# CONSTITUTION, COURT, AND AUTHORITY

SUSAN E. GROGAN

John Brigham. *The Cult of the Court.* (Philadelphia: Temple University Press, 1987). vii + 269 pp. Notes, bibliography, index. $34.95.

In this book the author's approach to the Supreme Court differs from that of most political scientists. The book is not about what the Court does, but rather about what the Court is and, ultimately, where it is in the American polity's system of authority. Brigham observes that the Supreme Court occupies a preeminent position for other governmental institutions, the legal profession, academics, journalists, and—no less important—the public. This is so because the Court's pronouncements on the Constitution have, in practical terms, become the Constitution. Acknowledging the voice of former Attorney General Edwin Meese in dissent, Brigham argues that "we have come to speak of the Constitution as 'what the justices say it is' and we look for 'it' in their opinions. Their words are no longer authoritative gloss on the thing itself; they have become the thing itself" (p. 31).

Brigham locates the ability of the Court to make this kind of claim in our adherence to a "cult" of the Court, that is, in "the way we see the institution" of the Court (p. 9). Brigham's particular concern is with "how . . . political explanations have become a nearly sufficient basis for the authority of the Court" (p. 5). Faced with the existence of this "cult," he attempts a kind of "deprogramming"—an exposing and illuminating of the cult of the Court through an examination and analysis of the Court-as-institution. The purpose of this deprogramming is not, it would seem, to destroy the cult but, rather, to make it understandable. In this way, one can better assess the implications of such a way of viewing the Court.

Brigham's institutional approach distinguishes this study of the Supreme Court. Moving beyond law and beyond politics, Brigham calls for an examination of the Court in terms of understood behavior or action in social context. Institutions, in this perspective, are "ways of doing things" (pp. 14, 21). Institutions are understood through practices, which vary in their relationship to the nature of the institution. Certain kinds of practices "constitute" an institution: they make up an institution and make an institution what it is. While noting that it is difficult to determine which

LAW & SOCIETY REVIEW, Volume 22, Number 5 (1988)

practices are indeed constitutive (particularly as those practices are distinguished from those that are only conventional), Brigham identifies two constitutive practices integral to the Court: "the link between the Court and the legal profession," and "the authority to interpret the constitution" (p. 23).

The interpretive authority of the Court, argues Brigham, is found in its place at the peak of the judicial hierarchy. Brigham's emphasis on place gives a new and significant gloss to Justice Robert H. Jackson's comment, in *Brown* v. *Allen*, 344 U.S. 443 (1953), that "we are not final because we are infallible, but we are infallible only because we are final."

Brigham's perspectives provide a new way of looking at, and a new purpose for wanting to know about, what have become the standard elements in our descriptions of the Supreme Court. For example, his discussion of the justices shows how a changing vision of the individuals who sit on the Court reflects the developing institution. The cult of the robe has been largely replaced by a more political cult of the judge. The desiderata of independence and learning for justices remain, but the nature of the requirements has changed. Where independence was once the insulation of the justices in their work from interference by other governmental institutions, it has now come to include the impartiality of the justice in terms of his or her policy views. Today "professional practice and institutional apprenticeship" have become prerequisites for Supreme Court service (p. 74). Brigham argues that a maturing institutional bar has contributed to the authoritative position of the Court in the contemporary political system.

Brigham's institutional approach is used similarly in his discussions of other aspects of the Court, including the physical Supreme Court (i.e., the building), nonjudicial personnel working within and with the Court, the business of the Court (types of litigation, workload, policy issues), the decision-making process, and compliance. Brigham examines these as practices that characterize the Supreme Court as we know it, as practices that constitute the Supreme Court as authoritative institution, or as actions the natures of which reflect the institutional constraints.

As intriguing as Brigham's work is in imposing a different perspective on the Court—e.g., in his assessment of workload reforms calling for a National Court of Appeals (pp. 141–148)—his approach to the Court as an institution is more than a heuristic improvement. Brigham links the nature of the Court as institution to the nature of the state. Institutions matter because "it is through institutions that established ways of proceeding, and *ultimately state power*, are maintained" (p. 30) (emphasis added). Institutions support the power of the state by determining the constraints on and the possibilities within political action. If institutions in general act in this way, should there be special concern about the Court as institution? Brigham's view is that there

should be. He finds the implications of having the world of political action channeled by the Court as Constitution disturbing—especially, it seems, when its authority is grounded not in its wisdom or virtue (or even perceptions thereof) but in its finality. "Democratic aspirations" and the "promise" of the Constitution cannot be met under a Court monopoly on Constitutional interpretation (p. 232).

I find the implications disturbing as well. In his introduction, Brigham relates his conversation with a Supreme Court intern concerning the benefits of having been "on the inside" (p. 4). For this intern, the value was that "one could never teach constitutional law with a 'straight face' again." Brigham tells us, "I do teach constitutional law, and I teach it with a straight face."

SUSAN E. GROGAN is Assistant Professor of Political Science at St. Mary's College of Maryland, St. Mary's City, Md. She received her B.A. and M.A. from the State University of New York at Albany and earned her Ph.D. in the Department of Government at Cornell University, Ithaca, N.Y.

## CASE CITED

*Brown* v. *Allen*, 344 U.S. 443 (1953).