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Book Review

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Book Review

Ellis Katz and G. Alan Tarr, eds., *Federalism and Rights*. Lanham, Maryland: University Press of America, 1995. Pp. xxiii + 208.

Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism*. Cambridge, Mass.: Harvard University Press, 1993. Pp. vii + 474.

Reviewed by Candice Hoke

Until relatively recently, many legal academicians seemed to view advocacy of a reinvigorated federalism as little more than a thinly disguised ploy for revitalizing racism or other politically regressive governmental policies. However accurate this view may once have been, it now appears more legal scholars are heeding the previously scarce voices who have been suggesting that the achievement of critical instrumental process values rests in empowered and valued state governments, and that federalism should not be forever tainted by the odious causes in whose service it has sometimes been placed.¹

Some legal scholars who previously would have confided that they found in federalism cases and theory nothing worth deep reflection may have begun to reconsider that judgment. The books reviewed here are complementary resources that will be useful to those resuming this academic and political journey. Neither book, however, directly confronts the key operational questions that currently envelop political leaders and legal minds at both the federal and state levels of government. These include, for instance, such quandaries as which powers should be allocated to the states instead of the federal government, and which held concurrently or by the federal government alone. What precise responsibilities should each level of government have on which regulatory matters? And what types of "checking" powers should each level of government have on the other's functions? Nor does either book offer a comprehensive theory of American constitutional federalism that transcends the traditional dichotomous thought-paths endemic to

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1. That is to say, a federal governmental structure permits a wide range of substantive policy ends to be achieved under its umbrella, from regressive to progressive. Federalism writ large as a political theory also coexists with a variety of ideological positions, including some that are diametrically opposed to one another. In this aspect, federalism is similar to many other theories. Natural law, for example, was invoked by Chief Justice Taney to justify *Dred Scott* and yet was also appealed to by abolitionists. Martin Luther King relied on natural law for his civil rights activities, yet Chief Justice Burger also called upon natural law to reject civil rights claims in his concurrence in *Bowers v. Hardwick*. Stanley Fish, among others, has argued that no theory entails any single line of political consequences.

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this area. Instead, each focuses on one problematic that has traditionally plagued discussions of federalism, and moves those debates forward.

Federalism and Rights

Does federalism—and especially those models by which subnational governments retain significant powers—promote or undermine individual rights? These essays confront the obstacle that troubles contemporary American legal scholars most persistently when evaluating any new calls for increased devolution of regulatory power. Notably, these essays do not merely rehearse the old certainties that have plagued the debate within American legal circles but seek to reconsider the problem using theoretical, comparative, and historical perspectives. The anthology, sponsored by Daniel Elazar's Center for the Study of Federalism at Temple University, presents a broad set of ideas that help to transcend the traditional antinomies associated with discussions of federalism. Five of the eleven contributors are lawyers, but only one, A. E. Dick Howard, is currently a professor at a U.S. law school. The others include several American political scientists, a state appellate judge, a Canadian law professor, and a European Community judge.

Elazar's lead essay, "Federalism, Diversity and Rights," establishes the anthology as a leading resource for contemporary federalism studies. An eminent political scientist, Elazar argues that modern democratic government rests upon "three pillars," namely "federalism, the protection of individual rights, and the idea of civil society" (page 1). He suggests that democracy is possible only if a nation seeks to combine and protect all three of these commitments. Elazar thus seeks to demonstrate certain inherent interconnections between robust federalism and vigorous rights protection—and to refute their disjunction. To do so, he elaborates a vision of federalism that draws its inspiration from civic republicanism.

"Federal democracy," Elazar offers, "is constitutionalized partnership and power sharing on a non-centralized basis through discussion and deliberation" (2). It does not aim for rule by simple majority, but rather seeks "to create a balancing of interests, voices and diversity in such a way that there is no permanent majority." Individuals, Elazar notes, cannot be reduced to having merely one interest, but should be recognized as belonging to shifting, divergent majorities and minority coalitions depending on the particular issue and the moment in time. Federalism's "constituent institutions . . . together share power . . . in a multicentered or noncentralized way" (2) and thus better permit each citizen to exercise some power and influence over some government policy.

Thus, Elazar contends, federalism must be recognized as a "form of democratic republicanism" that is capable of "accommodat[ing] the diversity inherent in a democracy." By contrast, the French Jacobin error lay not only in preferring simple majorities but also in organizing the state as a "power pyramid," with those occupying the top deciding "who or what is on top" and who sinks to the bottom. The pyramid model, Elazar observes, often situates the people of a state "not just on the bottom . . . but really underneath it" (2).

Parliamentary democracy commits an analogous error, he suggests, because power is concentrated in the elite center and all others are cast into the periphery. Of governmental structures, federal democracy alone entrusts the people themselves with real political power—one primary individual right. The centrality of this principle—whether the government vests citizens with real, as opposed to merely theoretical, political power—is underscored by Elazar's contention that it should function as *the* criterion by which to determine whether a government is truly a federal democracy or merely a pretender.

Elazar's essay is also noteworthy for linking federalism and individual rights with what he identifies as the third primary goal and constituent mechanism of modern democracy, that of achieving a civil society. Here, Elazar extends Adam B. Seligman's work² and contrasts a federal democracy with totalistic governments: "The idea of a civil society holds that every political-social order has to have both governmental and private spheres and that government does not have the authority to intervene in every aspect of the social order" (3). It is constituted by associations and individuals, and establishes governmental institutions by the consent of the governed. Elazar emphasizes that unless governmental power is limited from controlling the private sphere, the conclusion is a totalistic, if not totalitarian, state. Civil society, then, is necessarily composed of interdependent forces: government functions as a "framing institution" (5) within which private, public nongovernmental, and governmental activities can thrive.

Elazar does not glibly pass over the claims for other group and individual rights to be recognized and protected. But he joins those who caution against encouraging persons to identify themselves primarily according to the "primordial ties" of ethnic and religious communities. He reasons that these ties tend to foment the most bloody and intractable conflicts, ones that are capable of razing civil society. Despite some obvious glaring discontinuities, he suggests, in this nation "federalism and rights have not been in tension but have actually complemented each other in the development of a more successful, a more democratic, a more peaceful, a more just, and a more progressive civil society" (7). As evidence for his proposition, we might note that the abolitionist and then civil rights and women's movements of the past 150 years all began as private associations of citizens in smaller communities, who later successfully forged them into national movements. Federalism theory contends that citizens are more likely to consider themselves politically empowered, and to undertake activities designed to force political change, if they have both subnational governmental units, and vigorous private and nongovernmental associations, on which and through which local citizens can focus their energies for change.

We should recognize, Elazar says, that political progress toward humane ends will more likely be continued if we strengthen a sense of responsibility to the communities of which one is a part, and not just a sense of individual rights. Here, of course, Elazar weaves some important threads from commu-

2. See *The Idea of Civil Society* (New York, 1992).

nitarian writers and civic republican theorists, and can be understood as advocating a concept of situated rights. This conception argues that rights arise from and are dependent upon the health and vitality of the civil society in which one lives, rather than simply inhering in human beings. It thereby entails recognition that individual rights are vulnerable to political vicissitudes; those who value rights highly among human goods should exercise great care in maintaining the civil society in which rights may be respected and receive robust protection. In other words, social vigilance and political involvement are needed, not simply “rights talk.”

Some of these themes are echoed in other essays, but a number of authors plow significantly different ground. Dick Howard’s essay—“Does Federalism Secure or Undermine Rights?”—reviews the historical arguments raised both for and against federalism. He develops the downside potential of federalist governments, noting the “tyranny of small places” (21), the problematic justification for varying individual rights as between subnational units, and the practical difficulties that flow from the absence of uniform law governing the nation. But when the right of self-government is recognized as one key individual right, Howard argues, the balance of the argument shifts sharply in the federalist direction. Local autonomy can promote the recognition and protection of rights, rather than tyrannical majority rule, and power concentrated in a centralized government can lead to tyrannical hostility to individual rights. Howard concludes that the benefits of a federal structure of government far outweigh its risks, and he underscores the substantial risks to individual rights of having a unitary, centralized government.

Those interested in philosophical treatments of rights will find Gary Jeffrey Jacobsohn’s extended article especially worthwhile. Jacobsohn, a professor of political science at Williams College, has evaluated the work of prominent constitutional rights theorists including Michael Perry, Ronald Dworkin, and Robert Bork, focusing on their conception of the relation between individual rights (both their creation and their protection) and federalism. He contends that within virtually the entire spectrum of modern constitutional theory—including even those who have advocated enhanced subnational governmental power—runs a “a predominant, almost pervasive, inhospitability to the idea of federalism” (30). He traces this hostility to “a philosophically driven compulsion for a uniformity of rights on the one hand, and a desire to respect the integrity of diverse group experiences on the other” (31). Viewed through these lenses, the diversity of the types and vigor of rights protection permitted by our federalism appears obsolete and regressive. This conclusion has, in turn, obstructed development of a more sophisticated understanding of the integral role subnational governments can play (and have historically played) in the creation of new rights.

Jacobsohn locates strains of contemporary antifederalism (as opposed to the historical anti-Federalists, who, in today’s vernacular, would be federalists) running through an extremely wide range of constitutional theorists, including, perhaps most surprisingly, even some civic republican and communitarian writers. The analysis he presents suggests that constitutional theorists’ dismissal of any perduring values from federalism is not historically based, but is

rooted deeply in their jurisprudential commitments to rights universalism. If Jacobsohn is correct, the problem for federalism proponents is one of developing not simply a broader and more accurate historical understanding of the relationship between federalism and rights, but also a defensible jurisprudential model of rights that coexists with the diversity of legal policies encouraged by federal democracy. Only after this jurisprudential task is completed, Jacobsohn suggests, can the reflexive posture against federalism be effectively transcended.

Though this review has focused on the theoretical discussions of federalism gathered into the book's first unit, the other two parts offer worthy contributions for legal scholars. The second unit, *Federalism and Rights in the United States*, begins with a pair of articles by Jean Yarbrough and Michael P. Zuckert that take decidedly opposed positions on the conception of rights underlying the framers' Constitution, and on whether states were conceived as mechanisms for protecting rights or more feared as threats to rights. The authors also disagree on the extent the Fourteenth Amendment was designed to nationalize and universalize rights protection, and the extent the Reconstruction amendments more generally reallocated powers between state and nation. A third essay in this group, by a state court judge, Dorothy Toth Beasley, inventories the enhanced protections for rights that flow from our federal system, and contends dual protections are far superior to those offered by a unitary system. Talbot D'Alemberte ends the unit, offering a series of concrete proposals by which state governments, and particularly state judiciaries, can be strengthened in the rights-enhancing role outlined by Justice Brennan.

The book's last unit is dedicated to exploring comparative perspectives on federalism. Here its offerings are few but noteworthy. One essay, by Koen Lenaerts, a European Community judge and Belgian law professor, surveys the growth in meaningful individual rights at the federal level, and mechanisms for protections of rights, since the Community came into existence. He perceives a synergistic relationship between enhanced rights enforcement via private party litigation and augmented Community judicial powers over the conduct of individual states. The European Community's experience thus far parallels that of the United States with regard to modern enforcement of the Fourteenth Amendment.

Canada's recent constitutional experiments are explored in the final comparative article. At base, Irwin Cotler's essay—"Can the Center Hold? Federalism and Rights in Canada"—sounds a warning to other nations that might seek to provide exceptional autonomy to certain ethnic groups. Although he does not offer concrete proposals by which the crisis could have been avoided, Cotler cautions that instead of safeguarding diversity and pluralism at the national level, the singling out of certain groups such as the Quebecois and aboriginal peoples fomented more aggressive centrifugal forces that threaten the very existence of the nation and, thus, all other rights.

To Make a Nation

Samuel Beer has written a lively, opinionated intellectual history of the American approach to republican government. He seeks to demonstrate the

invalidity of Martin Diamond's conclusion that "the federalism of the framers, far from having a coherent rationale, combined two incompatible forms, one state-centered, the other nation-centered." Beer disputes Diamond's observation that, during the founding, the people "could not decide whether they were one community or many" (xi). Rather, he contends that the Constitution proceeds from a coherent logic, what Beer terms "national federalism" (137), which better preserves the people's sovereignty and rights than a unitary government (307).³ Beer submits that the internal logic of the American federal system did not emerge by accident of political compromise in 1787 but was forged in the debate spanning 800 years of primarily European philosophical discourse, with which our framers were well acquainted. He vividly recounts the clash of the great ideas concerning the proper relationship between the individual and the government that culminates in the American Constitution.

Beer's theory of American constitutional federalism is thus not based on historical analysis of the Constitutional Convention, the Reconstruction amendments, or the post-New Deal period, nor on a legal or conceptual analysis of the Constitution's allocation of powers between the two primary levels of government. He finds most apposite the conflict of ideas beginning with Aquinas and ending with *The Federalist*. He admirably stresses the relationship between federalism structures and an empowered, represented people in whom ultimate sovereignty is vested. In so doing, he undermines the validity of any view that federalism should be equated with the favoring of authoritarian governmental structures and policies.

The deficiencies of Beer's study are substantial, however, even recognizing the constraints imposed by the discipline of intellectual history. Chiefly they revolve around Beer's inability to transcend the dichotomy he perceives. The antinomies Beer surveys in his Introduction and Conclusion, which prompted the study, are familiar: national theory versus compact theory; Hamilton versus Jefferson; federal power versus "states' rights"; civil rights policies versus racism and regressive postures; FDR and Lincoln versus Jefferson Davis; Lyndon Johnson's vision of America versus Ronald Reagan's. Beer clearly identifies those advocating enhanced national power as the ones in the white hats. Those concerned with strengthening state or local governmental power, from the founding period through today, are just as clearly the bad guys. A close reading also reveals Beer's conviction that the latter are out of step with the Hegelian spirit of history and fail to recognize that human progress is ineluctably on the side of those advocating more nationalist positions. While the book does offer some arguments aimed at transcending the dichotomy between these camps, in other places Beer rehearses the antinomies of the reflexive old faith with such vigor that the book's contribution to current discourse is

3. The explication and justification of Beer's conception of "national federalism" span the entire work. A few elements are worth noting here. Popular sovereignty led to the creation of a national republic via the Constitution. Territorial allocation of certain powers to states, with retention of other powers centrally, was achieved by the Constitution. The allocations of power are superintended nationally for national purposes (e.g., 137, 215-17, 379-92).

limited. In many ways, Beer's book epitomizes the historic quandary but fails to transcend it.

Beer's choice to return to Aquinas as the baseline for reconstructing the intellectual history of American federalism may be somewhat surprising, for Aquinas articulated the theoretical rationale for obedience to monarchy. According to Aquinas, the cosmos was created and ordered into a hierarchical system within which subordinates owed, as a matter of divine providence, obedience (31–32). Inequality formed an essential aspect to the divine plan: social and natural order “can mean only the ranking of things on a scale of inequality” (34). Beer suggests that the Thomistic world envisioned “a kind of federalism from the top” whereby the chief ruler is constrained in some respects by the ultimate (divine) power, but otherwise “creates a sphere of autonomy for the subordinate and for the community that he rules” (49). Within this hierarchical tradition, both the secular and ecclesiastical governments ruled by the consent of the governed, but that “consent” derived from deference to authority, not freely chosen self-government. Thus “the task of republicanism was to convert the passive consent of deference into the active consent of self-government” (64).

The break with the authoritarian tradition, Beer asserts, owes significantly to the foundation laid by John Milton. Milton advocated liberty of conscience, not just for the hierarchically empowered but for all persons (72–73). Because each person can participate in the discovery of the truth, the individual should concomitantly play a role in deciding what is the common good. Deference to authority interferes with the open discussion and rational deliberation by which persons test and correct their tentative conclusions. The state should have the benefit of these open discussions, Milton contended, because “a wider spectrum of opinion can increase the chances of public judgment's reaching new and broader truth” (76).

After developing this baseline via Aquinas and Milton, and with some intermittent attention to actual historical events resulting in the republican revolutions of the eighteenth century, Beer devotes roughly one chapter apiece to select figures who intellectually advanced the understanding of national federalism. He extols James Harrington's proposed structure for the national republic, criticizes Montesquieu's confederate republic, and locates the Hegelian transcendence in Madison's “compound republic.”

Those familiar with the shifts over time in Madison's commitments to nationalism versus empowered subnational governments will find Beer's treatment of Madison frustrating. Beer does not even advert to the dramatic change from Madison's youthful exuberant trust in an empowered national government that would protect individual rights—his position when writing as *Publius*—to his disdain of this position barely a decade later. The Federalists' prosecutions under the Alien and Sedition Acts led Madison to be deeply suspicious of unchecked national power, and moved him to advocate vigorous dual protections of rights. This experience also led Madison, in later life, to become far more Jeffersonian than Hamiltonian in his approach to federalism as a theory and operational structure. Beer's characterization of Madison

as an unabashed centralizer and his treatment of Madison as though his thinking ended with *The Federalist* raise questions about the accuracy and fairness of his treatment of the other key figures he analyzes. In short, Beer's history too often displays a Hegelian determinist drive toward the predetermined end of Beer's theory of national federalism.

Now that renewed political and legal attention has been focused on federalism, more resources dedicated to exploring its persistent questions will likely become available. Beer's *To Make a Nation* delineates the theoretical antecedents of American constitutionalism from Aquinas to Publius, and more specifically advocates a particular conception of national republican government. *Federalism and Rights* surmounts the platitudes and antinomies that tend to characterize federalism discussions, providing diverse and sophisticated insights into the question whether federal governmental structures tend to promote or retard individual rights. Both books, speaking in decidedly different voices and relying on different disciplines, form complements for probing the origins and nature of the best structure of government that will respect humanity.