Book Reviews

AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS. By Stephen M. Griffin.[1] Princeton, N.J.: Princeton University Press. 1996. Pp. xii, 216. $29.95.

Daniel O. Conkle[2]

According to Professor Stephen M. Griffin, contemporary constitutional theory has focused too narrowly on the Supreme Court's elaboration of constitutional law and, in so doing, it has neglected the political dimension of American constitutionalism. Griffin suggests that the most important task of constitutional theory is to explain the process by which the meaning of the Constitution has evolved over time, but he argues that the Supreme Court's role in this process has been greatly exaggerated. Griffin's response is to seek "a theory of constitutional change that will situate the Constitution in the continuous flow of American political development."[3] (p. 7)

Griffin begins by recounting the emergence of judicial review, through which "the Constitution was legalized" (p. 17) by treating it much like other forms of law. This "legalization of the Constitution" (p. 18) made it enforceable by the courts, but only to a limited extent, since the judiciary's institutional limitations prevented the courts from giving full effect to the Constitution's many values. As a result, legalization left "large areas of the constitutional order subject to ordinary political change," (p. 18) a situation that continues to prevail today. Although outside the domain of "the legalized Constitution," (p. 18) however, these areas remain a part of the Constitution itself, understood more broadly as "a text-based institutional practice." (p. 56)

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2. Professor of Law and Nelson Poynter Senior Scholar, Indiana University-Bloomington.
3. Griffin calls his book an "introduction" to American constitutional theory, but he emphasizes that it is "a *critical* introduction." (p. ix; emphasis in original)

Because the Constitution, on this understanding, includes non-legal as well as legal dimensions, constitutional change can occur not only through formal amendments and judicial interpretations, but also through political developments. Over the past two centuries, formal amendments have been few in number, leading many to suppose that judicial interpretation has been the primary source of constitutional change. But Griffin finds this view "profoundly mistaken." (p. 42) He points to a variety of political changes that, in his view, should be regarded as "constitutional" but not "legal" changes. (p. 27) Early changes included the development of the President's cabinet and the emergence of political parties. In this century, the most important constitutional changes, dating to the New Deal, have been the growth of federal governmental power and, within the federal government, the growth of the President's power in relation to that of Congress.

In support of his claim that the judiciary plays a secondary role in the process of constitutional change, Griffin notes that courts must await litigation and are rarely in a position to institute major constitutional changes on their own. The massive growth of federal power during the New Deal and thereafter, for example, was (eventually) permitted by the Supreme Court, but the Court certainly did not initiate this development. More generally, the pattern of its constitutional rulings suggests that the Supreme Court is, indeed, the weakest branch of government,[4] and that its power is substantially dependent on that of the popular federal branches. Thus, the Court rarely has invalidated federal, as opposed to state, governmental practices. And when it has invalidated federal practices, its decisions often have had political support within one or even both of the political branches, permitting the Court to profit institutionally from the separation and dispersion of federal political power.

Griffin devotes the initial portion of his book—almost the first half of his book—to developing his political theory of the Constitution and constitutional change. Proceeding from the theoretical vantage point that he has thus constructed, he then turns his attention to what he describes as the more conventional questions of constitutional theory. These questions focus on the Supreme Court and its role in the American constitutional system. Griffin believes that the contemporary debate on these

4. See Federalist 78 (Hamilton), in Jacob E. Cooke, ed., *The Federalist* 521, 522-24 (Wesleyan U. Press, 1961).

questions is seriously flawed because, in essence, it is politically naive. He offers a number of interesting insights.

In addressing the fundamental question of whether judicial review is undemocratic, writes Griffin, we must test the practice against the standards of *contemporary* American democracy, not against the democratic standards of previous historical periods. And he argues that our contemporary democracy differs from that "of the Framers and Progressive reformers" in five important respects. In particular, contemporary American democracy (1) "recognizes the importance of a national guarantee of civil rights and civil liberties, . . . including the right to vote, to run for office, and to participate in politics generally"; (2) accepts political parties and interest groups as legitimate participants in the political system; (3) is "populist" in the sense that it depends essentially on direct election and includes "a more direct role for public opinion in the policy process in the form of polls, initiatives, and referenda"; (4) rejects white supremacy; and (5) rejects any meaningful constitutional limit on the national political agenda, assuming sufficient popular demand. (pp. 103-04) Griffin notes that this new democratic reality—the emergence of modern democracy, especially in the wake of the civil rights movement—has led in recent decades to significant *congressional* protection of individual rights. With Congress taking the lead to an increasing extent, the role of the Supreme Court in protecting individual rights has not only become less important, but also more difficult to defend.

To the extent that the Supreme Court does engage in constitutional decisionmaking, according to Griffin, its efforts continue to be shaped by the legalization of the Constitution in early American history. When the Constitution was legalized, the courts treated it essentially like other forms of law, and, not surprisingly, they turned to various legal sources as they approached the task of constitutional interpretation. This resulted in a "pluralistic theory of constitutional interpretation" (p. 145) that—with modifications reflecting more general changes in American legal practices—continues to be "the best descriptive-explanatory account of constitutional interpretation." (p. 148) According to this theory, the Supreme Court and other courts look to various sources when they interpret the Constitution, including "the text of the Constitution, the intent of the Framers, precedent, inferences from the structure of the Constitution, and the national ethos or tradition." (p. 148) At this descriptive-explan-

atory level, then, Griffin endorses the theories of scholars such as Philip Bobbitt, Richard Fallon, and Robert Post.[5]

At a normative level, by contrast, Griffin notes that the pluralistic theory is defensible only on the assumption that the legalization of the Constitution was and remains desirable. In fact, claims Griffin, this legalization has created a false distinction between law and politics. Especially when the Supreme Court interprets general constitutional language, such as that of the Fourteenth Amendment, the Court cannot readily defend its decisions without "reach[ing] beyond the law to principles of morality and politics." (p. 188) Even so, the Court—supported by lawyers and constitutional scholars—strives to defend its role as a "legal" function, one that reflects and maintains the distinction between constitutional law and ordinary politics. The legal community thus "maneuver[s] to protect the autonomy of the law by maintaining the legalized Constitution," (p. 188) but its effort is ultimately in vain. If so, then the legitimacy of the Court's interpretive function may properly be questioned, for it depends in part on the perpetuation of a fiction.

Griffin's basic project, however, is not so much to critique the Supreme Court's role in constitutional interpretation, and therefore the Court's role in the process of constitutional change, as it is to suggest that the importance of this role has been substantially overstated. Looking to the future, moreover, he suggests that "the most important and pressing constitutional issues have very little to do with the constitutional doctrines developed by the Supreme Court." (p. 193) Instead, they relate to continuing power disputes between the President and Congress and to "the long-term trend toward increased distrust of politicians and government," (p. 200) a trend that Griffin regards as "the most disturbing aspect of the contemporary constitutional system." (p. 200)

Throughout his book, Griffin relies on a broad and diverse array of sources, not only from the law and legal scholarship, but also from the fields of history and political science.[6] He discusses the work of political scientists of the behavioral tradition, for example, and he uses the concept of the state to help illuminate the

5. See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford U. Press, 1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987); Robert Post, *Theories of Constitutional Interpretation*, 30 Representations 13 (1990).

6. Griffin's references are easy to find, in footnotes that appear—as they should—at the bottom of each page.

role and importance of political institutions in implementing constitutional power. This is interdisciplinary scholarship at its best.

Griffin provides an important corrective to the prevailing approach to constitutional theory—what he calls the "legalistic or Supreme Court-centered approach." (p. 5) At the same time, however, he may go too far in the other direction, underestimating the importance of the Court's role in our constitutional system. For example, Griffin decries the joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*.[7] According to Griffin, the joint opinion "trumpets the primacy of the legalized Constitution . . . [and] asserts that the Court is at the center of the American constitutional universe; that its actions best embody the essence of American constitutionalism." (p. 207-08) As Griffin must concede, however, the view expressed in the joint opinion is broadly accepted in the legal and political cultures of contemporary America. And this widespread perception of the Supreme Court—fully accurate or not—itself emboldens the Court, ensuring that it will continue to play a powerful role in the process of constitutional change.

Although it may be exaggerated, Griffin's essential claim is nonetheless insightful and important. In the law schools, at least, teaching and scholarship about the Constitution have focused primarily on the legalized Constitution, including the Supreme Court's protection of individual rights. As Griffin maintains, however, this focus neglects the more political aspects of American constitutionalism and American constitutional development.

Does this mean that law professors should move away from their "legalistic," "Supreme Court-centered" approach (p. 5) to the Constitution and constitutional theory? I think not, at least not in the sense of changing the basic focus of their teaching and scholarship. Law schools, after all, are in the business of teaching students to be lawyers, and potentially judges. As a result, it seems entirely appropriate for their courses on the Constitution—and for the scholarship of their faculty—to concentrate on the legalized Constitution, which, as Griffin himself points out, "provides the framework in which lawyers and judges work." (p. 206)

This is hardly to suggest that Griffin's book is irrelevant to the work of law professors and their students. The book includes insightful commentary on the descriptive and normative constitutional questions that law schools customarily confront. Perhaps

7. 505 U.S. 833 (1992). Griffin's commentary is directed to general language in the joint opinion, not to the specific constitutional issues that the Court was deciding.

more important, Griffin identifies the constitutional issues that law schools tend to ignore. At the very least, then, this book should teach constitutional law professors and their students that their field of study is limited; that the Constitution is more than the legalized Constitution; and that the Supreme Court's claims to the contrary are profoundly mistaken.

RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY.

RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY. Ronald F. Thiemann.[1] Washington, D.C.: Georgetown University Press. 1996. Pp. xiii, 186. Cloth, $55.00; Paper, $17.95.

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It is ironic, but not entirely surprising, that our constitutional jurisprudence of religion has substantially evolved to date without the serious influence of those, such as theologians and clergy, who are most learned in the nature and practice of religion. Although religious experts are occasionally summoned for testimonial purposes and courts occasionally advert to authoritative works on religion—and while there are, to be sure, a handful of legal professionals who actually have formal training in religion—by and large these are exceptions to the self-styled autonomy of the law. Indeed, despite suggestions to the contrary, law remains the lawyer's dominion, and the law of religion is no exception.[3]

It is precisely this context that makes Ronald Thiemann's *Religion in Public Life: A Dilemma for Democracy* all the more interesting and valuable a contribution to the field.[4] An ordained Lutheran minister and a theologian of genuine caliber, Thiemann poses in his book the familiar question: "What role should religion and religiously based moral convictions play

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2. Assistant Professor, Marquette University Law School. I would like to thank Elizabeth Staton Idleman and Daniel P. Meyer for their insightful comments.

3. For a recent exhortation to the legal community to engage in a deeper understanding of religion and its relationship to culture and society, see Winnifred Fallers Sullivan, *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States* (Harvard U. Press, 1994).

4. Thiemann is also the author of *Constructing a Public Theology: The Church in a Pluralistic Culture* (Westminster/John Knox Press, 1991) and *Revelation and Theology: The Gospel as Narrated Promise* (U. of Notre Dame Press, 1985), as well as the editor of *The Legacy of H. Richard Niebuhr* (Fortress Press, 1991).