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A Constitutionalist Perspective

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BOOKS: A CONSTITUTIONALIST PERSPECTIVE

Beau Breslan, *The Communitarian Constitution*. Baltimore: Johns Hopkins University Press, 2004. Pp. 288.

Reviewed by Elizabeth Dale*

Intended as a sustained critique of modern communitarian thought written from a constitutionalist perspective, Beau Breslan's *Communitarian Constitution* is a handy primer on modern communitarian thought and a provoking consideration of the impact of communitarian thinking on contemporary politics. The book opens with three chapters that provide a genealogy of communitarian theory in the United States, beginning with a brief sketch of the communitarian's anti-Federalist roots and then moving on to offer a sustained examination of such modern communitarian thinkers as Michael Walzer, Alasdair McIntyre and Amitai Etzioni. In these initial chapters Breslan points out the differences among communitarians, tracing not only the obvious divides between conservative and radical proponents of the doctrine, but also revealing the more subtle differences within those groups of communitarian thought.

While chapter two is mostly about difference, chapter three emphasizes commonalities, as Breslan moves from theory to a consideration of what a communitarian version of the American constitutional order might entail. He first defines the core values of communitarianism—the “belief that the interests of the community supersede the particular desires of the individual,” the requirement of a community defined by “shared moral values,” and an emphasis on “discussion as a means of identifying the common good” (p. 80–83)—and then explores how a “fully developed communitarian polity” based on those values would function (p. 106) (quoting DANIEL BELL, *COMMUNITARIANISM AND ITS CRITICS* 137 (1993)). While his treatment is sympathetic in spots, his overall conclusion is not. Embracing a

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communitarian vision of the United States constitution would, in his view, entail “a fundamental constitutional reform” that ultimately must fail because communitarianism can neither check the “whimsical” decisions of the majority, nor limit the power of government. A communitarian regime would, therefore, be unable to protect either the interests of minorities within a polity, or, ultimately, the values of the majority because struggles for power would inevitably break down the shared understandings that defined the community’s values (p. 78–109).

Having developed that critique of the communitarian constitution in the first half of the book, in its second half Breslin offers a constitutionalist alternative. His constitutionalism is grounded on a strong theory of the rule of law defined by adherence to the constitution as the supreme law of the land (p. 122). As that suggests, Breslin sees the merit of constitutionalism as being that it will succeed in doing what communitarianism cannot: block the exercise of unfettered power by the state or the people. Breslin’s constitutionalism “proscribes the rise of tyranny by coordinating and confining the power of institutions and individuals and by keeping all accountable to certain preexisting rules” (p. 122).

Liberals might ask how this differs from liberalism, or why liberalism, rather than constitutionalism, is not the obvious alternative to communitarianism. It is here that the logic of the book does not succeed. Breslin concedes that in the United States, constitutionalism is inherently liberal (p. 133–34). But he adds that while the rights imbedded in the constitution form one check on public power, rights and judicial review are not the only way that constitutionalism may be expressed: separation of powers and checks and balances may also create a government sufficiently limited that it merits the title “constitutionalist” (p. 122).

Ultimately, while Breslin asserts that constitutionalism can, and should, stand distinct from liberalism, it is hard to tell precisely what the difference he sees is. This ambiguity is, in large part, a function of the book’s organizing principle. In the first half of the book Breslin develops his discussion of communitarianism by setting it in opposition to liberalism, and readers of this journal may be somewhat disappointed with the treatment of liberal thought that results. While Breslin, who describes himself as a constitutionalist first and foremost, is not averse to liberalism, his treatment of liberal ideas in the first three chapters is glancing at best. Though he painstakingly unpacks the thought of communitarians—analyzing, for example, how Mary Ann Glendon’s criticism of “rights talk” is more subtle than that offered by Ezzioni—Breslin allows liberalism to be defined by its critics, not its proponents (p. 70–71).

The result is a very generic ideology—the book claims that John Stuart Mill, John Rawls, and John Locke are all liberals—but aside from the serendipity of their first names, it is unclear what they have in common, or whether their theories of liberalism are in any respect distinct. More disappointing, liberalism in this book is

often reduced to a caricature: evidence that an activist “opposed a state ordinance prohibiting individuals from using opposite sex facilities by arguing in favor of a ‘woman’s right to urinate in any public facility, at any time’” supplies grist for Amitai Ezioni’s anti-liberal mill and also subtly shapes Breslin’s treatment of liberalism as an ideology that can only lead to the fragmentation and selfishness of “inflated rights” and “hyperindividualism” (68-69) (quoting AMITAI EZTIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN AGENDA* 5 (1993)).¹

Thus, the foundation for Breslin’s fundamental argument—that constitutionalism provides a viable alternative to communitarianism, while liberalism cannot—is not laid as well as one might wish. There are other points where his logic ought to be more rigorously developed, most notably in his assessment of the role and power of the rule of law in a constitutionalist system. He rests his reliance on the rule of law as the core of a constitutionalist system by asserting that the rule of law has almost universal authority: “The conviction that the rule of law is somehow better or more virtuous than uncontrolled governance has swept across the globe, and even though many regimes have not yet adopted a similar posture, the believers outnumber the nonbelievers” (p. 125). Perhaps this is so, though legal historians have not been so convinced of the rule of law’s power or ubiquity.² But more to the point, even if the rule of law has *become* the strong value that Breslin asserts it is, it remains a value, and its power and scope depends on the fact that the majority of the members of any given society share that value. How, then, can the rise of alternative values (or the lust for power, or fear) be prevented from overcoming its authority?³ Breslin’s book raises these questions, but does not sufficiently engage them.

Nor does Breslin’s concluding section, where he examines the way theory has influenced practice, completely succeed, though it is in this section that the book is at its most provocative. Although some of the communitarian impulses he describes, AmeriCorps (p. 213-14), efforts to return policy-making authority to city governments (p. 214), local experiments in alternative forms of education (*id.*) seem bland and unthreatening, others do not. In his closing pages, Breslin asserts that communitarian ideas have influenced the Bush administration’s response to the

¹ Thus, Breslin asserts that: “The prescriptive communitarian attack on neutral values, inflated right, and pure hyperindividualism is an equally aggressive second-generation assault on the contemporary liberal opus.” (p. 210). But on the next several page he moves from posing questions about whether those communitarian attacks on liberalism are valid (p.211), to an examination of the credibility of the communitarian alternative (pp. 211-12), without ever answering his own key question: whether the communitarian critique of liberalism had merit.

² See, e.g., ELIZABETH DALE, *THE RULE OF JUSTICE: THE PEOPLE OF CHICAGO VERSUS ZEPHYR DAVIS* (2001); Morton Horowitz, *The Rule of Law: An Unqualified Human Good? Review of Albion’s Fatal Tree*, 86 Yale L.J. 561 (1977).

³ The same objection, to be sure, can be made with respect to liberalism. Using the Soviet Constitution as an example, Breslin notes that the viability of any political system depends not only on having institutions and processes in place to enable it, but also on a shared will to make it work (p. 117-18).

war on terror and popular response to those initiatives, encouraging a thoughtless passivity on the part of the public when presented with arguments rights need to be limited in times of terror, and habeas corpus needs to be suspended. (p. 214-15) Breslin's causal argument is not completely convincing, the history of free speech during and immediately after World War I suggests the nation has been willing to limit individual rights in less communitarian times.⁴ But it is certainly true, as Breslin concludes, that the recent emphasis on the community could have "profound constitutional consequences," especially if that emphasis involves a shift away from a rights-based vision of the constitution.

That having been said, there is much to recommend about this book. It is a good introduction to the works of many of the major communitarian thinkers and to constitutional theorists like Charles McIlwain. It engages a range of contemporary political issues in the context of examining communitarian and constitutionalist thought, and in the process reveals much about the impact of those debates on our constitutional regime. Breslin's failure to fully develop the constitutionalist alternative he offers is a disappointment, as is his weak sketch of liberalism. But that does not detract from the contribution the book makes as an introduction to the study of contemporary communitarian ideas and thinkers.

⁴ RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* (reprint 1999).