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Book Reviews

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BOOK REVIEWS

FEDERALISTS AND REPUBLICANS: THE END AND THE BEGINNING

BY STANLEY D. ROSE*

THE PRESIDENCY OF JOHN ADAMS, THE COLLAPSE OF FEDERALISM, 1795-1800. By Stephen G. Kurtz. Philadelphia: University of Pennsylvania Press, 1957. Pp. 448. \$8.50.

THE JEFFERSONIAN REPUBLICANS, THE FORMATION OF PARTY ORGANIZATION, 1789-1801. By Noble E. Cunningham, Jr. Chapel Hill: University of North Carolina Press, 1957. Pp. x, 279. \$6.00.

In 1796, of the 139 presidential electors, 71 voted for John Adams and 68 voted for Jefferson. In 1800, 73 of 138 electors voted for Jefferson and 65 cast for Adams. This change represents the statistical basis of the Revolution of 1800. It was the end of the Federalists and it brought into power the Jeffersonian Republicans.¹ The causes of this change make an involved story of which the two fine books being reviewed here tell only parts.²

The traditional views of what happened to usher in Jeffersonian Democracy are too simple. The Federalists did split among themselves. During Adams' administration unpopular and repressive laws were passed, such as the Alien and Sedition Laws. But inquiry is necessary before a viewer can realize why such acts were so unpopular. On the other hand, few presidents have been so popular as was Adams after the revelation of the XYZ affair. Moreover, it must not be forgotten that the Federalists were the party in power. They had established a national government that was a going concern. Under the circumstances, only an organized opposition could make any headway. As to when and how such an organization came into being, there has been a variety of views. The information now available appears to permit a reasonable explanation of the events that brought Jefferson into the White House.

The historical issue presented is a clear one: Why this political

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1. The victory was lasting. In 1804, Jefferson received 162 out of 176 votes. In 1808, Madison got 122 out of 175; in 1812, 128 out of 217. In 1816 James Monroe had 183 votes cast for him out of a possible 217.

2. On the period and the problems discussed in the essay, two works, in addition to those being reviewed, are indispensable: CHARLES, THE ORIGINS OF THE AMERICAN PARTY SYSTEM (1956) and DAUER, THE ADAMS FEDERALISTS (1953). And, of course, still to be considered is BEARD, ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY (1915).

shift? However young our nation may have been in 1796-1800, it cannot be assumed that its political struggles were primitive and unsophisticated. The full range of the forces by which men are swayed, from terror to philosophy, were present in the new republic during these years. We should therefore avoid any simple explanation of this period. In general, it is probable that no monistic theory of history is ever satisfactory. It is more fruitful to look for factors that influenced a particular historical result. In torts there may be room for only one substantial factor per case. According to the *Restatement*, a substantial factor is a factor that may have such an effect in producing the result as to lead reasonable men to regard it as the cause.³ But, as the cases show, different judges or juries find under the same circumstances different factors which they regard as substantial. In looking at history, therefore, let us look to the factors that were present and let us leave our minds open on the issue of which one was the most important.

The men of the eighteenth century understood the diversity of interests that constitutes political life. They knew that some restraint was essential if these varied interests were to be pursued. There was an overriding general interest in an orderly society. But order was a general need only in order that particular interests could be attended to. Once a general order was established in society, politics consisted in the non-violent interplay of particular interests promoting their own needs.

The classic statement of this thought occurs in the tenth paper of *The Federalist* where Madison wrote:

So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.⁴

The language of this excerpt is representative of a generation of men who had been engaged in political activity of the first significance for all of their adult life. They had organized and led the revolt of the

3. RESTATEMENT, TORTS § 431, comment (a) at 1159 (1934).

4. THE FEDERALIST No. 10, at 56 (Mod. Libr. ed. 1937) (Madison).

colonies against England, they had unsuccessfully tried to wring strength from their first rudimentary union under the Articles of Confederation, they had gathered into a secret conclave and had drawn up a new Constitution, they had secured the ratification of this document after a most intense struggle and, finally, in 1789 they launched the new government on its way. It therefore comes almost as a shock to find one of *our* contemporaries saying:

It has now become common knowledge that the men who made the Constitution did not expect the development of political parties. They believe, instead, that public policies would be determined by transitory majorities consisting of combination of interests that would agree on a particular solution of a current issue presumably formulated in a statute. . . . The fathers evidently expected such an *ad hoc* combination to dissolve as soon as its purpose had been consummated.⁵

No evidence is given to support this assertion and, it seems to me, eighteenth century experience would deny it. The formal education of the men of the eighteenth century, almost entirely classical in substance, would have thoroughly braced these men for enduring and important political activity. The men of our revolutionary generation were familiar with the party politics in the England of their century. The analysis of political parties by Edmund Burke in 1770 had justified the existence of permanent parties based on principle.⁶ And then there was Bolingbroke. Burke may have doubted that anyone read him anymore,⁷ but John Adams had.⁸

Bolingbroke's *Dissertation upon Parties*⁹ is a rambling historical essay accounting for the existence and position of English political parties in the early eighteenth century. Much space is devoted to distinguishing between party based on principle and faction based on personal interest which is adverse to the national interest.

Then, as now, the distinction between "party" and "faction" was made much of. Madison, in *The Federalist*, defined "faction" as

5. BINKLEY, *AMERICAN POLITICAL PARTIES, THEIR NATURAL HISTORY* 7 (2d ed. 1945). When Professor Binkley later queried why the Federalist party was so shortlived, his own answer was that "the Federalists never conceived of their group combination as constituting a political party, because they did not believe in such an institution." *Id.* at 49.

6. 1 *WORKS OF EDMUND BURKE, THOUGHTS ON THE CAUSE OF THE PRESENT DISCONTENTS* 306 (Bohn ed. 1872) Robbins, *Discordant Parties, A Study of the Acceptance of Party by Englishmen*, 73 *POL. SCI. Q.* 505 (1958).

7. "Who now reads Bolingbroke? Who ever read him through?" 2 *WORKS OF EDMUND BURKE* 361 (Bohn ed. 1872).

8. "Had I been present I should have answered him: 'I, I myself!' I have read him through, more than fifty years ago, and more than five times in my life, and once within five years past." 10 *WORKS OF JOHN ADAMS* 82 (C.F. Adams ed. 1850-56). But in an autobiographical fragment, Adams related how much time he had devoted to Bolingbroke and added: "But, I confess, without much good or harm. His ideas of the British constitution are correct, and his political writings are worth something; but, in a great part of them, there is more of fiction than of truth." 2 *ADAMS, op. cit. supra* at 41-42.

9. 2 *WORKS OF LORD BOLINGBROKE* 5 (1841).

a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.¹⁰

Some years prior to this, Edmund Burke had defined "party".

Party is a body of men united, for promoting by their joint endeavors the national interest, upon some particular principle in which they are all agreed.¹¹

It is easy to see how one might look at the other fellow's *faction* and one's own *party*. The English parallel is of interest. George III ascended the throne in 1760 and he, too, hoped to be above party. George is supposed to have derived his views from Bolingbroke's *The Idea of a Patriot King*.¹² Ultimately, the British King learned to use party or faction for his own purposes. Washington however appears to have been our only practitioner who hoped to rise above party and work only in the national interest. If it could have been done, probably only he could have done it.

In our early political life, there were many outcries against "faction." The most prominent voice was that of Washington. In September of 1796, in his Farewell Address, prepared by Hamilton, he spoke "in the most solemn manner against the baneful effects of the spirit of party." But the warning came too late. Political parties were already formed and in operation. The address itself was regarded as a partisan statement and Washington was considered the spokesman for the party in power. It was said that his denunciations of those who were opposed to the Government was, in fact, an attack upon all political views that differed from his.¹³

Other voices were raised against the violence of party divisions. So eminent a thinker as John Taylor of Caroline believed that parties were not natural to the republican form of government. But this form of argument usually appeared to be directed at the Republican Party. New England divines thundered at the evils of the party spirit and urged support of the Government which, naturally enough, turned

10. THE FEDERALIST No. 10, at 54 (Mod. Libr. ed. 1937) (Madison).

11. 1 BURKE, *op. cit. supra* note 7, at 375.

12. 2 BOLINGBROKE, *op. cit. supra* note 9, at 376. Of this work, Harold Laski said: "It bears upon its every page the marks of a personal antagonism. It is too obviously the programme of a party to be capable of serious interpretation as a system." LASKI, POLITICAL THOUGHT IN ENGLAND: LOCKE TO BENTHAM 139 (1920).

13. CHARLES, THE ORIGINS OF THE AMERICAN PARTY SYSTEM 38 (1956). "That he always had the good of the country at heart will be admitted, but he interpreted the good of his country to mean the maintenance of the principles for which his party stood." BEARD, ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY 71 (1915).

out to be the Federalist Party. These arguments obviously had no effect upon the course of events.¹⁴

And so from the very first, political action and political organization were destined to be with us.¹⁵ If interests developed into political issues and such issues were best promoted by political parties, the question arises when the political parties actually came into existence. The answer is a matter of judgment and definition. Charles A. Beard contended¹⁶ that the capitalistic interests that brought about the drafting and the ratification of the Constitution were the group that, as the Federalists, secured and administered the legislation that continued to promote their interests. Cunningham rejects Beard's argument as "unconvincing."¹⁷ He concludes that there is no substantial evidence that the parties of the 1790's had any direct connection with the divisions over the ratification of the Constitution. Aside from Beard, the writers being discussed here all put the origin of American political parties at one point or another in the five-year period between 1790 and 1795.

Political opposition was therefore a foregone conclusion for the new nation. But this nation being unique, the characteristics of its political activity were perforce unique. The physical distances within the union were immense. The means of communication were primitive.¹⁸ There was no recognized center of culture, as London or Paris. There were no nationally known newspapers or periodicals. There were no national cultural leaders, only political leaders. For these reasons, other political experience, such as in England, offered to the new partisans little practical guidance as to organization.

For purposes of the present essay then, we start with the situation in 1795. The two administrations of Washington had developed the issues that left the nation divided. The divisions had not yet crystallized into parties because the leaders were not yet to the fore and organizations were not yet in being. By 1800, however, we had al-

14. See CUNNINGHAM, *THE JEFFERSONIAN REPUBLICANS, THE FORMATION OF PARTY ORGANIZATION, 1789-1801*, at 140 (1957).

15. Adrienne Koch points out that the Constitution was drafted and ratified with full recognition of the "reality of political opposition." When writing *The Federalist*, Hamilton and Madison "explicitly recognized the necessity for factions and resulting diverse political interests that arise naturally in every free government." Koch, *Hamilton, Adams and the Pursuit of Power*, 16 R. POL. 37-38 (1954).

16. BEARD, *ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY* (1915).

17. CUNNINGHAM, *op. cit. supra* note 14, at 23 n. 71. Beard's views on the economic interpretation of the Constitution have now been so severely attacked that it is doubtful that his inferences from that interpretation will merit further attention. The attack has been all along the line: facts, logic, and method. See McDONALD, *WE THE PEOPLE; THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958); BROWN, *CHARLES BEARD AND THE CONSTITUTION* (1956).

18. For the extent of the isolation of communities during this period, see 1 BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 250 (1916) and 1 ADAMS, *HISTORY OF THE UNITED STATES* 1 (1890).

ready had a full scale battle between two mature political parties. And after that election, one party was already on the road to extinction. The reasons for these changes were several. The one most discussed in books is the fight within the Federalist party. After a consideration of this episode, other factors that influenced the change will be taken up.

The split among the Federalists is usually accepted as the most important reason for the fall of the party. Two great men, personally incompatible, tried to command the party. Adams has the better press to-day mainly because Hamilton's reputation is going through one of its periodic contractions. But in the past there have been historians who placed the blame on Adams for his attempt at personal rule.¹⁹ Since Hamilton to-day gets the major credit for splitting the party, some aspects of his treatment of Adams deserve mention. In 1796, Hamilton tried unsuccessfully to secure for the nominal vice-presidential candidate of the Federalist party, Thomas Pinckney of South Carolina, sufficient electoral votes to get him elected president over John Adams. Everyone knew about this game and Adams' dislike of Hamilton became venomous indeed.

In 1800, Hamilton's support of Adams was of a rather peculiar nature. He wrote a pamphlet that came into the public domain and received a national circulation. It is a document unique in our history.²⁰ Hamilton began by stating his general opinion of the "disgusting egotism, the distempered jealousy, and the ungovernable indiscretion of Mr. Adams' temper, joined to some doubts of the correctness of his maxims of administration."²¹ The details are then set forth and "yet with this opinion of Mr. Adams, I have finally resolved not to advise the withholding from him a single vote."²² However, "to refrain from a decided opposition to Mr. Adams' re-election has been reluctantly sanctioned by my judgment; which has been not a little perplexed between the unqualified conviction of his unfitness for the station contemplated, and a sense of the great importance of cultivating harmony among the supporters of the government . . ."²³

The probable consequences of such talk are obvious. But it should

19. *E.g.*, FORD, WASHINGTON AND HIS COLLEAGUES 220 (1919).

20. The full text is in 7 WORKS OF HAMILTON 682 (J. C. Hamilton ed. 1851). In speaking of the "vengeful, deceitful, and deadly pattern of cross-purposes that Hamilton inflicted upon . . . Adams," Adrienne Koch declares that "no event in American history is quite so baffling and irresponsible as the appearance of Hamilton's document against Adams in the months prior to a national election." Koch, *Hamilton, Adams and the Pursuit of Power*, 16 R. POL. 37, 38 (1954). "[H]is famous pamphlet . . . was a blunder of the highest magnitude." KURTZ, THE PRESIDENCY OF JOHN ADAMS, THE COLLAPSE OF FEDERALISM, 1795-1800, at 401 (1957).

21. 7 WORKS OF HAMILTON 695 (J.C. Hamilton ed. 1851).

22. *Id.* at 725.

23. *Id.* at 726.

be realized that there were also real issues that divided the men of this period. The financial policies of Hamilton have been often considered in relation to economic classes, on the theory that the classes divided along party lines. But foreign affairs also provided partisan and class issues. The most important issue of foreign policy during the 1790's was that of our relations with France and England.

The French Revolution broke out just as our new nation was getting under way. We were bound to France by the treaty of friendship of 1778, and yet the great upheaval in France quickly strained the relationship. The British Government was soon at odds with the governing class in France and it appeared that we would have to take sides. Our people did take sides along domestic political lines. Hamilton's financial system required friendship with Britain. Even if they had no monarchical or aristocratic leanings, the conservative Federalists tended rather naturally towards Britain. To Jefferson, however, the events in France seemed to merit the approval of right thinking men. Jefferson's views did not prevail and by 1798 we were engaged in a quasi-war with France.²⁴

Under Washington's leadership, the Government avoided fulfilling its military and naval obligations under the 1778 treaty, attempted to steer a neutral course between Britain and France, and signed the Jay Treaty with Britain. Washington's final act in this field was his Farewell Address in which he exhorted his countrymen to avoid entangling foreign alliances. A recent writer regards this as all domestic politics. He believes that Washington was really saying that alliances are entangling only when with France; never when with Britain. Hamilton's foreign policy required the prestige of Washington and so his conclusion is that

Used as a tool by Hamiltonians and convinced that opposition to Federalism was personal opposition and "faction," Washington in his last years became intensely partisan without knowing it.²⁵

In June of 1796, Washington became convinced that the American Minister to Paris, James Monroe, was not in sympathy with the views of the administration and recalled him.²⁶ Monroe's successor was General Charles Cotesworth Pinckney of South Carolina. The French

24. The story of how France went from friend to foe in ten years is told in DECONDE, *ENTANGLING ALLIANCES; POLITICS & DIPLOMACY UNDER GEORGE WASHINGTON* (1958).

25. DE CONDE, *op. cit. supra* note 24, at 509. Relying on De Conde's earlier work, Cunningham agrees that the address was a partisan campaign document. CUNNINGHAM, *THE JEFFERSONIAN REPUBLICANS, THE FORMATION OF PARTY ORGANIZATION 1789-1801* at 94 (1957).

26. "With the dismission of Monroe the last anti-Federalist in high position under Washington was dropped; the nonpartisan character of the administration was a thing of the past." KURTZ, *THE PRESIDENCY OF JOHN ADAMS, THE COLLAPSE OF FEDERALISM 1795-1800*, at 121 (1957).

Government regarded the recall of Monroe as an affront and, in November, refused to receive the general. Accordingly, one of the most pressing tasks facing Adams after his inauguration was the re-establishment of relations with France. Adams sent a commission of three men to deal with the French Government. The men were Pinckney, already in Europe, Elbridge Gerry, and John Marshall. The commission was never received by the French Foreign Minister. Instead they were met by a party of three men (later known as X, Y, and Z) who made it clear that a government loan and personal bribes were the prerequisites for resumption of the relations between the two countries. When Adams gave the news of this humiliating experience to Congress, the country was united as never before. The administration prepared for war. Almost at once congress passed a direct tax on dwelling houses, lands, and slaves.²⁷ This tax, apportioned by states, was intended to raise \$2,000,000. A new army was formed, commanded by Washington and with Hamilton as second in command. Hamilton's post was secured through the prestige of Washington and against the desires of Adams.

But most far-reaching of all were the Alien and Sedition Laws. The leading authority on these laws states:

Under the guise of patriotic purpose and internal security, the Federalists enacted a program designed to cripple, if not destroy, the Jeffersonian party. In the face of the emergence of an effective grass-roots democratic opposition to their domestic and foreign policies, they retreated to repression as a means of retaining political power. The authoritarian alien and sedition system was the logical culmination of Federalist political philosophy.²⁸

By any test, these laws were immoderate and ill-advised. And yet all the leading Federalists approved of them.²⁹ This unanimity of purpose and the determination exhibited in the execution of the Federalist program, appears to have been the most important single impulse in uniting the Republicans for 1800. But as the Republicans began to unite in opposition to the Federalist record, Adams himself rejected that record. After he had Talleyrand's assurances that any

27. 1 Stat. 597 (1798).

28. SMITH, *FREEDOM'S FETTERS; THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 21 (1956). These laws "were a manifestation of the Federalist belief that they alone were fit to rule, and a resentment of all criticism of their policy." DAUER, *op. cit. supra* note 2, at 153.

29. Smith, *Alexander Hamilton, the Alien Law, and Seditious Libels*, 16 R. POL. 305 (1954). Also KURTZ, *op. cit. supra* note 26, at 317. Dauer points out that Adams made no official recommendations on these laws. He later denied supporting them, and blamed them on the Hamiltonians. But his violent language during this period encouraged the belief that he supported these laws. DAUER, *op. cit. supra* note 2, at 159. Adams "united with a mad political faction and an insane judiciary in jailing Republican editors and repressing political freedom throughout the nation." BRANT, *JAMES MADISON, FATHER OF THE CONSTITUTION, 1787-1800*, at 466 (1950).

representative of the United States would be respectfully received, Adams, on February 18, 1799, nominated William Vans Murray, our Minister at The Hague, to renew negotiations with France. This act forthwith ended the Hamiltonians' dream of glory. They believed Adams' peace move to have been an act of sabotage. The Federalist split was now permanent and beyond reconciliation. Kurtz's conclusion is that Adams' peace move "saved the nation from Hamiltonian militarism and prevented the outbreak of civil war."³⁰ This contention seems a bit strained but that is probably the way it looked to Adams' contemporaries.

We have alluded to the split among the Federalists that alone could have been fatal to their continued success. Next was examined the great issue of foreign policy that divided our people during this period. References have also been made to economic divisions during this period. It is pertinent to show the relevance of these divisions to our foreign policy. There was no doubt that we owed a debt of gratitude to France, but stronger considerations directed us towards Great Britain. In the figurative language of Samuel Bemis:

Under Hamilton's system the infant nation nursed at the breast of commerce. Without commerce life would have been impossible, because the revenue which vitalized the nation came from imposts. Most of the commerce of the United States in those years was with Great Britain.³¹

This conclusion can be supported by the available statistics. "Of a total value of \$15,388,409 of imports paying ad valorem duties \$13,798,168 were from Britain."³² In addition to the revenue derived, there was also the personal value to the commercial classes of amicable and unrestricted relations with Great Britain. Those engaged in shipping, shipbuilding, and ancillary businesses were the heart of the support for the Federalist cause.

This special interest of those responsible for the operations of the Government may be contrasted with the outstanding fact of our social structure in the 1790's. During those years, 80 to 90 per cent of the free citizens of the country drew their living from agriculture. The overwhelming majority of these people were also self-sufficient and had no significant interest in foreign markets. For such as these, the issues of foreign affairs would not necessarily have a life or death character. Every patriot would be aroused at the indefensible conduct of the French in the XYZ affair or at British seizure of American ships. But when anger was untouched by a personal economic interest

30. KURTZ, *op. cit. supra* note 26, at 353.

31. BEMIS, *JAY'S TREATY; A STUDY IN COMMERCE AND DIPLOMACY* 1 (1923). And again, "The elixir of national credit which energized the Government depended . . . almost wholly on imports, which a war or even commercial hostility with Great Britain would have destroyed." *Id.* at 270.

32. *Id.* at 33. This was for the year 1790.

other factors might affect one's decision on the appropriate measures to be taken. Hamilton's policies might require British imports, but self-sufficient farmers didn't. And so, as Dauer concludes, it is

apparent that the history of the decline of the Federalist party is largely the history of the step-by-step loss of the agrarian elements from the party.³³

But a Federalist split, immoderate legislation, and all the other factors we have considered would not have necessarily produced a Republican victory in 1800. There is no doubt that time was on the side of Jefferson. But people do not necessarily vote as their interests appear to dictate. For instance, former negro slaves in New York City were ardent Federalists.³⁴ One of the decisive elections in the campaign of 1800 was that which took place in New York City. It can hardly be claimed that the workers of this city were agrarians. It could well be argued that their real interest lay in the prosperity of the commercial classes of the port. But the workingmen, capably led by Aaron Burr, went solidly Republican.³⁵ Something extra was needed to rally varied elements to one standard. That something was party organization and leadership. Jefferson and the Republican party supplied these needs for 1800. Professor Cunningham's book gives the details on how the Republican Party was made into such an effective organization in time for the election of 1800. To give depth to his account, he starts at the beginning. Men talked of party but in the records of early Congressional votes there is not much resembling what we to-day would call party regularity. For the first few years, the political issues were national and were those concerned with Hamilton's financial plans. It was "Madison's party" that led the Congressional opposition to Hamilton's assumption plan.

The Congressional election of 1792 was the first one in which these very real issues were available for public debate. It was also the first time when organized machinery for the promotion of candidates appeared. There was no uniform tradition or experience for this sort of thing. In some states local custom prevented a candidate from announcing his availability or from personally requesting votes on his own behalf. In other places no candidate could hope to prevail without providing the electorate with free liquor.

Candidates were selected by committees meeting at taverns. The decisions were spread by letter or word of mouth. "Tickets" might be published in the newspaper. The principal difficulty in all states was

33. DAUER, *THE ADAMS FEDERALISTS* 7 (1953).

34. BINKLEY, *AMERICAN POLITICAL PARTIES, THEIR NATURAL HISTORY* 43-44 (2d ed. 1945).

35. BINKLEY, *op. cit. supra*, asserts that one reason the workers supported Jefferson was their dislike of those Federalist abolitionists who had freed their slaves and dumped them into the labor markets of the city.

communication. It took an energetic group of men to send the word out. Round robin letters were resorted to. Each recipient of a letter bearing political news was expected to send out copies of the letter to a given number of his friends.

Party lines were so undeveloped that in 1793 no one knew what the character of the new Congress would be until it met. Men apparently became party men after they went to Congress. It is agreed that this third Congress (1793-95) saw genuine parties come into existence on the national level. So effective were the opposition groups in this Congress that they provoked Washington's unhappy condemnation of "faction" and "opposition to the government."

During these early years, the caucus was developed as a congressional institution. This, of course, served as a strong unifying force. It met on matters of legislative policy. In 1796 and for some time afterwards, the congressional caucuses chose candidates in national elections. Kurtz states that "Republicans had settled upon Jefferson as their standard bearer as early as 1794."³⁶ For Cunningham, "the nomination of a Republican candidate for the presidency was accomplished by a general consensus of Republican leaders. . . ."³⁷ This is hard to imagine. Such an arrangement probably works only when the person involved has a very definite national reputation and there are no serious competitors. These conditions were met in 1796. The election showed that neither party organization was as yet fully developed, but the parties did deliver the maximum amounts of votes for their leaders. With Washington retired, the way was now clear for the showdown party struggle.

Jefferson took charge of the party in 1797 and set his sights on 1800. He led his party through the storms of the late 1790's preparing the issues, encouraging the state leaders, and getting party pamphlets written. There were about 200 newspapers—mostly weeklies—in the United States in 1800. Jefferson encouraged the support of such papers which exhibited the proper spirit and attempted to stir up interest in establishing new ones. The proof of the success of all this activity was the deliverance of Republican votes in a bloc with a tie for Jefferson and Burr. This was not an unmixed blessing.

One point not discussed by Professor Cunningham is the method of financing the activities of these early parties. For instance, in the 1796 election 30,000 copies of the Republican party's ticket were spread through Pennsylvania.³⁸ It is a not unreasonable inference that 30,000 of anything costs money. A good part of Cunningham's narrative concerns the mailing of pamphlets and newspapers to various parts of

36. KURTZ, *op. cit. supra* note 26, at 90.

37. CUNNINGHAM, *op. cit. supra* note 25, at 90.

38. *Id.* at 104.

the Union. Jefferson's mailing expenses must have been enormous.³⁹ In February of 1799 Jefferson wrote to Madison that "every man must lay his purse and his pen under contribution."⁴⁰ Later on in the same month he wrote to Madison that he had committed Madison to a subscription for \$100 to be used for the formation of a newspaper in Philadelphia.⁴¹ Jefferson and others also assisted those Republican editors who were fined under the Sedition Law.⁴²

The evidence is before us so that we may now ask: why did the country go Republican in 1800 and stay that way? None can doubt that the Federalists deserved to lose. They worked at it and succeeded in destroying themselves. But would this political shift not have come about even without the assistance of the Federalists themselves? The answer appears to be in the affirmative. The Hamilton-Adams struggle is largely irrelevant to the ultimate outcome of parties in America. The overwhelming numerical superiority of those agrarians who belonged, if anywhere, in the Republican party made certain that as soon as leaders and organization came to that party, victory was sure to come.

But, of course, the point is: why did the victory come in 1800? The answers appear to be as numerous as the writers. Kurtz states:

It seems unlikely that the American electorate was choosing between the underlying political philosophies of Adams and Jefferson when it voted in November, 1800. . . . It seems more likely that the voters were concerned with the record: with the Alien and Sedition Acts, high taxes, the standing army, and the possibility of future peace. Jefferson's election promised better things for America, because he was known to be the antagonist of everything in Federalism that stood for repression. . . .⁴³

The opposite view is that of Charles A. Beard who asserts that:

It is true that if one takes the mass of materials in the newspapers and pamphlets as reflecting the relative importance of the issues of the campaign of 1800, one may assign to freedom of the press, Jefferson's irreligion, and the attacks on the aristocrats the very first rank among the questions of the day. But these matters did not obscure the old economic problems which had been at the centre of the political conflicts since the days of the Philadelphia Convention.⁴⁴

Reflection should indicate that neither of these conclusions explains enough. Beard's view requires the certainty that people vote according to their economic interest. That cannot be relied upon. The em-

39. In 1792, Congress detailed postal rates (1 Stat. 235). Mail sent by sea was much cheaper but obviously took longer. Mail sent by land started at 6 cents for a delivery up to 30 miles. Over 450 miles, a letter cost 25 cents.

40. CUNNINGHAM, *op. cit. supra* note 25, at 129.

41. *Id.* at 131.

42. *Id.* at 172.

43. KURTZ, *op. cit. supra* note 26, at 404.

44. BEARD, *op. cit. supra* note 16, at 357.

phasis as given in Kurtz's analysis is not entirely satisfactory. The great mass of the voters were probably unaffected by the repressive activities of the Federalists but were probably disturbed by the exhibition of immoderation.

Manning Dauer presents a middle view. He accepts the general economic division within the country as being commercial and agrarian and he concludes that

once a stable central government was established, the dominance of agriculture in the American economy assured that the Jeffersonians would triumph if they could develop a moderate program. They did so. . . . In contrast, Federalist policy, while ambitious, was designed increasingly for commercial groups alone. . . .⁴⁵

This view contains all the elements that made for this particular victory at this particular time. The long run trend clearly favored an agrarian party. But there had to be an agrarian party in existence and there had to be a reason for breaking an established voting habit. An anti-Federalist was not necessarily a Republican. Jefferson created a party and demonstrated that he did not have any radical changes in mind. For instance, in New York, Aaron Burr had established a bank for Republican interests.⁴⁶ Thus, disaffected Federalists, uncommitted voters who disliked the Federalists excesses, and all agrarians now had a responsible and moderate party to vote for. The conclusion seems warranted that parties then as now must have been coalitions.

As might have been surmised from the previous discussion, the Cunningham book restricts itself to the details of the organization of the Republican party. Much of this material appears to represent newly mined ore. The book therefore is a valuable addition to our political historiography. This is not a summary dismissal of the book. It is all that needs to be said. Previous historians have gotten Jefferson into office in 1800 without much consideration of the party organization that did the trick. This account of that organization is therefore a much needed story.

The book on John Adams however needs a bit of explanation. It is a detailed study of the collapse of Federalism, and only that. Such matters as the troubles in recruiting for government service are considered only because the new partisanship aggravated the problem. There is nothing concerning other aspects of the history of the United States during these years except such as bears on the central theme of the book. What is done in this book also needed doing. The details on this period are not entirely settled. Kurtz has discussed the Feder-

45. DAUER, *op. cit. supra* note 2, at 263. Dauer accepts the economic divisions proposed by Beard. These are now suspect. See note 17 *supra*.

46. Reubens, *Burr, Hamilton and the Manhattan Company*, 72 POL. SCI. Q. 578 (1957) (Part I); 73 POL. SCI. Q. 100 (1958) (Part II).

alist contribution to the Republican victory of 1800. A detailed study has yet to be made of the interests that coalesced in 1800 to make the victory possible at that particular time.

BOOKNOTE

As an historical account of the period, Claude Bowers' *Jefferson and Hamilton*⁴⁷ does not receive high credit from the writers being considered here. All agree that the book is weighted too heavily in Jefferson's favor and that it is too frequently erroneous in detail.⁴⁸ Too much credit is given to Jefferson as the personal genius behind the details of the growth of the Republican party.⁴⁹ Charles⁵⁰ asserts that Bowers' account of the organization of the party rests "almost wholly on conjecture." The book served causes other than those of history.⁵¹

THE SUPREME COURT FROM TAFT TO WARREN. By Alpheus T. Mason.

Baton Rouge: Louisiana State University Press, 1958. Pp. 250. \$4.95.

Professor Mason suffered criticism and some abuse for disclosing in Stone's biography so much of what occurs behind the scenes in the operations of the Supreme Court. The present volume may have been inspired at least in part by that experience. Mason is disturbed by the discrepancy between what the Court is in fact and what it is in folklore. In fact it is a mundane institution grappling with mortal problems—problems which have proven too difficult for other agencies of government and society to settle. If "the law" provided an answer, such problems would never have gone to court, or at least not to the Supreme Court. On the other hand, folklore insists that by some magic years ago the Constitution laid out the answers to all future problems—in terms somehow not obvious to others, but which must, or should, be plain to the Justices. "This small book may perhaps, by portrayal of what actually occurred in the Supreme Court during four dramatic and revealing decades, dispel superstition and promote understanding of the judicial function in American politics." Of course, Mason knows only a small part of what went on in the Supreme Court during the period in question, but thanks to his Stone papers he knows more

47. BOWERS, *JEFFERSON AND HAMILTON* (1925).

48. KURTZ, *op. cit. supra* note 26, at 423.

49. CUNNINGHAM, *op. cit. supra* note 25, at 255.

50. CHARLES, *THE ORIGINS OF THE AMERICAN PARTY SYSTEM* 83 (1956).

51. See Petersen, *Bowers, Roosevelt, and the 'New Jefferson,'* 34 VA. Q.R. 530 (1958).

than most of us. Whether that bit is enough to serve his purpose is not for me to say.

Critics of the Court may get some satisfaction, if they read Mason selectively. But if they read him whole they will find a powerful case for the proposition that the trouble with the Court is not the Court, but our myths about the nature of the Constitution and the judicial process. In Mason's long view the Justices have done a fine, perhaps a magnificent, job as instruments of government. For him they have nothing to lose by a full disclosure of what goes on behind scenes—and of what ingredients go into decisions. I take it he means this in the double sense that: (1) our judges have been honest, conscientious men and; (2) their effectiveness does not depend upon the myth that they merely find, but do not make, the law. It is deeply unpleasant to say so, but I fear the second proposition is not as plain as the first.

WALLACE MENDELSON*

THE LAW OF AWOL. By Alfred Avins. New York: Oceana Publications, 1957. Pp. xxxi, 288. \$4.95.

In a society in which it is to be expected that most able-bodied young men have served, or will serve, in some branch of the armed forces, a book about military law has inherent value. Not only does it explore an area of the law long neglected by the civilian bar, but also it concerns a subject matter within the knowledge—often inaccurate—and experience of a substantial part of the population. Every draftee, enlistee and officer candidate is given instruction in military law. Periodic courses of supplementary instruction are held for professional servicemen. Someone, generally a non-lawyer, must investigate alleged offenses, determine whether the facts warrant the preferring of charges, draft the correct specification and take care of the numerous administrative and quasi-judicial functions which culminate in a court-martial. And, of course, the administration and vagaries of military law are favorite topics of barracks discussion.

In this context of public interest, Mr. Avins' book is valuable. It is valuable even though it concerns only the offense of AWOL because this offense is the most common one and because it is a military offense without counterpart in civilian law. The author's treatment of the offense is comprehensive. In the first part of the book, he discusses the rationale, importance and history of AWOL and its relation to

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other offenses. The second part is devoted to the prosecution's case and contains chapters on the initiation, duration and termination of absence, leave, the communication of orders as related to AWOL, place of duty, fault, attempted AWOL, and factors aggravating the offense. In the third part, which embraces the defendant's case, the author discusses impossibility, mistake of fact, illegality, ambiguity of duty, *de minimus* and condonation.

In his introduction, the author expresses the hope that the book will be of use to the law student, practicing attorney, military attorney, military service school presenting a law course, ROTC student and, primarily, to the non-lawyer officer who plays a basic role at every stage of the court-martial process. However, it is doubtful that this hope will be realized because the book contains too many defects. It lacks a format. It is treatise, casebook and law review article all in one, and is, therefore, difficult to read with comprehension. Too often, the author fails to indicate that he is quoting from a case, and the reader is hard pressed to differentiate between the author's opinions and the authorities he relies upon. This fact alone makes the book of doubtful utility to any non-lawyer. In addition, the author assumes too much knowledge on the part of the reader and he skips rapidly from one topic to another without adequate introductory material setting forth precisely what the subject of discussion is and why it is important. On the other hand, the author attempts complicated explanations of simple concepts, with a resulting verbosity and confusion which frustrate comprehension. Comprehension is further frustrated by the fact that the author frequently criticizes cases by name only, without a clear statement of the holding.

Beyond question, the author has made a great effort to incorporate all available materials into his book, and it is a valuable source of information for the military lawyer and the military legal historian. However, the author has gone to such lengths that the reader may suspect that the book is a "play to the grandstand." The non-lawyer officer, for whom this book was written, will derive little or no benefit from ancient English and American cases and from cases decided in South Africa, the Philippines, India, Newfoundland, Palestine and the Straits Settlements of Penang and Singapore.

In one important respect, the book is incomplete in that it omits any discussion of the problem of proof. It is one thing to know the elements of a particular offense. It is an entirely different, and far more difficult, thing to know how to prove the elements. The non-lawyer officer who acts as Summary Court-Martial or who participates as counsel in Special Courts-Martial can refer to the Manual for Courts-Martial or the Law Officer's Manual if he desires to know the

elements of a particular offense. No similar publication exists to aid in the solution of the problem of proof. Frequently, a reviewing authority must set aside a conviction of AWOL by Special Court-Martial for failure of proof, although it is apparent from the record that the offense could have been proved. The fault is attributable to counsel's lack of expertise, and, in this area, Mr. Avins could have made a significant contribution if he had included a chapter on proof.

By way of conclusion, it may be stated that the book would be an excellent first draft. However, it needed, and did not receive, thorough and competent editorial supervision. As it stands, the book falls short of the mark the author has set for it.

LAWRENCE HERMAN*

TRAFFIC VICTIMS, TORT LAW & INSURANCE. By Leon Green. Indiana: Northwestern University Press, 1958. Pp. 128. \$4.00.

Tort law is that body of precepts which serve formally as criteria in the distribution of certain kinds of risks. Through various patterns of community intervention and private agreement, the onus of a given loss may fall on its immediate recipient, on another party to the loss producing transaction, or may be distributed over the community at large. The rules of tort law serve as formal guides in deciding where this burden should be placed in a particular case. Since a given configuration of guides represents the response of the community to recognized problem areas, it is natural that as the problems change these formal criteria alter—overtly by conscious design or covertly by subtle changes in meaning, interpretation and application.

We are occasionally presented with a study which, by spanning several centuries of growth in a hundred pages or so, is able to sketch broad changes in the patterns of risk distributing criteria and to evaluate these changes in terms of current problem areas.¹ In this volume, Professor Green has given us such a synopsis of the developing law of negligence and its relation to the problem of compensation in traffic cases.

The early nineteenth century saw a lessening of the "strict" liability imposed by earlier tort law and the growth of negligence as an important tort doctrine. Green traces the gradual articulation of the classical theory of negligence (and the elaboration of the respective defenses) through cases involving railroads, employers and em-

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1. A very recent and parallel example is EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951).

ployees, landowners, manufacturers, suppliers and other categories. The strong defense-orientation of classical negligence is said to have been aimed at "freeing infant enterprise of the 1800's from the burdens of tort liability imposed by the strict morality of earlier law."²

Late in the nineteenth century, the pendulum began to return and the scope of liability slowly expanded. The *res ipsa* doctrine, *Rylands v. Fletcher*, extended nuisance liability, and the increased protection of intruders were some of the landmarks of this movement. Both the "prima facie negligence" and "negligence per se" doctrines assisted the plaintiff in his case, and the change within the negligence test itself³ ultimately "gave negligence law its widest extension of the century. . . . [and] opened areas to litigation which were thought to have been forever fenced off by the decisions of the 1800's."⁴ The reversal of this trend is said to be due to the growing feeling that "it did not pay [as it did during the infancy of industrial enterprise] to place the risks of our industrial society on its victims."⁵ Since modern enterprise is more able to bear the risks it creates and since those risks continue to grow severe beyond the capacity of individual victims, the twentieth century has seen this trend continue to enlarge the ambit of tort liability.

Turning to the present, Green finds that even this increasingly liberal negligence doctrine is unable to cope adequately with that unique twentieth century problem, the traffic casualty. Both the frequency⁶ and the complexity⁷ of traffic cases make impossible their adequate adjustment by traditional doctrines and procedures. "Negligence law and its administration in its most important area," concludes Green, "stumbles along wholly incapable of providing remedies for the ever-mounting toll of traffic casualties."⁸

Green's concluding chapter contains a detailed affirmative proposal for a solution to the problem he has described—a proposal that merits careful study. In barest outline, the plan substitutes for present operator liability insurance a system of compulsory *vehicle* loss insurance for the benefit of any person injured by the use of the vehicle, and replaces present jury trial procedures with a limited trial to a master under the supervision of a local court. The only issues at this "trial" will be the fact and extent of the loss and, where contested,

2. GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* 31 (1958).

3. *Id.* at 54. Green discusses Brett's formula stated in *Heaven v. Pender*, 11 Q.B.D. 503 (1883) and its final approval in the United States in *McPherson v. Buick Co.*, 217 N.Y. 382, 11 N.E. 1050 (1916).

4. *Id.* at 54.

5. *Id.* at 49.

6. Green notes that there were 40,000 deaths and 1,400,000 injuries caused by the automobile in 1956. *Id.* at 92.

7. One must read Green's description of this complexity (page 67) to feel the full force of his argument.

8. GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* 81 (1958).

the identity of the vehicles involved. Damages will be measured by ordinary rules with the important exception that no recovery will be allowed for pain and suffering. Such a plan, Green concludes, will insure that "injuries—all serious injuries—will be compensable by the most adequate remedy that fair consideration and complete adjustment can provide."⁹

There is nothing novel about proposals to alter the existing scheme of compensation for traffic victims.¹⁰ Indeed, discussions of the problem began to appear in legal periodicals as much as forty years ago¹¹ almost before the automobile was established as a reasonable means of transportation. But there are some novel aspects of Green's proposal.¹² Of special interest is the conceptual framework Green uses as a base for his proposal. It is customary to consider the nineteenth century as the age of rugged individualism and to regard the classical defense-oriented negligence doctrine it produced as one of the implications of a laissez faire political system.¹³ This equation of orthodox negligence theory with individualism (and its alleged corollary, limited government intervention in the risk distributing process) has become so commonplace that proponents of change in this area have necessarily been forced into constructing antithetical conceptual equivalents. That is, the "return" of the liability pendulum which in the late nineteenth and early twentieth century has so vastly expanded the scope of liability is usually described as a shift from "individualistic" to more "socialistic" criteria of risk distribution.¹⁴ We are attempting to satisfy what Bohlen has called "the more highly socialized modern sense of justice."¹⁵

Leon Green squarely reverses this traditional analysis. The nineteenth century, says Green, was an age in which protection of the *group* was favored at the expense of the individual—to protect the community's interest in developing enterprise, the individual victims of that enterprise were sacrificed.

9. *Id.* at 101-02.

10. For detailed discussion of various proposals and full citations to the relevant literature, American and otherwise, see Ehrenzweig, *Full Aid Insurance for the Traffic Victim—A Voluntary Compensation Plan*, 43 CALIF. L. REV. 1 (1955).

11. Carman, *Is a Motor Vehicle Compensation Act Advisable?*, 4 MINN L. REV. 1 (1919); Rollins, *A Proposal to Extend the Compensation Principle to Accidents In The Streets*, 4 MASS. L.Q. 392 (1919).

12. The concept of loss insurance seems to be gaining recognition, and has been discussed elsewhere. See, and compare with Green's proposals, Ehrenzweig, *op cit. supra* note 10 at 20, 24.

13. A typical statement is that the growth of negligence in the nineteenth century "was but another manifestation of the individualism which underlies laissez faire as a political philosophy." 2 HARPER & JAMES, THE LAW OF TORTS 752 (1956).

14. See PROSSER, TORTS 16 (2d ed. 1955); 2 HARPER & JAMES, THE LAW OF TORTS 753 (1956).

15. BOHLEN, STUDIES IN THE LAW OF TORTS 440 (1926).

We speak of the period as one of rugged individualism. . . . It is much nearer the truth to think of it as the period of group welfare. The individual had to give way for the welfare of the group—not merely the enterpriser, but all of us . . . citizens of every type who hoped to profit by the creative genius and business ventures of the day.¹⁶

Conversely, the twentieth century, rather than being an age of increased concern for the group at the expense of the individual, has been a period of recognition “that the strength of the group lies in the strength of the individual—that he is not expendable.”¹⁷

In comparing the orthodox analysis with Green's, it is a fair question whether the analyses do not cancel each other out. Where two incompatible explanations are so plausibly interchangeable, perhaps neither reaches the heart of the matter. What Green has perhaps demonstrated in the final analysis, is that phrasing the issue in terms of the individual *versus* the group is of little utility.¹⁸

Much of the confusion surrounding the debates over similar compensation plans stems from an involvement with abstract political slogans with perhaps individualism and socialism being key terms.¹⁹ By making awkward this traditional joinder of issues Green makes his proposal difficult to discuss in terms of political generality. Critics and supporters alike will be forced to evaluate the plan in terms of the relatively low level standards of costs, demonstrable needs, and administrative feasibility. Since this is a level of argument from which evidential tests have presumably not been barred, one cannot help but feel that Professor Green has done us a service in this regard.

Few areas of social science research have available so persuasive a demonstration of a present inadequacy as is available to students of this problem. The classic statement of that inadequacy over twenty-five years ago²⁰ resulted in considerable agitation for a system of compulsory insurance and a way of eliminating fault as a base for liability. In opposition to these proposals, various interests pressed and secured compromise measures such as the now widespread financial responsibility laws.²¹ Since this early experiment, the problem has continued

16. Green, *op. cit. supra* note 8 at 33.

17. *Id.* at 61.

18. Which is not to say that this was Green's intent. See Green, *The Individual's Protection Under Negligence Law: Risk Sharing*, 47 Nw. U.L. Rev. 751, 770 (1952).

19. For typical arguments using these slogans, see Lilly, *A Brief Statement, Etc.*, 16 A.B.A.J. 756 (1930); Sherman, *Grounds For Opposing the Automobile Accident Compensation Plan*, 3 LAW & CONTEMP. PROB. 598 (1936); McVay, *The Case Against Compulsory Automobile Insurance*, 15 OHIO ST. L.J. 150, 161 (1954); *Symposium*, 25 N.Y.S. BAR ASS'N BULL. 295-345 (1954).

20. COLUMBIA UNIVERSITY, COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932).

21. See Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. Rev. 300, 305 (1950).

without relief in what amounts to the clearest demonstration possible that the problem will not succumb to compromise. A recent commentator observes:

The development in court enforcement of claims and the spread of financial responsibility legislation with security requirement, together with an increase in the number of voluntarily insured motorists, give the victim perhaps a slightly greater hope of recovery than in 1932. But aside from these lesser developments, the problem still appears substantially undiminished.²²

It would seem fair to suggest that continued inability and refusal to recognize the inadequacy of the compromise may find support in the emotional attraction and repulsion of terms such as "individualism" and "socialism." Perhaps a fresh look at the increasingly tragic automobile problem, minus issue-clouding generalities, offers some real hope for its solution.

WILLIAM R. ANDERSEN*

22. Grad, *op. cit. supra* note 21 at 330. The insurance industry's awareness of the existing inadequate compensation pattern is attested by the introduction of new types of coverage, specifically aimed at "the problem of the uncompensated highway accident victim." See, Gottomoeller, *Family Compensation—Why and How*, 9 FEDERATION OF INSURANCE COUNSEL QUARTERLY 74 (1959).

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