

On Restoring Popular Self-Government

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George W. Carey is Professor of Government at Georgetown University and also the editor of *The Political Science Reviewer*. His first writing in *Modern Age* was with the Fall 1964 issue, in which he reviewed *The Supreme Court on Trial*, by Charles S. Hyneman. The American people, Carey concludes in the essay below, have seen a sharp decline in their ability to make decisions in public issues that affect both their personal lives and their communities. The situation in which we now find ourselves is one that has been fomented by a dominant progressivism, that is, an aggressive, if not arrogant, progressivist ideology which has led to “a shrinkage in the domain of popular control over public policy.” This progressivism is now solidifying its power through the support of its most reliable and powerful ally, the judiciary which some Americans increasingly view as a judicial tyranny. The test for American conservatives in the years ahead, Carey believes, “will be the extent to which they are successful in restoring popular self-government.” That, in fact, the very survival of our constitutional order is at stake, as this essay astutely demonstrates, is a matter that demands the urgent attention of any citizen whose own destiny is also at stake.

THE MOST NOTABLE change in the American Republic over the last forty years has been the alarmingly precipitous decline in the degree to which the people are allowed to make decisions over public matters and concerns that directly affect their daily lives and the character of communities in which they live. My concern in this respect is only symptomatic of a profounder and more general problem; namely, the Philadelphia Constitution—often referred to during its bicentennial as the “oldest living constitution”—is now close to death.¹ To be sure, the institutions it created are still there,

and we still do what is necessary (*e.g.*, voting, paying our taxes) to support their operation. But the character of the regime it established has been so thoroughly transformed that the Constitution is increasingly irrelevant for understanding the distribution of power or even how and by whom we are governed. Our Constitution has come to resemble those old Soviet Constitutions which told us next to nothing about the distribution of authority. The difference, of course, is that the Soviet Constitutions were purposely framed to deceive and ours was not. It should come as so

surprise, then, to find that we are at the initial stages of a crisis of legitimacy, the character of which I will spell out in what follows.

I

When post-World War II conservative movement came to fruition in the middle 1950s, few conservatives conveyed a sense of impending doom regarding the survival of our constitutional order. Even fewer perceived its demise or declared that, if trends continued, the Constitution might be dead letter within two or three decades. After World War II, other matters—the most notable being both the internal and external threat of the Soviet Union—were clearly paramount. There were, of course, concerns about the intellectual and moral degeneration of the West and America in particular—a concern common to every generation of conservative thought. But to the extent that there was concern over the Constitution or constitutional issues, it centered on the growth of presidential powers, particularly with regard to the president's capacity to "declare" war either illegally through unilateral actions or legally through the wide ranging treaty commitments under the auspices of the United Nations.

The conservative wing of the Republican party during the early 1950s included libertarians and the remnants of the America First, most of whom were keenly aware of Franklin D. Roosevelt's clandestine and successful maneuvering that resulted in our entry into the World War. The furor over the Bricker Amendment, now long forgotten, was a measure of the degree to which conservatives were caught up with this aspect of presidential powers. To be sure, other constitutional developments and trends, particularly the increasing powers of the national government vis-à-vis the states and the growth of the welfare state during the New Deal, were also key con-

cerns. Yet, the feeling seemed to persist that these issues could be resolved through the political process established by the Constitution; that remedies could be had once the people put matters into their proper constitutional perspective; that whatever ailed us, even in matters touching upon our traditional constitutional principles such as separation of powers and federalism, could be resolved once the people were sufficiently aroused. A belief that restoration of the constitutional order was possible through political means, that is, through the electoral processes, is certainly a central message conveyed in Barry Goldwater's *Conscience of a Conservative* published in 1960. In fact, and very much to my point here, James Burnham in his classic, *Congress and the American Tradition*, completed in 1959, wrote to the point that Congress had lost power relative to the presidency over the decades, but he held out the prospect that our constitutional equilibrium could be substantially restored if Congress could just bring itself to say "no" to the president more often.

In retrospect it may well be that the conservatives of this era were too optimistic; that they had not yet come to realize fully the transformed nature of our regime. The Court's expansion of the commerce power and its subsequent decisions that removed virtually any restrictions on the national power may well have had the effect of disarming conservatives, lulling them into the belief that the worst had happened. Congress did, indeed, begin to use the commerce power as a means of expanding federal control over matters traditionally regarded as well within the province of the states' reserved powers.² To make matters worse, by the 1950s the Supreme Court had long since given Congress a green light to work its will in this area, placing no limits on the reach of the commerce power. Nevertheless, conser-

vatives by the late 1950s realized that the uses to which the commerce power could be put rested with Congress and, thus, ultimately the people. In other words, while nationalists' view of the commerce power prevailed, the matter of how far and to what concerns this commerce power would be extended still remained very much a political matter, one that could be worked out under the constitutional forms and processes.

The use of the commerce power is still within the realm of popular control, even though its scope exceeds anything contemplated by the Founding Fathers. We must turn to another development whose full import has only been realized in the last forty years to see the debasement of popular government over concerns that are probably of more importance to the maintenance of decent and orderly government than any congressional abuse of the commerce power.

II

A different but more ominous path to the centralization of power and the diminution of popular control has been the Supreme Court's use of the fourteenth amendment, particularly its interpretation of the "due process" and "equal protection" clauses. Just how constitutionally earthshaking this has proved to be is difficult to overstate. Writing in 1926, shortly after the Court's decision in *Gitlow v. New York* (1925)—the case generally recognized as having started the process of nationalizing the Bill of Rights by applying its provisions to the states—the celebrated constitutional historian Charles Warren noted that "The recent very general acceptance of the view that the constitutionality of the Tennessee Anti-Evolution-Teaching Law would eventually be tested in the United States Supreme Court is a striking commentary upon the progress we have made away from the principles of government believed in by the framers of

the Constitution." He went on to note, correctly in my view, that the "framers of 1787 believed that they should impose few limitations upon the authority of the State Legislatures, except such as were necessary from a National standpoint." "Certainly," he added, "if anything has no need of National protection, it is the relation between a State and its own pupils." Yet, he remarks, with the "constantly expanding interpretation which the Court has given to the language of that Clause [due process], the general public has now acquired the habit of assuming that practically every new State statute is to be submitted to final test before that Court."³

Warren could see the logical consequences of the *Gitlow* decision, a decision which, on its face, seemed harmless enough. If the Court could fit freedom of speech and press into the "liberty" protected by the fourteenth amendment, which it did in this decision, the "logical and inevitable conclusion," is that "every one of the rights contained in the Bill of Rights ought to be and must be" protected. In this connection, and by way of bolstering his contention, he also points to a fact that is most interesting in light of the prevailing understanding of our political tradition today: namely, that—contrary to the assertion in *Gitlow*—freedom of speech "as a matter of fact and history, and as a matter of law ... was not in any degree as 'fundamental' as most of the other rights recited in the Bill of Rights." "It is a singular and little known fact," he continues, "that the right of free speech was not included as one of a person's fundamental and inalienable rights in any Bill of Rights adopted by any of the States prior to the Federal Constitution."⁴

Warren's predictions, after considerable backing and filling by the Court over the decades, have come to pass. A major part of the so-called "revolution" presided over by Chief Justice Earl War-

ren was the accelerated "incorporation" of rights in the Bill of Rights into the "liberty" protected by the fourteenth amendment, a task continued by the Berger Court. Today, with a few exceptions scarcely worth noting, the Bill of Rights has been nationalized. But as even the most casual observer of the Supreme Court knows, the Court has gone well beyond anything envisioned by Charles Warren. To begin with, it has found a process by which to find rights that are not even specified in the Bill of Rights, *i.e.*, rights, such as the "right of privacy," that reside within the "penumbras, formed by emanations" of other rights and guarantees in the Bill of Rights. There are legal authorities and justices who point to an even more plentiful source of unspecified rights, the ninth amendment. Aside from practicing "substantive due process," recent Courts have also hamstrung the states through the use of "substantive equal protection" that involves "heightened scrutiny" of "suspect categories" with the end of "protecting" specified minorities from the "tyranny" of majorities, either legislative or popular.

Since *Gitlow* the Court has used the fourteenth amendment to subordinate the states with regard to a host of important matters such as public security and order, aid to religious schools, control of pornography, obscenity and nudity, prayer in the public schools, legislative apportionment, abortion, racial integration of the schools, busing to achieve racial balance, police procedures, and virtually all processes in criminal trials. As Lino Graglia puts it, "In the years since *Brown* [1954], nearly every fundamental change in domestic social policy has been brought about not by the decentralized democratic (or, more accurately, republican) process contemplated by the Constitution, but simply by the Court's decree."⁵ This clearly represents an exercise of constitutional

power which, unlike that associated with the expansion of the national commerce power, is more or less permanent and beyond the control of the electorate through normal political processes. What is perhaps most noteworthy about this shift is that it occurred without fundamental questions ever being asked, much less debated. The questions Warren asked in 1926, at what we now can see were the incipient stages of this development, are even more relevant today: "In the change of conditions from the year 1868," he inquired, "is the 'liberty' of the citizen to be freed from State restraint, by National interposition, of greater or less importance than the 'liberty' of the State to control its own affairs and to regulate its own welfare and good order, under its own State Constitution as construed by its own State Courts?" Was it a "good thing," he went on to inquire, that state legislation drafted to "meet local conditions and to regulate local relations should be standardized, by being forced to comply to a new definition of 'liberty' applied to every State by the judicial branch of the National Government?"⁶

III

The Supreme Court has answered these questions for us by usurping powers that the drafters and ratifiers of the fourteenth amendment never intended it to have.⁷ Nevertheless, most critics of the Court feel that it is far too late "to turn back the clock"⁸ and return to the state of affairs prior to the *Gitlow* decision. This consideration, however, does not touch upon a basic concern held by traditionalists. They would point out that, beyond any question, the Framers strove to incorporate a rule of law version of separation of powers into the Constitution. The deliberations at the Constitutional Convention at numerous points reveal as much, not the least of these being the various proposals for electing

a president in a manner so that he would not be a mere lackey of the Congress. Now, according to this version of the separation of powers, the union of any two of the three powers—legislative, executive, judicial—constitutes tyranny because it can lead to arbitrary and capricious government. In Federalist essay 47, for example, by way of explaining why the separation of powers is necessary we find Publius quoting from Montesquieu: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*.”

Nor is this all. Just as the Court unilaterally assumed powers in *Marbury v. Madison* (1803) and by expanding its jurisdiction under the 14th amendment, it has more recently elevated itself to the status of first among equals. In *Cooper v. Aaron* (1957) the Court declared that the Constitution means what it, the Court, says it means and that “all other public officials and branches of government, national and state, shall respect this Court’s statements of what the Constitution means, no matter what other interpretation may seem to them to be clearly implied by the words of that document.”⁹ This was a new assertion of judicial power, one that had never been advanced previously in the course of our history and for good reason: The Supreme Court is a creature of the Constitution, enjoying in this respect no higher or lower status than that of the Congress or the presidency. Moreover, each branch, given this “equality” of birth, is entitled to judge of its own constitutional responsibilities. Such Publius assumed to be the case when he maintained that the efficacy of the Court’s decisions that might endanger the liberty of the people would rely upon the compliance of the other branches that possessed the powers of the “purse” and “sword.” Put otherwise, the Court’s assertion of su-

premacy runs counter to the theoretical foundations and principles of the Constitution; these are the very principles, it should be noted, that provide the support for the traditional and very narrow form of judicial review asserted in the *Marbury* case.

Some contend that this enormous expansion of judicial authority renders our system a *kritarchy*, rule by judges.¹⁰ This is a neutral description of our present system at the level of theory. In principle, it is difficult to see any limits to this judicial activism, if we accept the assumptions upon which it is predicated. Put another way, there would scarcely seem to be any area of concern in which judicial authority would not reign supreme, short of outright (and, in the Court’s view, “unconstitutional”) disobedience on the part of the executive arm of government. What restrains the Court from the exercise of total power would seem to be little more than public opinion: what the Court can get away with and still remain an effective ruling body.

Originalists, unhappy with the predominant role the Court has assumed in recent decades, can be seen as trying to restore the proper constitutional distribution of powers. This they do by focusing on the Court’s departure from the traditional rules of decision-making, the restoration of which would deprive the Court of its policy making authority, while simultaneously allowing it to guard the Constitution against constitutional encroachments by Congress or the president. But the full implications of the Court’s newly found powers are best realized by viewing the matter from the broader perspective of the separation of powers. With the Court having taken legislative authority onto itself and also having declared its decisions to be constitutionally binding on all the branches, what we have today is judicial tyranny. In reality we have an oppressive concentration of powers which could scarcely

be imagined by an individual reading the Constitution with an innocent eye.

IV

Our present situation gives rise to critical questions. Perhaps the most obvious relate to how it has come to pass that the Court could assume these powers and why the traditional view of the Court's proper place in the constitutional order seems to have been eclipsed, particularly among the citizenry. Here the answers are varied, some relatively concrete in nature, while others involve theories related to the influence of the academy, the media, and other bastions of liberalism. Let us examine, very briefly, the more concrete. First, I think it must be acknowledged that the Supreme Court, as an institution, enjoys a high place in the hearts and minds of the American people. It may render highly unpopular decisions, but its revered status, its prestige, is more than enough to enable it to endure this intense criticism, in part because any given decision usually affects only a small portion of the population. Second, the vast majority of the American people have consistently displayed—at least in modern times—an abysmal ignorance of our fundamental constitutional principles. This point scarcely needs documentation. But more certainly, when it comes to the finer points of the Framers' thinking about the Court, the ignorance can be quite telling. For example, as Federalist 78 makes clear, the Court's power to nullify legislation extends only to measures that are clearly, beyond question, contrary to the Constitution. This obviously is no mandate for the Court to use its equity powers to correct whatever injustice it may perceive in the society; nor is it a mandate for the Court to legislate and then administer its remedies, often over a recalcitrant population. On the contrary, there has to be, as Publius puts it, an "irreconcilable vari-

ance" between the statute and the Constitution before the Court is justified in *nullifying* the statute.

James Wilson articulated this position from another perspective when, at the Philadelphia Convention (21 July), he pointed out that laws might be "unjust," "unwise," even "destructive" and "dangerous," but "not ... so unconstitutional as to justify the Judges in refusing to give them effect." But our prevailing morality is markedly different today. Laws that seem unjust for whatever reason are fair game for judicial challenge under our present constitutional morality. Indeed, if asked by some polling organization, the odds are that the American people would look upon the Court as the institution designed by the Framers to perform this very function. A teleological view of the Constitution, as establishing a system designed to secure given ends—*e.g.*, equality, justice, individual rights—has taken firm hold in the public imagination. The activist philosophy has gained support because it embraces this teleological view that exalts "rights."

Finally, even when there is a great public outcry against a Court decision, overturning it through the political processes is extremely difficult, if not impossible, even when the majorities seeking to do so are persistent. The reasons for this are not hard to see. As countless commentators have noted, our constitutional system renders it difficult to secure working majorities in the political processes. Only part of this difficulty can be attributed to institutional structures and processes. As Publius makes clear in Federalist essays 10 and 51, the multiplicity and diversity of interest within our extended republic—perhaps greater in diversity and number than ever before—make it difficult for majorities to find their common ground and then to exert their strength in common to fulfill their will. But once they have,

the task of undoing what they have accomplished is extremely difficult. In a seldom cited passage from Federalist 63, Publius speaks to this point. While remarking that the extended republic “will exempt the people of American from some of the dangers incident to lesser republics,” it also “exposes them to the inconveniency of remaining for a longer time, under the influence of those misrepresentations which the combined industry of interested men may succeed in distributing among them.” The Court’s policy decisions, of course, bypass the political processes that help to insure that such “inconveniences” will be rare. Beyond this, these judicial policies are frequently set forth as prescribed by the Constitution, which means that they cannot be overturned by ordinary legislation but only by the super-majorities needed to amend the Constitution. If we take into account other obstacles to overturning Court decisions—not the least of which is the popular support it enjoys as an institution, particularly when it comes under sustained attack—we begin to see why the prospects of reversing the decline of self-government are slim. Any realistic assessment of the American political landscape clearly reveals that the Court has enormous discretion, free from control by the political branches.

Still another question is, simply, what motivates the Court? It would not seem to be power for its own sake, for no one who reads the cutting-edge decisions of the Court in modern times can avoid noting their ideological assumptions and overtones. The Court, to put the matter bluntly, since assuming its new plateau of constitutional power has consistently decided major issues in a manner consonant with the doctrines and the principles of the “hard” Enlightenment ideology against which Burke inveighed and which are foreign to our political tradition. This is to say, a majority of the

justices have acted *as if* they were the true sons of the Enlightenment, not guardians of the Constitution. The Court’s record on major issues speaks for itself: it has acted to promote a consolidated or unitary government through its interpretation of the fourteenth amendment, and it has all but given the Congress a blank check to proceed in its use of the commerce powers, as if the Founders had really instituted a unitary system. Taken as a whole, its decisions under the establishment and free exercise clauses of the first amendment demonstrate a hostility towards religion, its doctrine of the “separation of church and state” resting upon a gross fabrication of the historical record. It has championed the causes of egalitarianism. In conjunction with the bureaucracy it has approved the use of racial “quotas” as part of affirmative action; it has seen fit, with scarcely any constitutional sanction, to embrace elements of the extreme feminist agenda. It has adopted a standard of “one man, one vote” for purposes of state representation, a standard nowhere to be found in our constitutional history. Comfortable with the relativism that characterizes modern secular humanism, it has consistently advanced the cause of “individual” rights that have not only erased the distinction between license and liberty, but have also resulted in the invention of a constitutionally protected right to kill the unborn.

This list could be considerably expanded with detailed particulars. But enough has been said to show that the Court reflects and acts upon—to an extent far beyond that of any other of our constitutional institutions—the fashionably “enlightened” and “progressive” values, outlook, and orientation of our elite law schools. Operating against the backdrop of a divided, apathetic, and constitutionally illiterate population, a new version of the Constitution has been “sold” to the American people; a version

that features the judiciary as an arm of justice and fairness, striving to remove the inequities in American society.

V

Certain general conclusions, relevant to broader problems in conservative theory, seem warranted on the basis of our modern experience with the judiciary. First, the theory behind written constitutions would seem to dictate that the successive generations should rule as nearly as possible in keeping with the original understanding of the constitutional terms. The chief difficulty with this understanding is not, as the judicial activists contend, in discovering original intentions. Rather, the chief problem involves obfuscation of original intent (*e.g.*, working with the fringes in order to create uncertainty where none existed, a technique used by the Court in interpreting the intentions of the drafters of the fourteenth amendment) or the more subtle process of transmutation (*e.g.*, where policy preferences are simply read back into the document as embodying original intent, the technique originally used by the Court to come up with the doctrine of separation of church and state). What we can see is that both techniques will be used and legitimated so long as they serve the ends of the "validating" classes of society. This is precisely the situation we find ourselves in today. Without going into detail it would appear that the dominance of progressivism, given the breadth of its ideological sweep, has created a unique, unanticipated state of affairs and that we will continue to see a shrinkage in the domain of popular control over public policy so long as progressivism retains this dominance. There may be retreats, strategic and otherwise, but over the long haul, well into the next century, progressivism will find the judiciary to be its most reliable ally.

Finally, in the broader picture, we

come to see from our experience that each culture necessarily embodies a different kind of conservatism, each of which, in turn, incorporates different principles. Only with a conservatism anchored in the presumptions and principles of the Founders, in their understanding of constitutionalism and in the proper functions of each of the branches, are we prepared to do battle with the children of the Enlightenment. This means, among other things, that generic conservative principles, or at least some of them, may be of dubious value. For instance, there can be no gainsaying that generic conservative teachings contain anti-democratic overtones; that the giants of the past who railed against the excesses of democracy are, partly for this very reason, now situated in the pantheon of conservative heroes. The American strain of conservatism, however, emphasizes popular government, taking care to provide for the rule of law, as well as to mark out the realms in which majorities can rule. It also provides yardsticks we can use to determine when it is that the prerogatives of the majority have been trampled upon by unaccountable judges. American conservatives, who take their bearings from our political tradition, are not at all reluctant in urging the American people to take back their heritage through the political processes available to them, even if this means being called "populists." Nor are they afraid to denounce judicial tyranny as illegitimate, which it most surely is. Likewise, they do not see stacking the Supreme Court with judges who will make the "right" decisions as any answer to our present plight.

In sum, the test for American conservatives in the years to come, oddly enough, will be the extent to which they are successful in restoring popular self-government. Odder still, this task promises to be an uphill battle with success far from guaranteed.

1. I say "close to death," but others might well pronounce it dead. As Forrest McDonald put it to Wabash undergraduates a few years ago: "I shall mention only in passing the constitutional order that the Framers bequeathed to us, inasmuch as, to the most part, that order has long been defunct." "I Have Seen the Past and It Works," in Edward B. McLean, ed., *Derailing the Constitution* (Bryn Mawr, 1995), 37. 2. The recent Lopez decision (1994) struck down the federal "Gun-Free School Zones Act of 1990," the first time in sixty years that the Court invalidated legislation based on the commerce power. Congress has repassed this law with a "finding" that relates the regulation to commerce so that in all likelihood it will pass muster next time around. The case, however, points up the absurd lengths to which Congress must often go in showing a relationship between its regulations and commerce. For this reason, the extension of power rests

upon foundations that will always be vulnerable to attack. 3. Charles Warren, "The New 'Liberty' under the Fourteenth Amendment," *Harvard Law Review* 39 (1926), 431. 4. Warren, 460-61, 458-59. 5. Lino Graglia, "How the Constitution Disappeared," *Human Life Review* 12 (Spring 1986), 71. 6. Warren, 464-65. 7. The most thorough work in this regard is Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass., 1977). A new edition of this book will soon be released by the Liberty Press, Indianapolis. 8. I cannot help noting Richard Weaver's comment in *Ideas Have Consequences* that few things are easier than turning back a clock. 9. Charles S. Hyneman, *The Supreme Court on Trial* (New York, 1963), 78. 10. For an excellent development of power in interpreting the Civil Rights Act of 1964 see Paul Craig Roberts and Larry M. Stratton, *The New Color Line* (Washington, D.C., 1995).

Springtime

*First black on black, the starling,
Crazed marauder, no one's darling.*

*Then red on black, the retching voice
Of the swamp's redwing, no one's choice.*

*Now black on red, with noble crest,
The cardinal in color blest.*

*The redstart comes; he's black until
His brilliean takeoff when our hearts stand still.*

*The jay comes—blue, buff, depends on how you look,
Sees all, tells all, steals all, our sky-blue crook.*

*They're coming, the burning tanager,
The shy, swift, intermittent hummingbird,*

*All hues and shades and tints and mixtures,
All songs, unchanging, each year's pictures,*

*New but old, spend all in one season,
Yet ever coming home, by some eternal reason.*

*And now I see white, even white on white,
The ice, the snow, of a day ago,
Moving slowly, white clouds against white clouds,
Sunshine Mother and Father of all colors,
You blind me so that I now can see. O beautiful, I see.
Though I move slowly, I come. Will you wait for me?*

—William F. Rickenbacker (1928-1995)