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Book Note: The American Polity: Essays on the  
Theory and Practice of Constitutional  
Government. by Edward J. Erler.

Rikke Dierssen-Morice

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THE AMERICAN POLITY: ESSAYS ON THE THEORY AND PRACTICE OF CONSTITUTIONAL GOVERNMENT. By Edward J. Erler. New York: Crane Russak. 1991. Pp. xii, 125. \$19.95 (paper).

The original intent of the Founders and the Supreme Court's apparent deviation from that intent, especially in its equal protection jurisprudence, forms the core of Erler's *The American Polity: Essays on the Theory and Practice of Constitutional Government*. In five separate essays, Erler touches upon a series of constitutional themes ranging from natural law, majority rule and the protection of property, to the separation of powers and the doctrine of individual as opposed to class rights. His point of view is best illustrated by the justices he most frequently cites with favor: Chief Justice Rehnquist and Justices Scalia, O'Connor and Kennedy.

In his first essay, Erler tries to revive the notion of natural law as a viable constitutional principle. According to Erler, for the Founders "natural law was the law of reason and thus the ground for the rule of law itself." Natural law meant the creation of a system where there would be no "preordained class barriers to the development of *natural* talent."

After the adoption of the Fourteenth Amendment, which corrected the Constitution's "imperfect expression of the principles enunciated in the Declaration of Independence," equal rights meant freedom for all, regardless of race, to choose their form of government. Each individual "in the state of nature is the sole proprietor of his life, liberty, and happiness." Government has as its "sole legitimate object the protection of the antecedent and pre-political (natural) rights of those who have consented to be governed." Equal protection "must thus be understood as the equal protection of equal rights," not as rights that adhere to one's class status. For Erler, the "insistence upon treating equal protection rights as class rights severs those rights from the necessary ground of equality" by promoting the notion that all rights are "merely assertions of power or privilege on the part of those who are powerful enough to make good on their claims." The danger inherent in severing the idea of equality from the notion of rights is that once all rights are deemed to be positive, there is no interest that cannot be disguised in terms of rights. For Erler, history demonstrates that "there is no guarantee that class rights will remain in the service of the liberal state," and thus he urges a return to the basic notion that the common good derives from the natural rights of the individual.

Erler's distaste for the doctrine of class rights is further devel-

oped in his final essay, *Equal Protection and Personal Rights: The Regime of the "Discrete and Insular Minority."* Through use of the idea of the "discrete and insular" minority first raised in 1938 by Justice Stone in famous footnote four of *Carolene Products*, Erler believes the Court "has come perilously close to converting the doctrine of individual rights—a doctrine presupposed by the whole of the American legal and political tradition—into a doctrine of class rights."

For Erler, Stone's use of the notion of a "discrete and insular" minority to apply heightened judicial scrutiny was intended for those "who are unreasonably disadvantaged by laws passed by legislatures that do not represent them. The 'discreteness' and 'insularity' proceed precisely from this lack of representation." Yet, Erler does not believe that Stone would have qualified religious and racial minorities as "discrete and insular" minorities simply because they are unable to dominate the political process in terms of religious or racial interests. "These are not groups who are disenfranchised—such as aliens—but groups that participate in, but do not control, the majoritarian political process." While the Court has expanded its definition of "discrete and insular" minorities to include the dimension of "historic" discrimination and "stigma," for Erler, even when there is a benign or legitimate purpose for a racial classification, such legislation is unconstitutional. As the Founders knew, "class politics, whatever its character, was incompatible with the moving principles of liberal government." According to Erler, it is Justice O'Connor who "rightly points out" in her dissenting opinion in *Metro Broadcasting, Inc. v. F.C.C.* (1990) that "[t]he Constitution clearly prohibits allocating valuable goods such as broadcast licenses simply on the basis of race."

In Erler's opinion, the Court, by using the Fourteenth Amendment as an instrument of class politics, "runs the considerable risk either of making a majority faction more likely as the majority inevitably becomes more aware of its class status as a majority, or of transforming the liberal regime into one no longer based on majority rule." To challenge majority rule, for Erler, is to attack the foundational principle of the "consent of the governed," and with it the principle of equality.

Throughout this short book, Erler consistently supports his call for a more traditional approach to constitutional interpretation with the Framers' writings in *The Federalist*. What did the Framers actually intend? In response, Erler not only gives his view as to how the Constitution should be read, but also makes an effort to lay out the views of many "liberal constitutionalists" such as Laurence

Tribe, J. H. Ely, John Rawls, and Peter Westen. This provides the reader with an interesting 'debate,' although it is less than obvious that there is a clear winner.

*Rikke Dierssen-Morice\**

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\* Third year law student, University of Minnesota.