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Book Review: Democratic Theories and the Constitution. by Martin Edelman.

Mark S. Pulliam

interest." But since a strong case could be made that it does endanger such liberty, to sustain his view Smith needs to address the issue of equality directly and develop and defend a view of it that is compatible with American liberal democracy as he understands it. If the principle of rational liberty is not itself sufficient to sustain a broad constitutional jurisprudence, we are led back to the question of the adequacy of Smith's reformulation of liberalism.

Smith focuses on the objections to his views that come from the left—from the neo-Kantian equalitarians—and deals cursorily with the more conservative perspective of those who defend higher law. He makes some thoughtful and penetrating criticism of equalitarians but dismisses too readily, particularly given the difficulties he has defending the grounds of rational liberty, the concerns of the defenders of higher law. Smith rejects the traditional view and its "absolutist orthodoxies" because it is no longer convincing to most people and so could not be the basis of a new constitutional consensus; because it is impossible in any case to provide a convincing, rational account of the existence and content of higher law; and, finally, because he fears that its "moral absolutism appears equally capable of justifying self-righteous lawlessness and unlimited governmental moral regulation." But the major difficulty with Smith's reconstituting of liberalism is that, in his desire to avoid moral absolutes and to elaborate a position consonant with current opinion, he is left with a view that is not clearly distinguishable from the democratic relativism he seeks to avoid. A convincing case is yet to be made that the sort of decent, moderate liberal democracy favored by Professor Smith can be persuasively defended without reliance on higher law or natural right or a rationally defensible view of enduring nature or essence.

DEMOCRATIC THEORIES AND THE CONSTITUTION. By Martin Edelman.[1] Albany: State University of New York Press. 1984. Pp. 399. Cloth, $39.50; paper, $16.95.

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Did the framers intend to embody a specific ideological or political theory in the Constitution, or did they enact an open-ended charter of evolving democratic principles? Professor Martin

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Edelman's *Democratic Theories and the Constitution* assumes the latter without much supporting argument or analysis. Professor Edelman is more concerned with the development of political thought in the United States, particularly since 1937, than with the ideological origins of the Constitution itself. Because he uses the Constitution as a vehicle for his exegesis of democratic theory, his failure to address the question of original intent tacitly approves of the Supreme Court's increasingly noninterpretivist approach to constitutional decisionmaking.

Democratic Theories and the Constitution also rests on a somewhat contradictory, or at least tenuous, premise. Edelman acknowledges that "[t]he Constitution, taken alone, cannot provide us with a single theory of democracy because it ws the product of republican, not democratic, theory." Moreover, he notes that "[t]he men who drafted the Constitution . . . deliberately rejected the prevailing idea of democracy." Thus, the "democratic theories" that Edelman explores at great length in his book are concededly not based on or derived from the Constitution. Why, then, has he chosen to analyze these theories from the standpoint of constitutional law? The prevailing conception of "democracy" has undoubtedly changed quite a bit since the framing and ratification of the Constitution. (Indeed, few college students could provide a working definition of the republican form of government that is expressly guaranteed by the Constitution.) What effect, if any, does this—or, more pointedly, should this—have on the meaning of the Constitution, the interpretation of which has also changed dramatically since its ratification?

Edelman believes that "different theoretical models of democracy can be used to interpret our fundamental law with equal constitutional justification." This highly problematic premise, of course, begs the ultimate question of democratic political theory: if the Constitution does not draw its authority from the intent of the framers, what legitimacy does it have?

Professor Edelman's focus on democratic—as opposed to republican—theory is subject to the same criticisms that have been raised against Ely's *Democracy and Distrust* and Choper's *Judicial Review and the National Political Process*—it misses the point.[3] In

3. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Professor Gary McDowell recently summarized these criticisms in his monograph THE CONSTITUTION AND CONTEMPORARY POLITICAL THEORY 17-18 (1985). Edelman never comes to grips with the distinction. He argues that

> American history supplies no single authoritative theory of democracy. The men who drafted the Constitution were creating a republic, not a democracy, and the

The Federalist, James Madison identified the structural defects of "pure" democratic government:

> [A] pure Democracy . . . can admit of no cure for the mischiefs of faction. . . . Theoretic politicians, who have patronized this species of Government, have erroneously supposed, that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.[4]

The framers believed, however, that the dangers of unbridled majoritarianism could be harnessed by republican government—indirect political representation in geographically larger units.[5]

The injustice and oppression the framers associated with democratic rule—the "violence of faction"—consisted primarily of the numerically superior debtor, nonproperty-owning class interfering with or usurping the property and economic interests of property owners and creditors. In short, the framers sought an institutional arrangement that would defuse the "dangerous vice" of coerced transfers motivated by envy:

> From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results: and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.
> . . . *[T]he most common and durable source of factions, has been the various and unequal distribution of property.* Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination.[6]

In Madison's view, the ultimate danger of majoritarianism was political interference with economic and property rights: "a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project."[7]

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very variety of democratic theories in our history destroys whatever authority a uniformly accepted theory might have provided. Lacking an authoritative definition, different theoretical models of democracy can be used to interpret the Constitution with equal justification. Today's theories, like those of the past, must be evaluated in terms of their consequences, not their sources. (P. 42).

4. THE FEDERALIST No. 10, at 46 (Bantam Classic ed. 1982).

5. *Id.* at 47. Economist Mancur Olson has elucidated the theoretical basis for Madison's insight:

> [O]ther things being equal, *the larger the number of individuals or firms that would benefit from a collective good, the smaller the share of the gains from action in the group interest that will accrue to the individual or firm that undertakes the action. Thus, in the absence of selective incentives, the incentive for group action diminishes as group size increases, so that large groups are less able to act in their common interest than small ones.*

M. OLSON, THE RISE AND DECLINE OF NATIONS 31 (1982). It follows that "if all else were equal, small jurisdictions would have more collective action per capita than large ones." *Id.* at 33.

6. THE FEDERALIST, *supra* note 6, at 44 (emphasis added).

7. *Id.* at 49. *See generally* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE

How does Edelman deal with the framers' concerns about democracy and the protection of property rights? He concedes that "Madison's . . . rejection of majoritarianism[ ] was based on his fear of faction," and that "[i]n 1787-1788 Americans shared a belief in a state of nature and its Lockean corollary—that men entered into civil society to protect and promote some fundamental rights they had enjoyed in a state of nature." However, Edelman either fails to recognize or consciously ignores the ideological underpinnings of these developments. He regards Madison's concern about filtering out unjust and irrational "popular passions" as nothing more than a desire to achieve an undefined "public good." Likewise, Edelman asserts that "[n]o one bothered to spell out the substantive content attributed to individual nature rights," suggesting that the framers had no specific belief as to the content of natural rights. This, of course, is absurd, as a reading of the historical materials demonstrates.

According to Professor Forrest McDonald, Locke was the most influential natural law theorist in colonial America.[8] Locke's concept of self-ownership and the concomitant private ownership of property created by individual labor was a central tenet of Locke's political theories.[9] The "evil" desire of "covetousness" arising from unequal accumulations of wealth threatened man's freedom to own property in the state of nature.[10] McDonald summarizes:

> This corruption is what leads man to surrender his natural freedom and equality by entering into a political society and agreeing to submit to its authority: the enjoyment of his rights has become "very uncertain, and constantly exposed to the Invasion of others." Otherwise, "were it not for the corruption, and vitiousness of degenerate Men, there would be no need" for government. The purpose of uniting under governments is to preserve all men in their "lives, Liberties, and Estates," which Locke calls "by the general Name, *Property*." . . . Thus constituted, government can have no powers except such as are compatible with the end for which it is established; and it cannot . . . take from any man his property without his consent . . . .[11]

The history of constitutional law is in large measure the history of the Supreme Court's wavering willingness (or, more recently, resolute refusal) to perform its institutional function of controlling the inevitable urge for economic redistribution. Edelman describes this

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POWER OF EMINENT DOMAIN (1985); B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

8. F. MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 60 (1985).

9. *Id.* at 63-64.

10. *Id.* at 64-65.

11. *Id.* at 65 (footnotes omitted).

process accurately, but without critical insight, and seemingly without appreciation of the concepts involved.

Thus, Edelman's analysis of decisions during the period from 1886 until Roosevelt's reconstruction of the Court during his second term is fundamentally flawed. He criticizes the Court for using natural law concepts to overturn state laws interfering with private economic activity. In Edelman's view, such decisions were inconsistent with prevailing democratic theory. By neglecting the question of original intent, Edelman overlooks that the danger of democracy most feared by the framers was coerced transfers of wealth in the guise of economic regulation. Hence the doctrines of substantive due process, liberty of contract, and intrastate commerce, which Edelman suggests were erroneous,

> were connected by a political theory whose basic tenet was that private economic activity (or as the Court would put it, the right to own, use, and enjoy the fruits of property) should be free from all but the most obviously necessary governmental regulation. Behind this political theory, and behind the constitutional interpretations based on that theory, there remained the same notion of the function of the Constitution. This idea had not changed since the Revolution.

Edelman does not explain why the Court was wrong in embracing these doctrines, which were consistent with the concerns of the framers and the political philosophy of Locke. He states that the Court during this period was "using a theory which ignored the changes that had reshaped the socioeconomic infrastructure of America," and "too often emphasized a type of property which no longer corresponded to the dominant economic factors." The Progessive reform movement, led in part by Louis D. Brandeis, was a creature of these changing factors. A new political theory developed that elevated freedom of speech and similar individual rights over property and economic rights. Edelman observes:

> Although the democratic theory of the Progressive movement derived from America's political heritage, Progressives no longer spoke of the natural rights of man. A natural right suggests something absolute, an activity or possession totally beyond governmental or societal control. While the natural rights of others justifies certain minimum public interferences with a man's natural rights, the basic premise of freedom from government control serves to keep regulations to a minimum. The Progessive, however, envisioned regulations which were so extensive, so basic to the economic workings of society, that it no longer made sense for them to talk about the natural right of property. Americans were to have a right to equal opportunity, according to the Progressives, but that right was to come from governmental action, not as a gift of beneficent Nature or Nature's God.

The crisis of the Depression resulted in the now-familiar political machinations leading to the "revolution in American constitutional law" that began in 1937 and continues to this day. Henceforth, "the Court's role in defining the pattern of governmen-

tal policy would be determined by the Justices' theory of the nature of those rights and their view of the Court's function in a democracy." Consequently, says Professor Edelman, constitutional law ultimately consists of the application of "the democratic theory of each Justice."

Without any sign of consternation at this unsettling conclusion, Edelman reviews the "competing paradigms" of democratic theory, including the theoretical and doctrinal bases for legal realism, "liberal natural rights" (*i.e.*, the Warren Court activism exemplified by the opinions of Justice William O. Douglas), and various other "theories" of noninterpretive constitutional decisionmaking. In accordance with the book's modern emphasis, the constitutional rights Edelman explores fall into the categories "citizenship," "political participation," and "political freedom."

Democratic Theories and the Constitution is primarily a synthesis of existing scholarship that uses secondary source materials extensively. Readers looking for original ideas or fresh insights will be disappointed. The book disposes of constitutional law prior to 1937 in the first fifty-four pages. Edelman's treatment of the post-New Deal era is apparently designed for use as a political science text. Particularly as an undergraduate text, however, its implicit and uncritical bias in favor of noninterpretive modes of judicial review is a serious flaw. Unfortunately, there is a surfeit of such texts, and *Democratic Theories and the Constitution* has little to commend it as an entry in this dubious genre.

THE BRITISH BOARD OF FILM CENSORS: FILM CENSORSHIP IN BRITAIN, 1896-1950. By James C. Robertson.[1] Dover: Croom Helm. 1985. Pp. 213. $16.95.

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It makes perfect sense to inquire why a book on British film censorship, brought out by a somewhat obscure publishing house (for American readers, at least), written by the "Head of the History Department at Hitchins Girls' School in Hertfordshire," printed in rather distracting "typewriter face" by Biddles Ltd., deserves even a brief review in an American law journal. The answer is that Robertson, however unintentionally, raises one of the key legal questions now confronting democratic societies: what should

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