

it is important to end on this note of warning. The move from association to assembly will not achieve the goals that Inazu wants so long as property and contract rights are forced to ride in the back of the bus.

### Endnotes

- 1 357 U.S. 449 (1958).
- 2 See Russell B. Porter, *President Opens Fair as Symbol of Peace*, N.Y. TIMES, May 1, 1939, at 1, which covered five columns of the eight-column layout.
- 3 Franklin Roosevelt, President of the United States, Annual Address to Congress: The “Four Freedoms” (Jan. 6, 1941), available at <http://docs.fdrlibrary.marist.edu/od4frees.html>.
- 4 Franklin D. Roosevelt, President of the United States, State of the Union Message to Congress (Jan. 11, 1944), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=16518#axzz1oGC0rByP>.
- 5 278 U.S. 63 (1928).
- 6 130 S.Ct. 876 (2010).
- 7 468 U.S. 609 (1984).

## THE UPSIDE-DOWN CONSTITUTION

BY MICHAEL S. GREVE

*Reviewed by Robert R. Gasaway\**

*“I must study politics and war, that my sons may have liberty to study mathematics and philosophy, geography, natural history and naval architecture, navigation, commerce, and agriculture, in order to give their children a right to study painting, poetry, music, architecture, statuary, tapestry, and porcelain.”*

John Adams

### BREAKING ADAMS’ CURSE

O’ toiling lawyer, for God’s sake put down the brief. Set aside that contract. Review those documents later. And pick up or click into Michael Greve’s *The Upside-Down Constitution*—a logically rigorous, practically relevant exploration of America’s constitutional foundations, development, and discontents.

Mr. Greve’s subject is the present condition of American constitutionalism. To get at the subject, he explores the Founding’s first principles and traces their development to the present day. More specifically, the book is about constitutional logic. (By one count, some form of the word “logic” or phrase “constitutional logic” appears on average once every five pages.) It’s about how, in Mr. Greve’s view, our own Constitution’s logic has been turned upside down over time by forgetfulness.

Mr. Greve studies the Constitution’s current health by looking through a lens of 200-plus years of American federalism. It turns out that a federalism lens, in Mr. Greve’s hands, can illuminate the Constitution’s logic and its alleged inversion over the last 75 years. But *The Upside-Down Constitution* is about constitutionalism, not federalism, and it is about logic, not policy. *The Upside-Down Constitution* is about federalism and policy in the same way *Moby-Dick* is about a whaling voyage.

Readers familiar with Mr. Greve will be happy to find that his wit remains in evidence throughout. They may be bewildered to find that he betrays a decided ambivalence toward prevailing “conservative” modes of constitutional interpretation and even toward federalism itself.

Mr. Greve’s sweeping thesis is that the Constitution’s foundational principles have been forgotten—and inverted—by all sides to the current constitutional debates and, worse still, this forgetting and inversion are principal causes of “our current institutional dysfunctions, public discontents, and fiscal imbalances.”

In fact, says Mr. Greve, we have lost our way in a sea of misguided and disconnected erudition. Our Supreme Court crafts magnificent decisions in some cases, but miscarries badly in others. One of our law professors, Bruce Ackerman, recently

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Michael S. Greve’s *The Upside-Down Constitution* is published by Harvard University Press.

and “to his enormous credit” recovered “the Founders’ idea of constitutional politics that differs from ordinary politics in kind and in normative force.” But those “real achievements” were at the same time “clouded” by Professor Ackerman’s “outlandish interpretation of the New Deal as a free-form constitutional convention and amendment process.” Our economists profitably and systematically explore predictive models of the behavior of public officials. Our political scientists pursue an “academic boomlet” in studies of constitutional development. No one pulls all the pieces together, however, largely because no one has proved capable of explaining the full depth and extraordinary genius of the Founding.

While bench, bar, and ivory tower contentedly noodle away, real-world problems refuse to wait. Our politics has become a “shrill debate.” Our opinion surveys find “record-low public confidence in our political institutions.” It has begun “to dawn on members of the body politic that the cause of the present fiscal crisis” may be “structural,” not “purely cyclical.”

In the midst of this discouraging picture, Mr. Greve finds what solace there is to be had in the Founding itself. The Founders “knew that their bold effort to establish constitutional order for themselves *and their posterity* carried a risk, to the point of certainty, of an unintended turn—perhaps even an inversion.” But they worked “in fulsome hope that future generations might remember what the Founders were getting at and perhaps, in light of experience and improved knowledge, understand the Constitution’s genius in ways surpassing the understandings even of the Founders themselves.”

To this day, says Mr. Greve, the Founders’ own constitutional understandings go “far beyond” those of “modern-day jurists, political scientists, or economists.” But we can no longer afford our ignorance. We are cursed today by John Adams’ far-too-fully-granted wish—that we his grandsons might avoid hard studies in “politics and war” and take up fuzzy studies in “statuary, tapestry, and porcelain.” “[W]e have forgotten an awful lot,” says Mr. Greve. And we “find ourselves in dire need of remembering it.”

#### AMERICA’S CONSTITUTION AND ITS DISCONTENTS

If prophesy like this seems discordant, it may seem less so if one considers Mr. Greve’s earlier work. *The Upside-Down Constitution* is Mr. Greve’s second major book. His first, *Real Federalism: Why It Matters, How It Could Happen*, was by comparison full of sunshine and hopefulness. There, Mr. Greve described the advantages of a “real” and liberating “competitive” federalism, together with the contours of a political movement that, Mr. Greve had thought, might rally to its banner and help achieve its (partial at least) implementation. The hope was not fulfilled.

Mugged by reality, Mr. Greve thinks now that hopes for better federalism have not been fulfilled because under current conditions they cannot be fulfilled. Our Constitution has become hard-wired by misinterpretation to frustrate such efforts and entrench “Them the States and Factions” as against “We the People.” We the People, for our part, wander aimlessly. We flail, and we fail in our attempts at reform. Cursed sons of Adams, we lack even a constitutional vocabulary to describe our predicament.

#### A Few Good Premises

The keys to these conundrums and the book as a whole lie hidden in plain sight in the book’s eloquent, densely argued introduction. Those 17 pages merit careful reading and re-reading. Especially telling are the Introduction’s opening citations to primary sources. They define *the* foundational ideas of American constitutionalism according to Mr. Greve.

These foundational ideas are, *first*, Alexander Hamilton’s insistence in opening *The Federalist* that it has been “reserved” to Americans to “decide the important question” whether societies are “really” capable “of establishing good government from reflection and choice” and not “accident and force”; *second*, Chief Justice Marshall’s *McCullough v. Maryland* statement that constitutions must be “adapted to the various crises in human affairs”; and, *third*, James Madison’s “if men were angels” observation from *The Federalist*—the “great difficulty” in forming a government “which is to be administered by men over men” is that “you must first enable the government to control the governed; and in the next place oblige it to control itself.”

Mr. Greve reads these sententious and very public statements primarily according to their centuries-old public meaning. But he reads them also and importantly according to how they (sometimes unwittingly) have been reflected and illuminated in the thought prisms of modern jurisprudence, economics, and political science of various ideological and disciplinary stripes—law professor Bruce Ackerman, Nobel economist James Buchanan, constitutional development theorist Ken I. Kersch, political scientist Keith E. Wittington, the Justices of the United States Supreme Court, and others.

These few bedrock constitutional principles, together with the essential further assumption of the Founders’ genius and benevolence, become Mr. Greve’s springboards to an extended set of *predictions* regarding the federalism elements we should and should not expect to find in the paper document we read today. And those predictions are in turn employed to revolutionize received theories of originalist constitutional construction, the New Deal constitutional revolution, and constitutional interpretation as a whole.

If your legal training or political interests have caused you concern about divisions in our political and legal culture, or if you are intrigued by a truly new approach to interpretation (rooted in the Founding, not someone’s moralizing), you should invest the time and grapple with Mr. Greve’s analysis.

#### The Founding Achievement

Mr. Greve emphasizes as an initial matter the paradoxical nature of any decision in favor of a *federal* constitution. “In the *United States*,” Mr. Greve asks, “what good are the states?” This question, he finds, “turns out to be very close.” Any decision to entrench multiple state governments necessarily means the entrenchment of multiple state political elites, and those local elites, sure as the sun shall rise, will be “prone” to abuse their citizens. Why would any sane, public-spirited person want that?

For two reasons, it turns out. For one, the “first-order choice (federalism yea or nay) is often foreclosed,” as it was to the American Founders. If “there was to be a union at all”

in 1787, “some form of federalism was a forgone conclusion.” For another, the signal advantage “of entrusting a second set of junior governments with authority over the same citizens and territory” is that this division of authority can be used “to oblige government to control itself.”

Our Founders, says Mr. Greve, made Madisonian virtue of historical necessity. They did so by deeply embedding structural (as opposed to expressly textual) “competitive” federalism principles into the Constitution. Those principles aim to “oblige” government at all levels “to control itself.” They function, in the first place, by largely limiting “the central government to procuring public goods that can be provided only at that level” and, in the second place, by enabling mobile citizens “to choose among varying bundles of public services and the taxes that come with them,” thus forcing “the junior governments to compete for productive citizens and firms.” Our federalism is, properly speaking, a federalism for disciplining governments, both state and federal. It is a federalism *for* the people and *against* the political elites—including most especially state political elites.

So far, so simple, so vaguely familiar. All we need to do today, it could appear, would be to revere our Founders, read what they wrote into the Constitution, follow instructions, and parade-step our way to good government. This is the fatal mistake of those who adhere to what Mr. Greve calls “academic originalism.”

It turns out that the academic originalists’ parade, by wise constitutional design, has no leader—or at least none visible to the naked eye. “Famously,” says Mr. Greve, federalism “is not ‘in’ our Constitution (although it is ‘in’ many others).” Our Constitution, it turns out, is not “just any old constitution, but a deliberately minimalist constitution that makes politics possible but confidently leaves its shapes and outcomes to future generations.” To be properly adapted, in John Marshall’s words, to “various crises in human affairs,” a constitution must be “minimalist” in this sense. Our Constitution is thus, for Mr. Greve, “a *common law* constitution,” and it could not be otherwise without straightjacketing future generations.

To understand such a minimalist constitution, we cannot simply read it. We cannot understand individual clauses without first understanding the whole. And before we can do that, we must tarry long over what the instrument is and what it is intended to do. Above all, and strange as it may seem, we must *classify* it. We must understand the answers it gives to the enduring questions it must necessarily confront—above all, the perennial men-are-not-angels dilemma.

Mr. Greve insists that, in confronting the obstacles to good government found at all times and in all places, our Founders embraced a nearly pure instance of what Mr. Greve, following modern social science, calls “competitive” constitutionalism. For Mr. Greve, the Constitution is therefore not a contract (although it has “contractual elements”) but a “coordination device.” It enshrines “decision rules” not “distributive consequences.” It reflects a “constitutional choice by a single, sovereign people” looking ahead centuries to a very distant time horizon. It is emphatically *not* “a mere bargain among interests, states or elites.”

It happens, says Mr. Greve, that our Constitution’s individual clauses (together, importantly, with the “great” constitutional “silences”) cohere into an elegant, workable, nearly miraculous whole. And it follows that true constitutional advances may be achieved only with great difficulty and only intermittently at “constitutional moments” when the whole people, as opposed to a majority “faction,” has achieved consensus on needed improvements—moments likely to arrive only via some recent unmasking and dearly bought defeat of a pervasive and seemingly plausible constitutional heresy.

Indeed, if people’s “loyalties to some other collective entity—a tribe, an organized religion, a preexisting state—run too deep,” constitutional lawmaking in the American sense becomes impossible. Because loyalties to the Constitution, *qua* Constitution, are likely to become magnified and assume primacy only when the Constitution itself is threatened, constitutional peril becomes almost a precondition for meaningful constitutional advance.

The upshots are that ours is a “competitive” constitution, and it may be importantly advanced only expressly, open-endedly, and intermittently. Proper constitutional change, as opposed to deeper understandings of pre-existing provisions and structures, may occur only through express textual amendments, lest the Constitution be buffeted by “accident and force” not “reflection and choice.” Proper constitutional texts, as opposed to ill-conceived attempts to impinge prerogatives of future generations, must remain open-ended, lest the Constitution become a straightjacket. And proper constitutional lawmaking, as opposed to textual clarifications, extensions, and mid-course corrections, may occur only intermittently—at centuries-long intervals when those rare “constitutional moments” arrive.

#### *All History at a Glance*

As if all the above were not quite enough for one volume, it turns out there is much, much more. *The Upside-Down Constitution* is laid out in five parts that traverse all constitutional history in dialectical fashion. The initial thesis (Part One) is the Founding. It is for Mr. Greve—as advertised by its admirers—an achievement to the fullest extent practically possible at the time, a *novus ordo seclorum*, a true, qualitative advance in the theory and practice of good government. Beginning immediately thereafter comes the Founding’s elaboration, largely by the Supreme Court and from the Republic’s earliest days up to the New Deal, in the form of the concrete legal doctrines of a “Competitive Federalism” (Part Two).

Next come the New Deal’s antithetical “Transformation” (Part Three) and its extensions and elaboration into what the Supreme Court has called “Our Federalism” (Part Four). As a result of these transformations, the Founders’ federalism is upended. Thesis becomes antithesis, and what had been government for the People becomes government for the governing elites. Directly contrary to the Founders’ intentions, the New Deal Constitution is “solicitous” of the interests “of the political class in accumulating surplus.” It “unleashes factions (now more charitably called ‘interest groups’) to clamor for





negative, about New Deal constitutionalism. In Mr. Greve's telling, the twentieth-century law's empire of the New Deal resembles the British Empire of olden times—justified as benevolence, impelled by profit (“rent seeking”), acquired in an absence of mind. Mr. Greve asserts in a revealing passage that the New Deal “never even aspired” to “reasoned engagement” in a constitutionally “honorific” sense. This is why, according to Mr. Greve, there is no “New Deal equivalent of the Declaration of Independence, the *Federalist Papers*, or the Gettysburg address.”

Mr. Greve's views are thus ironically parallel to those of New Deal historians (like Arthur Schlesinger, Jr.) who see in the political clash over the New Deal a struggle between forces of enlightened benevolence and benighted self-interestedness. But in Mr. Greve's telling (unlike Professor Schlesinger's), it is the New Deal, not its opponents, that embodies self-interestedness and reaction.

In this revisionist telling, just as a sovereign monarch used to be duty-bound to protect the People's rights against invasions by local dukes and earls, so the sovereign United States Constitution assigns this same function to the federal government—and especially to the United States Supreme Court as the Constitution's first ambassador to future generations. Not surprisingly, under republican government as under monarchical government, the dukes and earls chafe at their yoke, long to be rid of it, and conspire continuously against the sovereign's defense of the People's rights. And in the New Deal era, says Mr. Greve, the local chieftains at last prevailed in a constitutional overthrow, abetted by unique political conditions; informed by practical wisdom acquired over decades of constitutional experience; and enabled by an intellectually shallow or (sorry to say) intellectually corrupt Supreme Court. This narrative is novel, well-defended, and pointedly expressed. It makes for compelling reading. It will infuriate some of the New Deal's admirers.

On the other hand, Mr. Greve takes further, albeit less-impassioned, aim at New Deal constitutionalism's most ardent detractors. What about the expansion of federal spending powers beyond the bounds of the enumeration of other federal powers by the Constitution? Perfectly legitimate, says Mr. Greve, relying on Alexander Hamilton. What about the expansion of federal authority over interstate commerce to the point of allowing wheat-market cartelization and prohibiting farmers from feeding their own homegrown wheat to their own home-bred cattle? Perfectly legitimate, says Mr. Greve, relying on Chief Justice Marshall. Those results, he says, follow necessarily not only from the public meaning of the relevant texts but also from the structural fact that ours is a “minimalist” constitution.

Concededly, these last propositions may surprise those who've read about Mr. Greve in the national newspapers. The *New York Times Magazine* did a feature article on Mr. Greve and others a few years back, the thesis of which was that Mr. Greve (and these others) were part of a movement to overturn the New Deal and bring back an old version of the Constitution from “exile” in order to achieve a great triumph of constitutionalized libertarian economics. *The Upside-Down Constitution* dispels such notions. It clarifies Mr. Greve's belief

that Washington can cartelize, regulate, or prohibit practically every economic activity—putting aside the wisdom of doing so.

Less obviously, but equally important, Mr. Greve and the New Deal Justices agree that “the Old Court's justices”—that is, the pre-New Deal Supreme Court—“failed to realize that the formalism that once had been their strength was rapidly turning into a liability.” On an intellectual plane, then, Mr. Greve sees the New Deal Court's failing, not in its disavowal of “formalism” or its quest for a new “functional” jurisprudence, but in its inability to attain a functional jurisprudence he finds “constitutionally plausible.”

The bottom line for Mr. Greve is a New Deal Court that could recognize problems but was too inept (or intellectually misguided) to craft solutions. Upon sensing the impossibility of sustaining doctrine based on formalistic distinctions, the New Deal Court could have, for example, shifted the doctrines delimiting the federal government's enumerated powers from the old “formalisms” to what might be called a “serviceable functionalism”—perhaps by stressing that not everything that happens in the world can be deemed “commerce” subject to federal regulation, but nonetheless interpreting “commerce” meaningfully, functionally, and capaciously to encompass all non-fraudulent, voluntary transactions for value. This is, of course, very close to what the Supreme Court has said and done in the Rehnquist and Roberts eras. Mr. Greve wonders why it could not have happened sooner.

The New Deal is for Mr. Greve a legal sandwich of nourishing meats between moldy bread slices. The nourishing meats are the center of the New Deal, the New Deal constitutional reforms that non-specialists know about—those having to do with expanding federal authority to regulate economic activity; letting loose Social Security-scale federal spending initiatives; letting states run their local monopolies free of direct judicial supervision and correction. Those cases, says Mr. Greve, were correctly decided. Indeed, not only were they correctly decided, they embody a goodly degree of correct (if hazy) constitutional insight.

But this healthy constitutional center comes, according to Mr. Greve, at an intolerably high cost of top-level confusion (or downright ignorance) about constitutionalism as such, plus, its inevitable consequence, near-total disarray in ground-level doctrine. If there are more than a few oddball instances of New Deal Justices penning decisions that can pass Mr. Greve's exacting muster in the handling of commonplace constitutional doctrines, Mr. Greve can't think what those could be. Moreover, Mr. Greve sees all the most characteristic New Deal flaws—ignorance of constitutionalism, doctrinal disarray, persistent confusion—converging, discouragingly, in the New Deal Court's signature opinion in *Erie Railroad v. Tompkins*.

For Mr. Greve, *Erie* is one of “the most central decisions” in “the entire history and architecture of American constitutional law” and represents “the general sense of an entire generation of judges and legal scholars.” Although greatly and importantly qualified by “new” strands of federal common law, *Erie*, unlike other Supreme Court decisions of like consequence, has avoided serious challenges to its fundamental legitimacy for 75

years now. What could appear more legitimate, after all, than the Supreme Court exercising common-law decisionmaking powers to yield common-law decisionmaking primacy to state governments, as *Erie* professes to do?

And yet, according to Mr. Greve, *Erie*'s supposedly irreproachable, once-for-all-times dismantling of the Constitution's common-law substructure constitutes the New Deal's preeminent and irredeemable theoretical and practical mistake. On a theoretical level, *Erie* rests on premises of "rank" legal "positivism" that are inconsistent, all at once, with eighteenth-century, nineteenth-century, and modern understandings of common law. On a practical level, *Erie* leaves in disarray the ground-level doctrines implementing the People's vital interest in protecting their interstate and international commerce from expropriation by state and local governing elites. With the substructure of common law gone, Mr. Greve insists, the Court finds it difficult or impossible, theoretically and practically, to craft workable conflict-of-laws and federal-preemption doctrines. It finds it difficult rhetorically to justify a properly expansive jurisdiction for the federal courts.

And with these doctrines neutered and the federal courts' jurisdiction restricted, says Mr. Greve, our streams of commerce have come to resemble the rivers of Germany before the *Zollverein*. Our economic enterprises, in this brave New Deal world, are liable to being taxed or looted without definable limit by every self-interested "interest group" that can win friends and influence people in any state legislature, administrative agency, or attorney general's office throughout the country.

Mr. Greve's New Deal is, therefore, truly new. In his telling, nearly all of the New Deal's supposed doctrinal crimes were legitimate. But nearly all of its supposedly legitimate doctrinal developments were crimes. The New Deal in this telling is every bit as bad as its worst critics had feared. But it is bad for reasons that have lain almost entirely overlooked—until now.

#### THE PROMETHEAN CASSANDRA

Mr. Greve's new New Deal is as central to his work as is his Founding. Indeed, absent this central figure, one might wonder whence cometh his distinct undertones of controlled outrage and pervasive pessimism. Why such gloomy undertones in a book so redolent with heady overtones of Promethean breakthroughs?

There is of course the prior question of whether those breakthroughs are real. At the end of the day, can it really be that a scholar might return in thought to Liberty Hall; listen intently to what was said and done there; insert those sparkling insights into the context of what has since been said, and done, and learned; and then descend the Liberty Hall steps several years later with tablets etched with the long-forgotten but newly revalidated principles of '87—and in the process synthesize swaths of economics, jurisprudence, and political science and resolve the raging debate between partisans of an original Constitution and those of its living doctrinal embodiments? (As Mr. Greve himself says, "I recognize the presumptuousness, and perhaps the implausibility, of my intellectual enterprise.")

But even (and especially) for readers like me who are inclined to grant the accomplishment of some such feats, a striking fact is the absence of tones of triumphalism from this time-travelogue. It is remarkable that our intrepid Prometheus, having returned from 1787 free of Adams' curse, delivers himself of Cassandra's prophesy.

Mr. Greve frets himself by having the courage of his convictions and insisting on the powerful gravitational force of even an inverted constitutional logic. He frets because he believes, deeply, that the Constitution's structure remains coherent but becomes pernicious when interpreted according to the interests of "Them the States and Factions." Just as the Constitution's authentic logic was the great invisible hand benevolently guiding judicial decisions for the good of We the People, back when the Constitution stood upright, so now the inverted constitutional logic forms *the* present-day stumbling block to decisions being made for our benefit.

When precisely did this inversion from government for the People to government for governing elites become entrenched? According to Mr. Greve, on the morning of April 25, 1938, when *Erie* was decided. And when, according to Mr. Greve, shall We the People overcome? Some day, surely, but only when the *Erie* doctrine (albeit probably not the *Erie* holding) surrenders unconditionally to higher constitutional principle. It is the remote distance of that future day—together with the constitutional toil and torment he predicts for the interim—that so troubles my dear friend, Mike Greve.

