debate over how federalism questions should be resolved. He also argues that, of the other two principal versions of federalism, Marshallian federalism most comports with the objective that the framers expressed in the preamble to the Constitution: to “secure the Blessings of Liberty to ourselves and our Posterity.”

Barber begins by framing the basic federalism question, which, he believes, has been misstated frequently in American constitutional history. He explains that the federalism debate is about specific kinds of limits on the national government, namely “whether the national government should conceive its end narrowly, to minimize conflict with the states,” and “whether the powers of the states constitute limits on the means available to

the nation when it is pursuing its authorized aims.” Barber points out that the common understanding of how judges approach these questions is that they reason from a historical understanding of whether the states or the federal government have been allocated the relevant authority. Under this model, courts engage in “drawing the line between the powers of the nation and of the states—drawing the line to maintain ‘the federal balance’ intended by the founding fathers.” But this approach is a mistake, according to Barber, because the Constitution allocates powers exclusively to the federal government. It reserves other powers to the states, but without naming these powers. Hence, a judge facing a federalism question should not analyze whether, for example, the power to regulate, say, interstate commerce or education, has been allocated to the federal government or to the states (although, according to Barber, this is precisely what a majority of the present Supreme Court justices do). Instead, the judge should review whether Congress, in passing the legislation at issue, acted within the boundaries of its constitutional authority. The difference is a big one, Barber claims.

With this background, Barber reviews in great detail the three federalism models. He begins with the traditional states' rights position. In this model, a judge presented with a federalism question must initially determine whether legislating in the subject area involved in the litigation has historically been left to the states or to the federal government. A states' rights advocate views the United States as having been founded by a compact between the people of each state, acting through their respective state governments. By this compact, the people created



the federal government “to govern specific areas of social practice that the separate sovereigns [felt] they cannot govern successfully or efficiently on their own,” including foreign affairs, relations with Native American groups, interstate trade, and immigration. From the time this country was founded, states’ rights advocates have consistently held that this “dual sovereignty” model creates a means to check the national government’s power—to prevent it from overreaching and “encroaching on the prerogatives of the states.”

Proponents of states’ rights federalism have included numerous important historical figures, judges among them. For example, both Madison and Jefferson indicated broad support for states’ rights solutions to issues facing the new country. Subsequently, in the 19th century, the leading proponent of the states’ rights position was John C. Calhoun, who asserted that the Kentucky and Virginia Resolutions of 1798, drafted by Jefferson and Madison, respectively, formed the basis for the “compact” or “dual sovereignty” model of states’ rights federalism. Calhoun also forcefully argued that the dual sovereignty model vested the states with the authority to nullify federal legislation as well as court decisions that the states believed were ultra vires. This aspect of the states’ rights position had widespread popular support in the antebellum South, but it was also urged on the country much more recently—for example, as a basis to nullify the public school desegregation mandate of *Brown v. Board of Education*—and it has continued to attract adherents into the present century. Barber also explores at some length the views of William Rehnquist, who, while an associate justice, “launched his states’ rights campaign in *National League of Cities v. Usery* (1976),” and who, as chief justice, led a “dramatic if limited return to states’ rights” jurisprudence.

Barber next reviews Marshallian federalism, which was advocated by Alexander Hamilton, Daniel Webster, Harlan Fiske Stone, William Brennan, and numerous legal scholars. Under this model, a judge asks “whether Congress is doing the kind of thing the Constitution authorizes.” If it is, then the judge considers “whether the Constitution prohibits the particular measure in question.” In *McCulloch v. Maryland*, Marshall rejected the “compact” or “dual sovereign” federalism model, and concluded that the American people had adopted and ratified the Constitution as a national charter and as the “supreme” and governing law of the country. The Marshallian

model therefore presumes that the federal government is empowered by the Constitution to encroach on powers that the states have historically believed were reserved to them. Indeed, as Barber makes clear, Marshallian federalism ignores the question of whether powers are reserved to the states, and presumes that Congress may take action even in areas where there is no express authorization to be found in the Constitution. This does not mean, of course, that the authority of the federal government is unlimited. Marshall stated instead that “the powers of the government are limited, and ... its limits are not to be transcended.” The limit that Marshall had in mind was the prohibition on Congress’s enacting legislation with an “end” or objective that was not constitutionally authorized. If Congress enacted a statute with such an end, then the federal courts could strike it down.

Barber states that Marshallian federalism further limits “national power by a rule against pretexts.” For example, Congress “cannot tell reviewing courts that it is regulating commerce” when it is in fact “combating morally, ideologically, or culturally controversial practices like partial-birth abortions, racial discrimination, and anti-war protests. This rule against pretexts implies a state’s right: a right against pretexts. This one state’s right is Marshall’s replacement for dual federalism’s indefinite number of subject-matter rights.”

Barber points out that there have been numerous instances in U.S. history in which Congress acted pretextually, and therefore without constitutional authority. Among them were the pretextual Commerce Clause justifications asserted by congressional proponents of the Mann Act, formerly known as the “White-Slave Traffic Act,” which originally criminalized the interstate or foreign transportation of women for purposes of prostitution, “debauchery,” or “any other immoral purpose,” and the Partial-Birth Abortion Ban Act, which criminalized a late-term abortion procedure on the basis of a political phrase (“partial-birth abortion”) that has questionable, if any, meaning in the medical community. In Barber’s view, the transparent pretext underlying the development and passage of each of these statutes would properly have permitted a court to nullify them.

Finally, Barber analyzes “process” federalism, which has its roots in the Supremacy Clause, the “general Welfare” clause of Article I, § 8, and certain sections of *The Federalist* but emerged only in the late 20th century as a variation on the Marshallian model. Under

the process model, the leading proponents of which have been Justice Harry Blackmun and legal scholars Herbert Wechsler, John Hart Ely, and Jesse Choper, a judge considering how to rule on a federalism question focuses on the process by which the legislation in question was enacted. The judge asks whether the federal legislation that is claimed to unconstitutionally pre-empt state prerogatives was enacted by a process under which the state, through its elected representatives in Congress, was afforded the opportunity to participate. This is the critical question because process federalism assumes, according to Barber, that “a state’s congressional delegation ... represents the state’s true interests better than the state’s government does.”

Accordingly, in considering federalism questions, the process model requires that the judge not consider any “states’ rights claims about the scope of national power,” but instead address exclusively the question of whether the state was represented in a manner consistent with constitutional requirements in the process of debating, considering, and adopting the federal legislation. Because states’ interests ordinarily are represented in that process, judges should ordinarily uphold federal legislation against federalism challenges. As Barber states, under process federalism, “Congress can do what it wants vis-à-vis the states, regardless of the substantive ends pursued.”

There are clearly major differences between these three ways of considering federalism questions. For one, the states’ rights position assumes significant limits on the assertion of national authority by the federal government, whereas the Marshallian and process federalism models negate the fundamental states’ rights assertion that the powers reserved to the states limit the powers of the federal government. The Marshallian and process federalism models also suggest that Congress has broad authority to act on a national scale and pre-empt state action, even where the Constitution does not specifically delegate authority to Congress. Unlike process federalism, however, the states’ rights model shares with Marshallian federalism a presumption that federal authority is limited. In the Marshallian model, Congress is permitted to legislate in a manner that pre-empts the states only where the federal statute’s passage was undertaken by Congress in good faith and not as a pretext for avoiding a claim that the legislation was enacted without constitutional authority. A judge adhering to pro-

cess federalism, by contrast, does not inquire into congressional motivations or potential pretexts, but simply asks whether the states' interests in the relevant subject matter area were appropriately represented through the process of considering and enacting the federal legislation at issue.

The significant differences among these models are evident in almost 200 years of reported cases. Beyond *McCulloch*, Barber discusses a number of decisions that illustrate the profoundly different outcomes that result from the application of these different versions of federalism. He begins the book with a contemporary assertion of states' rights federalism, *Florida v. Department of Health and Human Services*, 2011 WL 285683 (N.D. Fla.), which was one of the cases challenging the Patient Protection and Affordable Care Act that later went to the Supreme Court. In sustaining the challenge, the judge held that the statute's "individual mandate," which requires most individuals to purchase insurance to support the creation of an adequate risk pool for insurance companies to extend health care coverage to all, was not consistent with "our federalist system" of "dual sovereignty." As Barber points out, in reaching this conclusion, the judge ignored any question regarding whether the statute was an appropriate response by the federal legislature to a perceived national problem (in fact, the judge acknowledged that the lack of adequate health care coverage for approximately 40 million fellow citizens is a serious issue for the country). Instead, the judge emphasized that the individual mandate violated the states' "sovereign" rights to regulate the insurance markets.

Barber also reviews the important states' rights conclusion reached in *National League of Cities v. Usery* (1976), which was later overturned by *Garcia v. San Antonio Metropolitan Transit Authority* (1986). In *Usery*, the Supreme Court, in a decision written by Justice Rehnquist, held that Congress violated the Tenth Amendment by amending the Fair Labor Standards Act to subject state and local governments to minimum wage and overtime pay requirements. The Rehnquist majority conceded that Congress, under the Commerce Clause, had the authority to require that employees be paid a minimum wage and receive other protections. But the statute violated the Tenth Amendment, in their view, because it pre-empted certain functions that states have traditionally regulated, including the authority to deter-

mine minimum wages to be paid to state employees. Further, that pre-emption, if permitted, would "disable" the states from "functioning effectively" in "their capacities as sovereign governments." This conclusion naturally followed, according to Justice Rehnquist, from the "dual-sovereign" nature of the U.S. system of government, and from the fact that the affected states' rights were "akin to" individual rights (that is, those in the Bill of Rights), which act as limitations on federal government authority. To reach a different conclusion, the majority believed, would emasculate the states' rights historically recognized and protected in America's "dual sovereign" system.

Garcia is the leading process federalism case, and, according to Barber, resulted in the "formal adoption" of process federalism. Like *Usery*, *Garcia* concerned the application of federal minimum wage and other federal protections to state and local government employees. Writing for the majority in upholding the statute and overturning *Usery*, Justice Blackmun stated that judges should not "attempt to draw the boundaries of state regulatory immunity" by analyzing whether the legislation under review relates to "traditional [state] governmental functions." That approach "is not only unworkable but is also inconsistent with established principles of federalism," including the "very principles" on which the Rehnquist majority supposedly based its holding in *Usery*. Instead, the *Garcia* majority concluded, the appropriate means to assess whether the statute transgressed any limits on congressional authority was to determine whether, in the process of debating, considering, and enacting the legislation at issue, Congress ignored or violated the "procedural safeguards inherent in the structure of the federal system."

In focusing on states' rights federalism, Barber asks the basic question, "What's so good about states' rights?" He unambiguously replies that the states' rights model of "dual sovereignty" is not a legitimate way to think about American federalism. In fact, states' rights federalism is "indefensible," "impossible to defend," has "no intellectual merits," is "a bogus constitutional concept," "serves no national end," and underlying the views of perhaps its greatest proponent—John C. Calhoun—is "a false theory of the union." Barber also observes, with a hint of wistfulness, that if "common sense governed constitutional debate, Marshallian

federalists and process federalists would be the only contestants in the arena."

The states' rights position, Barber writes, is ultimately unpersuasive because of its many fallacies, one of which is that the mixed historical record is insufficient to support the compact theory. In Barber's view, there is limited, if any, concrete evidence that the framers had such a theory in mind when drafting and negotiating the Constitution. Rather, it fell to Calhoun, in the generation following that of the framers, to advocate for an interpretation of events and public statements at the founding to support the argument in favor of the "dual sovereignty" model. But, if the historical record that supports the theory is based exclusively on Calhoun's writings, then the theory is simply false.

The vitality of the states' rights position is also undermined by the failures of its prominent supporters to advocate for it consistently. Indeed, Barber pointedly observes that "no major figure of American political history has consistently supported states' rights or dual federalism," including Jefferson, Madison, and Calhoun, each of whom pushed a states' rights position relative to particular issues, but supported a strong national government on other issues. Jefferson's decision to push for and complete the Louisiana Purchase is one "heralded example," Barber remarks. Even Calhoun was not above ignoring the "dual sovereign" argument and asserting that the "national government had an affirmative duty to protect" slavery. Calhoun argued, for example, that "a sovereign state" could not bring an anti-slavery resolution to Congress, and he claimed that the national government—and not the governments of the separate states—had a duty to take appropriate action, such as closing the postal system to abolitionist literature and asserting "its powers over foreign and domestic commerce," to support the continuation of slavery in states that authorized it. Further, Calhoun believed that the supposedly sovereign states were not free to determine whether to support or undermine slavery within their own borders, but instead were obligated to "suppress abolitionist activities within their borders and cooperate in returning fugitive slaves." Barber also notes that, when Calhoun was a member of Congress, he took an expansive view of national power, supporting the imposition of protective tariffs and the chartering of a national bank. Barber believes that the failure of these outspoken proponents of states' rights federalism to adhere consistently to that posi-

tion underscores the lack of legal, moral, and philosophical support for that model.

Instead of the “indefensible” states’ rights model, Barber concludes that Marshallian federalism best captures the framers’ view of “the kind of country the U.S. was intended to be.” Barber states that the majority of the framers, including Madison and Hamilton, intended to create the conditions in which certain “benefits and virtues”—including a “good government” and “a good way of life”—would be advanced. The optimal means for creating and sustaining these conditions would be what Barber calls a “Large Commercial Republic”—an “urban-industrial order committed to property, growth, and liberal values like toleration and equal opportunity,” and in which “personal virtues (like personal responsibility, honesty, religious moderation, and racial indifference)” predominate. But the “ultimate end” of the Large Commercial Republic, its animating ideal, is a “secular public reasonableness,” an ethos that presumes “manageable if not more-or-less peaceful international and domestic environments,” “levels of technology that permit life without predation and exploitation at home and abroad,” and “a measure of autonomy for human thought from the commands of forces like God, History, and The Market.” Citizens of such a state would “value security and prosperity over racial, religious, and ideological purity,” and “favor eyewitness testimony over hearsay and therewith science over tradition. ...” At the same time, “a politics of secular public reasonableness entails many restraints on [governmental] power; it excludes appeals to racist, sexist, and other antiliberal values. ...” Threats to the Large Commercial Republic arise from “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.”

In Barber’s view, the Large Commercial Republic can be brought about only by Marshallian federalism. States’ rights federalism focuses on the local and parochial. By its advocates’ definition, it “play[s] no role in the pursuit of national ends” and cannot advance the “general Welfare” necessary to inspire a secular public reasonableness necessary for a Large Commercial Republic. In fact, as the historical record demonstrates, the states’ rights model would allow the creation of antiliberal positions on any number of important

issues in states where a majority favored those positions. States’ rights advocates will inevitably appeal to racist, sexist, and nonscientific positions against the “general Welfare” and ultimately react with hostility to the creation of a Large Commercial Republic. As between process federalism and Marshallian federalism, only the latter contains an overt limit on congressional overreaching, which it does by endorsing judicial nullification of federal legislation enacted with pretextual objectives.

In the end, states’ rights federalists “need an argument”: They must be able to “show some good that would result to the nation from viewing the founding their way,” and why “the typical American would be better off seeing herself as a citizen of one state, not as a citizen of the United States.” Barber expounds in immense detail the legal, philosophical, and moral reasons why states’ rights advocates cannot satisfy this standard. Nonetheless, Barber understands that a traditional states’ rights position will continue to be represented in the national debate about the nature and scope of federal authority to make policy affecting the states. He acknowledges that the “mixed” and “ambiguous historical record” provides supporters with reasonably grounded arguments for believing that at least some of the framers supported some type of the states’ rights position espoused by Calhoun and others before and after the Civil War. Barber also opines that advocates of the states’ rights model will continue to draw strength from the current composition of the Supreme Court, the anti-government mood in the country, the “increasingly doctrinaire character” of American politicians, and the public’s “purposelessness” and general disinterest in self-reflection and self-criticism.

Barber is concerned that the continued vigor of states’ rights federalism will have adverse effects for the United States. Principally, the states’ rights model in its current form will continue to be a substantial impediment to an honest national conversation, grounded in scientific truth and devoid of appeals for divine guidance, regarding how best to address the many challenges facing the nation, such as the threat of climate change, the growing inequality of wealth, and the status of more than 10 million illegal immigrants in the United States. The complexity of these issues precludes the development of reasonable national solutions on a state-by-state level.

Barber closes with a prediction regarding how states’ rights federalism will continue to

change, as it has since the 19th century. It will change because of the rise of a “global oligarchy”—those businesses that operate on a global scale, beyond the control or regulation of any single state government. These actors, which Barber refers to as “first possessors,” will seek to obtain the most favorable business conditions in each jurisdiction in which they operate. A state government dominated by adherents of a parochial and partisan states’ rights perspective will not be able to regulate effectively a first possessor that seeks to expand its commercial advantages in the local market, including, in particular, at the expense of local third parties who seek to enter that market. Indeed, first possessors will be expected to support the most parochial arguments in favor of those state legislators espousing states’ rights positions, if that support results in first possessors’ retaining and expanding their commercial and financial interests by “subordinating government—state and national—to ... the Global Market.” This usurpation of the states’ rights position for purposes of advancing the interests of first possessors will result in their accumulation of even more power, and, in the end, in rule by a “monied elite”—an oligarchy, which is a form of government that Jefferson and other anti-Federalists specifically sought to prevent. In Barber’s view, when this end state is achieved, the domestic population “will finally lose what little remains of its capacity for rational self-examination and meaningful constitutional reform.” The abundant evidence of the public’s apathy toward and ignorance of important public issues, the stunning scope of influence that large corporate interests have already achieved at the state and federal levels in drafting legislation and in influencing the government to look the other way in the face of significant violations of the law, and the extent to which both major political parties have been captured by those who represent first possessors, compel one to conclude that Barber’s prediction is correct. ☉

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DUTY: MEMOIRS OF A SECRETARY AT WAR

BY ROBERT M. GATES

Alfred A. Knopf, New York, NY, 2014. 621 pages, \$35.00.

Reviewed by John C. Holmes

After serving for 26 years in the National Security Council and the Central Intelligence Agency, including as director of the latter under President George H.W. Bush, Robert M. Gates was proud of his part in what he called the “glorious crusade” of ending Soviet communism. In 2002, he became president of Texas A&M University, and he was feeling happy and fulfilled in that role. Then, in October 2006, President George W. Bush asked him to become secretary of defense, and Gates could not refuse. Nor could he refuse President Barack Obama’s request that he continue in the position. His new book, *Duty: Memoirs of a Secretary at War*, describes in agonizing detail the frustrations, bureaucratic delays, bungling and infighting, and logistical hurdles he endured during his four and a half years as secretary of defense, in a cause whose goals were far murkier than those of the Cold War had been.

Gates expresses extreme displeasure with having continually been compelled to testify before congressional committees, and contempt and disdain for many members of Congress whom he believed would rather badger witnesses and pronounce their own (often poorly informed) opinions than attempt to find real solutions to real problems. Reluctant to criticize others by name, Gates nevertheless mentions Sen. Harry Reid and Rep. Nancy Pelosi as self-centered and egotistical, more interested in posturing and obtaining rewards for their constituents than in their national responsibilities. He found Vice President Joe Biden “impossible to dislike” but disagreed with nearly every foreign policy opinion of Biden’s over the past four decades.

Gates dedicates the book to “the men and women of the United States Armed Forces.” Indeed, he often states that these dedicated men and women were the main reason for his continuing on as secretary, and that their performances were one of the few pleasures of his job. He frequently visited them at the front lines in Iraq and Afghanistan, usually unannounced, in an effort to observe the wars’ effectiveness and to raise morale. Observing, as he often did, the wounded and the coffins of those who had died in action caused him invariably to choke up; in fact, he feared

that his decision-making capability might be compromised by his personal concern for the personnel in harm’s way.

Gates is frank in his portrayals of Washington policymakers. He was somewhat more attuned to President Bush than to President Obama and more comfortable with Bush’s appointees. Nevertheless, contrary to some reports, he found Hillary Clinton competent and straightforward, and he agreed with the large majority of her opinions. Gates found President Obama thoughtful, open-minded, and resolute, and he found Obama’s Department of Defense appointees intelligent, hardworking, and loyal, though lacking in real-world experience. “Because of the difference in our ages and careers, we had very different frames of reference. My formative experiences had been the ... rivalry with the Soviet Union. ... Theirs had been America’s unrivaled supremacy in the 1990s, the attacks on September 11, and the wars in Iraq and Afghanistan. Bipartisanship in national security was central to my experience but not to theirs.”

Gates is also candid in his assessments of budgetary decisions and military actions. Although he proudly enumerates the many over-budget expenditures he obtained from Congress during his tenure with the Department of Defense to assist the military in such matters as newer weapons and higher salaries, he now urges savings. In February and March 2009, Gates chaired more than 40 meetings to consider which programs should receive more money and which should be eliminated.

In *Duty*, he discusses the political aspects, both domestic and foreign, of modern warfare. As secretary of defense, he urged that America realign its priorities in dealing with new realities of warfare, from those appropri-

ate for nuclear diplomacy during the Cold War to those appropriate to military engagement with rogue nations and guerilla actions we face today.

Gates believes that both the Bush and Obama administrations appointed some generals for political reasons. He also writes that it was at his urging that President Obama appointed Leon Panetta as Gates’ successor. Obama had previously not considered Panetta, who has recently written his own book, *Worthy Fights*, which criticizes the Obama administration’s foreign policy.

In *Duty*’s final chapter, “Reflections,” Gates notes that Afghanistan is the longest war in our nation’s history, yet victory has seldom been mentioned or sought. Gates approved of the surges in Iraq and Afghanistan that probably prevented outright defeat. Yet he also approved of Obama’s announced deadline on the removal of troops from these countries, as these wars became increasingly unpopular. Gates laments the endless conflicts, posturing, and blame games in politics, which he faults the press for promoting. Even generals too often let their strategic military and other opinions, sometimes in conflict with other generals’ or the president’s, be aired to an encouraging press.

Gates also assesses his own stewardship as secretary of defense: what he accomplished and what he could have done better. By choosing the title *Duty*, Gates implies that his decision to serve as secretary of defense was reluctant and stemmed from patriotism rather than from a desire for personal glory or ambition.

John C. Holmes was an administrative law judge (ALJ) with the U.S. Department of Labor for more than 25 years, and he retired as chief ALJ at the Department of Interior in 2004. He currently works part time as an arbitrator and consultant; enjoys golf, travel, and bridge; and can be reached at jholmesalj@aol.com.

ADDITIONAL BOOK REVIEW

In addition to the book reviews in the paper copy of this issue of *The Federal Lawyer*, a bonus review is included in the online version of the magazine. The following review is available at www.fedbar.org/magazine. ©

EICHMANN BEFORE JERUSALEM: THE UNEXAMINED LIFE OF A MASS MURDERER

BY BETTINA STANGNETH (TRANSLATED FROM THE GERMAN BY RUTH MARTIN)

Reviewed by Christopher C. Faille

