

Walter Berns's Constitution

From a Constitution Day seminar in honor of Walter Berns
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In America today, the Constitution has come to mean constitutional law. Most Americans venerate their Constitution and realize that it is an important source of their liberties and of their nation's success. But when they talk about it, or hear political leaders or the media talk about it, the subject is almost always what courts—especially the Supreme Court—have said in its name. We pay attention to our Constitution when the Court holds that one of its provisions forbids, or does not forbid, a particular practice—banning violent video games, regulating corporate political contributions, suing funeral hecklers, providing racial preferences in college admissions. Moreover, as Justice Antonin Scalia noted in his AEI Boyer Lecture in 1989, these holdings are often treated as if they were policy decisions rather than constitutional decisions—even when they are not, in fact, policy decisions. If the Court holds that Congress does not have the authority under the interstate commerce clause to forbid the possession of guns in school zones by means of a statute with such-and-such provisions, the media report gravely that the Court has said people can take guns into schools.

It was not always this way. There was a time when the Constitution was understood to be a guide to political officials and even to citizens and voters. Consider the president, whose oath of office, prescribed by the Constitution, is pointedly spare—he will “preserve, protect, and defend” the Constitution. As Walter Berns has noted, in the nineteenth century all of our presidents invoked the Constitution in their inaugural addresses following the taking of that oath; moreover, constitutional arguments were central to many live political controversies, especially in Lincoln's speeches and debates on slavery and the union. But in the twentieth century, beginning with Theodore Roosevelt, constitutional appeals and references all but vanished from presidential inaugurals and also from political debates (one exception being FDR's arguments for his court-packing proposal). Modern presidents assuredly do not regard the Constitution as a guide to their own actions. They would not think of vetoing an act of Congress simply because they regarded it as unconstitutional, even though the veto power was intended as a safeguard against unconstitutional legislation. Instead, they sign the act into law and say that, while they may have their own opinion, it is of course up to the courts to decide the constitutional question; and then their Justice Departments proceed to advocate the act's constitutionality before those courts.

Congressional practice has become little different. Several decades ago, in the early years of Walter Berns's career, it was still the case that a few curmudgeonly senators would rise to ask what provision of the Constitution authorized the undoubtedly worthy bill under consideration and then vote against it in the absence of a satisfactory answer. No more. The Speaker of the House of the previous Congress articulated the modern approach. Asked for the constitutional authority for a controversial piece of legislation, she said, "Are you serious?" (this was not a question but an expression of contempt). In the current session, the House leadership has reversed course and required that the source of constitutional authority be specified at the beginning of every bill—but to little avail. "General welfare," "necessary and proper"—these are good enough for congressional work. The Constitution as a guide to action is now just for judges in pronouncing on the actions of others.

Walter Berns's fifty years of scholarship stands in opposition to this shriveled conception of the Constitution. He is one of a line of AEI constitutional scholars distinguished for not being lawyers—a line that also includes his great friend, the late Robert Goldwin, and now his younger colleague, Michael Greve, and also departed members of the AEI extended family, such as Herbert Storing and Martin Diamond. I do not know that Walter, or any of them, would regard it as a badge of honor to be a member of the American Political Science Association rather than the American Bar Association. But it is certainly a distinguishing characteristic of their work that they regard the Constitution as a political document—one intended to provide serviceable solutions to enduring political problems such as succession, faction, corruption, and religious-political strife; to promote civility and to restrain and channel the passions; and thereby to secure the blessings of liberty. To perpetuate these blessings, the Constitution is to be studied in its own right, along with the Declaration of Independence and *The Federalist* papers and the work of antecedent thinkers from the ancients through Hobbes and Locke. They are to be studied not as a source of slogans or prescribed solutions, but rather of counsel—of wisdom—in understanding and coping with today's problems in our own ways. The reasoning and decisions of courts are an important part of this endeavor—the Constitution is emphatically law and is to be respected as such—but they are not the only or even the most important part.

Walter Berns's work advocates and embodies this approach in three distinctive ways. The first, surely reflecting the influence of his teacher Leo Strauss, is scrupulous attention to the text. Walter is a man of firm opinions and sometimes a sharp tongue, and he is a brilliant polemicist when he wants to be—as in his devastating put-down of Garry Wills's interpretation of the Declaration.¹ But in dealing with the text of the Constitution or a court opinion, or the pronouncement of a philosopher or politician, he is unfailingly fair-minded,

¹ "In 272 Words," *Commentary* 94, no. 5 (November 1992): 54–57.

nuanced, and sympathetic, seeking to understand the constraints and purposes of the author in the best possible light. Especially when he disagrees with an argument, he is patient to discover the kernel of usable truth.

A striking feature of Berns's discussions of constitutional cases is that he will analyze the words and reasoning of the advocates, courts, and dissenters at length without getting around to mentioning how the case was actually decided. To a lawyer such as myself, this habit of emphasizing reasoning over result is infuriating, until you get the hang of it. When you do, you are liberated. The decision is what interests the litigants and gives the case its immediate drama, but it is the reasoning that lives on—affecting future behavior and the course of our constitutional order, often in unpredictable ways. In a Berns essay, decisions are important mainly to illustrate the strengths and (more often) weaknesses of the reasoning Walter has been leading us through—as when this reasoning leads, in about the same breath, to the banning of *Memoirs of Hecate County* but not of a seamy crime magazine.² And Walter recognizes the tug of the immediate case upon reason and principle. A staunch opponent of extra-constitutional legislating by judges, he admits that he would have done his damndest to invalidate Virginia's compulsory sterilization law at issue in *Buck v. Bell*, even though the Constitution seems to say nothing on the matter.³ His capacity to place himself in the shoes of his subjects extends even to his imagined self.

Second, Walter's attention to words and reasoning is coupled with a powerful opposition to excessive abstraction and formulae—especially to abstract “rights” that are supposed to override all other considerations. Should the democratic principle of “one man, one vote” lead us to abolish the Electoral College in favor of direct popular election of the president? No, says Berns, because that principle, important as it is, is not the only important consideration—we also want our presidents to attend to regional and other interests and want our succession contests to be resolved with clear and unambiguous results. The Electoral College has done these things rather well for more than two centuries, and almost certainly better than direct election would have done. And, come to think of it, the Electoral College promotes some valued aspects of liberal democracy that direct election would compromise—such as the protection of minorities, which are more influential at the state level than they would be in a single national electorate.⁴ Should the libertarian principle that individual freedom trumps all other considerations decide cases under the First Amendment? No, because that principle, important as it is, is not the only important consideration—few people are indifferent to the uses of freedom, and effective freedom depends not only on the absence of restraint but on the nature of the culture in which it is exercised. And, come to think of it,

² *Freedom, Virtue and the First Amendment* (Baton Rouge: Louisiana State University Press, 1957), 41ff.

³ “*Buck v. Bell: Due Process of Law?*” *Western Political Quarterly* 6, no. 4 (December 1953): 762–75.

⁴ See *After the People Vote: A Guide to the Electoral College* (Washington, DC: AEI Press, 1992).

our freedoms surely rest more on our constitutional structure and traditions of limited government than on absolutist extensions of the First Amendment: the whole Constitution is our Bill of Rights. Freedom, says Berns, is not an answer but rather a problem—it is a good in itself, and an instrument for virtue, in many circumstances but not in others. As a license for every individual to do exactly as he pleases, it can lead to its opposite, to tyranny.⁵

Which brings us to the third Bernsian emphasis: the importance of the polity, in particular the nation-state, enjoying the patriotic allegiance of its citizens. Neither freedom nor democracy nor any other desirable condition, not any Supreme Court doctrine or five-part balancing test, not any law professor's theory of how our institutions should be deconstructed and reconstituted, can exist except in the context of a living organic nation that protects and suffers them. A nation is in large part a historic accident; its course is not always open to persuasion, but the good in it cannot endure without considered patriotic commitment. The American nation, because it consists more than others of a set of political ideals as well as ties of blood and geography, depends more than others on the cultivation of patriotism and public-spiritedness. Freedom may be a problem, but it is one worth fighting for. If a sufficient number of citizens are unwilling to stand for freedom in the necessarily imperfect embodiment of our national inheritance, then all of the clever theorizing on its behalf is for naught.

America has become vastly more democratic, heterogeneous, libertarian, and statist than it was two hundred and twenty-four or even fifty years ago. Can the sort of informed constitutional inquiry that Walter Berns exemplifies make a practical difference anymore? Perhaps not, but it is important to note that, although Walter is opposed to many contemporary developments in law, policy, and society, his writing is not oppositional: he writes not as a dissenter but rather as a teacher. A deep theme, a *basso continuo*, runs through his writings from his first book, *Freedom, Virtue and the First Amendment* (1957), down to one of his most recent, *Making Patriots* (2001). That theme is the necessity of civic education to the preservation of our constitutional liberties. He is not proposing the creation of a new categorical grant program for constitutional studies; he does not have a specific reform platform at all, and he understands the great difficulties of accomplishing what he has in mind. He insists only that if we cease to know our Constitution—to understand its theories and practices and appreciate its strengths and shortcomings—then its great achievements will not endure.

I believe that Walter's life's work is itself an essential part of the program he advocates. That our political leaders have taken their leave of constitutional reflection and advocacy is a great loss—in part because it has left federal judges with a monopoly on the

⁵ See *Freedom, Virtue and the First Amendment*.

enterprise, and monopoly is not good for anyone. But their monopoly is yet incomplete: constitutional reflection and advocacy is not only for those in power, but also for citizens and especially for scholars who specialize in it for the benefit of others. Walter's great contribution is in seeing the Constitution whole—as much more than a set of legal doctrines or parade of court decisions—and in showing that it can illuminate the most vexing contemporary problems and controversies. There is no better way to observe Constitution Day than to read Walter Berns.