

October 1987

The Concept of Tradition in Constitutional Historiography

Mark Tushnet

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#)

Repository Citation

Mark Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 Wm. & Mary L. Rev. 93 (1987), <https://scholarship.law.wm.edu/wmlr/vol29/iss1/11>

Copyright c 1987 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

THE CONCEPT OF TRADITION IN CONSTITUTIONAL HISTORIOGRAPHY

MARK TUSHNET*

These comments address some aspects of a theme suggested in the second part of Professor Horwitz' paper¹ from the perspective of one who is not a historian of the late eighteenth century but who, as a student of contemporary constitutional law, is a consumer of discussions about the era of the framing. The theme is the recurrent attraction of the concept of republicanism as a way to make sense of at least some aspects of the Constitution.² I want to direct attention to three points concerning the concept of a republican tradition, which add up to an expression of skepticism about the utility of the concept. The first point is historical, and the others involve the contemporary application of assertedly republican ideas.

The historical point is that, as Professor Horwitz suggests, giving the republican ideal its proper place in the historiography of the Constitution is no small task.³ The difficulty is that republicanism can have two quite distinct meanings. First, the term can refer to the particular group of ideas that coalesced in the late eighteenth century, and which historians like Pocock, Bailyn, Wood, and Appleby have retrieved for us.⁴ Alternatively, the term can refer to a tradition, which is different from a complex of ideas that can be precisely identified as being in existence during any particular period. I suggest that traditions consist of the relations among complexes of ideas.⁵ That is, at one point people characterize their be-

* Professor of Law, Georgetown University Law Center. A.B., Harvard University, 1967; J.D. and M.A., Yale University, 1971.

1. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 *WM. & MARY L. REV.* 57 (1987).

2. Surprisingly little attention has been afforded to the possibility that republicanism might help make sense of the Reconstruction amendments to the Constitution.

3. Horwitz, *supra* note 1.

4. *See id.* at 58 n.7.

5. This formulation differs in important ways from my own prior uses of the concept of the republican tradition. *See, e.g.*, Tushnet, *Federalism and the Traditions of American*

liefs—the complex of ideas they hold—as a coherent whole. When those beliefs become a tradition, however, the coherence of the whole may dissolve. Successors orient themselves to the tradition by identifying some elements in their predecessors' thought to which they continue to adhere and disregarding or explaining away other elements in that thought which they feel compelled to reject.⁶ Viewed in this light, republicanism as a tradition would consist of the orientation that successive generations had toward the historical complex of ideas now characterized as the republicanism of the late eighteenth century.

If that is so, however, whether the concept of republicanism should continue to be invoked in discussions of constitutional development is unclear to me. It seems that few people in any generation after the founding conceived of themselves as having the requisite relation to republicanism. That is, few people oriented themselves toward the body of eighteenth-century thought. One might make the point succinctly by noting that the historians I have mentioned had to retrieve republicanism by refreshing our memories.

In recent constitutional theorizing, Frank Michelman characterizes republicanism as a dissenting or minority tradition.⁷ Historians who have tried to trace the descent of republicanism have indeed located it in the artisan class of ante-bellum New York,⁸ the peasantry of upland Georgia after the Civil War,⁹ and most ingeniously in the followers of Huey Long and Father Coughlin.¹⁰ Yet,

Political Theory, 19 GA. L. REV. 981 (1985); Tushnet, Book Review, 100 HARV. L. REV. 423 (1986). Obviously, I think that the present formulation is better than the earlier ones.

6. My reformulation was provoked in part by my discomfort with certain statements in public discourse about the Judeo-Christian tradition. I had thought that the Judeo-Christian tradition was actually a Christian tradition; that is, only Christians can describe a Judeo-Christian tradition because they orient themselves to a set of ideas that includes elements that comprise the essence of Judaism. Conversely, Jews do not orient themselves to a set of ideas that includes elements that comprise the essence of Christianity.

7. See Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 18 (1986).

8. See S. WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850* (1984).

9. See S. HAHN, *THE ROOTS OF SOUTHERN POPULISM; YEOMAN FARMERS AND THE TRANSFORMATION OF THE GEORGIA UPCOUNTRY, 1850-1890* (1983).

10. See A. BRINKLEY, *VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN, AND THE GREAT DEPRESSION* (1982).

if my suggestion about the proper way to conceptualize republicanism as a tradition is correct, these efforts are fundamentally misguided. Whatever linkages today's historians can find between elements of late-eighteenth-century republican theory and the concerns of artisans, peasants, and the like, it seems indisputable that those people did not orient themselves to the republican tradition. Indeed, I suspect that in terms of self-conception, most of the people these historians wrote about thought of themselves as attempting to fulfill the promise of liberal or Protestant thought as it was in the late eighteenth century.¹¹ The historiographical problem, then, is to make sense of republicanism as a tradition.

This problem is exacerbated when one considers that historians have not attempted to locate traces of republican thought even in majority traditions. Most notably, any systematic effort to develop linkages between late-eighteenth-century republicanism and later thought eventually will conclude that republicanism animated the twentieth-century Progressives and the New Deal at least as much as it animated the artisans, peasants, and other dissenters.¹² When the historians do the necessary work, constitutional lawyers will find the concept of republicanism rather less illuminating than it now appears to be. The concept will be spread so broadly across the spectrum of constitutional thought in the United States that it will tell us little about any particular topic.

The difficulty may arise because constitutional lawyers who recently have been attracted to the idea of republicanism have failed to distinguish between a complex of ideas, elements of which are held by different people at different times, and a tradition. The eighteenth-century republicans and their contemporaries, the eighteenth-century liberals, articulated numerous ideas, only some of which remain attractive. Identifying ideas of people in the past which today seem attractive, and from those ideas constructing a body of contemporary thought, is quite different from that construction, itself attractive because it is composed of only those elements of past thought that are attractive today, with some pur-

11. I take this to be the essential argument, often obscured, however, in J. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS* (1984).

12. For example, I would think that the idealist liberalism of T.H. Green and John Dewey could readily be reinterpreted as republican.

ported historical body of thought such as eighteenth-century republicanism. I believe that republicanism as a tradition had relatively few adherents until its recent rediscovery.

I do not mean to suggest that the elements of republican thought that people have recently found to be attractive are not in fact attractive. Rather, whatever is attractive about those elements must be defended in contemporary terms, and not as the legacy of a valued tradition. In a sense, historians' recent rediscovery of republicanism has been appropriated by constitutional lawyers in the same way we always appropriate historical work, by converting it into a hagiographical yearning for the restoration of what we have lost. Concerned that we will be unable to develop cogent defenses for what we find attractive in republican thought, we re-present this thought to ourselves as valuable *because* "the framers" thought it was valuable.¹³

The theory that eighteenth-century republicanism was a complex of ideas suggests another dimension of the problem.¹⁴ That complex unravels once we attempt to disentangle the currently attractive strands from the currently unattractive ones. We are left with nothing that has any historical pedigree. We might consider, therefore, two elements of republicanism that recent constitution-
alists have found attractive: its concern for a certain type of egalitarianism, and its reliance on concepts of public virtue.

Eighteenth-century republicans were egalitarians of a certain sort. They were sure that a government controlled by people who were dependent on others for their livelihoods would become corrupt. This dependency was troubling for several reasons. If the de-

13. The Burkean tradition of conservative thought might defend aspects of republican thought in this way, but such a defense would not succeed here. Burkean conservatism defends whatever arrangements happen to have developed in a society on the ground that they are that society's traditions and therefore must be valuable to it. Yet, if republicanism is not in fact a viable tradition, as I have suggested, the Burkean defense of the republican revival in constitutional law is unavailable. This point indicates one of the most serious problems with Burkean thought—its inability to account for change except by stating that whatever changes occur are those that are appropriate for the society. See, e.g., C.B. MACPHERSON, *BURKE* 38-50, 71-74 (1980).

14. The rediscovery of the republican tradition may allow contemporary liberals to meet proponents of the jurisprudence of original intent on originalist grounds. By invoking republicanism, contemporary liberals can contest the claim that originalism is linked to conservative results.

pendents followed the dictates of those upon whom they depended, they would not inject into public deliberations the disinterested concern for the public good that republicans thought essential.¹⁵ Alternatively, they would be so distracted from the public good by the daily struggle to survive that they would attempt to utilize the government to protect their parochial interests. Their superiors, however, in this view, were also unlikely to contribute to the public good, because their characters would be shaped by the experience of having people dependent on them, which would lead to arrogance and the view that the social order existed to promote *their* parochial interests.¹⁶ The eighteenth-century republicans had a straightforward solution to the problem of dependency: restrict the franchise to those who were not dependent. Within the restricted franchise equality would prevail; outside it, inequality would not threaten the republic.¹⁷

Contemporary admirers of republicanism obviously do not defend the reimposition of franchise restrictions that two centuries of struggle have eliminated. They believe instead that republicanism can be revitalized by establishing the independence of all who are currently enfranchised. I, too, find that vision quite attractive. It is not really a republican vision, however, insofar as it is predicated on an expansion of the franchise well beyond what the eighteenth-century republicans thought appropriate. Once again, emphasizing the historical definition of republicanism draws us further away from it rather than allowing us to appropriate it selectively for our present purposes.

15. Voting in the open, for example, would lead the dependents to give their vote, not technically, but in fact, to those on whom they depended.

16. The republican regard for independence explains why historians have been able to trace republican-like concerns to artisans and peasants; these were precisely the people who had some of the characteristics of an independent population but were feeling the pressures of social change that were transforming them into dependents.

17. Eighteenth-century republicans also had a solution to the potential instability created by the resentment of those outside the franchise. The solution was a culture of deference and patriarchy. This solution, however, is obviously and properly irretrievable today. Joyce Appleby has cogently argued that this irretrievability resulted from the expansion of the capitalist market economy, which itself was defended by republicans as valuable. J. APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S* (1984). To that extent, then, eighteenth-century republicanism was not coherent as a political economy.

A second element of republicanism that recently has become attractive is its concern for public virtue. That concern seems to offer an escape from the debilitating effects of interest group competition on the political process.¹⁸ In place of selfish interest, concern for the public interest would prevail. Michelman has suggested, however, the difficulty of recapturing a sense of "the public interest" once we have abandoned other elements of the world view that constituted eighteenth-century republicanism.¹⁹ For example, republicanism's competitor, liberalism, has become so strong that reconstituting a public policy that was not neutral among alternative visions of the good would be impossible. The republican state, however, must reject neutrality in order to encourage the civic virtue that is its foundation.

Consider in this connection the proposition that eighteenth-century republicans regarded organized religion as an essential element in the institutional arrangements that supported civic virtue. The heirs of the eighteenth-century republicanism thus are the supporters of the legislation at issue in *Edwards v. Aguillard*,²⁰ the "equal time for creationism" case. Pointing out the connection between civic virtue of the past and the present necessity for the republican state to avoid neutrality on matters critical to the development of appropriate character in the citizenry explains why many people are concerned that the republican tradition is necessarily authoritarian and for that reason unattractive.

Once again, however, this conclusion is not correct. Precisely because republicanism was a complex of ideas that made sense only as a unit, we cannot select from it only one or two strands, nor can we ignore it because one or two strands are unattractive. Unfortunately, neither can we re-appropriate it as a unit, for too much about eighteenth-century republicanism depended for its sense on a social setting in which religion meant Protestant Christianity, the franchise was restricted, and other forms of unattractive exclusions from participation in government prevailed. This suggests to me a quite modest conclusion: that the rediscovery of the republican

18. See, e.g., Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

19. Michelman, *supra* note 7, at 21-23.

20. 107 S. Ct. 2573 (1987).

tradition can have for contemporary constitutionalists only the significance that all historical work has for us. It shows us that we must constitute our society for ourselves, aware of but neither bound by nor able to reproduce the experiences of the past.