

BOOK REVIEW

Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution. By BENJAMIN STRAUMANN. Oxford: Oxford University Press, 2016. Pp.xiv + 414. Hardcover, \$85.00 ISBN 978-0-19-995092-8. Also available as e-book, ISBN 978-0-19-995093-5.

A constitution is a set of higher-order, pre-political rules that make government by politicians possible; that is, it is a blue-print for governance. Straumann describes the essence of the Roman Republican constitution in eight carefully argued chapters, showing that the fall of the Republic was not, as Sallust would have it, the result of a failure of virtue, but rather of the deliberate breaching of the Roman constitution through serial usurpations of power by various members of the Roman ruling classes, from the brothers Gracchus onward. For him the Roman constitution is the central interpretative criterion for understanding early modern constitutionalism (and also the issue that sets Roman political thinking apart from the Greek).

Straumann's point of departure is Classical Rome; yet the largest part of the book is devoted to analyzing how early moderns, from Jean Bodin (1530–1596) onward, received and interpreted the earlier era. Awareness of the pitfalls that led to the collapse of the Roman constitution, he argues, was what guided early modern political thinkers such as the American Founding Fathers to frame the US Constitution in the manner they did.

This reviewer, normally more inclined toward literary criticism, was intrigued by the title of Straumann's work and was happy to be entrusted with its review. Living in a country (South Africa) with an almost brand new (twenty years old) constitution, I am constantly impressed by the manner in which the limits of this constitution are tested, sometimes even by powers within Government, and of the way the highest court in the land (the SA Constitutional Court) serves to safeguard it. During the several months during which I slowly and carefully read (and briefly summarised for myself) Straumann's work, political events in both my country and in the approach to the US Presidential elections were illuminated for me by what I was learning from Straumann's lucid exposition of what a constitution is and what it does, and what happens when it is not adhered to.

A constitution need not necessarily exist in written form (as in the US and South Africa), but can be customary, that is, hereditary (as is the British constitution). Straumann's criteria for the recognition of a constitution (18) are its entrenchment, its political and normative importance, and its upholding of rules with a juridical quality that constrain the exercise of unbridled power.

Part I is titled "Inchoate Constitutionalism in the late Roman Republic". In two chapters, relying largely on Cicero's writings, Straumann explores in turn the Roman concept of a constitution (27–62), political emergencies that arose during the era in question and the extraordinary powers allowed (constitutionally or otherwise) to individuals to meet these emergencies (63–117). Chapter Three considers constitutional rights at Rome (118–145). For Cicero, the Roman constitution was drawn from three sources: the *mos maiorum*, Roman laws (*leges*) properly passed, and the idea of "natural justice" (*ius*, not *lex*). *Salus populi* (the weal of the people) was its highest aim. An inbuilt protection of the public weal was the right of appeal (*provocatio*). All these points, and many others, Straumann illustrates with copious recourse to events (mostly) of the last two centuries of the Republican era.

According to Straumann, two differing approaches to the Roman constitution (popular versus senatorial) led to a questioning of its fundamental principles. Yet these two elements of the state were the basis for the Polybian (and Ciceronian) concept of "balance of powers" and strain between the two was not necessarily unhealthy. Laws passed *per vim* were unconstitutional, as was abrogation of the right of appeal (as in the case of the Catilinarians), but, as the constitution in cases of crisis allowed for the appointment of a (limited-term) *dictator*, the acts of such dictators were constitutional. A *dictator* like Sulla could, however, not legislate without ratification by the Roman people, who were considered sovereign. Cicero's claim that Catilina was "no longer *civis*, but *hostis*" and therefore open to any punishment without the right to appeal, was dubiously constitutional. Straumann tellingly compares this with the "emergency measures" enacted in the US after 9/11. Space precludes discussion of Straumann's exposition of the similarly dubious status of various extraordinary commands afforded leaders such as Scipio Aemilianus or Pompeius Magnus.

The second part comprises two chapters on the Roman awareness of the existence of a hierarchy of laws, Chapter Four dealing with Cicero's views on the legitimacy of political authority (149–190) and Five comparing Greek and Roman constitutional thought and practice (191–237). Some of these issues, such as limits to the sovereignty of the people, were briefly addressed in Part I, but are now

treated in greater detail. Again lack of space prevents discussion of these issues, as also Straumann's detailed exposition in chapter Five of the Aristotelian idea of the "virtue of the ruler" as the prime issue in governance, with the "good life" as its main aim.

Part III devotes three chapters to "the limits of virtue" as political criterion, in refutation of the Greek thesis and against the apparently common modern critical practice of lumping "Graeco-Roman thought on constitutionalism" together as a unit. In a further careful analysis of Roman political thought (again largely Cicero's thought, particularly on the centrality of the protection of private property and obedience to a higher order "natural law"), Straumann in Chapter Six discusses the Roman republic as a "constitutional order" (241–259). Chapter Seven turns to the early modern era with "Machiavelli and the anti-constitutional tradition" (260–277). Chapter Eight, on "Jean Bodin and the fall of the Roman republic", offers an extensive critique of Bodin's views on Roman constitutional issues (278–302).

Part III and the "Epilogue" (303–341) together offer details of the interpretation of the Roman constitution by a long list of thinkers, starting with Machiavelli's acceptance of Augustine's portrayal of "Roman virtue" as the "preservation and aggrandisement of the state" (which derived from the Sallustian interpretation rather than the Ciceronian). Again space precludes anything more than a list of these thinkers, from Alberico Gentili (who offered a "Hobbesian alternative"), Sir John Spelman, Botero and Richelieu, Marchmont Nedham, Harrington, Walter Moyle, the Founding Fathers Trenchard and Gordon (who decried "cant-words like 'virtue'"), Locke, Montesquieu (and his influence on Jean Jacques Rousseau), Bonnot de Mably (who rescinded his support for monarchical rule, turning to "ancient republicanism") to a brief excursus on the French "Reign of Terror", and, finally, in the United States, Jefferson, John Adams, Gordon Wood and Samuel Adams. Adams, a classicist reinterpreting the Scottish enlightenment thinkers Hume and Smith, defended bicameralism as the essential Ciceronian-Polybian tool toward "balance of power". He, with Hamilton and James Madison, won over Jefferson and Thomas Paine in support of a fixed constitution for the US that could not be redesigned by a new "constitutional committee" every twenty years or so, as the latter two had advocated.

This wraps up the case Straumann has made throughout: that a Roman-type constitution featuring higher-order normative laws based on what Cicero termed "natural justice" (as are both the US and SA constitutions), is preferable to reliance

on potentially virtuous law-making by a sovereign ruler, whether an individual or a group, as postulated by Aristotle and followed by many subsequent political theorists.

The usual appendices (Bibliography, general and classical indices) run to a further seventy-one pages (343-414), which makes the work useful for both ancient historians and political theorists as well as for the general reader. Straumann teaches at the New York University School of law. His background as both lawyer and educator shows in his meticulous legal argumentation and his carefully didactic reiteration of key points in that argument, which make for easy navigation by a less informed readership. This small quibble aside, it has been a pleasure for this reader metaphorically to sit at the feet of a master of constitutional studies.

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