Our Peculiar Security: The Written Constitution and Limited Government

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Contents

Preface ix

1 The Greatest Improvement on Political Institutions: The Constitution’s New Science of Politics 1
   Gary L. McDowell and Eugene W. Hickok Jr.

2 The Declaration of Independence and the Constitution: The Two Documents Support and Complement Each Other 17
   John Agresto

3 The Ratification Struggle of 1787–1788 and the Anti-Federalists 25
   Robert A. Rutland

4 The Legislative Power: Structure and Limits 41
   Joseph M. Bessette

5 Executive Power and Republican Government 57
   Morton J. Frisch

6 The Judiciary and American Constitutionalism 71
   Henry J. Abraham

7 A Nation of States: Federalism in the Framing of the Constitution 97
   Charles F. Hobson
8 Constituting and Preserving the Republic
   Ralph A. Rossum

9 The Supremacy Clause: The Central Element of the Constitutional Scheme
   Gerald Gunther

10 Reflections on the Bill of Rights
   Harry M. Clor

11 The Reconstruction Amendments: A Bicentennial Remembrance
   Gerald T. Dunne

Index

About the Contributors

About the Editors
In many respects, ours is a political age bereft of a constitutional memory. The general public seems little informed about the Constitution that has for two hundred years provided so well for its security and prosperity. What’s more, it seems willing to dismiss, as inadequate or antiquated, the theories of politics that produced their Constitution. Perhaps this is to be expected. After all, one of the greatest achievements of the founders’ “novel experiment” is that it has not required much thinking about. Indeed, what greater success could one claim for a government that has lasted so long with so little attention paid to it?

But public ignorance of the document does not necessarily lead to constitutional bliss. This is true now more than ever. For after more than two centuries, the current generation seems to have accepted the misguided notion that the Constitution is little more than a lawyer’s brief or judge’s opinion. It seems Charles Evans Hughes’s nonjudicial dictum (his having uttered it not from the bench as chief justice, but from the back of a train as a gubernatorial candidate in New York) that yes, we live under a constitution, but the Constitution is only what the judges say it is, has come to be taken too seriously.

Today it seems there is a willingness not only to agree with Hughes’s pronouncement, but to go one step further and to argue that this is what those who wrote, proposed, and ratified the Constitution intended. Such an understanding of constitutional government advances the argument that judges are peculiarly suited not merely to interpret the text, but to infuse it with new meaning from
Preface

one age to the next in order to keep it in tune with the times, as Walter Berns has put it.

This collection of essays is meant to offer an alternative view. The theme that runs throughout these selections is that the Constitution is neither bereft of intrinsic meaning nor simply the preserve of the judiciary. Rather, the view presented here is that the Constitution has a dual character. On the one hand, it is law, in a binding and judicially enforceable sense. On the other hand, it is a decidedly political document—a charter that not only creates and empowers but places certain limits on the institutions of government. Simply put: the Constitution possesses a theory of politics that transcends the opinion of the judges from age to age in the same way that it transcends the opinions of members of Congress and of presidents, from age to age.

The essays contained in this volume begin with the assumption that it is significant that ours is a written constitution. In this way, the collection is more at home with the political thought of Thomas Jefferson and John Marshall than with much of contemporary scholarship. For, like Marshall in *Marbury v. Madison* (1803), the authors here believe that a written constitution is one of the greatest improvements on political institutions. Also, like Marshall, they believe that the Constitution is meant as a rule for courts as much as for legislatures and presidents. Perhaps most significantly, the authors here believe that the written Constitution is indeed "our peculiar security," as Thomas Jefferson once put it. They argue that the text of the Constitution means something, and that this something can still be discerned and applied in this age. They believe, as did Marshall and Jefferson, that today's politics can and must be guided by the Constitution's words.

This is so, as suggested above, because the Constitution is more than mere words chosen in the heat of debate and the shadow of compromise two hundred years ago. There is something more there, something in or behind the words of the Constitution that makes the document more than an archaic artifact of the late eighteenth century. There is something more to the Constitution than words so empty that each new age brings with it an obligation for the judiciary to give those words meaning only through reference to the contemporary concerns and values of the particular age.

What distinguishes this Constitution is that it embraces a moral theory of politics that, as John Agresto points out in Chapter 2, is best seen in the document that started the process of founding the
American Republic: the Declaration of Independence. The Constitution, while it may lack the rhetorical luster and philosophical brilliance of the Declaration, fulfills in a concrete and practical way the promises of the Declaration: a commitment to the idea that any government, in order to be legitimate, must derive its powers from the consent of the governed; that governments are instituted only to secure those rights nature gives but leaves insecure; and, most important, that all men are created equal and endowed by their Creator with certain inalienable rights. This is the theory of politics that makes the Constitution more than a blank page to be filled by whatever beliefs may be currently fashionable.

The essays contained in this volume make clear that the Constitution is more than a list of rules and regulations that may be adjusted at will to meet the demands of political expediency. The Constitution is, at its most basic level, the embodiment of the consent of the governed. As the embodiment of the consent of the governed, those who wield the powers the Constitution creates—legislative, executive, and judicial—are obligated to respect that consent, or what Alexander Hamilton described as "the intentions of the people."

What follows represents an attempt to take the framers of the Constitution seriously. As Agresto argues that the Constitution can only be understood in light of the political principles outlined in the Declaration of Independence, Robert Rutland recounts in Chapter 3 many of the principled arguments that animated the debate among those who supported and those who opposed the ratification of the Constitution; Rutland thereby provides a more complete understanding of the premises on which constitutional government in this republic is built. Joseph Bessette in Chapter 4, Morton Frisch in Chapter 5, and Henry Abraham in Chapter 6 analyze the first three articles of the Constitution and provide an understanding of legislative, executive, and judicial power as defined by the Constitution; they recover a view that has been all but lost on the present generation of Americans. In Chapter 7 Charles Hobson discusses the role of the states in the new Republic, while in Chapter 8 Ralph Rossum outlines the process of constitutional change established by the framers. Gerald Gunther in Chapter 9 and Harry Clor in Chapter 10 provide an analysis of the supremacy clause and the first several amendments to the original charter and explore the fact that, for many in the founding generation, amending the Constitution was considered anathema and unnecessary, while for others it was con-
sidered essential. Finally, in Chapter 11 Gerald Dunne explores the importance and relevance of the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth—regarded by many as the very heart of constitutional government in the United States today.

Considered together, these essays will bother those who have for too long found comfort in embracing an understanding of the Constitution that is at odds with the understanding of those who wrote, ratified, and governed under the Constitution during the formative years of the Republic. But most important, the essays collected here provide an understanding of the Constitution and constitutional government that reflects the hope and the product of the generation of men who brought forth what James Madison referred to as a "new science of politics," a science of politics they believed would secure the blessings of liberty not only for themselves but for us, their posterity.

These essays were originally delivered as lectures in celebration of the bicentennial of the Constitution. The lecture series was sponsored by the Center for the Study of the Constitution and funded by the National Endowment for the Humanities. Professors Valerie Earle, Peter Schultz, and Richard Stevens planned the series and oversaw the initial administration of it. Professor Stevens provided insightful and valuable leadership during the lecture series and we are most grateful to him. We offer special thanks, as well, to Scott Bishop for his editorial assistance, and especially to Pat Merrill and Lynn Gemmell of Rowman & Littlefield. And, of course, we owe a special debt to Vickie Kuhn, who has worked so very hard to make this book, and many others, possible.