Law & Society REVIEW

Book Reviews

Kathleen E. Hull, Editor

Direct Democracy and the Courts. By Kenneth P. Miller. New York: Cambridge University Press, 2009. 278 pp. $24.99 paper.

Reviewed by Jason Pierceson, University of Illinois, Springfield

Direct Democracy and the Courts comes at a time when the conflict between courts and direct democracy is particularly visible, as evidenced by the passage of California's Proposition 8 banning same-sex marriage and its subsequent challenge in federal court. This lucidly written, rich, and important book effectively explores the politics that result from a political system that blends strong judicial review with strong direct democracy. The author, Kenneth P. Miller, evaluates this hybrid system from a Madisonian perspective of appreciation for deliberative, representative democracy, and neither the courts nor the initiative process are immune from criticism. In the end, however, Miller posits that "direct citizen lawmaking has been largely contained by the constitutional system in which it operates," largely through judicial counterbalancing (p. 216).

The book's greatest strength is the extensive research on the history of initiatives. Because of Miller's thorough research, the book will serve as a resource for scholars of both direct democracy and judicial politics. Miller's framing of the Progressive Era's push for voter initiatives as being driven by a very different view of democratic politics than that of the Founders is particularly useful. Elite deliberation with passive publics was replaced, or partially replaced, by a system that values active citizen engagement and control. This, of course, creates a tension in the U.S. polity, particularly over majoritarian power and the rights of the minority. Indeed, this concern for minority rights that are, and have been, threatened by the initiative process is, appropriately, one of the central themes of the book. As Miller notes, "A fair reading of the record suggests that direct democracy's consequential impact on rights has been to limit the *expansion* of rights in a numbers of areas, including affirmative action, bilingual education, marriage, and certain areas of the criminal law" (pp. 154–5; emphasis in original). Miller is careful to point out that the normative implications of this depend on one's view of what rights are, or should be, but he clearly notes that rights expansion is complicated by the presence of direct democracy.

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The role of the courts in constraining the initiative process complicates this process even further, and in a way unintended by the Progressives, according to Miller. Indeed, the several chapters that Miller devotes to the exploration of judicial attempts to limit direct democracy will be of great interest to law and society scholars. He chronicles the process of unfavorable judicial response to the constraining of rights or initiative interference with the constitutional allocation of governmental powers, as reflected in the U.S. Supreme Court's invalidation of term limits at the federal level. This discussion will contribute to an ongoing debate among scholars of the courts regarding the extent to which courts are willing, or have the power, to challenge political majorities. Contrary to scholars who make the argument for generally passive and constrained courts, Miller demonstrates that judges can, and often do, effectively challenge majorities, especially in the states. In other words, law and legal norms matter for judicial policymaking. If judges feel that majorities have made a mistake in constricting rights or by unduly interfering with constitutional mechanisms or principles, then they often act on these sentiments.

One weakness of the book is that, because of the breadth of policy areas covered, Miller's analysis is sometimes underdeveloped. For example, as evidence of his central point about the shift of so much politics to initiatives and the courts, away from legislatures, Miller criticizes both the California Supreme Court for legalizing same-sex marriage in 2008 and the voters for enacting Proposition 8. As he states, "in this hybrid constitutional system, the initiative system and the judicial power have fed off each other as they have competed in a high-stakes fight for the last word" (p. 221). Consequently, he calls upon judges to refrain from judicial activism as a way to defuse this situation. (Miller also calls for supermajority requirements for state constitutional amendments and multiphase processes for their enactment.) This characterization of the situation in California might have been less critical of the courts had Miller seen the decision not as an activist forcing of same-sex marriage on the California polity but the culmination of a decade-long attempt to provide rights for same-sex couples, largely driven by the legislature. In fact, by the time of the high court decision, the legislature had already enacted a domestic partnership framework that mirrored the state's marriage law and had twice passed same-sex marriage legislation, only to be thwarted by Governor Arnold Schwarzenegger's veto pen. In other words, Madisonian deliberation very nearly accomplished the policy that the court mandated. Arguably, then, the courts and the initiative are not equal culprits. Proposition 8 more directly undermined Madisonianism.

Overall, this is an important book that will be of great interest to scholars of the courts, direct democracy, democratic theory, and

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state politics, and more generally to anyone interested in this unique aspect of the U.S. political system.

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Creon's Ghost: Law, Justice, and the Humanities. By Joseph P. Tomain. New York: Oxford University Press, 2009. 320 pp. $75.00 cloth.

Reviewed by Keith Werhan, Tulane University

Joseph Tomain's *Creon's Ghost* is an episodic meditation on a long-standing legal conundrum: whether (and if so, how) positive law is subject to override by some form of higher law. Tomain's project is to explore rather than to solve this problem, and in the process, to integrate the wisdom of the humanities with the theory and practice of the law.

"Creon's ghost" is a metaphor representing the inevitable conflicts that arise between positive law and higher law, together with the haunting question of how one should respond to positive law that one regards as unjust—that is, as inconsistent with one's conception of higher law. The nub of the problem at the heart of *Creon's Ghost* is this. Positive law is easily ascertainable, but it is unsatisfying because it is not necessarily just. Higher law, by contrast, is grounded in principles of justice, but it is frustrating because it is highly contestable and ultimately indeterminate.

Tomain's method in *Creon's Ghost* is to refine readers' understanding of the problematic relationship between positive law and higher law, and to begin a conversation between law and the humanities, by pairing humanities texts central to the Western tradition with works of legal philosophy and then using the insights gleaned from that comparison to understand a variety of constitutional law decisions of the U.S. Supreme Court.

Tomain begins, appropriately enough, with the tragic conflict between Creon (representing positive law) and Antigone (representing higher law) in Sophocles' *Antigone*. He pairs *Antigone* with H. L. A. Hart's exposition of legal positivism in *The Concept of the Law*, which denies any challenge to positive law based on higher law notions of justice. The conflict in *Antigone*, of course, ends badly for both Creon and Antigone, and this portends the larger tragedy: High stakes attend the conflict between higher law and positive law, yet a satisfactory resolution of the conflict is beyond one's reach.

Tomain builds on *Antigone* chronologically, analyzing the apparition of Creon's ghost in Plato's philosophy, with special emphasis on the "Allegory of the Cave" from the *Republic* (paired with

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