ANALYZING DEMOCRACY

Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy. By Richard Bellamy. Cambridge: Cambridge University Press, 2007. 282p. $95.00 cloth, $39.00 paper.
doi:10.1017/S1537592711000739

— Jacob T. Levy, *McGill University*

This sharp, intelligent, and clear book ably ties together two of the more important strands in political and legal theory of the past 20 years: the neorepublicanism most closely associated with Philip Pettit and the critique of the judiciary-centered model of constitutionalism, a model most prominently linked with Ronald Dworkin's philosophical apotheosis of the Warren Court. That critique in turn has a few strands, all of which Richard Bellamy makes use of: Jeremy Waldron's philosophical defense of legislative politics of rights against the judiciary; Cass Sunstein's and Mark Tushnet's partly institutional theories of constitutional politics; Sandy Levinson and Robert Dahl's critiques of the antiegalitarian American constitutional order; Thomas Christiano's theory of the moral status of democratic politics; and the political science findings (e.g., from Gerry Rosenberg) about how rarely courts in fact lead progressive social change. Both neorepublicanism and the antijudicial turn are presented as reactions against a prevailing liberal hegemony, though by now the supposed hegemony is starting to look a little thin.

To all of this, Bellamy also adds a robust defense of the institutions and practices of really existing democracy, notably partisan contestation and majoritarianism. This is an important addition and the greatest strength of the book, but I set it aside for the moment to consider the neorepublican and antijudicial strands.

Neorepublicanism and the antijudicial turn seem like a natural fit, and not only because they share a foil in Dworkin. According to republicans, liberals believe in a conception of freedom that can be respected by mere inaction. And judicial review is especially good at saying "no" to other branches of government that are trying to engage in an action. The legislature votes through some majoritarian interference with the choices of individuals or minorities; the judiciary strikes it down. According to republicans, their preferred conception of freedom, freedom as nondomination, is not only (or even primarily) a matter of inaction, and so it seems to make sense that it would not be naturally protected by a judiciary wielding the power to say "no." State action is needed to secure nondomination: We have taken a prince so that we shall not have a master. Moreover, republicanism has a strong traditional connection with popular or democratic government, and the antijudicial turn has also been a turn toward the endorsement or celebration of democratic politics in the constitutional arena.

The antijudicial turn and neorepublicanism, however, have not heretofore been decisively joined in the literature, for a few reasons. Pettit has been at pains to say that nondomination is a substantive evaluation of policies and states of affairs. Democratic procedures may do well or poorly at promoting nondomination. In other words, Pettit has remained committed to an arm's length and instrumental relationship between democracy and liberty, just as (ostensibly) noninterference liberalism does. This has helped him establish the distinctness of his republicanism and nondomination from civic humanism, from Isaiah Berlin's positive liberty and from (which is not the same thing) Benjamin Constant's ancient liberty. Pettit (like Quentin Skinner) insists that nondomination is both a negative and an individualistic conception of liberty, and so he has tried to maintain its conceptual distance from collective self-determination. Pettit is, moreover, not a democratic enthusiast in practical terms, and defends the importance of expert administration. From the other direction, Waldron has sought to emphasize that his critique of judicial review is a liberal one, and so has not gone out of his way to link it to republicanism.

Bellamy draws on the antijudicial turn to say that nondomination's meaning will be legitimately contestable, not a matter of simple right answers. Given that fact, it is itself an act of domination for judicial elites to impose their own interpretation, rather than allowing a community of democratic citizens and their elected representatives to reach their own best judgment. He argues that what he calls "legal constitutionalism"—the constitutionalism centered on judicial review of legislation using a written constitutional text and/or ideas about fundamental rights—necessarily violates freedom understood as nondomination. He moreover argues that even if one could disregard procedures and look only at substantive outcomes, as Pettit seems to think, legal constitutionalism has no clear advantage over, and probably a real disadvantage in comparison with, democratic politics. It is not always clear how important Bellamy thinks this claim is. Legal constitutionalists hold that judicial review is *so clearly* superior to democratic politics when it comes to principled questions of freedom that we confront a straightforward trade-off between majoritarianism and taking rights seriously. Bellamy, it often seems, would be content to say that it is not so clear, and that we have no reason to expect a decisive judicial advantage. But he also seems to genuinely believe there is a majoritarian advantage. The measurements here seemed to me ad hoc and unpersuasive; more or less any left-leaning major piece of legislation seemed to be counted as enhancing freedom in the relevant sense. In any case, the stronger claim is not really needed to defeat Dworkin and his allies.

The highlight of the book is its principled defense of really existing democratic politics. Both Habermasian and post-Rawlsian versions of deliberative democratic theory

have tended to obscure the merits of contestatory, majoritarian, partisan democracy—the only stable kind of democratic government the modern world has known. Bellamy's account here is pragmatic but not only that. Given the legitimate contestability of how to interpret and implement fundamental constitutional values, the idealized consensus seeking of the deliberativists would actually fail to do what we want from democratic politics. The author charges the deliberativists with thinking like legal constitutionalists: imagining in advance of politics the one right answer that ideal judge-like deliberators would reach, and treating success or failure at reaching those substantive outcomes as a measure of whether deliberation was proper. In just the same way that nondomination requires us to reject the legal constitutionalists' philosophical abstraction in favor of real politics, so does it require us to reject the deliberativists' idealized consensus-seeking procedures in favor of real contestation. Bellamy is not alone in this push-back against deliberative theory—Ian Shapiro, Michael Walzer, and Waldron himself have all made related claims. But Bellamy's argument here is powerfully put, and weaves together institutional and philosophical ideas exceptionally well.

The second, affirmative, half of the book, building up an account of competitive and majoritarian democratic politics on questions of principle, oriented toward nondomination, is first rate, one of the best works in democratic theory in recent years. I found the first half—the paired critiques of legal constitutionalism and liberal conceptions of freedom—not quite up to the same standard. I mention a few quarrels below.

While there is clearly something to Bellamy's linkage between democratic politics and nondomination, there is also something to Pettit's separation between them, and I do not think Bellamy gives the latter its due. If the relationship of judges to democratic citizens could be one of domination, that is far from being the *only* possible such relationship. But the example seems to be at risk of swallowing the whole category. Bellamy's insistence that nondomination is respected when equal citizens are able to reach and enact their judgments about constitutional norms democratically crowds out much evaluation of the substantive results of democratic decision making. Sometimes majorities *do* dominate minorities; sometimes democratic politics passively allows private domination to persist; sometimes such politics actively creates private domination; and sometimes the democratic state and its agents dominate the citizenry writ large. It is one thing to say that the judiciary might do all of these things as well, or that we have no guarantee that it would do better. It is quite another to say that any result of a nondominating procedure must itself count as nondominating. It seems to me that Bellamy is so concerned to avoid giving aid and comfort to those who leap from a prepolitical judgment that some policy would violate liberty directly to "therefore, judicial review" that he is far too diffident of expressing such judgments at all. This tends toward an idealization of legislative action to which, on his own terms, he does not need to commit.

It also tends toward the neglect of executive and bureaucratic action, save in a brief discussion of security policy at the end. The chapter trying to disenchant us of the idea of the rule of law treats it as fundamentally an idea about restraint on legislatures (attributing the same thought to Dworkin, arguably, and F. A. Hayek, falsely). But judicial restraint *on executive action* lies closer to the core meaning of the rule of law, and that out of which legal constitutionalism evolved. The writ of habeas corpus, not the injunction against enforcing an unconstitutional statute, is the paradigmatic case of judicial enforcement of the rule of law. The failure of American constitutional courts in practice to enforce the rule of law against a lawless executive in recent years makes the legal constitutionalist's case hard to make on these grounds; but that is the relevant terrain for the argument.

Bellamy embraces the republican account that liberal liberty is noninterference, and nondomination is republican liberty. This account is entirely unsatisfactory. The fact that Berlin equated liberal liberty with noninterference does not make it so. When Hobbes and Bentham are one's central cases of liberalism, and Locke, Montesquieu, Smith, and Constant are all defined as outside of liberalism, something has gone badly astray. For Locke, it was the union of arbitrary (i.e., dominating) and absolute (i.e., interfering or at least potentially interfering) power that made for unfreedom. The neorepublicans have performed a service in distinguishing noninterference and nondomination, and in developing the latter. But they have performed disservices, too: overemphasizing the conceptual rivalry of the two, telling a history of ideas in which nondomination lies outside the liberal tradition, and encouraging a new view in which interference (the *absoluteness* of power) is irrelevant to liberty altogether. Bellamy is especially guilty of this last offense. Officially, his argument is that noninterference is incoherent once we reject (as he thinks we must) the idea of prepolitical rights; in the circumstances of politics, we must be able to democratically decide what our respective spheres of free action are, rather than treat them as naturally given. De facto, I think that the urge to avoid giving an inch to Dworkin has gotten the better of him: It is easier to jump from noninterference to a court that can simply say "no" to legislatures than it is to make that leap from nondomination, and so noninterference must be rejected.

Finally, Bellamy throughout says that he is defending a "political constitutionalism" against "legal constitutionalism." He means to show that democracy is a good way (indeed the only good way) of adhering to constitutionalism's core values. But eventually it becomes hard to see what continued work the word "constitution" and its derivatives are doing. It seems to mean only that contra

https://doi.org/10.1017/S1537592711000739 Published online by Cambridge University Press

Dworkin, democratic politics does concern itself with fundamental matters of principle, and does secure freedom adequately—in other words, that it promotes the values that constitutionalists say they care about. But I cannot see what differentiates the "legal constitutionalism versus political constitutionalism" argument from a "constitutionalism versus democracy" argument, save that "constitutional" has become an attractive word and Bellamy does not wish to forfeit its rhetorical advantages.

The Constitutional Presidency. Edited by Joseph M. Bessette and Jeffrey K. Tulis. Baltimore: Johns Hopkins University Press, 2008. 384p. $61.00.
doi:10.1017/S1537592711000740

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Thirty years ago, the editors of this volume published *The Presidency in the Constitutional Order* (1981). That book contributed to the rebirth of a political science of constitutionalism, not only but not least by calling attention to the work of Herbert J. Storing (p. viii), a distinguished political scientist who placed the Constitution at the heart of his understanding of American politics. In the intervening years, some things have changed. It is no longer quite as true as it then was that political scientists "tend not to attach much explanatory weight to the Constitution in their accounts of American politics" (p. 8). Indeed, a growing number of political scientists recognize that "constitutional analysis may be indispensable to an adequate description of political behavior" and thus seek "to develop a distinctly political (and not merely legalistic) understanding of the constitutional presidency" (pp. viii–ix). The battle against a myopic legalism in constitutional analysis was won by political scientists some time ago. Indeed, many of the finest constitutional lawyers today are also political scientists of a sort, who recognize the necessity to explain "the connection between constitutional forms and political practice" (p. 4). Today, it is widely recognized that constitutions matter, and the task of political scientists and constitutional lawyers alike is to explain how they matter, without returning to the empty formalism of the past. *The Constitutional Presidency,* like its predecessor, is an important contribution to that inquiry, to the search for a *political* understanding of the *constitutional* presidency.

The essays in *The Constitutional Presidency* are united in defense of an energetic executive; in defense of the constitutional republic (against more populist conceptions of democracy); and, as I have already indicated, perhaps above all in defense of a certain way of doing political science. Two or three of the contributors do not join every part of the common project, but altogether, the volume advances a reasonably unified and coherent argument about presidential power, about constitutionalism, and about political science. In each of these respects, the book is timely. Thirty years ago, after Vietnam and Watergate, the presidency was a diminished office; today, after 9/11 and in light of controversies about the "unitary executive" and the expansion of presidential power during the tenure of President George W. Bush, the office is no longer diminished, but it *is* again vulnerable to the attacks of those who reasonably fear the illiberal and undemocratic tendencies of overweening executive power. The contributors to this volume present a judicious and sober case for an energetic executive, taking into account the place of the presidency in the constitutional order, subject to both constitutional and political challenges by Congress, the courts, and ultimately the people: "a constitutional arrangement that allows for a substantial degree of executive initiative and discretion within a framework of political checks is more effective and less dangerous than a set of arrangements that so constrains and restricts the executive power as to render it incapable of carrying out its proper tasks or that makes it necessary to set aside the Constitution to do what the good of the community requires" (p. 24, from the introductory chapter by the editors).

In regard to constitutionalism more broadly, two paradoxes of democratic constitutionalism emerge in this volume that may prove to admit only practical and imperfect solutions. First, a number of the contributors to the volume are troubled by the continuing ascendance of the plebiscitary or "rhetorical" presidency in recent years. As James W. Ceaser argues in his essay in this volume, "the office of the presidency is probably more 'friendly' to the use of demagoguery today than it was in the past" (p. 288). But that problem may prove to be insoluble in democratic constitutions: as Gary J. Schmitt argues in his essay in this volume, "it is naïve to think . . . that a separation of powers clash will be resolved simply independent of the character and direction of public opinion, an opinion likely to be energized by the stakes at hand" (p. 74). Second, there is some reason (as recent events might be thought to confirm) to think that the tension between rule of law and executive discretion cannot be resolved constitutionally, but only politically. Thus, Lincoln—even or especially Lincoln—writes: "measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation" (quoted on p. 19). These two paradoxes of democratic constitutionalism are a theme in many of the essays in this volume.

It is not possible to do justice here to all of the fine essays that are included in *The Constitutional Presidency.* After an introductory essay by the editors that canvasses prevailing understandings of presidential power, the volume includes ten essays that might be divided (though the editors do not do so) into three groups. The first three essays discuss presidential power in historical perspective (an essay on the meaning of Article II that emphasizes the logic connecting the *powers* and the *duties* of the presidential office, an essay on Washington's Proclamation of Neutrality, and an essay on a