

BOOK REVIEW - The Constitutional Meaning of Reconstruction and Reunification

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Our Secret Constitution : How Lincoln Redefined American Democracy. By George P. Fletcher. Oxford University Press; 272 pages; \$25.

[1] The most significant event in American legal history was the Civil War, which claimed one life for every seven slaves freed. Even as it abolished slavery and changed the laws of the land then, it also created a new set of principles that guides our thinking today.

[2] So asserts George P. Fletcher, Cardozo Professor of Jurisprudence at Columbia University, in his thought-provoking new book, *Our Secret Constitution*, a work which is sure to attract readers interested in constitutional law, and American and German history.

[3] In the American postbellum struggle for unification (reconstruction), secular redemption from past inequities, and renewed pursuit of justice under law, Fletcher finds a process of political evolution similar to Germany and other nations.

[4] Much as historians and lawmakers strive to maintain continuity with the Constitution of 1787, Fletcher perceives the Civil War not only as a rupture between the North and South, but also between two visions of the United States. Couched in the deistic language of the 18th century, the Constitution was based on peoplehood in voluntary association, an individualistic concept of freedom, republican elitism (basically white landholders), and the institutionalisation of slavery. The new vision, which Fletcher calls the "Secret Constitution," conveyed a sense of transcendent values, and espoused equality of all persons, organic nationhood and popular democracy.

[5] Forged on the killing fields of Antietam and Atlanta, this "Secret Constitution" redeemed American ideals. Heralded by Lincoln's Gettysburg Address and reinforced by the Thirteenth, Fourteenth and Fifteenth Amendments, it brought new life to what Fletcher calls the "Great Maxim" of the Declaration of Independence: the unique, self-evident proposition that "all men are created equal." Evidence of a systematic effort to remake the United States in this spirit is found in the fourteen constitutional amendments adopted between 1865 and 1993.

[6] After these principles of higher law were crystallized in the immediate post-war period, a rejection began to emerge in the courts of the 1870s and 1880s, Fletcher observes, driving this new order underground. But, the "Secret Constitution" slowly began reasserting itself in various new constitutional amendments, then in academic discourse, and finally in the rhetoric and decisions of the Supreme Court.

[7] American lawyers and historians suffer from the curse of American distinctiveness, Fletcher says, failing to see that our Civil War was a struggle for unification and unity similar to those in Europe. Out of the French Revolution came the redeeming Code Civil. In the wake of World War II, West Germans also sought secular redemption in the principle of *Rechtsstaatlichkeit* (Principle of the Rule of Law), cultivated alongside economic prosperity and expressed in the West Germany's *Grundgesetz* (Basic Law - the new constitution of 1949). This *Vergangenheitsbewältigung* (process of overcoming the past) consisted of a commitment to human rights and world peace, and the construction of a democratic future first envisioned in the years of the Weimar Constitution.

[8] The first article of the *Grundgesetz* declares: "Human dignity is inviolable. All state power is obligated to protect it and respect it." Strikingly similar to the Thirteenth Amendment in the affirmation of human dignity and autonomy, Article 1 raised the greatest casualty of the Third Reich to the highest virtue of the new *Bundesrepublik* (Federal Republic of Germany). While German theorists affirm equality as a derivative of the rule of law, American legal tradition uniquely views equality as a derivative of human creation in God's image, and considers "consent of the governed" as an indispensable prerequisite of government.

[9] After mass violence and monstrous injustice, there is a tendency to punish the vanquished and to root out undesirable traits in the state. International law, which protected citizens of other states against Nazi atrocities, failed to protect German Jews against their own government, later prompting the Nuremberg tribunal to introduce the concept of crimes against humanity. After communism collapsed, Hungary honoured martyrs, but former party officials were not disqualified from continued public service. The example in Hungary has, however, proven to be an exception in the former-East. Czechoslovakia, for example, enacted "lustration" laws, denying former communists participation in public life. The *Bundesrepublik* replaced all judges and law professors in the East Germany. Early

Radical Republicanism led to similar disqualifications in the defeated South, but did not lead to trials of prominent leaders.

[10] While the Weimar Constitution declared all Germans equal before the law; the *Grundgesetz* embraced "all human beings." Americans came to this principle of universalisation as early as 1868 in the Fourteenth Amendment. Yet, Fletcher contends, the concept of "equality under the law" has not been applied to many important issues as effectively by the U.S. as in Germany and other European countries. Such issues include the voting rights of citizens convicted of a felony, equalization of education through a national curriculum and a single university qualification exam, child support payments based on number of children rather than level of income, protection of victims during trials, and protection of "human dignity" rights of female dancers against "peep show" entrepreneurs.

[11] After principles of higher law were crystallized in the immediate postbellum period, a reaction emerged in the courts of the 1870s and 1880s, Fletcher observes, a phenomenon that drove the "Secret Constitutional" order underground. However, it began reasserting itself in various new amendments, then in academic discourse, and finally in the rhetoric and decisions of the Supreme Court.

[12] Fletcher cites the antebellum *Slaughter-House Cases*, 83 U.S. 36 (1873) and equal access cases related to the Civil Rights Act of 1875, as rejections of the concepts of nationhood, equality and democracy. In the 20th century, however, these concepts were revived in the dissenting opinions of the Supreme Court, the spread of the franchise, and the fine-tuning of the American system of representation.

[13] A generation after the clash of ideological forces in the Civil War, a distinctively American school of philosophy called "pragmatism" emerged, Fletcher states. Although interpreted variously, this philosophy clearly emphasizes experience over logic, and avoidance of extremes. Its central metaphor is the problem of rebuilding a ship at sea-- the challenge of drawing a new constitutional order forth from a legal revolution.

[14] Post-war German pragmatism also rebuilt a ship of state at sea without pulling up historic planks. For fear of a resurgent extreme-right, Germans may be quicker to censor speech than Americans, yet their was identifiable reticence in the censure of Austria's right-wing leader, Jörg Haider. Economic strains and limited funds mandate re-evaluation of egalitarian social policies. Experience, rather than ideological abstractions, guides the search for European union without nationhood.

[15] "The rule of law dictates an ongoing quest for reconciliation," Fletcher concludes. "We sought a constitution and found we had two...in (their) constant tension, we are redeemed from the dogmatism of those who believe they have the last word."