NYU JOURNAL OF LAW & LIBERTY

BOOKS:
BETWIXT PRINCIPLE AND PRACTICE: TARA ROSS'S DEFENSE OF THE ELECTORAL COLLEGE

Tara Ross, *Enlightened Democracy: The Case for the Electoral College.* Los Angeles: World Ahead Publishing, 2004. Pp. 256.

Reviewed by Seth Barrett Tillman*

Ms. Tara Ross has written a primer for the educated citizen wishing to become better informed about the procedures and history of the electoral college, for the generalist lawyer whose field is not election law, and I might add, for the school teacher or college professor looking for just the right fit for an introductory class on American government. It is aptly titled: Ross presents *the case* for the electoral college. Discussions that focus on critiquing the system are examined with the intent of answering those criticisms, not with the purpose of leaving it up to the reader to assess on her own the net difference of benefits and losses, winners and losers. Ross does not want to leave it up to the reader to make this assessment entirely on her own. She wants the reader to reach the conclusion she has already reached. Why? Because Ross is a believer. She believes in the Constitution of 1787 and our shared lived history of that constitutional order.[1] She believes that "We the People" will continue to benefit from that legal order, should we be wise enough to let it con-

* Harvard Law School, JD, cum laude (2000); University of Chicago, AB, honors (1984). Member of the Bar of the District of Columbia and the State of Illinois. This review was written while clerking for the Honorable Jane R. Roth, United States Court of Appeals for the Third Circuit (2004-2005).

[1] Ross's book is not a defense of the electoral college as defined by the Constitution abstracted from the body of statutes (state and federal) and customs governing our elections. Rather she specifically defends first-past-the-post, winner-take-all on a statewide basis against alternatives - even though this particular choice is a matter for state discretion under Article II. *See* TARA ROSS, ENLIGHTENED DEMOCRACY 152-53 (2004) (rejecting reforming the electoral college by replacing statewide elections with district elections for each individual elector). This position is somewhat surprising because the Founders may have believed that holding separate district elections for each elector was the preferable strategy. *See* Letter from James Madison to George Hay (Aug. 23, 1823), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 556-57 (Philip B. Kurland & Ralph Lerner eds., 1987) ("The district mode [of popular election of the electors] was mostly, if not exclusively in view when the Constitution was framed and adopted . . . .").

tinue unmolested by little academic scribblers intent on change where angels should fear to tread.

And there is nothing wrong with such a project. The early literary history of our country was jeweled with a variety of legal tracts, pamphlets, and books designed to explain the operation of the Constitution to the layperson. That such books are now rare might not be a sign of lack of interest by the people, but a reflection of the growing complexity of the modern American (administrative) state and the inability of the academic elite to engage the public in language they too might understand. The public might actually be capable of negotiating the language of contemporary academia, but the latter misconceives the intellectual ability of the former. So all told, I am very supportive of Ross's efforts and purpose. Her book (the somewhat snobbish title excepted) [2] is part and parcel of the growing genre of modern populist constitutional scholarship. Indeed, I too have written in this vein, arguing in one law review article that certain elements of the Constitution are actually better drafted than modern legal scholars understand and in another that other elements are far worse than we imagine.[3]

What Does Ross Do Right?

Ross lays out the motives and purposes of the Constitution's designers when they created the electoral college. She explains the general operation of the electoral college in theory as well as in practice by focusing on past elections that put the institution under stress. She maps out the arguments (mostly) for and against its continuing use and the arguments for and (mostly) against a handful of proposed reforms. It *is* a comprehensive and thoroughly readable presentation accomplishing its stated objective. It is *not* an encyclopedic or systematic discussion of modern legal theory or political science, which would focus on the moral, practical, and legal weaknesses of the electoral college.

Most importantly, Ross gets one key question right: she argues that when assessing the electoral college versus one-man-one-vote (or against any other institutional alternative), our assessment should focus on more than equality between individual voters. Rather, we should also consider other institutional values: the

---

[2] Likewise, George Will's forward to Ross's book is not above ad hominem attacks posing as scholarly thought. *See* George F. Will, *Forward* to ROSS, *supra* note 1, at xi ("[s]uch proposals [as Colorado ballot amendment 36 providing for proportional allocation of a state's electors as opposed to winner-take-all] appeal to single-minded - hence simple-minded - majoritarians."). You will not find language like this in *The Federalist*: The Founders intended to converse and inform would-be voters, not to insult them. *See also supra* note 1 (Madison contending that the Founders expected the States to appoint electors through district wide elections, as opposed to winner-take-all).

[3] *Compare* Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why* Hollingsworth v. Virginia *was Rightly Decided, and Why* INS v. Chadha *was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005) (arguing, contra Supreme Court dicta, that the Orders, Resolutions and Votes Clause is not a redundant provision), *with* Seth Barrett Tillman, The Federalist Papers *as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601, 607-610 nn.29-30 (2003) (arguing that a minority of electors acting strategically could frustrate the constitutional scheme providing for both a House contingency election for President and a Senate contingency election for Vice-President).

ability of the system to make decisions with finality, to resolve disputes, and to minimize fraud. That said, Ross's book does have some problems. What book does not? *First*, Ross says things about the electoral college that are simply wrong.[4] *Second*, Ross's use of history sometimes obscures, rather than explains, the significance of certain events. And, *third*, Ross makes some poorly supported abstract or philosophical arguments.

Things Ross Tells You about the Electoral College That Are Simply Wrong

First, in discussing House contingency elections for President, Ross notes that some substantial procedural questions remain open. She suggests that the House "should consider these logistical issues and adopt procedures for a contingent election"[5] in advance of an actual crisis where judgment will naturally be clouded by partisanship. It is a good sentiment. It is a lawyerly sentiment. Rules should be picked in advance while we are all behind the veil of ignorance. But any such course is in all likelihood unconstitutional. One House cannot generally bind a successor House. Each House, elected every two years, has equal constitutional powers under the terms of the Constitution, and that temporal equality extends to equal authority to make or unmake House rules governing contingency elections for President. It is for this reason that the House readopts the rules as a matter of preliminary business early, when members are first seated. In short, rules for a House contingency election cannot be chosen in advance, and if so chosen, such rules would have to be readopted by the successor House when the contingency election must actually be decided.[6] Scholarly opinion is divided with regard to

---

[4] And even when not quite wrong, her presentation can remain somewhat unbalanced. She states:

> [M]inority groups that congregate in one state or region of the country may increase their impact in the presidential election. The Hispanic vote has greater weight than it might otherwise have, as it can be influential in determining the outcome of Texas' and California's votes. The Jewish vote in New York carries similar influence. Farmers in the Midwest have the ability to make a statement as well because they can affect the votes of several states.

ROSS, *supra* note 1, at 41.

If Ross's point is that *all* groups have more influence than they otherwise might have, then it follows that *nobody* has any disproportionate influence. Such a result could only obtain in a place like Garrison Keillor's *Lake Wobegon*: where all the children are above (the local) average. If Ross's point is that only some discrete groups (i.e., those "that congregate in one state or region") have extra influence, then she has failed to inform the reader exactly who the relatively disadvantaged are and precisely why they should be resigned to live in such a system in perpetuity.

[5] ROSS, *supra* note 1, at 29; *see also id.* at 135.

[6] Although I believe that similar principles apply to Senate rules and Senate contingency elections for Vice-President, there is an alternative view holding that because the Senate is a continuing body, its rules survive dissolution and reassembly of the Congress every two years. Under this view, the Senate might be empowered to pick rules governing Senate contingency elections well in advance of actual need. Even so, such rules could be modified (subject to standing rules) by the Senate at the time of the contingency election. In short, the Senate might have the ability to entrench its rules in a way that the House does not.

whether or not such questions could be settled by statute. Good arguments can be made either way, and the federal courts have not yet spoken.

Second, in the 2004 general election, Colorado voters rejected ballot amendment 36, which provided for popular proportional selection of presidential electors, rather than the customary plurality (or majority) winner-take-all. This proposition was defeated by the voters. Ross, however, argues that this failed state constitutional amendment violated the Federal Constitution. Why?

> [The] Constitution explicitly designates each state's legislature as the entity with authority to decide the manner of appointing electors. State legislatures may certainly delegate legislative power to citizens for purposes of state law, but they may not delegate their constitutionally mandated duties in the national presidential process.

She continues:

> This principle has been upheld by the Supreme Court. Speaking to an Ohio plan that would allow the people to act in place of the legislature for [the purpose of ratifying a proposed federal constitutional amendment], the Court observed ... that "the language of [Article V] is plain, and admits of no doubt in its interpretation." ... In short, the Court held, when the Constitution [in Article V for the amendment process] says "the legislature," it means "the legislature [and not the voters through referendum]."[7]

Ross's argument has a certain textual attractiveness. But naïve textualism is a dangerous thing when wholly abstracted from history and practice. When the Bill of Rights - the first amendments to the Constitution - was proposed, the ratifying States generally acted by resolution in ratifying amendments. Governors – even if they were part of the lawmaking apparatus with regard to statutes – were generally excluded. The term "legislature" in Article V was understood to embrace not the lawmaking or statute-making apparatus of the State, but just the legislative chambers. This view was *not* universally shared. New York acted by bill, and Governor Clinton participated. Longstanding practice, not the text of the Constitution, has "ratified" the non-New York view with regard to the meaning of Article V: governors do not participate in the Article V process for ratifying amendments to the Constitution. Ross believes and wants you to believe that just because the term "legislature" in Article V embraces only the legislative houses, the word "legislature" in Article II, Clause 2 – "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled" – must have the same meaning.[8] Not so fast. Cannot the term have a variety of meanings depending on

---

[7] ROSS, *supra* note 1, at 155-56 (quoting Hawke v. Smith, 253 U.S. 221, 226 (1920)).

[8] When Ross does not like the outcome of naïve textualism, she dumps that interpretive method in favor of intuitionism. In arguing against the propriety of the eleven most populous states allotting their electors to the candidate receiving the most popular votes nationally, a proposal which would effectively

context? For example, Article I, § 4 states that "the times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof." Our unbroken history since the Founding is that here "legislature" refers not to the State's legislative houses, but to the lawmaking apparatus of the State. Here, state governors are and have always been included if they are part of the lawmaking apparatus under state constitutional law. Thus, the term "legislature" might have a variety of textual meanings depending on context. At least that was the position of Chief Justice Taft.[9]

One could reasonably make the argument that the term "legislature" in Article II incorporates whatever method or methods each State's constitution permits for lawmaking, which might encompass statewide referendums as Colorado has chosen. So what *does* the term "legislature" mean in Article II? Answer: we do not know. And the federal courts have not told us. But if the term is ambiguous, if it will equally embrace two constructions, and one such construction preserves the constitutionality of state law and state powers *and* simultaneously enlarges the zone of democratic action by American voters, it is obvious which construction the courts and commentators ought to pick. So why does Ross come out the wrong way?

I fervently hope that the two errors pointed out above do not seem picayune. They are not meant to be snarky. They are meant to illustrate a point. Our constitutional system and the electoral college are complex, too complex. You should not have to be Professor Akhil Amar or Circuit Judge Michael McConnell to understand how the President is elected. Other political systems have managed with less complexity. Perhaps, we could too? Frequently, Ross tells the reader that

---

create a direct popular election, she notes: "[w]hy do 11 states not abuse their power if they attempt to effect a constitutional amendment without bothering to get the consent of at least 27 additional states [to reach the three-quarters necessary to effect constitutional change under Article V]? Surely their actions violate the spirit of the Constitution, if not the letter of it." *Id.* at 157. Are penumbras far behind? Ross fails to explain what particular constitutional provision might preclude the state legislatures from making this discretionary choice – one she obviously objects to.

[9] *See* William Howard Taft, *Can Ratification of an Amendment to the Constitution be made to Depend on a Referendum*, 39 YALE L.J. 821, 822 (1920) ("The precise question [to be resolved in *Hawke*, 253 U.S. 221] is whether the word, 'Legislatures,' as used in *this* article, means the law-making powers of the states, or whether it means the representative political bodies called 'Legislatures.'") (emphasis added); *id.* at 825 (Notwithstanding the use of the term "legislature" in Article I, "the function given to the legislature in Article I, Section 4, is plainly that of making a law ... just like any other law of the state. . . . Such redistricting laws are submitted to Governors for the exercise of their power of approval or disapproval as any other law is."). *But see* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, Boston University School of Law Public Law & Legal Theory Working Paper No. 05-13, at 19 n.34 (forthcoming 2006 U. ILL. L. REV. 1) (taking Thomas Jefferson to task for identifying the President as a branch of the legislature), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=748104. Jefferson's view might very well have been the dominant view in the eighteenth and early nineteenth century. *See, e.g.*, 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA Appx. D (Rothman Reprints 1969) (1803) ("The president of the United States may be considered *sub modo*, as one of the constituent parts of congress, since the constitution requires that every bill, order, resolution, or vote... shall be presented to him....") (footnote omitted), *available at* http://www.constitution.org/tb/t1d04000.htm.

the system would be improved, not by institutional or concrete reforms, but by better explaining the system to the public.[10] This is public relations as statecraft. But if some aspects of the electoral college are too complex for Ross to clarify . . . who will then explain them to the public?[11]

Ross's Use of History Sometimes Obscures, Rather Than Explains, Events or Principles

First, Ross tells us that the electoral college was "universally admired"[12] at the time of the Convention and that Hamilton thought the electoral college was an "excellent" system. Moreover, "[t]he other Convention delegates agreed with him; they viewed the Electoral College as one of the great achievements of the Constitutional Convention."[13] Unfortunately, the only authority Ross summons for the latter quotation is a paper in *The Federalist*, again by Hamilton - so at the end of the day, Hamilton is the only delegate or ratifier whose position is fully explained or supported. Considering how much of her argument is tradition-based, authority-centered, and founder-reliant, it would have been helpful if so tendentious a position could have been supported by more than the sole opinion of the mercurial Alexander Hamilton.

Second, Ross seems to believe that the political history of the electoral college can be neatly segregated from the political history of the States that compose it. For example, she writes:

> The Civil War was among the first major events to undermine the value of state decision-making in the eyes of Americans. In the mid-1800's, many southern states opted to continue slavery, citing states' rights as a defense for their actions. Slavery was an appropriate casualty of the war, but the legitimate principle of states' rights unfortunately also took a beating during this time.[14]

No mention of Jim Crow! Slavery might have ended, but state sponsored segregation had not. Moreover, a freedman's right to vote in former confederate

---

[10] *See, e.g.*, ROSS, *supra* note 1, at 140 ("To the small degree that voters do not perceive the election as legitimate [when the electoral college fails to elect the candidate that took a plurality of the popular vote], this minor problem can and should be cured by educating voters ...."); *id.* at 147.

[11] The electoral college system is riddled with ambiguity. Of course, Ross could not address every such problematic case. I have only found fault where she has actually attempted to explain such an issue. For the reader interested in such legal conundrums consider the issue of whether or not an elector is permitted to cast his vote for the same person for President and Vice-President. *Compare* Seth Barrett Tillman, The Federalist Papers *as Reliable Historical Source Material for Constitutional Interpretation*, *supra* note 3, at 610-11 n.31 (elector has authority to vote for a single individual for both President and Vice-President), *with* Vasan Kesavan, *The Very Faithless Elector*, 104 W. VA. L. REV. 123, 126 (2001) (duty to vote for two distinct persons), *with* http://wcco.com/topstories/local_story_348135504.html (last visited Jan. 11, 2005) (during the 2004 election, one Minnesota elector voted for John Edwards for both President and Vice-President).

[12] ROSS, *supra* note 1, at 8.

[13] *Id.* (citing THE FEDERALIST NO. 68, at 410 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (1961)).

[14] ROSS, *supra* note 1, at 66.

states tended to end with the evacuation of Union troops. Given that this was our lived history, why exactly should we highly value states' rights? Exactly when and where—except amongst a certain group of academics preaching high theory—did the principle of states' rights ever lead to better governance or simple justice?

More importantly, this lived history undermines the argument for the electoral college. A sensible argument might be crafted defending the two vote bonus for each state: effectively overvaluing small states relative to large ones. It is even possible to defend the equality of state representation in a rare House contingency election.[15] But any such system posits that the sense of the people is, at the very least, consulted in each State on election day.[16] If the whites exclude the blacks from voting, then such States become rotten boroughs—where the few who enjoy the de jure or de facto franchise effectively control the State's entire block of electors. If this is the upshot of the electoral college, then perhaps we would all be better off risking some increased fraud in order to provide every jurisdiction with sufficient incentive[17] to see to it that all our citizens, convicted felons then serving time and those who participated in rebellion excepted, who wish to vote can vote. Of course, such considerations lead inexorably to direct popular election for President and Vice-President.

Incredibly, in the one place in her book touching on the exclusion of former slaves from the polls, Ross uses that fact merely to argue that Hayes, the winner of the electoral vote in 1876, might also have won the popular vote and that therefore the electoral college is wrongly criticized when that contested election is cited as a clear example of the system producing the wrong winner.[18] Is not a larger criticism to be gleaned from these facts? I.e., that in the period following the Civil War, Presidents sometimes won in the electoral college by taking entire and complete state electoral slates in States where freedmen and their descendants could not vote? If that is a fair restatement of our historical past, then it is not clear in what way past elections might be proxies for measuring the success of the electoral college as an institution, even with regard to Ross's limited purpose of measuring broad popu-

---

[15] *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1456, at 321 (photo. reprint Fred B. Rothman Publications, 2d printing 1999) (1833) ("[I]f the people do not elect a President [in the electoral college using rough proportionality by population], there is a greater chance of electing one in this [different] mode [in the House where all States have an equal vote].").

[16] ROSS, *supra* note 1, at 142 ("The Electoral College was devised to ensure that a President will have the 'support of the people' ...."). *Cf. id.* at 130 ("[V]oter attention to the actions of Congressmen [in a House contingency election] would act as a disincentive to deal-making because congressional members must seek reelection if they are to continue in office."). Ross's position here is odd. For the voters to monitor their Congressmen, their votes must be publicly cast. But past House contingency elections were conducted by secret ballot, as prescribed by the Constitution. *See* U.S. Const. art. II, cl. 3 (House shall "choose by ballot"), *amended by id.* amend. XII (same). Perhaps Ross will consider a constitutional amendment for this purpose?

[17] The Fourteenth Amendment tried to address the problem of the state-as-a-rotten-borough by creating a mechanism that would penalize states engaging in vote theft by reducing their representation in Congress. *See* U.S. Const. amend. XIV, § 3. This scheme failed to accomplish its purpose.

[18] ROSS, *supra* note 1, at 169.

larity in many states, crossing regions, reflecting moderate national coalitions. In short, the argument - if it ain't broke, don't fix it - just won't work. History does not show that the system has worked.

In other words, Ross argues that the winner in the electoral college might not have a plurality of popular votes, but will generally have achieved victory in a majority of States, which will reflect a measure of broad popular appeal. But if States are allowed to award electors while concomitantly excluding citizens from voting, then the whole exercise is pointless, even on Ross's terms. The checkerboard of States on election night is a reflection, not of the sense of the people in a democratic republic on federal principles, but of an election stolen by means of law.

Ross Makes Philosophical or Abstract Arguments That Are Not Well Supported.

Ross defends the indirect election of the President by electors chosen by the people on a state by state basis. Ross defends the two elector bonus for each State. Ross even defends state equality in House contingency elections. She has a variety of justifications. But justifying these two election schemes is no easy task, particularly because they are so different from one another. Her defense is mainly rooted in federalism[19] and states' rights.[20] It is not altogether clear that she distinguishes these two positions. In essence, she argues that but for these departures from allotting electors in proportion to state population, the little States would be victims of the big States, and tyranny of the majority would be the result rather than reasoned deliberative democracy.[21]

Does this really make sense?[22]

---

[19] *Id.* at 52 (defending electoral college as an element of federalism embracing local and national constituencies).

[20] *Id.* at 64 (declaiming the modern "loss of appreciation for States' Rights"); *id.* at 203 (arguing that "states' votes, rather than individual votes', ensures that winning presidential candidates will be the best").

[21] *Id.* at 12 (defending electoral college as a protector of minorities and small states); *id.* at 32 (arguing that goal of electoral college is to avoid tyranny of the majority); *id.* at 33 (noting that small states are a "permanent minority constituency"); *id.* at 39 (arguing that purpose of electoral college was to preclude "irrational majorities"); *id.* at 121 (noting need to maintain system in which "large states [cannot] trampl[e] on the smaller states").

[22] There are times in Ross's analysis where she departs from Burkean "if it ain't broke, don't fix it" in favor of a quasi-Hobbesian position. But her approach in this regard is uneven and inconsistent. *Compare id.* at 119 ("If a [committed party] elector were to suddenly decide to exercise independence [thereby changing the election result] . . . the state's citizens would likely revolt."), *with id.* at 140 ("A President is legitimately elected if he campaigned and won under the rules. To the small degree that voters do not perceive the election outcome as legitimate [when the plurality winner of the popular voters loses in the electoral college], this minor problem can and should be cured by educating voters on the important rationales underlying our ... system."). Notably Ross does not want to educate voters to accept elector independence, given prior party commitments by electors, as implicit in the Constitution of 1787. Why the double standard? *Cf.* EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY 183 (1934) ("But certain people have recently raised the cry, 'Back to the Constitution.' Just how far back would they like to go?").

It is true that the Founders believed that a system exclusively allotting *all* government power in proportion to population might systematically disadvantage small States. But were they correct in that belief? Is there any evidence from our history that the larger States might have or could have colluded against the small States? If this fear has no basis in fact, why should we depart from general democratic principles: allotting electors to States in proportion to population, absent the two electoral vote bonus for each State? Are not the large States, compared to one another, heterogeneous in the same way that the small States are?

Moreover, the very fact that these two very different election schemes can be defended in terms of *federalism* teaches that a very wide variety of institutions are consistent with that broad philosophical position. A fundamental difference between the two systems is the size of the bonus. If the size of the State bonus given each State exceeds the number of electors allotted to all States on a population basis (i.e., imagine all States received a 50,000 electoral vote bonus, rather than a bonus of a mere two electoral votes), then you have engineered political equality amongst the States. Any candidate carrying 26 States (including the District of Columbia) will prevail. So the size of the bonus matters. But if any bonus, 2 votes, 3 votes, 4 votes, or 50,000 votes, is consistent with federalist principles, would not a bonus of one vote – rather than two – have worked too? And given the equal representation of all States in the Senate as another device to protect small States, did the small States need any bonus at all for the purpose of electing the President? Federalism and states' rights are just too broad to use as defenses for the particular characteristics of the system the Founders built.

It is very easy to criticize. And any book spanning more than two-hundred years of legal doctrine and American history is bound to make a few stray mistakes. This is particularly true when the institution the author seeks to explain and defend departs so far from current democratic mores. Ross has directed her efforts to achieving a herculean, if not impossible, task in one slender volume. Despite its faults, on the whole hers is a readable book that largely achieves its intended purpose.

NYU JOURNAL OF LAW & LIBERTY

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 Breslin'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 Breslin 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 Breslin 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

* Associate Professor of US Legal History, Department of History, University of Florida and Affiliate Professor of Law, Levin College of Law, University of Florida.

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 Eztioni—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 Eztioni'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 Horwitz, *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).