

ESSAY

CONSTITUTING THE CONSTITUTION: UNDERSTANDING THE AMERICAN CONSTITUTION THROUGH THE BRITISH CULTURAL CONSTITUTION

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Reference is often made to the legal, philosophical, and historical progenitors of the American Constitution in ideas derived from Great Britain, such as the writings of John Locke or William Blackstone, and familiar documents like the Magna Carta or The Petition of Right of 1628. Perhaps an even more significant constitutional heritage may be found in our inheritance of the British appreciation for the customary or cultural foundations of fundamental law. This appreciation for what is often termed the “organic” constitution, beholden philosophically to Aristotle, Aquinas, and Burke, emphasizes how a society or nation is “constituted,” and the implications of that social constitution for the written or codified document. In this respect, the example of British constitutionalism may be helpful in understanding the proper approach to American constitutional interpretation.

I. BRITAIN’S “CONSTITUTED” CONSTITUTION

Consideration of what the inhabitants of Great Britain understand to be “the British Constitution” is instructive. By “the Constitution” the British (and all traditional societies) mean how the entire nation is “constituted” or “made up.” It is an older meaning of the word, which conveys a richness that our narrower, purely documentary “Constitution” misses. In earlier American culture, people spoke of a man’s “constitution,” or overall condi-

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tion, as healthy or sound, strong or weak. Even today we sometimes speak of a horse's "constitution" as its overall health and abilities. Similarly, when the British understand their constitution in this sense, they mean the overall condition and character of the country, including its economy, households, religion, education, manners, and arts—as well as the organization of government. The state is only a formal and representative expression of the nation's "constitution." According to this organic composition of the traditional constitution, the government and laws should conform to the other aspects of a nation's constitution, both to preserve the wholesome institutions of which society is comprised and to avoid needless friction between law and private conduct—friction that ultimately leads to diminished esteem for the organs of government. In this way, when we refer to "the Constitution" in the British sense we actually mean *more*, not less, than when we use the same words to describe the written, American Constitution. It is perhaps a more complete, wiser understanding of what a constitution is.

One of the most prominent English Constitutional Law scholars in the 1800s, now largely forgotten, was Sir William Anson, the Master of All Souls College at Oxford.¹ In his classic nineteenth-century work, *The Law and Custom of the Constitution* (note the title, itself reflecting a traditional organic view), Anson wrote that it is "the connection and relations" of persons in a society that "form the constitution."² Therefore, Sir William insists, especially in the early stages of its development, "the action of the State . . . dare not depart from custom."³ Instead, "religious observance and moral action, as well as the maintenance of order . . . are its concern."⁴ A government neglects its primary duty when it forgoes "maintaining and enforcing its [country's] customs," and does so at its peril—especially when it uses the written Constitution and laws to *attack* those moral customs.⁵ When, in America, this study of society and custom was separated from that of law and government and given

1. Of the almost forty colleges that make up Oxford University, All Souls is distinguished by the fact that it has no resident students. The Fellows of All Souls may give lectures for the larger university community, but their primary service is research and scholarship. It is unknown what effect this may have had on Sir William's writings on the English Constitution.

2. SIR WILLIAM ANSON, *THE LAW AND CUSTOM OF THE CONSTITUTION* 3 (1886).

3. *Id.* at 4.

4. *Id.*

5. *Id.* at 6.

over to sociology, with its Marxist presuppositions, we lost a vital link to understanding the essential role that law, government, and our own Constitution play in maintaining the social customs that gave rise to our great nation in the first place.

Sir William Anson rightly noted that because the British Constitution consists of the way that nation is constituted—culturally, morally, economically, religiously, *and* politically—the country’s constitutional change is gradual and slow. Alterations in law and custom are almost always “unconscious adaptations,” and are “never . . . comprehensive”; sudden, radical change in law initiated by legislators or judges would not only violate this organic constitution, it would cause innumerable and serious problems.⁶ Modification in the structure of law, society, or the family should be in piecemeal changes, making the traditional constitution “a somewhat rambling structure,” with bits and pieces of the past heritage, perhaps not clean and thoroughly consistent, but compatible with conservative sensibilities.⁷ Hence, even the political aspect of the constitution (Crown, Lords, and Commons, or “the King in Parliament”) is indistinct, as it is “collected from statutes [and] . . . legal decisions,” forming a “monument . . . of political sagacity.”⁸

Like Edmund Burke’s values of prudence, prescription, and incremental adaptation, the traditional Constitution, in that wise Parliamentarian’s words, is “a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.”⁹ It reflects, in St. Thomas Aquinas’s formulation, Divine Law and Natural Law.¹⁰ It is, in an important sense, a given. As such, it should be respected. For a single government, political party, or group of Supreme Court Justices to attempt suddenly to change that organic, cultural constitution would be improper, disastrous, and potentially suicidal. For a group to attempt to *use* the written Constitution to undermine and corrupt the cultural constitution from which it sprang, would be both dishonest, as a matter of interpretation, and foolish, as a matter of policy.

6. *Id.* at 31.

7. *Id.*

8. *Id.* at 35.

9. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 82 (Frank M. Turner ed., 2003) (1790).

10. ST. THOMAS AQUINAS, SUMMA THEOLOGICA II-I, Q. 91, art. 2, 4.

II. THE AMERICAN "CONSTITUTIONS"

What insight does the "uncodified" British Constitution provide for Americans?¹¹ First, it serves to clarify the often unfamiliar idea that a cultural constitution of social, religious, economic, educational, familial, and governmental traditions *exists*. It is how America is "constituted" or "made up"—the cultural features that go back hundreds of years and remain today and will remain tomorrow, because customs change very slowly, especially if they are grounded in Divine and Natural Law. Second, it reveals that the *written* (or "codified") Constitution of the United States was derived from, and properly reflects, that original, organic constitution (of many national, but primarily Northern European heritages). And third, it suggests that attempts to distort the written Constitution in order to attack the underlying foundational constitution are especially dangerous.

Whether or not such attempts are ultimately defeated by the cultural and spiritual moorings of the organic American constitution, the use (or, rather, misuse) of the formal U.S. Constitution in an attempt to destroy the essential social constitution unavoidably causes considerable confusion and difficulties. Renewed appreciation for the organic American constitution is of special importance to prevent the expansion of the "culture of death," as Pope John Paul II termed it,¹² caused by various distortions of the written U.S. Constitution by those seeking to undermine the cultural and moral foundations of that document.

The best description of our nation's cultural constitution remains Alexis de Tocqueville's *Democracy in America*.¹³ Despite its age, this insightful study of the manners, morals, institutions, and social practices in the United States continues to define the essential culture of America. Those who doubt this fundamental continuity should consider the persistence of basic Christian

11. Professor Bogdanor provides this valuable distinction between "unwritten" and "uncodified." See *THE BRITISH CONSTITUTION IN THE TWENTIETH CENTURY* (Vernon Bogdanor ed., 2003). The British Constitution *is* written as well as organic in the sense that many written aspects (historical documents, statutes, judicial decisions, and so on) are a part of it; but unlike the "written" United States Constitution, these are not confined to a single "codified" constitution. This probably aids in an appreciation of the other social aspects of the constitution. In that sense, the American Constitution is at a disadvantage, compared with its British ancestor.

12. Pope John Paul II, Encyclical Letter, *Evangelium Vitae* ¶ 12 (Mar. 25, 1995).

13. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop trans., 2000) (1835, 1840).

religiosity, which Tocqueville admirably described, in contemporary American culture.

What are some of the essential aspects of how America was and is constituted? Tocqueville saw the values of American democracy—equality and liberty, which could lead to the excesses of tyranny and anarchy—as restrained by the salubrious cultural aspects of American society: the Christian religion; aristocracy in the legal profession and among businessmen; public-spiritedness through free associations; strong traditional families; and a basic decency of manners. These cultural aspects of American society serve as the *organic* constitution, without which the abstract principles of liberty and equality in the written, *political* Constitution cannot remain functional. Those who seek to damage this essential constitution through appeal to the abstract principles of equality and liberty in the formal Constitution—by persecuting religion, undermining professional and business authority, restricting free associations, destroying or “redefining” the family and those moral and legal principles that support it, and ridiculing decency in manners—contribute to the demise of *both* constitutions in America.

Foremost in the protection of American political rights, for Tocqueville, was the existence of a healthy Christian church.¹⁴ The varied denominations produced by religious freedom create a general Christian ethos in the United States, which civilizes morals and restrains the excesses of democracy.

I have not seen a country where Christianity wraps itself less in forms, practices, and [representational] figures than the United States, and presents ideas more clearly, simply, and generally to the human mind. Although Christians of America are divided into a multitude of sects, they all perceive their religion in the same light.¹⁵

The resilience of a basic (even evangelical) Christian culture in America against a hundred years of secular education, media, and liberal government confirms Tocqueville’s analysis and affirms the persistence of a social constitution.

14. Indeed, Tocqueville refers to America’s Puritan origins as a fundamental “point of departure,” and asserts that “there is not one opinion, one habit, one law, I could say one event, that the point of departure does not explain without difficulty.” *Id.* at 29.

15. *Id.* at 423.

The aristocracies of lawyers and businessmen, the one by its education and the other by its wealth, serve for Tocqueville as parts of the American social constitution that mitigate against democratic “tyranny of the majority” and the potential anarchy of strict equality.¹⁶ Indeed, Tocqueville notes that “[t]he American aristocracy is at the attorney’s bar and on the judge’s bench.”¹⁷ Lawyers, trained in the methodical workings of the law, play a valuable role in the American cultural constitution:

When the American people let themselves be intoxicated by their passions or become so self-indulgent as to be carried away by their ideas, the lawyers make them feel an almost invisible brake that moderates and arrests them. To their democratic instincts they secretly oppose their aristocratic penchants; to their love of novelty, their superstitious respect for what is old; to the immensity of their designs, their narrow views; to their scorn for rules, their taste for forms; and to their enthusiasm, their habit of proceeding slowly.¹⁸

It is in this way that a good lawyer—and a good judge—can maintain the cultural constitution by encouraging the people “not to be unfaithful to their own laws and to remain in accord with themselves.”¹⁹ Such restraint serves the interests of all, for attacks on *all* types of authority ultimately promote only the chaos which most harms those of low income and status, as Thomas Hobbes effectively explained.²⁰

Freedom of private associations (for example, social clubs, churches, and benevolent societies), while allowing what strict egalitarians deride as “discrimination,” promotes, for Tocqueville, voluntary public-spiritedness. Public-spiritedness, in turn, prevents the populace from relying totally on the government, and “[t]he inhabitant of the United States learns from birth that he must rely on himself to struggle against the evils and obstacles of life.”²¹

16. *Id.* at 239–64.

17. *Id.* at 256.

18. *Id.*

19. *Id.* at 257; *see also id.* at 254 (“The lawyer belongs to the people by his interest and by his birth, and to the aristocracy by his habits and his tastes I doubt that democracy could long govern society, and I cannot believe that in our day a republic could hope to preserve its existence if the influence of lawyers in its affairs did not grow in proportion with the power of the people.”).

20. *See* THOMAS HOBBS, *LEVIATHAN*, pt. 1, ch xiii, at 87–89 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

21. TOCQUEVILLE, *supra* note 13, at 180.

Even today, when natural disasters strike in the United States and abroad, assistance from America's "private" charity greatly outpaces and overshadows help provided by public programs. The American cultural tradition of people forming associations freely, even if it works to "exclude" some others, is legitimate and socially beneficial. "I must say," Tocqueville wrote, "that I often saw Americans make great and genuine sacrifices for the public, and I remarked a hundred times that, when needed, they almost never fail to lend faithful support to one another."²²

The faithful lending of support to which Tocqueville refers invariably involves the activities of private groups. Those reformers who have worked to prevent exclusivity in voluntary associations and to transfer ever more social welfare activities to the state (with its onerous bureaucratic regulations), may have inadvertently undermined this voluntary public-spiritedness of the organic American constitution, thereby damaging the cultural constitutional fabric and diminishing actual social welfare and benevolence. As Aristotle noted in his critique of Plato's communism, it is rather hard to display the virtue of generosity when one is allowed little or no money.²³

Strong, healthy families also form an important part of the American social constitution, supporting the political rights and democratic elements of the written Constitution. Although lacking the strict parental authority of family life in aristocratic societies, Tocqueville found the American family more intimate, loving, and stable.

In the democratic family the father exercises hardly any power other than that which one is pleased to accord to tenderness and to the experience of an old man. His orders would perhaps be neglected; but his counsels are ordinarily full of power.²⁴

The persistence of the "family values" issue in American political life—despite multitudinous attempts at destroying that institution through easy divorce laws, adulation of "single parent homes" and same-sex "marriages," abortion, and attacks on the traditional role of the father—attests to the fundamental nature of the family in the American cultural constitution. The failure of the state to find any substitute for the

22. *Id.* at 488.

23. ARISTOTLE, *NICOMACHEAN ETHICS* 1099a32; *POLITICS* 1263a25–b14.

24. TOCQUEVILLE, *supra* note 13, at 561.

moral and emotional role of the family reveals the enduring value to society of that timeless institution. A country respectful of this valuable constitutional component would not only refrain from further undermining it by specious reference to the written Constitution, but would reinforce it through appropriate public laws.

Tocqueville, perhaps surprisingly to modern sensibilities, found an American culture constituted by a basic decency in manners. While not the highly formalized decorum of aristocratic society, he recognized that “[i]n democratic peoples, manners are neither so learned nor so regular; but they are often more sincere.”²⁵ The civility of manners and speech in the social constitution (primarily taught in families, churches, and schools) makes the freedoms of speech and press that are part of the written, political Constitution constructive and functional. The misuse of formal constitutional rights to defeat those underlying values and institutions—by, for example, defending obscenity, pornography, and antisocial behavior as “rights”—causes many social problems and perverts the constitutional meaning of freedom. One has only to hear contemporary university students’ slang to realize that the benevolent restraint of verbal vulgarity formerly taught by family and school has practically disappeared.

To Tocqueville’s admirable description of America’s cultural constitution, we might add those national and ethnic traits and characteristics of the groups that shaped the U.S. population during its formative years. National qualities, until “political correctness” banned them, featured in any analysis of a culture or society—for example, the propriety and standards of the English; the faith, mysticism, and humor of the Irish; the fighting spirit and frugality of the Scots; the precision and piety of the German and Dutch settlers in Early America. I realize it is not fashionable to speak of such national characteristics today, but any examination of eighteenth-century North American writings will be found replete with them, and they, therefore, formed a conspicuous element in the original cultural constitution of America. Without recognizing the rich variety of traits forming American civilization, which are represented in much of the best of our country— independence, charity, a strong work ethic, social morality,

25. *Id.* at 580.

military vigor, fair mindedness—we will be less able to defend them against assault by other “values” that manifestly produce less prosperity, freedom, and happiness. The rest of the world, in its envy, admiration, and sometimes fear of the United States, attests to the esteem with which these American cultural constitutional values are widely held.

III. CONSEQUENCES OF CONFLATING THE CONSTITUTIONS

This Essay has attempted to show that the traditional appreciation the British have for their “cultural constitution” as an amalgam of social characteristics gradually evolving through its history—moral, political, economic, religious, educational, familial, and so on—has something to teach Americans concerning our own understanding of the United States Constitution. The first lesson that Britain’s (or any traditional society’s) appreciation of this cultural constitution teaches is that such an organic social reality actually exists. It is ignored at our peril. Judges who misuse the written Constitution to undermine these values show a disgraceful disregard for the political culture that produced that venerable document, as well as disrespect for the very judicial institutions in which they work.

Public institutions should be the guardians of this cultural heritage, not its detractors and enemies. The long-term interests of individuals, business, civic organizations, and even the media, reside in understanding and preserving the best of a country’s cultural constitution. The ultimate grounding of the American “constitutions” is 3,000 years of Judeo-Christian tradition. St. Thomas Aquinas wrote that Human Law made in variance with Natural and Divine Law would ultimately fail.²⁶ If American legislators and jurists make decisions without reference to the cultural constitution, they, too, will fail.

26. AQUINAS, *supra* note 10, at Q. 95, art. 2.