

subtopic

Modern Constitutionalism

NATURAL RIGHTS and MODERN CONSTITUTIONALISM

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The idea of constitutionalism is as old as political science, and its features are best described and defended by political philosophers. [Aristotle](#), for example, first addressed the question of the best form of government and, after weighing all the relevant factors, decided in favor of a “mixed regime,” specifically a mixture of oligarchy and democracy, or as he put it, a system of rule by the middle class. Such a regime, he said, would be free from factions and, for that reason, was likely to be stable and moderate.^[1] He gave it the name “polity”; this can be said to be his version of constitutional government.

Rome was the first to adopt a mixed constitution. A mixture of aristocracy and democracy, it was intended to guard against instability and undue concentration of power. Rome’s political philosopher ([Cicero](#)) favored it because it provided all that can be hoped for in a constitution: “an even balance of rights, duties, and functions, so that the magistrates have enough power, the counsels of the eminent citizens enough influence, and the people enough liberty.”^[2] And Polybius, the Greek historian, pronounced it a success because it provided a perfect mixture of nobles and common people.^[3]

But [Montesquieu](#), the French political philosopher, writing in the mid-eighteenth century, said Polybius’s account was “idealistic,” that is, unsupported by evidence. Montesquieu looked at Rome’s history and found, instead of a stable, institutionalized balance of factions, a slow but steady evolution toward mob rule. He wondered whether there might not be a way of improving on the Roman system, and, with that in mind, examined the British Constitution. But his account of the British Constitution proved to be as idealized as Polybius’s of the Roman, and deliberately so. The British Constitution figured in his account only because it bore some resemblance to the form of government under which political liberty is best secured. This form proved to be one in which the three powers of government (the legislative, executive, and judicial) are divided. The legislative power is further divided, with one house representing the body of the people, and another house representing the nobles: those distinguished by birth, wealth, or honors. In turn, the executive power, which is vested in a monarch, possesses the veto power, and the judiciary is independent of the other branches because its task is to protect civil liberties, property rights, and the rule of law.^[4] With such a vision of the form of government best suited to secure political liberty, it is no wonder that the American Founders called him “a great man,” and referred to him as “the celebrated Montesquieu.”^[5] But contrary to Montesquieu, the British Constitution was obviously not based on the new idea of separated powers. Nor did it conform to Thomas Paine’s still newer idea of the constitution as an act of the people antecedent to government and as determining the authority committed to government. It was, even then, an old constitution. The Viscount Bolingbroke, a British statesman, said as much in his *Dissertation upon Parties*. By constitution, Bolingbroke suggested, we mean:

that assemblage of laws, institutions, and customs, derived from certain fixed principles of reason, directed to certain fixed objects of the public good, that compose the general system, according to which the community hath agreed to be governed.^[6]

When speaking of laws, Bolingbroke probably had in mind, first of all, the [Magna Carta](#), which, originally merely an agreement between King John and the barons of the realm, was made a statute in 1297; the Toleration Act of 1689, guaranteeing religious liberty (except for Roman Catholics); the [Bill of Rights of 1689](#), guaranteeing, among other things, free parliamentary elections and the right to petition for redress of grievances, and forbidding cruel and unusual punishments; and for one more example, the

Triennial Act of 1694, which limited the life of a Parliament to three years. Bolingbroke was thinking of this act when he called the Septennial Act of 1716 a “monstrous” violation of the principles of the Revolution of 1688. Paine, looking at the same act, drew the conclusion that Britain had no constitution.

Self-interest was no part of the British Constitution; British society rested on a contract, yes, but not a contract that could be dissolved and renewed at the pleasure of any generation. It was, instead, a contract—Burke refers to it as a partnership—“between those who are living, those who are dead, and those who are to be born.”^[12]

British institutions are “established,” not recently made or designed; as Burke puts it, king, lords, juries, “grand and little,” are all prescriptive. Prescription, in Roman law, gave title to landed property by possession or long-continued use and without a deed; Burke transformed this rule of private law into a rule of public law. “Prescription is the most solid of all titles,” he says, “not only to property, but, which is to secure that property, to government.”^[8] The British Constitution rests on these prescriptive establishments; indeed, Burke calls it a “prescriptive constitution...whose sole authority is, that it has existed time out of mind.”^[9] Prescription, he says, is a “great fundamental part of natural law.”^[10]

But this natural law differs widely from that of [Hobbes](#) or [Aquinas](#). For Hobbes, the fundamental law of nature, which derives from the right of nature, is “to seek peace, and follow it”^[11]; for Aquinas, the natural law, grounded on the eternal law (God himself), prescribes the ends, and the order of ends, to which man is by nature inclined.^[12] But Burke says nothing about the substance of his natural law; nor, unlike Aquinas, does he say that a human law that disagrees with natural law does not have the force of the law. Still, this law is not useless. By appealing to natural law, Burke does for the British Constitution what Bolingbroke and the others never attempted to do; whereas they spoke of the laws making up the constitution, Burke provides a foundation for the constitution with a law of laws, or, as he put it, a “superior law.”^[13] He therefore enhanced its reputation in revolutionary France, and of greater importance, its authority in Britain, particularly among those charged with governing Britain.

Burke is famous among Americans for his support of their revolution. He pointed out, correctly, that “the people of the colonies [were] descendants of Englishmen;” and that their laws and sentiments were English.^[14] He was also mostly correct when he said the colonists were devoted to liberty according to British ideas and on British principles. Yet, like the French, the Americans made a revolution by invoking the rights of man, not their rights as Englishmen, and, more precisely, as they said in their [Declaration of Independence](#), their natural rights to life, liberty, and the pursuit of happiness.

In fact, the American Revolution was closer in spirit to that of the French than Burke was willing to recognize. Admittedly, it was not a revolution in “sentiments, manners, and moral opinions”; nor did the Americans abolish a church, seize its property and kill its priests and prelates; nor, by way of demonstrating a determination to rid themselves of every vestige of their Christian (indeed, their religious) inheritance, did they replace the Gregorian calendar with one devoid of any ecclesiastical connections. Nevertheless, they did claim that America was a new order of the ages (a *novus ordo seclorum*), and they meant this claim to be taken seriously.

Certainly theirs is a new kind of constitution. It is based on a new principle, derived from the new idea of democracy which, in turn, is the product of the new political philosophy of Thomas Hobbes and more directly [John Locke](#), whose words are three times quoted in the Declaration of Independence.^[15] It was Locke who (greatly to simplify) demonstrated that all men are created equal insofar as they are equally endowed with certain unalienable rights. Thus, in 1776, Americans asserted that government is instituted “to secure these rights,” and when any form of government fails to do this, “it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” This means that the people are the source of legitimate government. The name for this is popular sovereignty, and popular sovereignty is the salient feature of modern constitutionalism.

It is not, however, the only feature. Since all men are created free and equal, it follows that no man may rightly govern another without his consent. This consent is originally given in the constitution, and since the constitution states the terms under which men agree to be governed, the constitution has to be written. Men insist on this, and not only Americans. What this means is that limited or constitutional government can no longer (if it ever could) be achieved by mixing democracy with oligarchy or aristocracy, and it goes without saying that the day is long past when someone can claim to rule by the grace of God. Limited or constitutional government is possible in this democratic world only if the people are willing to impose limits on themselves. The Constitution of the United States does this by providing

- a president chosen not by the people but by electors who, having made their choice, would immediately disband
- a Senate chosen not by the people but by the various state legislatures, each state, regardless of the size of its population, being entitled to choose two
- House of Representatives chosen not by a majority of the whole people ("the people in their collective capacity") but by majorities within each of the districts into which each state would be divided
- and finally, a Supreme Court with the power to veto popular legislation and whose members would, in effect, serve for life

Generally, the Constitution provided a system of majority government, but the governing majority is assembled not from among the people directly but from among the representatives of the people. Because they represent different interests, and because the legislative branch is separated from the executive, and because the legislative is itself divided into House and Senate, assembling this majority is no simple matter. It was not supposed to be.

[1] Aristotle, *Politics*, Book IV, 1293b-35; 1295b-35.

[2] Cicero, *The Republic*, Book II, sec. xxxiii, 58.

[3] Polybius, *The Histories*, Book VI, 11.11.

[4] Montesquieu, *The Spirit of the Laws*, Book XI, chapter 6.

[5] See *Federalist* 9, 47, 78.

[6] Henry St. John Bolingbroke, "Dissertation upon Parties, Letter X" in *The Craftsman* (London: R. Francklin, 1754), 108.

[7] Burke, *Works*, II, p. 308. [Or see Edmund Burke, *Reflections on the Revolution in France* in *Select Works of Edmund Burke* (Indianapolis: Liberty Fund, 1999). Volume 2, page 114[193]. Accessed 26 May 2017. <http://oll.libertyfund.org/titles/656>. -Site Editor]

[8] Ibid., VI, p. 146. [Or see Edmund Burke, "Speech on the Reform of the Representation of the Commons in Parliament" in *Select Works of Edmund Burke*. (Indianapolis: Liberty Fund, 1999). Volume 4, pages 20-21. Accessed 26 May 2017. <http://oll.libertyfund.org/titles/659>. -Site Editor]

[9] Ibid., p. 146

[10] Ibid., II, p. 422. [Or see Edmund Burke, *Reflections on the Revolution in France* in *Select Works of*

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Published on Natural Law, Natural Rights, and American Constitutionalism (<https://nlmrac.org>)

Edmund Burke (Indianapolis: Liberty Fund, 1999). Volume 2, page 179[255]. Accessed 26 May 2017. <http://oll.libertyfund.org/titles/656>. –Site Editor]

[11] Hobbes, *Leviathan*, ch. XIV.

[12] Aquinas, *Summa theologiae*, I, 2, 90 ff.

[13] Burke, *Works*, VI, p. 21. [Or see Edmund Burke, “Fragments of a Tract Relative to the Laws against Popery in Ireland,” in *Letters, Speeches and Tracts on Irish Affairs*, Collected and arranged by Matthew Arnold with a preface (Macmillan and Co., 1881), Chapter 3, part 2. Accessed 18 May 2017. http://www.ricorso.net/rx/library/authors/classic/Burke_E/Ir_Affairs/Tracts_1763.htm. –Site Editor]

[14] Ibid., I, p. 464. [Or see Edmund Burke, “Speech of Edmund Burke, Esq., on Moving His Resolutions for Conciliation with the Colonies,” in *Select Works of Edmund Burke*. A New Imprint of the Payne Edition. Foreword and Biographical Note by Francis Canavan (Indianapolis: Liberty Fund, 1999), Volume 1, pages 178[237]–180[239]. Accessed 26 May 2017. <http://oll.libertyfund.org/titles/796>. –Site Editor]

[15] The words, “pursuit of happiness” are from the *Essay Concerning Human Understanding*, I, vi, 4; “mankind are more disposed to suffer,” from *Treatises on Government*, II, section 230; and “a long train of abuses,” from *Treatises on Government*, II, section 225.

Published 2011 by the Witherspoon Institute

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