BOOK REVIEWS

MR. REPUBLICAN, A BIOGRAPHY OF ROBERT A. TAFT.

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We have long known about the substantial political role played by American lawyers. Alexis de Tocqueville pointed it out in the 1830’s;¹ George Kennan complained about it in the 1950’s.² Political scientists have even attempted to quantify the impact of lawyers’ participation in politics,³ while muckrakers have been more inclined simply to assert such participation and decry it.⁴ But we have had little scholarly attention directed to the way in which the legal ideology of a lawyer-statesman shapes his approach towards public issues. James T. Patterson’s well-written and informative biography of Robert A. Taft, Mr. Republican, deserves special notice on this score, since he has marshalled the evidence needed for such an inquiry. Further, while he does not argue the point directly, his interpretation of Taft suggests that we cannot arrive at an adequate understanding of Taft’s political persuasion unless we appreciate the central importance of his conservative legalism.

Taft’s legal ideology set him apart from other varieties of conservatives. He shared little common ground with romantic agrarians or nostalgic traditionalists.⁵ Nor was Taft’s conservatism rooted in a deeply religious sense of man’s nature. In fact, he took his religion rather lightly. Moreover, he compiled a creditable record in favor of civil liberties which separated him from the more authoritarian conservatives, and his aversion to militarism was so strong that opposition to it constituted one of the principal themes of his public life.⁶ Finally, in his primary devotion to a conservative notion of the rule of law, he differed

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¹ A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 171-77 (1947).
³ H. EULAU & J. SPRAGUE, LAWYERS IN POLITICS (1964).
⁵ A convenient repository of this current of conservative thought is I’LL TAKE MY STAND (1930).
⁶ Ambiguity compounded by the interests of Republican partisanship characterized Taft’s response to the foremost examples of authoritarian and militaristic conservatism of his time, Senator Joseph McCarthy and General Douglas MacArthur. See J. PATTERSON, MR. REPUBLICAN 444-49, 487-91 (1972) (hereinafter cited as PATTERSON) for Taft’s response to McCarthy and MacArthur, respectively. Still, his own record clearly distinguished him from these types of conservatives.

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from those conservatives whose mission consisted almost wholly of the straightforward defense of business interests. Robert Taft's complaint about Henry F. Pringle's interpretation of William Howard Taft surely has application to any attempted account of his own political philosophy. "I do not think you distinguish clearly enough," Taft wrote his father's biographer, "between the attitude of mind which considers that the whole future of civilization depends on the rule of law in an ordered society, and one which sympathizes with the big bankers of Wall Street and the reactionary heads of small industrial concerns." The rule of law counted most heavily in Taftian conservatism.

Yet, if Taft's legalism gave a special flavor to his conservatism, his conservative allegiance kept him at odds with the most innovative legal theories of his day. During much of Taft's lifetime, a significant group of lawyers and legal scholars bent their efforts to make law an instrument of reform. Taft's legal ideology stood in opposition to theirs. His was not a sociological or functional jurisprudence, and he would have none of that deeper skepticism about legal decisionmaking which grew strong in the 1920's and 30's under the banner of legal realism. Taft characterized jurists like Thurman Arnold as "extremists." It might have been different, for young Bob Taft, first in the class of 1913 at Harvard Law School, received an invitation to serve as law clerk for Justice Oliver Wendell Holmes. Had Taft become Holmes' clerk, the venerable Justice, who believed the life of the law had not been logic, but experience, might have provided an alternative influence to the young man's father. As it was, on advice from his father Taft declined the offer in favor of what he found to be a boring law practice in Cincinnati.

The view of the law, therefore, that informed Taft's legal ideology was the traditional one which he inherited from his father. To Taft, the rule of law meant governing in accordance with strongly held convictions, and, most especially, adherence to three overarching principles: equal justice under law, equality of opportunity, and human liberty. It also meant careful attention to the facts of concrete situations, and the logical application of principle to those particular circumstances. More liberal jurists of the time would have derisively labeled such an approach "mechanical jurisprudence."

The term had a measure of aptness in the celebrated instance in which the mature Taft gave direct expression to his vision of the rule of law. At Kenyon College in 1946, he attacked

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7 Id. 50.
8 Id. 671 n.26.
9 Id. 392.
10 J. Frank, Courts on Trial 206-07 (1949).
the trials of Nazi war criminals at Nuremberg as contrary to “that fundamental principle of American law that a man cannot be tried under an ex post facto statute.” Taft’s contention rested upon a strict reading of the major international treaties of the interwar years. These treaties did not, of course, prescribe the specific legal concepts and procedures which the Nuremberg tribunal employed, and good reasons exist for requiring a high degree of specificity as a precondition to invoking criminal sanctions. But jurists who disagreed with Taft’s position were not disingenuous in arguing that these treaties had established a duty to refrain from aggressive war with sufficient clarity that Nazi officials could properly be tried for having violated a preexisting obligation. In any event, Taft narrowed his objection. He allowed that execution or incarceration of the Nazi officials by court-martial would not trouble him on the policy ground that, if free, they might start another war. Taft simply felt that “the elaborate procedure of the Nuremberg trials” sullied the judicial process by making it an instrument for carrying out “a predetermined policy.” If Taft intended to suggest that the guilt of the Nuremberg defendants was predetermined, he was wrong. The Nuremberg tribunal handed down acquittals as well as guilty verdicts, and it based the latter on the evidence presented to it. More likely, Taft meant that the policy of war prevention was being effected through judicial means. In that case his objection came down to a preference for extralegal action with no procedural safeguards against arbitrary results, as opposed to an attempt at some semblance of due process, which ran the risk of discrediting the rule of law by not conforming to the exact tenets of American jurisprudence. Still, the significance of Taft’s Kenyon College speech is not the relative merits of his legal arguments and those of his critics, but rather the striking illustration it provides of Taft’s commitment to conservative legalism.

Taft’s legal ideology shaped his attitude towards international organizations in the postwar world. Although he voted for the United Nations, he would have preferred a league of sovereign nations based on law and justice. In contrast, Taft pointed out, the U.N. had to rely on the good will of the great powers. Taft wanted a statement of principles which a world court would interpret in justiciable controversies. A nation that refused to abide by this reign of international law would suffer the opprobrium of world public opinion. Taft hoped that moral force would secure obedience in most cases, but he was prepared to see economic sanctions and military force employed if the

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11 Patterson 326.
12 Id. 328.
member nations, none of which would possess a veto, determined that such measures were necessary. To such an organization, Taft, who frequently sought to assure the United States a free hand in its dealings with foreign nations, was willing to surrender American sovereignty. Patterson sees Taft's vision, which bore a striking resemblance to that advanced by William Howard Taft in 1918, as wholly inappropriate to the world of 1945. And so it would have been if Taft had insisted on including the communist nations. But his advocacy of an international organization based on law and justice did not turn on communist participation. If the communist nations refused to join, Taft urged pressing on with the idea with whatever nations would join. Surely such an organization posed a feasible alternative to the North Atlantic Treaty Organization, which Taft ultimately opposed. Whether an organization of this type would have moved the world closer to an international rule of law by the power of its example is open to question, but Taft's willingness to attempt it is not.

Conceivably, Taft's legalism contributed decisively to his major legislative accomplishment. Patterson's account of the passage of the Taft-Hartley Act does not clearly resolve the question of what Taft hoped the law would accomplish. At one point, Patterson ascribes to Taft a desire to alter the “realities of power” in labor relations. It would indeed have been “the ultimate irony of the struggle” as Patterson notes, had Taft succumbed to so instrumental a view of law that he expected to alter power relationships in any substantial way through his legislation. Taft's performance, however, comports more closely with the contention that his objective was securing fairness, as he understood it, rather than affecting power. Taft did, in 1946, speak of the need to “redress somewhat the excessive power given to the labor unions in collective bargaining, so that unreasonable men may not be tempted to abuse that excessive power.” But in the same year, Taft demonstrated that excessive union power troubled him far less than disregard of those principles he considered basic. Almost singlehandedly, Taft thwarted Truman's near-successful attempt to win legislative authority to draft strikers. The President's “most extreme” and “unconstitutional” request, Taft declared, “violates every principle of American jurisprudence.”

Taft saw a disregard of these principles by the National
Labor Relations Board as well, and it was this perception which spurred his attack on the way in which the Wagner Act had operated. The Board, Taft believed, had interpreted the Act as favoring the organization of workers by industrial unions. Taft wanted the government to play a more neutral role in labor matters, and many of the changes made by Taft-Hartley in the National Labor Relations Act reflected this desire. Thus, the affirmation in section 7 of the right of employees to engage in concerted activities for collective bargaining purposes was amended to include an explicit statement that employees, likewise, had a right to refrain from such activities. Further, Taft-Hartley expanded the list of unfair labor practices in section 8 by outlawing union activities that interfered with section 7 rights. It left intact the Wagner Act's proscription of similar practices by employers, although it did try to guarantee greater freedom for employers to speak out against unions. Moreover, both of the changes that seemed most clearly aimed at union power—forbidding the closed shop as a matter of federal law while permitting states to legislate against the union shop, and making secondary boycotts illegal—could find strong, if not persuasive, justification on fairness grounds. The closed shop did compel support for the union from workers who opposed it, and the secondary boycott inflicted economic harm, purposely and directly, on those who were once removed from the primary labor dispute. That contrary arguments can be advanced which, for some of us, carry greater weight is beside the point, for the issue is Taft's motivation, and in assessing that we must think in terms of fairness as he understood it.

Taft's reactions to the House bill give further indication that his conservative legalism determined the purpose he had for the law. Expressing a belief that legislation should not range much beyond the correction of clear abuses, Taft opposed governmental scrutiny of internal union affairs. Nor was he interested in providing governmental authority to intervene in nationwide strikes. The problem, he confided, had been overrated. He preferred "to suffer the inconvenience of strikes than have a completely government regulated economy."[^20] And consistent with his stand a year earlier, Taft remained adamant against authorizing the President to seize plants when strikes created national emergencies. Congress had time enough to act when a particular situation arose, and, in Taft's opinion, it should confine its action to the situation before it.

Thus far, we have examined specific instances in which Taft's legal ideology contributed directly to positions he took on

[^20]: Id. 356.
public issues. But his legalism had a more pervasive effect and shaped his general approach to problems of state as well. We have just noted his predilection for particular legislative action in particular national emergencies created by strikes. Taft by no means confined this preference to the labor relations field, for it appeared in the realm of foreign affairs too. Patterson pays a good deal of attention to Taft’s foreign policy views, in part because subsequent events have supplied a measure of vindication for attitudes that struck many at the time as simply isolationist. Taft issued an early warning against the United States assuming the role of international “knight-errant” and he worried about the dangers of an American imperialism. Patterson displays a certain fondness for pointing out that such utterances by Taft accord well with the skepticism that emerged in the late 1960’s concerning the direction of United States foreign policy. A rhetorical similarity undeniably exists, but the bases of analysis employed by Taft and later critics differ. A substantial part of Taft’s hesitancy over such foreign entanglements as Lend-Lease, the Bretton Woods monetary arrangements, the loan to Great Britain in 1946, the Marshall Plan and NATO reflected a caution rooted in his inclination to decide no more than one case at a time and to limit the implications of each decision as closely as possible to the facts of that case. Taft’s critique of increasing American commitments abroad, therefore, pertained more to the manner and dimension than to the purpose.

Such a posture well suited Taft’s penchant for statistics. He was a veritable hound after facts, and this sometimes led him away from his conservatism. The issue of federal aid to education furnishes a notable example. In 1943, Taft engineered the defeat of the Thomas Bill by attaching an amendment which barred racial discrimination in the use of federal aid, which assured the defection of Southern Senators who had previously supported the bill. Yet, even then, statistics demonstrating gross inequalities in per-pupil spending for schools had caused him to entertain some doubts about his opposition to federal aid for education. The figures, after all, ran contrary to his belief in equality of opportunity. By early 1945, Taft began working on a bill that would guarantee in part through federal assistance some minimum expenditure per pupil. The next year, he joined Democratic Senators Elbert Thomas of Utah and Lister Hill of Alabama as cosponsor of a federal-aid-to-education bill. The National Education Association’s lobbyist explained Taft’s conversion process. Taft, he observed, “crammed his mind with

21 Id. 200.
22 Id. 245, 291.
more facts than any man I've ever seen. Before it was all over, he was giving us the answers.”

Taft’s conservative legalism, expounded as it was with unquestionable intelligence, made him the most appealing political leader of the American Right in his generation. But it likewise made him obsolete, even within the Right itself. The presumptive heirs to Taft’s mantle of conservative leadership took more from the authoritarianism of McCarthy, the militarism of MacArthur, and the parsimony of Byrd than from the legalism of Taft. The Nixons, Knowlands and Goldwaters belonged to a different generation of conservatives, whose habit of mind did not include a central regard for the rule of law as Taft understood it. His was a conservatism appropriate to an age of reform. He forged it in reaction to the New Deal’s employment of state power for progressive purposes. Through its insistence on a rule of law in accordance with traditional principles, Taftian conservatism would have contained the reformist impulse, which required for its adequate implementation a more instrumental jurisprudence that sanctioned a less principled use of state power. The conservatism of the next generation marked the beginnings of a renewed awareness that state power has an important role to play in defending the status quo at home and abroad.

Patterson is right, I think, in comparing Taft to Calhoun. Neither man was a cheap apologist for vested interest. Yet both gave eloquent voice to a legalism particularly suited to a social order that was passing. The order which Calhoun’s legal principles protected was the slave plantation system of the Old South. Taft’s legal philosophy meshed best with the entrepreneurial form of capitalism, which began to give way to corporate capitalism at the outset of the twentieth century but survived longest in the Middle and Mountain West. Taft’s conservatism represented the swan song of this old order.

23 Id. 324.
24 Id. 616.

William Gang†

This book provides the most systematic and articulate defense of the one-man-one-vote apportionment rationale. There is a twofold objective: "to discuss the Supreme Court's conceptions of democracy and to determine whether . . . the Court acted reasonably when it created new legal and political relationships in the aftermath of its apportionment decisions. Put another way, the [book] attempt[s] to determine which of the Court's opinions—majority, concurring, or dissenting—were reasonable and which were not."1

Ball contends that the Warren majority fully appreciated the democratic values at stake in the apportionment decisions, and that to grasp adequately its treatment of those issues it is necessary to focus on the "normative" aspects of the Court's opinions.2 Ball describes several facets of judicial policymaking and puts forth criteria for examining and evaluating judicial opinions generally.3 But it is the "normative dimension" which is most important to Ball because it "becomes the conceptual spectacles through which the Court judges perceive reality (the empirical dimension) and make their choices known (the legislative dimension)."4 In brief, Ball seeks to demonstrate the continued viability of theoretical analysis, though in fact his arguments borrow from the "impact" perspective.5

The introductory chapter is crucial. Here Ball sets out to construct a reasonable paradigm of democracy. Such a paradigm, he says,

should reflect the situational context, it should accept the open-endedness of the laws and the necessity of changes due to past errors, it should aim for the alleviation of suffering and for the attainment of the good life for all, it should stress the importance of good reasons, and rest on due consideration shown all citizens.6

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1 H. Ball, THE WARREN COURT'S CONCEPTIONS OF DEMOCRACY 45 (1971) [hereinafter cited as BALL].
2 Id. 15.
3 Id. 25-35.
4 Id. 25.
6 BALL 35.
Ball's description of the characteristics of a democratic model ultimately proves to be the linchpin of his reasoning. He describes democracy as "a democratically oriented social system" with such mechanisms as majority rule and minority rights. "Democracy," according to Ball, "has little to say about the substantive content of the economic or social theories that prevail." Democracy is justified since all men are equally ignorant; no one man or group can claim power on the basis of possessing all political truth. Furthermore, argues Ball, "there is no way to justify decisions made in the name of democracy which deny a minority of . . . citizens the right to vote, freedom of speech, freedom of assembly, and freedom of the press." Political equality is the foundation for the right to political power, and to be democratic a political system must be representative. In a nutshell, Ball contends that a malapportioned legislature cannot be democratic.

The remainder of the book is devoted to a four-part analysis of the major apportionment cases. First, the majority, concurring and dissenting opinions in each case are stripped to reveal the attitudes of each justice on democracy and representation. Second, the democratic model constructed by each of the justices is compared with the "model" Ball constructed in the introduction. Third, Ball examines the adequacy of each justice's definition of the conceptual issues, his "technical evaluation" of those issues and the justifications put forth in defense of his attitudes. Finally, there is an overall evaluation by Ball of the "reasonableness" of each opinion.

As noted, Ball's book is the most systematic and reasoned defense of the one-man-one-vote apportionment rationale. Each case is handled with skill and acumen, the author bringing his model of democracy to bear with logical consistency and devastating effect. To say that much, however, is not to say that the book is convincing. Nor is it necessary here to take a position against the need for reapportionment, or to quibble with Ball on relatively minor points. Once one accepts Ball's premises, his arguments are irresistible. But why accept his premises? Normative political theory for Ball frankly amounts to nothing more than positing the values he subscribes to, defining and analyzing the apportionment problem in terms of those values and con-

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7 Id. 37.
9 Id. 37.
10 Id. 39.
11 Id. 41.
12 Id. 43.
13 Id. 66-67.
15 BALL 46.
cluding with what was implicit in his introduction: that one man, one vote is essential to a healthy democracy. Put another way, Ball's introduction posits theoretical support—disguised as a "model of democracy"—for values which lay at the foundation of the Warren position. He then applies those theoretical criteria to each of the justices' opinions to determine which justices put forth positions most closely in tune with the "model" constructed in the introduction. Those positions which square are labeled reasonable and adequate, while those which do not are condemned as unreasonable and inadequate. The conclusions come as no surprise.

To avoid such circular reasoning one must take issue with the premises, namely elements of the posited model. Permit me therefore to raise several objections of a general nature. First, the characteristic features of Ball's paradigm of a reasonable democracy are applicable not only to democracy, but to any form of good government, whether it be democracy, aristocracy or monarchy. Only perverted forms of government make other than the public good the object of public policy. Second, for Ball, as for most moderns, democracy is conceived of as the only legitimate form of government. Instead of using the paradigm concept, as it was used in classical theory, to express the best regime under the best possible circumstances, Ball sees democracy as the only possible paradigm worthy of actualization under any circumstances. Third, the reality of political existence becomes hidden under the mask of Ball's rational, almost mathematical, democratic theory. Man is not only rational but economic, emotional and spiritual as well. History reflects these facets of politics. Ball does not. To use more precise political theory terminology, Ball elevates "elemental" representation—governmental form—over "existential" representation—governmental substance.

To take another facet of the last point, Ball's model of democracy is troubling because it is inconsistent. Ball seemingly defines democracy as nothing but process. It is open-ended, fallible, and contains no economic or social substance. Democracy means that anything goes." Ball's model of democracy, however, remains in fact anything but value neutral. Substance slips in the back door under the guise of explicating the true nature of a good democracy. The individual features need not be repeated here. It is the standard "open society" model.

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18 See E. VOEGELIN, NEW SCIENCE OF POLITICS 31-37 passim (1952).
19 BALL 45.
20 For a statement and critique, see Kendall, THE OPEN SOCIETY AND ITS FALLACIES, 54 AM. POL. SCI. ASS'N REV. 972 (1960).
societies elevate toleration as their highest goal; no public truth exists except the necessary belief that there is no public truth. There is one exception; individual rights become the foundation for all public policy. Rights only expand, never contract, and there is no felt need to balance rights with duties. The cart, quite consistently, is put before the horse. To ascertain the meaning of specific provisions of the Bill of Rights, one no longer sifts them through the constitutional text and historical experience. Instead, the Bill of Rights—even specific provisions—becomes the medium through which the Constitution and democracy are defined. Such a reading of the Constitution, as I have argued elsewhere, ultimately elevates not the people but the infallibility of an “informed” and activist majority of the justices. *Lucas v. Colorado General Assembly* is a prime example.

Finally, the success of Ball’s thesis rests on a certain reductionism. Consistent with conceiving democracy as the only legitimate form of government, for Ball, democracy is the sole feature of the American constitutional framework. From the inception of our nation, however, democracy was but one element, though a predominant one, of our constitutional scheme. Rather than juggling the democratic, aristocratic and monarchic features of our Constitution, Ball prefers the far easier task of explicating democracy. Not only does Ball define the American constitutional framework in such a way as to eradicate nondemocratic features, but he condemns anyone who does. For Warren, and one suspects for Ball, “the choices perceived were profoundly simple: either protecting constitutional rights or ignoring the appeals of... citizens who had been denied those rights.”

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22 377 U.S. 713. See Ball 184.
24 Ball 199.
25 Id. 191.