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Book Review: Federalism: The Founders' Design. by Raoul Berger.

Donald O. Dewey

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government. As this example demonstrates, construction of a coherent, useful, grand theory is possible.

3. *Is Construction of an Uncontroversial Grand Theory Possible?*

Here the answer must be no. Any grand theory will reflect fundamental premises about the proper role of government and the appropriate function of courts. These premises are likely to be controversial; moreover, as premises, they are not susceptible to logical proof. Therefore, the grand theories generated by the premises will inevitably be controversial as well.

Here again, the minimal representation theory provides an instructive example. The theory rests on two premises. First, that effectuating the decisions of a properly chosen legislature is invariably of paramount importance to the legal system. And second, that even in the absence of an explicit constitutional mandate, the courts are the appropriate agency to police the legislative selection process. Nearly everyone rejects the first premise; some, including most originalists, disagree with the second. Thus we would all reject the minimal representation theory. Because our reasons involve basic premises, however, none of us would be demonstrably either right or wrong in doing so.

* * * *

Although Tushnet fails in his effort to totally discredit the search for grand theories of constitutional law, his analysis contains important lessons for those who would construct such theories. Grand theorists must be more precise, both in specifying their premises and describing the content of the theories themselves. Such precision will not end the debate over the theories; it will, however, at least make clear what the debate is about.

FEDERALISM: THE FOUNDERS' DESIGN. By Raoul Berger.¹ Norman, Oklahoma: University of Oklahoma Press. 1987. Pp. viii, 223. \$16.95.

*Donald O. Dewey*²

Professor Raoul Berger says he came reluctantly to his advocacy of states' rights. He was somewhat embarrassed by the company he had to keep, for he had long associated the doctrine with

1. Professor of Law Emeritus, Harvard University.

2. Dean of Natural and Social Sciences, Professor of History, California State University, Los Angeles.

“Southern condonation of lynchings, with official oppression of blacks, and with demagogues who duped their constituents.”

Once he took the plunge, however, he landed on his feet, running, and forged to the forefront among the states’ righters. *Federalism: The Founders’ Design* is a convenient little handbook for those who defend states’ rights, whether on the political platform, in the classroom, or in the courtroom. Professor Berger presents his case in 201 pages of text, with 854 footnotes. The book is so thoroughly annotated that a fourth of its pages contain more footnotes than text. The first six chapters are tightly organized and march relentlessly and quite impressively forward. The last three chapters are quite another matter, as I will try to show.

“Dual Federalism” would have been a fitting title for Berger’s book, if he had been willing to show his hand at the outset. In the same vein, his subtitle, “The Founders’ Design,” could profitably have replaced “Introduction” as a heading for Chapter One. He argues there that the wishes of the Founding Fathers—the writers and ratifiers and, to a lesser extent, their contemporaries—should prevail. Indeed, “it is established learning that what the Constitution meant when it left the hands of the Founders it means today.” Characteristically, he berates the “unelected, unaccountable, and virtually irremovable” Supreme Court for usurping power from the people by changing federalism to limit the states’ authority.

Berger argues convincingly that the states were sovereign and independent prior to the establishment of the Union. He neglects to mention that this deprives Abraham Lincoln of his basic argument against the constitutionality of secession. Ironically, the only references to Lincoln show him as an advocate of state sovereignty, a sterling example of what can be achieved by selective quotation. Having established that the states were not created by the nation, Berger next argues for dual sovereignty, a term not often heard these days. National supremacy, he argues, means only that the central government is supreme within its “limited and defined sphere.”

Berger devotes several chapters to specific sections of the Constitution, reclaiming the tenth amendment from what he regards as an unjustifiably dusty shelf, and reining in the rampant fourteenth amendment, the necessary and proper, the supreme law, the general welfare, and, especially, the commerce clauses. He even attempts to demonstrate that John Marshall’s *McCulloch v. Maryland* decision and Alexander Hamilton’s national bank message of 1791 did not extend national powers, but merely sought appropriate means to implement delegated powers.

Having contrived to place Marshall on the side of the states' rights angels, Berger yanks him back when he comes to the commerce clause. Because *Gibbons v. Ogden* "long has cast a shadow over exposition of the commerce clause," Berger holds Marshall largely responsible for opening the door to national interference with state prerogatives, especially concerning moral issues.

If Berger had been content to stop there, he would have had a tightly argued little book (or at least booklet) which would be accepted as gospel by the "originalists" and as a large burr under the saddle of the "revisionists." Instead he proceeds with chapters which are as extraneous as they are contentious. One is a six-page summary of what he has written elsewhere on the fourteenth amendment. He does not repeat there his concession in *Government by Judiciary* that it would be "utterly impossible to undo the past." Next is a vigorous protest against the Supreme Court's ruling in *Garcia v. San Antonio Metropolitan Transit Authority* (1985) that municipal transportation becomes a federal concern by virtue of the commerce clause. This chapter appears to be a "This is the last straw!" addition to a book that was already written; it is one of the few places where a significant number of recent citations occurs, and earlier in the book he referred to 1983 decisions as occurring "the day before yesterday."

The conclusion and the appendix on original intention continue the debate with reviewers who were critical of his earlier writings. He expresses contempt for academicians who are so eager to right social wrongs that they encourage the judiciary to become, in effect, a constitutional convention by ignoring the wishes of the ratification conventions of 1788.

Berger's bibliography is surprisingly dated. Even though some of the vintage histories he uses are timeless, a lot of good history has been written, with new interpretations, since his sources were published. More disturbing is his reliance on early editions of documents which have been partially supplanted by definitive publications in the last two decades. Although *The Papers of James Madison* (William T. Hutchinson *et al.*, eds.) and *The Documentary History of the Ratification of the Constitution* (Merrill Jensen *et al.*, eds.) are not yet completed, they cover much of the ground important to Berger's thesis and they cover it much better than his sources, a 1900-1910 edition of Madison's *Writings* and Jonathan Elliot's 1836 *Debates* of the ratification conventions. Each volume in *The Documentary History of the Ratification of the Constitution* published to date has at least a full column of index citations on the state-nation relationship, and Volume I (1976) has two-and-one half

pages! Berger is, himself, the most frequently cited author in his bibliography, even without counting the citations to five reviewers of his books.

AMERICAN CONSTITUTIONAL LAW (2d ed.). By Laurence M. Tribe.¹ Mineola, New York: Foundation Press. 1988. P.p. 1778. \$38.95.

*Stanley C. Brubaker*²

In their response to the Supreme Court nomination of Robert Bork, the leading lights of the legal academy gave proof, if such were needed, that constitutional jurisprudence in America has been transformed. Of all the so called "extremist" positions for which Bork was pilloried before the Senate Judiciary Committee, not one lacked support from a liberal giant of yesterday, such as Herbert Wechsler, Hugo Black, or Bork's own mentor, Alexander Bickel. Yet at Bork's nomination hearings last fall, the legal academy passionately and overwhelmingly opposed him. Leading the charge was Laurence Tribe, Tyler Professor of Constitutional Law at Harvard Law School.

Contemplating Professor Tribe's career, former Harvard Dean Erwin Griswold doubted if any legal scholar off the Court "has ever had a greater influence on the development of American constitutional law." Perhaps an overstatement, but at forty-seven years of age, Tribe has compiled an impressive record. He has written or edited a dozen books and scores of influential articles; a leading casebook in constitutional law cites his commentaries nearly fifty times (more than twice the number for Bickel).³ He has won nine of the twelve cases he has argued before the Supreme Court. He has smooth relations with the media, and is their most frequently quoted source on constitutional questions. And he has close ties to liberal politicians, including some presidential aspirants.

With his scholarly credentials, press relations, and political connections, Tribe weighed in heavily against the Bork nomination. He devised legal arguments for Democrats on the Judiciary Committee, rehearsed them in marathon sessions with Chairman Joseph

1. Tyler Professor of Constitutional Law, Harvard University.

2. Associate Professor of Political Science, Colgate University. This review is adapted from "Rewriting the Constitution," originally published in *Commentary* magazine, Dec. 1988, p. 36.

3. G. STONE, L. SEIDMAN, C. SUNSTEIN, and M. TUSHNET, *CONSTITUTIONAL LAW* (1986).