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CLAREMONT
REVIEW OF BOOKS

A Journal of Political Thought and Statesmanship

William Voegeli: Tyranny of the Minorities

Angelo M. Codevilla: The Original Fascist

Steven F. Hayward: Reagan in the Age of Trump

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The Chinese Threat
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Joseph M. Bessette: Why Trump Is Not a Demagogue

Allen C. Guelzo: Progressives Unmasked

Algis Valiunas: Samuel Johnson

Christopher Caldwell: Against Dual Citizenship

A Publication of the Claremont Institute
PRICE: $6.95
IN CANADA: $9.50

Book Review by Jeremy Rabkin

Curtailing the Court

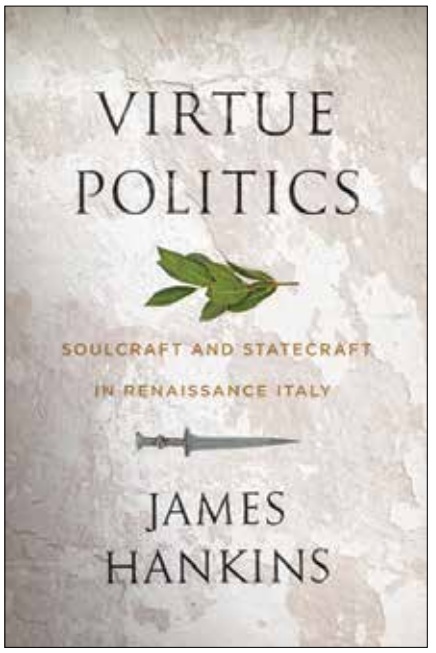
The Political Constitution: The Case Against Judicial Supremacy, by Greg Weiner.
University Press of Kansas, 224 pages, $29.95

Reconsidering Judicial Finality: Why the Supreme Court Is Not the Last Word on the Constitution, by Louis Fisher.
University Press of Kansas, 288 pages, $45

As their subtitles indicate, both of these new books seek to lower expectations for the Supreme Court. In that sense, their arguments might reasonably be described as "conservative," if by that one means a distrust of abstract ideologies pursued with excessive zeal. In *The Political Constitution*, Greg Weiner, a professor of political science at Assumption College, repeatedly invokes the wisdom of Edmund Burke (along with the cautions of Felix Frankfurter). Louis Fisher, also trained in political science, spent most of his career working as a constitutional law specialist at the Congressional Research Service. His *Reconsidering Judicial Finality* appeals to lessons from the long history of constitutional disputes since the founding. Both authors draw on learning that extends far beyond Supreme Court case law and both argue in calm, measured tones. Although readers will benefit from both books, I am doubtful either will persuade readers to change their views. I am even more doubtful they will help judges to decide cases or even assist advocates in crafting arguments.

The books are in some ways complementary, reaching their broadly similar conclusions by different paths. Fisher analyzes a dozen or so episodes since the Civil War in which major rulings by the Supreme Court were subsequently revised or circumvented by political pressure. Weiner's book anchors his claims about judicial authority in much wider, theoretical arguments about the grounding of civic obligation and republican government, in which Aristotle and Thomas Aquinas are invoked along with John Locke, John Stuart Mill, and Edmund Burke (with Weiner praising the latter against the classical liberals). He also appeals to general assertions of the founders, especially James Madison, who was skeptical (by Weiner's account) that courts could resolve very much on their own. The book has much less to say about actual Court decisions, apart from a few that it surveys in a final chapter as belated illustrations of his overall argument for judicial restraint.

Weiner's argument is aimed, quite explicitly, at contemporary constitutional theorists—mostly law professors of a libertarian bent, such as Randy Barnett of Georgetown, whose work he discusses at some length. He also takes aim, though more briefly, at scholars like Hadley Arkes, who call on courts to consider natural law in resolving constitutional disputes. Weiner says little about which major cases should have come out differently.



Virtue Politics

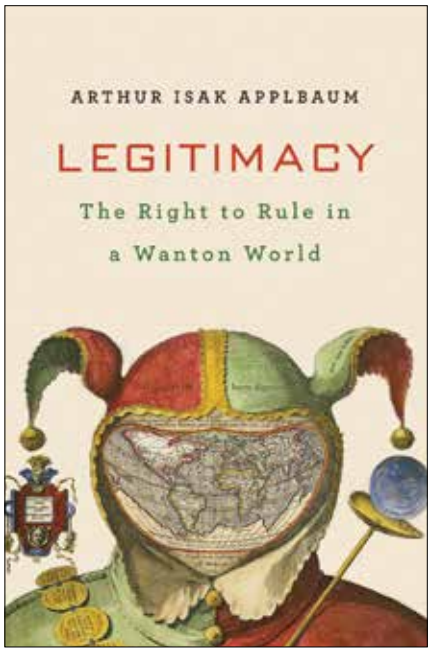
Soulcraft and Statecraft
in Renaissance Italy

James Hankins

Belknap Press

"Magisterial."

—Wall Street Journal



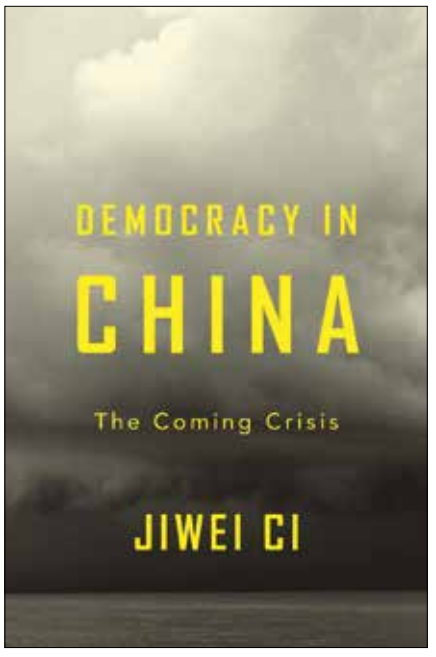
Legitimacy

The Right to Rule in a
Wanton World

Arthur Isak Applbaum

"An exemplary display of philosophical clarity, passion, and insight."

—Michael Ignatieff,
President, Central European University



Democracy in China

The Coming Crisis

Jiwei Ci

"A passionate argument in favor of a more democratic China."

—Rana Mitter,
author of *Forgotten Ally*

Harvard University Press

hup.harvard.edu

Even Fisher seems less concerned with advocating a change in doctrines, focusing more attention on policy disputes that gave rise to constitutional litigation. He is admirably open-minded about the possibility that the Supreme Court may make further revisions in its approach to government regulation of abortion.

A glance at the abortion debate serves to highlight the strangely academic quality of both presentations. Weiner says nothing about *Roe v. Wade* (1973) or abortion. (If I missed a stray reference somewhere, so did the person who prepared the index.) Fisher does emphasize ongoing political debate about *Roe*. He does not, however, explain what it says about the premise of his book—that many people somehow labor under the delusion that the Supreme Court has the last word on the meaning of the Constitution and therefore cannot be persuaded to change its mind. If it were not already widely recognized that the Court can change its views, why did we have such a rancorous debate over the nomination of Brett Kavanaugh (and so many previous nominations, going back at least to Robert Bork in 1987)?

In both these books, the focus has shifted from what the Constitution means to what the courts should feel comfortable saying about what it means. These questions are hard to separate. What we get from the effort to do so is an appeal for "judicial restraint" or caution—perhaps worthy at some level of abstraction, but not very instructive unless we have some independent background standard against which to assess decisions as exercises in restraint (rather than, say, abnegation, cowardice, or betrayal).

Both authors emphasize—fairly enough—that elected officials also have a responsibility to interpret the Constitution and their conclusions have some claim to respect from judges, especially when legislators respond to extended public debate. Both books then conclude—or leave readers to infer—that if judges acknowledged the political background of much constitutional debate, they would act with more restraint.

But when it comes to intense public debates, most participants care more about winning than winning by democratic methods. If courts can deliver the preferred result, partisans don't feel it demeans their standing as voters or republican citizens to have courts make the call. Even elected officials may be glad to pass the buck, especially if the issue is contentious. Fisher recounts almost-forgotten episodes in which the Court changed its view (such as making paper money legal tender in the 19th century and finding constitutional protections for women's rights in the 20th). He does not attend to many famous episodes in which the Court provoked great controversy at the time but ultimately carried the public (and certainly the politicians) with it, as with rulings demanding that legislative districts be regularly redrawn to assure demographic equality (one person, one vote).

Weiner is equally evasive. He offers a two-page discussion at the end of his book defending the 1954 desegregation ruling in *Brown v. Board*. It was, he says, a "clear case in which courts *should* act [his emphasis] not because local communities are wrong or even because they are unfair but rather because the national political community has made a deliberate determination to remove issues from their control." He immediately acknowledges that Congress did not respond with legislation to implement this ruling until ten years later, so the "deliberate determination" of the "national political community" was not evident in the 1950s. Presumably Weiner means the "determination" made when the 14th Amendment was adopted in 1868. But for nearly a century thereafter, elected officials seemed to think its guarantee of "equal protection of the laws" did not forbid racial segregation. Weiner repeatedly urges courts to respect civic tradition and political determinations. He does not explain why *Brown* should be exempted from such appeals (which were, in fact, pressed on the Court by defenders of segregation at the time), nor why the exemption if appropriate (I think so) should be limited to this one case or one issue.

Both books are at their weakest in connecting generalized appeals to political caution or judicial restraint with the formulation of actual doctrines—the main responsibility of the Supreme Court. So Fisher devotes many pages to criticizing *Korematsu v. United States* (1944), which allowed detention of Japanese residents and their American children during World War II. Decades later, Congress acknowledged that this policy was wrong and that is now the dominant view of the episode. But, Fisher protests, the Supreme Court only acknowledged its error in 2018. He fails to note that the Court's statement did not touch the grounds of the decision—neither its acceptance of racial classification (which the Court still approves in a supposed good cause such as affirmative action) nor of special wartime detention (as with Guantanamo detention without criminal charges for terror suspects not classified as prisoners of war).

Fisher devotes many pages to disputing the Court's treatment of corporations as "persons" protected by constitutional guarantees. There are many interesting points in his recital of relevant history (including that late 19th-century rulings treated the conclusion as established without ever setting out a full argument for it). He concludes that *Citizens United v. Federal Election Commission* (2010) was wrong to extend First Amendment protection to corporate expenditures in aid of political campaigns. Yet Fisher ignores the central argument in the majority opinion there: if corporations have no free speech protection, can the government impose censorship on the *New York Times* (owned by a corporation) or CNN (owned by another)?

Weiner defends the Warren Court's ruling in *Williamson v. Lee Optical Co.* (1955), upholding a state law prohibiting the sale of eyeglasses except by licensed opticians. Commentators for decades took the decision to mean that courts should not second-guess political determinations on the justification for economic regulation. Elsewhere in the book, Weiner acknowledges that the Constitution specifically sets out safeguards against political measures "impairing the obligation of contracts" or letting "private property be taken…without just compensation." He makes no effort to explain what rules could allow the sort of extreme deference illustrated by *Lee Optical* while still maintaining the force of actual constitutional protections for economic activity.

Meta-doctrines about respect for political deliberation are no substitute for actual constitutional doctrines. If we're worried about judges acting impulsively or heedlessly, we might welcome more emphasis on precise interpretations—even if disputable in relation to what the original meaning was—as a way of pinning down judicial decision-making and making results more predictable. These books never get down to the level of assessing particular doctrines.

If the concern is to stop ambitious or disruptive judicial interpretations in the first place, these authors may seem too modest in their pleas for restraint. Why not limit the power of courts by constitutional amendment? A number of European countries impose limited terms on constitutional court judges. Canada's 1982 Constitution makes constitutional decisions of the Supreme Court subject to parliamentary override. Still there are complaints about judicial activism in Canada as in most European countries. Even in our democratic era (or especially in our era), people want checks on elected politicians. Not even clever constitutional design can force citizens to be more thoughtful or more keen about defending their civic privileges. Vague appeals for judicial restraint aren't likely to do better.

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Book Review by Andrew D. Carico

God, Man, and the Constitution

Great Christian Jurists in American History, edited by Daniel L. Dreisbach and Mark David Hall.
Cambridge University Press, 342 pages, $130

In this impressive new volume, editors Daniel L. Dreisbach and Mark David Hall have put together 17 contributions examining 19 Christian jurists from the colonial period through today, detailing how Christianity informed their jurisprudence and identifying where they lived up to the faith and where they fell short.

Dreisbach, a professor of justice, law, and criminology at American University, challenges the shibboleth of a "godless" Constitution in his cogent introduction, noting that the founders' thinking regarding limited government, separation of powers, checks and balances, and a representative system presupposed the Christian teaching of a fallen human nature.

The book breaks down into four sections. The first profiles colonial-era figures (e.g., John Winthrop and William Penn) who drew from their Christian worldview in establishing the legal foundations of the nascent colonies. The second examines prominent founding-era jurists (e.g., James Wilson, John Jay, and John Dickinson), showing how Christianity influenced their thoughts on revolution, resistance to power, opposition to slavery, and the moral content of natural law and English common law.

Section three looks at 19th- and early 20th-century jurists. Especially noteworthy is the life of Justice John Marshall Harlan, who, though an early supporter of slavery and opponent of Abraham Lincoln, was led by his Presbyterian faith to see America as part of God's plan for liberty's expansion and slavery's eradication—a sentiment implicit in his famous "color-blind Constitution" dissent in *Plessy v. Ferguson* (1896).

Section four analyzes six modern jurists engaged in our current "culture wars." Although the late Supreme Court Justice Antonin Scalia held that his originalism prevented him from judging based on his Catholic faith, his faith still informed his text-based jurisprudence, teaching him about formal rules and categories, a respect for terminology, and original sin. In a similar way, the Catholicism of Robert P. George, McCormick Professor of Jurisprudence at Princeton University, deeply informs his jurisprudence, not least in his interpretation of the so-called new natural law as providing reasonable grounds for moral truths.

This admirable collection contains important implications for Christians worried about the contemporary sanctity of the rights of conscience, but the editors could have addressed more directly in this volume how Christianity can both protect itself and continue to inform the American political and legal order in an increasingly post-Christian world.

Still, readers will come away with a greater appreciation of Christianity's influence on America's legal and political development. The book may even embolden future jurists to proclaim Christianity's continuing world-historical significance, having found inspiration in these great Christian jurists.

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