THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM

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PREFACE

THIS VOLUME COMPLETES a trilogy of books on American constitutionalism conceived for Rowman & Littlefield's Ashbrook Series on Constitutional Politics. It therefore takes its place alongside *American Political Parties & Constitutional Politics* (1993) and *Separation of Powers and Good Government* (1994).

Each of the three volumes addresses a distinct set of institutions and themes. What was said in the preface to the second volume is true of the trilogy as a whole: "It represents no school of thought, no consensus of opinion. As there are different authors, so there are different views and scholarly interests represented." Behind this diversity, however, lies a common intention. Each of the volumes brings together American political scientists and legal scholars who have established reputations for taking the Constitution seriously as the architectonic law of the United States. Through their contributions to the Ashbrook Series, these scholars have helped to reintroduce students of politics to a distinctively constitutional analysis of American political institutions.

This mode of analysis is at once recognizable to those familiar with the political discourse of the 18th and 19th centuries. For most of this century, however, constitutionally informed analysis has operated in the shadows of a political science that prefers to see the Constitution as only marginally relevant to the ideas and activities of political actors. The new political science has been accompanied by the rise of a political rhetoric silent about the Constitution, a phenomenon lamented by Walter Berns in this volume. A properly constitutional analysis, on the other hand, approaches the study of political institutions and activities in terms not only of their efficacy in satisfying the infinite variety of human wants, but also of their relation to the forms and ends of republican constitutionalism.

The American Constitution was written neither to create work for lawyers nor to provide an object of contemplation, free of practical concern, for scholars and their students. According to our founding documents, it was written to form a more perfect union, one in which Americans could better secure their rights and pursue their private and public happiness. In explaining the purpose of constitutional government in these terms, the Founders provided a standard of political health by which their work could and should be judged.

In effect, they compel any who desire to understand American politics to consider the soundness of the constitutional design in light of its ambition to frame a democratic way of life more competent, more decent, and more free than any other polity in human history.

This book takes as its subject that part of the constitutional structure that wields the judicial power of the United States, with a necessary emphasis on the Supreme Court. A cursory reading of the debate over the ratification of the Constitution reveals that the federal judiciary, with its powers and its jurisdiction, was an object of both fear and favor. To some, like Alexander Hamilton, the federal judiciary was to be the guardian of the higher law of the Constitution. The reason of the Framers embodied in the Constitution would be championed by experienced and learned judges whose independence from ordinary politics would make possible their dependence on the law of the Constitution. To others, the powers and independence of the federal judiciary posed the greatest of threats to constitutional government. In their view, judges would be empowered, in the words of an Anti-Federalist, "to mould the government into almost any shape they pleased."

We offer these essays as a contemporary effort to understand the role the Supreme Court was meant to play, the role it has in fact played, and the role it ought to play in our republic as we enter the third century of the Constitution's abiding presence among us. This volume grows out of a conference held at Ashland University in April 1996 and sponsored by the John M. Ashbrook Center for Public Affairs.

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Part I

The Supreme Court as Republican Schoolmaster

The Supreme Court as Republican Schoolmaster: Constitutional Interpretation and the "Genius of the People"

Walter Berns

The Framers of the Constitution believed, or, at least, would have us believe, that they had solved the political problem facing the nation in 1787 by devising a structure that provided a "republican remedy for the diseases most incident to republican government." Had they been more candid, they would have said the diseases most incident to *democratic* government, for, although they insisted that the government was "wholly popular," by which they meant it was not a "mixed" regime, there was no denying the fact that it was not a democracy, certainly not a direct democracy.[1]

Plainly the Framers—or to be more precise, Publius—made no effort to conceal this fact during the ratification debates. On the contrary, they praised the Constitution for putting some distance between the people and the organs of government. For example, they said that the Constitution would exclude "*the people in their collective capacity*" from any share in the government.[2] Accordingly, their Constitution provided a president to be chosen not by the people but by electors who, having made their choice, would immediately disband; it provided a Senate chosen not by the people but by the state legisla-

[1] Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), nos. 10 and 14.

[2] *Federalist* no. 63, 428.

tures, each state, regardless of the size of its population, being entitled to choose two; it provided a House of Representatives chosen not by a majority of the whole people ("*the people in their collective capacity*") but by majorities or pluralities within each of the districts into which each state would be divided; and it provided a Supreme Court with the power to veto popular legislation and with members who would, in effect, serve for life.

They also said that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or *elective*, may justly be pronounced the very definition of tyranny."[3] Accordingly, the Constitution provided a system of divided power and checks and balances, and it was understood that what was most in need of being checked were popular majorities. Popular majorities too readily become factious majorities, and it was for them especially that the Framers proposed a "remedy."[4]

Not everyone was confident that their remedy would prove to be sufficient. The Framers might well insist that, in the absence of "better motives," safety could be had by dividing and balancing powers.[5] But the Anti-Federalists were not persuaded; they would depend on those better motives, on the good sense of the people at large. They held that a "republican, or free government, can only exist where the body of the people are virtuous, and where property is pretty equally divided."[6] Nor were the Anti-Federalists the only ones to have doubts about the viability of what has come to be called the "procedural state." At the close of the Constitutional Convention the venerable Benjamin Franklin was asked by a Mrs. Powell of Philadelphia: "Well, doctor, what have we got, a republic or a monarchy?" Franklin replied, "A republic, if you can keep it." Which is to say, the Framers had done what they were asked to do and whether they had done well would henceforth depend on the people. The people had ratified the Constitution, but would they continue to abide by its rules and restrictions? Or, as Ralph Lerner puts the question (in the first essay to speak of the Supreme Court as republican schoolmaster), "would the system 'wholly popular' survive, even thrive, on talents wholly popular?" It was surely not something to be taken for granted.

Lerner says "it was axiomatic," for thinking revolutionaries,

[3] *Federalist* no. 47, 324. Emphasis supplied.
[4] *Federalist* no. 10, 65.
[5] *Federalist* no. 51, 349.
[6] Centinel (Samuel Bryan?), in *The Complete Anti-Federalist*, ed. Herbert J. Storing (Chicago and London: University of Chicago Press, 1981), 2:139.

"that securing the republic depended on first forming a certain kind of citizenry," and that "every organ of the new republican government could be expected to do its part in this project, each in the mode most becoming to it."[7] Legislator, executive, and judge alike, but each in his own way, were expected to provide the people with an education in republicanism.

Their ability to do this would seem to depend on their enjoying the confidence of the people, and, at the same time, on being somewhat removed from them. For this reason, probably less could be expected of the legislature, and particularly the more popular House of Representatives, which would be directly dependent on the people. Publius says that "the people commonly *intend* the PUBLIC GOOD," but they are sometimes mistaken about the means of promoting it. When that happens, when the "interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusions, in order to give them time and opportunity for more cool and sedate reflection." But Publius has to acknowledge the possibility of "parasites and sycophants" who, when seeking the people's suffrage, will "flatter their prejudices [in order] to betray their interests."[8] Even at best, legislators will be more likely to see themselves as servants of the people rather than their teachers or exemplars.

More might be expected of the executive, especially of a George Washington. During his eight years in office, Washington delivered eleven addresses, ten of them to the Congress and one, on a special occasion, directly to his "Friends, and Fellow Citizens." This, his Farewell Address, is nothing so much as a lecture on American republicanism: the patriot's duty to serve his country (and then to retire to private life); the pride associated with being an American citizen; the common interest binding the regions (and the dangers which may disturb the union, including the dangerous spirit of party); the connection between the Constitution and liberty; the need to avoid involvement in Europe's quarrels, to the end of "remain[ing] one people"; and, of course, the dependence of political prosperity on religion and morality.

Upon taking office, John Adams followed Washington's example by emphasizing the virtues of the republican Constitution: "What

[7] Ralph Lerner, *The Thinking Revolutionary: Principle and Practice in the New Republic* (Chicago and London: Cornell University Press, 1987), 91. This essay was originally published in the 1967 issue of *The Supreme Court Review*, 127–180.

[8] *Federalist* no. 71, 482–83.

other form of government, indeed, can so well deserve our esteem and love?" Thomas Jefferson continued the practice in his First Inaugural: "We are all Republicans, we are all Federalists," and all are obliged "to bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possesses their equal rights, which equal law must protect, and to violate would be oppression."

In 1825, John Quincy Adams devoted the major part of his Inaugural Address to the Constitution and, in the process, provided the people with an understanding of what a president, when he takes the oath of office, swears to preserve, protect, and defend, and why that Constitution deserves to be preserved, protected, and defended. "We now receive it," he said by way of summary, "as a precious inheritance from those to whom we are indebted for its establishment, doubly bound by the examples which they have left us and by the blessings which we have enjoyed as the fruits of their labors to transmit the same unimpaired to the succeeding generation."

These early presidents set an example for those who were to follow them, at least until the turn of the century. Only Lincoln and Grant, each in his Second Inaugural, failed specifically to refer to or speak of the Constitution. But after William McKinley, references to it became the exception rather than the rule. Theodore Roosevelt made no mention of it; William Howard Taft had something to say about the three post-Civil War amendments, but Woodrow Wilson (who elsewhere suggested that it be scrapped) did not utter the word "Constitution" in either of his Inaugural Addresses, nor did Warren Harding or Herbert Hoover. Calvin Coolidge acknowledged it in passing, but Franklin Roosevelt, after a perfunctory reference to it in his Third Inaugural, spoke of it only in his Fourth, and then only to complain of its alleged imperfections. Harry Truman ignored it altogether, as did Dwight D. Eisenhower, John F. Kennedy, and Lyndon Johnson. Richard Nixon mentioned that he had taken an oath to uphold and defend it; and, as one might expect, considering the conditions under which he assumed the office, Gerald Ford referred to it in 1974; but from Jimmy Carter came not a word about the Constitution. Instead, he appealed to the Bible, quoting this passage in Micah 6:8: "He hath shown thee, O man, what is good. . . . [A]nd what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God." That said, Mr. Carter proceeded to walk proudly down Pennsylvania Avenue with his wife in hand. Sounding a note that has, alas, echoed among Republicans ever since, Ronald Reagan said that "in this present crisis, government is not the solution to our problem; government is the prob-

lem." George Bush mentioned that he had taken the same oath taken by George Washington; and, finally, Bill Clinton, uttering not a word about the Constitution, called upon us to "give this capital back to the people to whom it belongs," then handed the microphone over to Maya Angelou who recited a poem about a rock, a river, and a tree.

So much, then, for the possibility that presidents might serve as republican schoolmasters, reminding the people of the excellence of the Constitution and their duties under it. Over the years, the office has been democratized, so that presidents, like the typical legislator, see themselves as servants rather than as teachers of the people. Or if, like the first Roosevelt, they view the office as a "bully pulpit," it is only because it allows them to preach partisan sermons. No one objects, or no one except political scientist Jeffrey Tulis who points out that the Framers saw the office as above partisan politics and that, as late as 1840, a president was censured for delivering partisan speeches.[9]

Jimmy Carter epitomized the new understanding of the office, indeed, of constitutional government, when he spoke of a "government as good as the people." That might stand as a measure of the distance we have come since 1787, except that a President Ross Perot would take us further still. Campaigning for the office in 1992, he promised, if elected, to institute an "electronic town hall," or a government by call-in show. The people, under no obligation to think before they talk, would tell him what they wanted, and he promised to oblige them. He further promised to resign if he failed to oblige them. Under his care, the Framers' "wholly popular" government would become a government incapable to doing anything unpopular.

What of the judiciary? Lerner begins his account by acknowledging the obvious: that judges are empowered to decide certain cases and controversies, not to serve as a "propagandist, haranguer, or part-time philosopher." And yet, he goes on, "a thoughtful judge, reflecting on the close connection between judicial power and public opinion, might have reason to wonder whether the judge's task narrowly conceived is adequately conceived."[10] Narrowly conceived, his task is to decide cases and controversies and, in the process, to "guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves."[11] The thoughtful judge, however, knowing that his deci-

[9]Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton, N.J.: Princeton University Press, 1987), 75.

[10]Lerner, *The Thinking Revolutionary*, 91.

[11]*Federalist* no. 78, 527.

sions might be politically unpopular, will go on to wonder what he might do to make them acceptable to a democratic people.

He might, of course, craft persuasive opinions in support of his judgments and, like the great Chief Justice John Marshall, see to it that he speaks for a unanimous court. Marshall's predecessors did more than that, or, in the event, did other than that. Required by a parsimonious Congress to go on circuit—in effect, to leave the capital and conduct their business among the people—they chose to speak directly to the people through the medium of the grand jury charge. In Lerner's words, the early justices (John Jay, Oliver Ellsworth, James Iredell, James Wilson) "were quick to see and seize the opportunity to proselytize for the new government and to inculcate habits and teachings most necessary in their view for the maintenance of self-government": that there is a connection between self-restraint and true liberty, that genuine liberty depends on law-abidingness, that it is the individual's interest to submit to decisions made by constitutional majorities, etc. In a word, they instructed the people in republicanism, and what is striking is that they did so not with appeals to their authority but, rather, to a common interest, an interest shared by judge and people alike: "It cannot be too strongly impressed on the minds of us all," Jay said, "how greatly our individual prosperity depends on our national prosperity, and how greatly our national prosperity depends on a well-organized, vigorous government."[12]

It was probably inevitable that this use of the grand jury charge would be abused, that admonishments to be good republicans would become admonishments to be good Federalists, or, in the case of Justice Samuel Chase, would become partisan harangues. For this he was impeached (but not convicted) and, more to the point here, his abuse of the practice led to its disuse. From that time to the present, if the justices were to serve as teachers of republicanism, it would have to be in the ordinary course of deciding cases and controversies.

That they were able to do this is largely the work of John Marshall, the greatest of the Supreme Court's republican schoolmasters. Asked, in the celebrated case of *Marbury v. Madison*, whether the Court might issue a writ of mandamus, Marshall reversed the usual and logical order of procedure, deliberately postponing the answer to that question to the last, so that he might deliver a lecture on the virtues of constitutional government. In the course of that lecture, he declared that the executive must obey the law, that the laws, to be valid, must conform to the Constitution, and (this by way of suggesting rather than declaring) that the Court has, as it is now generally

[12] Lerner, *The Thinking Revolutionary*, 99, 100, and passim.

acknowledged to have, the final word in determining the constitutionality of acts of Congress.

Constitutional government is first of all government by due or formal process, and that process, that *formal* process is prescribed in the Constitution. The problem, anticipated by the Framers and later elaborated by Alexis de Tocqueville, arises from the fact that "men living in democratic ages do not readily comprehend the utility of forms." Forms serve as restraints, but, Tocqueville points out, this is precisely what "renders [them] so useful to freedom; for their chief merit is to serve as a barrier between the strong and the weak."[13] That, over the course of the years, we Americans have been willing to be governed "formally," rather than expeditiously, is largely Marshall's doing. He taught us to venerate the Constitution and its Founders. He did this by initiating the process of determining the validity of legislation by its compatibility with the Constitution, which has the consequence of identifying constitutionality not only with legitimacy but with wisdom, the wisdom of the Founders who, as Marshall would have it, could do no wrong.

Justice Felix Frankfurter complained of this in his dissent in the 1943 flag salute case. "The tendency of focusing attention on constitutionality is to make [it] synonymous with wisdom, to regard a law as all right if it is constitutional." Such an attitude, he said, "is a great enemy of liberalism."[14] Well, not entirely. Certainly wisdom is not *synonymous* with constitutionality, or foolishness with unconstitutionality, but it is not foolish—at least, it is not simply foolish—to confuse them. In each case, a connection of some sort exists, and constitutionalism requires the people to recognize it, to believe that constitutionality and wisdom and unconstitutionality and foolishness are somehow related.

James Madison was concerned about this even before the Constitution was ratified. It was this concern that led him to take public issue with his friend and colleague Thomas Jefferson who, in his draft of a constitution for the state of Virginia, had suggested that questions of constitutionality be turned over to the people themselves. Madison acknowledged that the plan was consistent with republican principle, that, as constitutions derive from the people, it is appropriate that the people determine whether their terms have been violated. Nevertheless, and despite the great authority attached to the

[13] Alexis de Tocqueville, *Democracy in America*, vol. 2, book 4, ch. 7 ("Continuation of the Preceding Chapters").

[14] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 670 (1943). Dissenting opinion.

name of its author, Madison felt obliged to state his objections—his "insuperable objections"—to the plan. It was both impracticable, he said, and dangerous, and dangerous because, among other reasons, it would undermine the stability of government. "As every appeal to the people would carry an implication of some defect in the government," he wrote in *Federalist* 49, "frequent appeals would, in great measure, deprive the government of that veneration that time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability."[15]

Ever the republican schoolmaster, Madison would have the people identify the Constitution with wisdom, to respect it and its Framers, for only then would they be willing to be guided by it when decisions, made in its name, are otherwise unpopular among them.

It would seem to be obvious that, of the various organs of the new government, the Framers expected the judiciary to be best situated to do its part in the "forming [of] a certain kind of citizenry." Strangely, they said nothing of the states, nothing to suggest that the states might be, as the Anti-Federalists insisted they were, schools for citizenship where "the education of youth, both public and private, is attended to, their industrious and economical habits maintained, [and] their moral character and that assemblage of virtues supported, which is necessary for the happiness of individuals and of nations."[16]

The Framers were familiar with the argument—they read it in the press and heard it from the lips of Patrick Henry when the Constitution was being debated in Virginia—and Madison was not alone in holding it to be a chimerical idea "to suppose that any form of government will secure liberty or happiness without any virtue in the people," but, as I say, they made no mention of the states in this context. Instead, they relied on the organs of the national government, and especially the judiciary, to form the character of citizens, or as Marshall put it in his biography of Washington, they expected the Constitution to influence the "habits of thinking and acting." Perhaps they took it for granted that the states would do what the national government was unable, even forbidden, to do: support religion, sustain the family, provide a moral education in its public schools, and, not least, by being closer to the people, make it more

[15] *Federalist* no. 49, 340. This and the preceding paragraph are taken from my book, *Taking the Constitution Seriously* (New York: Simon and Schuster, 1987), 189–190.

[16] Mercy Warren, *History of the Rise, Progress and Termination of the American Revolution*, in *The Complete Anti-Federalist*, 1:21.