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Professed Values, Constructive Interpretation, and Political History: Comments on Sotirios Barber, *The Fallacies of States' Rights*

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PROFESSED VALUES, CONSTRUCTIVE INTERPRETATION, AND POLITICAL HISTORY: COMMENTS ON SOTIRIOS BARBER, *THE FALLACIES OF STATES' RIGHTS*

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Our barely functioning Congress seems to embody the issues that this conference on constitutional dysfunction is meant to address. At this moment, however, congressional disarray may result less from institutional design than from our lasting heritage of white supremacy. Republican control of the House owes much to the party's Southern Strategy, which has exploited widespread dissatisfaction with the Democrats' official renunciation of racial stratification. That challenge to the American Way is exacerbated by the idea, outrageous to some, of a black President. That context has some bearing on this Symposium's topic of federalism. For, as Professor Larry Yackle reminds us, "states' rights" have most significantly been invoked in order to defend the Old South's brutally oppressive and exploitative system of racial subordination.[1] I return to this topic.

Professor Barber argues that the federal government has overriding authority to promote the values that are cited in the Constitution's Preamble, the most important of which, for our purposes, include justice, the general welfare, and liberty.[2] I call these the prime values. Professor Barber challenges an understanding of the Constitution that limits federal authority on the basis of states' rights. Barber acknowledges that the federal government can abuse its authority by acting under the pretext of serving prime values. That is, indeed, a significant facet of our history. In the supposed service of the common

[*] Law Alumni Scholar, Professor of Law, Boston University School of Law. This is a slightly revised version of remarks delivered on November 16, 2013 at a panel for the Boston University School of Law Symposium, America's Political Dysfunction: Constitutional Connections, Causes, and Cures, 94 B.U. L. REV. 575 (2014).

[1] *See* Larry Yackle, *Competitive Federalism: Five Clarifying Questions*, 94 B.U. L. REV. 1403, 1403 (2014) (analyzing "the South's resistance to racial equality" in the language of states' rights).

[2] *See* SOTIRIOS A. BARBER, THE FALLACIES OF STATES' RIGHTS 5 (2013) (arguing that national powers to promote the Constitution's ends override states' powers).

defense, for example, the United States has many scores of times invaded other countries and has occupied some of them for long periods of time.[3]

Barber's argument is to be welcomed because, unlike many writings on the Constitution, it reveals its interpretative assumptions. Barber has a general view about legal interpretation that he wishes to apply to the Constitution. A discussion of his argument and his interpretative theory is timely because it shows the relevance of the issue to which I have alluded (and which has hardly been noted in this Symposium) – the fact that, since its beginnings, the United States has been what some have aptly termed a white dictatorship.

A discussion of Professor Barber's use of his interpretative theory is complicated, however, because he does not discuss that theory in his book debunking states' rights (the book that is under consideration here). Instead, he refers us to a book on constitutional interpretation that he coauthored with Professor Fleming.[4] In that work they endorsed a "philosophic approach," which, as they note, is "close to" Ronald Dworkin's theory renamed.[5] Dworkin's theory holds that we should interpret a body of law so that its application serves a set of moral principles that provide that body of law's best possible justification (so far as justification is possible).[6] Barber and Fleming say, however, that we should interpret the constitutional text so as "to realize our constitutional commitments"[7] in order "to make the best of a legal document established by nonphilosophers to meet their needs as they understood them and as their posterity continue to understand them."[8] Both theories interpret law in a favorable light but, as stated, they do so on different grounds. Barber and Fleming's interpretative theory takes into account, for example, only the constitutional text, whereas Dworkin's theory considers all authoritative decisions, including constitutional case law. Further, Dworkin makes no reference to the motivations of those who made the decisions, which Barber and Fleming's theory seems to do (for example, compare Dworkin's language to Barber and Fleming's, such as "to meet their needs as they understood them"). Because of those differences, I discuss interpretation under the two theories separately.

So let us consider the theory that apparently holds that "our constitutional commitments" are determined by the extent to which those who drafted the Constitution believed that it served certain of their needs (at least insofar as

[3] *See* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL32170, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2009 (2010), *archived at* http://perma.cc/4F77-WUY6 (listing instances of the use of military forces abroad).

[4] BARBER, *supra* note 2, at 7 n.5 (referring readers to an earlier book that Barber coauthored with Professor James Fleming (citing SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION (2007))).

[5] BARBER & FLEMING, *supra* note 4, at xiii ("What we're calling the philosophic approach is close to what Ronald Dworkin calls the 'moral reading' of the Constitution.").

[6] RONALD DWORKIN, LAW'S EMPIRE 52 (1986).

[7] BARBER & FLEMING, *supra* note 4, at xiii.

[8] *Id.* at 189.

"their posterity continue to understand them"). This criterion of constitutional meaning is ambiguous in several ways, but for our purposes it is unnecessary to sort out all of those possibilities. Suffice it to say, first, that few if any of us have knowingly signed on to any commitments made by the drafters of the Constitution, so it is unclear how any such commitments could bind us here and now.

Second, those who can truly be said to have "established" the Constitution originally were a small subset of the U.S. population at the time. This subset was comprised mainly, if not entirely, of relatively affluent white men, who cannot plausibly be thought to have acted on behalf of the majority of Americans. The majority, after all, was comprised of women, blacks (including slaves), and Native Americans, whose interests the Framers apparently did not consider. It is similarly a small subset of the U.S. population that has been principally responsible for maintaining the Constitution since the Founding Era. So we cannot reasonably regard those who established and have maintained the Constitution as a democratically representative set of individuals. On the contrary. We have even less reason to believe they are capable of making commitments that are binding on others.

Even more importantly, however, it is difficult to regard the original Constitution, with its provisions supporting chattel slavery,[9] as containing genuine commitments to justice, liberty, and the general welfare (or to any one of them). The laws and public policies adopted by those who established and those who maintain the Constitution have, by and large, continued to neglect the interests of women and people of color, who have continued to constitute the majority of the U.S. population. For example, the Framers evidently saw among their needs cooperation with those who insisted on maintaining chattel slavery and, through this cooperation, went beyond merely tolerating slavery to actively supporting it, for example, by returning fugitive slaves.[10] It would be implausible to suggest that supporting (or even tolerating) slavery is compatible with a genuine commitment to the values that are cited in the Constitution's preamble, such as justice, liberty, and the general welfare.[11]

Following the Civil War, to be sure, those who maintained the Constitution abandoned chattel slavery.[12] Within a dozen years, however, those same people[13] came to understand their needs to include the maintenance of white

[9] *See, e.g.*, U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

[10] *Id.*

[11] *See id.* pmbl. ("We the People of the United States, in Order 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 to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."). A parallel argument could be made regarding women and Native Americans.

[12] *Id.* amend. XIII, § 1 (abolishing slavery).

[13] That is, those who maintained the system in which the Constitution is officially

supremacy. This meant creating, supporting, or tolerating Jim Crow, a system that was as close to slavery as possible (that is, as close to slavery as federal courts were understood to allow). I do not see how the creation, support, or toleration of Jim Crow can be reconciled with justice, liberty, or the general welfare.

During the Cold War, when the United States was competing with the Soviet Union for economic, political, and military ties with developing nations (most of whose citizens were people of color), those who maintained the Constitution (or the constitutional system)[14] came to understand their needs to include the official condemnation of white supremacy. But they did not then and have not since understood their needs to include either the full rectification of past injustices or the purely forward-looking promotion of equal opportunity for all American children.[15] On the contrary. Judging by federal policy, those who have maintained the Constitution in recent decades have understood their needs to include the promotion of inequality, which especially disadvantages children of working parents and children of color.

After the Civil War, Americans of color experienced a brutal campaign that effectively undermined constitutional commitments to civil rights, and since the 1970s they have been subjected to a campaign that is gradually undermining legislation meant to enforce those constitutional commitments. The Southern Strategy of the Republican Party is a constituent part of this effort.[16]

It accordingly seems implausible to suggest, as Barber does, that those who created and those who have since maintained the Constitution made genuine commitments to the values that are cited in the Preamble. Chief Justice Roger Taney appears to have more accurately characterized the commitments of the Framers and their successors. In his *Dred Scott* opinion, Chief Justice Taney argued that we cannot take the words of the Declaration of Independence or of the Constitution's Preamble at face value.[17] He argued that the true commitments of those who established and maintained the Constitution can be inferred instead from their consistent, systematic practice.[18] We know that

regarded as basic law. Can we say that they maintained the Constitution if they abided by Supreme Court decisions that undermined the Constitution by misrepresenting some of its amendments? Perhaps, if we assume they believed that those decisions soundly interpreted the Constitution.

[14] I omit this qualification hereafter.

[15] *See* DAVID LYONS, CONFRONTING INJUSTICE 77-111 (2013) (discussing institutional failings post–World War II to address racial inequality adequately).

[16] *See* JOSEPH A. AISTRUP, THE SOUTHERN STRATEGY REVISITED: REPUBLICAN TOP-DOWN ADVANCEMENT IN THE SOUTH 47 (1996) ("Reagan policies and actions represent the implementation of the Southern Strategy in the form of a conservative approach to civil rights policies designed to address the intermediate and inner color lines.").

[17] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 409-13 (1857).

[18] *Id.* at 407-10 (concluding that the Framers' conduct demonstrated that they did not intend the "rights" of the Declaration of Independence and the Constitution to extend to enslaved Africans).

some, like Thomas Jefferson and George Washington, regarded slavery as morally indefensible, but even they were committed to continuing racial subordination as public and personal policy.[19]

This means we cannot reasonably use the theory that we have been examining for the purpose of interpreting the Constitution, as it employs false assumptions about the values that are cited in the preamble. We have been given no good reason to think of justice, liberty, or the general welfare as constitutional commitments.

Professor Barber might reply that the terms that he and Professor Fleming use to elaborate upon their theory of constitutional interpretation were misleading, as the formulation we are considering does not adequately represent the more basic "philosophic approach." Fair enough. Let us then look at Dworkin's theory, to which they refer.

According to Dworkin, one must interpret a body of law in terms of values that provide the best possible justification of the authoritative decisions that have been made in the system.[20] Dworkin does not refer to commitments that are supposedly based on some persons' perceptions of their needs. Dworkin says that we should interpret the law so that our applications of past authoritative decisions respect principles that provide their best justification.

This seems promising because values such as justice, liberty, and the general welfare are capable of justifying constitutional arrangements and thus of providing a basis, under Dworkin's theory, for constitutional interpretation. We must keep in mind, however, that the theory treats interpretation as conditional upon the justifiability of the actual decisions that have been made, including constitutional case law and legislation under the Constitution. The theory looks to see whether a proper subset of those decisions can be understood, without distortion, to serve sound, or at least plausible,[21] moral principles.

This is not a purely formal condition. As I understand Dworkin, he does not mean by "justification" whatever someone offers by way of justification. The principles that are regarded as providing justification must actually do so. If we take justification seriously, as Dworkin's use of the word requires, it will be impossible to justify some officially approved social practices. I assume that this applies, for example, to chattel slavery and Jim Crow.

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[19] See, for example, DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823 (1999); and THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (Richmond, Va., J.W. Randolph rev. ed. 1853) (1785), for Jefferson's view of slavery and African Americans. He never gave up slaves or supported abolition in his time. *See* FRITZ HIRSCHFELD, GEORGE WASHINGTON AND SLAVERY (1997).

[20] DWORKIN, *supra* note 6, at 52 (calling this a "constructive" interpretation); Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV 165, 165 (1982).

[21] Dworkin's examples imply that moral justification can be given by less-than-perfect principles, but that there are limits to the kinds of principles that are capable of truly providing moral justification.

That creates an important threshold for legal interpretation. To repeat: If legal interpretation is predicated on the moral justification of what is to be interpreted, then interpretation is impossible for law that is morally indefensible.

How does this relate to federalism? The original Constitution not only permitted but supported chattel slavery. Part of the original design – part of what constitutes its federalism – was to allow the several states to decide independently whether to allow slavery. This meant, under the circumstances, that the Constitution accepted the continuation of slavery, as it was certain to be maintained in several of the states. Another part of the original design was to provide positive support for slavery, most directly by requiring all the states to hand over to slave owners all persons who were officially found to be escaped slaves – after a hearing that lacked due process.[22]

The question that then arises is whether the federalism of the original Constitution was morally justifiable. To be clear, this is not a question about political feasibility. Perhaps a more just arrangement could not have been agreed upon by the Constitutional Convention. Perhaps, if a more just Constitution had been proposed, it could not have been ratified. That is simply beside the present point. To determine moral justification by political feasibility would lead us to regard the Final Solution and the Holocaust as morally justifiable once it was agreed upon at the 1942 Wannsee Conference, because rejection of it was by then not politically feasible.

So I assume that the federalism of the original Constitution, which was friendly to slavery, was not morally justifiable. What about the federalism of the Constitution after 1865, when slavery was abolished? In judging a body of law, Dworkin considers not only the original texts, such as the Constitution as amended after the Civil War, but all the case law that it generates.[23] And one cannot help but observe that the relevant body of law was for a long time friendly to Jim Crow. I see no possibility of justifying that body of law. Under Dworkin's theory, federalism under Jim Crow was not justifiable. His theory then appears to imply that federalism under Jim Crow is not interpretable.[24]

It is arguable that federalist aspects of the Constitution became morally justifiable after enforcement of the civil rights legislation of the 1960s began in earnest. Only then did it begin to appear that the constitutional relationship

[22] In *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), the Supreme Court understood the Fugitive Slave Act of 1793 to allow summary hearings to determine whether someone held was an escaped slave. The 1850 amendments to the Act positively excluded due process by banning testimony on behalf of those who were held as escaped slaves and by offering financial incentives for hearing officers to find in favor of slaveholder claimants.

[23] *See* Dworkin, *supra* note 20, at 168 (discussing the "chain of law" judges ought to consider when interpreting law).

[24] Dworkin does not address this implication of his theory. In *Law's Empire*, he discusses what he calls "wicked law," which appears to be a legal system that the interpreter regards as fundamentally unjust, in which context he unaccountably converts his theory into something like subjective intentionalism. DWORKIN, *supra* note 6, at 101-08.

between the states and the federal government was becoming a plausible candidate for moral justification – precisely because federal law was overriding morally indefensible laws and practices in the states. One might then agree with Professor Barber and hold that federalism can today be justified insofar as it is disciplined by values that are cited in the Constitution's Preamble. This is, however, a relatively recent development, not something that seems traceable to commitments that were made for us by the Framers and their successors. On the contrary, their actual commitments, to slavery and Jim Crow, have had to be rejected.