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Book Review: Liberalism and American Constitutional Law. by Rogers M. Smith.

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sation than a solution. And, even if he is no better than a number of predecessors in this field at defining due process, Mashaw is an excellent conversationalist.

As with due process, conclusions about *Due Process in the Administrative State* lend themselves to metaphor. The book is perhaps best analogized to a train ride. The route is at times difficult to discern. The scenery is interesting, lush, and varied; its order sometimes surprising. Veteran travellers will find much of the scenery familiar but also will note that many passing vistas appear in a new light. Although the journey covers considerable ground, no one will be bored on the trip. On disembarking, most will notice that they arrived back where they started. But everyone should feel curiously refreshed and glad that they went.

LIBERALISM AND AMERICAN CONSTITUTIONAL LAW. By Rogers M. Smith.[1] Cambridge, Mass.: Harvard University Press. 1985. Pp. 1, 328. $22.50.

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The law, and particularly American constitutional law, is not self-contained. There are both practical and theoretical obstacles to confining the meaning of the Constitution to a strict reading of the words of the text supplemented, perhaps, by the clear intention of its framers. Our fundamental law points beyond itself, both down to the political forces and consensus that generate and support it, and up to the broader political and moral purposes to which it is finally instrumental. Constitutional law, understood as a mediator between regime purposes and principles and everyday political life, necessitates a Supreme Court that, as Tocqueville argued, is a political as well as a legal institution.

But if this view is more true to the nature of our constitutional law than the narrowly legalistic view, it too is problematic and raises a host of difficulties. How can we prevent infrequent, principled, and well-considered exercises in judicial statesmanship from giving way to frequent, unprincipled, and ill-considered fiats? Is there an understanding of the judicial task that promises to reduce instances of judicial imperialism by guiding and restraining judges as they move beyond the law to the broader purposes that it serves? Is an unelected Court, which is also a powerful political institution,

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compatible with American democratic principles and capable of sustaining support among a people who respect its decisions largely because they view it as a court of law? And finally, what, more precisely, are these broader ends that the Constitution serves and what are the philosophic or principled grounds for holding that they are the proper ends of our government, or of all governments? Is there a political and constitutional philosophy that can both defend these principles and relate them to the provisions of our Constitution? In his *Liberalism and American Constitutional Law*, Professor Rogers M. Smith focuses on this final concern, providing what he hopes will be a convincing "general theory of American liberal constitutionalism," a theory grounded on a reformulated view of the purposes of American liberalism.

Professor Smith's work is informed by the view that liberal political theory and American constitutional practice are mutually illuminating to the point that neither can be properly understood without reflecting on the other. He warns political theorists that political ideas are "arid unless . . . linked to their articulation in current forms of political life." And he admonishes legal thinkers that at the root of our constitutional controversies are unresolved problems inherent in modern liberal theory. We need, he thinks, a consensus about American liberalism, as a foundation for a "renewed constitutional consensus."

The core of American liberalism can be found, in Smith's view, in the philosophy of John Locke. Not the overly tidy Locke of Professor Louis Hartz, but a more obscure and problematic figure. Locke stressed limited government and the rule of law because he saw these as essential means to his ends of prosperity, civil peace, scientific progress, and rational liberty. The commitment to these goals moderates what some critics see as the excessive individualism of Locke, providing a public dimension to the pursuit of happiness. More important, Smith believes, is Locke's opinion that the "capacity for rational self-determination is the distinctive feature of human nature and also the essential element of moral responsibility." According to Smith, this notion elevates liberalism by adding a moral dimension to its view of mankind's personal and political ends. The Lockean idea that mankind has a "special capacity for rational liberty" is the core of Smith's effort to develop a theory of constitutional liberalism.

But if Locke is the source of our understanding of a sound liberalism, why does Professor Smith need to elaborate his own theory? Because, says Smith, Locke did not adequately justify his belief that attaining rational liberty is the proper goal of human be-

ings and of the political community. Locke "advances principles that he claims are at once laws of nature, divinely sanctioned, and based on methodical reason. But the rational premises and methods employed by Locke do not seem to establish natural law and natural rights, or even to be compatible with them." Locke's psychological empiricism culminates in moral relativism, for all human beings do not in fact find pleasure in the same things, and particularly not in rational self-determination. Yet Locke clearly also asserts that right or justice is grounded in nature and that some human pursuits are intrinsically more worthy than others. Smith concludes that Locke's relativism is incompatible with his belief that there is an objective human good. In addition, Locke fails to show, or even to try to show, that "morality can be a matter of rational demonstration, and that reason can reveal the law of nature."

The major political consequence of this intellectual incoherence of Lockean liberalism is confusion about the extent to which legitimate government is grounded on consent rather than on the attainment of certain ends such as rational liberty. This ambiguity is evident, Smith notes, in the Declaration of Independence, which argues that legitimate government must both protect certain natural rights and be based on the consent of the governed.

Smith also discusses the alleged inadequacy of liberalism's goals, including its excessive stress on individualism. He distinguishes three basic views: a "civic" critique made in the name of civic virtue, community, and man's natural sociality; a "romantic" critique that stresses self-realization and the full development of individuality; and a "social equalitarian" critique made in behalf of equal treatment or, more radically, equal human worth. While he acknowledges that there is something to be said for each of these critiques, Smith basically rejects them as anti-liberal and incompatible, therefore, with his effort to establish the theoretical foundation for a new liberal consensus. But although ultimately misguided, these critiques have undermined and pushed in new directions a classical liberalism made vulnerable by its inadequate theoretical foundations.

What does all this have to do with American constitutional law? A great deal, in Smith's view, since "judicial decisions are incidents of broader philosophical developments in American thought." Through a detailed discussion of four constitutional issues—due process, free speech, legislative apportionment, and social and economic welfare—Smith seeks to show how unresolved or shifting resolutions to the problems of American liberalism have in-

fluenced judicial efforts to develop clear and persuasive principles in these different areas. He discerns three broad, related developments. First, the continuing tension between the consent and higher law legitimations of liberalism, which is particularly apparent "in the recurring debate between natural and positive law theories of the meaning of due process." Second, the tendency for a powerful liberal relativism to undermine the credibility of the higher law, a development that has led to "increasing judicial agreement that consent is the basic justification for the legitimacy of the American constitutional system." (Thus recent court activism has been supported by appeals to evolving social values rather than to objective higher law or principles.) Finally, Smith notes that reservations regarding original liberal ends, reservations that both arise from and contribute to liberal relativism, have led to "judicial attempts to incorporate new sorts of values into the law, especially more romantic and egalitarian ideals."

The main lesson that Smith draws from each of his four studies of constitutional issues is that sound, coherent constitutional doctrine awaits the reformulation of the purposes and grounds of American liberalism. Thus while the Court and leading commentators on due process assume that natural law standards have been superseded by "empiricism, consent, and democracy," they remain, despite their relativism, unwilling to accept any and every decision that might result from an open democratic process. This "lingering counter-majoritarianism" has, however, no solid, principled ground to stand on. Smith argues that we can move beyond our present patchwork, theoretically inadequate treatment of due process issues either by giving way to a majoritarianism that flows from an open democratic process—a position that few find totally acceptable—or by addressing and resolving the philosophic problem of providing a convincing account of why some desires and interests are to be preferred to others. He finds in free speech cases a similar need to overcome confused and inadequate legal principles by elaborating a convincing case for advocating some values over others. And in the areas of apportionment and of economic rights and duties he concludes that the law reflects confusions and uncertainties "about the proper purposes and foundations of a liberal constitutional regime" that can only be resolved by a fresh look at liberalism.

Professor Smith believes that the solution is to adopt as our goal "liberalism's traditional concern to promote reflective self-direction, or rational liberty." The rational liberty approach is concerned with "the process of moral decision-making" and is particularly concerned that conduct express "a process of rational

deliberation." It moves beyond process to a concern with substantive standards in its "insistence that we must strive not to endanger anyone's capacities" for rational deliberation. The rational liberty approach focuses, then, on the process of deliberation rather than on substantive outcomes of that process. Its concern with substantive outcomes is essentially negative in that it focuses on preventing those actions that inhibit rational deliberation in others or in society as a whole.

But why rational liberty rather than self-preservation, prosperity, self-expression or equal worth? Not, Smith makes clear, because reason can show that the pursuit of rational liberty is the proper activity of man and, therefore, the highest purpose of his political communities. The "rational liberty position," he asserts, "makes no claim to having discovered any ultimate truths about our essence or any natural moral order." How then does it avoid the very relativism that Smith has argued is the core problem of liberalism? Smith's reply is that

> because the rational liberty view takes its bearings ultimately from our personal experience of our selves as conscious, self-directing beings, it calls for us to judge what constitutes rational self-guidance not by any particular theory but by the notions engendered by that experience, as perceived and expounded by the community at large.

Not reason or nature but "our conscious personal experience" that we are capable of "rational deliberation and self-control" is the ground for holding that rational liberty is the proper goal of liberalism. To claims that human beings are incapable of free will, are fundamentally irrational, or ought to pursue other goals than reason, Smith has two replies: that these positions are no more rationally defensible than his and, more important, that "the common sense self-understanding of most people," as well as our experience, tells us that we are capable of rational liberty.

Grounding rational liberty on our experience of rational consciousness has important consequences for Smith's position on the question whether consent or objective, substantive ends legitimate a liberal regime. What constitutes rational liberty is determined, Smith contends, by notions engendered by our experience of rational consciousness "as perceived and expounded by the community at large. Thus, political institutions should, through democratic processes, elicit and enforce prevailing social standards of what constitutes minimally rational, deliberative conduct and of what preserves the ability to engage in it." It appears that the principle of rational liberty is given meaning and legitimated by the reigning perceptions of the community or by "prevailing social stan-

dards," by what we might call the current collective consciousness of the community. Although he comes to it by a somewhat different route, Smith seems to agree with the dominant current view, which he set out to modify, that consent legitimizes democracy.

We can also discern within his legitimation of rational liberty glimmerings of the tension between consent and substantive ends that, he argues, is a sign of the inadequate theoretical foundation of current liberalism. What assurance is there that community consent will endorse rational liberty as the proper end of our liberal Constitution or that it will have a sensible understanding of the meaning of rational liberty? Smith's view that the epistomological basis of rational liberty resides in our "common sense self-understanding" suggests that human beings are distinguished by their awareness of their existence as rational beings, that they have a natural consciousness of their rational nature. If this is the basic premise of his notion of rational liberty, then Smith's view of liberalism rests on an unacknowledged notion of man's natural essence and an unresolved tension between consent and objective ends. If Smith means to say only that human beings raised in the American political and cultural tradition experience themselves as rational beings, then his position seems to be fundamentally indistinguishable from the "the democratic and relativistic" jurisprudence that he attributes to Alexander Bickel, a jurisprudence that upholds principles when they "represent the deeply held values of the American people." But his view may be more relativistic than Bickel's, for he notes at one point that the argument for rational liberty is "based on the fundamental characteristics of the human condition as we now experience it." Unless one has a good deal more optimism than seems warranted by political developments in our century, current experience seems a fragile foundation on which to ground a new theory of liberal constitutionalism that holds that men are rational and aware of their rationality.

Despite these difficulties, Professor Smith makes a convincing case that rational liberty would be a better principle, than, for instance, current ideas of privacy or equalitarianism, to guide the Supreme Court's resolution of cases. As a principle to guide constitutional adjudication, Smith argues that rational liberty has the merits of positive theory in that it is grounded in will or consent at the same time that it provides the suitable restraints on majoritarian choices characteristic of the higher law tradition. More generally, Smith contends that the rational liberty view occupies a moderate middle position between the moral vagueness of the neo-Kantian, equalitarianism of Rawls and the repressive and outdated moral ab-

solutism of conservatives such as Walter Berns and John Courtney Murray. Holding that it is "wrong to destroy or injure the capacities for rational self-direction" of oneself or of others, the rational liberty view advances "a certain notion of morally worthy behavior that liberal societies are expected to enforce and promote." But this view also encourages tolerance and limited government, for its supports rational self-direction rather than substantive standards and holds that this goal is one that "each person must largely pursue on his own, within his preferred forms of association. It demands that each reflect for himself on his circumstances and decide on the course that will best aid in achieving both his continued self-guidance and his distinctive happiness." But can this theory provide adequate restraints on the majority, and sufficient moral guidance for a liberal society? Smith's applications of the principle of rational liberty in the areas of criminal law, due process and free speech suggest that, while he would have arrived at his decision by a different route, he hardly ever disagrees with recent decisions of the Court. Concerning criminal law, he argues that rational liberty would support strong procedural guarantees while also stressing "the duty and benefits of self-control." It would thus be "less prone to be corrupted into a license for lawless behavior" than right-to-privacy jurisprudence. In due process cases, rational liberty is again superior to privacy jurisprudence because it can provide "a more coherent, predictable, and principled reading of substantive due process requirements." And in free speech cases Smith argues that rational liberty provides some limits to preferred protection and thereby supports contemporary free speech doctrine: "[R]ational liberty goals imply that expression which is both non-cognitive in form and irrelevant or antithetical to rational deliberation in content is sufficiently distant from the First Amendment's purposes to merit only minimal scrutiny protection." In these three areas of the law, then, Smith makes a strong case that the rational liberty theory could support a moderate, balanced jurisprudence that provides broad scope to individual liberty while also supporting the community's interest in rational deliberation, including the moral restraint necessary for that deliberation.

But Professor Smith is less persuasive when he discusses legislative apportionment and economic and social rights—issues that center on questions of equality. In these areas the rational liberty principle alone is not always able to support his conclusions: an additional principle is needed, in this case a view of equality that can stand on its own against the assault of radical equalitarians. Smith notes that "the rational liberty view assumes that the relative deprivation of economic goods need not endanger any basic liberty

interest." But since a strong case could be made that it does endanger such liberty, to sustain his view Smith needs to address the issue of equality directly and develop and defend a view of it that is compatible with American liberal democracy as he understands it. If the principle of rational liberty is not itself sufficient to sustain a broad constitutional jurisprudence, we are led back to the question of the adequacy of Smith's reformulation of liberalism.

Smith focuses on the objections to his views that come from the left—from the neo-Kantian equalitarians—and deals cursorily with the more conservative perspective of those who defend higher law. He makes some thoughtful and penetrating criticism of equalitarians but dismisses too readily, particularly given the difficulties he has defending the grounds of rational liberty, the concerns of the defenders of higher law. Smith rejects the traditional view and its "absolutist orthodoxies" because it is no longer convincing to most people and so could not be the basis of a new constitutional consensus; because it is impossible in any case to provide a convincing, rational account of the existence and content of higher law; and, finally, because he fears that its "moral absolutism appears equally capable of justifying self-righteous lawlessness and unlimited governmental moral regulation." But the major difficulty with Smith's reconstituting of liberalism is that, in his desire to avoid moral absolutes and to elaborate a position consonant with current opinion, he is left with a view that is not clearly distinguishable from the democratic relativism he seeks to avoid. A convincing case is yet to be made that the sort of decent, moderate liberal democracy favored by Professor Smith can be persuasively defended without reliance on higher law or natural right or a rationally defensible view of enduring nature or essence.

DEMOCRATIC THEORIES AND THE CONSTITUTION. By Martin Edelman.[1] Albany: State University of New York Press. 1984. Pp. 399. Cloth, $39.50; paper, $16.95.

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Did the framers intend to embody a specific ideological or political theory in the Constitution, or did they enact an open-ended charter of evolving democratic principles? Professor Martin

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