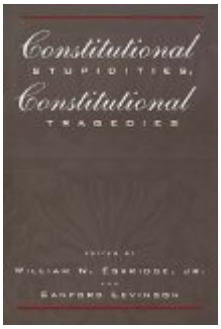
H-Net Reviews
in the Humanities & Social Sciences

William N. Eskridge, Sanford Levinson, eds. *Constitutional Stupidities, Constitutional Tragedies.* New York: New York University Press, 1998. x + 286 pp. $23.00 (paper), ISBN 978-0-8147-5132-9; $65.00 (cloth), ISBN 978-0-8147-5131-2.



Reviewed by R. B. Bernstein (New York Law School)
Published on H-Law (March, 1999)

Should Constitutional Historians Take Constitutional TheorySeriously?

Constitutional historians are divided from constitutional theorists by common subjects: the Constitution's origins, interpretation, and development over time. Historians sometimes demur at theorists' demands that they assist in identifying a constitutional provision's true meaning (though the temptation to do so can be strong). Theorists often propound thought experiments that historians reject because they could not have happened. (A real, recent example: "What if Canada had ratified the Constitution in the midst of the ratification controversy of 1787-1788? ")

Thus, historians often greet theorists' work with frustration seasoned with derision, and may well view this book that way. At its core are two questions posed to an array of constitutional theorists: "What is the stupidest provision of the current Constitution? " (pp. 1-6, 13, and 15-112) and "What is the worst decision you would fell compelled to reach under your own favored theory of constitutional interpretation? " (pp. 6-10, 113, and 115-256). As the volume's editors, Professors William N. Eskridge, Jr., of Georgetown University Law Center and Sanford Levinson of the University Texas Law School, explain, the inquiry into constitutional stupidities began as a jest conjured up in an afternoon's walk during a conference at Tulane University on constitutional design. It first took form as the "Constitutional Stupidities Symposium," *Constitutional Commentary* 12 (Summer 1995): 139-225. Revised and expanded, those papers appear as Part One of this collection. The editors then organized a companion symposium on constitutional tragedies (pp. 7 & 11 n12), the basis of Part Two.

Eskridge and Levinson divide constitutional theorists into positivists and normativists (p. 6). When interpreting the Constitution, positivist constitutional theorists look to external sources of doctrinal legitimacy, such as the original intent or understanding of a constitutional provision or "neutral principles." By contrast, normative constitutional theorists figure out how to interpret the Constitution to make it conform to our aspirations for it; as Ronald Dworkin would put it, they seek to make it the best Constitution it can be. Levinson and Eskridge brush too hastily past the point (p. 6) that even positivist theorists are engaging in a normative enterprise. After all, the positivist's claim that original intent, or neutral principles, or the evolution of the constitutional system are the best guide to interpreting the Constitution is based not only on that guide's superior capacity to support legitimate interpretations of the Constitution, but on the idea that a legitimate interpretation of the Constitution is normatively desirable. To put it more plainly, we seek an external source of legitimacy because it is a good thing to interpret the Constitution in a legitimate way.

Eskridge and Levinson offer this distinction to justify their inquiry into constitutional tragedy, testing the normative claims of various theories of constitutional interpretation by inquiring whether those theories can ever produce unhappy results. But the division between positivists and normativists also illuminates the "stupidities" inquiry. Identifying constitutional stupidity and consti-

tutional tragedy form the flip-side, as it were, of deciding what is truly intelligent, praiseworthy, and valuable about the Constitution. Thus, exploring stupidities alleged to exist within the Constitution, and tragedies that might result from interpreting the Constitution, enable us to begin to formulate an agenda for improving the Constitution by a normative standard of what it should be and what functions it should perform. Furthermore, such inquiries also help us to use that normative standard as a rule of thumb for interpreting the Constitution, and for deciding how to interpret it.

I. "Stupid is as stupid does."

The orchestrators of the "stupidities symposium" excluded the repealed slavery and Prohibition provisions, focusing attention on "the current Constitution." They gave the participants little more guidance than that, however. The result is a spectrum of definitions of constitutional stupidity, ranging from "things we don't like" to "things that might have worked once but don't work any longer" to sheer oversight.

Steven Calabresi targets "spinach stupidity" (from the *New Yorker* cartoon of a toddler growling, "I say it's spinach and I say the hell with it!"). Calabresi's "An Agenda for Constitutional Reform"(pp. 22-27), asserts the undesirability of the activist national government that has evolved since the 1930s. He identifies the features of the Constitution that led to this bad situation as mistakes rather than stupidities; his cure is an array of proposed amendments to the Constitution (including balanced-budget, term limits, line-item veto, and nondelegation) favored by many conservative critics of the constitutional system. Although these subjects are often the focus of vigorous, legitimate disagreement, to label the view one does not like as a constitutional stupidity or mistake seems politicized overreaching spurred by nothing more than ardent certitude.

Other essays maintain that the Constitution embodies assumptions about the nature and extent of government that no longer describe constitutional reality; these essays focus on what we can call "shelf-life stupidity." Robert F. Nagel suggests (pp. 71-74) that the Federalists' wrongly assumed that the states would encroach on the federal government rather than the other way round; that view does not hold water now, and maybe did not do so then. Other essays–by Akhil Reed Amar (pp. 15-17) and Sanford Levinson (pp. 61-66)–zero in on that favorite target of constitutional theorists, the Electoral College, though Levinson also directs his fire at the provisions governing transition from one Presidential administration to the next.

Michael Stokes Paulsen (pp. 75-76) identifies the sole example of "sheer stupidity": If the Vice President is impeached, he presides over his own trial, according to a plain reading of the Constitution. This stupid result is easily explicable (though Paulsen does not do so) by noting that the Convention devised the Vice Presidency at the last minute, and thus failed to integrate the office fully into the constitutional system.

Virtually all the targets in Part One are constitutional provisions receiving almost no attention from jurists in deciding concrete cases. Indeed, Lief Carter proposes (but then rejects the argument) the stupidity of the so-called housekeeping provisions of the Constitution, arguing that they trivialize a document that should rather codify and inculcate grand principle (pp. 28-34, and esp. p. 31). This emphasis suggests two things. First, provisions not subject to continual interpretation and reinterpretation by courts seem more likely to contain the seeds of stupidity, of whatever kind. Second, judicial interpretation of the Constitution may be a safeguard against most stupidities in so-called "open-ended" or "interpretable" constitutional provisions.

Even so, Louis Michael Seidman insists (pp. 90-94), the oft-construed criminal-procedure provisions of the Bill of Rights are constitutional stupidities because they "function mostly to make us satisfied with a state of affairs that should trouble us deeply." By convincing us that they protect the rights of suspects and defendants, these provisions reconcile us to the United States' status as the nation with the second-highest rate of incarceration in the world (behind Russia). Seidman's troubling essay is more suggestive than conclusive, as is the case when a scholar seeks to make a counterintuitive point in a limited space. Few of the other essays in Part One rise to this level of intellectual challenge; most easily sort into one or another of the conventional pigeonholes of stupidity.

Philip Bobbitt dismisses the stupidities symposium as a "parlor game" (pp. 18-21) and cogently indicts the whole enterprise. (Carter's essay seconds Bobbitt's position, though more mildly.) Most constitutional historians will be drawn to his essay, for Bobbitt persuasively insists that such inquiries take place in a self-imposed vacuum, detached from the history that gave rise to the Constitution and that shaped its development as a system of government.

At bottom, three themes pervade these essays. A

methodological theme is the failure, sometimes amounting to outright refusal, by most of these theorists to acknowledge the historical context for a given constitutional provision, or the historical reasons why the framers included a given feature in the Constitution in the first place and why that feature has survived pressures for its replacement or repeal. The first of two substantive themes is the disdain shared by most of these theorists for federalism and their preference for national governmental authority. One need not go so far as Calabresi, for example, to be unsettled by these writers' refusal to acknowledge that different states might well have different reasons for using differing qualifications (other than the floor set by the voting-rights amendments to the Constitution) to govern access to the polls. Similar points apply to the theorists' distaste for the Senate (pp. 35-39, 95-97). Indeed, the word "federalism" appears nowhere in the index to this book.

The second substantive theme is the theorists' misapprehension of the task of framing a constitution or a constitutional amendment. The inquiry into constitutional stupidities presupposes that framing a constitution, or an amendment to one, is a serene intellectual exercise permitting uniform consistency, coherence, and foresight. By contrast, constitutional historians have long described the Constitution and its several amendments as bundles of compromises making up a constitutive text riddled with tensions and inconsistencies. For this reason, many constitutional historians may well scoff at the seriousness of these inquiries into constitutional stupidities, saying, "So what else is new? "

II. "Constitutional tragedy doesn't need bodies on the stage."

Part Two poses a more serious question; thus the essays responding to it are more serious and substantive than those in Part One. Constitutional theorists argue that their proposed method of constitutional interpretation is the best or soundest or fairest or most just way to interpret the Constitution. Is any theory of constitutional interpretation uniformly best or soundest or fairest or most just, however? Or is even the best theory of constitutional interpretation capable of generating bad, unsound, unfair, unjust, even tragic results?

Despite the lack of an agreed-upon definition of constitutional tragedy, Part Two has an underlying coherence, because so many of the essayists refer to the Greek dramatists, with Sophocles' *Oedipus Rex* and *Antigone* as favored benchmarks. Most of the scholars writing in Part Two regard tragic outcomes as inevitable, no matter what interpretative method one uses; partly, their concurrence that tragedy is unavoidable comes from shared recognitions that law cannot guarantee to provide justice by reference to moral norms, or that democracy itself is no guarantee of avoiding tragedy in governance. This is the theme of the best essays in this part, by Larry Alexander (115-120), J. M. Balkin (121-128), Rebecca L. Brown (139-146), Christopher L. Eisghruber and Lawrence G. Sager (147-151), and Gary Jacobsohn (172-179). Three other eloquent essays, by Gerard V. Bradley (capital punishment, 129-138), Marie A. Failinger (152-161), and James E. Fleming (right to die, 162-171), focus focus on tragic issues of life and death. Another favored theme is juristic hubris; according to Pamela S. Karlen and Robert Ortiz (voting rights, 180-188), Michael W. McConnell (various cases, 203-206), Earl M. Maltz (*Brown v. Board of Education*, 207-216), and John Yooo (*McCulloch v. Maryland*, 241-247), various issues have tempted judges to exceed what judges can do in interpreting the Constitution.

Conclusion: Heeding Normative Assumptions

The essays gathered in this book compel us to reexamine the normative dimension of our understanding of the Constitution: What should it be? What should it do? How should it be interpreted and applied to resolve constitutional quandaries? When should it be revised or even replaced?

My point is not that historians should spend much time considering these questions in the present–though as I write this review the dust is still settling on the vain attempts of hundreds of historians and constitutional scholars to argue for a specific interpretation of Article II, section 4 of the Constitution (defining impeachable offenses). Rather, historians who deal with the Constitution's history ought to be more self-conscious about the normative assumptions and values that we bring to that scholarly task. We ought to be aware that we may well be evaluating the work of constitutional actors in the distant or near past by reference to our own understandings of what the Constitution should have been and should be today.

In sum, therefore, reading *Constitutional Stupidities, Constitutional Tragedies* will spark in constitutional historians a renewed appreciation for the obligation to heed the normative dimension of the constitutional historian's task. We must remain sensitive to the unvoiced normative assumptions that drive the thought and actions of those whom we study–and those who study them.

Charles Zelden Book Review Editor Legal Studies Program H-Law Liberal Arts Department Nova Southeastern University zelden@polaris.acast.nova.edu 3301 College Ave Phone: (800) 338-4723 x8218 Ft Lauderdale FL, 33314 Fax: (954) 262-3931