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Book Review: Politics, Democracy, and the
Supreme Court: Essays on the Frontier of
Constitutional Theory. by Arthur S. Miller; God,
Country & the Supreme Court. by James K.
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a cold, impersonal, corporate world. That may not be the last word on modern libel law, but it is a good beginning.

POLITICS, DEMOCRACY, AND THE SUPREME COURT: ESSAYS ON THE FRONTIER OF CONSTITUTIONAL THEORY. By Arthur S. Miller.¹ Westport, Ct.: Greenwood Press. 1985. Pp. viii, 368. \$35.00.

GOD, COUNTRY AND THE SUPREME COURT. By James K. Fitzpatrick. Chicago, Il.: Regnery Books. 1985. Pp. x, 217. \$18.95.

*Scott G. Knudson*²

Professor Arthur Miller's most recent book is a collection of essays, all but one of which were first published in various legal periodicals from 1974 to 1984. Some of the topics are fairly narrow. Several, however, raise the most sweeping jurisprudential issues. In an introductory essay, Professor Miller suggests that constitutional jurisprudence is dominated by several myths—for example, the myth of separation of powers. More broadly, Miller argues that scholars should recognize that the Supreme Court is one of the political branches of the government, to be analyzed as such.

In his central essay in the second chapter, Miller lays out his thesis that constitutional study should not focus simply on the Constitution of 1787, but on three "constitutions"—political, economic, and corporate—which determine how America is organized and directed. Miller carries this theme throughout the book, arguing in the third essay that we are moving from a constitution of powers to a constitution of control, under which modern technology will increase the concentration of state power, resulting in an increased emphasis on state security and mass control measures.

Miller asserts that orthodox constitutional thought is permeated by a basic myth: that ours is a government of limited powers, as set forth in the Constitution. Borrowing a concept from Professor Michael Reisman, Professor Miller calls this myth the *jurisprudential publique*, the orthodox constitutional law of lawyers, judges and most scholars. The reality, he says, is a *jurisprudence confidentielle*, the private and largely unwritten set of rules that govern the

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behavior of governmental officers. No constitutional theory can be accurate unless it incorporates these informal rules.

Miller says that eighteen principles make up the political constitution; one of these principles, for example, is that the political constitution is evolutionary, changing in interpretation and application as circumstances change.

The principles of the economic constitution are strongly pro-capitalist, with the state delegating the power to govern to property owners, who have biased the law in favor of their class. Miller's anti-corporate attitude is evident, as he asserts that the corporation is part of the growing social stratification that has subordinated the individual while increasing the power of a governmental and corporate bureaucracy that dominates society. For instance, he thinks that universities have become mere service stations for corporate America.

The third essay focuses on Miller's concern with the increasing power of the state to use modern technology to concentrate power to control masses of society. Although America has been governed by a constitution of powers, Miller asserts that a combination of crises (like commodity shortages, ecological dangers, and the threat of nuclear war) is moving us toward a constitution of control. Once a country of bountiful resources, America is facing a shortage of affordably priced resources that will curtail our standard of living. Further, Miller argues that the technological advances that brought this country to its high standard of living will also enable the state to centralize power and to control the populace. As examples, he mentions the advance in microprocessing, which can destroy privacy, and the National Security Agency, which has a far-reaching ability to monitor overseas communications.

Professor Miller's other essays deal with narrower topics, such as Wisconsin's open primary law (struck down by the Supreme Court), the status of corporations under the fourteenth amendment, and emergency powers, most of which relate in some way to his prediction that we are headed for a super-government that eventually will control all of American society.

His conclusion, that scarcity will force America to move from a "constitution of powers" to a "constitution of control" (read police state), strikes me as too facile. Similar apocalyptic predictions have been made before; they are notoriously unreliable. Human ingenuity and self-interest have responded to past needs; there is no reason to expect that solutions for new problems cannot again be found. Not long ago, neo-Malthusians predicted that reserves of oil were likely to be consumed within a decade. Since then, there have

been changes in energy consumption, partly because of regulations, but also because of market forces that have led to a surprising drop in oil prices.

Miller fails to recognize that modern technology can be a democratizing force. The personal computer, for instance, decentralizes the analytical tools needed to be effective in modern society, enabling a clever but small entrepreneur to compete against a large corporation. Nothing in our history indicates that the necessary adjustments cannot be accomplished through market-induced technological change and supply and consumption adjustments. Compulsory adjustment measures, even if necessary because of some short-term event (a new Arab oil embargo, for example), do not presage the coming of a police state.

Miller's very negative views of the future are evident in his argument that the mass media will be a tool to produce this new state. He does not explain how the press will become subservient to the state. Why will the media manipulate public opinion to serve the ruling elite's view of the national interest? Individual newspapers or networks may be manipulated from time to time, but isolated instances do not mean that the press is prone to extensive and prolonged manipulation. To effect that level of control, a strong and enduring consensus would have to exist between the ruling elite and the editors and publishers and news directors. In my view, this uniformity of views is nowhere evident. The press, let us recall, helped to destroy McGovern and Hart as well as Nixon, Johnson as well as Goldwater. The publishers tended to dislike Franklin Roosevelt, yet his power was partly due to skillful use of the media. Much the same can be said of President Reagan. The Defense Department knows the art of propaganda; but "peace activists" and disarmament receive extensive and largely favorable publicity. Unfortunately, such complexities and nuances are missing from Professor Miller's world-view.

One might suppose that Miller would welcome any decision of the Court that expanded the potential for vigorous political debate as a means to forestall the development of a constitution of control. In fact, however, he is critical of the Court's protection of the political rights of corporations, on the ground that their wealth gives them undue political power. Here again the problem is more complex than Professor Miller acknowledges. Beyond doubt, corporate wealth creates enormous political clout. Viewed in isolation, this advantage is unfair. But part of their clout is used against each other. Besides, those who wish to regulate corporations also have unfair advantages—for instance, the false public perception that a

corporation is simply a rich, impersonal entity, rather than a representative of the ordinary people who own its stock, or consume its products, and who may be hurt by a regulation that reduces corporate profits or increases the prices of corporate products.

II

Although James Fitzpatrick also advocates major changes in constitutional law, his blueprint differs markedly from Miller's. In Fitzpatrick's view, America was founded on Christian religious principles, which were both expressly and implicitly embodied in the Constitution. He maintains that we have lost touch with these principles, moving increasingly toward a secular society lacking a core sense of values. To counter this trend, Fitzpatrick argues that religious values should be reincorporated into the ethos that shapes our primary social institutions—the family, schools, and communities—to give people a sense of what is good about society and worthy of a responsible loyalty. He develops this idea through a series of essays on apparently disparate topics, from John Calhoun to the Scopes trial to McCarthyism. In a final essay on abortion, he attempts to tie all these subjects together, arguing that society has a right to embody its moral principles in its laws.

Fitzpatrick introduces his essays with a quote from Edmund Burke: "It is ordained in the eternal constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters." The founding of this country was an attempt to prove that the historic checks on those "passions," a monarchy or state church, were unnecessary. The "great experiment," says Fitzpatrick, is nearly over. We have moved from a religiously based society with a republican system of government to a secular society lacking the checks upon will and appetite that insure social survival.

Fitzpatrick amplifies on this theme in his essay on the establishment clause. Beginning with the Pilgrims and the Mayflower Compact, he reviews some of our founding documents in an effort to demonstrate that colonial Americans wanted to maintain a role for religion in government. True, the adoption of the establishment clause meant that the framers rejected a theocratic society in favor of a national government without an established church. But they did not mean that it was unconstitutional for public policy to reflect religious convictions. The primary purpose of the establishment clause was to prevent sectarian strife, to prevent the national government from interfering with churches within individual states. In support of this view, Fitzpatrick cites the founding charter of Brown University, drafted in 1765. That charter stated that a mem-

ber of any protestant denomination could serve as a professor or tutor at the university, that the university was open to students of all religious denominations, and that "the sectarian differences of opinion shall not make any part of the public and classical instruction." Fitzpatrick asserts that the quoted sentence is nearly identical to the intention of the draftsmen of the establishment clause.

Fitzpatrick also attacks the broad scope of judicial review that has been adopted by the Supreme Court. His argument is not that *Marbury* was wrong, but that the Court has gone far beyond the position taken by Marshall in *Marbury*. The mistake, in his view, was to go from Marshall's position that acts of Congress which demonstrably violate the Constitution are to be declared invalid, to Chief Justice Hughes's position that the "Constitution is what the Supreme Court says it is." Nevertheless, Fitzpatrick cautions against overemphasizing judicial imperialism. He points out that in another generation it may be the liberals who will argue that the Court's power should be restricted. The fundamental issue, he says, is what society should stand for, not what governmental techniques it should employ.

For Fitzpatrick the issue in the Scopes trial was whether "empiricism and secular humanism set loose in Europe in the eighteenth-century Enlightenment will win the final victory over the older Biblical understanding of the nature of man and his role in history, the role associated with the Christian faith." He stresses that public schools, at least below the college level, are social institutions paid for by the people to transmit the skills and values of the community. Community control of the schools will help to achieve this, but it also requires something more: a concern for the content of what schools teach.

Writing on Joseph R. McCarthy, Fitzpatrick notes that the late Senator is commonly reviled as more evil than a long line of criminals, like Leopold and Loeb and Charles Manson. So accepted is this view that even the average dictionary now has a pejorative definition of McCarthyism. Fitzpatrick argues that this negative characterization is a vast oversimplification of the events that surrounded McCarthy. Basically his thesis is that although McCarthy's methods were unfortunate, McCarthy had influence because the American elite could not face up to the fact that communism was a true threat to the country.

Fitzpatrick reserves his most emotional essay for his analysis of the Supreme Court's abortion decisions. Reflecting on the evolution of American attitudes, from opposing abortion to supporting a woman's right to abortion, Fitzpatrick likens the change to the will-

ingness of the Germans to accept the Nazi regime in the 1930's. By denying the separate existence of the fetus, America is taking one more step down the road to euthanasia. Once one analyzes the question of human existence merely as one of viability, Fitzpatrick argues, there is no logical defense against infanticide, since no infant is viable without outside support.

While Fitzpatrick's goal of revitalizing traditional values is laudable, he overlooks a critical paradox: if support for those values has diminished greatly in modern America, as seems to be the case, then they can no longer be enforced democratically. Committed to democracy as he is, Fitzpatrick never faces up to the possibility that his religious and cultural preferences may no longer be compatible with democracy. For example, even if one assumes that (1) abortion is wrong and (2) *Roe* will be overruled, it is unrealistic to expect that most states will turn the clock back and prohibit all or nearly all abortions.

The consensus of religious belief that may have existed in 1787 does not mean that the same convictions are equally prevalent today. Moreover, Fitzpatrick has no answer for the question how to resolve conflicts between different groups with equally firmly held convictions concerning religion or morality. In one community *Catcher In The Rye* may be deemed unfit for school children, while in another *Huckleberry Finn* and *Little Women* may be condemned as preserving racial and sexual stereotypes. Conservatives are not the only ones who want to enforce "fundamental values."

Despite their considerable flaws, neither of these books should be ignored. Fitzpatrick helps us to understand the attitudes of the religiously-motivated activists who are now so prominent on the political right. Miller's book is a valuable reminder that even in America the legal Constitution is not the most fundamental social fact, that in an important sense we have "constitutions" rather than "a Constitution."