Republicanism and Liberalism in American Constitutional Thought

William & Mary Law Review

Volume 29 | Issue 1 Article 8

Republicanism and Liberalism in American Constitutional Thought

Morton J. Horwitz

REPUBLICANISM AND LIBERALISM IN AMERICAN CONSTITUTIONAL THOUGHT

MORTON J. HORWITZ*

I. INTRODUCTION

Arguments in legal history often serve as "stand ins" for more general controversies in legal and political theory. One of the most dramatic examples of this phenomenon is the question of what actually *was* the character of American constitutional jurisprudence in the late nineteenth and early twentieth century—the period of the so-called *Lochner* Court.[1]

As I study the constitutional history of this period, I have increasingly come to believe that to a surprising extent, the picture we have of the Court between 1880 and 1937 is largely the product of winner's history My own view is that the Supreme Court maintained an astonishingly constant underlying vision during its first 150 years. The first sharp break, I would submit, occurs only after 1937

As you all will recognize, no dogma is more widely accepted in American constitutional history than the proposition that the late-nineteenth-century Supreme Court brought about the first radical reversal of American constitutional premises.[2] As an aside, let me point out that when the constitutional history of an earlier generation was written as a clash between nationalizing Federalists and states rights Antifederalists, the difference between the Marshall

---

* Charles Warren Professor of American Legal History, Harvard Law School. B.A., City College of New York, 1959; Ph.D., Harvard University, 1964; L.L.B., Harvard Law School, 1967.

1. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2, at 434-36 (1978).

2. *See generally* S. FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901 (1956); C. JACOBS, LAW WRITERS AND THE COURTS 85-93 (1954); A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH 1887-1895, at 209-21 (1960) (discussing several Supreme Court decisions in the 1890s that evidence a move toward judicial activism, particularly cases overturning the Income Tax Act of 1894); B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 130-38 (1942).

and Taney Courts was often represented as more sharply discontinuous than anyone would concede to be true today.[3]

Early in the twentieth century, when the progressives perceived industrial society as increasing in inequality and oppression, they became convinced that a redistributionist state was both necessary and just. Simultaneously, they sought to delegitimate the antiredistributionist picture of the neutral state,[4] which had become a widely shared constitutional ideal. The Income Tax Case of 1895,[5] though framed in more technical constitutional terms, was the ultimate expression of the view that any progressive—hence redistributive—income tax was illegitimate.[6] That view, I believe, had deep roots in early American constitutional history.

As I hope to show, the neutral-state ideal can be traced from early American political and constitutional thought to its application in the current debate over characterizing American constitutional thought as republican or liberal.[7] One of the ways to understand the debate between republicanism and liberalism in early American constitutional history requires a consideration of whether and when the idea of a neutral, night-watchman liberal state triumphed in American political thought.

---

3. *See* 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 278-320 (1922).

4. Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985).

5. Pollack v. Farmer's Loan & Trust, 157 U.S. 429 (1895).

6. *See also* A. PAUL, *supra* note 2, at 198-208 (discussing *Pollack*).

7. *See generally* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST AND THE FOUNDATIONS OF LIBERALISM (1986); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969); Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. 20 (1986); Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 WM. & MARY Q. 3 (1986); Ross, *The Liberal Tradition Revisited and the Republican Tradition Addressed*, in NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY 116 (1979); Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982).

II. LEGITIMATION OF THE NEW DEAL BY DELEGITIMATION OF THE *LOCHNER* COURT

A. The Rise and Fall of the Neutral State

Progressive historiography often represented the rise of substantive due process as a radical break in constitutional jurisprudence. In retrospect, this course of events seems similar to what John Marshall was doing under the contracts clause[8] and what the antebellum state courts were deciding under takings clauses[9] rather than some sharp discontinuity in constitutional ideology. The creation of antiredistributive constitutional checks on legislatures has always taken many-splendored paths in American constitutional law.

So why, if I am correct, was the so-called *Lochner* Court misrepresented as a unique era in American constitutional history? Why, moreover, does *Lochner* continue to stand as a symbol of everything that is to be avoided in constitutional adjudication?

A detailed defense of my view of the *Lochner* Court would take too much time. Suffice it to say that McCurdy's important work on Justice Field[10] and Jones' excellent reconsideration of Thomas Cooley[11] point in this same direction. An earlier generation saw the post-bellum rise of laissez-faire as a Lochnerian wish to let a free market trump protective governmental regulation. Revisionists see instead a continuation of the Jacksonian wish for a neutral state that would prevent "the interests" from using government to feather their own nests. Justices Cooley and Miller expressed their Jacksonian roots, for example, in the municipal bond cases.[12] The

---

8. *See* U.S. CONST. art. I, § 10.

9. *See* Bloodgood v. Mohawk & H. R.R., 18 Wend. 9 (N.Y. 1837); Beckman v. Saratoga & S. R.R., 3 Paige Ch. 45, 57 (N.Y. 1831); Gardner v. Village of Newburgh, 2 Johns. Ch. 162, 168 (N.Y. 1816); Raleigh & G. R.R. v. Davis, 19 N.C. (2 Dev. & Bat.) 431, 439-41 (1837); Harvey v. Thomas, 10 Watts 63, 66-67 (Pa. 1840).

10. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. LEGAL HIST. 970 (1975).

11. Jones, *Thomas M. Cooley and the Michigan Supreme Court: 1865-1885*, 10 J. AM. LEGAL HIST. 97 (1966).

12. *See* 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 918-1116 (1971).

justices felt that the railroads used the anti-laissez-faire position to get a larger share of the pie.[13]

The late-nineteenth-century insistence on a neutral state that was predominantly antiredistributionist arose simultaneously out of both conservative and progressive concerns. Conservatives feared that the state might be used to bring about levelling, whereas progressives feared that the state was becoming the instrument not only of the wealthy and the powerful, but of corrupt city political machines.

The rise of the regulatory welfare state in the twentieth century represented a fundamental assault on this liberal conception of a neutral state that had emerged out of the American Revolution and had been developed and elaborated over the course of the nineteenth century. The current discussions regarding liberalism and republicanism in early American thought serve a larger purpose. They enable us to recognize that the creation of the ideal of neutrality was not limited to America, but rather was part of the nineteenth-century liberalism throughout the Western World.

In Europe, as Schumpeter demonstrated so brilliantly in his *History of Economic Analysis*,[14] the challenge to liberalism's assumptions of neutrality also focused on questions of economic policy. Among those challenges were the Progressive Income Tax in the English Budget of 1911, the attack on the the Gold Standard as preventing government regulation of the money supply, and the introduction of the tariff as a challenge to free trade policy.[15] All these challenged policies identified neutrality with a "natural" self-executing market economy.

As is typical of American history, however, the central arena of controversy in this country over the liberal idea of the neutral state was constitutional law. In the United States, the progressive historians and their New Deal successors challenged the *Lochner* Court's basic assumptions of neutrality. If we examine the development of these arguments, we will see the moment when the meaning of the *Lochner* era was mystified and misrepresented.

---

13. *Id.*

14. J. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS (1954).

15. *See id.* at 759-71.

B. Two Lines of Delegitimating Strategy

The progressives formulated roughly two lines of attack, or delegitimating strategies. In the first, they argued that democracy required judicial restraint. Starting from Thayer's famous 1893 essay,[16] the progressives developed the view that not only was judicial review undemocratic, but the *Lochner* Court had departed from a supposedly well-established historical baseline of judicial restraint. Thousands of pages were written to demonstrate that under the influence of either natural law or mechanical jurisprudence, the Supreme Court had violated precedent and converted procedural due process into substantive due process, thereby subverting the ideal of judicial restraint.[17]

In their second line of attack, the progressives went beyond questions of institutional legitimacy to focus on inquiries concerning the substantive premises that lay behind the liberal idea of a neutral state. How could the free-market conceptions that made freedom of contract a constitutional ideal be defended in light of the vastly unequal market power existing between unorganized labor and corporate capital? How could there be freedom of contract amid the tremendous corporate concentration taking place? How could there be a coherent distinction between the state and the market, or between public and private realms, when cartelization was creating private economic power that overshadowed public power? How could there be a vital, effective, flourishing democracy when prevailing constitutional doctrine supported and legitimated a society growing ever more unequal in wealth and power?[18]

The first line of attack eventually prevailed. This challenge gradually was drawn into the mainstream of constitutional discourse in

---

16. *See* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

17. *See* L. BOUDIN, GOVERNMENT BY JUDICIARY (1932); E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1928); C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930); B. WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT (1931); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. (1908); Thayer, *supra* note 16.

18. *See* Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Hale, *Coercion and Distribution in a Supposedly Non-Coercion State*, 38 POL. SCI. Q. 470 (1923); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

its 1950s legal-process/neutral-principles mode.[19] Even before that, however, the assumption that the *Lochner* Court represented some aberration that a more neutral constitutional theory was supposed to address and correct became a dogma of conventional constitutional scholarship.[20] This dogma triumphed, I would suggest, because it served originally both the legitimating and delegitimating needs of those who wished to bring about a New Deal. In fact, the New Deal produced the first judicially initiated constitutional revolution in American history, if we exclude the eventual impact of the equally far-reaching Civil War Amendments.

C. Justifying Change as a Return to a Golden Age

New Deal thinkers did not portray their revolution as a justifiable overthrow of anachronistic nineteenth-century liberalism. They opted not to demonstrate that liberalism's conception of an antiredistributive state was incompatible with the moral and political premises of a regulatory welfare state. Instead, New Deal proponents explained their revolution opportunistically as a healthy and normal corrective to a *Lochner* Court that had strayed from a historically neutral baseline of democracy and judicial restraint. For the past fifty years, a symbiotic relationship has existed between constitutional legitimation of the New Deal and delegitimation of the *Lochner* Court.

At this juncture, one should wonder why New Deal constitutional historians chose this particular form of delegitimating argument. For example, why was it necessary to argue that the *Lochner* Court Justices wrote their own conceptions of the Constitution into the law any more than John Marshall or Joseph Story did? Why did the argument emphasize that the *Lochner* Court went off the track, rather than that these were good reasons for a New Deal departure from well-established constitutional byways?

Just asking the question suggests the answer. It is more difficult to justify a constitutional revolution on substantive than on procedural grounds, easier to claim that one is restoring the neutral and

---

19. *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

20. *See* S. FINE, *supra* note 2; B. TWISS, *supra* note 2; Pound, *supra* note 17.

the natural according to some metahistorical baseline of neutrality. Wherever legitimacy is defined by law, there will be a clear advantage to those who argue for continuity over discontinuity, as well as for those who claim to restore such continuity. It will be easier for those who wish to change things to mystify—to themselves and others—the fact that they are changing things. Justifying great changes as desirable is not as easy as representing them as a return to some earlier Golden Age.

What is lost by such a form of justification, however, is any powerful substantive vision of what made the change seem imperative in the first place. We have gradually lost touch with the reasons why the idea of a neutral state was incoherent and depended on unsupportable background assumptions about the relationship between state and society, public and private law, freedom and coercion, rights and duties. Some of our most prominent legal thinkers have been able to return virtually unchallenged to *Lochner* Court assumptions[21] in part because for almost fifty years constitutional historians have taught that the dispute concerned disembodied institutional ideas of legislative power and judicial restraint, not law as the embodiment of substantive visions of the good society.[22]

III. The Republicanism-Liberalism Debate

One of the most promising bodies of recent historical scholarship that offers us some real hope of illumination is the current debate over the roles of republicanism and liberalism in early American political and constitutional thought.[23] Although a number of methodological and conceptual problems remain to be clarified, I hope that this debate will spark a new age of reconsideration of the entire body of American constitutional history. In particular, I believe that the schism between the liberal ideal of the neutral, night-watchman state of Madison's tenth *Federalist*[24] and the ideas of neutrality that were most elaborately expressed in the classical legal thought of the *Lochner* era offers an important line

21. *See, e.g.*, R. Posner, The Economic Analysis of Law (2d ed. 1972); Easterbrook, *The Court and the Economic System*, 98 Harv. L. Rev. 4 (1984).

22. *See* J. Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

23. *See supra* note 7.

24. The Federalist No. 10, at 62 (J. Madison) (Tudor Publ. Co. 1937).

of development. First, let me state what I find so exciting about this debate. I will then try to explain the reasons why I feel that the participants all too frequently continue to talk past each other.

A. A Caveat

I am convinced that there was a republicanism-liberalism schism in early American thought that probably continues along some of its axes up to the present day Like all ideal types, however, these categories need to be dealt with very carefully Because a number of variables constitute each of these categories, they will inevitably combine and recombine over time. A great danger exists, therefore, that scholars will accord more weight to one variable than they should in interpreting a period.

In 1720, for example, attitudes towards commerce or property may be fundamental in defining the republican-liberal or court-party/country-party dichotomy These particular variables, however, may be relatively unimportant by 1800. If one of the decisive questions in 1787 is whether a republican government can exist over a large territory, that question may have been insignificant in England twenty years earlier or in America twenty years later. In 1750, one's conception of law may be relatively unimportant in defining the essence of republicanism. In 1890 the same conception may be at the core of the tradition.

A similar caveat relates to how we interpret particular thinkers. I have little doubt, for example, that Madison's tenth *Federalist*[25] is one of the central texts of an emergent American liberalism. Although I associate the ideal type of liberalism with a denial of a substantive conception of the public interest, I am equally convinced that Madison, and indeed any representative of the Virginia Enlightenment, would not have rejected completely such a substantive conception of the public interest. Like most of the revolutionary generation, Madison was still wavering between two paradigms.

---

25. THE FEDERALIST No. 10 (J. Madison) (Tudor Publ. Co. 1937).

B. Defining the Issues

What issues are at stake in the republicanism-liberalism debate? The best way to approach this question is to offer a brief and superficial intellectual history of the problem.

Before Bailyn,[26] Pocock,[27] and Wood[28] attempted to define the issues of the republicanism-liberalism debate, a body of work on Adam Smith that can be traced back to Polanyi[29] and has been brought forward by Wills[30] had already addressed the question. In my opinion, this body of scholarship decisively sets Adam Smith apart from his successors. Unlike that of his successors, Adam Smith's philosophy was rooted in a conception of political economy. The starting point for this conception was not only a labor theory of value but, more importantly, a self-consciously normative political culture that subordinated economic to political ideas.

The recent publication of Smith's *Lectures on Jurisprudence*[31] is an astonishing confirmation of this view. First, the substance of these lectures demonstrates that Smith is clearly in the line of the great republican political sociologists from Montesquieu to Tocqueville.[32] Even more importantly, Smith's lectures underline what I would call the late-eighteenth-century republican theory of law as constitutive and creative of political culture. Smith explains the shift from feudal to liberal ideas of property not as the result of economic necessity, but rather as the self-conscious use of law to perfect and improve society and human nature.[33]

One issue in the republicanism-liberalism debate is the status of positivism, or the separation of facts and values. Straussians had been attacking both Marxism and liberal instrumentalism from the right since the 1950s.[34] Pocock's appeal to the tradition of civic vir-

---

26. *See* B. BAILYN, *supra* note 7.

27. *See* J.G.A. POCOCK, *supra* note 7.

28. *See* G. WOOD, *supra* note 7.

29. K. POLANYI, THE GREAT TRANSFORMATION 111-12 (1944).

30. G. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 102-03, 129-30, 209, 231-32, 254, 289 (1978).

31. A. SMITH, LECTURES ON JURISPRUDENCE (1978).

32. *See* 1 R. ARON, MAIN CURRENTS IN SOCIOLOGICAL THOUGHT (1965); Nedelsky, Book Review, 96 HARV. L. REV. 340 (1982).

33. *See* A. SMITH, *supra* note 31.

34. *See* L. STRAUSS, NATURAL RIGHT AND HISTORY (1953).

tue seems to resonate with these antipositivist appeals to an Aristotelean community.

Pocock elaborated the republican tradition out of a similar distaste for the forms of atomized individualism that had come to dominate liberalism. Above all, however, he seemed to be looking back to Polanyi, who believed that orthodox Marxism, by reducing politics to superstructure, had denuded an independent vital form of human fulfillment and development.[35]

If I read him correctly, Bailyn's work is also directed primarily against Beardianism[36] in American history. To the extent that Beard is a stand-in for Marx, Bailyn, like Pocock, focused his analysis on the reductionist base-superstructure methodology of orthodox European Marxism.[37] By emphasizing ideological origins, Bailyn was insisting on the autonomy of ideas and cultural traditions. Like Pocock, Bailyn was pointing a way out of instrumental social science's mode of class or interest group explanations of social change.

If Bailyn's work has a conservative spin because of his sense that revolutionary ideology bore a distorted or pathological relationship to reality,[38] Wood's great book[39] sought to relegitimate the Beardian social-conflict model without returning to its simple reductionist premises. Along with Pocock, Wood was the first writer actually to recognize that republicanism was a truly coherent political alternative to liberalism in American thought.[40]

At this point, we can begin to see the emergence of the basic model. Liberalism stood for a subjective theory of value, a conception of individual self-interest as the only legitimate animating force in society. In addition, liberalism stood for a night-watchman

---

35. Pocock, *Cambridge Paradigms and Scottish Philosophers: A Study of the Relations Between the Civic Humanist and the Civil Jurisprudential Interpretation of Eighteenth Century Social Thought*, in WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT 235, 248-49 (1983).

36. Horwitz, *Progressive Legal Historiography*, 63 OR. L. REV. 679 (1984) (referring to the model of social conflict among interest groups in, *e.g.*, C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1935)).

37. *See* R. HOFSTADTER, THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON (1968).

38. *See* B. BAILYN, THE ORDEAL OF THOMAS HUTCHINSON (1974).

39. *See* G. WOOD, *supra* note 7.

40. J.G.A. POCOCK, *supra* note 7; G. WOOD, *supra* note 7.

state, denying any conception of an autonomous public interest independent of the sum of individual interests.

Republicanism stood for the primacy of politics and the relative autonomy of ideals of the good life. It emphasized the growth and development of human personality in active political life. Republicanism proceeded from an objective conception of the public interest and a state that could legitimately promote virtue.

The argument becomes endlessly complex when one attempts to determine who the liberals and the republicans were in 1789. Even Hamilton and Jefferson will not easily fit the liberal or republican models, as these are only ideal types. These models capture only implicit tendencies, which are, at best, immanent in the thought of any one person.

C. Understanding Attacks on the Republican Synthesis

This difficulty is compounded when one seeks to understand the attacks from the left on the republican synthesis in the work of Appleby,[41] Diggins[42] and Kramnick.[43] Two elements appear to be in contention. The first is the relationship between the republican conception and economic development. The fear of the so-called left liberals is that the republican model, by emphasizing the tension between the civic humanist tradition and commerce, is in danger of descending into hopeless anachronism and nostalgia. Appleby, for example, quite astutely perceives that in America in 1789, economic development was desirable and virtually universally agreed upon. Following Polanyi, Appleby questions whether a moral economy of development can exist without permitting an emerging market to overwhelm an autonomous conception of politics.[44]

The second point of contention is whether, in effect, the republican vision does not lead inevitably to authoritarian conceptions of morality.

---

41. *See* J. APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790'S (1978); J. APPLEBY, ECONOMIC THOUGHT AND IDEOLOGY IN SEVENTEENTH CENTURY ENGLAND (1978).

42. *See* J. DIGGINS, *supra* note 7.

43. *See* Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982).

44. *See* sources cited, *supra* note 41; Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76 (1971).

D. Fitting Law into the Debate

How does law fit into this debate? First, the republican synthesis enables us to see the deeper roots of what previously were deemed anomalous positions. As Treanor has shown,[45] for example, the surprising absence of just compensation clauses in postrevolutionary state constitutions was based on powerful republican communitarian conceptions of property.[46]

I would go so far as to argue that the fifth amendment to the Constitution represents a dramatic liberal reversal of the dominant conception of the relationship between the state and individual property holdings. The republican communitarian model in fact drew sustenance from the then widely accepted feudal common law view that all property was held by the King. From this perspective, indeed, the contract clause decisions of the Marshall Court are important in establishing a liberal conception of the relationship between state and individual.[47]

If one reconsiders the dissenting opinion of Chief Justice Gibson of Pennsylvania in *Eakin v. Raub*[48] opposing judicial review, this opinion now can be viewed not as some aberrational democratic protest but as part of a more deeply rooted republican conception of government. The same can be said for questions of separation of powers and for such oddities as the system of legislative review of judgments. This practice was widespread in the New England states in 1800, but was dismantled under judicial pressure by 1825.[49]

Second, the republican synthesis illuminates one of the richest issues in American legal and constitutional history, the characterization of the public interest. The republican tradition promotes the concept of an autonomous public interest, whereas the liberal ideal holds that the public interest is either simply procedural or

---

45. *See* Note, *The Origins and Original Significance of the Just Compensation Clause*, 94 YALE L.J. 694 (1985) (authored by William M. Treanor).

46. *See id.* at 704-08.

47. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

48. 12 Serg. & Rawle 330, 343-58 (Pa. 1825) (Gibson, C.J., dissenting).

49. E. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT 13-14 (1938).

the sum of private interests. This issue runs throughout the nineteenth-century debates on legal and political theory. In the twentieth century, the issue is central to understanding progressivism and its impulse to create an administrative-regulatory state. The theory of public interest remains quite unexplored in legal history.

Both the liberal and the republican traditions sought to appropriate law to their own visions. As the liberal tradition became increasingly dominant, proponents of liberalism believed that a neutral state with neutral law could provide the framework for a neutral market society. The republican legal tradition is still in great need of further elaboration, despite Newmyer's admirable work on Justice Story[50] and Gordon's still unpublished Holmes Lectures delivered at Harvard.[51] It is misleading, in my view, to identify that tradition with, for example, the antilegalism of the abolitionist movement. The republican tradition was affirmative about law.

IV. Broadening the Foundation of American Republicanism

The next question relates to the sources of American republicanism. From Bailyn's *Ideological Origins*[52] through Wood's *The Creation of the American Republic*[53] and Pocock's *Machiavellian Moment*,[54] the sources of American republicanism have increasingly been located in eighteenth-century English oppositionist thought. The mixed-government tradition of the English opposition, with its heavy emphasis on property, status, and an equilibrium among fixed social orders, has provided the foundation for the current dominant interpretation of republicanism. Wood, however, has offered a basis for interpreting American republicanism as an essentially indigenous departure from its conservative and hierarchical English origins.[55] He has accomplished this feat by emphasizing the almost instant irrelevance of John Adams' effort to use the

50. R. Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic (1985).

51. R. Gordon, Lawyers as the American Aristocracy (Feb. 19-20, 1985) (unpublished Holmes Lectures at Harvard Law School).

52. B. Bailyn, *supra* note 7.

53. G. Wood, *supra* note 7.

54. *See* J.G.A. Pocock, *supra* note 7.

55. G. Wood, *supra* note 7.

traditional ideas of fixed ranks in a more socially fluid American environment.[56]

Despite these strides, the current interpretation of republicanism seems to be constructed on too narrow a foundation. Several other important intellectual strands in early American constitutional thought have been badly neglected.

First, the Bailyn-Wood interpretation has rendered American constitutional history before the Stamp Act crisis of 1763 virtually irrelevant to an understanding of post-1776 sources of constitutionalism. The work of an earlier institutionalist generation of constitutional historians who traced American constitutional ideas back to seventeenth-century colonial charters and codes has been undeservedly ignored.[57] The legalism of the generation of 1787 owes at least as much to 150 years of colonial constitutional struggles as it does to the constitutional ideas of the English opposition.

Second, the recent emphasis by writers such as Wills on the influence of the Scottish Enlightenment is an important development in expanding the sources of republican ideas.[58] The communitarian basis of English republican thought is rooted in its prescriptive and hierarchial ideas of civil virtue. By contrast, many of the Scots offered a more egalitarian conception for the basis of community.[59]

A liberal appropriation of Adam Smith, for example, grossly distorts his meaning. Polanyi sought to show this many years ago.[60] More recently, Wills has suggested the same.[61] The recent publication of Smith's *Lectures on Jurisprudence*,[62] indeed, places him squarely within the republican tradition of political sociology from Montesquieu to Tocqueville.[63]

---

56. *Id.* at 576-87.

57. *See, e.g.*, P. REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES (1970); Chafee, *Colonial Courts and the Common Law*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 61-78 (D. Flaherty ed. 1969); Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931).

58. *See* G. WILLS, *supra* note 30.

59. *Id.* at 175-80.

60. K. POLANYI, *supra* note 29, at 43-45.

61. *See* G. WILLS, *supra* note 30.

62. A. SMITH, *supra* note 31.

63. *See supra* notes 31-32 and accompanying text.

Third, the influence of French republican thought has been virtually ignored. The exception to the rule is the mandatory bow to Montesquieu's ideas on separation of powers. This point, however, usually is followed by the required observation that in fact Montesquieu misdescribed the English constitutional system.[64]

The question of influence requires much more study. Why are Montesquieu's institutional observations given such prominence, whereas the set of classical ideas that led him to insist that a free republic cannot exist over a large territory is rarely systematically understood? As with Adam Smith, Montesquieu's focus on the social conditions necessary for republican government has been entirely subordinated to a liberal, institutionalist interpretation of Montesquieu.

This brings us to Rousseau. I am convinced that interpretations of Rousseau and of his relationship to Montesquieu have been distorted ever since the French Revolution assigned each his symbolic role. Only Tocqueville understood that Montesquieu and Rousseau were emphasizing different aspects of one emergent republican tradition.

The dialectical character of *Democracy in America*[65] must be understood as Tocqueville's attempt to integrate his two great forebears. The Tocquevillian focus on the social conditions for a "happy Republic," moreover, stands in sharp contrast to the mechanistic American liberal emphasis on institutional equilibrium.

The influence of Rousseau on American republican thought appears at most to be indirect. This came about in either of two ways. Rousseau might have influenced English religious dissenters, who in turn affected, for example, many Pennsylvania radical republicans after the Revolution. Alternatively, Rousseau's philosophy might have appeared through the Jeffersonian ideal of the relatively equal and homogeneous republic of yeoman farmers. The clearest link between American and French republican thought, however, is found in the single most consistent theme proposed by

---

64. *See, e.g.*, Neumann, *Introduction*, in MONTESQUIEU, SPIRIT OF THE LAWS, at liii-lv (1949).

65. 1 TOCQUEVILLE, DEMOCRACY IN AMERICA (1835); 2 A. TOCQUEVILLE, DEMOCRACY IN AMERICA (1840).

Antifederalist opposition to the Constitution, the argument that only geographically small republics can maintain freedom.

This argument has rarely been given its due. The theory was dismissed unfairly by the authors of the *Federalist* papers as amounting to no more than an argument against representative government and in favor of wildly impractical schemes of direct democracy.[66] This was a a preposterous inference, considering the widespread acceptance of representative systems in the colonies. Because of the early dominance of national interpretations of American constitutional history, the argument usually is dismissed as expressing utopian and romantic objections to the Constitution, or else is saddled with subsequent proslavery states' rights ideology.

The argument for small republics contained the essential elements of what today we would call the social basis of democratic society. Whereas the liberal vision severed virtually any connection between ideas of civic virtue and the quality of government, this classical republican theme, espoused by Montesquieu and Rousseau, Adam Smith and Tocqueville, underlay the fear of a territorially extensive government.

The republican theme proposed two basic ideas. First, only relative equality of condition could promise the necessary foundation for an informed and active citizenry that would not permit its government either to exploit or dominate one part of the society or to become its instrument. Second, only in small societies could the people's representatives remain in touch with the populace and its "middling sort."

The weight of history was overwhelmingly on the side of this analysis. Liberalism therefore had to create a new analysis that could justify the possible existence of freedom in a large state. In the process of creating such a justification, liberalism was forced to break with the classical republican analysis that closely identified the character of governmental institutions with the structure of social conditions. Liberals thus were compelled ultimately to break with the concept of the virtue of their citizenry. The fact that no American Tocqueville ever appeared is directly related to the power of liberal thought in severing political sociology from an

66. *See* G. WOOD, *supra* note 7, at 499-500.

analysis of the nature of governments. The French and Scottish Enlightenments, not eighteenth-century English opposition thought, provided republicans with the categories for analyzing the connection between a public-spirited citizenry and a relatively equal and active citizenry.

V. Conclusion: The Dichotomy Between Natural Law and Positivism

The central focus of law and republicanism in American history ought to be on the normative and constitutive character of law. Liberalism regarded law as a necessary evil and viewed it as the price individuals had to pay for a reasonable degree of security. The republican vision, on the other hand, defined law as constitutive of culture and as potentially positive and emancipatory. Under the republican view, law could create structures that enabled individuals and communities to fulfill their deepest aspirations.

What is so striking about Holmesian legal positivism, as expressed in *The Path of the Law*,[67] is that it represents, at least at the explicit level, a dramatic reversal of the ordinary normative conception of law that has prevailed through most of American history. The twentieth-century dichotomy between natural law and positivism has confused our ability to recapture the republican idea of law in American history, for this dichotomy was not incorporated into the way nineteenth-century American legal thinkers experienced the issue. For example, as Cover showed in his brilliant *Justice Accused*,[68] some antislavery judges were able to conceive of law as incorporating normative ideals. At the same time, these judges clearly rejected any appeal to higher law outside the body of legal principles.[69] Similarly, Holmes' prepositivist work, *The Common Law*,[70] shared the widely held view of his contemporaries that the common law was an expression of custom which itself had a normative and evolutionary character.

Finally, the attack of progressives on classical legal thought misleadingly charged late-nineteenth-century orthodoxy with a natu-

67. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).
68. R. Cover, Justice Accused: Antislavery and the Judicial Process (1975).
69. *Id.*
70. O.W. Holmes, The Common Law (1881).

ral law position. The positivist position of many progressives kept them from appreciating the many normative elements built into legal categorization and legal reasoning. The famous constitutional law doctrine of implied limitations is one such example. These normative elements were not experienced as importing external higher law principles into the body of law.[71]

In my view, the stark jurisprudential dichotomy between natural law and positivism is itself a twentieth-century positivist creation that has prevented us from seeing the way in which all legal structures inevitably embody normative positions. When one creates a pyramidal and categorical legal structure, as late-nineteenth-century classical legal thought aspired to do, one is also committed to deductive and formalistic legal reasoning and to conceiving of all legal questions as, in principle, on-off questions, or questions of kind. By contrast, when one conceives of legal phenomena as arranged along a horizontal continuum, as Holmes eventually did, all legal questions become matters of degree, not of kind. Legal reasoning, consequently, emphasizes balancing tests and tradeoffs.

All legal systems have a legal architecture that categorizes and classifies legal phenomena. Every system of legal architecture also incorporates deep into that structure a set of normative premises concerning the proper way to talk about law. Whether distinctively republican or distinctively liberal systems of legal architecture exist is a subject worthy of future scholarship. That endeavor will only be impeded, however, if we remain stuck with the formalistic distinction between natural law and positivism. We must become more self-conscious about legal historiography and the ways in which controversies over political and legal theory influence legal historical inquiry. Now is the time for us to bridge the chasm between legal theory and legal history.

71. *See* E. CORWIN, *supra* note 17; C. HAINES, *supra* note 17; B. WRIGHT, *supra* note 17; Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).