Book Review - Sotirios A. Barber & Robert P. George (eds), Constitutional Politics: Essays on Constitution Making, Maintenance and Change.

Princeton University Press: Princeton, 2001. 337 pages, softback, £15.95, ISBN 0-691-08869-1

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Under the leadership of Walter Murphy (McCormick Professor of Jurisprudence, Emeritus), a distinctive approach to constitutional theory and politics has been taken at Princeton University for over two decades. In contrast to the vast swathe of scholarship in the field, the method of the 'Princeton Group' (the editors' self-appellation) is not the close textual analysis of doctrine or studies of judicial biography. Rather, a broader, more contextually-sensitive set of questions is asked: what is the nature of constitutions, why should they be obeyed, and what are the variables of institutional design and the implications thereof? The answers to such questions cannot ignore what higher courts have said, but nor need they not look beyond them. Thus, the method of the group, and hence this volume, is informed by larger normative debates and empirical analysis, as well as constitutional case law. In common with much American scholarship, it has been undertaken by both academic lawyers and political scientists. Regarding subject matter, as the sub-title suggests, our attention is trained on the creation, maintenance and amendment of constitutions.

According to the editors, the aspiration is to "cultivate the skills and the virtues of these categories of action as varieties of political competence." (2) The basics of constitutional law as "varieties of political competence"? This is a straightforwardly provocative manifesto. Even if these "categories of action" take the discrete form of activity known as constitutional politics, it is likely to grate with those who insist on neat law/politics demarcations. Indeed, after reading its fourteen essays, readers will be well disabused of the notion that constitutional adjudication is a discrete

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legal activity, if they ever held such an opinion. More importantly though, they will come away with the tools that allow them to establish a normatively defensible understanding of judicial and extrajudicial constitutional interpretation and a better sense of the place of constitutional courts in a democratic polity. For this reason alone, this book is warmly recommended.

The comprehensive methodology of this project is nicely illustrated by the excellent essays by Stephen Macedo and Sanford Levinson. Both scholars examine the question of normative diversity and the liberal constitution, focussing on the relationship between religion and the state, but coming up with very different answers. Macedo ("Transformative constitutionalism and the case of religion: defending the moderate hegemony of liberalism") essentially makes the case for marginalising illiberal religious practices on the back of an understanding of liberalism that goes beyond the standard rubric of mere 'neutrality between differing conceptions of the good'. This classical definition, says Macedo,

> wholly misses the radically transformative dimension of liberal constitutionalism, and is liable to obscure the extent to which a liberal constitutional order is a pervasively educative order. (167).

If we then accept that good, or "constitutional", citizens are deliberately shaped by our (liberal) constitutional order, we will recognise that a common schooling system has a pivotal role in this by taking on the civic task of reinforcing common beliefs and commitments so that they can be shared by all citizens. But should religious norms be amongst these common commitments? The answer given is No, on the basis that the diversity liberalism requires is that which supports,

> basic principles of justice and equal freedom for all [. They are] predominantly civic forms of diversity…the political aim is to secure our civil interests, not to promote Protestantism over Catholicism (180)….it is wrong to seek to coerce people on the grounds that they cannot share without converting one's faith (182).

Does this lead to the exclusion of religious identities from the public sphere? To the extent that it does, Macedo argues that it is a price worth paying. Being "oppressed" into support for liberalism is "crucial political work", indeed, it is "what transformative constitutionalism is all about." Those that feel marginalized "have nothing but their own hypersensitivity to blame." (182)

Levinson's parry ("Promoting diversity in the public schools") commences with an account of his own background (Jewish) and early schooling in the American South and later at Duke University where Methodism required morning prayers, Bible

https://doi.org/10.1017/S2071832200016291 Published online by Cambridge University Press

study classes and the singing of Carols. This of course predates the Supreme Court's landmark ruling in *Engel v. Vitale*[1] that found school prayers to be inconsistent with the Establishment clause of the First Amendment. Nonetheless argues Levinson, these educative practices promote discussions between peoples of differing faiths (or none at all), such that they develop critical social and *civic* skills which are key to a multicultural society. The cost of excluding religion from public schools is to force out those with strong religious sensibilities, leading to a fragmented schooling system, with lessened inter-cultural exchange, shorn of its pluralist potential.

It is noteworthy that whilst Macedo's argument is based almost entirely on references to classic liberal political theory and its application to the instant problematic, Levinson proceeds with an issue-by-issue analysis of the Supreme Court's case law (state aid, school prayers etc), intertwined with social theoretical contributions on multiculturalism. Thus, the reader is left with a comprehensive array of sources and tools from which to settle the debate (in her own mind). In this reviewer's mind, Macedo errs in not accounting for the significant gains that pluralist religious debate can add to civic culture and the very minor costs (if any at all) of such non-secular input to the transformative capacities of his secular vision of liberalism.

Unsurprisingly, the most commonly debated issue in this volume is that of constitutional judicial review – the primary mechanism of constitutional maintenance (and change too, depending on how one classifies such things, i.e. are maintenance and change distinct processes or merely different points on a single spectrum?) – and judicial supremacy. The approaches taken vary. John Finn ("The Civic Constitution: Some Preliminaries") discerns two dimensions to the nature of constitutions – the civic (or political), and the juridic (or legal). Only by appreciating these aspects can the authority of a constitutional order be comprehensively accounted for – they are not alternatives but components of a larger whole. The question then arises as to what the mix should be between the two? Finn's response is a rejection of both judicial and legislative supremacy, opting instead for departmentalism, according to which,

> each branch is entrusted with the power of interpreting the Constitution…[with the advantage that it would] encourage judges and indeed other constitutional decision-makers to seek the strongest (and not merely the most convenient) arguments for their conclusions – arguments that could hope to persuade the widest possible audience. (59, 61)

[1] 370 U.S. 421 (1962).

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Christopher Eisgruber ("Judicial Supremacy and Constitutional Distortion") is similarly concerned by the dynamic relationship between *what* the constitution is and *who* should interpret it, although he adds the element of *how* it should be interpreted. His argument starts from the premise of judicial self-consciousness concerning the democratic legitimacy of their function. Instead of directly addressing such worries, Eisgruber details how, in cases such as the infamous *City of Boerne v. Flores*,[2] the Court launches into highly legalistic or historical debates, ignoring the larger sweep of pivotal constitutional provisions, in this case, the Fourteenth Amendment. In so doing, the Court is revealing its understanding of the Constitution to be a set of legal restraints in preference to it being an instrument facilitating self-government. On this understanding, who then to interpret the Constitution but lawyers? – "a professional elite who may have no special insight into justice or politics but who are expert at the manipulation of fine-grained rules." (71)

Somewhat paradoxically, though, Eisgruber finds the solution to this lock-in to be in the Court's own judgments, or at least the key to the solution. Recalling the plurality decision in *Planned Parenthood v. Casey*,[3] Eisgruber applauds the Court's rejection of its own method in *Roe v. Wade*,[4] a highly legalistic analysis which ignored (and in some instances diminished) important ethical issues such as the liberty interests of the pregnant woman. In the latter opinion, the Court emphasised its goal to enable "the country…to see itself through its constitutional ideals", describing the Constitution itself as "a covenant running from the first generation of Americans to us and then to future generations [embodying] ideas and aspirations that must survive more ages than one."[5] This interpretation of the Fourteenth Amendment then is clearly a guide to political ideals for non-lawyers and as such could be a "vehicle through which Americans can see what binds them together as a people." (84) That is all very well, but it is a key without a lock.[6] Given the problem with which we started – that lawyers *qua* judges have manipulated interpretative hegemony of the Constitution for themselves – by what mechanism can this key have effect? Eisgruber implores Americans to "become self-conscience about the Constitution's character…if [they] are to be something more than the passive subjects described in *Casey*, they must themselves become self-conscious about the

2 521 U.S. 507 (1997).

3 505 U.S. 846

4 410 U.S. 113 (1973)

5 505 U.S. 868

6 Further, Eisgruber rightly notes that the institutional theory of the case "champions the authority of the judiciary". (84)

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Constitution's character." (85) But if interpretative hegemony rests with the judiciary, what incentives does the citizenry have to make that effort? And if they did, how would they wrestle hegemony away from the Courts? We are given few hints.[7]

At this point, the essay by Whittington ("The political foundations of judicial review") makes itself most welcome. The basic thrust of the piece is an attack on the oft-unquestioned mantra that judicial supremacy is the essence of constitutionalism – see for a recent example, Jutta Limbach,[8] but most famously propounded in Dworkin's *A Matter of Principle*[9] through his characterisation of courts as 'forums of principle'. Previous critiques have claimed this to be a falsehood, that supreme courts are in fact ultimately controlled by the other branches,[10] or in any event are the 'least dangerous branch'.[11] The tack taken here is different, in that judicial independence is defended not only on a normative basis, but also as an empirical fact, albeit in specific settings. Thus, there are occasions when political considerations will mean that incentives exist for other constitutional actors – Whittington's focus here is on the President – to "refrain from undermining judicial authority over constitutional meaning." (263) Such occasions may arise when the bounded rationality of the executive makes its well disposed to judicial leadership, or when that branch disposes of electorally tendentious issues. But of course, these are contingent, not necessary, settings. *Carte blanche* interpretative hegemony finds no foundation here, rather judicial supremacy is a function of cost/benefit analyses, or what Whittington calls, a "political logic".(291) The novelty of this argument becomes clearer when we focus on the commonly advanced bases for judicial independence – institutional isolation, fixed terms, or even the much maligned Herculean capacities to arrive at the 'right answer'. The 'departmentalism' of Whittington however posits the judiciary as within a relatively 'flat' or egalitarian dialogical process in which political logic means that elected officials habitually have sound reasons to defer to judicial interpretations of the constitution. So long as that is the case, the judiciary will enjoy wide scope to interpret and enforce the constitution as they see fit. However, in so doing, they are bounded by a set of background ideological conditions

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7 A review of Eisgruber's monograph, *Constitutional Self-Government* (Cambridge MA, Harvard University Press, 2001) is forthcoming in the German Law Journal.

8 J. Limbach, 'The Concept of the Supremacy of the Constitution', (2001) 64 *Modern Law Review* 1-10.

9 (Cambridge MA, Harvard University Press, 1985)

10 R. Dahl, 'Decision-making in a democracy: The Supreme Court as national policy-maker', (1957) 6 *Journal of Public Law* 293.

11 J.H. Ely, *Democracy and Distrust* (Cambridge MA, Harvard University Press, 1980).

which has concrete manifestation in political attitudes. Should judicial decision-making stray from these background conditions, the incentives for elected officials to raise challenges increases. What we then have is a theory of coordinate constitutional interpretation. Although at certain times, certain branches will have the upper hand (and Whittington would presumably acknowledge that the judicial branch in America has been aided in that by the decline of political parties), the standard legal model of courts sitting atop the constitutional pyramid is no longer accurate, to the extent that it ever was.

In summary, this is a collection of essays that substantially succeeds in its ambitions. Powerful arguments are made as to the strongly political quality of constitutional affairs, the best means by which they may be advanced and their normative underpinnings. It cannot be said that all the authors make equal contributions – there are a minority of somewhat weak pieces. But the sum is a collection that will give both a general roadmap to those that require one, and food for thought for more advanced readers. In terms of substantive law, most of the examples are drawn from American constitutional law, although there is a good contribution by James Fleming which takes Ackerman's critique of American exceptionalism in rights protection to task, by comparison with Germany. That said, readers would be mistaken to question the applicability of the lessons of this book on the basis of that limited scope. Substantially similar concerns occupy constitutional debates across advanced democracies. The doctrinal tools used to resolve them differ, but the essential questions are common and the level of reasoning adopted in most of the discussions herein is sufficiently high to vault the low hurdles of parochial legal technique. Constitutional democracy is not quite the simple, static, structure it is conventionally imagined to be. As Walter Murphy notes in his delicious opening chapter, it is certainly true that judicial review "allows losers in the political process to appeal to judges rather than to heaven." (15) But from this it does not follow that by providing a God-like proxy on earth, the Courts have assumed His status.