Book Review: *The Metaethics of Constitutional Adjudication*, by Boško Tripković

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1. Metaethics and Constitutional Theory

Constitutional scholars are used to questions like: "Did the court get it wrong in that assisted suicide case?"; "How *should* freedom of expression be balanced against other moral concerns"; "Was *Roe v Wade* the 'right' decision?" etc. At another level, we are used to endless debates about the appropriate role of the courts in a democracy, particularly concerning their involvement in moral disputes: should they get involved, and if so, how far should they be able to go?[1] This book takes a different step. As the blurb puts it, '[i]nstead of asking whether the courts get moral *answers* wrong, the book asks a more fundamental question: do the courts get the *morality itself* wrong?' In giving detailed attention to this more fundamental issue, Tripković's work presents an interesting, engaging and potentially valuable contribution to the literature on constitutional adjudication.

Its value may extend further in establishing a useful bridge between metaethics, on the one side, and constitutional theory on the other. The implicit idea is that interrogating the interaction between core philosophy and constitutional theory is an important task. This is something I respectfully share: those engaged in constitutional theory 'must think, and think carefully, about the philosophical implications and background' of their work.[2] Tripković's book can be read as taking this challenge to the door of constitutional courts, whom he charges with under-reflecting 'on the source of moral value behind their judgment[s]', even where they admit making *moral* judgements at all (2). The result is 'confusion and uncertainty about the nature of value in comparative constitutional adjudication' (2). Thus, engaging with the metaethics of constitutional adjudication does indeed seem a valuable pursuit.

Another aspect of the book that immediately catches the eye is the anti-realist conception of value it takes – 'one that does not presuppose the existence of mind-independent moral truths' (blurb). Put

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(The Version of Record of this manuscript has been published and is available in *Jurisprudence* (2019) (online) https://doi.org/10.1080/20403313.2019.1694784, and in (2020) 1 Jurisprudence (forthcoming print)).

[1] See, for example, J Waldron, *Law and Disagreement* (Oxford University Press 1999); J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346; JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980); RH Fallon Jr, 'The Core of an Uneasy Case For Judicial Review' (2008) 121 Harvard Law Review 1693.

[2] KL Murray, 'Philosophy and Constitutional Theory: The Cautionary Tale of Jeremy Waldron and the Philosopher's Stone' (2019) 32(1) Canadian Journal of Law and Jurisprudence 127, 130.

bluntly, moral anti-realism does not have a shining reputation in the legal academy. For example, Dworkin dedicated much of his career, up to his final work, developing something of a polemic against it. On his view, moral anti-realism is, at best, a uselessly debilitating viewpoint, and at worst, a 'denigrating' suggestion risking undermining our ability to 'live decent, worthwhile lives'.[3] Beyond the legal academy, Strauss was concerned that accepting anti-realism would lead to the breakdown of 'civilised life'.[4] As Tripković is attuned to in some of his arguments, this unease is still widespread. Many have taken up the 'mission', as one commentator describes it, 'to save the world from the horrible acts that are supposed to result when people become moral skeptics of any variety'.[5] In this climate, any attempt to defend and apply an anti-realist perspective, particularly in constitutional theory, is to be welcomed.

With this in mind, and noting that I may have gotten carried away in my own anti-realist excitement, I must admit that it was somewhat disappointing to find this immediate qualification of the scope of the work:

> *Whereas it would be inaccurate to describe this project as a moral reading of constitution* [sic] *for moral skeptics*, it certainly is a moral reading that is more cautious about presupposing mind-independently true moral answers, and even more cautious about developing a theory of constitutional interpretation from that metaethical premise. (7 – my emphasis)

Perhaps those of us so inclined will have to wait for that sceptical approach to constitutional adjudication. Regardless, Tripković's own philosophical leanings are clearly on the non-realist side of the spectrum, and it is refreshing to see this brought to constitutional theory in some sense. It is also to be welcomed that Tripković does take care to explain exactly what he purports to offer in such a careful manner.

Broadly, he aims to 'challenge and explain the metaethical foundations of value-based arguments in constitutional adjudication' (2). Tripković seeks to achieve this by, first, teasing out the 'implicit commitments about the nature of value' within existing methods of value-based constitutional adjudication (2-3). He then provides a philosophical scrutiny of these commitments, before offering a more 'plausible constitutional ethics' – 'a theory of ethical argument in constitutional adjudication that would be supported by a sound understanding of value' (6).

[3] R Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 Philosophy and Public Affairs 87, 139. See also R Dworkin, *Justice For Hedgehogs* (Harvard University Press 2011).
[4] L Strauss, *Natural Right and History* (University of Chicago Press 1953) 3.
[5] W Sinnott-Armstrong, *Moral Skepticisms* (Oxford University Press 2006) 13.

I offer some critical reflections on the scope of the work, its method, and some of its key arguments in Section 4 below. First, however, a brief summary of how the argument proceeds is in order. This is followed by a more detailed reconstruction of its themes.

2. An Overview

The first three substantive chapters are each dedicated to a different method of value-based constitutional adjudication Tripković identifies in current judicial approaches. Chapter 2 concerns itself with the argument from "constitutional identity", treating the 'common evaluative commitments of the society as articulated in the constitution' as the source of value (16). Chapter 3 deals with arguments which appeal to less "deep", currently prevailing 'moral intuitions of citizens' within the constitutional order (16) – "common sentiment". On this approach, the 'moral sentiments of the people in a particular community constitute the right solution to moral problems' (59). Chapter 4 turns to the argument from "universal reason", focussing on values which exist 'by virtue of our humanity' (16).

In each case, Tripković begins by carefully sketching the features of the approach at hand. This is provided via an analysis of its use in three systems, with concrete examples from a wide range of case law. Each chapter then deconstructs and critiques their underlying metaethical commitments. This pleasingly methodical structure certainly helps with one of the tasks of the book: to interrogate existing value-based arguments used by courts in constitutional adjudication. These chapters also serve as a ground-clearing exercise for the central argument that follows: in each case, Tripković diagnoses deficiencies in the conceptions of value taken, which, in the final constructive part of the book, he seeks to remedy with his own account.

Chapter 5 lays down the groundwork for this constructive task. Returning to core philosophy, the aim is to 'articulate a philosophical foundation for a theory of constitutional ethics' (143). This chapter is where the main burden of the book lies – it is the key turning point in the argument and sees several strands of the critical analysis thus far come together in elaborating Tripković's own metaethical stance. It is also here that the method and philosophical background of this book, implicit throughout, is exposed particularly clearly.

At this point, the ground-clearing and ground-laying work has been done. The final substantive chapter has the task of putting the theory of value to work in the realm of *constitutional* ethics – to place it in 'the institutional context of judicial reasoning' (192). While the work which follows is presented as (merely?) an issue of 'translation' (193), it is vital; it completes the journey from constitutional adjudication, to metaethics and back again.

3. Key Themes and Arguments

Tripković offers a combination of analytical, critical and reconstructive contributions, broadly corresponding to the structure of the book, above.

3.1. Analytical Elements

The taxonomy of current value-based arguments in constitutional adjudication arising out of the first three chapters seems a helpful contribution to the literature. In addition to the broad categorisation of styles of reasoning drawn from comparative adjudication, Tripković elaborates some more precise distinctions. For example, he differentiates "general" (53-56) and "particular" (50-53) forms of "constitutional identity" to which judges often refer. Such contributions will certainly assist those concerned with judicial engagement with morality in their work, providing helpful framing language and some solid analytical groundwork on the content of these methods, and their underlying metaethical commitments. This is heightened by the fact that Tripković examines a range of jurisprudence with a careful and interrogating style. Indeed, the whole host of implicit claims about morality that Tripković manages to dig out of some apparently innocuous judicial statements is entertaining at times (see his treatment of the US Supreme Court test for "cruel and unusual" (23)).

3.2. Critical Elements

The core of the critical work comes from Tripković's discussion of existing approaches, their present metaethical underpinnings, and the way they operate. As one might expect, the criticism of each approach differs, but one strand which catches them all is that is that none of the three methods of dealing with values in constitutional adjudication can, or should, operate in isolation from the others. For example, Chapter 2 'challenges the notion that constitutional identity can serve as an independent foundation of judicial moral judgment' (14). Similarly, in light of the problems Tripković finds in the argument from common sentiment in Chapter 3, he argues that it ought to be 'supplement[ed]' by the argument from universal reason – reconstructed to avoid dubious references to mind-independent truths (98).

The criticisms made of the common sentiment approach demonstrate well a style of argument that recurs throughout the book and which will be the subject of much of the commentary I offer below. As above, Tripković argues that this approach should not be taken as a singular, wholesale approach to value-based constitutional adjudication. The reason he initially gives is that 'when other types of argument' are excluded, it 'loses much of its appeal because it does not capture the way moral questions need to be approached' (60). It 'does not leave space for reflective endorsement and

justification of our moral feelings' (60). Immediately, one is tempted to ask for some indication of *why* "reflective endorsement" is needed. The underlying problem for Tripković is the implausibility of the common sentiment approach's undergirding emotivist and relativist metaethics (these commitments are drawn out on 80-89). This metaethics is implausible in light of the way "we" regard "our" moral principles in "our" discourse.

The instinct of the emotivist, that in moral evaluation we 'express our emotions only', is problematic because it 'fails to account for the role of reflection and reasoning in our moral talk' (91). Their view 'cannot account for the ways in which morality actually functions' (92). This is an early glance at a style of argument that comes to feature heavily in this book: the technique is to appeal to what "we" currently think, or how we talk in "our" culture. This might aptly be summarised as a reflective equilibrium, or perhaps an ethnocentrism. The challenge Tripković lays down for those attracted to relativism and emotivism is 'to explain the role of moral reasoning in our practice' (92). The problem, we are told, is that:

> Resolving moral questions…does not simply amount to counting our common feelings on the matter. We think of our moral judgments as justified when we are able to offer an argument for them starting from a value…and using the basic rules of moral reasoning. (92)

Tripković also wants to remind us that, when we say things like '"What Hitler did to Jews was wrong"', we 'do not imply that it is *our* feeling *now* that these conducts were wrong' (93). Rather, we condemn this 'because we think they were wrong', *full stop* (93). Presumably, we think they are *just* wrong *because* this is the result of our reasoning and reflective techniques. A further aspect of the criticism, then, is that the lack of reason and reflection on the emotivist account fails to support 'the objectivity of moral talk' (85) – 'the illusion of moral objectivity' we rely on in our discourse (95).

One might think this is a rather peculiar line to take against the emotivist. Tripković, in effect, appears to be insisting that the emotivist explain, perhaps even support, the illusion of objectivity or else have their metaethics and resulting constitutional approach rejected. But is not the very point of emotivism that such beliefs in objective morality are misguided? Why is it the *emotivist* who must give way to accommodate the (deluded?) objectivists – to, in a sense, humour their illusion of "objectivity"? I suspect the answer again comes down to the ethnocentric standard of justification that Tripković deploys: the plausibility of a theory depends on its ability to explain *our* intuitions, and the way *we* talk. If the emotivist cannot, that becomes a problem.

3.3. (Re)Constructive Elements

Having criticised existing approaches and their underlying conceptions of value by now, Tripković begins his constructive work. While, as above, he initially describes his task as to set out '*a* theory of ethical argument in constitutional adjudication that *would be* supported by a sound understanding of value' (6 – my emphases), it becomes clearer that his, more modest, aim is to provide a theory which can explain *current* uses of ethical argument in constitutional adjudication in an attractive way. Thus, at the end of Chapter 4 he lays down the challenge ahead: arguments from common sentiment and constitutional identity 'depend on contingent moral attitudes', and the argument from universal reason, on Tripković's account, brings in a reflective attitude which is contingently considered by us to be 'beneficial to a good moral judgment' (141). The challenge is that there remains something of a normative gap – why does it *matter* that these contingent attitudes are held in fact? Without it, a robust theory of ethical constitutional adjudication cannot get off the ground. Thus:

> …to motivate the use of these ethical arguments in constitutional reasoning, we need a conception of value that will vindicate our ability to rely on our contingent moral attitudes even if they do not lead to mind-independent moral truths. (141)

Notice that the goal is not to put anti-realism to work to construct a theory of adjudication suitable for the sceptic. Rather it is to *explain our current* approaches in a way which is attractive to the moral sceptic. This difference might seem subtle. However, it is, I submit, a significant one and gives rise to many of the critical reflections offered below. Having laid down this marker, let us now look at what this *reconstructive* work looks like.

It begins with the return to philosophical foundations in Chapter 5. Tripković first attempts to vindicate a conception of value before offering a translation into constitutional ethics. It is perhaps understandable, given the considerable burden of this chapter for the book, that it ends up as the most complex and challenging. Many strands of argument which have been hanging from earlier chapters are drawn together, and it is here that we really start to appreciate much of what has been going on thus far in a conceptually precise way. I certainly understood much of the previous discussion better upon reading this section. Key to much of what follows, and what has gone before, is a distinction between the "practical" and "theoretical" perspectives. Again, we are told that in the *practical* realm of deciding what to do, 'our values seem to us, and we present them to others, as true' (145). In our moral evaluations, the meaning of the concept of '"wrong"', for example, 'seems to be fixed by its reference, the episode in the world that our moral judgment is about' (145). Thus, when we say things like '"cruelty is wrong"', we are 'thereby seemingly describing an occurrence in the world as having a property of wrongness', regardless of contingent attitudes – it is *just wrong*. It is perhaps

rather surprising to find that, on Tripković's account, *even sceptics* seem to be implying all of this when they evaluate.

Yet in the *theoretical* realm, we explain our value experiences as causally affected attitudes, referring to evolution, history, culture and other explanations. This raises the spectre that there may be *other* reasons for our values that, despite how we like to talk about them, might have nothing to do with their (independent) truth after all. This results in a 'profound psychological uneasiness' (145). Tripković is right that the idea that our moral evaluations might not be independently true is daunting to many. The trend I described in the introduction is further testament to that. The dilemma, with which Tripković seems to share considerable sympathy is this: 'how can we go on claiming objectivity and truth for our values without having a bad philosophical conscience'? (146) One might ask whether this worry is worth humouring at all, or whether it is time to throw such metaphysical blankets[6] aside and try a bit of intellectual honesty. On the other hand, the problem that Tripković has identified is a real and pressing one for many, so perhaps one *should* think carefully first.

After dismissing several methods of coping with the problem, Tripković presents his own. And here, finally, we have the argument for Tripković's version of anti-realism, of which we have seen only glimpses so far. The argument is a multi-faceted and nuanced one. Tripković's claim is *not* that *there are no external truths,* but rather that 'the best causal accounts of the origins of *our* current values show that they are a consequence of contingent circumstances rather than the perception of external and absolute ethical truths' (152). This does not in itself prove the absence of independent truth, but it does show a gap between the 'realm of objective values (if there are any) and our existing values', which, in his view, is to blame for the paralysing thought above: the worry that our evaluations are not likely to be the result of objective truth, and so are likely to be wrong, or, equally worryingly, that we might never know (153).

Tripković uses a detailed Darwinian argument to show that evolutionary accounts, for one, are more plausible than realism in explaining our values. Not only that, but it can also explain why we talk as though our values *are* objective: it is helpful, in evolutionary terms, for us to believe in the illusion of objectivity (154ff) (recall that the inability to explain the illusion of objectivity was a defect found in emotivism). While a hardcore Darwinian account of morality is, perhaps, not for everyone, it is certainly a well-told story, and Tripković offers some provoking arguments to support it.

If Tripković had left matters there, however, he would surely have, contrary to his intentions, *increased* the metaphysical angst of the disappointed objectivists. On his account, we still *want* to have objective

[6] See Murray (fn2) 135–136.

truth on our side. Showing us that we likely do not only exacerbates this worry: *we are even more sure that we cannot do what we think we ought to.* However, Tripković does offer a solution. Essentially, he counsels us to "drop" the idea causing the unease. Thus, we need to stop worrying about external truth and realise that 'one need not know mind-independent truths to know how to live' (176). Tripković wants us to have confidence in what we *do* have – *our* identities, and *our* values, however contingent they may be. But, in order to continue evaluating in a useful way, and to temper excessive confidence, 'we need some other approach to judging these intuitions as warranted or trustworthy' (181). This is the role Tripković finds for reflection – 'ideas about the virtues of good moral judgment' (174) (recall that the inability to explain our current reflective approach was another defect in existing accounts).

This argument – that attachment to external truth as an idea is doing us more harm than good – is a strikingly pragmatic one.[7] Indeed Tripković very briefly notes some similarity in the attitude of reflective confidence he proposes and seminal pragmatist Richard Rorty's '"liberal ironist"',[8] but points out that his own approach is 'very different in the details and doctrines that support it' (174, n105). We are left to work out for ourselves what these differences are, but, considering the thoroughly pragmatic nature of the argument Tripković ends up using, and other similarities noted below, I wonder whether there is as much of a difference as he makes out.

Armed by now with a philosophically-grounded theory of value, Tripković resolves matters by translating it into the constitutional realm. On the model he proposes:

> [J]udicial moral inquiry proceeds from the emotive intuitions of a constitutional community present in the argument from common sentiment; these intuitions are then challenged with the argument from universal reason through reflective exposure to different moral perspectives; finally, the goal of this exercise is to contribute to a better understanding and development of constitutional identity. (224)

4. Critical Reflections

There is something immediately satisfying in the way the book ties together here: Tripković's pragmatically-defended conception of value rides in to "cure" the defects with those drawn from existing approaches to constitutional adjudication, and he issues a broad instruction to courts about

[7] See, for example, R Rorty, *Philosophy and Social Hope* (Penguin Books 1999) 48–49 (denouncing the idea of objective truth as 'something unknowable').
[8] See especially R Rorty, *Contingency, Irony, and Solidarity* (Cambridge University Press 1989) pt II.

how to use these approaches, finding a role for each. He certainly fulfils the task set for himself (as qualified): to reconstruct current approaches to constitutional adjudication according to his preferred metaethics. That said, in this section I offer some critical reflections on the nature and content of this project.

4.1. Scope

While the way the argument comes together is very neat, stepping back and looking at everything in place, a lurking dissatisfaction creeps in. The plausible theory of constitutional ethics we were promised has materialised as a refurbished version of *what the courts have already been doing*, on his account. Tripković seems to have come to the project of establishing a philosophically rigorous approach to constitutional ethics mainly with the aim of "fixing" the current approaches of the courts. But a question which stayed with me throughout is this: why go to such effort to do this, one might suggest, rather modest task? Why assume the current approaches of the courts are worth fixing in the first place? At times, it is as though the conception of value Tripković comes to is to be accepted simply *because* it allows us to praise the current approaches of the courts, but I wonder whether this puts matters the wrong way around: why mould the theory to the practice? Why not develop a theory of value and explore where it might lead us? Why does the conception of value have to be able to explain existing approaches, rather than future approaches having to change – potentially quite radically – according to a better conception of value?

Tripković is somewhat aware of this concern: he recognises that the theory 'leaves many things as they are', and 'only finds a distinct place for ethical arguments that already exist in comparative practice' (221). His response is that it nonetheless 'does unsettle the usual ways in which these issues are addressed' (221). As an example of this 'performative potential', Tripković's model rejects the current tendency to treat the three value-based arguments exclusively (221). But this re-raises the original concern: why limit the transformative potential to these modest adjustments? If the courts really *have* been "getting morality wrong", why assume they have been getting their methods of adjudication even *broadly* right? If, on the other hand, Tripković's point is that his theory of value can, *in its own right*, justify current approaches, so that they are *worth* holding on to, then perhaps this positive normative stance ought to be emphasised more. The problem is that all of this has been tied to explaining existing approaches, as though doing so successfully itself has normative force. Some might question this, almost conservative, account of justification.

4.2. Ethnocentrism

This aspect of the book might simply be a consequence of a broader feature. As noted at various points above, claims regarding "our" intuitions, "our" culture, or the way "we" talk about morality play a central role in the book. It is littered with such ethnocentric references and it is striking that this is present both in the key *arguments* Tripković makes for his approach, *and* in the *substance* of the model proposed. As he envisages, judicial enquiry starts with the 'emotive intuitions of a constitutional community', tested through engaging with values from other systems and corrected where doing so would 'contribute to a better understanding and development of constitutional identity' (224). Thus, judges ought to start and finish with the "we" of a constitutional community; the ethnocentric approach goes all the way down, up, and back again in this book.

The routine invoking of references to "our" intuitions; how "we" talk about morality and praising an approach in which courts will appeal to "our" collective intuitions, is again reminiscent of Rorty's thought – this time his unabashed ethnocentrism. Rorty became infamous for such appeals to 'our culture'[9]; 'our society' and its 'traditions'[10]; 'our community',[11] and the 'convictions to which we are already committed by the public, shared vocabulary we use in daily life'.[12] While Tripković does not attach himself to a particular substantive political philosophy as Rorty does with Rawlsian political liberalism[13], they both share this pragmatic ethnocentric approach. Rorty finds that political liberalism is the most appropriate philosophy *for "us"*; Tripković finds, first, that his non-realist reflective confidence is more appropriate given the way *"we" talk* about morality while also avoiding dubious metaphysics, and recommending that a judge take this reflective "we"-based approach to constitutional adjudication.

Given these similarities, perhaps a more substantive engagement with Rortyan theory, or pragmatic philosophy more generally, would be useful. Tripković would seem to have allies in these quarters. More critically, however, doing so would present an opportunity to engage with many of the criticisms that have been made of such "we"-based approaches. Indeed, as Rorty himself quickly noticed, many 'have been annoyed' by this style of argument.[14] It is worth reflecting on these criticisms, lest Tripković

[9] ibid 57.
[10] R Rorty, 'Postmodernist Bourgeois Liberalism' (1983) 80(10) Journal of Philosophy 583, 585.
[11] Rorty, *Contingency, Irony, and Solidarity* (fn8) 59.
[12] ibid xiv. And many more besides. For a more complete treatment of the role the "we so-and-so" reference plays in Rorty's work, see G Baruchello and R Weber, '"Who Are We?" On Rorty, Rhetoric, and Politics' (2014) 19(2) The European Legacy 197.
[13] See, for example R Rorty, 'Thugs and Theorists: A Reply to Bernstein' (1987) 15 Political Theory 564, 565–566; R Rorty, 'The Priority of Democracy to Philosophy' in M Peterson and R Vaughan (eds), *The Virginia Statute of Religious Freedom* (Cambridge University Press 1988).
[14] Rorty, 'Thugs and Theorists' (fn13) 564.

risk similarly annoying. Not doing so, I think, risks leaving some areas of weakness considering the foundational role the approach plays in both method and substance here.

a) "Who Are We?"

The most problematic issue is the question of who, precisely, "we" *are* in these ethnocentric appeals. While Tripkovic often invokes these "we"s, and "our"s, exactly who this refers to is usually left unelaborated. 'Who', as Bernstein asked Rorty, 'precisely constitutes this "we"?'[15] Sure, from the arguments Tripković uses these references to support, readers can probably work out *what* the "we" is supposed to believe, but exactly *who* "we" are is less clear.

One issue with this is that it makes it rather difficult to assess whether the pictures painted by Tripković are accurate characterisations of what "we" do believe. A momentary flash of a somewhat recognisable ethnos comes in a footnote, referring to respecting normative intuitions 'to the extent that they can be reflectively attributed to our identity as persons living in democratic polities at the beginning of the 21st century' (see 192, n1), but even this still seems vague. Perhaps, then, this fundamental question is worth reflecting upon further.

b) Disagreement

However, the danger is that greater clarity in this regard will likely lay bare the fact that many disagree. As Bernstein argues, to point to '"social practices," "shared beliefs," a "historical consensus"', or, one might add, "our constitutional identity" is to 'point to a tangled area of controversy'.[16] The 'overwhelming historical fact is that individuals' basic intuitions conflict'.[17] Has Tripković managed to pick out the ones "we" genuinely share for his key arguments? That would be quite a feat given the pervasiveness of disagreement in our everyday lives[18] (I, for one, do not ascribe to the "illusion of objectivity" Tripković wants to explain, and certainly do *not* mean to suggest that "wrongness" is a property of events in the world when I morally evaluate, as he suggests).

The issue goes also to the *content* of Tripković's constitutional ethics: if the judge is tasked with engaging with "our" fundamental constitutional identity (as tweaked through references to common sentiment and a reconstructed version of universal reason), then they will be tasked with taking sides in these interpretive disputes. What happens, or should happen, when people disagree with the interpretation of "we", or perhaps simply do not ascribe to the intuitions of the "we" at all, is thus

[15] RJ Bernstein, 'One Step Forward, Two Steps Backward: Richard Rorty on Liberal Democracy and Philosophy' (1987) 15 Political Theory 538, 554.
[16] ibid 552.
[17] ibid 550.
[18] See generally Waldron, *Law and Disagreement* (fn1).

another issue worthy of reflection. Some might take issue with the blunt suggestion that if "we" come across conflicting intuitions, it is time to consider whether it is 'justified in this particular case to force others into our own worldview, to impose our own identity on them' (188-189). The unsavoury, exclusory and domineering elements of ethnocentrism rear their head with suggestions like these; considerable power is given to those who define the "we" and which aspects of "our" identity ought to be maintained – *imposed*.

c) Legitimacy

This takes matters down into the depths of legitimacy and more familiar debates surrounding judicial power. Tripković does note that there are often a multitude of competing identities and opinions and that there is a need to consider the appropriate role of the courts in these circumstances (194). Aware of the legitimacy issues at stake, Tripković holds that the courts ought to 'respect public opinion', and, '[i]nstead of imposing their own evaluative attitudes' need to regard themselves as 'the guardians of reflectiveness', with an appropriate nod to the process theory of Ely (194 – 195).[19]

But while Tripković is somewhat aware of the issue, and signals some need for judicial restraint, I wonder how robust this settlement can be as a response to legitimacy concerns given that he *also* suggests that the identity and views of the people for which the courts decide is *just a starting point*. The courts may diverge not only where "the people" are insufficiently reflective, *but also where they are held to stray from the moral values embedded in "our" constitutional identity* (194). Someone has to decide what in fact *does* stray from this identity, and, necessarily, what this "we" involves in the first place. Presumably, this will be the court.

How confident can we be, then, that the legitimacy issues surrounding judicial imposition do not return under the guise of protecting apparently "better", "more accurate" conceptions of what "we" believe? It is lucky, I suppose, that (so we are told) 'much of our contingent intuitions about the way in which moral problems ought to be resolved in modern political communities point to democratic representation as the most appropriate institutional venue' (195). Let us hope the courts see it so. Regardless, a little more on the mechanisms of putting this judicial approach into practice would help. Perhaps working out exactly how it should operate, in order to maintain a suitable balance between the corrective role envisaged for the courts and their restrained role of protecting reflection, is an avenue for future research.

[19] See Ely (fn1).

5. Final Reflections

It is hoped that the above provides a fair summary of the key themes at play in this complex, thought-provoking work. Overall, this book has much to offer. It reminds us of the importance of reflecting upon the philosophical underpinnings of constitutional theory and provides some conceptual analysis which will be of use for that task and beyond. Its own philosophical arguments are interesting and engaging, even if there are further reflections to be had concerning some of the core assumptions and methods. In particular, the ethnocentric mindset running throughout is, in my view, worthy of careful reflection. It is the key to much of this work, but, as we have seen, also raises a whole host of further issues, which if under addressed put both the persuasiveness and attractiveness of the theory at risk.