Constitutional Disorder

by George W. Carey

Recapturing the Constitution: Race, Religion, and Abortion Reconsidered
by Stephen B. Presser
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The Supreme Court, as Stephen Presser laments, has wandered far off course; increasingly its Justices have taken to reading their own preferences and prejudices into the Constitution, thereby abandoning their solemn obligation to act as its guardians by interpreting its provisions in accordance with the basic values and intentions of the Framers. What is more, he points out, not only has the Court assumed powers it was never intended to have, its decisions on crucial constitutional issues have embraced values and principles clearly antithetical to those of the Founders. In so doing, he argues, the Court has contributed its share to our cultural degeneration. In sum, he is convinced that "The Supreme Court has lost its way, and it is time for the people to recapture the Constitution."

Presser, a professor of law at Northwestern University, proceeds logically in developing his case. To show that the Court has gone astray, he endeavors to reconstruct the metaphysical foundations of the Framers' thought. He then proceeds, by way of demonstrating what went wrong, to explain the origins and meaning of substantive due process and selective incorporation, before going on to critique the Court's decisions in the areas of racial integration, reapportionment, criminal procedures, the establishment and exercise of religion, and abortion. After this groundwork, he shows how the Court's decisions regarding "race, religion, and abortion" can be "corrected," that is, rendered compatible with the original meaning of the Constitution. The final chapter he devotes to specifying the more fundamental changes, such as amendments, that are needed to "recapture" the Constitution.

Crucial steps in Presser's approach and analysis point to the enormous difficulties confronting those who are intent on showing that the modern Court is, in fact, operating contrary to the intentions of the Founders. We also come to see that devising an *effective* means to control the Court by confining it to the performance of its legitimate functions, i.e., those intended by the Founding Fathers, is no easy matter.

By way of illustrating these difficulties, we can best begin with Presser's approach to determining "original intentions" marked out in the first two chapters. The title of Chapter One, "Clarence Thomas, the Constitution, Religion, Property, and the Rule of Law," is an indication that he is heading into muddy waters. And this turns out to be the case when he hails the appointment of Clarence Thomas to the Court on the grounds that Thomas's approach to constitutional interpretation, as evidenced principally in his speeches prior to his nomination, acknowledged the central role of the "natural law" in our constitutional tradition. Yet, as most contemporary students of American political theory know well, Thomas was only reiterating a view of the American tradition and its abiding values first articulated and championed by Professor Harry Jaffa. As Jaffa would have it, the Constitution must be interpreted through the prism of the Declaration of Independence; a position which he recognizes is at odds with "originalism" as understood, say, by Robert Bork. (So much is evident from the sharp exchanges between the two, the most recent being over Bork's review of Jaffa's recent work, *Original Intent and the Framers of the Constitution*.)

It is significant that Thomas abandoned his "natural law" approach shortly after his nomination, largely because, we may surmise, its proper articulation calls for refinements, clarifications, and distinctions that could not be made, or would lend themselves to distortions, given the partisan nature of the confirmation process. In any event, if the natural law is to be brought into the realm of constitutional interpretation by way of "original understanding," theoretical precision is essential because an influential and articulate element of the liberal community also looks upon the natural law, and specifically the Declaration and its catalog of natural rights, as justification for judicial activism. For this reason, to employ Presser's approach successfully entails carefully distinguishing between versions of natural law, and then convincingly showing which version prevailed during the founding period. There must also be, given the character of Presser's approach, an inquiry into the intended role of the judiciary with respect to the natural law of whatever description, e.g., whether perhaps the natural law itself indicates that the judiciary, as opposed to, say, the legislature, is better equipped to "discover" and implement its principles.

Presser's handling of these and like concerns leaves a good deal to be desired. He relies heavily on Justice Samuel Chase, one of the more controversial figures during the early years of the republic, in sketching the outlines of the natural law. He does not probe deeply into the literature of the founding era, never exploring, for instance, the extensive and highly pertinent primary materials in the Hyneman/Lutz volumes, *American Political Writings during the Founding Era, 1760-1805* or the important findings of M.E. Bradford. Perhaps his use, and nonuse, of *The Federalist* best illustrate the tenuous character of his analysis. He contends, for instance, that the Framers' notion of a republic, as opposed to their understanding of democracy, embodied "supraconstitutional principles" of the natural law, a distinction that he uses to advantage at various places in his discourse. Presser's contention, however, is contradicted by Publius's definition of republic found in *Federalist* 39, a definition that is totally devoid of any "supraconstitutional principles." At the same time, he seeks to bolster his view of "original understanding" by reading too much into *The Federalist*. On this score,

many—even those most sympathetic to his arguments—might well question his bold assertion that *Federalist 10* "implies there will be a single national interest" which "the framers believed" would "emerge . . . through the working of divine intervention."

Of particular interest in Presser's analysis of how the Court has strayed off course is his treatment of the *Brown* decisions. He maintains—correctly, in my view—that the Court in ordering the states to integrate acted *ultra vires*. He properly faults Bork for contending that the constitutional justification for these decisions can be derived from the 14th Amendment. But Presser's own treatment of the *Brown* decisions is deficient on two matters which raise important questions about the Court that bear, albeit indirectly, on Presser's proposals for recapturing the Constitution.

First, his assertion that the desegregation decisions can be "credited with facilitating the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965," though intended to present something on the positive side in an otherwise very critical analysis of these decisions, is highly questionable. The most systematic study we have that measures the impact of major court decisions is Gerald Rosenberg's *The Hollow Hope*. After careful analysis of the impact of the *Brown* decisions, Rosenberg finds no evidence that they hastened or otherwise helped the passage of either of these acts. The more general point, long suspected by students who have studied the impact of the Court's prayer decisions and reinforced by Rosenberg's more general analysis, is that the capacity of the Court to effect *intended* and large-scale social change through its decisions is greatly overestimated. Conversely, as documented by Graglia and others, the Supreme Court has the demonstrated capacity to cause unintended and irreparable social damage on a massive scale.

Second, contrary to what Presser intimates, Warren was not the moving force behind the desegregation decisions. Felix Frankfurter played this role, his behind-the-scenes maneuvering, when it eventually came to light, raising ethical concerns even among the editors of the *New York Times*. Frankfurter's role in the *Brown* cases is astonishing in view of the fact that he is still generally remembered as the leading proponent of "judicial self-restraint." Indeed, his dissent in the *Barnette* case, with which Presser deals at some length, ranks as perhaps the most eloquent defense of this doctrine. History will now remember Frankfurter as the father of modern judicial activism because of his persistence in securing desegregation by judicial fiat in the absence of any constitutional warrant. But the moral to be drawn from the episode is clear enough, and it is supported by innumerable less dramatic examples: in our discussions about the proper role and function of the Court in a republican regime, we must never assume or take for granted that judges will behave in a principled manner. On the contrary, we should assume the opposite.

While most conservatives will find Presser's "corrections" for the Court's decisions regarding race, religion, and abortion sensible, his final chapter is disappointing from almost any perspective. In proposing amendments that would overturn Court decisions in the areas of prayer in the public schools, abortion, and discrimination as a way to recapture the Constitution, he is clearly dealing with the symptoms of our constitutional disorder, not their causes. Unless we can permanently contain the judiciary, somehow confine it to its proper sphere, we have every reason to believe that in due course there will be judicial abuses in still other areas, so that succeeding generations will have to go through this corrective process over and over again.

At various points Presser seems to be aware of the need for fundamental change to curb the judiciary. In Chapter Four, he remarks that "selective incorporation" is "an unprincipled usurpation of law making power." He believes that "It ought to be reexamined and rejected, as effectively obliterating federalism." We are left to ask why he does not concern himself with amendments that would achieve this objective, amendments that would go a long way toward effectively and permanently restoring the intended relationships between the components of our constitutional system. A better question, and one that is clearly suggested by Presser's analysis, would be this: Given the duplicity of the judges, given their propensity to ignore their constitutional obligations, to distort the Framers' intent, and *inter alia* to thwart the legitimate will of deliberative majorities, why should we not amend the Constitution to strip them of the power of judicial review? In my judgment, given the proven insufficiency of constitutional checks on an irresponsible judiciary, this may well be the only way for the people to recapture the Constitution.

George W. Carey's most recent book is In Defense of the Constitution, *in a revised and expanded edition (Liberty Press, Indianapolis).*

Missing the Obvious

by Paul Gottfried

The Populist Persuasion
by Michael Kazin
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Michael Kazin (editor of *Tikkun*, son of a New York man of letters, Alfred Kazin, and professor of history at American University) has produced a book on populism which highlights his own concern: namely, that "left populism" is losing its appeal in America. For Kazin this is a lost opportunity. At the end of the last century, populists Ignatius Donnelly, James Weaver, Leonidas Polk, the young Tom Watson, and William Jennings Bryan had a reputation for being socially radical. The People's Party and the populist Omaha platform of 1892 supported the extension of public services, particularly in education, and proposed the socialization of railroads and utilities. How is it that populism has become a "reactionary" force, one that, in the words of Kevin Phillips, is about "who hates whom"? Kazin worries that at the present time populism's "assertion of resentments based on class and status may be a barrier to constructing a new type of universalism." Instead of "having compassion for the poor and transplanted at home and abroad," populism "too easily becomes a language of the dispirited, the vengeful, and the cynical."

In all fairness it should be said that Kazin does not hide the politically incor-