Book Reviews

The Political Foundation of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History

By Keith E. Whittington

*Reviewed by Thomas W. Merrill**

Princeton is probably the most esteemed university in America not to have a law school. It has made up for this deficiency, at least in part, by serving as the home of some of the most astute political scientists specialized in the study of the Supreme Court. The tradition began with Edward Corwin, perhaps the foremost constitutional scholar of the early decades of the twentieth century. Corwin was followed by Walter Murphy, a pioneer in the study of strategic interaction among the justices. The current heir to this title is Keith Whittington, the William Nelson Cromwell Professor of Politics at Princeton. Whittington combines a superb knowledge of Supreme Court history with a sophisticated understanding of the history and dynamics of American political institutions. As a result, his scholarship situates the Court and its decisions in a much broader political context than most lawyers are able to offer. Yet, at the same time, it avoids the reductionism associated with many accounts of the Supreme Court produced by political scientists.

Whittington's latest book addresses one of the central puzzles of American political history: how did the Supreme Court become so powerful? We live in a country that prides itself on being a democracy, in terms of both political governance and culture. Yet, on a remarkably wide-ranging list of social issues, public policy is set by a committee of nine elderly lawyers who have been appointed rather than elected, and who, for practical purposes, serve for life. Whittington's answer to this puzzle is nuanced and multi-dimensional. In the end, however, it boils down to the proposition that the Supreme Court has become so powerful because other political actors, most notably the President and Congress, have wanted the Court to be powerful. Only rarely have presidents sought to supplant the authority of the Supreme Court to define the constitutional framework in which American government operates. More commonly, elected political leaders have found it to be in their interest to defer to the Court, or to encourage the Court to take on hot button issues in the hope of removing them from the arena of ordinary politics.

There is nothing in the Constitution which foreordains the Court's claim to supremacy in interpretation of the "supreme Law of the Land;" that is an understanding which has emerged only over time. This development was almost certainly not anticipated by the framers. They may well have foreseen the power of judicial review. But judicial review—the prerogative of courts independently to construe and enforce the Constitution in cases that come before them—does not entail judicial supremacy. The concept of judicial supremacy means that the political branches of government should defer to the Court's articulation of the meaning of the Constitution, without regard to whether that understanding has been incorporated in a judicial judgment. One way of restating Whittington's thesis is in terms of delegation. Once the political branches, most importantly the President but also Congress, accept the principle of judicial supremacy, they have in effect delegated power to the Supreme Court to make policy in the name of the Constitution. Since the Constitution is a spare document subject to a variety of interpretations, this development has made the U.S. Supreme Court the most politically powerful tribunal in the world.

In an effort to explain this remarkable state of affairs, Whittington divides American presidents into three categories: reconstructive, affiliated, and oppositional. Reconstructive presidents seek to advance a theory of the Constitution that is at odds with the jurisprudence of the current Supreme Court majority. As Whittington correctly notes, such presidents are rare. Franklin Roosevelt and Lincoln are the clearest examples. Whittington also puts Jefferson and Jackson in this category, and thinks that Ronald Reagan aspired to be a reconstructive president, although with only partial success. Only reconstructive presidents embrace a departmentalist conception of constitutional interpretation, in which each branch has authority to interpret the Constitution independently of the others. All other presidents submit to the notion of judicial supremacy.

Affiliated presidents are the easiest to understand. Affiliated presidents agree with the central constitutional views of the current Supreme Court majority, and thus see no reason to question the Court's supremacy in matters of constitutional interpretation. Harding, Coolidge, and Hoover were thoroughly comfortable with the tenets of laissez fair constitutionalism, just as Truman and Eisenhower were thoroughly comfortable with the tenets of New Deal constitutionalism. Affiliated presidents defer to the Court, present arguments designed to flatter the Court, and appoint justices to the Court who will not disturb the constitutional status quo.

Oppositional presidents are much harder to understand. Oppositional presidents embrace constitutional positions that are at odds with the current Supreme Court majority. Yet, for various reasons, they too embrace the concept of judicial supremacy, and thus fail to challenge the Court's preeminence in matters of constitutional interpretation. The most common explanation for this, according to Whittington, is political weakness. The Congress may be controlled by another party, or the President may feel compelled to curry favor with a faction of his own party which has reasons to prefer the existing constitutional paradigm. For example, Grover Cleveland, a Democrat, was beholden to New York financial interests. This may explain why he urged his fellow Democrats faithfully to obey the rulings of the Supreme Court upholding property and contract rights against populist legislation, and appointed Horace Peckham, the author of *Lochner v. New York*, to sit

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on the Court. I also suspect, although Whittington is more circumspect about this matter, that limitations of vision or imagination on the part of certain presidents may account for their diffidence toward the Court.

Whittington's typology is illuminating. But it leaves many questions unanswered. Why have there been so few reconstructive presidents in American history? Why do affiliated presidents and oppositional presidents end up behaving in ways that are virtually indistinguishable? Most fundamentally, what accounts for the slow accretion of power to the Court, if different politicians have different reasons for deferring to the Court? One can understand why a few presidents (Lincoln, Roosevelt, Reagan) would want to take back the power ceded to the Court. And one can understand why many more presidents would be only too happy to cede authority to the Court or to quibble around the margins without directly confronting the Court's claim to supremacy. But why, over time, has power slowly but steadily flowed in the direction of the Court, and away from the political branches?

A number of possibilities suggest themselves. One might be that the Court is in fact more majoritarian than either the Office of the President or the Congress. The President and Congress are beholden to the coalitions of interest groups that put them in power and sustain them thereafter—what we have come to call the "base" of each political party. The Justices, who need not stand for election, and are nearly impossible to remove from office, are not burdened with such obligations. Some justices no doubt decide cases in accordance with their ideological predispositions. But this is difficult to sustain over a long career, especially as issues change in unanticipated ways. The more typical decisional strategy—especially on the part of the median justices who tend to control outcomes in close cases—may be to decide in accordance with what the Justice intuits a majority of Americans would want the result to be. Perhaps this majoritarianism, replicated over a sustained period of time, is what has given the Court enormous authority in the eyes of the public. Hence occasional lapses of overreaching are quickly forgiven, and the Court continues to rule without serious opposition.

Another possibility is that the Court enjoys certain advantages by reason of its continuity as an institution. The average tenure of justices is now over twenty-six years. This means that turnover is low, and the collective level of experience high. Presidential tenure cannot exceed eight years and is often less. Congressional tenure, especially in the Senate, is becoming more transient. As a result, the Court may have certain built-in advantages in the perennial struggle for political power. It may be more capable of acting purposefully over a sustained period of time. As anyone who has worked in a complex organization knows, authority tends to flow towards those who are most competent to get the job done. The Justices may also share a stronger loyalty to their institution and its prerogatives than some presidents or members of Congress do toward their institutions. This loyalty may translate into tacit agreement to temper temporary individual advantage in order to promote the interests of the institution, which are implicitly understood to mean aggrandizement of its power relative to other institutions.

All this is, of course, speculation. Whittington prefers instead to make judgments grounded in the careful gathering of historical facts. And I am sure that this fine scholar, and through him Princeton University (with or without a law school), will continue for some time to be an important contributor to our understanding of the Supreme Court and its outsized role in American society.

Under God: George Washington and the Question of Church and State

By Tara Ross & Joseph C. Smith, Jr.

*Reviewed by John J. DiIulio, Jr.**

Contrary to the arguments of some, James Madison, like most other Framers, envisioned America neither as a Christian or secular state, but rather a godly republic, a constitutional regime that acknowledged the God of Abraham and permitted religion to be both seen and heard in the public square, while promoting religious pluralism and forbidding religious tests for citizenship and office-holding. In 1952, in *Zorach v. Clauson*, U.S. Supreme Court Justice William O. Douglas, even while upholding the hideous, Catholic-baiting, no-aid separation doctrine invented a half-decade earlier by his ex-Klansman colleague, U.S. Supreme Court Justice Hugo Black (*Everson v. Board of Education*), nonetheless wrote that America's political system "presupposes a Supreme Being," and warned church-state separation extremists against trying to outlaw and eradicate even indirect government ties to religion.

Of course, neither Madison nor the other Founders envisioned America developing into a federal republic wherein the national government spent over a trillion dollars each year, or in which it implemented its public laws and policies largely by sending much of that money, with or without strings attached, to state and local governments, or doing so via grants, contracts, and vouchers to for-profit corporations and nonprofit organizations, both religious and secular. Indeed, neither "nonprofit organizations," nor, for that matter, the Internal Revenue Service (IRS) and the IRS code that decides on tax-exempt status, were anywhere in their capacious intellects or imaginations.

But only what Madison would have denounced as "theoretic politicians" and "factious minds" could fail in our day to understand that their wise strictures against "establishment" (as in taxing all to support a preferred state church, or giving public money to sectarian groups for sectarian purposes) do not apply as such to government support for religious congregations or faith-based organizations that use the funds for social services, not worship services, refrain from proselytizing, and contribute their own time and money to the civic-minded cause.

Madison and company would have been doubly dumbfounded by the disingenuousness manifested in our day by legal minds that breeze past studies demonstrating that, in places like Philadelphia, just blocks from where the Constitution was signed, religious non-profits lead in supplying scores of

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