

present danger" standard should not only control jury verdicts in free speech cases but also limit legislative discretion.¹⁰ Holmes refused to travel that road, informed Brandeis that he had gone "too far," and joined Justice McKenna's opinion upholding Gilbert's conviction under the Minnesota criminal anarchy statute.¹¹ When the Warren Court finally drove a constitutional stake through the heart of these remaining sedition laws in the late 1960s, it did so by invoking the Holmes of *Abrams* and the Brandeis of *Gilbert*.

In a case as rich with social and intellectual significance as this one, there were bound to be a few striking ironies. Polenberg captures these, too. Supporters of the defendants, many of them anarchists and socialists, cashed in Liberty Bonds to raise their bail. Punished for defending the Bolshevik Revolution in America, they were later banished from the Soviet Union for counterrevolutionary activities. Vicious though they sometimes were, even Henry Clayton and J. Edgar Hoover showed a greater respect for civil liberties than Felix Dzerzhinsky and the Cheka.

THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC. By Ralph Lerner.¹ Ithaca, N.Y.: Cornell University Press. 1987. Pp. xv, 238. \$24.95.

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In this collection of seven essays, Professor Ralph Lerner shows himself to be a discerning student of early American political thought and practice. Rich and subtle in understanding and graceful in expression, these essays must be read with care if their merits are to be fully appreciated. All of them will receive some notice here, but most of my attention will be given to "The Supreme Court as Republican Schoolmaster," both because its subject is closest to the concerns of this journal and because it raises the most questions in my mind.

Professor Lerner begins with an effort at "Recovering the Revolution" from "modern historians," among whom J.G.A. Pocock, Bernard Bailyn, and, above all, Gordon S. Wood figure

10. 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting).

11. *Id.* at 334 (Holmes, J., concurring).

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prominently in his account.³ Such historians either suppose "that all thinking takes place within horizons beyond our ken and power" or "that the meanings of important concepts were hardly clear to the very people voicing them." At bottom, they do not believe that serious thought matters but treat it as "ideology," as shaped by social, psychological, or economic forces. As a result, they often denigrate or misconstrue the thought of the past.

The correctness of Lerner's depiction of modern historians has been largely confirmed by none other than Gordon Wood himself, in a recent essay in *The New York Review of Books*.⁴ Wood does this partly by concession, in acknowledging that "Lerner is not entirely wrong when he suggests that the ideas the ideological historians [Wood specifies only Bailyn] write about often 'remain strangely evanescent . . .'" But mainly he confirms Lerner's depiction by standing his ground. "The secret to America's political success," he asserts, "cannot be found in any piece of paper or even in the thoughts and deeds of the men who framed the Constitution two hundred years ago. Rather the secret lies in our society and culture, which have been shaped by our entire historical experience." Although he does not acknowledge that modern historians have misconstrued past thought, Wood observes that "an act of imagination is required to recover it in all its fullness." I suppose that Lerner, a student of philosophy, might reply that imagination is the realm of poetry and that poets, as Socrates said, do not stick to the truth.

As a case study in historical misconstruction, Lerner considers Wood's portrayal of John Adams, in *The Creation of the American Republic*, "as one who moved from hopeful enthusiasm to a redoubled anxiety and loss of republican faith." To the contrary, argues Lerner, the young Adams always kept his judgment in balance and the old Adams "was still the very model of a thinking revolutionary." Lerner's illustration, it seems to me, is inconclusive, for Wood could have invoked the authority of Jefferson and Hamilton, by citing the former's opinion that Adams "had originally been a republican" but had, about the mid-1780s, undergone "apostasy to hereditary monarchy and aristocracy" and the latter's opinion that Adams was "a man of an imagination sublimated [in the sense of

3. Cf. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

4. Wood, *The Fundamentalists and the Constitution*, N.Y. REV. OF BOOKS, Feb. 18, 1988, at 33. See also *id.* at 38, 40.

“vaporous” or “heated”] and eccentric.”⁵ A better case against Wood was made by Gary L. Schmitt and Robert Webking in an article published several years ago. Examining the same sources that Wood did, and sometimes the very words he took from them, Schmitt and Webking showed that Wood had transformed the liberty-loving Americans of the founding era into equality-loving communitarians and had transformed the framers into devotees of aristocratic government.⁶ That indeed was an act of imagination, a re-creation of the American republic.

Lerner makes his case against the modern historians mainly by example, by proceeding to show how much we may learn from the revolutionary past by studying it seriously.

Two essays in *The Thinking Revolutionary* take up the thoughts of individual revolutionary statesmen, from rather unusual perspectives. “Franklin, Spectator” shows us Benjamin Franklin through his *Autobiography* and “Jefferson’s Pulse of Republican Transformation” shows us Thomas Jefferson through the Virginia laws he helped to revise in the late 1770s.

Franklin reveals himself to be “as ardent a fisher for souls” as any preacher, although for a different purpose and by different means. He wished to improve others, and himself, but his concern was with this world and not the next, and with enjoying in moderation the pleasures that it offered. Utility was his guide to self-improvement, whether the matter at hand was the practice of religion, the choice of studies, or the taking of a wife. Utility also informed Franklin that it was easier to win souls by pleasing others than by arguing with them; thus, Lerner observes, Franklin wrote his *Autobiography* to be entertaining as well as instructive. Franklin was “a master at ingratiating himself with his reader or auditor,” Lerner says, to which I will add that Jefferson was his star pupil.⁷ And yet Franklin keeps his distance from us and suggests, as I understand Lerner, that Americans do the same in their relations with one another.

In his prodigious labor to revise Virginia’s colonial laws, Jefferson sought, as Lerner informs us, to lay the foundation for a society

5. See Letter from Jefferson to the President (May 8, 1791), reprinted in 8 T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 193 (A. Lipscomb & A. Bergh eds. 1904) [hereinafter T. JEFFERSON, WRITINGS]; Letter from Hamilton, *Concerning the Public Conduct and Character of John Adams, Esq., President of the United States* (Oct. 14, 1800), reprinted in 25 A. HAMILTON, THE PAPERS OF ALEXANDER HAMILTON 190 (H. Syrett ed. 1977).

6. Schmitt & Webking, *Revolutionaries, Antifederalists, and Federalists: Comments on Gordon Wood’s Understanding of the American Founding*, 9 POL. SCI. REVIEWER 195 (1979). Lerner footnotes but does not discuss this article.

7. See Letter from Jefferson to T.J. Randolph (Nov. 24, 1808), reprinted in 12 T. JEFFERSON, WRITINGS, *supra* note 5, at 198-200.

that would be "self-governed by truly free men." Jefferson himself singled out four measures, those to abolish entails and primogeniture, to disestablish religion, and to provide for general education at public expense,⁸ and Lerner adds others, including proposals to allow voluntary expatriation (against the common-law rule of "perpetual allegiance") and to abolish the death penalty for all crimes except murder and treason.

Two of Lerner's essays are about early race relations. In "Reds and Whites," he says that the outcome of the confrontation between the two races was "perfectly predictable": the whites were bound to triumph. What then would be the fate of the Indians? Coexistence as separate nations was out of the question, for whites and Indians used the land in incompatible ways, whites for farming and Indians for hunting; besides, white America could not allow—no nation could—"populous self-governing enclaves of alien peoples" within it. Yet, as Lerner observes, republican principles required that the whites make a great effort "to include the Indians in the new political society." Consequently, it became the policy of several administrations to induce the Indians to turn to farming and cottage industry. This policy ended in failure, dramatized by the removal of the Creeks and Cherokees—the tribes that most nearly met the conditions set for assimilation—beyond the Mississippi during the Jackson administration.

Lerner discusses earlier government efforts to help the Indians make the transition to white ways of living: the appointment of agents, the licensing of white traders, the supplying of goods through government stores, instruction in agriculture and the domestic arts, the control (at best, only partly effective) of white migration into Indian lands. He thinks that still more might have been done, but he doesn't say what and his story describes difficulties that American statesmen before Jackson faced rather than opportunities that they missed. On one side in this drama were those proud Indians, resembling medieval aristocrats to Tocqueville's mind, who refused to become Lockean men, and, on the other side, those energetic Lockeans who were, to "the misfortune of the Indians," as Tocqueville relates, "the most civilized and, I will add, the most avid [people] on the globe."⁹

"Tocqueville's American" takes as its text the famous chapter in *Democracy in America* on the three races that inhabit American

8. See Jefferson, *Autobiography*, reprinted in 1 T. JEFFERSON, WRITINGS, *supra* note 5, at 73-74.

9. A. TOCQUEVILLE, *DE LA DEMOCRATIE EN AMERIQUE*, 2me partie, ch. x, at 346 (Gallimard ed. 1951). Tocqueville says "avide," which in French as well as English can mean either "ardent" or "grasping."

soil. In Tocqueville's narrative of Indian pride, rejection of assimilation, and ultimate doom, Lerner discerns the fate of aristocratic Europe; in that of black submission—the adoption of white men's opinions and consequently of bonds that impose a slavery over the mind—he discerns the possible fate of democracy itself. Democracy is based on majority rule, which easily becomes majority tyranny, so that, and here Lerner quotes from another part of *Democracy in America*, “One must in a sense renounce one's rights as a citizen and, so to say, one's status as a man when one wants to diverge from the path it [the majority] has marked out.” Further, social equality lies in the soul of democracy and its spirit easily leads men, to take another quotation from *Democracy in America*, to accept “an immense, protective power which is alone responsible for securing their enjoyment and watching over their fate.”

In Lerner's sensitive rendering, Tocqueville's discussion of race relations in America carries a message to aristocrats in Europe and to democrats everywhere: accept the democratic future and seek to ameliorate its defects.

Tocqueville makes his appearance again in Lerner's essay on “Commerce and Character,” this time to temper the hopefulness of the founders of the American commercial republic. The founders were Europeans, especially Montesquieu, Adam Smith, and David Hume, who constructed in thought an order in which peoples would care more for safety and comfort than for honor and salvation; where war had once divided them, trade would now unite them. American statesmen—John Adams, Alexander Hamilton, and Benjamin Rush, among others—are treated more as observers of this “market regime,” as Lerner calls it, than as participants in its creation. Surely Hamilton, above all, deserves more credit than this.

Tocqueville worried about the character formed by the American commercial republic. Equality, he observed, may lead to freedom, knowledge, and prosperity, but also to servitude, barbarism, and wretchedness. The alternative to a nation of free and equal individuals is one—Russia is Tocqueville's example—of timid and hard-working, yet still equal, animals.

I come finally to Lerner's essay on *The Supreme Court as Republican Schoolmaster*. The essay was originally published in 1967, and has frequently, and deservedly, been cited by scholars writing about the Court. Lerner maintains that “revolutionary thinkers” were concerned with “forming a certain kind of citizenry” in their republic and expected every part of the national government to do its part. The Supreme Court did so—assumed “the role of an edu-

cator, molder, or guardian of . . . manners, morals, and beliefs"—first, through the grand-jury charge and, second, through judicial decisions.

Traditionally used to instruct grand juries as to laws relevant to their deliberations, the grand-jury charge was employed by state judges to defend the American cause during the events that preceded and followed the break with Great Britain and then by Supreme Court Justices on circuit under the new Constitution to impart "political education" in a way that was "a cross between a political sermon and a speech from the throne." Lerner shows that these "political charges" reached well beyond their immediate audience, as they were often printed in newspapers, and also that their message not infrequently "ran counter to strong popular and partisan opinion." Indeed, they did. Supporters of France in her war with Great Britain could not have liked to hear Washington's Neutrality Proclamation defended—not merely explained—by Chief Justice John Jay, and to be told that they should not favor either side—that is, France—in the contest. The demise of this kind of schoolmastering was marked by Justice Samuel Chase's impeachment in 1803 for having, among other things, lamented before a grand jury Congress's repeal of the Federalist Judiciary Act of 1801 and Maryland's granting of universal suffrage. Thereafter, notes Lerner, the political charge to the grand jury soon faded from view.

According to Lerner, the next phase of the Supreme Court's role as Republican Schoolmaster began with the Chief Justiceship of John Marshall, when the Court undertook "to mold and educate" the people, "to inculcate civic virtue" in them through its decisions. "Much of John Marshall's greatness lies in his success in, so to speak, putting the Supreme Court as a whole on circuit." And it has continued to be "on circuit" ever since.

I need not say much about Lerner's discussion of the grand-jury charge. Some Supreme Court Justices did talk politics from the circuit bench, as his copious quotations reveal, and most Americans disapproved of this, not just because they did not agree with what they heard or read but also because they believed, in the words of Justice Chase's counsel at Chase's impeachment trial, "that political subjects ought never to be mentioned in courts of justice."

Lerner thinks, nonetheless, that the Supreme Court pursued the practice of "political sermons" in the guise of judicial opinions. One "mode" of political instruction was "merely replaced" by another, albeit "less visible," one. He refers the reader to no decision of the Supreme Court or any other court, but infers that the Court acted in this from other evidence. That evidence strikes me as

weak. For example, he infers from the constitutional convention's rejection of a proposed Council of Revision, in which Supreme Court Justices would have been joined with the president in acting on congressional legislation, that "the purposes envisioned" by such an institution "are better served" by judicial interpretation. This is a surprising inference: both supporters and opponents of the Council said that without this authority to pass upon the policy of legislation the Justices would, in their judicial capacity, be limited to passing upon its constitutionality.¹⁰

To take another key example, Lerner infers from *The Federalist* that the judiciary was expected to exercise "will (for we must call it that)," despite Hamilton's declaration in No. 78 (which Lerner quotes) that it was to possess "merely judgment" and that "will"—the power to make laws—would belong to the legislative branch. Lerner reaches this surprising conclusion by speculating that Hamilton didn't mean what he said in distinguishing will from judgment (he has Hamilton "smile" as he wrote), because "good sense" (corroborated mainly by a remark of Madison in No. 37) tells us that the boundary between the two, like other definitional lines, cannot be marked precisely.¹¹ Hamilton wrote this way, Lerner suggests, in order to deceive his readers (but not by much, as what he said, it turns out, "was essentially, though not simply, true"); as I understand him, Lerner thinks Hamilton encouraged, or perhaps only allowed, judges to avail themselves of this ambiguity in order to exercise what they would know to be will in their decisionmaking.

I find such conjectures to be unsubstantiated and unconvincing. Hamilton does speak of judges exercising discretion—not will—in No. 78. They do so in determining the "meaning and operation" of contradictory laws, including an ordinary law and the Constitution, and also, it appears, in "mitigating and confining the

10. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 92-104, 138-40 (M. Farrand ed. 1937); 2 *id.* at 73-80; see also 2 *id.* at 298-302.

11. Lerner subordinates to a footnote a reference to two remarks in No. 51 that he thinks support his disbelief in Hamilton's confinement of the courts to the exercise of judgment. There Madison (or Hamilton) stated that each branch of government "should have a will of its own" and that their members should be supplied with the "personal motives" of "interest" and "ambition" to induce them to perform their constitutional duties. THE FEDERALIST No. 51, at 336, 337 (J. Madison or A. Hamilton) (E. Earle ed. 1941). It seems clear to me that "will" in this context refers to control over one's business, not the power to legislate, and that the ambitions and interests of judges were to be satisfied by the permanent possession of their offices, not by the opportunity to act beyond their authority. As Hamilton argued in No. 78, judges would be reluctant to be firm and independent in performing their duties—indeed, able lawyers would be discouraged from giving up their private practices—if judicial appointments were for a limited period. THE FEDERALIST No. 78, at 505, 511 (A. Hamilton) (E. Earle ed. 1941).

operation" of "unjust and partial" but not unconstitutional laws.¹² Yet if discretion is "indulged too far," as Blackstone, whom Hamilton knew well, warned, "we destroy all laws" and "make every judge a legislator."¹³ Hamilton's solution, similar to Blackstone's, was closely to limit the exercise of discretion. "To avoid an arbitrary discretion in the courts," he said in No. 78, "they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."¹⁴ Marshall, it might be noted, spoke in a like manner: "When [courts] are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law. . . ."¹⁵ And so did Story: "Discretion . . . is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other."¹⁶ But neither Hamilton nor Marshall nor Story thought that discretion or, as we may call it, "equity," properly "bound down," will result in judges acting upon "their own pleasure."¹⁷

The Supreme Court has indeed acted as a schoolmaster to the American republic. Who can reflect on its major decisions and not appreciate their influence on public opinion? But, it seems to me, it can perform this task perfectly well within its assigned duties; there are lessons enough to be taught about the Constitution without its taking on extracurricular work. When the Justices have exceeded their constitutional role, they have often taught badly, as in *Dred Scott v. Sanford*.

Lerner is not content to argue, as did Robert Faulkner in his fine book about Marshall's thought, that "[w]ith its authority to interpret the Constitution established, the Supreme Court [under Marshall] could not help but influence profoundly the Americans' political life"; rather, he wants the Court to act on a "political platform" in exercising "what we must call" will. He does not, like Faulkner, have Marshall seek "to inculcate . . . a devotion to law," but has the Marshall Court act "to inculcate civic virtue."¹⁸ In so casting the work of the Court, Lerner, I think, seeks to correct what he perceives as a weakness in the framers' design. The "extended republic" of the framers, he remarks in one place, did not seem to

12. THE FEDERALIST No. 78, *supra* note 11, at 506-07, 509.

13. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 61-62.

14. THE FEDERALIST No. 78, *supra* note 11, at 510.

15. Cited in R. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 67 (1968).

16. Cited in G. McDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 75 (1982).

17. THE FEDERALIST No. 78, *supra* note 11, at 507.

18. R. FAULKNER, *supra* note 15, at 221, 217.

fulfill “the preconditions of republican virtue.” Indeed, “[w]hen sustaining republican virtue is the theme [of debate] the treatment [of those supporting adoption of the Constitution] is muted and surprisingly incomplete.” This bothers Lerner, but the justification, it seems to me, is quite plain: in a government intended to secure men in their natural rights, talk of inculcating virtue or molding manners, morals, and beliefs grates upon the ears. So, too, does the word “regime” which Lerner uses repeatedly to describe America. In the tradition of political thought that term denied a separate sphere of private activity.

It is not my purpose, however, to quarrel with Lerner over his desire to instill some virtue into the people and to borrow some of the attributes of a regime in doing it. What concerns me most is his attempt to draw the judiciary into what the framers considered to be the domain of the “political departments” of government, and to cite the most thoughtful framers in support of this project. That was not necessary to achieve Lerner’s objective and will, I fear, mis-educate his readers into believing that it is all right for judges to make policy in a good cause.

My dispute with Lerner over the role of the Court should not obscure my admiration for this book. Lerner is well worth arguing with, and in the course of doing so I have furthered my own education.

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