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Book Review: The Supreme Court & Constitutional Theory, 1953-1993. by Ronald Kahn.

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THE SUPREME COURT & CONSTITUTIONAL THEORY, 1953-1993. By Ronald Kahn.[1] Lawrence, KS.: University Press of Kansas. 1994. x+ 316 pp. $35.00

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In this book, Professor Kahn attempts to explain the decisionmaking processes of the Supreme Court of the United States. In doing so, he attempts to discredit what he terms the "instrumental" approaches to understanding these processes, and instead postulates that the Court takes a "constitutive approach" in its decisionmaking. Unfortunately, Kahn's arguments lack substance, and therefore fail to convince at least this reader that he is on to something.

Kahn identifies four different "instrumental" approaches. The first of these he terms the "election returns" approach. This is most strongly identified with political scientist Robert Dahl.[3] This approach views the Court as being a political institution with decisionmaking processes "not significantly different" from those of the elective branches of government and their appointees.[4] Justices are, according to Kahn's version of this view, concerned with the making of policy choices, and principles of natural and fundamental rights do not play a significant role in decisionmaking.[5] Dahl believes that the Court follows the policymaking preferences of the majority of the electorate, and serves primarily to legitimize the majority coalition's interpretation of the Constitution.[6] Views held by the Court that are contrary to those held by the majority coalition will, after some lag time, change so as to become aligned with the majority while the president, with the advice and consent of Congress, alters the Court through the appointments process.[7] In Dahl's view, it is the majority coalition, which itself consists of a collection of minority groups, that can be the effective guarantor of rights in the American system. Natural and fundamental rights, precedent, and legal doctrines are

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3. See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. Law 279 (1957).

4. P. 7.

5. Id.

6. P. 8.

7. Id.

merely the tools the Court uses in legitimizing the majority coalition's vision of society.[8]

The second "instrumental approach" identified by Kahn is the "policymaking approach" most strongly associated with political scientist Martin Shapiro.[9] Like Dahl, Shapiro sees the Court as a political policymaking institution, in which the decisions of the Court reflect the policy preferences of the Justices rather than legal precedent and rules.[10] Unlike Dahl, however, Shapiro sees the Court as having significant independent policymaking ability. Thus, the Court is able to decide whether to embark in new policy directions in the absence of strong support or pressure from interest groups or the elective branches of government. Shapiro argues that the Court's authority stems from its ability to react to diffuse but strong public support for constitutional values such as free speech.[11]

The third "instrumental approach" is the "safety valve approach." Adherents of this view, such as Anthony Lewis[12] and Archibald Cox,[13] believe that the Court serves to ensure the proper functioning of the pluralist political system. This view accepts Dahl's view of the equilibrium of the pluralist majority coalition as the protector of individual rights, but also holds that the Court has a necessary role in the maintenance of the system—i.e., that of counteracting the malfunctions of state and federal political institutions.[14] In this view, the Court and the law must be autonomous from the political branches of government.

The fourth "instrumental approach" is the "biographical approach."[15] This approach views the Justices' decisionmaking processes as being determined by their own polity and rights principles, and these principles are, in turn, determined by the Justices' biographical experiences. Legal debate amongst the Justices is not, in this view, the "epiphenomenal" cover for policy compromises, but is instead vital to the Justices' decisionmaking processes.[16]

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8. Pp. 7-8.

9. See, e.g., Martin M. Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (Free Press of Glencoe, 1964).

10. P. 10.

11. P. 13.

12. See, e.g., Anthony Lewis, *Earl Warren*, in Richard H. Sayler, Barry B. Boyer, and Robert E. Gooding, Jr., eds., *The Warren Court: A Critical Analysis* (Chelsea House, 1969).

13. See, e.g., Archibald Cox, *The Role of the Supreme Court in American Government* (Oxford U. Press, 1976).

14. P. 15.

15. Pp. 15-18.

16. P. 16.

Kahn criticizes these approaches as providing inadequate pictures of the decisionmaking processes. He argues that the "election returns" approach lacks empirical proof,[17] and that it uncritically accepts the outcomes of the pluralist process, failing to see that structural inequities may lead to unfairness in the outcomes of the political process.[18] Thus, according to Kahn, seeing the Court as being within the political process does not allow it to correct these structural inequities.

Kahn goes on to criticize the policymaking approach as failing to provide any normative basis for judging the quality of the Justice's decisions, as "Shapiro's argument . . . leads to the conclusion that no constitutional or moral theory is better than any other."[19] He also accuses this approach of "trivializing" the role of academics and "polity and rights" principles in influencing the Justices' decisions.[20] As we shall see, much of the remainder of this book is a futile attempt to refute Shapiro's view that the Justices pay significant attention to the academics only when their conclusions support the outcome that the Justices prefer.

The "safety valve" approach is criticized as focusing too narrowly on one value—keeping the pluralist political system open.[21] Like the election returns and policymaking approaches, the safety valve approach uncritically accepts a well-functioning pluralist system as a good thing, but it envisions a greater role for the Court in maintaining such a system. There is, according to Kahn, however, no place for "deep separation of powers, Tenth Amendment, *Federalist* no. 10, Reconstruction amendments, or other foundational principles" in this approach.[22] Funny, but I would have thought that the "right" to an open political process was itself a "foundational principle."

The biographical approach, according to Kahn, recognizes the importance of principles in shaping the opinions of the Justices.[23] It does not, however, recognize law as being independent of politics, as the life experiences of the judges affect the way in which they interpret the principles involved. The judges, in other words, are the medium through which the larger culture influences the interpretation of law.[24]

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17. Pp. 53-55.
18. Pp. 75-76.
19. P. 96.
20. Pp. 97-98.
21. Pp. 77-78.
22. P. 78.
23. P. 16.
24. Pp. 16-18.

Kahn believes that the fault that all of these approaches share is their failure to recognize the rule of law as autonomous from politics. He believes that there is a need for a new model that recognizes this. Thus, Kahn proposes a "constitutive approach" in which the Justices' views on "polity and rights" principles interact with the views presented by the "interpretive community."[25] Polity principles are those that are concerned with the proper role of the Court and other institutions in the American constitutional order,[26] while rights principles concern the fundamental rights that should be afforded individuals and, perhaps, groups.[27] The interpretive community consists of academic commentators, law professors, political theorists, and political scientists who write about the work of the courts.[28] Thus, these principles are more important than policy concerns, and the interpretive community is more important than political actors in shaping the actions of the Court.

Kahn offers no strong evidence for the primacy of rights and polity principles. Rather, he simply asserts the mention of these principles in a particular opinion indicates that this was the factor that determined the case (a ploy he uses several times throughout the book). Unfortunately, this does not demonstrate anything of the kind. Shapiro and the other "policymaking" theorists do not assert that rights and polity principles play no role in the Court's opinions, but rather that they are used to justify the policy decisions at which the Court arrives. Kahn makes no serious attempt to explain how he can empirically demonstrate the "true" motivations of the Court, but that does not stop him from making assertions about what that motivation is.

Much of Kahn's book is dedicated to demonstrating how the constitutive approach helps to understand the difference between the Warren and Burger Courts. He argues that the major difference between the Courts was in their responses to the interpretive community.[29] The Warren Court, according to Kahn, rejected the complacent polity views of the pluralists such as Dahl and instead adopted a "critical pluralist" view, which perceived a need for greater amounts of judicial intervention to prevent groups of people, especially blacks and urbanites, from being locked out of the political system (this belief was behind the voting and districting cases, as well as the educational deseg-

25. Pp. 18-22.
26. Pp. 20-21.
27. Pp. 21-22.
28. P. 206.
29. Pp. 179-81.

regation cases).[30] The Burger Court, on the other hand, accepted much of the analysis of its contemporary interpretive community, and its decisions reflected a different view of polity and rights principles than did that of the Warren Court. The Burger Court was, according to Kahn, more likely to view rights and polity issues as being embedded in institutional and societal contexts than was the Warren Court, hence the greater focus on affirmative action and institutional reform by the Burger Court. Thus, Kahn argues, the "no counterrevolution" view of the Burger Court, which sees it as an aimless transitional Court,[31] is fundamentally wrong. Rather, the Burger Court was responding to its own vision of the proper constitutional order.[32]

I find this argument quite thin. Kahn attempts to prove that the role of the swing Justices has been overstated in the literature, and that this has led to a view that the decisions of the Burger Court were generally unprincipled compromises. He provides statistics on the religious education cases heard by the Burger Court in order to prove his assertion, but as far as I can see, all he succeeds in demonstrating is the pivotal role of Justice Powell, who was in the majority in all but one of the cases.[33] Justice Powell's pivotal role in the affirmative action cases is also dramatically illustrated by his opinion of the Court in *Regents of the University of California v. Bakke*,[34] which received the votes of the four conservative Justices for the result and the votes of the four liberal Justices for much of the reasoning. Kahn identifies affirmative action as being at the heart of the Burger Court's constitutive concerns, and *Bakke* is clearly the most important decision handed down by that Court on this issue, yet to argue that the *Bakke* result is even coherent seems a daunting intellectual task. Nothing in Kahn's book persuades me to believe that there is any better way of viewing the Burger Court than as a policymaking entity with two fundamentally opposed voting blocs, and a center attempting to build compromises.

Likewise, if one analyzes where the Rehnquist Court has reversed the direction of the Warren and Burger Court precedents, one finds strong support for the view that the Court is politically responsive. The Court has for example, not entirely overruled

30. Pp. 65-66.

31. Vincent Blasi, ed., *The Burger Court: The Counter-Revolution That Wasn't* (Yale U. Press, 1983).

32. P. 138.

33. P. 117.

34. 438 U.S. 265 (1978).

the holding of *Roe v. Wade*,[35] but only modified it somewhat. Kahn holds this out as an instance of the Court resisting the pressures of the executive branch because of the Court's view of its own role in the polity as a protector or rights, and of the importance of precedent as a necessary component of institutional integrity.[36] There are at least two major reasons to doubt this view. First, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[37] was handed down during a presidential election campaign in which abortion was a key issue, and the Republican voters were deeply divided over the issue. (Republicans and Republican-leaning voters were closely divided on the issue of abortion during the summer of 1992, with 49% supporting and 42% opposed to President Bush's position that abortion should be legal only in cases of rape, incest, and when the pregnancy endangered the woman's life.)[38] The last thing the Bush reelection campaign would have wanted that year was a decisive opinion overturning *Roe*, as they were trying to defuse the issue.[39] The *Casey* decision actually closely paralleled public opinion on the issue, which favored abortion rights with restrictions.[40] Thus, *Casey* can easily be viewed as a political compromise. Secondly, although the plurality opinion goes out of its way to stress the importance of *stare decisis*, the decision actually overturns the tri-

35. 410 U.S. 113 (1973).

36. Pp. 256-57.

37. — U.S. —, 112 S. Ct. 2791 (1992).

38. Larry Hugick, *1992 Presidential Campaign: August*, Gallup Poll Monthly, August 1992, at 2, 6.

39. Although the 1992 Republican Platform called for a constitutional amendment banning abortion, the Bush campaign backed away from this position. See, e.g., *The President's Measures to Strengthen Families*, Bush Campaign Document, August 15, 1992 (available on the internet—gopher tamuts.tamu.edu).

40. A survey by the Gallup Organization taken January 16-19, 1992 showed that respondents overwhelmingly supported three of the provisions upheld by the Casey decision; 86% favored requirements that a doctor inform patients of alternatives to abortion, 73% favored a 24-hour waiting period before receiving an abortion, and 70% favored a requirement of parental consent for women under 18. However, 73% also favored a requirement that the husband of a married woman must be notified if she decides to have an abortion—a requirement that was struck down by the Casey decision. *Public Opinion and Demographic Report*, American Enterprise, May/June 1992, at 97, 100. Kahn might argue that this demonstrates that fealty to equal protection precedent rather than public opinion was driving the Court's decision on this issue. On the other hand, the Court did not seem terribly concerned with equal protection when it allowed the requirement for a 24-hour waiting period for a medical procedure that by definition can only be performed on women. I am not aware of any similar requirement for any other medical procedure in American law. Since the Court's concern with equal protection seems rather selective, it thus seems more plausible to argue that the three Justices who joined the plurality opinion were concerned with the practical implications of the spousal notification requirement, particularly the potential physical harm that might occur to some women in this situation.

mester framework of *Roe*, and also overturns subsequent decisions that invalidated restrictions on obtaining abortions (such as the imposition of a 24-hour waiting period).[41] This sounds more like the acts of a Court trying to justify policy switches rather than one actually concerned with polity principles.

Kahn's view of the Court's decisionmaking processes seems something of an academic insider's perspective, overstating the importance of academics to the process. Certainly, there are reasons to believe that academics do have some influence on the actions of the Court, particularly in areas that are technical and command little or no political attention. However, it is hard to believe that the Justices would listen to someone whose constitutional theories led to conclusions that were opposed to their policy preferences. Likewise, it seems naive to assume that the academics are also somehow immune to political considerations. Their policy preferences and the subjects they choose to write about are also shaped by the culture in which they live. It is very hard to believe that there are many academics out there forming theories of constitutional law that lead to conclusions to which they are personally opposed. In any event, Kahn's description of the Warren Court's rejection of the interpretive community's view of pluralism renders his view that the role of the interpretive community is pivotal incoherent. This history, if accurate, demonstrates that the Court is free to accept or reject the interpretive community's analyses, and the Court can develop its own. Indeed, Kahn argues that the current Court will probably reject the theories developed by the currently fashionable civic republican theorists because their writings fail to provide a rationale for the Court to maintain a role of imposing a critical vision of the Constitution.[42] The question ultimately left open is what actually affects the Justices' visions of the proper constitutional order. The answer that Kahn offers is that "the Court makes its choices [over polity principles and fundamental rights issues] in relationship to the boundaries of the debate within the interpretive community and the wider, informed society," and is "autonomous of the *direct* influence of electoral politics and the interpretive community."[43] How does Kahn know this, and where do Justices' choices come from? Readers of this book will have no idea.

41. The *Casey* decision also overturned aspects of *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

42. P. 265.

43. Pp. 262-63.