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Dietze: America's Political Dilemma

Paul G. Kauper

University of Michigan Law School

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RECENT BOOKS

BOOK REVIEWS

AMERICA'S POLITICAL DILEMMA. By *Gottfried Dietze*. Baltimore: The Johns Hopkins Press. 1968. Pp. xii, 298. \$7.95.

Gottfried Dietze, Professor of Political Science at The Johns Hopkins University, is a distinguished student of comparative government and of the American constitutional system. Federalism as a principle of government has received attention and emphasis at his hands. Perhaps his best known work is *The Federalist*, a penetrating and comprehensive commentary on what Professor Dietze rightly characterizes as the great classic on federalism and free government.

One must understand the author's devotion to constitutionalism and free government to appreciate his latest book. In this volume Professor Dietze expresses and documents his concern over what he regards as basic departures from the constitutional system created by the Founding Fathers.

One basic set of ideas runs through the book. The Constitution was designed to create a government of limited power. The end purpose was to protect the freedom of the people. Minorities were to be protected against the majority. While it created institutions of popular government based on the representative principle, the Constitution—far from sanctioning an unlimited democracy expressing itself in majority rule—created institutions designed to protect the minority. Federalism, the separation of powers, judicial review, and the protection of property rights assumed central significance in the constitutional scheme. Implicit in the whole structure was the rule of law. The institutions of popular government were a further means of securing freedom, but democracy was not an end in itself.

But, according to Professor Dietze, the grand design has been substantially and seriously altered. The evolution of American constitutionalism threatens the very values the Constitution was designed to protect. Democracy, intended as a means to insure freedom, has become an end in itself, and this is the core of the problem. The protection of property rights and federalism as a restraint on federal power have been diluted and weakened by the abdication of judicial review; the result is that the powers of Congress have been vastly extended and the protection of property rights reduced to a minimum. The principle of the protection of civil rights as a restraint on government has been turned upside down, and now Congress legislates to create new "civil rights" which in themselves operate to restrain the freedoms retained by the people. The presidency, viewed originally as an executive office of limited power, has become vastly more powerful at the expense of the powers of Con-

gress. The President is no longer the chief executive of a federal republic, but the powerful head of a nation. Moreover, the democratic idea has corrupted the determination of foreign policy. We have lost sight of the original idea that the President in consultation with the Senate was to determine a long-range foreign policy serving the dominant value of advancing human freedoms. Instead of committing ourselves firmly to a policy of opposing Communism, we have vacillated, retreated, and blunted our efforts—all this as a result of democratization of our foreign policy.

This then is *America's Political Dilemma* as Professor Dietze sees it. A nation committed to limited government and to limited democracy as a means of furthering freedom has now made democracy an end in itself. The liberal principle of the protection of the individual from government is now being subordinated to the democratic principle of popular government. Whether the nation can extricate itself from this dilemma is a question he discusses in the concluding chapter.

Anyone reading Professor Dietze's scholarly and well-documented book cannot fail to recognize that he has accurately captured and set forth the main lines of our constitutional development. That there has in fact been a great transformation of the system as originally conceived can hardly be doubted. It appears to me, however, that in some of his conclusions Professor Dietze has overstated the case and that in other respects his interpretations are open to question. It is accurate to say that the Supreme Court no longer exercises its powers to protect property and contract rights as it did at an earlier time. But in view of the continued widespread enjoyment of property and contract rights in this country, it may be questioned whether lessened judicial protection of these rights has undermined the institution of private property to the extent implied by the author. It is undoubtedly true that judicial review has declined not only as a protection for property rights but also as a limitation on federal power—so that the emphasis is no longer on the integrity of the federal system but on federal supremacy—but nonetheless it seems to me that judicial review is now operating more powerfully than at any other stage in our history. The difference is that the Court has accorded priority to values which it believes are central to a democratic society. In doing so, it has accorded protection to various kinds of minority interests as a restraint on majority action. Judicial review is thus far from dead. Indeed, some of the important questions we face today arise precisely because the Court is such a powerful organ in the determination of national policy. The current inclination of courts to feel obliged to correct—according to their own best lights—situations which the other branches of government have failed to meet is a phenomenon of judicial power which deserves careful attention. The author's tendency to view the Supreme

Court's historic role as that of a disinterested tribunal interpreting and applying a higher law does not give an adequate picture of the subjective aspects of judicial review and of the great power the Court wields in making policy determinations in the name of constitutional interpretation.

It seems to me that Professor Dietze, in stating his general thesis, does not take adequate account of the underlying historical forces which have shaped our constitutional development. The nation has moved a long way from the economic, social, and political environment of the eighteenth century. The movement toward egalitarian democracy had its roots in the Jacksonian era, and surely the frontier development was a powerful factor in the same movement. Democracy thrived peculiarly well on the freedom nurtured by American soil. The expanded role of the federal government, so well aided and abetted by the Supreme Court, was an inevitable consequence of the centripetal forces operating in American life. These forces created a sense of nationhood as distinguished from a federal union, and called for national solutions to problems transcending state lines and the power of the states to deal with them. I do not believe that any court could have withstood the strength of this movement. Likewise, I think the writer has not adequately measured the historical impact of the Civil War. He does deal at length with President Lincoln and the dilemma he faced in resorting to unconstitutional means to save the Union. Indeed, since the author regards Lincoln's administration as a triumph of popular government inasmuch as the executive power was used to achieve the majority will—even though President Lincoln resorted to unconstitutional measures to achieve his purposes—he views this period as the beginning of the trend in American history which led to the present dilemma. But focusing attention on the unconstitutional aspects of President Lincoln's actions should not obscure the central historical fact that the Civil War was decisive in welding the nation together and so played a part in the nationalization process. It seems to me that the author also fails to do justice to the great historical purpose of the thirteenth, fourteenth, and fifteenth amendments to assure freedom and equality to former Negro slaves, and disregards the enlargement of congressional power necessary to implement these purposes. Similarly, the expanded role of government in the protection of property and contract rights—a development which ultimately received judicial sanction—cannot be adequately portrayed without reference to historical factors pointing to the need to restrain private economic power in the public interest.

To engage in these criticisms is not to belittle Professor Dietze's contribution in delineating as carefully and as forcefully as he has the departures in our constitutional system from the original conceptions which had their roots in eighteenth century liberalism. Neither

do I intend to minimize the dangers to freedom inherent in the centralization of power, growing encroachment of government on all phases of life, and enormous concentration of power in the office of the President. Indeed, in his discussion of this last point, Professor Dietze raises the not wholly fanciful specter of a President exercising dictatorial powers in order to save constitutional government, and makes some penetrating and chilling comments about political assassinations, particularly the greater likelihood of their occurring as more and more power is vested in one man. As Professor Dietze sees it, the country is suffering from an excess of democracy. This is the basic root of all our constitutional aberrations. Democracy unlimited will destroy not only representative government and the freedoms it is designed to protect, but also democracy itself. The author foresees the possibility of a dictatorship aimed at preventing collapse of the constitutional order, and he invokes as a parallel the dictatorial powers used by Lincoln to save the Union during the Civil War.

In the concluding chapter the author reaches the critical question whether in the end popular government can survive. The discussion at this point gets to the heart of the problem: the old question of republican versus democratic forms of government. Professor Dietze is clearly committed to the republican principle that leadership should be in the hands of people who are elected because they are wise, mature, experienced, and committed to constitutional principles. Democracy corrupts leadership and centers power in people whose decision-making is guided by emotion rather than reason. Professor Dietze does not end on a very hopeful note. The extension of the suffrage, he concludes, has lowered the general level of intelligence, wisdom, and experience of the electorate. And it remains to be demonstrated that improved and broadened education will give us a responsible electorate. Despite this, he wistfully expresses the hope and possibility that before it is too late we will return to the enduring principles on which this nation was founded.

One need not accept all of Professor Dietze's interpretation of our constitutional theory and history to recognize that his challenge to democracy touches the vital nerve center of our day. Whether popular government can survive—or even more pertinently, whether the nation can survive popular government—is an honest question. Does popular government produce or even tolerate the kind of leadership essential to cope with domestic and international problems? How much can be expected of a system which in the choice of leadership places such a premium on popularity, photogenic qualities, and personal charisma? Can a President pursue a long-range foreign policy in the face of a popular opinion which concentrates on immediate interests?

Professor Dietze's book was written before the events of recent months evinced a growing divisiveness in the nation, polarization

of political views, increased resort to violence, and denial of orderly governmental processes. These are all symptomatic of a deep-seated national malaise. I do not believe that the answer is to summon the people to return to the old conceptions of federalism and judicial review. We cannot turn the clock backward. But the ills of our day are a challenge to sober-thinking, responsible leadership to find intelligent and rational responses to our problems and to undertake creative adaptation of constitutional principles to the contemporary scene. The centralization of power, the aggrandizement of executive authority, and the expansion of governmental controls do pose threats to freedom as Professor Dietze so well points out. Ways and means must be found to strengthen state and local government in order to preserve a viable federalism, to improve the legislative process in order to restore a balance between the legislative and executive branches, and to mobilize the resources, leadership power, and sense of responsibility of the private sector as an alternative to big brother government.

Any constitutional system must in the end find its strength and viability in popular understanding and support. No written guarantee of principles and no formal institutional devices will insure continuity of the constitutional order. Ultimate survival depends on what Woodrow Wilson called the "sense of constitutional morality"—a quality rooted and nurtured in the minds and hearts of the people. Appreciation of our constitutional heritage, respect for law and the institutions which support it, a compassionate feeling for our fellow citizens and sensitivity to their needs, a regard for the common good, a sense of civic responsibility, faith in the process of reasoned argument and persuasion, and the practice of moderation and civility in the face of conflicting claims and demands are components of this quality. Only with the support of this ethical consensus can democracy rise above the excesses of popular government, and freedom survive the forces encroaching upon it. The mustering of our educational and spiritual resources in the cultivation of this consensus is today's greatest challenge and offers the one hope for the resolution of our political dilemma.

*Paul G. Kauper,
Henry M. Butzel Professor of Law,
University of Michigan*
