

Supplement to Max Farrand's THE RECORDS OF THE FEDERAL CONVENTION. Edited by James H. Hutson.¹ New Haven, Ct.: Yale University Press. 1987. Pp. xxvi, 473. Cloth, \$45.00; paper, \$12.95.

SELECTED WRITINGS ON THE CONSTITUTION. By Raoul Berger.² Cumberland, Va.: James River Press. 1987. Pp. 308. \$28.95.

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These two works present students of the Constitution with a paradigmatic display of counterpoint. James Hutson has updated Max Farrand's massive three volumes by adding whatever new material has appeared and, in essence, reediting the sloppy 1937 Volume IV. He has not uncovered much startling material, but there is plenty here to arouse the curiosity of those committed to the heresy—as Straussians consider it to be—of believing that the Constitution was conceived in sin, i.e., politics.

Professor Raoul Berger's collection of essays on the other hand demonstrates once again his demonic diligence, his presumption that he knows more about the intention of the framers (whether of the Constitution or the fourteenth amendment) than they probably did, and his devotion to a Doctrine of the Immaculate Conception of American Constitutionalism: Original Virtuous Intent. Hutson's book is necessarily dry reading; Berger's addiction to overkill makes his labors into a (*pace Céline*) *voyage au bout de l'ennui*.

Hutson's first service to the scholarly community is—I trust—finally to entomb the myth, initiated by the late W.W. Crosskey, that Madison in the long period between 1787 and his death in 1836 revised his *Notes*, improved his own speeches, and generally behaved in a most disingenuous manner. (Crosskey needed support for his bizarre thesis that the framers intended to establish the New Deal but their efforts were sabotaged by, of all people, Chief Justice Marshall and a cabal of decentralists.)⁴ Hutson points out that the only contemporary copy of Madison's *Notes*, transcribed for

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4. *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (2 vols. 1963).

Thomas Jefferson between 1791 and 1793 by his nephew John Wayles Eppes, surfaced in the Edward Everett papers at the Massachusetts Historical Society in the 1970s and totally refutes Crosskey's charges.

But more interesting to me is the further insight we get into the key role of George Washington, *politician*. As I have said before,⁵ Washington's political talents (perhaps like Dwight Eisenhower's) have traditionally been underestimated. According to the standard script, the austere Washington took the chair at the Convention, somehow survived the summer's ordeal, made one speech, and remained above the conflict. Reading James Thomas Flexner's *George Washington and the New Nation* (1969) about twenty years ago (admittedly not a muckraking biography but superbly documented), I began to wonder. In one of my own essays,⁶ I had emphasized Washington's symbolic value, but Flexner indicated that Washington had vetted Madison's "Virginia Plan" before the Convention and had participated in the caucus of the Virginia delegates in Philadelphia while they were sitting around in late May awaiting a quorum.⁷

Now Hutson by providing previously unpublished notes from Washington's *Diary* has created some new blips on my political radar. Most of Washington's daily scribbles are about where he had dinner or drank tea: he must have had quite a taste for tea. But on May 26 we find the first of an intriguing list of entries that state "dined with a club," "dined with the Club," (June 2), "dined with a Club of Convention Members" (June 7), and so on for the rest of the summer.

Perhaps some zealous scholar has found out who belonged to "the Club" and what they discussed, but until evidence to the contrary appears I will stick with my hunch that a lot of what is now known as "networking" was underway and that the magisterial Washington may have been assuaging the doubts of some delegates about the legitimacy of their proposed "Amendment" to the Articles of Confederation and other related matters.

Recall that although a number of the delegates knew each other from service in the Continental Congress, they knew little about conditions in other parts of the country. As Madison said, he knew no more about Georgia than Kamchatka!⁸ Informal dinners

5. Roche, Book Review, 4 CONST. COMM. 166 (1987).

6. *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799 (1961).

7. J. FLEXNER, *GEORGE WASHINGTON AND THE NEW NATION* 116-17 (1970).

8. *Id.* at 122.

can often play a critical role in public policy: the choice of the nation's capital emerged from a deal Hamilton, Madison, and Jefferson cut at dinner in June 1790.⁹

What Hutson has done is to reinforce Farrand's evidence of the pragmatic nature of the debates. He has turned up a marvelous letter of July 6, 1787, from Abraham Baldwin (the Yale graduate and Connecticut "mole" in the Georgia delegation) to Joel Barlow (later a leading "Connecticut Wit," author of the *Columbiad*, and Madison's Minister to France) which gives the flavor:

The conjectures of people on the great political subjects now before the convention are very various and not a little amusing. So many forms of government I believe never were contrived before. They are floating about here in all directions like Spectator[']s worlds some half finished[,] some a quarter[,] the great part but just begun—meer [sic] political tadpoles.

In the course of the summer just about every conceivable notion was proposed, discussed, and rejected, sidetracked, or modified.

In short, Hutson reveals that this body of working politicians with over 1300 years of collective experience at every level of provincial, state, and confederal government kept improvising, drawing on their personal knowledge, arguing quite vigorously, but generally showing an experienced politician's willingness to face the ultimate reality, namely, in William Samuel Johnson's words, "Whether we shall be able to agree upon any Plan which will be acceptable to the people." As Benjamin Franklin in another context allegedly told Noah Webster: "I have all my life been changing my opinions on many subjects and in this case [his support for a bicameral legislature] I have yielded my opinions to those of other men."

George Mason, frustrated by the Convention's refusal to require a two-third's vote for navigation acts (tariffs)—he anticipated the "Tariff of Abominations" of 1828 which manifestly aided northern manufacturers at the expense of southern raw materials—announced that the framers were anything but "an assemblage of Great Men. There is nothing less true. From the Eastern States there were Knaves and Fools[;] from the States Southward of Virginia they were a parcel of Coxcombs[;] and from the middle States Office Hunters not a few . . ."¹⁰ This is vintage American politics: the winners take the jobs and the losers complain that a bunch of scoundrels tilted the playing field.

To end this necessarily brief summary of Hutson's valuable labors on a cheerful note we might indicate that towards the end of

9. M. PETERSON, THOMAS JEFFERSON AND THE NEW NATION 412-13 (1970).

10. Quoted in Williamson letter to J.G. Blount.

their labors George Washington and the delegates were on the evening of September 14 honored by Philadelphia's First Troop at the City Tavern. The evening's feast cost £89, 4s, and 2d—of which £20, 12s, 6d was spent for food; £2 for musicians and the rest for liquid refreshments!¹¹ If the Convention was a seminar in Political Theory, the Philosopher-Kings had a singular farewell party, a triumph of appetite over virtue.

To turn from the unprogrammed, frantic universe of Hutson to that of Raoul Berger is like leaving a locker-room for a monastery. Suddenly one enters a quiet, decontaminated world of Platonic forms disguised as constitutional norms, one populated by legal logicians constantly under attack from *hoi polloi* for believing that law is not a political instrument. One can almost see, carved in the arch leading to Berger's paradise, the inscription from Justice Roberts's opinion in *U.S. v. Butler*: "[T]he judicial branch of the government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and decide whether the latter squares with the former."

It is hard to review this collection of occasional essays because Professor Berger is constantly citing his other works and thus widening the field of inquiry. However, let me state that whatever my reservations about the fashion in which he employs his evidence, Berger has opened some incredibly rich veins for others to mine. Like Leonard Levy his scholarly energy seems inexhaustible, though far more often than Levy, in my judgment, his endless mining of a seam achieves *de minimus* status. But like Levy, Berger often confuses probability with certainty. Setting Levy—an old and cherished friend—aside for another occasion, let us take Berger's case for the view that the framers assumed the federal court(s?) would have jurisdiction to evaluate the constitutionality of acts of Congress, but *not* to engage in judicial usurpation of legislative power—a constant theme in his works.

In essence this is a restatement of the thesis that there are supernal "neutral principles" of constitutional interpretation (analogous perhaps to the *grundnorms* Hans Kelsen discovered which still haunt the positivist tribe of international lawyers) the employment of which is not wicked "judicial activism," but judicial statesmanship. The federal courts are supposed (as Roberts suggested) to turn to the Constitution for the Platonic calibration, not to slip their own premises into the process. This is an exercise worthy of a medieval scholastic, especially in view of Berger's reliance on Chief Justice John Marshall's opinions for corroboration.

11. Cited in Bicentennial Alert, Sept. 1987, at 16.

From the day the Court was established, I submit, and notably after Marshall did his remarkable job of massing it (abandoning the previous practice of *seriatim* opinions), decisions on constitutional matters were "result oriented." As I have dilated on this elsewhere,¹² I will only challenge Berger (or anyone else) to tell me first, how Marbury obtained standing in 1803 when by common-law rules his case was moot, and second, why the Federal Coasting Act of 1789, which Marshall held vested jurisdiction in the Court in *Gibbons v. Ogden*, was inapplicable in *Willson v. Blackbird Creek Marsh Co.*? Only Charles Evans Hughes approached Marshall as a constitutional broken-field runner; Earl Warren was a poor third.

Judicial activism delights both presidents and Congress. As James Buchanan put it so succinctly in his March 4, 1857 Inaugural Address, the constitutionality of slavery in the territories "is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision [in the Dred Scott case], in common with all good citizens, I shall cheerfully submit"

Here a personal recollection may be useful. In the fall of 1966 Congress passed a District of Columbia Crime Bill that would have warmed the heart of Lord Justice Jeffreys: it almost made jumping a red light a capital offense. President Johnson growled about it and began an endless round of talks with his staff and advisers. Almost without exception the old professionals told him to "write a nasty signing statement and then let the courts clean it up"; an appropriate statement was prepared. Others, including Harry McPherson, his Special Counsel, Joe Califano, his top domestic aide, and myself urged a veto; a stinging veto statement was prepared. The President, sulking, virtually disappeared with the two documents as the ten day clock ran down. At 2:30 a.m. of November 13, the day the clock ran out, the White House phone went off in my home. I sleepily picked it up and a familiar voice said, "I've vetoed it." I began to say congratulations but was cut off by a ferocious exclamation: "You have destroyed me!" Bang. The next morning I learned that each of the others who had urged the veto got the same treatment.

To put it bluntly: Does any American outside of a convent, a mental institution, or a law school feel that most politicians were

12. See my Introduction to J. ROCHE, JOHN MARSHALL: MAJOR OPINIONS AND OTHER WRITINGS (1967). For a further exploration of Supreme Court activities in a micro-analytical context see Roche, *The Expatriation Decisions: A Study in Constitutional Improvisation and the Uses of History*, 58 AM. POL. SCI. REV. 72 (1964).

dismayed when the Supreme Court moved in to decide the school prayer, reapportionment, desegregation, birth control, abortion, and other matters which involved ticking political bombs? Of course advocates of the losing side screamed about judicial usurpation, but secretly there was a great sigh of relief that these horrendously divisive issues had been surgically removed from congressional and presidential jurisdiction. Whether the Court behaved wisely in accepting these hot potatoes is another question: I chuckle every time I think how rapidly John Marshall would have evaded *Griswold*!¹³

All of which—I repeat—is not to deny that we can learn a great deal from Raoul Berger's works. The problem is similar to one in high school biology: you discover much from dissecting a frog, but not about live frogs.

13. See Marshall's letter to Story on how he on Circuit (unlike his colleague Johnson in South Carolina) avoided the constitutional question of a state's right to penalize black seamen, or their employers, engaged in interstate and foreign commerce: "[A] case has been brought before me [*The Brig Wilson*] in which I might have considered its constitutionality, had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act."