

# Imposing Constitutional Traditions

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## IMPOSING CONSTITUTIONAL TRADITIONS

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One of the many virtues of Horwitz's essay is that he directs us to consider the ideological continuities in American constitutional history.<sup>1</sup> As legal and constitutional historians learn to emphasize diversity, complexity, and particularity, as they begin to reconstruct constitutional history as an arena of struggle between varying and contending normative orders,<sup>2</sup> a consideration of the constants that have channeled and structured ongoing conflicts and positions has paradoxically become more important.

I am also reluctantly coming to believe that it may make sense to think historically in terms of long-term political traditions.<sup>3</sup> The common trait shared by early-nineteenth-century urban artisans, late-nineteenth-century agrarian populists, and a few early-twentieth-century progressives, which allowed each to become signposts of a continuing republican tradition, is not easy to define. Nevertheless, noting continuities of language and of political posture is important. This, at a minimum, is what the idea of a tradition allows us.

The allure of giving primacy to a liberal-republican split comes from the possibility of defining a limited number of paradigmatic conflicts in our constitutional history. What are the axes of such continuing conflict? Horwitz raises two.<sup>4</sup> I would add a third. The two raised by Horwitz are the claimed neutrality of the legal regime and the relative size of the legitimate political regime. First, in all places, in all times, throughout our national history, liberals have insisted that the legal order must maintain neutrality towards litigants and others who come to it for resolution of their conflicts.

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

2. See *Rights Consciousness in American History*, 74 J. AM. HIST. (1987) (forthcoming).

3. *Contra* Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 WM. & MARY L. REV. 93 (1987).

4. Horwitz does not, however, suggest that these two axes of conflict exhaust the inventory.

Republicans, by contrast, have believed that a legitimate legal order ought to pursue substantive visions of the public good. Second, in all places, in all times, throughout our national history, liberals since Madison have argued the virtues of large and extended republics. Meanwhile, those sometimes labelled republicans have almost always regarded small size as a signal characteristic of a virtuous political order.

A third and perhaps too obvious distinction between liberals and republicans is in the idea of the citizen. For liberals, to the regret of many political theorists, the continuing hallmark of citizenship has been self-seeking, relatively passive, possessive individualism. By contrast, the allure of republicanism may stem from its notion of active, public, virtuous citizenship as a prerequisite to legitimate government.

These differing views of citizenship reflect and enrich both of Horwitz's themes. For republicans, small size was a prerequisite for participatory citizenship, because a virtuous republic required the direct vigilance of an active, unmediated citizenry, and because the relationship between state and citizen in a republic was premised on both a shared community of restraint and a deep suspicion generated by the potential to mask or control aggrandizements of power. An official ideology of legal neutrality would be nothing but a crucial indication of the corruption of the body politic. To assert formal neutrality would be to claim a frame of reference that deviously justified the distancing of the citizen from participation in political and legal order.

In contrast, liberals have viewed the large size of the federal government as an advantage, in large part because it would free independent, self-seeking individuals to pursue private goals, without thereby destroying the legitimacy of the state. Citizens would not have to devote their full time and energy to the conservation of the polity. Legal neutrality was likewise important because of liberal skepticism that any particular collection of citizens would itself be neutral or disinterested or virtuous or public-spirited enough to be entrusted with the articulation of public and legal values.

Horwitz's article shows us both the allure and the dangers of dividing our constitutional world between republicanism and liberalism. Along with Frank Michelman's recent *Harvard Law Review*

article,<sup>5</sup> Horwitz's essay suggests the foundations for a less nostalgic constitutional neorepublicanism. As always, Horwitz gives us a large view of constitutional history, one that allows us to see the whole of our national history without denying the seriousness and the significance of constitutional conflict.

I remain skeptical, however, that liberalism and republicanism are useful categories to define the primary continuing traditions of conflict in two centuries of American constitutional history. I doubt whether we ought to divide our constitutional history between liberalism and republicanism. Recent scholarship has definitively demonstrated the significance of the liberal-republican conflict in the construction of our constitutional origins.<sup>6</sup> Much of the impressive recent work has suggested the continuing availability of republican categories of thought for a variety of groups in constitutional opposition to mainstream liberal doctrines.<sup>7</sup> I am unconvinced, however, that the vocabulary used by these groups was necessarily antiliberal simply because it played on republican themes.

In imagining liberalism and republicanism as competing structures, we have underemphasized the fuzziness of the boundaries between the two at many points in their history.<sup>8</sup> For example, determining whether free laborers in early- or mid-nineteenth-century American cities were liberals or republicans is a fruitless task. They can plausibly be imagined as embodiments of republican values. But they were also deeply liberal, not just because they constantly quoted Adam Smith and spoke in terms of the free market, but also because, to use Horwitz's category, they were deeply committed to notions of a neutral state. Indeed, their attack on crimi-

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5. See Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) (discussing the conflict between the "world creating" jural immanence of the unified community and the "world maintaining" jural transcendence of the diversified abstract state).

6. See J. APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER* (1982) (the republican vision of the 1790s); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); G.S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

7. See, e.g., Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767.

8. This is, I should emphasize, a point made by Horwitz as well. Horwitz, *supra* note 1, at 73-74.

nal conspiracy prosecutions and, later, on the labor injunction was premised on the non-neutrality of state involvement in labor relations.<sup>9</sup> One can say, perhaps correctly, that these free laborers were committed to notions of a neutral state for strategic reasons, but whether strategic or not, their writings suggest a public, constitutional commitment to liberal principles that we should not ignore. In our legitimate desire to avoid propagating a winners' constitutional history, we must avoid investing our losers with a monolithic and ahistorical character that is untrue both to their particular circumstances and to the historical contexts within which they struggled.

More importantly, I fear that the fashion of investing republicanism with the colors of our official constitutional opposition discourse carries definite political costs. Such an assumption may blind us to the political and moral ambiguities that republicanism traditionally has borne. It may hide alternative voices and alternative traditions. It may keep us from recognizing the transformative and destabilizing visions that are a part of liberalism.

I intend to spend most of my remaining time on the first of these unclear but present dangers. First, however, I want to say a few words about the third danger; that is, the potential denial of the transformative vision of liberalism. Obviously, in these cynical days, when we identify contractualism with the *Baby M.* case,<sup>10</sup> we need to remember the liberating potential once identified with the idea of contractual, self-seeking, self-creating behavior. Steinfeld emphasized this concern in his study of the changing legal understanding of indentured servitude and dependency.<sup>11</sup> Without historical work such as Steinfeld's, recovering a sense of the release that a liberal political economy and constitutional order gave to artisans who had previously been formally constrained by the le-

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9. See Forbath, *supra* note 7. See also H. ROCK, *ARTISANS OF THE NEW REPUBLIC: THE TRADESMEN OF NEW YORK CITY IN THE AGE OF JEFFERSON* (1979); S. WILENTZ, *CHANTS DEMOCRATIC* (1984) (New York City and the rise of the American working class from 1788 to 1850).

10. *In re Baby M.*, 217 N.J. Super. 313, 525 A.2d 1128 (1987).

11. R. Steinfeld, *From Servant to Employee: Property and Jurisdiction in the Early Modern Master/Servant Relationship* (1986) (unpublished manuscript). The same sense of transformation also pervades much of Appleby's work. See J. APPLEBY, *supra* note 6; J. APPLEBY, *THE ORIGINS OF ECONOMIC LIBERALISM* (1978).

gally enforceable statuses of servanthood is very difficult.<sup>12</sup> Similarly, one cannot read the writings of Elizabeth Cady Stanton without gaining renewed appreciation for the transformative potential that can be found in individualistic, contractual, self-seeking behavior.<sup>13</sup> For married women, as for other dependent individuals, the constitutional values of liberalism offered the promise of a life without hierarchy and illegitimate constraints. Liberalism itself has generated much of the criticism and the impetus for opposition to liberal constitutional doctrine.<sup>14</sup>

Exactly what is republicanism after the eighteenth century? Who embodies it as a living tradition? If republicanism is something more than just the compendium of "groups we like throughout American history," what are its salient features? To answer these questions, let me start by outlining the substantive features of seventeenth- and eighteenth-century republicanism, largely in terms of visions of the citizen. We can then decide where those features might be found in nineteenth-century public debate and action.

What is that early modern vision of the citizen? Let me sketch my abbreviated caricature of Pocock, one so cartoonlike that I won't even bother to apologize for obliterating all the complexities and subtleties of Pocock's marvelous work.<sup>15</sup> The study of sixteenth- and seventeenth-century republicanism begins with the problem of how to respond to permanent and irrevocable secular change, change promoted and constructed by an identifiable political regime. Such change is not divine, nor is it natural. Human agency has imposed this change, and the change is for the worse. The question that informs the Machiavellian moment, that informs all republican political and legal thought, is who can stop or restrain change?

Machiavelli, in particular, had an answer: an aroused and militant—and military—citizenry. Only those people who can stop change are entitled to the status of citizen. How would they do this? Simply, these people would demonstrate their willingness to

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12. See R. Steinfield, *supra* note 11.

13. E.C. STANTON & S.B. ANTHONY, CORRESPONDENCE, WRITINGS, SPEECHES (E. DuBois ed. 1981).

14. See Unger, *The Critical Legal Studies Movement*, 96 HARV. LAW REV. 576 (1983).

15. J.G.A. Pocock, *supra* note 6.

kill their rulers. Citizens, therefore, are those who have the capacity and the willingness to kill.

The problem that a republican citizenry raises for permanent—or even temporary—government is, of course, considerable. The resulting problem for republican political thinkers is how to make killing unnecessary, or less necessary, or at least occasional, without redefining the nature of the citizen. One answer, that of seventeenth-century English thought, is property.<sup>16</sup>

Property is the solution to the problem of killing for many reasons. These reasons do not include, however, a republican belief in a natural or prepolitical nature of property. Horwitz is absolutely correct that republicans saw property both as rooted in political sovereignty and as a constellation of political decisions.<sup>17</sup> Instead, property solves the republican dilemma of governmental legitimacy because property is imagined as a means simultaneously to constitute a citizen who is capable of taking up arms against his ruler and to make the use of those arms unnecessary. How does property create someone who is willing to take up arms? Because only the man<sup>18</sup> who has a stake or domain and can use these autonomous resources to resist the corruptions of a ruler will be willing to kill that ruler.

Conversely, by securing citizens in their possessions, by respecting vested property rights, the state imposes its own restraint, so that the king need not be killed. To the citizenry, the ruler says, "Look, I am respecting your property, leaving you with the material freedom to rise up and kill me. Therefore, I am not imposing those forms of irrevocable change that would mean the end of liberty. Consequently, you need not kill me." The institution of property thus offers both the deference of the state to the domain of the citizen, and a quasi-empirical legitimation of the state.

Property constitutes the citizen as the possessor of a domain. What he possesses is important. He possesses a farm, but he also "possesses" women, children, and servants. He is a smaller "sover-

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16. J.G.A. Pocock, *VIRTUE, COMMERCE, AND HISTORY* 56, 61, 68 (1985); see also J. HARRINGTON, *The Prerogative of Popular Government*, in *THE POLITICAL WORKS OF JAMES HARRINGTON* 389 (J.G.A. Pocock ed. 1977).

17. Horwitz, *supra* note 1, at 69-72.

18. Note the intentional use of this gender.

eign," able to meet the king as an equal. Both he and his ruler possess legitimate authority within their proper spheres.

The point of this romp through the land of Pocock is that republicanism is intensely patriarchal. The maleness of the republican citizen is not metaphoric; it is literal, it is direct, it is explicit. A scholar of the republican-liberal conflict might begin, therefore, by noting that the distinctiveness of liberalism, certainly in the eighteenth century, stemmed from its novel critique of patriarchy, particularly as it involved the relationship between fathers and sons.<sup>19</sup>

Where would this feature of a republican tradition be played out in our constitutional history? Let me describe one example.<sup>20</sup> Why were women abandoned by radical republicans after the Civil War? Why were the fourteenth and fifteenth amendments passed in forms that explicitly excluded women from participation in the reconstruction polity, even though abolitionist women had been the constant allies of the men who would become the architects of reconstruction?

The easy answer is that men of the nineteenth century, including radical republicans, were sexist. This, of course, is true, and relatively uninteresting. They were, however, also racist, yet they took their commitment to the enfranchisement of the black man with great seriousness. Because of their republican inheritance, they could not imagine how to accomplish this enfranchisement without constituting black men as possessors of domains of women and children, without making freedmen into "householders."<sup>21</sup>

The abandonment of women was not easy for most radical republicans. These republicans also believed in both the liberal notions of contractual capacity and the liberal critique of entrenched dependency.<sup>22</sup> The latter could and perhaps should have led to female enfranchisement. In this case, however, visions of republican

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19. For a wonderful study of eighteenth-century American culture, see J. FLIEGELMAN, *PRODIGALS AND PILGRIMS* (1984). See also M. GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

20. Others have identified different examples. See, e.g., C. STANSELL, *CITY OF WOMEN* (1986) (economic and social conditions of women in nineteenth-century New York City).

21. See E.C. STANTON & S.B. ANTHONY, *supra* note 13. To some extent, freedmen shared in this understanding of the prerequisites for their citizenship. See L. LITWACK, *BEEN IN THE STORM SO LONG* (1979) (a historical account of the aftermath of slavery, including reconstruction and its effects on the Southern states).

22. See *Brief for Plaintiff, Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 45-57 (1872).



citizenship took precedence over liberalism. The belief in how one constituted a citizen was deeply tied to the patriarchal notions rooted in republicanism.

This problem presents an example of real liberal-republican constitutional conflict. In this case, republicanism served as the political theory of stasis and constitutional conservatism. Liberalism, by contrast, might have been the source of disruption and constitutional redistribution.

In conclusion, let me restate three reasons for my skepticism about a project that would characterize our constitutional history as a continuing story of conflict between liberal and republican political theories. First, we must consider the costs of compartmentalizing analytic categories in understanding our constitutional past after 1800.<sup>23</sup> Certain constitutional positions, notably those of Native Americans, some feminists, some religious minorities, and occasionally environmentalists, cannot be reduced to either republicanism or liberalism. Second, before we constitute republicanism as "our" tradition, we must carefully consider whether our values bear any resemblance to the republican structure. We can, of course, name our values anything we want, including republicanism or neo-republicanism. At some point, however, we should recognize our own historic singularity, particularly if we become convinced, as I am, that the emotional energy that lies behind the original republican impulse is largely unknown to us. Third, in emphasizing republicanism as the continuing alternative to the liberal constitutional tradition, we may deny the disruptiveness and transformative characteristics that are a part of a liberal constitutional tradition. And that, as well, would clearly be a loss.

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23. A comparison with France, where political debate has at various times seemed to revolve obsessively around orientations toward the French Revolution, would certainly be in order.