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Book Review: Conservatives in Court. by Lee Epstein.

Alan B. Morrison

Rather they are justified by their being made correctly in reference to necessarily nebulous "fundamental values."

To Tribe's credit, there is no flinching. In *Constitutional Choices* he writes that "I find all legitimating theories not simply amusing in their pretensions but, in the end, as dangerous as they are unconvincing."[9] Since a Constitution is, at the simplest level, a set of legitimating procedures embodying a legitimating theory, it becomes clear that Professor Tribe's quarrel is not really with interpretivists, and not even with the Constitution of the United States, but with the basic ideas of constitutionalism and majority rule.

What does one make of a distinguished constitutional lawyer who doubts the possibility of constitutionalism, and whose core commitment seems to be to a radical subjectivism? Professor Tribe protests that his position does not amount to "a policy of 'anything goes' ", but he never succeeds in explaining why it does not—indeed, he makes little effort to do so.

One hopes that a conscientious Senator, instructed by this book and confronted by such a nominee, would vote against confirmation.

CONSERVATIVES IN COURT. By Lee Epstein.[1] Knoxville, Tenn.: University of Tennessee Press. 1985. Pp. xii, 204. $17.95.

Alan B. Morrison[2]

I began reading this book with some apprehensions. The works listed on the back cover as "of related interest" suggested a substantial possibility of a conservative bias, at least on the publisher's part, and the title page indicated that the book was funded in part by the Andrew W. Mellon Foundation, which is known to be supportive of conservative organizations. I was concerned that the book would be a paean to the conservative movement and that it would fail to take a hard look at what was occurring in these organizations. I was nonetheless hopeful that it would provide substantial new data about these organizations—how they operate, what they are doing, how they are financed, and how their success can be measured by some objective standard.

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9. L. TRIBE, CONSTITUTIONAL CHOICES 6 (1985).

1. Assistant Professor of Political Science, Southern Methodist University.

2. Mr. Morrison is the Director of the Public Citizen Litigation Group in Washington, D.C., which Ms. Epstein refers to as a "liberal" organization.

Unfortunately, the author achieved none of these goals. Unlike many other political scientists, Professor Epstein is unsophisticated about litigation. As a result, her book is marred by many semantic, factual,[3] and analytical errors that no experienced observer would make, plus dozens of unhelpful truisms. For example, she sometimes displays no awareness that the merits of a controversy may be decisive, implausibly attributing conservative defeats to "better organized" opponents of segregation, or seeming unsure why "expert attorneys" were unable to persuade the Court that the nineteenth amendment was improperly adopted. With similar naïveté, she mentions a suit by the Washington Legal Foundation on behalf of the secret service agent who was shot, along with President Reagan, by John Hinkley. I confess that I have never heard of this case, although Epstein reports that it has generated considerable publicity. To her, this apparently routine tort suit is a "highly salient case" that enhanced the reputation of the plaintiff's attorney. One wonders why.

Professor Epstein frequently notes that one organization prefers to file amicus briefs, while another prefers to "sponsor" litigation and still others have recently attempted the tactic of intervention. But she does not explain the legal and practical significances of these differing approaches. She also fails to supply data about the frequency with which each organization employs each of these forms of participation in litigation.

In general, Epstein's data about conservative groups' litigation is both sketchy and—at times—misleading. For example, when discussing the National Right to Work Committee she first observes that the Committee has 250 active cases, which sounds like a lot, but on the next page she reports that there are fourteen staff attorneys plus 100 cooperating outside lawyers, suggesting a rather different picture. Since Epstein does not supply the necessary financial data, the reader cannot calculate even approximately how many cases or amicus briefs are produced for a given sum.

The little data she supplies suggests to me that conservative groups commit vast resources to filing amicus briefs in the Supreme Court—a phenomenon that cries out for appraisal. Yet Epstein

3. For instance, there was no tax code change in 1939 that caused the spinoff from the NAACP of its Legal Defense Fund (p. 5); it is not the Federal Register, but the Federal Reporter that attorneys read to find cases (p. 60); Charles Halpern was not "former clerk at the District of Columbia Court of Appeals" (p. 119), but a law clerk to a judge on the United States Court of Appeals for the District of Columbia Circuit; and while the NAACP's suit against the NAACP Legal Defense and Education Fund over the Fund's continued use of "NAACP" was successful in 1983 as the book asserts (p. 157, n.1), it was on appeal and eventually was reversed. NAACP v. NAACP Legal Defense & Educ. Fund, 753 F.2d 131 (D.C. Cir. 1985), *cert. denied*, 105 S. Ct. 3489 (1985).

makes no effort to determine whether such briefs are more than simply echoes of what others are already submitting. Finally, she seems to suggest that the choice between a role as a "sponsor" for a party and an amicus is simply made according to the individual preferences of the group. In fact, financial concerns or the fact that you are supporting the government often dictate that you can only be an amicus.

Epstein suggests that amicus briefs may not be very effective, a view that I share with many others. The book, however, does not test this hypothesis. Perhaps no meaningful study could be done, but a survey of judges and their clerks might produce interesting anecdotal information about the utility of amicus briefs and might reveal the circumstances in which they are not simply disregarded.

Insofar as Professor Epstein examines the efficacy of amicus briefs, she does so in a naive manner. In discussing a case in which the Pacific Legal Foundation filed such a brief, she says that "the U.S. Supreme Court adopted the PLF's arguments," implying that only the PLF had made the point. Since the party being supported in that case was the Secretary of Defense, who was represented by the Office of the Solicitor General, which is universally recognized as having a very able group of attorneys, and since the point referred to—the need to balance national security concerns against the environmental issues—is hardly subtle, it strains credulity to think that but for the PLF's brief, the Justices would have had to discern that point on their own. If that is the author's view, at least she should have made clear that an examination of the government's brief revealed no such argument and that therefore a reasonable inference is that it was the PLF which persuaded the Court to adopt the approach.[4]

Professor Epstein asserts that one of the "most common traits of conservative groups has been their tendency to refrain from cooperation in litigation," by which she means that "the conservative groups have avoided what they consider 'me-too' participation, with the intention of eliminating needless duplication of effort," contrary to what she believes are the wasteful practices of liberal groups. Part of the problem in making these comparisons is that the discussion of liberal groups is based entirely on the research of others, most of which appears to have focused on the period before 1969, the time when the public interest movement greatly expanded in

4. Similar overstatements can be found on page 61 regarding the value of an amicus brief filed by the National Chamber Litigation Center ("the Supreme Court adopted its argument in full"), and on page 87 concerning a brief filed by citizens for Decency Through Law (whose amicus "arguments were incorporated into the Court's opinion").

scope, size, and subject matter. Perhaps Epstein's conclusions are correct, although my own experience is quite to the contrary, as I have seen several cases in which "me too" briefs have been filed by conservative legal foundations, not only where other similar groups were involved, but where their interests were represented by such "underrepresented organizations" as the United States Government, Duke Power Company, and the Pacific Gas & Electric Company. I recognize, however, that my experiences are not necessarily typical, nor have they been statistically validated. But then I did not make so bold an assertion, for if I had, I would surely have backed it up by detailed charts and tables, which could be readily assembled from the public dockets.[5]

Professor Epstein relied too much on secondary sources and on the views of the attorneys in the groups that she was studying, without any apparent effort to interview their adversaries. Who, for instance, would take the word of Dan Burt, founder of the Capitol Legal Foundation, on anything about the so-called "Nader network," which he has roundly criticized in his own book? Why would anyone rely on the views of Raymond Momboisse of the Pacific Legal Foundation, to justify his decision to side with the State of California against "liberal" public interest law firm challenges to its authority? Momboisse concluded that "the opposition had the ability to throw tremendous manpower into the litigation." While those of us who have litigated on the liberal side may or may not be skilled attorneys, no one else has ever accused us of having "tremendous manpower," and it is difficult to understand why the author credited such a statement without further inquiry.[6]

Ideally, this book would have told us something about the finances of conservative legal organizations, a topic that could have been made even more interesting if coupled with a comparative analysis of liberal legal groups. Here again, however, Epstein does not dig very deep. In several places she simply relies on what people have told her, without even examining the Form 990's that every organization is required to file with the IRS annually and that

5. The chart on page 77, purporting to show success rates of the economic litigation groups in the Supreme Court, vastly overstates their importance since a "win" is counted whenever a group files a brief on the winning side. The more relevant questions are, who was the group supporting, who else was on that side as an amicus, and did the group add anything of substance? Numbers like those on page 77 don't begin to scratch the surface of such an inquiry.

6. Ms. Epstein does report that the AFL-CIO claims that the National Right to Work Legal Defense Foundation "has not accomplished a great deal and has simply relitigated well-settled issues." But even that statement is subject to serious doubt since it comes from a 1973 secondary source, which was written several years before the Foundation's success in the *Abood* line of cases that the author herself discusses on pages 49-53.

are publicly available, except for one schedule listing the names of large donors. Professor Epstein does not appear to have asked the groups themselves for detailed financial data, and even with respect to fundraising, she has not made any real effort to distinguish the gross amounts raised through the efforts of Richard Viguerie and others from the net available to the organizations, except to note that several of the groups broke off their relationships with Viguerie because he was taking too large a cut for himself.

Similarly, there is no hard data on salaries, with a few minor exceptions. Indeed, even though James Watt's prior salary at the Mountain States Legal Foundation was made public when he joined the Reagan Cabinet (he took a slight pay cut), that figure does not appear. Given the ability of magazines such as *The American Lawyer* to probe deep into the books of America's largest and most secretive law firms, it seems likely that any real effort by an interested researcher, particularly one with conservative credentials, would have produced some real information about salary levels. For a scholar who wants to do a comparative study of the differences in conservative and liberal organizations, salaries should be one of the first items on the research agenda.[7]

Another important question is whether the new conservative groups are, like their older counterparts, little more than covers for the economic interests on whose side they so often appear, as exemplified by the test case for the child labor laws that Professor Epstein discusses. Symptomatic of this problem is that the author wrote two separate chapters, titled, respectively, *Conservative Economic Litigation Since the 1960s* and *Conservative Public Interest Litigation Since the 1970s*, with little more than a hint that there is any basis for the charge that there is substantial overlap between these groups. That question needs to be answered, but it can be done only by looking very specifically at particular cases and not by posing general questions of the participants, asking them to describe the kinds of litigation their group is doing. Once again, my own experience tells me that the charge that these groups are little more than covers for big business has substantial merit, although I recognize that in some cases there are philosophical principles at stake in which it is not simply big business running under a protective public interest cover. Indeed, Professor Oliver Houck's massive study of

7. One example of the relative financial resources of the conservative law firms is that in a case in which my group was suing the Federal Government over its refusal to rehire the fired air controllers, Mountain States Legal Foundation moved to intervene (along with another conservative D.C. group with its own counsel), and flew three lawyers from Denver to Washington just for that quite routine motion.

this question, *With Charity For All*,[8] does the very kind of analysis not done here from the perspective of the IRS's guidelines on public interest law firms and concludes that these conservative groups don't pass the test. And in the area in which the possibility of this deception is perhaps the greatest—the Right to Work Committee's efforts to foster its vision of union democracy—there is almost no attention paid to the very serious issue of whether the vast majority of the Committee's support for dissident union members comes from those who would prefer to see no unions at all.

Perhaps the most interesting comment in the book is Epstein's casual observation that "unlike liberals, conservatives are divided over the very use of the courts. Many are reluctant to advocate judicial activism, regardless of ideological bent." That is a very interesting observation, but one which is left dangling with almost no discussion or analysis. What does the term "conservative" mean in the context of judicial activism? Is it a political label or a vision of the role of the courts? Are conservatives, as the quotation seems to suggest, acting inconsistently because they believe that the courts should be used for their purposes, but not for those of others with whom they disagree, or is there an underlying philosophical basis under which it is truly conservative to use the courts, at least in some circumstances? Do the answers differ depending on which side the conservative or liberal is supporting (the individual, a business, or the government), and does that difference, if any, run through the whole gamut of litigation or does it just exist in certain areas? Put in soap opera terms, the question, "Can a true conservative find true love in juducial activism?" is one that should have been asked, but apparently did not occur to the author.

In earlier eras, the typical suit against government was brought on behalf of a business, and advanced "conservative" legal arguments. Yet over the last few decades the charge of "judicial activism" has been made principally by conservatives who object to others going to court to overturn executive or legislative decisions. Yet history shows that at one time these conservatives were either activists themselves or had that role carried on for them by their doctrinal forerunners. Even today a very substantial portion of the challenges to government decisions are brought by businesses and not by consumers, environmentalists, or civil libertarians. The point is hinted at in Epstein's book, but she never states the proposition, let alone fully develops it.

There is a related irony in Professor Epstein's discussion of the

8. Houck, *With Charity For All*, 93 YALE L.J. 1415 (1984). The article includes a breakdown between amicus and party representation.

suits brought by those who were opposed to federal welfare in the 1920's, which led to the Supreme Court's decisions in *Massachusetts v. Mellon* and *Frothingham v. Mellon*, holding, respectively, that neither states nor individual taxpayers have standing to challenge federal welfare grants. Although the lessons of those cases are deeply imbedded in my litigating repertoire, I had not focused for many years on the fact that they were brought by conservatives, rather than liberals, whereas today many of the challenges to excessive, improper, or unlawful government spending are brought by taxpayers advancing liberal arguments. But as is so often the case in administrative law, procedural rulings on issues such as standing apply to all parties regardless of their political outlooks. In fact, as Epstein observes, several of the suits of conservative groups ran aground on standing.[9] I wish that she had related this fact to the more general question of the propriety of conservative legal activism.

Another interesting observation in the book, which the author never develops, is that labor and other liberal groups used to file charges with bar associations against conservative organizations for allegedly improper conduct in stirring up litigation. That tactic has now been turned around, as most of the charges go in the opposite political direction. Yet the author, as in the standing area, never inquires about the utility of such efforts, in either the short or long term.

At the end of the book Epstein has a section entitled *Success and Future of Conservative Interest Group Litigation*. The reader at this point expects to find what has been missing all along, a coherent theory about where this movement has come from and where it is going, yet the author can only muster thirty-one lines, less than three quarters of a page, in which to state her case. And what a case it is: "Regardless of the measure used, it is more difficult to assess the success of the newer conservative groups; the conservative public interest law firms, in particular, are just beginning to get their feet wet; . . . their ability to achieve such goals depends upon their ability to attract adequate funding;" and "judicial politics, in fact, may not be significantly different from the legislative and executive processes, which are widely understood to be characterized by

9. In this regard it is bad enough for the author not to disclose that the Washington Legal Foundation lost both cases involving the challenges to the transfer of the Panama Canal and the termination of the Taiwan Treaty, but to cite the cases as events that "helped the WLF to solidify its reputation within the conservative community in the capital" suggests that conservatives are impressed by filing suits, with no concern for the outcome, a view I would not attribute to thoughtful strategists of any political stripe.

the presence of competing group interests."[10]

What this book could and should have been is a serious examination of the role played by the various conservative organizations currently part of today's legal scene. Are they simply covers for business organizations? Do some of them simply echo the positions taken by law enforcement officials? Are there groups that truly represent individuals who otherwise have no representation, the criterion that those of us in the liberal public interest movement believe describes the proper role of the public interest lawyer? Who exactly are these conservative groups, what are they doing, how effective are they, and what would be lost to the system if not another penny went to support them? Where do judicial activism and restraint fit into long-term conservative strategy? I do not know the answers to many of these questions, but I do know that I cannot find them in *Conservatives in Court*.

CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS. By Leonard W. Levy.[1] Oxford University Press. 1986. Pp. 272. $29.95.

Donald O. Dewey[2]

When a historian's second volume of essays is published, you know he is both prolific and influential. If that historian is Leonard Levy, you also know the essays will be trenchant, controversial, and often witty.

This selection of twelve essays concentrates primarily on first and fifth amendment freedoms—especially those concerning speech, press and religion and the freedom against compulsory self-incrimination. Most of the essays come from the 1980's, though one was printed as early as 1961 and another in 1962. Two have never

10. In several places Epstein tries to draw a distinction between conservative groups and their liberal counterparts by statements, such as the following, that set up contrasts that are meaningless to me: "Its founders believed that the [Pacific Legal Foundation] would handle legal issues rather than advocate specific causes arising in California and dealing with the environment, in particular" (p. 121). *See also* (or perhaps *compare*) at 122-23: the PLF "has not attempted to bring test cases to court. Rather, PLF attorneys 'have been involved in systematic [litigation] campaigns . . . from the other side' . . . by putting liberal groups on the defensive." (The example cited is an amicus brief supporting the Navy.) *See also* discussion on page 50 contrasting the strategy of the NAACP Legal Defense and Education Fund and the Right to Work Legal Defense Fund and the discussions of various strategies on page 132.

1. Andrew W. Mellon All Claremont Professor of Humanities and Chairman of the Graduate Faculty of History at Claremont Graduate School.

2. Professor of History and Dean of Natural and Social Sciences at California State University, Los Angeles.