

1990

Book Review: Conceptual Change and the
Constitution. Edited by Terence Ball and J.G.A.
Pocock.

Stephen A. Conrad

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Conrad, Stephen A., "Book Review: Conceptual Change and the Constitution. Edited by Terence Ball and J.G.A. Pocock." (1990).
Constitutional Commentary. 1019.
<https://scholarship.law.umn.edu/concomm/1019>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

since it ultimately becomes a question for national debate and solution by representative bodies. Why not leave unspecified constitutional rights with the legislatures in the first place?

It is unlikely that a national consensus will ever be reached on a fixed set of rules for the exercise of judicial review so long as right and wrong remain relative terms determined by counting votes. Only if we return to the founders' public philosophy can we retain the spirit of constitutional government. Otherwise, constitutional choices are made on the basis of personal preference. We cannot expect the Constitution and a stable American system to survive the onslaught of the Jacobin ideology which permits personal desires to determine public policy. Such an attitude will not preserve history's most successful constitutional order nor that noble document "intended to endure for ages to come" upon which it is based.

CONCEPTUAL CHANGE AND THE CONSTITUTION.
Edited by Terence Ball¹ and J.G.A. Pocock.² Lawrence, Kansas: University of Kansas Press. 1988. Pp. x, 218. \$25.00.

*Stephen A. Conrad*³

Most of the essays in this volume originated as papers for presentation at an April 1987 conference at the Folger Institute for Renaissance and Eighteenth-Century Studies, where Professor Pocock has for some time now been a leading presence in collective reflection on how best to approach the history of political thought. It's no surprise, then, that the book offers methodological self-consciousness aplenty. But if anything, Professor Ball's distinctive methodological commitments are even more apparent here than are Pocock's. Indeed, some of Ball's fellow contributors to this volume have taken a stand squarely with him in these commitments, which look to the current *Begriffsgeschichte* ("conceptual history") movement in Germany as a guide for improving the study of the history of Anglo-American political theory. To be sure, several of the essays collected here don't show any special affinity with this new school of conceptual history; but what's most noteworthy about the volume overall is how so many of them do.

-
1. Professor of Political Science, University of Minnesota.
 2. Harry C. Black Professor of History, The Johns Hopkins University.
 3. Associate Professor of Law, Indiana University—Bloomington.

I

James Farr's essay is the first and maybe the best example. It's also the broadest in its implications; in fact, it even includes some remarks addressing the Critical Legal Studies movement wholesale, and Duncan Kennedy's penchant for structuralism in particular. In the setting of this volume, however, the most important purpose served by Farr's essay is to begin to address what is meant by "conceptual change" as a term of art derived from contemporary European methods of conceptual history and adopted by Ball and Pocock as the titular focus of the book they have assembled.⁴ Together with Ball and Russell Hanson, who also contributes an essay here, Farr is one of the editors of a recent collection of essays from Cambridge University Press entitled *Political Innovation and Conceptual Change*. And the crux of the instant essay by Farr is the relationship he posits between "constitutional innovation" (which he takes to be a species of political innovation) and conceptual change as a "constitutive" agent of such innovation.

The constitutive function in question is, of course, that performed by language itself—a topic rendered almost trite nowadays in the simplest treatments of it. But Pocock, for one, almost never lapses into simplicity. Nor does Farr in this essay. He does, however, achieve a welcome clarity, paradoxically by renouncing pretensions to universalistic, predictive "general theory" in his "sketch" of a nonetheless broadly applicable account of how the conceptual language of politics changes over time, and how such conceptual change is related to changes beyond language.

Invoking Karl Popper, Farr argues that "contradiction" and "criticism" are *the* "triggers" par excellence of the "mechanisms" of conceptual change, quite often in political life, and in the founding of American constitutionalism as a case in point. Moreover his idea of "contradiction" is as closely identified with politics (or, more precisely, ideological politics) as it is scrupulously restricted to the particular meanings to be found in specific historical contexts.⁵

This approach leads to a more appreciative view of the capability of "contradiction" than what Farr sees in that paradigm of CLS exegesis by Duncan Kennedy, *The Structure of Blackstone's Commentaries*.⁶ In contrast to Kennedy, Farr theorizes that

4. See Farr's bibliographic footnote, at 29, esp. his citations to review articles by Melvin Richter. Cf. Richter's more recent remarks in 17 *POL. THEORY* 296 (1989).

5. Cf. Farr, *Understanding Conceptual Change Politically*, in *POLITICAL INNOVATION AND CONCEPTUAL CHANGE* 24-49 (T. Ball et al. eds. 1989) 24-49.

6. 28 *BUFFALO L. REV.* 28 (1979).

contradictions exist largely between beliefs . . . ; and structures (like “practices,” a term I prefer) may be said to be contradictory only to the extent that the beliefs that constitute them are contradictory. Moreover, contradictions between beliefs beget “motion,” if you like, but it is a motion of reflection and discourse that tries and often succeeds in propelling us beyond the particular contradiction of its motivation. This suggests—contrary to the claims of Critical Legal Studies—that contradictions are historically contingent and may be resolved. And in resolving them, doubtless others will occur, even in a world of modest change, much less in a world of conceptual and practical turbulence of the sort that 1787 symbolizes.

Farr is thus not only more strictly historicist and contextualist than Kennedy in his approach to the analysis of contradictions, Farr is also, by virtue of the premium he places on historical context, a good deal more “liberal” and “whiggish”—adjectives that Pocock himself has suggested are all but inevitably applicable to the proper study of the history of Anglophone political thought.⁷

In contemplating the “successful,” “innovative” resolution of historically contingent contradictions in early American constitutional thought, Farr aligns himself with the still-prevailing “ideological turn” in the historiography of the Founding, in the work of Bernard Bailyn, Gordon Wood, Pocock, and so many others who either agree with them or follow their lead if only by rebutting them in the very terms they have set. This is most obviously what *Begriffsgeschichte* shares with the ideological school of early American historiography: analysis organized around a canon of political keywords located in their immediate discursive contexts. Farr could not be on firmer ground when he points this out and quotes Bailyn, Wood, and Pocock in support of his own call for a more concentrated focus on “contradictions” (and “ambiguities”) as the essence of both the Americans’ “Revolutionary frame of mind” and their chief accomplishments as innovative constitutionalists after 1776.

The second essay in this volume, by Gerald Stourzh, is emblematic of the collection in the way it harnesses the lexicographical format of the *Begriffsgeschichte* method to engaged but disciplined political science like that of Ball, Farr, and Hanson. Stourzh traces the “changing meanings” of the term “constitution” in 17th- and 18th-century England and America, with a view to isolating the “greatest innovations” of the founders in a reconceptualization of “constitutionalism” so epic that this partly medieval, partly early-modern concept could become the best promise for securing “human rights” in the twentieth century.

Yet Stourzh’s attention throughout most of his essay is devoted

7. See, e.g., POCOCK, VIRTUE, AND COMMERCE, AND HISTORY 1-34, esp. 32-34 (1985).

less to the climactic conceptual innovations of the founders than to the “roots” of constitutionalism with which he contrasts those innovations. His own summary of his thesis may therefore recall the variable whiggishness of several generations of McIlwainians and neo-McIlwainians:⁸

There are [he submits] two quite distinct roots of applying the word “constitution” to the sphere of government (in the largest sense). The first, and by far the most important one, is to be found in the application of analogies from nature to politics, or, to be more precise, in the transfer to bodies corporate or political of a term that is usually applied to the physical body. The second root is to be found in the rise in importance, around the middle of the seventeenth century, of the legal term “constitutions” (always used in the plural form), which ultimately can be traced to the *constitutiones* of Roman and canon law.

Even for readers to whom this argument sounds familiar there may be surprises in this essay: characteristically, Stourzh has fresh evidence of formulaic orthodoxies; and as often as not it calls for refining or reconsidering them.

If it's fair to say that the greatest interest of Stourzh's essay lies in new evidence rather than novel argument, then it's apt to remark of the subsequent essay, by Pocock, that many of his incidental points and asides may prove more interesting than his overarching thesis. That thesis is announced in the title, *States, Republics, and Empires: The American Founding in Early Modern Perspective*; which is to say that Pocock marshalls observations about the founders' reconceptions of the terms “state” and “republic,” and their assimilation of the term “empire,” in order to fortify what has become one of his signature propositions: “The Constitution of the United States was a great achievement of early-modern [that is, not modern] politics, and a great deal may be learned by viewing it in early-modern terms.”

Still, Pocock hardly denies that the founders were innovators: Not only did Madison and many of his Federalist allies reduce the heady richness of early modern “republican” theory, by converting “the word ‘republic’ to mean ‘government through representatives’ ”; they no less profoundly transformed the meaning of the term “federal,” divorcing it from its sense of the “federative” power that in early-modern theory was attributed exclusively to sovereign states. Henceforth “federal” would conventionally denote, in America and beyond, “a government elected by the people . . . [and]

8. See Katz, *The Problem of Colonial Legal History*, in *COLONIAL BRITISH AMERICA: ESSAYS IN THE NEW HISTORY OF THE EARLY MODERN ERA* 457-89, esp. 476 and 458 (Greene & Pole eds. 1984); cf. generally Katz, *The American Constitution: A Revolutionary Interpretation*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 23-37 (Beeman *et al.* eds. 1987).

exercising sovereignty [directly] over the individuals composing a civil society" unto itself. Despite the classic work on this very theme by Martin Diamond, Samuel Beer, Gordon Wood, and a few others, Pocock is right, I believe, to urge the importance of pursuing the study of this transformation of the word "federal," because the topic does indeed seem to have been "little studied in recent years."⁹

Nevertheless, Pocock's ruminations here on methodology are likely to be of much wider interest than any proposal for historians to reorder their substantive research agendas. Not that Pocock lays out specific prescriptions of method. But some of his obiter dicta seem to indicate a departure from the almost boundless pluralism and relativism that have generally marked his *oeuvre*. To take one example, he writes as follows, in contemplation of "rules" (no less!) for historical contextualization and interpretation:

[T]he historian, and in particular the historian of discourse, is committed by his vocation to operating in an open context; it is, in other words, hard to find any theoretical limit to the number and variety of contexts in which past historical action may be situated for purposes of interpretation. There must, for this reason, be rules and disciplinary procedures for admitting new contexts of interpretation and for demonstrating their relevance and validity; but these rules must themselves be constantly open to discussion.

Such concern for authority notwithstanding, Pocock is hardly inclined to take up the methods of the jurisprudence of "original intent." Indeed, he and Ball evidently agree on the matter: the Introduction to the volume, which appears under both their names, concludes with a memorably elegant argument that historians who search for "original intent" are deluding themselves as much about what they are doing as what they are seeking.

II

Although not yet as well known to legal scholars as the established luminaries of the ideological school, the younger historian Peter Onuf has already made an indispensable place for himself in partial association with it. His research tends to build upon and complement it; but he never fails to uncover and synthesize evidence in his own way. His is the fourth essay in the collection. And although he has entitled it *State Sovereignty and the Making of the Constitution*, and aims throughout to explore the meanings of "state sovereignty" as a discursive concept at the Founding, he more than any of the other conceptual historians contributing to this volume takes note of the "pragmatism" of the founders as a

9. My own attempt to pursue the matter is *Metaphor and Imagination in James Wilson's Theory of Federal Union*, 13 *LAW & SOC. INQUIRY* 1 (1988).

dimension of their "rhetoric." This orientation serves him very well in restoring to its authentic salience the practical point that at the Founding, in order to disarm the localism of the Antifederalists—eminently reasonable as it must have then seemed—the Federalists had to make *and win* an argument "that their goal was to preserve and strengthen the states, not to destroy them." This is a point that may just have been decisive in the Ratification debates; and it has remained continually important throughout the two ensuing centuries of the rhetoric of federalism in America.

Beyond this main point of Onuf's, however, his essay is to my knowledge unrivalled as a brief exposition of the aspirational character of the Antifederalists' republican theory at its most compelling—to many of their contemporaries if not to many of us today.

Next comes a piece by Garry Wills—short, but with pretensions to an arresting revisionism that goes beyond anything attempted by any of the other contributors. The title is *James Wilson's New Meaning for Sovereignty*; and as in the work of virtually every major twentieth-century commentator on Wilson's constitutional theory, the new meaning credited to Wilson is that of "popular sovereignty" as an *operative* concept. But Wills departs radically from earlier commentators in tracing Wilson's conception of popular sovereignty to none other than Rousseau. According to Wills, Rousseau was Wilson's "mentor." Wilson's "profound understanding and use" of Rousseau was absolutely "central"—albeit virtually unacknowledged by Wilson himself and quite "unrecognized" by Wilson's best students to date—in the *Lectures on Law*, Wilson's *summa* on American constitutionalism.

As evidence for such claims, Wills relies on what he takes to be textual parallels between the *Lectures* and the *Social Contract*. Wilson had a "version" of "the general will," and it was Rousseau's. "For Wilson, no less than for Rousseau, the only legitimate government was a continuing revolution."

There is undoubtedly something to this perspective on Wilson. But it is difficult at best to assess how much, at least on the basis of Wills's slim evidence and apodictic approach. Since Wills is said to be at work on a book about Wilson, I'm resolved to withhold judgment for now, despite my own recent inclination to accord far less "central" a place than does Wills to voluntarism (not to mention Rousseau's "general will") in Wilson's constitutional theory.¹⁰

10. See Conrad, *Polite Foundation: Citizenship and Common Sense in James Wilson's Republican Theory*, 1984 SUP. CT. REV. 359, esp. 381ff (1985); Conrad, *James Wilson's "Assimilation of the Common-law Mind,"* 84 NW. U. L. REV. (forthcoming). But the best cor-

III

The sixth essay is a revised version of a prize-winning article recently published by Daniel Walker Howe in the preeminent journal of early American history, the *William and Mary Quarterly*. For this collection Howe has slightly modified the title and the emphasis of that article to bring his work more in line with the "linguistic turn." The title here is *The Language of Faculty Psychology in THE FEDERALIST PAPERS*; and his thesis, as he restates it at the outset, is that:

The conventional paradigm that did most to shape the argument of *The Federalist* was eighteenth-century faculty psychology. By examining the authors' use of the language of faculty psychology we can discover what they meant by such crucial terms as "interest," "balance," "reason," "passion," and "virtue" in *The Federalist*. Only then can we appreciate how they were adapting conventional conceptions to the needs of a new nation and a new political order.

Nevertheless, this formulation of the thesis doesn't fully convey the force of Howe's novel analysis. Although he scrupulously avoids what he himself calls the "mistake" of trying "to extract from [*The Federalist*] a complete political theory or a comprehensive statement of the relation between government and virtue, such as one finds in Aristotle," Howe does venture a reinterpretation that would seem to ground the entire argument of *The Federalist* on one "coherent model" of "human nature." This is a reductive exercise that resembles many another efforts to find, as Howe intimates he has found, *the* "key" to both "the rhetoric" and "the argument" of Publius.

But even if Howe goes too far in claiming to have shown conclusively that "Publius constructed his political science on the model of faculty psychology," Howe's is a welcome corrective to tidy ahistorical interpretations of *The Federalist*. For example, Howe lays special emphasis on the importance of reading the psychological terminology of Publius in light of the teachings of Thomas Reid's eighteenth-century Scottish school of moral philosophy, which by the 1780s was already in its early heyday in America. And in this light Howe finds that, "what looks to twentieth-century eyes like broker-state pluralism [in *The Federalist*] was, to Publius's contemporaries, subsumed within a familiar scheme of eighteenth-century moral philosophy—namely, the principle of countervailing passions."

Occasionally I am given pause by the thoroughgoing symmetry of Howe's interpretation, as when Howe so thoroughly "identifies"

rective to Wills on Wilson remains George M. Dennison, *The "Revolution Principle": Ideology and Constitutionalism in the Thought of James Wilson*, 39 REV. POL. 157 (1977).

Publius's conception of the executive branch of government with the "will" as a faculty of the mind that Howe surmises, by analogy:

As the will ought to implement fixed principles and conclusions of the understanding, according to Reid's psychology, so the executive [according to Publius] ought to enforce only laws enacted by the legislature [the branch of government Howe says Publius identified with "the understanding"]. In identifying the executive with the will, Publius was not making the presidency supreme but was emphasizing its rationality and subordination to the law.

This sort of categorical resolution of the celebrated ambiguities of *The Federalist* gives little hint of the idea of the energetic and independent, not merely implementing, presidency that Madison came to propound at the 1787 Federal Convention. Granted, Howe's essay focuses on the text of *The Federalist*, deliberately excluding almost all context other than the source literature of eighteenth-century faculty psychology. Therefore nothing Madison, or Hamilton, or Jay said or wrote outside *The Federalist* is to Howe's point; nor is anything written by any of their Federalist allies or Antifederalist opponents. These, to my mind, unquestionably significant elements of context are excluded from consideration by Howe so that he can more fully highlight an element of context usually overlooked. Ultimately he is very persuasive that his distinctive project is worth the candle, however many qualms one might have about some of the conclusions he reaches along the way—such as my concern that Howe repeatedly overestimates the rationalism of Publius (and of Thomas Reid, for that matter).

IV

As I see it, the sixth and seventh essays in the volume, Ball's and Hanson's, are the center of gravity of the entire collection. Like Farr's, their methods as conceptual historians require them to take historical contingency seriously; yet they are implicitly as engaged with our political controversies as with those of the founders. At the very least, Ball and Hanson evince an attachment to the *idea* of political "principles" the value of which ultimately depend little if at all on historical context. More than that, both Ball and Hanson privilege one principle—"democracy"—as a virtually suprahistorical, foundational value.

Whatever its merits, such a pairing as that I perceive between concern for historical *facts* and concern with enduring political *values* is bound to make for a complex point of view. I infer that a self-consciousness about this complexity is at the heart of the methodological commitments of Ball and company as "conceptual historians."

In Ball's essay here (a shortened version of an essay that appears in a more obviously engaged book),¹¹ Ball says he aims to reexamine the debate between the Federalists and Antifederalists as a "conceptual-cum-political controversy with an eye to discerning the argumentative and rhetorical resources used by both sides to preserve old meanings or, alternatively, to create new ones." Almost as if to emphasize methodology over substance, Ball chooses as his particular topic the contested meanings at the Founding of that now so widely mooted term/concept "republicanism." "My reason," says Ball, "for retreading this oft-trod ground is to bring into bold relief the conceptual dimensions of the controversy over ratification." This leads Ball to what is to me his most important contention: in reviewing some of the aspects of the disputed meaning of "republicanism" in the 1780s, he claims to show "how the ratification debate took a 'linguistic turn' as the protagonists became increasingly aware of the conceptually constituted character of their respective views of politics and citizenship."

There is an undisguised critical edge to such a contention. In characterizing late eighteenth-century "conceptual changes" in the meaning of republicanism as "rational strategies in a hard-fought conceptual-cum-political struggle," Ball does not pretend to remain perfectly neutral as between the two sides in the struggle. He avers that:

Although both groups [Antifederalist and Federalist] may be said to have inhabited essentially the same "universe of republican discourse," it is worth noting that while one wished to maintain the boundaries of that universe, the other wished to redraw them.

And it is worth noticing that as authority for this view Ball cites important books by the authors of the two final essays in this collection, *The Democratic Imagination in America* (1985) by Russell Hanson, and *The Jeffersonian Persuasion* (1978) by Lance Banning. It is the perspective Ball largely shares with Hanson and Banning that heightens the core "irony" (to use Ball's term) of Madisonian republicanism: "Even though the meaning of the word 'republic' may be mutable, Madison contends, the principles of republicanism are timeless and above the partisan fray." And Ball concludes his own essay on a note of bracing ambiguity as to the problem of reaching a historically informed estimation of Federalism *qua* republicanism:

In revising the meaning of "republic," Publius had not merely changed the meaning of a word. He had constituted a world. Whether or in what sense that world was

11. T. BALL, *TRANSFORMING POLITICAL DISCOURSE: POLITICAL THEORY AND CRITICAL CONCEPTUAL HISTORY* (1988), chap. 3: *Reconstituting Republican Discourse*.

any longer *recognizably* "republican" continues to be a matter of dispute. (emphasis added)

Ball's pregnant use of the word "recognizably" is a nice transition to the subsequent essay by Hanson, entitled "*Commons*" and "*Commonwealth*" at the American Founding: *Democratic Republicanism as the New American Hybrid*. Ball is posing the difficult question Hanson squarely addresses, the question of the historically unstable but principled distinction *and interrelation* between "democracy" and "republicanism" that Madison and his allies reworked in order to achieve a Founding widely revered by strong and weak democrats alike for over two centuries. Moreover, Hanson could not be plainer that the Federalists' "success," such as it was in their own day and thereafter, was *not* the function of a prevailing "consensus" on fundamental political values.

As Hanson says, by 1787, "[f]or the Antifederalists . . . the Revolution was over." Not so for their innovative opponents: "If the Antifederalists desired a popularly limited government, the Federalists advanced the idea of a limited popular government . . . [and to be] less popular in orientation [was to be] not so *obviously* republican in character." (emphasis added).

The import of Hanson's adverb "obviously" is the same as that of Ball's "recognizably": historical contingency notwithstanding, all is not flux; there is a shape to some processes and events that yields a fixed point of reference. How else are we to read Hanson's cadence: "[By the age of Andrew Jackson, d]emocracy had proved irresistible. Madison's carefully wrought distinction between democratic and republican forms of government had broken down, and the work of the Revolution had truly been completed"?

Hanson's is, however, something of a "false" cadence, especially in relation to Lance Banning's essay, which completes this collection. Because Banning has been such a prominent and thoughtful spokesman on behalf of the importance of republicanism in early American history,¹² the title alone of his essay is especially significant: *Some Second Thoughts on Virtue and the Course of Revolutionary Thinking*. For many republican theorists of the eighteenth century and neo-republicans of the twentieth, "virtue" is a conceptual keyword of almost talismanic overtones. And often its charm lies in its legitimation of a civic culture that emphasizes the sacrifice of self-interest to the public interest.

Whatever the meaning of a politics of virtue could or should be today, Banning wants to remove this notion of sacrifice from the

12. Cf. Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 63 WM. & MARY Q. 3 (1986).

central place some historians have accorded it in reconstructing Madisonian republicanism. Instead, Banning finds the “most essential meaning” of “virtue”—to Madison and to most Americans throughout the eighteenth century—in the ethos of eighteenth-century British opposition politics: “a jealous, vigilant commitment to the public life: continuing participation in a politics that trusted only limited responsibilities to national officials and demanded, even so, that these officials be continuously watched for any signs of an appearance of a separate set of interests.”

Some might say that this conception of Madisonian republicanism collapses republicanism into liberalism altogether. On its face Banning’s point as quoted here might be interpreted to say as much. But attentive regard to exactly *how* he reaches his point doesn’t admit of so facile a synthesis—or, indeed, of definitive synthesis at all. Yet paradoxically, by refusing to isolate the thought of a theorist like Madison from its immediate contexts, Banning illustrates the coherence of an—not *the*—eighteenth-century republican tradition identifiable by its essence, despite the impossibility of giving a comprehensive account of that tradition.

Banning thus reminds us that it is this essentialism—and a faith in the meaningfulness of essences inhering in political concepts and their keywords—that gives a unity (although not a unanimity) to this collection of essays. It is not the essentialism of Aristotle, or of Montesquieu, but of a group proceeding under the banner of “conceptual history.” And as much as most of them owe to Aristotle or Montesquieu or both, they take pains to derive their essentialism from historical data unimagined by either.