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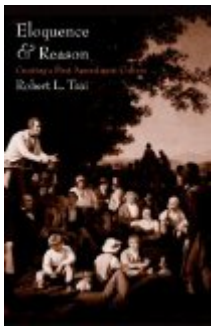
Robert L. Tsai. *Eloquence and Reason: Creating a First Amendment Culture.* New Haven: Yale University Press, 2008. xiii + 198 pp. $45.00, cloth, ISBN 978-0-300-11723-3.



Reviewed by Anders Walker

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Commissioned by Christopher R. Waldrep (San Francisco State University)

Robert L. Tsai's *Eloquence and Reason* provides an interpretation of First Amendment jurisprudence that is at once nuanced, novel, and compelling. More than presenting simply a history of litigation strategy or Supreme Court politics, Tsai focuses on language, positing that freedom of speech is "a distinctive way of life" and "a sophisticated system of devotional practices," not unlike the "webs of signification" that Clifford Geertz associated with culture (pp. 1, 6n13). Animating free speech culture, argues Tsai, are certain inspired rules of rhetoric, or what sixteenth-century political theorist Thomas Wilson called "precepts of eloquence." Such precepts, continues Tsai, not only "set fire to reason" as Oliver Wendell Holmes famously noted, but also elevate constitutional discourse from mere assertions of brute power to discursive constructs that simultaneously define Americans even as they bind them, ruler and ruled alike (pp. 12-13).

To illustrate how free speech doctrine might be thought of as a cultural formation, Tsai divides his book into five chapters. Chapter 1 challenges the notion--popular among conservatives--that America was somehow defined by its founders, positing instead that it has defined itself over time, not simply through Kramer-esque acts of mob-led "popular constitutionalism," but through more refined discursive interchanges between "elites" and the "population" (pp. x, 2). Such interchanges, argues Tsai in chapter 2, are more than public transcripts that elites use to exploit the masses; in fact, they represent a much more complex "amalgamation of elite and majoritarian conceptions of politics" (pp. 2, 28). Tsai then dedicates chapters 3, 4, and 5 to proving Holmes's point that eloquence actually bolsters legal reasoning by showing how linguistic constructs, such as "house-on-fire" metaphors, "market place of ideas" metaphors, and "meeting" metaphors, actually accomplished important political work over the course of the twentieth century (pp. 52, 60, 86). For example, in chapter 3, Tsai shows how fire metaphors justified the curtailment of free speech in 1919 (Holmes's famous mention of "falsely shouting fire in a crowded theatre" in

Schenk [1919]) only to evolve over time into a shield against state laws limiting free speech (for fear of "burning down the barn to roast the pig" in *Butler v. Michigan* [1957]) (pp. 53, 57-58). Tsai goes on to recover the rise of the "wall of separation" metaphor in chapter 3, noting that it first took hold in the context of Supreme Court discussions of religion in 1947, and Franklin Delano Roosevelt's imaginative articulation of the "Four Freedoms" in chapter 4, a nonjudicial invention that dissuaded the Supreme Court from remaining hostile to wartime dissenters, particularly Jehovah's Witnesses who refused to salute the flag (pp. 93, 122). Chapter 5 concludes with an alternate reading of the founding, one focused on the role of language in the creation of "an emerging constitutional culture" (p. 157).

Perhaps the only study of American constitutional law to adopt an explicitly Geertzian approach, Tsai's work goes a long way to showing how legal language facilitates the exercise of political power, and how such language might be thought of as an inextricable part of our national culture (p. 6n13). Whether or not metaphorical language is used to liberate or repress, in other words, Tsai shows convincingly that the invocation of metaphor is itself important, and that the American state repeatedly "resorts to the figurative" for reasons that have so far gone largely untheorized (p. 35).

Because of its highly theoretical slant, Tsai's book should be of interest to multiple scholarly communities. Historians of the First Amendment will undoubtedly find ***Eloquence and Reason*** a provocative jumping-off point for discussions of more traditional histories by Leonard Levy, Mark Graber, David Rabban, and Harry Kalven. Though reminiscent of Kalven's celebration of America's First Amendment tradition, Tsai does not spend much time talking about the intersection of litigation strategy and politics, focusing instead on the more theoretical aspects of First Amendment language itself. Similarly, Tsai does not dedicate much effort to engaging Rabban's recovery of early nineteenth-century free speech advocates, an occlusion that actually raises an interesting question: can Tsai's analysis of metaphor be extended back into the nineteenth century and applied to other fields of law--for example, property rights or contract?

Precisely because of its unique approach, Tsai's work points to a significant question of whether law plays a more important role in cultural formation than we might otherwise expect, even positing that First Amendment discourse is in fact that aspect of American culture which, despite our myriad differences, we ultimately share. Read in this light, Tsai challenges those who prioritize America's founding as a defining cultural moment, indicating that our national culture actually developed much later and therefore is much younger than many may have previously thought. After all, much of the First Amendment doctrine that we tend to celebrate today was the province of unpopular minorities, particularly communists, during the early decades of the twentieth century. Tsai suggests that these radicals succeeded in part because they chose a line of linguistic reasoning that resonated with Americans generally, a point that explains why lawyers who came of age in the 1930s--Herbert Wechsler among them--struggled with decisions like *Brown v. Board of Education* (1954) but found it easy to advance civil rights once couched in First Amendment language like *New York Times v. Sullivan* (1964) (which Wechsler argued). Does this mean that mid-century calls for neutral principles were in fact a call for more eloquent principles? Perhaps. Though he does not concentrate on litigators like Wechsler, Tsai shows clearly how notions of expressive liberty facilitated civil rights activism, indicating that legal liberalism worked better when it got the language right.

Due to its heavy emphasis on language, ***Eloquence and Reason*** promises to hold a strong interdisciplinary appeal. Anyone teaching law and

culture or law and literature should consider assigning this book, as should anyone engaged in critical legal studies. Perhaps the most striking aspect of Tsai's book is its sophisticated use of cultural/linguistic analysis in the service not of deconstruction but of formation, a topic that may even be of interest to political scientists and socio-legal scholars. Both the regime politics literature and emerging studies on judicial opinions and cultural framing stand to benefit from Tsai's elaboration on the state's turn "to the figurative," a compelling meditation on the relationship between law, language, and power (p. 35).

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