

VOLUME XVI, NUMBER 2, SPRING 2016

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## REVIEW OF BOOKS

*A Journal of Political Thought and Statesmanship*

Bradley C.S.  
Watson:  
**Russell Kirk**

Michael  
Nelson:  
**Political Sex  
Scandals**

Angelo M.  
Codevilla:  
**John Quincy  
Adams**

James V.  
Schall, S.J.:  
**Modern  
Catholic  
Thought**

James W.  
Ceaser:  
**Scruton vs.  
the Left**

**LIGHTS, CAMERA, FACTION!**  
ESSAYS BY MARTHA BAYLES, CHARLES R. KESLER,  
AND WILLIAM VOEGELI



R. Shep  
Melnick:  
**Ending  
Extreme  
Poverty**

Allen C.  
Guelzo:  
**Did the  
Slaves Free  
Themselves?**

Robert K.  
Faulkner:  
**Heroes,  
Old &  
New**

Anthony  
Esolen:  
**The Iliad**

Mark  
Helprin:  
**Defense  
Is Missing  
in Action**



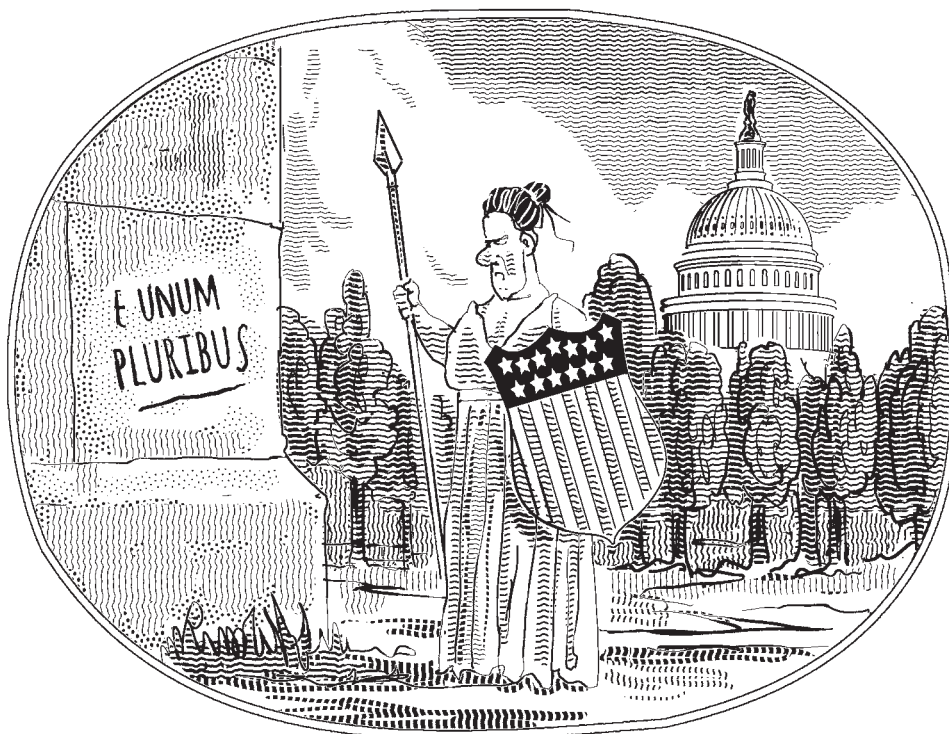
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## OUTGROWING CONSTITUTIONALISM

*Liberty and Coercion: The Paradox of American Government from the Founding to the Present*, by Gary Gerstle.  
Princeton University Press, 472 pages, \$35



THE GREAT POLITICAL DIFFICULTY, James Madison wrote, is that in the first place you must enable the government to control the governed, and in the next place oblige it to control itself. How does America, a nation fundamentally averse to out-of-control government, go about the republican business of enabling government to govern?

Cambridge historian Gary Gerstle's new book presents the answer as a paradox for what might be called the "liberal nationalist" school of American historiography: he applauds increases in the federal government that advance liberals' domestic goals, regrets conservatives' success in thwarting or slowing such expansions, and issues dire warnings about the foreign policy commitments conducive to the "national security state" and the "imperial presidency." From his perspective it is troubling that liberals' recent victories in the culture wars—gay marriage most conspicuously—have been abetted by the sort of interventionist government that liberals deplore in the war on terrorism. While confidently and gracefully applying progressive standards to modern governance, *Lib-*

*erty and Coercion* is also clearly dissatisfied with constitutionalism, especially federalism and originalism.

IN OUR NEW COUNTRY'S EARLY DAYS, Gerstle writes, the government's limited capabilities made the republic's success uncertain. This argument stands in contrast to the recent, leftist scholarship, such as Patrick Griffin's *American Leviathan* (2007), which contends the federal government was, from the beginning, designed to enable quasi-imperialist military expansion. To the contrary, Gerstle says, early 19th-century territorial expansion, national defense, and everyday administration were made *more* difficult by Americans' deep aversion to a standing army, government bureaucracy, and centralized power. The country was held together less by any highly developed governing capacity than by reliance on self-interest, as manifested in easy access to citizenship for white immigrants who hoped to prosper, and in citizen militias that were quite willing to defend themselves as they encroached on Indian land.

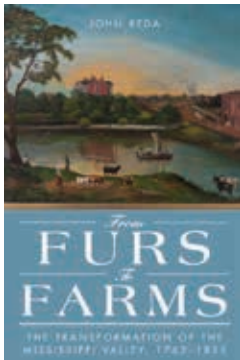
According to *Liberty and Coercion*, the failure of antebellum America to guarantee

the rights proclaimed in the founding era was the next deplorable consequence of insufficient government. Gerstle recognizes that there was no realistic way for the new republic simply to abolish slavery and form a biracial people, but blames jealous adherence to federalism for permitting the states to violate individual rights. Although Anti-Federalist resistance to centralized power helped produce the Bill of Rights, Gerstle says that rights were still insecure because Anti-Federalists were devoted to majoritarianism at the state level. In 1789, for example, Representative James Madison tried, and failed, to make the Bill of Rights a constraint on state as well as federal government power, a defeat later certified by Chief Justice John Marshall in *Barron v. Baltimore* (1833).

Gerstle also condemns, in part, the continuation under the Constitution of the states' traditional "police power" over public order, health, safety, and morals. Economic regulations under the police power were good, he asserts, but social regulations that often punished nonconformists' ideas and practices regarding marriage, sexuality, morals, race,

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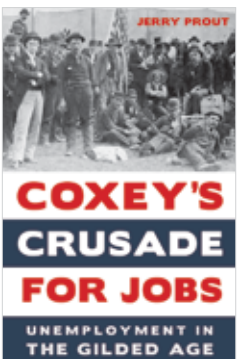
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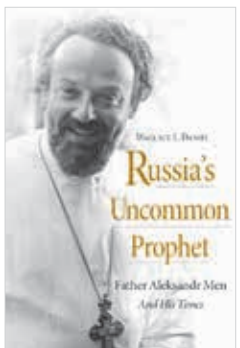
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and free speech were bad. That the police power endured well into the 20th century accounts for much of the "paradox" in the book's subtitle. The great liberal triumphs of the last century, however tardy and truncated to his taste, rendered government less paradoxical. He applauds the New Deal, for example, though "the largest ambitions of the labor movement [were] compromised." He welcomes "incorporation," the judiciary's "agonizingly slow" determination in a long line of cases that the 14th Amendment protected Bill of Rights guarantees against state actions, not merely those of the federal government. He also likes the Warren Court's and Great Society's assertions of federal authority over civil rights, but wishes there had been more actions "in employment markets to generate jobs or to level the playing field between capital and labor."

**I**N SHORT, GERSTLE FAVORS "BREAKING the power of the states" through "rights jurisprudence and a living constitution," and downplays conservatism's fears that a big government can be malevolent as well as benevolent. He hopes that his "interrogation" of the Constitution and the powers it reserved for the states and denied to the federal government will give pause to conservatives, especially libertarians, "about the virtues of originalism when it comes to constitutional interpretation." Above all, he holds, what must be overcome is reverence for the Constitution and its "sacrosanct" ideal of limited government.

Today's libertarians, however, applaud states' decisions to reduce police power regulations of such lifestyle issues as homosexuality and recreational drugs. On these topics federalism accommodates differing local views, and it is not the continued centralization of power in the federal government, but the opposite, that has produced such results. Indeed, federalism was a reality that predated the Constitution, one which its authors had to account for, not one they created. Gerstle dislikes this reality, but doesn't adequately account for it in his larger argument.

The founders, by contrast, treated federalism as a feature of the hand they were dealt, one with advantages as well as drawbacks. They didn't consider it a scourge to be extirpated over the course of the American experiment. During a discussion of Congress at the Philadelphia convention of 1787, recorded in Madison's *Notes*, William Johnson of Connecticut said:

The controversy must be endless whilst  
Gentlemen differ in the grounds of

their arguments; Those on one side considering the States as districts of people composing one political Society; those on the other considering them as so many political societies. The fact is that the States do exist as political Societies, and a Govt. is to be formed for them in their political capacity, as well as for the individuals composing them.... On the whole [Johnson] thought that as in some respects the States are to be considered in their political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined.

This on-the-ground reality of a federal polity dictated that the Constitution account for federalism's resulting relationships, tensions, and ambiguities. In the process the meaning of federalism shifted. The older view, advocated by the Anti-Federalists, held that it concerned sovereign states associated primarily for self-defense from external enemies. This meaning gave way to the modern notion that central and state governments could have both distinct and concurrent powers. The Constitution's success, for the particular nation it would govern, required renegotiating the federal relationship over time based on this new view. This is the logical, practical way to understand the history of federal-state relations, the changing locus of regulatory authority, and the protection for rights in any given era. Neither the Constitution nor the underlying reality will simply bend to the imperatives of a different political theory—particularly one openly endorsing a highly centralized government.

**T**O ANALYZE THE SHAPE AND LIMITS of American central State-building, Gerstle introduces the concepts of exemption, privatization, and surrogacy. Each practice allowed the federal State to grow by overcoming formal constitutional limitations. In a scheme adopted from philosopher Isaiah Berlin, Gerstle argues that this growth empowered the transition from upholding "negative liberty" to bestowing "positive liberty." *Exemption* occurred when the federal government chose, with the blessing of the judiciary, not to apply constitutional principles or constraints to people or situations deemed to be outside the Constitution's ambit—typically in the areas of war, political dissent during wartime, international trade, territorial expansion, immigration, and domestic emergency. *Privatization* occurred when the

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federal government bargained or contracted with private parties to perform functions it was unwilling to institutionalize or was not constitutionally authorized to conduct. Prominent examples include infrastructure building, homefront mobilization during wartime, some forms of diplomacy, and national health insurance.

THE CONCEPTS OF EXEMPTION AND privatization help explain the halting, often incoherent growth of federal power. Though Gerstle does not deploy them with great thematic rigor, he shows convincingly that federal power expanded in ways not consistent with constitutional authority. This trend is clearest in regard to the third concept, *surrogacy*, whereby a constitutional provision becomes the basis of federal regulatory powers that were deployed significantly beyond its original purposes. The provision may be specific, such as the authority to establish post offices and roads, or quite expansive, like the general welfare and commerce clauses. Much of the New Deal was based on the “surrogacy” redefinition of the Commerce Clause, which also was a pillar of civil rights legislation in the 1960s. Today, the redefined Commerce Clause is the basis of myriad federal regulations that leave no aspect of American life unaffected.

The resulting mismatch between government power and constitutional authority has been a major feature of modern American history. “If a rhinoceros were to enter this restaurant now, there is no denying he would have great power here,” G.K. Chesterton once told a dining companion. “But I should be the first to rise and assure him that he had no authority whatsoever.” Gerstle recognizes the challenge this mismatch presents for modern liberalism. He concludes that tools of surrogacy, privatization, and exemption have proven inadequate for making the Constitution an instrument of liberal purposes. Further “progress” will require amending the Constitution, probably more than once. Difficult as that might be, discussion of the topic would at least “open up an ideological space that allows a belief in a living constitution to take root and grow.”

Gerstle observes that this quintessentially progressive idea no longer orients the political conversation. That he, and liberalism, struggle with this reality demonstrates that conservatism and originalism have had significant success in reorienting politics around the original meaning of the Constitution. He observes that exemption, privatization, and surrogacy were always “improvisational” tactics rather than “transformative” strategies, a

concession bolstering the conservative argument that the growth of the modern state has entailed exceeding, ignoring, or demolishing constitutional limitations. Thus is modern liberalism frustrated by a more sustained discussion of what the Constitution really requires, forbids, and permits. It is from this perspective that Gerstle blames conservative constitutionalists for limiting the federal government’s ability “to address problems confronting the country in the twenty-first century.” Reinvigorating the living constitution would herald a new era wherein American government could be “fixed” so that it “works.”

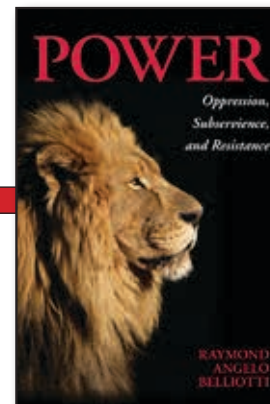
BUT WHAT GETS DEFINED AS A “PROBLEM” to be “fixed” by a government that “works”? This is an eminently political question. A book as ambitious as *Liberty and Coercion* suffers from its facile assumption that benighted conservatives are simply *wrong* in calling for more local and private ordering, and less federal government intervention. Such issues are at the heart of constitutional politics.

Gary Gerstle writes on his book’s final page that the “paradoxes that have long shaped America’s structure of public power” will not be resolved because the tensions between liberty and the coercion necessary for order simply “run too deep.” At one level, his book recognizes that such tensions have always been part of the American polity—the federal polity. Its argument would have profited from a deeper appreciation that the Constitution was formed for, and has been formed by, that polity. To say that conservatives have unleashed “unremitting hostility to the exercise of public power at the federal level” is surely an overstatement, but Gerstle’s own analysis shows that today’s conservatives express a suspicion of central power at least as old as the Anti-Federalists.

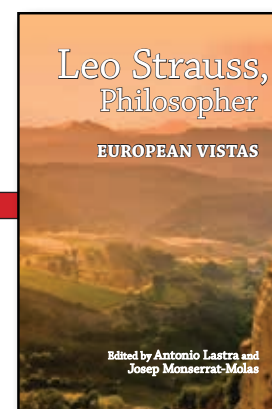
Human liberty has expanded steadily throughout American history. This is no accident. The Constitution both accepts and requires that politics remains within certain boundaries. It is one thing to disagree with conservatives on where those boundaries are located and how they should be enforced. It is another to say we would be better off with a “living constitution” of ever-more expansive, centralized government, relying solely on the judgment of liberals convinced they know all that needs to be known about what constitutes a problem, and a solution.

*Johnathan O’Neill is professor and chairman of the Department of History at Georgia Southern University.*

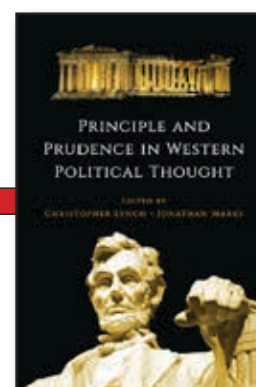
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