2012

Republican Philosophy of Law

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In sharp dissent from these autocratically inclined theorists, and following instead Aquinas's thesis that positive law should always be subject to evaluation in terms of a higher natural law, thomists of the Renaissance identified unjust political laws as an important variety of instances in which the law is nonbinding upon anyone. The English jurist John Fortescue (ca. 1394–1476), his compatriot Christopher St. Germaine (1460–1549), the Italian cardinal Robert Bellarmine (1542–1621), and later the Puritan clergyman Thomas Hooker (ca. 1586–1647) were among thomistic legal theorists of the period promoting such a natural law–dependent view. They followed Aquinas likewise in the opinion that while natural law is not man-made, no higher authority is required to propound it or to evaluate positive law in terms of it, because its nature is openly accessible to human reason.

The theorists so far discussed attended to law exclusively as it applied to individuals residing in a given state or subject to its governance. However, as the rise of nation-states brought international relations into prominence, such thomists as the Spanish monks Francisco de Vitoria (ca. 1492–1546) and Francisco Suárez (1548–1617) sought to extend the concept of natural law to the area of international affairs. In an extensive body of writings, these thomists urged that we should see rights, obligations, and the other conceptual constructs of natural law theory as belonging not just to individual persons in their dealings with one another and the state, but also to nations in their dealings with other nations. Thus, even if no international legislative body had ever codified a positive law to cover international affairs, the same rational faculties that enable our apprehension of the natural law in the civil sphere provide us access to it in the international arena as well. If this is correct, then relations among states do not obtain in the legal vacuum that otherwise threatens. The Dutch Protestant legal theorist Hugo Grotius (1583–1645) was noteworthy for making extensive further contributions to natural law theory in its international applications.

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See also MEDIEVAL PHILOSOPHY OF LAW; SIXTEENTH- TO EIGHTEENTH-CENTURY PHILOSOPHY OF LAW

Republican Philosophy of Law

The legal theory of the Roman republic, as revived and elaborated in Renaissance Italy, commonwealth England, and the legal traditions of the French and American revolutions, is here called republican legal theory.

Republican legal theory developed out of the jurisprudential and constitutional legacy of the Roman *res publica* (public concerns), as interpreted by subsequent admirers in Italy, England, France, and the United States. Leading republican authors include Marcus Tullius Cicero (106–43 B.C.), Niccolò Machiavelli (1469–1527), James Harrington (1611–1677), Algernon Sidney (1622?–1683), John Adams (1735–1826), and (more controversially) subsequent self-styled "republican" legislators such as Abraham Lincoln (1809–1865) and Charles Renouvier (1815–1903). Many im-

portant writers outside the republican tradition also reflect its strong influence, including Montesquieu (1689–1755), Jean-Jacques Rousseau (1712–1778), and Immanuel Kant (1724–1804). These three also illustrate the close connection between republican ideas and the European Enlightenment leading up to the French and American revolutions.

The central concepts of republican legal theory include pursuit of the common good, popular sovereignty, liberty, virtue, mixed government, and the rule of law, linked by a Roman conception of *libertas* that defined justice between free people as subjection to no one's will or interest, but only to general laws approved by the people for the common or "public" good of the community.

Republican theorists have usually followed Cicero's conception of Rome's republican laws and institutions, as set out comprehensively in his treatises *De officiis* (on duties), *De legibus* (on the laws), and *De republica* (on public concerns). Other fundamental texts include the first ten books of Titus Livius (59 B.C.–A.D. 17) in his history of Rome, the sixth book of the *Histories* of Polybius (ca. 205–123 B.C.), and much less importantly, the works of Aristotle (384–322 B.C.), insofar as they anticipate and justify Roman practices. Of these authors only Cicero primarily concerned himself with legal institutions, not just in his monographs, but also in letters and orations, including the widely read *Philippicae* and speeches against Catiline. Cicero and Livy took the proper province of legislation to be the public interest or *res publica*, protected by laws established in advance, to avert the influence of private considerations. Private interests (*res privata*) also deserved protection, within their own sphere, defined by public deliberation. The republican tradition justified popular sovereignty as a necessary check on self-interested factions, but only under the guidance of an infrequently elected legislative council or "senate." Necessary components of a "republican" constitution on the Roman model include a bicameral legislature, standing laws, and elected magistrates.

Constitutional law has always been the central concern of republican legal theory, but several other components of the republican tradition have provided judges, legislators, and lawyers with standards of virtue and a vocabulary for legal discourse. Republican public virtue (*virtus*) is a disposition to serve the common good. The *Lives* of L. Mestrius Plutarchus (ca. 50–120) supply a rich source of republican narratives and models of civic virtue. Cornelius Tacitus (ca. 55–120) and Gaius Sallustius Crispus (86–34 B.C.) contain salacious accounts of the vices that emerge when republican principles decline. All three authors had considerable influence on the aims and invective of subsequent republican theorists.

The central project for republicans since Cicero consists in reviving the liberty, principles, and virtue of the Roman republic, while avoiding the vices and constitutional flaws that led eventually to the tyranny of emperors and tragedy of civil war. Cicero had proposed frequent rotation in office for executive officials and a strengthened senate, to control both the magistrates and popular assembly. Machiavelli suggested in his *Discorsi sopra la prima Deca di Tito Livio* (1517–1518) that republics thrive best in poverty and war, which unite citizens in pursuit of the common good. He concluded that wealth and leisure made Rome too corrupt to be free. Harrington agreed in his *Commonwealth of Oceana* (1656) and advocated limits on landholding and rotation in office, to maintain the civic equality necessary for true republican virtue. Sidney's *Discourses Concerning Government* (1698) argued that wealth would actually strengthen the republic, and he endorsed representation in the popular assembly to check the excesses of direct democracy. Adams' *Thoughts on Government* (1776) and *Defence of the Constitutions of Government of the United States of America* (1787–1788) also embraced representation, with the added check of a veto in the chief executive. James Madison (1751–1836), writing *The Federalist* (1787) under the republican pseudonym of "Publius," praised the American republics' central constitutional reform, which totally excluded direct democracy from any active role in legislation.

Despite their different proposals for protecting republican liberty and virtue, all the main authors in the republican tradition shared a basic conception of the constitution and legal order that they sought to revive. This embraced pursuit of the common good through standing laws, ratified by controlled popular sovereignty, in a bicameral legislature of senate and democratic assembly, to be executed by elected magistrates. Republicans agreed that unelected kings or any other un-

controlled power in the constitution would lead to self-interest and corruption. Liberty and the common good depended on "mixed government" and a "balanced constitution." During the age of European revolution many theorists reluctant to define themselves as "republican" accepted aspects of this ideology. Montesquieu supported monarchy, which made it impossible to endorse or even accurately to describe republican government. However, he did embrace the common good and rule of law in *De l'esprit des lois* (1748), as well as balanced government, the senate, and a (representative) popular assembly. Rousseau viewed a sovereign popular assembly as the essential attribute of legitimate government. His essay *Du contrat social* (1762) insisted on ratification of all laws by a general vote of the people, as was done in Rome. Rousseau would have restricted the senate to a purely executive function. Kant proposed in *Zum ewigen Frieden* (1795) the creation of an international federation of republican states, to provide the basis for perpetual peace.

Rousseau's identification of liberty with law, and law with the common good, repeated the republican formula of Cicero, Machiavelli, Harrington, Sidney, and even Montesquieu, who put it into a monarchical context. Rousseau differed only in his program for realizing republican virtue. Republicans since Harrington had endorsed representation as a technique for purifying the popular will. Republicans since Cicero and Polybius had praised mixed government as the best control of private passions. Rousseau, however, preferred the democratic formula that only plebiscites make law. He attributed this idea of a unitary state to the Spartan king Lycurgus, which reflected his general preference for Spartan equality to republican balance—even to the extent of accepting slavery for some to maintain the liberty and virtue of the rest. Montesquieu had also admired Spartan poverty and virtue. Both authors insisted that republican purity could only survive in small states or cantons, like Sparta and Geneva. French unicameralism and the Reign of Terror under Maximilien Robespierre (1758–1794) both derived in large part from Rousseau's fascination with the homogeneity, poverty, and asceticism of Sparta. Rousseau's direction has colored the tone of French republicanism ever since and marks the beginning of separate republican traditions in France and the United States.

The republican revolution of the American Civil War represented a rejection of "Greek" republicanism, with its frank reliance on slavery, and a return to the Roman rhetoric of liberty and Cicero's condemnation of servitude as a violation of natural law. American republicans never feared commerce or wealth, and the new "Republican" party sought to maximize both and reinvigorate the common good through a widened electorate and universal rule of law. The Fourteenth Amendment to the United States Constitution protected the original Constitution's guarantee of a "republican form of government" by forbidding the states to deny any person the equal protection of the laws or to deny citizenship and its privileges to any persons born in the United States.

The strongly republican nature of early American constitutionalism produced a senate, a bicameral legislature, elected executives, balanced government, popular sovereignty, and broad commitments to the "general welfare," "liberty" and "due process" of the law. Yet twentieth-century American constitutionalism developed after the World War II toward a dry "legal process" theory that endorsed the frank pursuit of self-interest by an atomized and unreflective electorate. The recent American republican constitutional revival emerged in response to moral dissatisfaction with postwar liberal interest-group pluralism as a suitable basis for any just legal order.

The republican revival began among intellectual historians such as Gordon Wood (1933–) and J.G.A. Pocock (1924–) in the 1960s and 1970s, followed in the late 1980s by legal academics such as Cass Sunstein (1954–) and Frank Michelman (1936–), who argued that the United States Constitution reflects an ideology of shared citizenship and common purpose that might justify judicial intervention against self-interested legislation. Their primary arguments concerned republican deliberation and the common good, rather than republican institutions. This self-styled "liberal" republicanism echoes Rousseau, Montesquieu, and the American antifederalists in questioning the value of popular sovereignty in a very large and pluralistic republic and in preferring the local democracy of smaller cantons and communities.

Liberal critics of republicanism question whether this heightened civic federalism can solve the problem of pluralism without an intolerable threat to personal autonomy. For

many, the very idea of a shared common good appears a veil for intolerance and oppression. Republicanism implies the possibility of collective objectivity and seems alarmingly antidemocratic in its reliance on the senate and judiciary. Roman checks and balances intentionally frustrate the immediate will of the people to serve their common good. If private desires and personal interests are everything, the self-denial of republican virtue must be pointless.

Liberal fears of republicanism reflect liberal fears of government that go back at least as far as the English Revolution of 1688. When they are not virtuous the people may be dangerous, and even Cicero feared the tyranny of the mob more than the tyranny of kings. Sometimes in the wake of civil war monarchs promise safe and stable government. Rome settled for Augustus (63 B.C–A.D. 14), England for Charles II (1630–1685), and France for Napoléon Bonaparte (1769–1821). In each case subjects received from their sovereign guarantees that protected the private sphere while ceding public power to the state. Benjamin Constant (1767–1830) frankly distinguished the (republican) "liberty of the ancients," in *De la liberté des anciens comparée à celle des modernes* (1819), "for which we are no longer fit," from the (liberal) "liberty of the moderns"—liberty to pursue one's own private pleasures in peace. Modern liberalism emerged from the older republican tradition, when full republicanism no longer seemed attainable.

Republican legal theory remains America's central contribution to modern legal discourse, through the United States Constitution's practical demonstration that popular sovereignty may seek liberty and justice in pursuit of the common good, through the rule of law, checks and balances, a deliberative senate, and a stable judiciary, without collapsing into tyranny and civil war. The Roman republic provided a model and inspiration for republican theorists in America, as it had in Italy, England, and France. The United States, however, became the first nation since Rome to make this system work, through the innovation of representation in the popular assembly. Republican theory triumphed so completely in America that its origins are largely forgotten. Most modern legal discourse is in some sense "republican," because republican theory is so deeply entrenched in the universal institutions of contemporary constitutional government. Almost every generation experiences some return to republican first principles, as well as new attempts to build civic community and a revived legal order from the ruins of the west's oldest and most persistent legal and political philosophy.

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See also DEMOCRATIC PROCESS

Rescue in Tort and Criminal Law

The common law traditionally has recognized no general duty to aid another person in danger.