

Brian E. Butler. *The Democratic Constitution: Experimentation and Interpretation.* University of Chicago Press 2017. 248 pp. \$45.00 USD (Hardcover ISBN 9780226474502).

Brian Butler's *The Democratic Constitution: Experimentation and Interpretation* offers the thesis that democracy needs to be protected democratically rather than by relying on judicial supremacy over constitutional interpretation by nine unelected Supreme Court Justices. Butler's notion of democratic experimentalism synthesizes Justice Holmes's anti-formalism, Peirce's and Dewey's theories of inquiry and democracy, and Richard Posner's empirical and experimental approach to legal interpretation and adjudication. Butler illustrates what democratic experimentalism looks like through a close reading of dozens of key cases showing the virtues of an ongoing, open-ended, empirical, fallibilist, and collaborative approach to constitutional interpretation against rival formalist and exclusionary theories. The latter include, among others, Antonin Scalia's textual originalism, Ronald Dworkin's vision of Hercules, the ideal moral guardian of the constitution, and Richard Epstein's reliance on a univocal value underlying constitutional interpretation—market competition. Butler critiques a ubiquitous and recurring theme in these constitutional theories, that of 'exclude in order to bind,' whose aim of conceptual clarity forestalls the democratic means available to an experimentalist judiciary.

Butler is not alone in advancing this project. His book not only deploys the theoretical tools of classical pragmatism and highlights the experimentalism of Posner's practice, it also builds on the work of a host of like-minded critics. Butler references experimental methods by Roberto Unger and Cass Sunstein but claims they fail to stand up to Dewey's robust democratic demands. Instead, Butler highlights the scholarship of Michael Dorf and Charles Sabel as providing the plausible means of constructing a theory of a democratic constitution that, instead of painting the ever-present picture of 'constitutional law as giving final and foundational rules to democracy,' offers a 'an experimental version of constitutional law that is democratic "all the way down"' (201).

I began reading the book both prejudiced by the view of the Supreme Court as the ultimate undemocratic arbiter of democracy and skeptical that Butler's vision was practicable. Because I am a scholar of pragmatism, someone who takes seriously its virtues in theorizing various forms of culture, including law and politics, my prejudice and skepticism speak to the ubiquity of this view of the court and the need for an alternative conception of it that Butler provides. Halfway through the book, my fear that his theory was utopian had vanished entirely. Butler's notion of a democratic constitution, although radical, is not a utopian theory.

Butler's first chapter poses the democratic challenge to constitutional law, and shows the impoverished responses to this challenge in the literature. Next, he presents an economical exposition of Peirce's methods for fixing belief, tenacity, authority, a priori, and science. Theories of constitutional interpretation that strive for formal clarity at the cost of empirical inquiry manifest the methods of tenacity, authority, and the a priori method, while democratic experimentalism exhibits the virtues of the method of science, which is the only method that can detect its own error and stand the test of the community. (Textual originalism, after all, is not itself textual or original, so it must be an a priori method). Butler then offers a clearly written and concise discussion of Deweyan democracy. For Dewey, democracy is 'broadly social before it can be seen more narrowly as a political concept,' and 'affects all modes of human association' (23). Democracy involves 'pluralistic values and a decentered picture of social institutions' (24). Last, democracy involves engaging publics, formed in organic response to social problems, according to the method of experimental intelligence—Peirce's method of science writ large (25). In chapter three, Butler praises Posner's

adjudicative preference for empirical facts and skepticism of legal formalities. These expository chapters are not left behind; rather, Butler consistently threads these themes of the method of experimental intelligence, Deweyan democracy, and law as information-producing through the cases involving regulatory takings, *Lochner*-style constitutional interpretation, *Citizens United v. FEC*, *Brown v. Board of Education*, and *Obergfell v. Hodges*.

Each case-based chapter analyzes the facts of the case, the arguments of the majority and dissenting opinions, the arguments of the scholarly critics of the case, and closes with how the central and pressing issue of each case would be adjudicated via democratic experimentalism. For the sake of brevity, I will discuss one topical example, the case of *D.C. v. Heller*, the recent decision overturning a statute in the District of Columbia restricting individuals' ability to carry firearms. Scalia's majority opinion in *Heller* exemplifies exclusion-based jurisprudence. It excludes the 'prefatory clause,' 'a well-regulated Militia being necessary to the security of a free State,' by claiming that the 'preexisting right... had nothing whatever to do with the militia' (52). It dismisses the larger context of the case, the legislative record of the statute challenged, changing circumstances, and the social consequences of its decision (67). It claims to find the original meaning of 'people' to refer to individuals, the meaning of 'bear' to mean carry, and the meaning of arms to have not changed since the eighteenth century.

Scalia's public meaning originalism, as an over-arching theory meant to hem in judicial interpretation, represents both a pipe-dream quest for certainty criticized by Dewey, and what Posner criticizes as legalism, which treats the law as 'an autonomous discipline running on rules specific to its own internal logic' and treats the use of extra-legal facts as improper intrusions on the formality of law (60). Posner and Butler think such meta-theories of constitutional interpretation are disingenuous guises, 'either rationalizations or rhetorical weapons' (61). Democratic experimentalism, instead of excluding information, aims to include relevant information and make the court a part of information production (65). This remedy treats governmental activity as primarily local, and views the function of Congress and administrative agencies as assisting local organizations with information pooling and providing resources to support experimentation (66). Using strategies such as benchmarking and learning by monitoring, democratic experimentalism aims to create an informed and transparent record of the decision making process, with a view of the court as collaborators in the problem-solving process.

Butler contrasts Scalia's exclusionary approach in *Heller* to Posner's information-producing approach in *Moore v. Madigan*, a case similar to *Heller* involving an Illinois ban on carrying ready-to-use guns outside the home. Posner anchors his analysis of the case with benchmarking, asking why other states have not emulated Illinois's approach and asking for empirical evidence of its efficacy. Posner seeks empirical justification for the law and investigates other alternative strategies for maintaining public safety. According to Butler, Posner's opinion 'treats the project of gun regulation as a collaborative project and then analyses the aim functionally' (74). It motivates the legislature to provide 'empirical justification for a more effective and less restrictive' means to achieve its aims instead of drawing a 'bright-line prohibition' as Scalia's opinion does (74). The denotative examples Butler uses are quite effective in distinguishing the exclusionary and formal from the empirical and experimental.

But if the Supreme Court is not the wise, elite body countering the majority mob, what shall it do in its deferential posture to democracy when the majority lords it over a minority? Enter Butler's discussion of *Brown v. Board*. On its face, the first *Brown* decision poses a challenge to democratic experimentalism, while Warren's remedial order exemplifies it. The initial decision overturned democratic state legislation, while the remedial order emphasized context, flexibility, and local

control, although it lacked proper benchmarking and information pooling (155). But Butler's research shows more to the story than a concisely written precedent-setting case overturning the formalism of 'separate but equal.' Citing Richard Kluger's *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*, Butler explains the bottom-up approach of the litigation and the social scientific evidence it both used and produced. This not only aligns with law as information-producing but with Dewey's process of democracy involving a response to an organically formed public responding to a problem. Butler concludes, 'given a Deweyan conception of democracy, *Brown* can be seen as a democratic result' (161).

To close, I would like to point future readers of this excellent work to its cover art. I imagine Butler, an artist and philosopher of art himself, had a hand in its selection. The book's title is mapped onto an actual map of property plots of a section of the city of Chicago. Street names appear next to numbered and colored sections of land, perhaps the work of a city planner. Some plots are allocated as 'Church,' others as 'School,' and some remain beige rectangles, indeterminate possibilities. The image, as I read it, represents both the checkerboard approach to constitutional interpretation that Dworkin's Hercules avoids in favor of principle and the ongoing work of Deweyan democracy to organize pluralities according to the method of intelligence. Dewey, at home amid the bustling chaos of the immigrant communities of Chicago, saw ameliorative possibility in the flux he witnessed there at the turn of the last century. *The Democratic Constitution* jumps into a similar workshop of possibility in a bold act of democratic faith. Its careful research and consistent message convince the reader that its vision is no utopian dream, but a live and timely option.

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