I. INTRODUCTION

How do we “understand” a constitution—its purpose as a whole, the manner in which its provisions should work together or produce useful tensions, and the type of society it is intended to produce and serve? These considerations would seem increasingly important in an era during which written constitutions are prevalent, and the failure of constitutional regimes, particularly in the developing world, remains distressingly common and violent.1 For American lawyers, constitutional debates tend to be played out in the realm of conflict between original meaning and the idea of a living Constitution.2 Yet, in practice, both these approaches tend to undervalue the importance of the role played by cultural context in shaping the document’s purposes.

“Originalism,” in practical terms, generally is some version of “plain meaning” interpretation, which involves significant difficulties in reconciling specific terms and provisions with broader constitutional goals more or less laid out in the document.3 The second, “living Constitution”
form of interpretation, while perhaps useful for determining how best to serve current needs, does not address questions of the broader intent of the constitution itself, as opposed to more abstract philosophical predilections and policy goals.\(^4\) Finally, those who have sought to garner a deeper meaning from the document, certainly a more general overall intent, have tended to be practitioners of the “original intent” school, which has been criticized as an attempt to “psychoanalyze” the framers of that document—something impossible with dead men—and to write in stone particular theoretical concerns that may or may not even be reflected therein.\(^5\)

This Article argues that a better means of finding a useful and responsible context within which to examine specific constitutional terms and provisions may be gleaned from an examination of the constitutional analysis in Alexis de Tocqueville’s classic *Democracy in America*.\(^6\) This

\(^4\) See, e.g., Bruce Ackerman, *The Living Constitution*, 120 Harv. L. Rev. 1737, 1755 (2007) (arguing that advocates of living constitutionalism sometimes distort broader intent with more abstract texts in an effort to revolutionize American values); William T. Barrante, *A Jurisdictional View of the United States Constitution*, 83 Conn. B.J. 217, 239 (2009) (arguing that a “living constitution” view can distort jurisdictional lines to come to the Court’s favored answer and undermines the original understanding of federal structure producing the “consolidated government” that the founders sought to prevent); David R. McKinney, *The Tyranny of the Courts*, Utah B.J., Sept./Oct. 2005, at 8, 9 (stating that, over enforcing constitutional terms, living constitutionalism enforces abstract philosophical principles that proponents claim underlie and give meaning to the text resulting in unsupportable decisions completely dependent on the current views of the court).

\(^5\) See, e.g., Morgan Cloud, *A Conclusion in Search of a History to Support It*, 43 Tex. Tech L. Rev. 29, 29 (2010) (“Originalism survives in constitutional discourse not because its advocates succeed at identifying the ‘Framers’ original intent’ or the ‘original public understanding’ of ambiguous eighteenth century texts, but rather because this claim often trumps competing arguments.”); Frank Guliuzza III, *The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case*, 42 Drake L. Rev. 343, 347 (1993) (illustrating the criticisms of originalism, including that it is unworkable due to insufficient historical material or contradictory conclusions based on historical materials that are found); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. Rev. 226, 228 (1988) (stating three objections to originalism, including derivation of original intent as impossible, self-contradictory, and wrong).

\(^6\) See infra Part VIII.
book is hardly unknown to American lawyers, who cite it with great regularity. The uses to which it is put—or at any rate for which it is cited—vary greatly. Lawyers have looked to Tocqueville as a proponent of the legal rights of municipalities,\(^7\) the importance of local associations to American democracy,\(^9\) the special status of lawyers as a kind of aristocracy in American society,\(^10\) the importance of juries as a source of legal education and stability,\(^11\) and the role of widespread property ownership as a source of protection for individual rights.\(^12\) Tocqueville has also been referenced in discussions relating to general cultural norms in the United States, including the role of religion in bolstering democratic habits and institutions in America\(^13\) and the tendency of Americans to transform political questions into legal disputes.\(^14\)

There have been broader, more cultural applications of Tocqueville’s thought to American jurisprudence as well, including from John O. McGinnis, who has praised late Supreme Court Chief Justice William Rehnquist for working to revive a “Tocquevillean America” through decisions seeking to reinvigorate local associations and civil society.\(^15\) Tocqueville also has been used as a source for understanding the religious nature of American society.\(^16\) His analysis of Americans’ particular approach to the quest for human happiness has been used as a means of interpreting the Fourth Amendment.\(^17\)

---

\(^7\) A recent search for “Tocqueville” on Westlaw produced in excess of 5,000 results.


This widespread attention given to Tocqueville’s work should make lawyers open to his searching examination of the United States Constitution within its cultural context. Tocqueville’s method of Constitution-reading casts a unique light on the document, its place within American society, and, more generally, the place of constitutions in general within their particular societies. In his book, Tocqueville’s understanding of constitutions arises after a discussion of the “point of departure,” environmental and other characteristics of the United States. This placement, plus his particular reading of the document itself in functional and political terms, shows that Tocqueville’s understanding of constitutions is an expression of and attempt to address the fundamental issues regarding the use and restraint of power within both physical and cultural contexts.

This Article is not intended to provide a schematic breakdown of the Constitution, or any precise methodological system for constitutional interpretation. Rather, it intends to show, through a narrative discussion of the analysis Tocqueville provides as background to his discussion of the American Constitution, the grounds for rethinking how we should read the document and its purposes—namely, in light of the social and political context from which it grew. In particular, Tocqueville’s analysis shows the extent to which constitutions should be read as responding to, rather than shaping, preexisting institutions and laws. Serious engagement with Tocqueville’s analysis should lead to discussions and judicial decisions more closely tied to, and respectful of, our Constitution’s intrinsic relationship to American culture.

18 See 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA pt. 1, ch. 8. (Harvey C. Mansfield & Delba Winthrop eds., 2000). References to this work will be taken from the Mansfield/Winthrop translation, except when the text in question comes from the author’s preface to the twelfth edition, which is available only in the Bradley translation, cited, infra note 28.


20 See 1 TOCQUEVILLE, supra note 18, pt. 1, ch. 2–7.

21 See id.

22 See id.

23 See id. at 45.
II. Tocqueville’s Purpose: Comparative Constitutional Law

*Democracy in America* is, in a critical and even essential sense, a comparative study of constitutions.\(^\text{24}\) To begin with, Tocqueville’s stated purpose in writing the book is to show that, while republican government is inevitable in France, it can be, despite its bloody past, an ordered, law-abiding government, consistent with human liberty.\(^\text{25}\) Indeed, he writes about America to show the French how such republican government might be achieved.\(^\text{26}\) Of course, Tocqueville is no mindless promoter of all things American, but he presents the United States, and its Constitution, as presenting an example of how order, liberty, and “the sovereignty of the people” may be made compatible with one another through human ingenuity in light of the facts of geography, history, and tradition.\(^\text{27}\)

As Tocqueville puts it in the introduction to the twelfth edition of his work:

> Though it is no longer a question whether we shall have a monarchy or a republic in France, we are yet to learn whether we shall have a convulsed or a tranquil republic, whether it shall be regular or irregular, pacific or warlike, liberal or oppressive, a republic that menaces the sacred rights of property and family, or one that honors and protects them both.\(^\text{28}\)

Here we see that Tocqueville’s concern is universal; the rights of property and of the family are not merely good for America, or France, but “sacred.”\(^\text{29}\) Democracy, meanwhile, is the trend throughout the world, according to Tocqueville.\(^\text{30}\) Thus, there is a general need to be addressed,

---
\(^{24}\) See, e.g., *id.* at 116–17 (comparing the structure of each constitution as establishing the federal government of the United States and the national government of France where the King of France is sovereign, so that laws are only passed with his consent, while the President is not sovereign and must execute laws even if he does not consent to their passage).

\(^{25}\) See *id.* at 187.

\(^{26}\) See *id.* pt. 2, ch. 5.

\(^{27}\) *Id.* at 53.

\(^{28}\) 1 *ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA*, at xx (Phillips Bradley ed., 12th ed. 1990) [hereinafter *TOCQUEVILLE* (Bradley ed.).]

\(^{29}\) *Id.*

\(^{30}\) See *id.* at xx–xxi. Tocqueville described Democratic America as “not only the most prosperous, but the most stable, of all the nations of the earth,” particularly when compared to other European nations that have been “convulsed by revolutions.” *Id.*
and Tocqueville seeks to show how democratic liberty may be established, not just for France, but also for the world.31

Tocqueville’s concern with America, then, is to present it as one example of how republican government can be made safe for human flourishing.32 In the United States, the sovereignty of the people—democracy—already had held sway for sixty years, serving as “the common source of all their laws.”33 Also, the people there had flourished during this time—in population, territory, and wealth.34 In addition to these concrete benefits, the fruits of democracy in America also had included peace, stability, and respect for rights, even as the bitter fruits of war and tyranny had flowed therefrom in France.35

Thus, it is with the eyes of a comparativist that Tocqueville looks to American society and institutions.36 He asks his fellow Frenchmen to do the following:

[L]ook to America, not in order to make a servile copy of the institutions that she has established, but to gain a clearer view of the polity that will be best for us; let us look there less to find examples than instruction; let us borrow from her the principles, rather than the details, of her laws.37

The principles to which Tocqueville looks are standards of political thought, derived in large measure from Montesquieu and the constitutionalist tradition.38 Order, the balance of powers, “true liberty,” and “deep and sincere respect for right,” he avers, are “indispensable to all republics.”39 Nonetheless, “[t]he laws of the French republic may be, and ought to be in many cases, different from those which govern the United States.”40

31 See 1 Tocqueville, supra note 18, at 187.
32 1 Tocqueville (Bradley ed.), supra note 28, at xx.
33 Id.
34 Id.
35 Id. at xxi.
36 See supra note 24 and accompanying text.
37 1 Tocqueville (Bradley ed.), supra note 28, at xxi.
38 1 Tocqueville, supra note 18, at 89, 383.
39 1 Tocqueville (Bradley ed.), supra note 28, at xxi.
40 Id.
Why, and how so? The answer is that Tocqueville is no ideologue. He does not hold that there exists any one perfect blueprint for the good society that can be laid down in a constitution or other law. Rather, political institutions, including laws, must fit the character and circumstances of the people they govern.

III. TOCQUEVILLE’S METHOD: UNDERSTANDING SOCIAL AND CULTURAL CONTEXT

The task Tocqueville assigns to himself is to show how the American Constitution manages to put the essential principles of a good republicanism into action within the American context. His goal is to convince the French to learn how they might put those same principles into action within the French context. As to the sources of such principles, it is important to note that Tocqueville, in his introduction, refers not merely to nations’ respective constitutions, but to their laws in general. Ironically, it may be this understanding of the limited role of constitutions that has caused lawyers in particular to overlook Tocqueville’s contribution to the study of public life. Instead, he is often dismissed as a mere political theorist when, in fact, his thoughts connect political theory and the study of law as a fundamental set of social institutions that order (or disorder) human relations.

Constitutions are laws of a particular sort; they are, in a sense, metalaws—laws governing how to make, interpret, and execute laws. Structural principles, such as the separation of powers, no less than specific provisions regarding terms of office and forms of address, are bound up primarily with law. They seek to answer the question of what actions by

---

41 See M.R.R. Ossewaarde, TOCQUEVILLE’S MORAL AND POLITICAL THOUGHT: NEW LIBERALISM 30 (2004) (noting that Tocqueville criticizes ideologues for essentially following their own desires when they ignore all other authorities).
42 See 1 TOCQUEVILLE (Bradley ed.), supra note 28, at xxi.
43 See id.
44 See id.
45 See id.
46 See id. at xx–xxi.
47 See, e.g., 1 TOCQUEVILLE, supra note 18, at 222–25 (illustrating the advantages to society derived from a democratic government).
49 U.S. CONST. art. I–III.
which government officials will be given the status of law, how they should be interpreted, and how and by whom those laws are to be enforced. To take one common example: in the United States Constitution, a law is an order approved by majorities in both Houses of Congress, then either signed by the President or, if vetoed by the President, subsequently passed over that veto by a two-thirds vote in both Houses of Congress. American courts—in the final instance the Supreme Court—are given the power to interpret particular laws in specific, contested cases, while the President and the executive officers are empowered to prosecute those who violate criminal laws, and the courthouse doors are opened to those who wish to pursue violations of laws regarding commercial and other private disputes. Complications arising, for example, from the desire to maintain the separation of powers, such as through possible impeachment of judges who overstep their authority, remain concerned with law; judges overstep their authority, after all, in the context of interpreting (or wrongly seeking to make or execute) those laws.

But, neither constitutions, nor the laws they govern, are mere tools capable of serving their purposes in the hands of anyone at any time for any relevant purpose. Unlike hammers and saws, laws rely on the characters of their users, not merely their users’ mastery of basic physical motions. Moreover, the materials on which laws work, namely people and groups of people, are possessed of free will; they may seek to dodge

---

50 See id.
51 Id. art. I, § 7, cl. 2.
52 Id. art. III, § 2, cl. 2 (establishing the jurisdiction of the courts).
53 Id. art. II, § 1, cl. 1 (establishing executive power in the President); Saikrishna Prakash, The Essential Meaning of Executive Power, 2003 U. ILL. L. REV. 701, 737 (stating that executive officers under the President “investigate, apprehend, and prosecute potential lawbreakers”).
55 See, e.g., Edward Mapara, Rule of Law, Respect for the Constitution and Other Laws, KONRAD-ADENAUER-STIFTUNG (May 2010), http://www.kas.de/wf/doc/1016-1442-1-30.pdf (seeing the law as a mere tool can lead to abuse and perpetuate racist and authoritative regimes).
56 See id. (describing the substantive, formalist, and functionalist theories).
the hammer’s blow.\textsuperscript{57} Thus, if lawmakers wish to influence people in a particular way—to encourage or discourage particular behaviors—those lawmakers must understand that particular people’s general tendencies and predispositions, as well as their prevalent character traits and how those traits shape general reactions to potential goals and forms of law.\textsuperscript{58} For example, while a law against eating pork would be much more likely to be enforceable in a Muslim country, rather than in a Christian or secular country, peoples of different Muslim backgrounds, with differing legal, cultural, and religious traditions, would vary in their acceptance of different levels of enforcement and sanctions associated with such a prohibition.

Tocqueville’s purpose is at the same time broader and less metaphysical than what would be associated with enforcement of a religious dietary prohibition. He seeks to promote sacred rights and human flourishing in the face of increasing democratization.\textsuperscript{59} He would defend liberty and human greatness in a time characterized by the sovereignty of the people (something he, of course, recognizes as fundamentally just in itself).\textsuperscript{60} Here, most concerning is the means by which he seeks to achieve—or, rather, allows his people to achieve—that goal. Again, this is what caused Tocqueville to be all but ignored by lawyers; his method is one of analyzing the character of the people to be governed before analyzing the laws by which they are governed.\textsuperscript{61} “In part” is an important qualification here because, in Tocqueville’s view, laws are only one means by which people’s actions are guided.\textsuperscript{62} Religion, custom, and other forces play an equal or greater role in many instances.\textsuperscript{63}

Consistent with his organic method of analysis, Tocqueville deals with the character of the people and environment of the United States before dealing at length with the Constitution.\textsuperscript{64} Not until the eighth chapter, well over 100 pages into the book, does Tocqueville begin his explicit

\begin{footnotesize}
\textsuperscript{57} See id. (describing how police have failed to obey court orders, leading to a breakdown in the rule of law).
\textsuperscript{58} See id. (describing how the formalist approach fails when a prospective, well-known law still results in injustice).
\textsuperscript{59} See 2 TOCQUEVILLE, supra note 18, at 482–84.
\textsuperscript{60} See id.
\textsuperscript{61} 1 id. at 27–29.
\textsuperscript{62} See id. at 45 (“In order to know the legislation and mores of a people, one must therefore begin by studying its social state.”).
\textsuperscript{63} See id. at 44.
\textsuperscript{64} Id. at 19–53.
\end{footnotesize}
discussion of the federal Constitution. And, before discussing even the state constitutions, he deals with local government. He begins his discussion with the exterior form of North America, its geography and the influence of its original inhabitants, and the historical, religious, and cultural background of those inhabitants and their social conditions. Then, he discusses the principle of the sovereignty of the people in America. The remainder of this Article follows Tocqueville’s analysis from the beginning of Democracy in America up through his discussion of the Constitution itself.

IV. BACKGROUND ANALYSIS: FACTS AND ORIGINS

At the beginning of Volume I, Tocqueville’s discussion of the geography of North America is filled with measurements and descriptions of climate, plant and animal life, and the like. There are two elements of note regarding the importance of this survey. First, Tocqueville observes that it was upon the “inhospitable” northeastern coast that English settlers first attempted colonization, and where the center of power still remains. However, “the true elements of the great people to whom the future of the continent doubtless belongs” are gathered together almost in secrecy in the area to its west—in what would become the early Northwest Territory. This was the land beyond the Alleghenies, which one might argue was one catalyst for the War for Independence, and in which the riches of nature were far more prevalent, if not easy to cultivate.

Second, Tocqueville compares North America with its southern neighbors, where European settlers found a seeming paradise that hid death (presumably Tocqueville means malaria and similar diseases). “North America presented a different aspect: everything there was grave, serious, solemn; one would have said that it had been created to become the

---

65 Id. at 56.
66 Id. at 19–53.
67 Id. at 53.
68 See infra Parts IV–VII.
69 1 TOCQUEVILLE, supra note 18, at 19–53.
70 Id. at 22.
71 Id.
72 See Relive, WARFOREMPIRE.ORG, http://www.warforempire.org/relive/relive.aspx (last visited Aug. 28, 2014) (describing how the British, French, and Indian empires fought for control of land west of the Alleghenies and how Britain, left cash strapped by its ultimate victory, shifted the burden to the colonists through higher taxes).
73 1 TOCQUEVILLE, supra note 18, at 22.
domain of intellect, as the other was to be the dwelling of the senses.”
While it might be easy to dismiss such observations as mere shadows of
the “climate theory” of national character put forward by philosophers
from Aristotle to Montesquieu, it is important to note that Tocqueville is
not satisfied to leave with a mere abstract claim that climate translates into
national character; rather, he equates the harsher nature of life in the
northern climes to a requirement that the peoples settling there exercise
more of their intellect in carving out a good life.

Tocqueville devotes the remainder of this chapter to a discussion of the
American Indians, their character, and their state of civilization. Again, it
would be easy to criticize this discussion for its lack of appreciation of the
mores and accomplishments of the continent’s original inhabitants. In
particular, one might criticize Tocqueville’s view that, due to the unsettled
nature of the Indians, the continent was essentially uninhabited and, there-
therefore, open for uninhibited European expansion. However, we
should not lose sight of the fact due to Tocqueville’s attitude—his
assumption that an unsettled people, by that very fact, forfeited any right to
any land. That was the assumption of the vast majority of European
settlers as well. In Tocqueville’s mind, the unsettled nature of the
Indians meant that the democratic principle in America “could grow in
freedom, and advancing along with mores, develop peacefully in laws.”
That is, there was no competition or counteracting influence to dilute or
divert the growth of the sovereignty of the people.

This is not to say that the experience on the frontier was irrelevant to
the development of American laws and constitutionalism—one can
mention here, for example, the critical role of the Indian-fighting (as well

74 Id.
75 David Hackett Fischer, Albion’s Seed: Four British Folkways in America 53–
54 (1989) (describing not just the folkways of various American settlers, but also the impact
of the specific areas in which they settled on those folkways through disease, length of
growing seasons and the like).
76 1 Tocqueville, supra note 18, at 23–27.
77 See id. at 27.
78 See id. at 26–27.
79 See Stuart Banner, How the Indians Lost Their Land: Law and Power on the
Frontier 6, 19 (2005) (relating how the unsettled nature of the Indians combined with the
creation by colonists of the means by which land was transferred allowed the same to gain
disproportionate power over the Indians).
80 1 Tocqueville, supra note 18, at 12.
81 Id.
as bear-fighting) militia in developing an armed citizenry with its commitment to individual and local rights of self-defense, along with local attempts to manage gun-related violence. 82 But, that influence was indirect, perhaps most obviously as part of the frontier attitudes and customs of the settlers.83 This experience was much different than that of contemporaries affected by the conflicts in Europe at the time, in which dynastic, religious, and national differences spawned set battles and wars, bringing about myriad shifting patterns of domination, differing markedly from the harsh domination and displacement visited upon Indians in America.84

In Chapter 2, Tocqueville moves on to discuss the Americans themselves or, rather, their origins in Europe.85 Tocqueville’s goal, in this chapter, is to clarify the social conditions and laws of the American people—two things he is convinced are intimately related.86 He begins by noting that people tend to look for the origins of a person’s vices and virtues too late, when “manhood begins,” whereas “[t]he man is so to speak a whole in the swaddling clothes of his cradle.”87 The same, Tocqueville argues, goes for nations: “The circumstances that accompanied their birth and served to develop them influence the entire course of the rest of their lives.”88

Here, it is important to note again that Tocqueville asserts that America was culturally “empty” when the European colonists arrived.89 Regardless of what one makes of that assertion in terms of its respect for indigenous cultures, his point remains relevant in the sense that the European settlers for the most part did not choose to adopt substantial

82 See Michiko Kakutani, Gun Control and Gun Rights Stay Fighting Words, N.Y. Times, Oct. 10, 2011, at C4 (stating that, on the frontier, almost everyone carried a gun to combat Indians and even bears, but many cities had gun control laws as well).
83 See, e.g., id. (looking at the influence of gun rights in the “untamed wilderness” on gun control measures).
85 1 Tocqueville, supra note 18, at 27.
86 Id. at 27.
87 Id. at 27–28.
88 Id. at 28.
89 See id. at 27.
elements of Indian ways of life—particularly Indian political culture.\textsuperscript{90} David Hackett Fischer’s work has shown that we need not posit a total lack of outside cultural influences in order to see remarkable consistency in the folkways, not of Europeans generally, but of the specific subcultures of English and Scottish groups predominant among settlers in the British colonies of North America.\textsuperscript{91} Tocqueville claims that, “[w]hen . . . one carefully examines [America’s] political and social state, one feels profoundly convinced of this truth: there is not one opinion, one habit, one law, I could say one event, that the point of departure does not explain without difficulty.”\textsuperscript{92}

Unlike Fischer, of course, Tocqueville is concerned primarily with the social and political characteristics of these settlers, and their impact on the social and political institutions, beliefs, and practices of the people.\textsuperscript{93} Their “notions of rights” and “principles of true freedom,” their “township government” brought over from Britain, their habits of freedom, and the sovereignty of the people all were strongly established at their entry upon the New World, and these characteristics flourished in a land in which they were isolated from contrary influences, save that of the indigenous people whose influences they rejected out of hand.\textsuperscript{94} In addition, the deeply religious nature of the people, with its emphasis on individual piety and responsibility, influenced the morals of that people, as did the prevalence of a kind of equality rooted in the smallness of the individual before God.\textsuperscript{95}

There were, of course, significant differences between the pious North and the more inegalitarian, slaveholding South.\textsuperscript{96} Yet, Tocqueville argues that these differences, while real, were less significant than in European countries and that the southern attitudes had quickly been relegated to minority status within American society.\textsuperscript{97} In support of Tocqueville’s argument, one might note the ambivalence among the (largely Virginia-
based) founding aristocracy toward slavery, an ambivalence not shared in other regions of the South, and rejected at a later point. The example and influence of the New Englanders, who had given up safety, comfort, and position in their homeland “to obey a purely intellectual need” and to live and worship according to their religious principles, caused their culture to serve as a beacon shining its light even into the slaveholding South.

Here, Tocqueville discusses specific political society and its basic, constitutional laws in America. For him, the “point of departure” of the Americans includes, not just their historical origins in Britain but, at least as important, the manner in which they settled the new country. Further, the principles of liberty, the sovereignty of the people, and even religion were bound up with constitutionalism. The Puritans established themselves into a society almost immediately through a constitutional act and document—the Mayflower Compact—which Tocqueville quotes at length.

The Mayflower Compact established a people devoted to walking together in the ways of their God, being bound by the laws they themselves would establish. It was a society to be ruled according to the sovereignty of the people, for the common good of a godly life. That is, not just selfish individualism, but liberty bound by law and pursuit of a higher, spiritual common good, determined through democratic means, was to be the rule.

This society was allowed to exist and flourish through policies we today see as ones of benign neglect from the mother country. In truth, the allowance of further significant emigration of Puritans to the shores of New England was critical to sustaining and encouraging the growth of this society, particularly when combined with the internal freedom and political

---

98 See, e.g., William W. Freehling, The Reintegration of American History: Slavery and the Civil War 12 (1994) (noting that the Founding Fathers “were in truth skittish abolitionists”).
99 Id. at 27.
100 See id. at 27, 36 (stating that a system of colonization was put into practice in New England, which allowed the emigrants to govern themselves to a certain extent).
101 See id. at 36.
102 Id. at 35.
103 Id.
104 See id.
105 See id.
106 See id.
107 See id. at 36.
independence allowed by Britain.\textsuperscript{108} The point of departure—settlement on isolated, hostile shores, with continuing reinforcement of originating cultural assumptions—was particularly conducive to the development of institutions, beliefs, and practices the Puritan settlers brought with them from the Old World to the New.\textsuperscript{109}

Tocqueville goes to some trouble to note the religious groundings and implications of laws in New England, with their punishments for religious offenses, and to note the disconnect between these laws, their origins, and their goals from the laws of the mother country.\textsuperscript{110} The result, at times, was outright oppression through laws regulating the particulars of daily life.\textsuperscript{111} But these oppressive laws were not imposed upon the New Englanders, rather, they resulted from the people themselves; they were the result of human sin, as translated into law through democratic rule.\textsuperscript{112}

Moreover, at the same time:

\[\text{[t]he general principles on which modern constitutions rest, the principles that most Europeans of the seventeenth century hardly understood and whose triumph in Great Britain was then incomplete, were all recognized and fixed by the laws of New England: intervention of the people in public affairs, free voting of taxes, responsibility of the agents of power, individual freedom and judgment by jury were established there without discussion and in fact.}\]

Such institutions were made possible in part by the conditions in North America. For example, the “almost perfect equality in fortunes and still more in intelligence” in Connecticut, for Tocqueville, explained how its wide suffrage for the time came to exist and function.\textsuperscript{114}

As important, in New England, the township developed before the county, let alone any higher form of political organization.\textsuperscript{115} Isolation from the mother country combined with other circumstances in the New

\begin{itemize}
\item \textsuperscript{108} Id.
\item \textsuperscript{109} See id. at 28.
\item \textsuperscript{110} See id. at 37–43.
\item \textsuperscript{111} See id. at 38–39 (The Code of 1650 punishes laziness and drunkenness and regulates the amount of wine an innkeeper can serve; there was even a movement to prevent “the worldly luxury of long hair.”).
\item \textsuperscript{112} Id. at 39.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id. at 40.
\item \textsuperscript{115} Id.
\end{itemize}
World encouraged the form of government, the municipality, that Tocqueville saw as the root of liberty in democratic times.\[^{116}\] This form allowed the colonies to recognize the formal sovereignty of their monarch while living under actual republics in their local governments.\[^{117}\]

Of course, American liberty was of a particular kind—rooted in religious conceptions of freedom and virtue.\[^{118}\] In this light, Tocqueville praises John Winthrop’s speech on liberty, in which he distinguished the beastly freedom of human desire from the true liberty born of virtue and following in the ways of God, and praises the Americans of Massachusetts for accepting Winthrop’s speech with applause.\[^{119}\] It was this specific understanding of liberty that, according to Tocqueville, maintained human flourishing in democratic times, and which he finds crucial to American political development.\[^{120}\] America, for Tocqueville, was fortunate that its people combined the spirit of religion with the spirit of freedom.\[^{121}\]

The combination of these two spirits, according to Tocqueville, was at the heart of American society and its laws.\[^{122}\] This is not to say, however, that there were no other active, relevant influences.\[^{123}\] The English past remained relevant.\[^{124}\] Tocqueville offers, as an example, the practice of granting bail to accused criminals, a practice he deems aristocratic because it allows those with access to sufficient funds to escape jail until trial.\[^{125}\] Tocqueville may be wrong in regarding as aristocratic the principle effect and even purpose of bail, which provides pretrial freedom and pursuit of valid defenses to the poor as well as the rich, provided the amounts demanded are equitably determined and applied.\[^{126}\] But, his broader point remains: The point of departure, not merely in its broadest, most intellectual aspects, but in the concrete practices brought by a people to its

\[^{116}\] Id.
\[^{117}\] Id.
\[^{118}\] Id. at 41–42.
\[^{119}\] Id. at 42.
\[^{120}\] Id. at 43.
\[^{121}\] Id.
\[^{122}\] Id.
\[^{123}\] Id. at 44.
\[^{124}\] Id.
\[^{125}\] Id. at 44–45.
new circumstances, matters greatly for a people’s social and political development.\textsuperscript{127}

At the beginning of Chapter 3, Tocqueville sums up and looks forward from his analysis thus far.\textsuperscript{128} Tocqueville stated:

\begin{quote}
The social state is ordinarily the product of a fact, sometimes of laws, most often of these two causes united; but once it exists, one can consider it as the first cause of most of the laws, customs, and ideas that regulate the conduct of nations; what it does not produce, it modifies.\textsuperscript{129}
\end{quote}

Having laid out the elements that influenced the development of the American people, Tocqueville now seeks to build on what he sees as the fundamental, foundational fact of social conditions in the United States: Equality.\textsuperscript{130} Throughout his work, Tocqueville references the democratic nature of American society and, concomitantly, the sovereignty of the people.\textsuperscript{131} However, it is important to keep in mind that, for Tocqueville, democracy is, above all else, about equality—equality of condition, equality of status, and equality under the law.\textsuperscript{132}

Contemporary observers, of course, see massive inequalities in the United States of their own day, let alone that of the early nineteenth century.\textsuperscript{133} But, from a comparative perspective, the conditions and circumstances of the Americans and their laws were both characterized by a deep equality.\textsuperscript{134} Further, where contemporary observers would tend to emphasize remaining inequalities and those laws perpetuating them (slavery is an obvious example), Tocqueville next details the impact of the law of inheritance in eroding what little aristocratic tendencies existed,

\begin{footnotes}
\item \textsuperscript{127} \textit{See 1 Tocqueville, supra} note 18, at 45.
\item \textsuperscript{128} \textit{Id.} at 46.
\item \textsuperscript{129} \textit{Id.} at 45.
\item \textsuperscript{130} \textit{Id.} at 46.
\item \textsuperscript{131} \textit{See id.} at 46, 53.
\item \textsuperscript{132} \textit{See id.} at 46.
\item \textsuperscript{133} \textit{See, e.g., Micha Kaufman, Income Inequality Threatens the American Dream—Here’s a Way to Fix It, Forbes} (Jan. 17, 2014, 10:01 PM), http://www.forbes.com/sites/michakaufman/2014/01/17/income-inequality-threatens-american-dream/.
\item \textsuperscript{134} \textit{See, e.g., Michael O’Malley, Women and Equality, Exploring U.S. History,} http://chnm.gmu.edu/exploring/19thcentury/womenandequality/ (last visited Aug. 28, 2014) (arguing that, in a premarket, farm economy, women enjoyed something akin to equality).
\end{footnotes}
particularly in the South. 135 That is, the laws themselves followed social conditions; they did not lead them. 136 Having already lived in a democratic society, Americans came to accept principles and habits further promoting such equality, including inheritance laws that favored equal partition of fortunes among heirs to destroy great family domains in society over the political desire to maintain concentrations of familial wealth (in land, especially). 137 These laws, in turn, further undermined that aristocratic connection between family spirit and the preservation of the paternal estate; property ceased to represent the family, and the natural laws of economic life further discouraged attempts to maintain the concentrations of land and other trappings of semi-aristocratic families. 138 Thus, according to Tocqueville, laws encourage, but do not determine social trends; the law is not, by nature, the leader but rather the follower of social developments. 139

V. PRINCIPLES AND THEIR LOCAL ORIGINS

Chapter 4, “On the Principle of the Sovereignty of the People of America,” in many ways is a summation of what Tocqueville already has said—for his story is one of the development of the sovereignty of the people in America. 140 He has already laid the groundwork for discussing the principle itself. 141 This brief chapter serves primarily as a place for Tocqueville to note the impact of the War for Independence. 142 This impact was not revolutionary, as we would understand that term today. It did not fundamentally alter the principles or ways of life of Americans. 143 Rather, in this conflict, “[t]he dogma of the sovereignty of the people came out from the township and took hold of the government; all classes committed themselves to its cause; they did combat and they triumphed in its name; it became the law of laws.” 144 In Tocqueville’s view, the last remnants of social inequality were quickly put on the road to extinction on account of the American victory in the War for Independence because that

135 1 Tocqueville, supra note 18, at 46–48.
136 See id. at 47.
137 See id. at 48–49.
138 See id. at 48.
139 See id. at 49.
140 Id. at 53.
141 See id. at 29, 39–40, 43, 53.
142 Id. at 54.
143 See id.
144 Id.
war spread the doctrine of democracy from the localities to the states and the nascent federation, as it brought all classes of people together to combat a doctrine and power structure defined in large measure by its rejection of the sovereignty of the people.145 Even those with doubts regarding human equality were enlisted in the fight against British rule, expanding democracy’s power and reach.146

For our purposes, however, what is most important in this brief chapter is that it sets the stage for what follows in Chapter 5, which explains the “[n]ecessity of studying what takes place in the particular states before speaking of the government of the union.”147 The implications of Tocqueville’s method of constitutional interpretation become clear at this point in regard to the United States; for it is here that we learn the relative importance of the states, not just in people’s lives, but also in the formation of their governments and constitutions.148

In commenting on the United States’ “complex [C]onstitution,” Tocqueville notes that it consists of “two distinct societies enmeshed and . . . fitted into one another; . . . two governments completely separated and almost independent: one, habitual and undefined, that responds to the daily needs of society, the other, exceptional and circumscribed, that applies only to certain general interests.”149 Of course, Americans are no longer accustomed to thinking of their government as composed of “twenty-four little sovereign nations, the sum of which forms the great body of the Union.”150 We no longer think of the national government as “only an exception” and the state governments as “the common rule.”151 Yet, any reasonable consideration of issues related to federalism must take into account the preexistence and central role of the states before the national government was formed,152 and the practical requirement that the national government not, in fact, replace them in their primary governing role.

145 See id. at 54–55.
146 See id.
147 Id. at 56.
148 Id.
149 Id.
150 Id.
151 Id.
152 Id.
This chapter is rich in analysis, some of which would no doubt be considered out-of-date today. For current purposes, Tocqueville’s methodology is of the greatest interest. He begins with the township—first in time in America, first in importance in the daily lives of Americans, and generative (first as cause) for the development of democratic principles and institutions. A discussion of Tocqueville’s political philosophy would concentrate on the development of human character and habits in the township, but, for our limited purposes, it is necessary to focus on intergovernmental relations. Here, we see the township in its generative sense, as an “individual” relating to the central government. This insight is buttressed by the fact that, in many instances, the township is best understood as a corporation—that is, a communal individual, in which the members of the group may even dispense with the need for representation in determining public policies. Administrative decentralization empowers these townships, and even its punishments—such as the levying of penalties on each inhabitant of a county that has sought to evade taxes by failing to appoint assessors—emphasize their separate, unified corporate nature.

The state deals (or, rather, once dealt) with townships as corporate groups. The powers, social positions, and habitual connections of local life were left intact, with the state seeking to serve the more common ends of all the townships within. It should come as no surprise, then, that after his lengthy discussion of social and political life in the townships, Tocqueville provides a more analytic, structural discussion of the constitutions of the American states, describing the tendency toward two-chamber legislatures and relatively weak governors. Most important for understanding American democracy and its conformity with the demands of ordered liberty is that, while the states may have centralized power in relation to general interests, the day-to-day concerns of the people, regarding agriculture, public roads, and most other elements of local life,

---

153 See id. at 77 (stating that “administrators are everywhere elected,” which may not be the case today given the rise of the administrative state).
154 See id. at 57–58.
155 Id. at 62.
156 Id. at 59.
157 Id. at 84.
158 See id. at 62–63.
159 See id.
160 Id. at 80–82.
are kept at the local level. Administrative decentralization kept social authority, political power, and common action at the local level, denying the central powers the ability to control the lives of the people.

VI. LEGAL STRUCTURES AND THEIR LIMITS

In Chapter 6, dealing with the judicial power, Tocqueville writes about the power of judges—though not specifically of the federal courts, but rather more generally about the role of judges in American society. Here, he picks up on a number of aspects of American judicial process and power: American judges’ powers are distinctly limited in that they may render decisions only when litigation has arisen (no advisory opinions); they may only decide particular cases or controversies; and they may not act until the cause is properly brought before the court. Few countries impose standing requirements that are this restrictive on their courts.

Moreover, what we have come to refer to as “judicial review,” namely the responsibility of courts to refuse to enforce laws that violate the higher law of the constitution (including the state constitution) was relatively limited in scope and power up through Tocqueville’s time. Nonetheless, this responsibility granted the courts the power to influence political life and decisions without rendering them dangerous to liberty. Combined with other democratic laws, such as the ability of normal people to bring public figures to account for their actions (the lack of legal immunity for political figures), judicial application of the higher law to particular laws supports democratic equality in the true sense, as well as supporting the rule of law.

Chapter 7 is a relatively brief discussion regarding political jurisdiction. In fact, an American might simply see this chapter as a discussion of the power of impeachment. But, such a reading would
miss Tocqueville’s comparative perspective and, with it, what makes the power of the lower house of the federal or state legislature to impeach high executive and judicial officers, and the power of the upper house to remove them from office upon “conviction” unique and important, namely, the extremely limited nature of the power of American political bodies to prosecute individuals.¹⁷⁰ In the state, as well as federal, governments, Tocqueville observes that the separation of powers is maintained in part through the mechanism of impeachment and removal, which keeps political officers in particular from overstepping their bounds through settled, democratic means without “upping the stakes” to the possibility of imprisonment or death.¹⁷¹ Yet, this brief, technical chapter is almost a footnote inserted before Tocqueville’s extensive discussion of the federal Constitution itself.¹⁷²

VII. TOCQUEVILLE AND THE FEDERAL CONSTITUTION

Only in Chapter 8 does Tocqueville discuss his sustained, formal analysis of the federal Constitution (and, even here, it is not a detailed, provision-by-provision analysis).¹⁷³ A writer of great self-awareness, he begins the chapter by noting:

> Up to now I have considered each state as forming a complete whole, and I have shown the different springs that the people have to move it, as well as the means of action they make use of. But all the states that I have viewed as independent are, however, forced in certain cases to obey a superior authority, that of the Union.¹⁷⁴

Here, Tocqueville makes clear an essential grounding fact, or “point of departure,” if you will, for the federal Constitution: It is a capstone, not a foundation, for the government of the United States.¹⁷⁵ It is a structure and plan only for “the portion of sovereignty that has been conceded to the Union.”¹⁷⁶

The essential, generally overlooked character of the Constitution, which serves as the basis of Tocqueville’s analysis, is that it is a structure

¹⁷⁰ *Id.*
¹⁷¹ *Id.* at 103–04.
¹⁷² See *id.* at 105.
¹⁷³ *Id.*
¹⁷⁴ *Id.*
¹⁷⁵ *Id.*
¹⁷⁶ *Id.*
of enumerated powers. Of course, our Supreme Court continues to give lip service to this fact, but for Tocqueville, the dominance of the states in the people’s lives is the grounding principle of the nation and its government.

Having begun his analysis at the beginning—the point of departure—and followed the development of the American people, society, and governments, Tocqueville now is in a position to begin his analysis of the federal Constitution.

The federal Constitution is a mechanism that sits atop the organic societies of states and, even more, townships. Where those townships have formed essential, sovereign governments at the state level, the federal government, while important, is not essential to the daily lives of the people, either as individuals or as communities. It is the exception, not the rule.

Tocqueville follows up on this recognition of the essential character of the federal Constitution by providing a summary that emphasizes, first, the division of authority between the federal and state governments, only then enumerating the powers of the federal government. This is not to say the federal government is without power. Tocqueville notes that, in a number of particulars—including the unity of federal courts and the national legislature’s ability to impose binding taxes—the American federal government is more centralized in its powers than was the French monarchy. However, the importance of the states remains a constant, reflected, for example, in the equal representation and power of the state legislatures to appoint their own representatives in the Senate.

The limited nature of the federal jurisdiction also cabins its executive power. Comparing the American President to the French King, Tocqueville notes that “[i]n the United States the executive power is

---

177 Id. at 108–10.
178 See, e.g., McDonald v. City of Chicago, 130 S. Ct. 3020, 3073 (2010) (discussing states’ rights, but refusing to allow cities to experiment with laws that have local implications due to varying conditions throughout the country).
179 See supra Parts IV–V.
180 See 1 TOCQUEVILLE, supra note 18, at 105.
181 Id.
182 Id. at 107–08.
183 Id. at 108.
184 Id. at 108–10.
185 Id. at 110.
186 Id. at 111.
187 See id. at 114–15.
limited and exceptional, like the very sovereignty in whose name it acts.\textsuperscript{188} However, limited federal sovereignty is not the only contrast.\textsuperscript{189} The President is not sovereign in the sense that the French monarch is.\textsuperscript{190} The President (before the invention of far-reaching executive orders well into the twentieth century) could not make laws. Indeed, the executive was not even essential to the making of laws, given that it had no control over the legislature itself, and its veto could be overridden.\textsuperscript{191} Only in foreign relations did the President hold “almost royal prerogatives” and, at that time, the limited foreign entanglements of the United States kept such powers from becoming important.\textsuperscript{192}

Beginning from the beginning, that is, in the cultural context, Tocqueville sees the very significant limits of presidential power in the American system.\textsuperscript{193} As sovereignty is split and limited in the United States, with the federal government enjoying only limited powers aimed at serving a narrowly understood common good, the President personally having no final power over legislation, is best understood as primarily a servant of the legislature.\textsuperscript{194} The President administers laws made by others, hence capable of carrying out the functions of the office even when a different party controls both Houses of Congress, because the President’s own function is intrinsically so limited.\textsuperscript{195}

The same types of limitations apply to the Supreme Court.\textsuperscript{196} The judicial power is “to apply the laws of the Union and to decide certain questions of general interest that were carefully defined in advance.”\textsuperscript{197} The Court’s ability to restrict the sovereignty of the states through its power to interpret the laws, with the law of the federal Constitution being supreme was, to Tocqueville, more apparent than real because of the primary position of the states within the lives of the people and the primary as well as residual jurisdiction this gave to state political institutions.\textsuperscript{198} When combined with the limited nature of judicial decisions—their

\textsuperscript{188} Id. at 115–16.  
\textsuperscript{189} Id. at 116.  
\textsuperscript{190} Id.  
\textsuperscript{191} Id. at 116–17.  
\textsuperscript{192} Id. at 118–19.  
\textsuperscript{193} See id. at 118–20.  
\textsuperscript{194} See id. at 119–20.  
\textsuperscript{195} Id. at 117, 119.  
\textsuperscript{196} Id. at 132–33.  
\textsuperscript{197} Id. at 132.  
\textsuperscript{198} Id. at 134–35.
capacity to undermine, but not simply nullify state laws, prior to the creation of modern judicial review—these factors highly limited the courts in their direct political power.

VIII. Conclusion

What does this summary of Tocqueville’s argument and method tell us about the federal Constitution as a whole, or about how we ought to interpret that document? Because this Article is intended only to point toward further work exploring the implications of Tocqueville’s method, here it is best to focus on the most obvious implications therefrom, even though they are, perhaps, least likely to point toward interpretations congenial to most observers today.

The federal Constitution was written for and ratified by a localist, religious people seeking to maintain their own self-government, even while increasing the stability and prosperity of themselves and their communities. The federal government was framed as a means of protecting American people and communities in enjoyment of their local liberties, taking on certain express powers so as to protect them and their common interests better. Each branch of the national government was given specific, limited powers for the achievement of limited goals, limited in their application by the very limited nature of that national government’s supremacy over the states—the only governmental units, after all, with general powers of legislation. Tocqueville’s analysis tells us that we should not look to the federal Constitution as a comprehensive document setting forth the organizing principles and blueprint for our public life. That way lays the French Revolutionary form of constitution—a commanding blueprint for all of society Tocqueville rejected as conducive only to violence and oppression.

In addition, what does this tell us about how to interpret particular provisions of the federal Constitution? Tocqueville’s understanding of

199 See generally Hamburger, supra note 166 (pointing out that the power of courts to find laws inconsistent with laws higher in priority was not, at the founding or long thereafter, assumed to give a power merely to “strike down” legislative provisions, but rather to bar their enforcement in particular cases and controversies).

200 See 1 Tocqueville, supra note 18, at 134–35.

201 See id. at 107.

202 See id.

203 See id. at 107–09.

204 See 1 Tocqueville (Bradley ed.), supra note 28, at xxi.

205 See id.
American constitutions and American social life as having been built up from the local to the more distant, from the organic to the more instrumental, is of great importance in understanding, for example, the proper limits of presidential power. For a president who is not sovereign, who is to have no lawmaking power, but rather serve the legislature in an administrative capacity, is not an executive officer with the power to make far-reaching decrees, called executive orders, that have massive impacts on individual lives. By the same token, a federal constitution intended as a limited mechanism for limited purposes, sitting atop organic wholes in the states and townships, is not designed to provide national standards of well-being, let alone achieve them, but instead is aimed at limited goals, achieved through powers specifically in the document. That this is an argument for a distinctly limited national government is clear, even though it may be unwelcome.

Of course, for most observers, such a reading of Tocqueville and the Constitution merely sets up an argument regarding the impact of the Fourteenth Amendment. Did that Amendment affect a revolution in our constitutional order, making us into one nation, ruled by a government of general powers? This is not the place to engage in such arguments in detail. One should note, however, that such an argument itself is ill phrased in any Tocquevillean understanding. To posit revolutionary weight, intent, and legitimate impact on one act of lawmaking is contrary to the traditions that lay behind it; it is to assert that we had a second, much deeper and more far-reaching revolution at the end of the Civil War than we did at the American Revolution itself. Even more, it is to assert that such a revolution would be legitimate and should be taken to its ultimate conclusion, with disdain for the traditions that went before it, that it shaped the society and culture that produced the Fourteenth Amendment.

206 See supra text accompanying notes 64–66.
207 See supra text accompanying notes 193–95.
209 See supra text accompanying notes 180–84.
211 See id. at 96–97 (“[T]he [Fourteenth A]mendment was adopted ... [to] extend['] the protection of the [n]ational government over the common rights of all citizens of the United States.”).
212 See id. at 128 (Swayne, J., dissenting) (“These amendments are all consequences of the late civil war.”).
213 See supra text accompanying note 181.
A more Tocquevillean approach would be to engage in analysis of the Constitution as a whole, including as modified by the Fourteenth Amendment. Such an analysis would emphasize the fundamental nature of the federal Constitution as setting up a mediating structure modeled, not on the French Revolutionary regime (which, of course, postdated the American Revolution), but rather on the long tradition of constitutionalism on which Americans drew.214 Such a vision builds upon the traditional understanding of any constitution as simply the fundamental laws and powers of a particular nation or people.215 But, it is a modified traditionalism in that, where jurisdictions overlapped in multiple ways and even layers in premodern Europe, the American federation was more systematized.216 Nonetheless, what premodern Europeans recognized, and what was lost by the British government at the time of the revolution and increasingly throughout Europe and the world, was a recognition that there need be no single, final sovereign with the power to order all of public life.217 There may be a governmental exception, as well as the governmental rule, using limited powers to serve limited, common ends beyond the capacity or even concern of the more primary, organic sovereigns of the lower, more local levels.218

Rethinking the Constitution and the Fourteenth Amendment in this light would not necessarily result in a call to simply undo decades of jurisprudence and state building. Indeed, concerns of stare decisis would militate against any such program. However, they should cause us to rethink how we conceptualize the nature and purpose of the national administrative state, its place, and the (legislative) origin of its legitimacy in our current constitutional order.

214 See supra text accompanying notes 100–03.
216 See id. at 48.
217 See 1 TOCQUEVILLE, supra note 18, at 39.
218 See id. at 107–08.