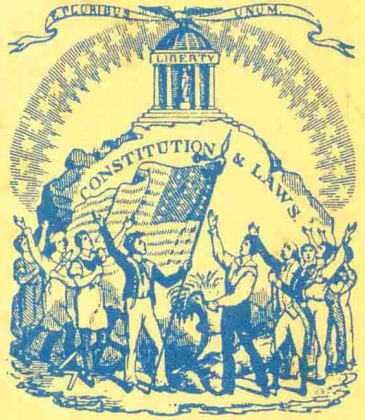


Conceptual Change and the Constitution



Edited by Terence Ball

and J.G.A. Pocock

CONCEPTUAL CHANGE AND THE CONSTITUTION

*Edited by Terence Ball
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To the memory of
Crawford Brough Macpherson
and
George Armstrong Kelly

Preface

The essays in this volume (with one exception acknowledged on p. 76) are revised versions of papers presented to a bicentennial conference bearing the same title, held in Washington, D.C., on 16–18 April 1987 and sponsored by the Conference for the Study of Political Thought and the Folger Institute for Renaissance and Eighteenth-Century Studies. We are indebted to the Folger Shakespeare Library and its director, Dr. Werner L. Gundersheimer, for warm hospitality; to the executive director of the Folger Institute, Dr. Lena C. Orlin, and her staff, for invaluable administrative support; and to the participants in a seminar concurrently conducted by the Folger Institute Center for the History of British Political Thought. We are equally grateful to the Research Programs Division of the National Endowment for the Humanities for their generous financial support. And not least, we are indebted to our audience and panelists. In addition to the editors and the authors appearing in the present volume, the latter included U.S. Solicitor General Charles Fried and Professors Charles R. Beitz, J. H. Burns, Stephen Holmes, Thomas Horne, Stanley N. Katz, Douglas Long, J. Donald Moon, James Moore, Anthony Parel, Melvin Richter, Lyman Tower Sargent, Gordon J. Schochet, and James Boyd White. To all of them, our heartfelt thanks for helping to make the occasion a stimulating and memorable one.

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Terence Ball
J. G. A. Pocock

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1

Introduction

Terence Ball and J. G. A. Pocock

I

Politics is a communicatively constituted activity. Words are its coin, and speech its medium. And yet, notoriously, the words that make up this medium have hotly contested and historically mutable meanings. Inasmuch as the concepts that constitute political life and language lose old meanings even as they acquire new ones, political discourse appears, in retrospect, to have been—and even now to remain—in a state of perpetual flux. Generally speaking, these changes are apt to occur gradually and at an almost glacial pace. Sometimes, however, such shifts in meaning and reference occur at a remarkably rapid rate, yielding unforeseen and often radical implications for future political thought and action. Such, arguably, was the case in early-sixteenth-century Florence, and during the English Civil War and the Glorious Revolution, the French Revolution, and other periods of political crisis and social change. At such times, conceptual innovations are brought about by action, practice, and intention, rather than by unintended structural change occurring in the historical context.

The same might also be said, and with even greater certainty, of the short span of years from the American Revolution through the debates over the ratification of the Constitution. This period of particularly intense political debate and disputation proved to be a period of profound political and conceptual change. The concepts of sovereignty, liberty, virtue, republic, democracy—even “constitution” itself—were virtually recoined. Others, such as “federalism,” were scarcely less than novel American additions to the vocabulary of politics. Political innovation and conceptual change went hand in hand.¹

These changes did not come easily or effortlessly. Conceptual disputes are almost never settled by uncontested definition or unanimous consent.² To the degree that conceptual disputes are political ones (and vice versa), they are apt to be hard-fought, in a most ungentlemanly way, with almost any weapon that comes to hand. Such changes as do occur are often the result of arguments *ad hominem*—rhetorical stratagems employed for temporary advantage and for narrowly partisan purposes—and of one side's sheer good luck in hitting upon an illuminating image or telling metaphor to make its case persuasive or at any rate palatable.³ When the complex exposition of a carefully constructed argument contributes to the making of conceptual change—as it does in *The Federalist Papers*, for example—rhetoric and theory, polemic and philosophy, will characteristically coexist in the discourse.

One of the more remarkable features of the Federalist-Antifederalist debate was the degree to which the participants appear to have been quite self-consciously aware of the limits and possibilities of their own and their opponents' language. The extent and depth of their sensitivity to "conceptual" questions would hardly have been unusual if displayed by a philosopher or political theorist—a Hobbes or a Rousseau, say—but it is all the more remarkable when we recall that these were mainly men of affairs. Lawyers, legislators, military men, merchants, and planters, they nevertheless had an acute ear for the nuances of political idioms and languages. More than one Antifederalist critic of the new Constitution was heard to complain about the shameless linguistic license of their Federalist foes. The Massachusetts Antifederalist John DeWitt, for one, warned about the pernicious political consequences of linguistic laxity and imprecision. "Language is so easy of explanation, and so difficult is it by words to convey exact ideas, that the party to be governed cannot be too explicit. The line cannot be drawn with too much precision and accuracy."⁴ The Federalists, for their part, contended that an older, essentially European stock of concepts and distinctions was woefully inadequate for describing and assessing the novel features of any post-Revolutionary American polity, particularly the one to be created by the newly drafted Constitution. Madison went so far as to offer a rather baleful reflection on the medium of language itself. To all the difficulties of drafting a constitution, Madison remarked,

the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include

many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, . . . the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.

Moreover, Madison added, “this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.” The “objects” with which the new Constitution abounded—the idea of a federal union, of the sovereignty of the people, of an extended republic, and the rest—were quite obviously both complex and novel; and no language, however perfect, could capture and convey their full meaning and import. Every language was at best, Madison concluded, a “cloudy medium.”⁵ On this much, at least, Federalists and Antifederalists could readily agree. Practical men of affairs they surely were, but they were also inhabitants of a sophisticated rhetorical and theatrical culture.

Add to this shared sensitivity both the obviously high stakes and the shortness of the time available to the participants to argue their cases publicly and persuasively, and one has the conditions under which profound political and conceptual changes can occur with almost unheard-of rapidity. Taken together, these conditions produced, almost overnight, a veritable flood of newspaper articles, broadsides, sermons, and pamphlets, some of which even today retain their sense of urgency and some measure of their persuasive power.⁶ Although *The Federalist Papers* are usually cited as the premier example, many of the Antifederalist pamphlets were not lacking in rhetorical and argumentative powers of their own.⁷

Federalist and Antifederalist arguments centered not only upon the substance of their differences but also upon the very vocabularies in which their disagreements might be most suitably described and adjudicated. Both, for example, professed to favor a representative republican form of government; but each had rather different understandings of “representation” and “republic.” Both, moreover, believed public “virtue” to be important, indeed indispensable; but each entertained different conceptions of civic virtue and had rather different views about where virtue might best be located. Should virtue reside in the individual citizen, as many Antifederalists maintained; or should civic virtue be built, as it were, into the system of government itself, as the Federalists insisted? Did institutions instill virtue into citizens or merely discipline their lack of it? And what of “representation”? Was it to be “actual” or merely “virtual”? Clearly, the answers that one gave to these and a host of other questions depended upon the choice, or the modification, of the particular political idiom in which one chose to think and speak and act.

Thus, theirs was not and could not have been what some might now wish to call a "semantic" squabble over the meaning of words—as though "words" scarcely matter or can mean anything one wishes them to mean. On the contrary, theirs was in no small part a *conceptual* dispute about the way in which American political life was to be constituted, lived, and justified. The upshot of this debate was that citizens of the fledgling republic ceased to speak a provincial variation of political English and began to speak in the terms of a political idiom that was distinctly and recognizably American.

II

Our common aim in this volume is to return to the political site at which these changes were wrought and this new language was created. We want, in particular, to examine two interrelated phenomena. First, we want to understand in a more general way the theoretical relationships between political (re)conceptualization and political change. Second, and more specifically, we seek to examine the particular changes in meaning that certain key concepts underwent during the debates in speech and writing, as well as the processes of drafting, amending, and ratifying that attended the creation and acceptance of the new United States Constitution of 1787–89. Or put another way, we want to analyze both the mechanisms of conceptual change and the ways in which the meanings of particular concepts changed during one particular period.

The first of these two tasks is undertaken by James Farr, who also attempts to clear a theoretical path for the detailed conceptual histories that follow. Farr contends that political debates disclose contradictions in the way in which (or the criteria according to which) concepts are employed. Criticism—that is, the discovery and public disclosure of such contradictions—then puts pressure on the participants to revise the meaning of the concepts in question (and/or the criteria of their application) in some supposedly noncontradictory direction. Such Socratic (or if you prefer, Popperian) rationality is rarely if ever realized in practice, because what is or is not contradictory is itself often in dispute.⁸ Often, but not always; for otherwise the very point of our having at our disposal the concept of contradiction, as well as the sting attending the charge that one is contradicting oneself, would wholly disappear. Within the give-and-take of political discourse, the charge of contradictoriness retains its sting and its ability to shift the onus of argument. The critic's exposure of contradictions, Farr concludes, is the main, though not the only, means by which conceptual change occurs.

Political discourse is constituted not only by concepts and the kinds of statements and assertions that they make possible but also—and

arguably, even more deeply—by the imagery that gives these concepts their place and point. This dependence is clearly evident, as Gerald Stourzh shows, in the evolution of the concept of “constitution.” Given the older imagery of a body politic, the concept of its constitution was understood mainly, if not exclusively, in physical or medical terms (compare our still-intelligible paeans to someone’s strong and healthy constitution—even though the reference in late-twentieth-century America is almost invariably to strong, healthy, and often narcissistic individuals, rather than to whole societies). Stourzh shows how and under what conditions the concept of constitution ceased to rely upon bodily imagery and came to refer, instead, to the sort of written document that is capable of establishing the political structure and the fundamental law of a state or nation. Stourzh traces the conceptual changes that made it possible for the Founders to conceive of a constitution in the way that they did and as we now do.

The concept of constitution is implicated in a network of other concepts, among the more central of which are “state” (in its more-or-less modern sense) and “union,” or, more specifically still, “federal union.” The question was often asked, How could the new Constitution bring into being a federated union of free and independent states? The query was at once political and conceptual. It could be asked and answered only if certain conceptual changes could be brought about. In the third essay in this volume, J. G. A. Pocock charts the changes that had to come about before such now-commonplace expressions as “federal republic” and “united states” could be rendered intelligible and meaningful. Where Stourzh focuses on “constitution,” Pocock directs his attention to “federal” and “federative” and suggests that not only the structure of civil society but also the relations between civil societies were involved in the debate.

The concept of sovereignty, as Peter S. Onuf notes, remained an exceedingly problematic one. Under the Articles of Confederation the thirteen states had, for all practical purposes, retained their individual sovereignty. Antifederalists suspected, not without reason, that the Federalists wished to establish a national government that would effectively end the sovereign power of the states, transferring it to the central government. The original intent of the Founders aside, it became clear during the course of the framing—and clearer still during the ratification debate—that the states would never surrender every last remnant of their sovereignty. Onuf examines the ingenious rhetorical twists by means of which the Federalists disarmed their critics by defending the new design as necessary to the maintenance of state sovereignty. But in being defended in this unexpected and novel way, the concept of sovereignty—along with such allied concepts as “state” and “union”—took on a new and distinctively American meaning.

The theoretical and rhetorical weaponry employed in these political-cum-conceptual battles came from a variety of sources. One of the more surprising of these, as Garry Wills maintains, was Jean Jacques Rousseau, the "theoretic politician" *par excellence*.⁹ The Pennsylvania Federalist James Wilson found in Rousseau a new notion of sovereignty, that of an essentially inalienable "popular sovereignty," to replace the older monarchical conception. In that older view, the people could not be sovereign but were, at best, a body crying for a head—that is, a sovereign. Clearly, this concept of sovereignty was singularly ill suited for service in republican discourse. Rousseau's genius lay in his having turned the tables on the absolutist-monarchist understanding of sovereignty by envisioning the people—as citizens, as subjects, and as individual selves—exercising sovereignty over themselves. And Wilson's genius, according to Wills, resided in his borrowing and amending this new Rousseauian-republican understanding of sovereignty to explicate the nature of the new American republic.

Another idiom in which Federalist authors defended the new design, Daniel Walker Howe tells us, was that of eighteenth-century faculty psychology. The view of human nature underlying and linking the arguments presented by Publius in *The Federalist Papers* derives from a more-or-less-coherent model of the various powers, or "faculties," possessed by human beings. These include not only the faculties of speech and reason but the potentially destructive emotions and affections as well. Just as a properly ordered individual constitution is one in which the tendencies toward self-destruction are kept in check, so, too, a rightly ordered public constitution would use the body politic's powers to check and control one another. Ambition, for example, must be made to counter ambition. By looking more closely at the concepts and categories of the language of faculty psychology, we see the rhetorical workings of *The Federalist* in a newer and arguably more illuminating light.

Among the concepts whose meaning was disputed during the ratification debate, none, as Terence Ball notes, was more hotly contested than "republic" and its cognates "republican" and "republicanism." Federalists maintained that the new constitution would create an extended republic; their Antifederalist rivals contended that the very concept of an extended republic was a veritable contradiction in terms. What was actually happening, Ball argues, was that several of the concepts constitutive of American political discourse were being disputed and changed during the course of the ratification controversy. Besides looking at the issue of size (can a large republic really be a republic?), he examines the Federalists' and Antifederalists' differing understandings of "representation" and "virtue" and concludes with

some reflections on the increasingly "linguistic" turn taken by the protagonists themselves as the debate wore on.

Addressing another dimension of the dispute over who had proper title to the term "republican," Russell L. Hanson suggests that two quite distinct interpretations of republicanism coexisted uneasily in American politics during the late eighteenth century. One relied on "democratic" methods of popular control to limit the powers of government; the other, on constitutional mechanisms to reduce popular influence on government. Both claimed the mantle of republicanism. It was the struggle between these two interpretations of republicanism, Hanson contends, that defined the principal axis of political disputation during the Founding Era.

No concept is more central to republican discourse than is "virtue." In the concluding essay, Lance Banning critically reexamines a stock piece of conventional wisdom. It has often been held that James Madison and his fellow Federalists proposed to construct a new kind of republic, one in which civic virtue would occupy only a peripheral place. The older republican ideal of a virtuous and vigilant citizenry that would keep corruption at bay was to be replaced by the more pragmatic vision of a polity that would be kept vital and vigorous by individual ambition and contending group interests. And yet, as Banning notes, Madison—the author of those twin exemplars of hard-headed realism, *Federalist* numbers 10 and 51—quite clearly continued to insist upon the indispensability of virtue. The contradiction, Banning concludes, is more apparent than real, for Madison was relying upon what one might almost term a postrepublican understanding of "virtue." Madison believed that even in a well-designed polity, the few, at least, must remain virtuous and public-spirited, even if the many might not be counted upon to be so or to remain so for very long. Without that saving remnant, the vices most feared by earlier republican thinkers would reassert themselves, and corruption would descend upon the land.

III

The vocabulary in which we debate contemporary issues is descended but is very different from the idioms in which the Founders spoke and argued and, on occasion, agreed. Conceptual change is a more-or-less-continuous process, and time has hardly stood still since the Founding. This might seem merely an academic point, of some minor historiographical interest perhaps but utterly devoid of political import. A moment's reflection, however, reveals that this is not so. Consider, by way of illustration, only one of many ways in which questions about

conceptual change are themselves important and highly charged political questions.

There is currently a call from some quarters for a return to a "strict construction" of the "original intentions" of the authors of the Constitution. This directs attention to some problems that are well known to historians of discourse and of jurisprudence in particular; and as historians and theorists of conceptual change, we would like to make a few observations on the matter. It is sometimes asked whether historical inquiry can recapture the "original intentions" of the author or authors of any text; the answer is that it can pursue them to great effect but rarely with finality. The reason is that utterances derive their meanings from the contexts in which they are made. These are contexts of language, of action, and of relevance; and any actor in history inhabits a number of such contexts at the same time. Consequently, he knows that his utterance is capable of bearing a number of meanings, and the act of intentionally imparting a certain meaning to it is an act of choosing and directing the context in which it is to be interpreted. Each of us, in uttering a statement, seeks to direct the manner in which it is to be understood, enjoining some ways of reading it and excluding others; but none of us possesses final or absolute authority over those who are to interpret or accept it.

The authors and ratifiers of the Constitution achieved highly authoritative utterance; they left to posterity a strongly worded text, containing equally strong indications of how it was to be interpreted; and to that extent, historians and jurists can pursue the "original intentions" of the text's authors with high hopes of agreeing on explicit statements about them. But these statements cannot be made incontestable; there may be legitimate debate between alternative readings of the text and its intentions. When this happens, the attempt to go behind the printed word, in search of the "intentions" that it communicates, may entail a debate between alternative readings and between alternative contexts in which the text is to be read. Alternatives of the latter kind may be of equal legitimacy, in the sense that the authors, as historical actors, may be seen to have inhabited and responded to several such "contexts" at the same time and may not have left or desired to leave any plain indications that they were to be read in one way and not in another. Language is ambivalent, and it is often important to keep it that way. It may happen, therefore, that the historian will be found pointing out that the authors of the Constitution expressed more than one set of "original intentions" and did not determine finally between them. When this happens, the decision to follow one reading instead of another is a judicial decision, rather than a historical statement. It is a decision to privilege one context of interpreta-

tion above another, to ascribe authority to one set of "original intentions" instead of another. Such a decision is normal and proper in jurists, whose business is to search for authoritative statements and for ways of ascribing authority to statements; but there are limits to their ability to claim the authority of history for what they pronounce, because the point must be reached at which the historian is no longer their partner in the search for authority. After that point, jurists are on their own, although they may still seek and find allies.

It can also be pointed out that to the extent to which we may be able to validate a series of statements about the "original intentions" of the authors of the Constitution, these intentions will prove to have been formulated in historicized contexts belonging to the late eighteenth century. Clearly, this does not prevent the text of the Constitution or the intentions that it embodies from retaining and exercising authority in the late twentieth century; the Constitution is one of those texts that continue to exercise authority and to display considerable continuity of meaning over long periods of time. Indeed, at least one of the authors in this volume argues that the Constitution expresses principles of early modern politics in early modern language (republican constitutionalism, the separation of powers) and is none the worse for that as a document governing a modern or postmodern society; indeed, if anything, it helps the United States maintain high levels of liberty and legitimacy, which were concerns of early modern politics.

But the more we "contextualize" the text—going behind it in search of the "original intentions" that it embodies—the more we shall find that the Founders were inhabiting eighteenth-century contexts and were thinking in eighteenth-century terms. We shall at the same time be made aware that processes of conceptual change and consequent interpretation have occurred, by means of which eighteenth-century language has acquired twentieth-century meanings (the Second Amendment offers an obvious example). Given that interpretation of the text has gone, is going, and must continue to go on, the call for a jurisprudence of original intent cannot be a call for the abolition of interpretation; it must, rather, be a call for interpretation to be conducted according to certain rules. Let us consider a historical analogy that may help in discerning what these rules might be.

The analogy is that of the succession of "Bartolists," "grammarians," and "Neo-Bartolists" in the civil jurisprudence of the sixteenth century. The Bartolists had evolved an elaborate technique for applying the rules of Roman law to the judicial problems of late-medieval Europe; but this was in turn challenged by the Renaissance grammarians, who with the aid of advances in classical philology claimed to be able to restore Roman law to its original Roman meanings.