Alexis de Tocqueville and American Constitutional Law: On Democracy, the Majority Will, Individual Rights, Federalism, Religion, Civic Associations and Originalist Constitutional Theory

Philip C. Kissam

Follow this and additional works at: https://digitalcommons.mainelaw.maine.edu/mlr

Part of the Constitutional Law Commons, Law and Philosophy Commons, and the Law and Society Commons

Recommended Citation
Available at: https://digitalcommons.mainelaw.maine.edu/mlr/vol59/iss1/3
ALEXIS DE TOCQUEVILLE AND AMERICAN CONSTITUTIONAL LAW: ON DEMOCRACY, THE MAJORITY WILL, INDIVIDUAL RIGHTS, FEDERALISM, RELIGION, CIVIC ASSOCIATIONS, AND ORIGINALIST CONSTITUTIONAL THEORY

Philip C. Kissam

I. WHY MODERNS CONSULT THE ANCIENTS
II. ALEXIS DE TOCQUEVILLE’S PROJECT
III. DEMOCRACY, THE MAJORITY WILL, AND RIGHTS
IV. DEMOCRACY AND FEDERALISM
V. DEMOCRACY AND RELIGION
VI. DEMOCRACY AND CIVIC ASSOCIATIONS
VII. DEMOCRACY AND ORIGINALIST CONSTITUTIONAL THEORY
ALEXIS DE TOCQUEVILLE AND AMERICAN CONSTITUTIONAL LAW: ON DEMOCRACY, THE MAJORITY WILL, INDIVIDUAL RIGHTS, FEDERALISM, RELIGION, CIVIC ASSOCIATIONS AND ORIGINALIST CONSTITUTIONAL THEORY

Philip C. Kissam

Count Alexis de Tocqueville’s Democracy in America has been said to be “at once the best book ever written on democracy and the best book ever written on America.” This praise should perhaps be tempered by consideration of Tocqueville’s purposes and the historical circumstances within which he worked and understood both democracy and America. Yet Tocqueville’s insights into American democracy as of the 1830s undoubtedly constitute a rich source of constitutional thought—either as support for particular constitutional principles or as constitutional ideas that should be contested. In a recent notable instance, John McGinnis has argued that Tocqueville’s ideas about democracy, especially his views that decentralization and diffuse government and civic or voluntary associations can create valuable social norms, provide a persuasive and coherent justification for the conservative jurisprudence of the Rehnquist Court. McGinnis argues that the Rehnquist Court’s “revival of federalism,” its expansion of freedom of expression rights for organizations like the Boy Scouts, and its expanded protection for religious expression in the public sphere

* Late Professor of Law, University of Kansas. My thanks to Ed Browne and Andrew Marino for their excellent research assistance and to my colleagues Ray Davis, Jonathan Earle, Mike Kautsch, Rick Levy, Phil Paludan, and Tom Stacy for their many helpful comments and suggestions on this project.


3. See SHELDON S. WOLIN, TOCQUEVILLE BETWEEN TWO WORLDS: THE MAKING OF A POLITICAL AND THEORETICAL LIFE (2001) (arguing that Tocqueville created an idealized picture of democracy in America that would dramatize salient features for the purpose of persuading nineteenth century European politicians that democratic forms of government were inevitable and should be accepted with modifications); see also Gary Wills, Did Tocqueville “Get” America?, N.Y. REV. BOOKS, Apr. 29, 2004, at 52 (“Some people are astonished that a twenty-six-year-old Frenchman . . . could write the best book on America, after a brief visit to the country. I am astonished that anyone can think that he did.”).


5. See McGinnis, supra note 4.

6. Id. at 511.

7. Id. at 531-38.

8. Id. at 543-59.
follow Tocqueville’s prescriptions for democracy and have enhanced the spontaneous ordering of society through the promotion of diffuse, localized social norms. McGinnis also argues that the “fundamental rights” jurisprudence of the modern Supreme Court, particularly the privacy rights doctrine, constitutes the judicial declaration of national norms that are antithetical to Tocquevillian democracy.

The purpose of this essay is to explore the relevance of Tocqueville’s theory of democracy to contemporary constitutional law. The brilliance of Tocqueville’s insights and his position as a detached observer, as a matter of nationality, geography, and time, suggest that Tocqueville’s viewpoint on American democracy should constitute a good basis from which to raise theoretical questions and arguments about American constitutional law, as it is and as it should be.

Unlike most writing on Tocqueville and the law, this essay emphasizes not only Tocqueville’s celebration of American democracy as of the 1830s but also his motives for writing, the contradictions within his work and between his analysis and historical circumstances, and the darker sides of his thought about democratic tendencies. This essay thus contests the recent writing on Tocqueville and constitutional law that lifts his optimistic ideas and concepts about American democracy out of context in order to support a conservative jurisprudence of the kind favored by the Rehnquist Court. This essay in contrast reveals good reasons for questioning, qualifying, and reconstructing Tocquevillian concepts of democratic government if these concepts are to help us develop a useful and attractive constitutional law for the twenty-first century.

When viewed in the context of the full text of Democracy in America, the historical circumstances within which Tocqueville worked, and the subsequent changing circumstances in American history, Tocqueville’s views on democracy tend to support the basic principles of modern constitutional law and the interpretive methodology that supports them much more than they support the originalist or revisionist versions of constitutional law that are being advanced by members of the Rehnquist Court and scholars like John McGinnis. Upon a full contextual examination, Tocqueville’s ideas justify a constitutional law that aims to promote an “equality of conditions” in American democracy. His ideas justify a robust protection of individual rights against the majority will when legislative majorities act on the basis of mere passion and majority opinion to coerce conformity and to disadvantage persons of difference. His ideas also justify judicial recognition of strong national government powers when national actions, by the legislature, executive, or judiciary, are appropriate to address economic and social problems because Tocqueville’s view of the advantages of federalism and decentralization are grounded in the subsidiarity principle—that government should be decentralized to its most effective level—rather than in some notion of fixed constitutional thought that stems from the eighteenth century. Tocqueville also recommended the use of interpretive methods in constitutional law that take account of historical contingencies and

9. Id. at 565-71.
10. Id. at 565.
11. Id.
12. See e.g., Mansfield, supra note 4; Frohnen, supra note 4; McGinnis, supra note 4; Jock Yellott, Tocqueville, Judge Hand, and the American Legal Mind, 38 S.D. L. Rev. 100 (1993).
changing circumstances—unlike originalist constitutional theory and its purportedly more rigid interpretive method.

This essay is organized as follows. The first two parts provide contextual background. Part I discusses why "we moderns" might be attracted to "the ancients" for help in constructing our political and legal theories. Part II describes Alexis de Tocqueville's general project, his purposes in writing *Democracy in America*, and the limitations entailed by his project. The succeeding parts then examine the relevance of Tocqueville's ideas to modern constitutional law. Part III considers Tocqueville's conceptions of democracy, the majority will, and individual constitutional rights. Part IV explores his views on federalism and decentralized government. Part V looks at Tocqueville's discussion of religion and its special importance to democracy. Part VI considers his theory of how civic associations are important to democracy and the relevance of this principle to contemporary constitutional law. Part VII examines the relevance of Tocqueville's analysis of democracy and law to originalist constitutional theory.

I. WHY MODERNS CONSULT THE ANCIENTS14

Why do we moderns appeal to ancient writers to help address political and legal issues? There are several reasons for this, but we should start by recognizing two fundamentally different though overlapping perspectives that are engaged in this process. First, one may have *intellectual motives* to discover how the ancients, especially writers who have obtained a revered status, addressed their political problems, not only as a matter of historical knowledge but also as a matter of understanding the flow and disruptions of historical developments and as a basis for a comparative analysis of political problems and solutions. But secondly, one may also—or in the alternative—have *political motives* to find some sort of persuasive authority or persuasive rhetoric that can support a political position to which a modern person is committed. This political perspective of course is the one likely to dominate the work of lawyers and law professors when they appeal to ancient writers on American politics and law, for intellectual workers in law typically engage in result-oriented rather than open-ended inquiry. For example, consider the attraction that members of the Federalist Society and other strict originalist theorists appear to have for pithy statements by James Madison and other Founders that seem to support claims of a Second Amendment individual right to guns,15 a very restricted reading of the

---

14. In this article I use the term "ancients" to refer to early writers about American democracy and constitutionalism, including both Founders and outside observers such as Tocqueville.

Commerce power of Congress,\(^{16}\) or the constitutionality of religiously-based government.\(^{17}\) As we examine the specific reasons for consulting the ancients on American government and the Constitution, we should keep in mind these perspectives and the possibility that investigators (including the present one) may often shift, at times imperceptibly, between these perspectives.

Several reasons to appeal to ancient writers on American government like James Madison and Alexis de Tocqueville can be associated with originalist constitutional theory, for originalist theory is aided by any persuasive evidence that helps establish an original meaning for an abstract term in the constitutional text or the value of such meanings. Tocqueville of course was neither a Framer of the Constitution nor writing about the original understanding of the text’s meaning in late eighteenth century America. But his analysis of how American society and government had developed during the first forty years of its constitutional government was written close enough in time to the adoption of the United States Constitution to arguably provide both (1) some indirect evidence of original meanings, and (2) more importantly, a kind of feedback evidence about the good consequences of the original Constitution and its original meanings. Thus, it seems natural that Tocqueville’s writing about democracy in America would appeal to originalist theorists, although perhaps different originalists will have different reasons.

First, those who believe in timeless truths about human nature or government or in the need for some kind of fixed authority for constitutional law may find comforting evidence of such truths or authority when they find it in the writings of revered ancient writers. While originalists need not or may not believe in many such truths, one timeless truth they do seem to believe in is the notion that law can be law only if it has an objective source and meaning on which everyone can agree by applying the same interpretive methodology to the abstract provisions of the constitutional text and their diffuse contexts.\(^{18}\) This view, in turn, engenders searches for original meanings of the constitutional text as either a matter of linguistic analysis,\(^{19}\) Framers’ intent,\(^{20}\) or “the original understanding”\(^{21}\) of constitutional provisions among the American public. In this approach, the objective determination of the original meaning of a constitutional text becomes dispositive of constitutional meaning. Arguments from precedents and principles of constitutional law that are not supported by or consistent with original meaning do not count—and these arguments are dismissed as the illegitimate


\(^{19}\) See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

\(^{20}\) See, e.g., RAOUl BERGER, GOVERNMENT BY JUDICIARY (1977); Bork, supra note 18.

\(^{21}\) Lopez, 514 U.S. at 584 (Thomas, J., concurring).
imposition of judicial values upon democracy that is essentially identified with current legislative majorities.  

A second reason for constitutional theorists to consult the ancients is to search for a more limited but spiritually deeper “ancestral originalism” or, in other words, ideas and practices endorsed by the ancients that constitute partial and important evidence of fundamental traditions in American history that have continued over time to inform constitutional values and practices. Thus, for example, what the Framers said about guns and the Second Amendment may not be good evidence of constitutional ancestral originalism, for the Second Amendment has not been applied in a consistent fashion by the courts to protect a constitutional right to guns against federal or state regulations. On the other hand, what James Madison said in Federalist Number 10 about the role of factions in constitutional government, or what Alexander Hamilton said in Federalist Number 78 about the necessity for the power of judicial review, are arguably parts of our enduring constitutional traditions. These latter ideas deserve consideration in constitutional argument, not as dispositive arguments like strict originalist arguments, but as important principles that should be taken into account in any situation to which they are relevant.

A third reason for constitutional theorists to consult the ancients would be to search for arguments from “heroic originalism” or, in other words, arguments from the wisdom of the Founding Fathers or other revered constitutional commentators like Thomas Jefferson who generally are thought to have been masterful political theorists. James Madison’s ideas about the play of political factions in republican government, Alexander Hamilton’s views about the power of judicial review, or (for some) even the Framers’ statements about guns may qualify as arguments for heroic originalism that deserve weight because of the political genius of these Framers and their particular ideas. As with ancestral originalism, these arguments need not be dispositive but are good arguments that should be taken into account. The basic point about both ancestral and heroic originalism is that these arguments are more limited in nature and less dispositive than originalist arguments of the “timeless truth” type that are intended to establish a fixed quality to constitutional law.

There are significant non-originalist reasons for consulting the ancients as well. One is the pragmatic Burkean notion that any successful organization should remain cognizant of and stay relatively close to its original principles to ensure that what worked for its initial growth and goodness remains a standard for advantageous operations. In commentating on how republics could ensure themselves a long existence, Niccolo Machiavelli put it this way:

---

22. See, e.g., Bork, supra note 18.
24. Id. at 1800-03, 1806-16. Cf. PHILIP BOBBI, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 93-167 (1982) (describing a form of constitutional argument from the American “constitutional ethos” that does not require but certainly can be enhanced in particular cases by arguments from “ancestral originalism”).
27. See id. at 1803-16.
There is nothing more true than that all the things of this world have a limit to their existence; but those only run the entire course . . . that do not allow their body to become disorganized, but keep it unchanged in the manner ordained, or if they change it, so do it that it shall be for their advantage, and not to their injury . . . And those are the best constituted bodies, and have the longest existence, which possess the intrinsic means of frequently renewing themselves, or such as obtain this renovation in consequence of some extrinsic accidents . . . And the means of renewing them is to bring them back to their original principles.  

Original principles can thus serve as a standard for pragmatic gradual Burkean change—in effect by requiring that all changes be justified by reasoning about the appropriateness of departing from original principles in order to accommodate government to changing historical circumstances.

A second non-originalist reason to consult the ancients is the more radical one of contrasting contemporary thought with ancient thought in order to develop a case for the advantages of contemporary thought. This approach focuses upon the flaws or weaknesses in ancient thought that can become part of a case for doing things differently. For example, Benjamin Constant, the nineteenth-century French liberal and a contemporary of Tocqueville's, believed it was important to contrast the "ancient freedoms" of positive liberty to participate in government, as in Athenian democracy, with the "modern freedoms" of negative liberty or individual rights against state regulations in order to promote the cause of liberalism.

More generally, consulting the ancients like Alexis de Tocqueville can provide a sense of detachment from the pressures and passions of immediate political struggles, and thus give us an opportunity or excuse to withdraw somewhat from the struggle and reflect dispassionately upon the wisdom of contemporary policy choices. In sum, the non-originalist reasons for consulting the ancients each involve incorporating older political ideas into a kind of comparative political or legal analysis of contemporary issues in order to help determine what should be done.

A final preliminary point should be noted. Whatever the reasons for consulting ancient writers like Tocqueville or James Madison, the investigation of ancient texts typically discloses historical contingencies that surrounded and influenced the writing of these texts as well as complicated intratextual conditions that are embedded in the texts. These kinds of historical and ideological circumstances ought to figure in any

---

29. See BENJAMIN CONSTANT, Principles of Politics Applicable to All Representative Governments, in Political Writings 170 (Biancamaria Fontana ed., 1988); Mansfield & Winthrop, supra note 2, at xxv; WOLIN, supra note 3, at 208, 413-14.
31. See generally Rakove, supra note 15 (describing the textual provisions of the constitution and historical context that speak to the meaning of the Second Amendment and the claimed individual right to guns).
analysis of Tocqueville’s ideas about democracy and constitutional law, and the next part of this essay begins this examination.

II. ALEXIS DE TOCQUEVILLE’S PROJECT

Count Alexis de Tocqueville, a young French civil servant judge, toured the United States for nine months in 1831 and early 1832 with his colleague, another young civil servant judge, Gustave de Beaumont. Their ostensible or official purpose, for which they obtained leave from the French civil service, was to study American prison reforms, especially the somewhat different reforms of New York and Philadelphia prisons. But Tocqueville, raised in an aristocratic family and becoming engaged in French politics as a liberal committed to individual rights, seems to have burned with ambition to make his political mark in France by discovering and writing about the new American society and republican government in ways that would influence French and, more broadly, European politics, and also promote his political career. In considering Tocqueville’s project, then, we should keep in mind three aspects of its origins: Tocqueville’s aristocratic background, which included family losses and other setbacks from both the French Revolution and Napoleon’s government, his growing commitment to nineteenth century liberalism and individual rights and his desire to write about America in striking and politically useful ways that would develop and promote his political views and ambitions.

Tocqueville’s method for examining and understanding America seems based upon his desire “to get beneath the surface” or, in Sheldon Wolin’s perspective, to develop a theory of republican government and democracy that would influence political developments in Europe after the French Revolution, Napoleon’s reign, and the conservative and liberal reactions that had set in across Europe after 1815. But

33. See id. at 27-33. American prison reforms in the early nineteenth century featured large-scale asylums designed to rehabilitate prisoners by isolating them from society and its influences. New York asylums provided for communal work by prisoners during the day, although prisoners were not allowed to talk with each other (and silence seems to have been maintained “by the whip”) while Philadelphia’s asylums kept prisoners isolated from each other all the time. See id. at 94-100.
35. Tocqueville’s maternal great grandfather, Malesherbes, defended Louis XVI at his trial, and five of his relatives were guillotined during the Republican Terror. Tocqueville’s father, Comte Herve de Tocqueville, and his wife were imprisoned during the Terror and only saved from the guillotine by the fall of Robespierre. Thereafter, Herve de Tocqueville’s wife suffered from nervous breakdowns and the Count obtained important government service only after the fall of Napoleon in 1814. Tocqueville, born in 1805, thus had family reasons to be skeptical about modern centralized government power and the democratic passions that propelled the French Revolution. See Mansfield & Winthrop, supra note 2, at xix-xx; PIERSON, supra note 32, at 14-18.
36. See Mansfield & Winthrop, supra note 2, at xx-xxi.
37. See PIERSON, supra note 32, at 31; WOLIN, supra note 3, at 102-31.
38. PIERSON, supra note 32, at 79. See also id. at 32 (“‘We are leaving,’ wrote Tocqueville, ‘with the intention of examining, in detail and as scientifically as possible, all the mechanism . . . of that vast American society which every one talks of and no one knows.””).
39. See WOLIN, supra note 3.
any good theory must abstract from its context and idealize salient aspects of the subject, perhaps in Tocqueville’s case even to the extent of presenting a utopian picture of democracy in America that would impress European politicians and readers and make them notice Tocqueville’s political ideas as well as Tocqueville himself. This basic purpose or perspective of Tocqueville provides an important reason to be cautious in assessing his claims about the operations of democracy in America in the 1830s, let alone the twenty-first century. Idealized theorizing may be good for political theory and good for European politics in the nineteenth century, but it also may consciously leave out, discount, or simply miss important aspects of American society and government in the 1830s.

Another reason for bringing caution and skepticism to Tocqueville’s claims comes from the nature of his and Beaumont’s travels in the United States, the kinds of people they met and were impressed by, and other sources of information they relied upon. To be sure, Tocqueville and Beaumont departed from the usual “tourist circuit” for Europeans who visited the United States in the first half of the nineteenth century. In their efforts to understand America and “get beneath the surface,” they traveled by stagecoach through the great woods of New York from Albany to Buffalo, visiting isolated farms, farmers and other inhabitants, including Indians who resided in the wilderness of Michigan Territory, as well as traveling to smaller undeveloped cities in the interior. In addition, they explored the leading cities on the coasts, and the interior of the United States via steamboats on the Ohio and Mississippi Rivers to get to New Orleans, eventually returning to Washington D.C. by stagecoach through Mississippi, Alabama, Georgia and the two Carolinas. Nevertheless, Tocqueville and Beaumont were members of French society, or its elite, and they were heavily entertained and much enjoyed their entertainments in the United States by leading members of American society, or its elite. Much of their information and ideas about society and government in America came from their discussions with and observations of members of the American elite or its ruling classes, whether the subject was the operations of government, religion, lawyers, or the effects of democratic government on society. Another important source on law and government in America for Tocqueville, as he wrote *Democracy in America* after his return to France, were the treatises of New York’s Chancellor James Kent and Supreme Court Justice Joseph Story, especially Story’s *Constitutional Commentaries*. Kent and Story were of course distinguished commentators on American law, but they were also conservative

40. See id. at 165-66, 363.
41. PIERSO, supra note 32, at 79.
42. Id. (including Detroit, Cincinnati, and Memphis).
43. See generally PIERSO, supra note 32.
44. See, e.g., id. at 84-92 (in New York City), 362-72 (in Boston).
45. See, e.g., id. at 390-425 (detailing conversations with Bostonian religious leaders and politicians, including former President John Quincy Adams, about the operations of state and national government, law and politics, and local government—especially the importance of the New England township, religion, and slavery in America).
jurists who believed that law should be an important constraint upon democratic legislative decisions and democratic excesses. Thus, at a time when new economic markets and the politics of Jacksonian democracy were transforming the American political economy, class structure and culture, Tocqueville and Beaumont were obtaining their primary information about democracy in America from those who were benefiting a great deal from American markets and who tended to be skeptical at best about the ideas of popular democracy promoted by Andrew Jackson and his democratic movement. As we shall see, Tocqueville’s ideas about economics and democratic politics in America tended to follow the views of his primary sources, and this is another reason to be cautious or skeptical of his views.

With these caveats, let us consider now the structure, main arguments, and key findings or assertions in Tocqueville’s theory about democracy in America. A significant theoretical contribution of Tocqueville’s was to perceive democracy as a social movement rather than as merely a form of government. This sociological approach in Democracy in America was established by Tocqueville’s basic premise that the strongest determinants of the way government and law work within a society are the “social state” or primary facts of the society or, in other words, its fundamental mores and habits. The social state of America, Tocqueville claims on the very first page of Democracy in America, incorporates an “equality of conditions” among its people, or at least among its white males, that exerts an “enormous influence on the course of society.” It was this equality of conditions, in Tocqueville’s view,

49. See, e.g., Pierson, supra note 32, at 367 (noting Rev. Jared Spark’s comment on Andrew Jackson “that General Jackson is not made to fill the office of President; his lack of experience in matters relating to civil government, and his great age, render him incapable of it.”).
50. See Marvin Zetterbaum, Alexis de Tocqueville, in History of Political Philosophy 657, 657-78 (Leo Strauss & Joseph Cropsey, eds., 1963); see also Wolin, supra note 3 (arguing that Tocqueville’s distinctive contribution to political theory lay in his analysis of political cultures as well as the forms of government).
51. Tocqueville, supra note 1, at 45.
52. Id. at 3.
53. Id. Tocqueville goes on to say:

[T]his primary fact . . . gives a certain direction to public spirit, a certain turn to the laws, new maxims to those who govern, and particular habits to the governed.

Soon I recognized that this same fact extends its influence well beyond political mores and laws, and that it gains no less dominion over civil society than over government: it creates opinions, gives birth to sentiments, suggests usages, and modifies everything it does not produce.

So, therefore, as I studied American society, more and more I saw in equality of conditions the generative fact from which each particular fact seemed to issue, and I found it before me constantly as a central point at which all my observations came to an end.

Id.
that had produced or enhanced the particular democratic practices in the United States, including those that he praised and those that concerned him a great deal.

The primary fact or concept of the equality of conditions in America is stated, however, only in an abstract or general way, and this finding or concept of Tocqueville's seems to be based upon similarly general claims and observations about the material security of all Americans: a proportionate distribution of material resources among white males (at least by comparison to resource distributions in Europe); an openness and availability of resources on the American frontier for those who currently lack resources; an asserted equality in manners or relationships among persons both rich and poor; an apparent widespread intellectual attitude of independence and individualism; and—significantly—an attitude among Americans about the equal importance of each person, at least in the sense of the equal importance of their opinions.  

But whatever its precise contours, this equality of conditions in Tocqueville's view was substantially strengthening the democratic forms of government in the United States and in turn was being strengthened by these forms—in particular by the frequent cooperative participation of individuals in local government work, jury service, and localized civic associations including churches.  

Tocqueville's primary concept of the equality of conditions is not only roughly defined but also idealizes America of the 1830s in two distinct ways. First, Tocqueville recognized that African-Americans, Native Americans and women did not share in this equality of conditions, and yet, while critical of these exclusions, he accepted them in general and did not let them much affect his analysis of democratic government.  

Second, Tocqueville in *Democracy* paid little attention to the growing economic inequalities in America during the 1820s, the development of the urban poor and working classes, and their quite limited social mobility. He recognized in a short passage the possibility that an industrial aristocracy could become sufficiently powerful to bring about a "permanent inequality of conditions" that would produce a class of poor and degraded workers with but "few means of leaving their condition." But Tocqueville viewed the state of industrial aristocracy in America in the 1830s, perhaps understandably, as "an exception, a monster, in the entirety of the social state" and also as "one of the most restrained and least dangerous" of all aristocracies. With this characterization, economic and social inequalities essentially disappeared from Tocqueville's picture of democracy in America.

---

54. See id. at 45-53; Zetterbaum, supra note 50, at 658-60.
55. See TOCQUEVILLE, supra note 1, at 3, 56-75, 258-64, 485-500.
56. Tocqueville recognized that slavery might be a future problem for the Union, and he seemed to believe that married women's acceptance of their "separate sphere" and subordinate role to husbands was actually a strength of American democracy. But beyond that he contented himself with describing these three inequalities. See id. at 302-79, 573-76; Kennedy, supra note 4.
58. TOCQUEVILLE, supra note 1, at 532.
59. Id.
60. Id. at 531.
61. Id. at 532.
The concepts of individualism and materialism are two other significant concepts that help structure Tocqueville's views of the American social state and democracy. Individualism, which tends to isolate individuals from each other (something that Tocqueville worries about), reinforces the equality of conditions by supporting the idea that everyone's opinion is or should be of equal importance.\(^{62}\) Paradoxically, though, individualism also created uncertainty among Americans about what is true or what is right unless their opinions were aligned with the majority opinion in society, and this uncertainty and desire for conformity contributed in Tocqueville's view to a mild despotism that can take hold of the majority will in American culture and politics or more generally in democracies.\(^{63}\) But in the 1830s, Tocqueville thought that Americans had successfully restrained any destructive excessive individualism by providing for the "local freedoms"\(^{64}\) of cooperative participation in both local government and many civic associations.\(^{65}\) One wonders whether the same could be said today about the effects of excessive individualism in the context of our much changed local governments and civic associations in the United States.\(^{66}\)

Tocqueville also observed that the widespread pursuit of material wealth by Americans, which takes place mostly in the marketplace on an individual basis, helps to explain both the apparent prosperity of the American economy and the substantial American desires for low tax and low regulation governments.\(^{67}\) But he worried about the tendency of democracy, or the equality of conditions in which all persons tend to follow majority paths, to favor "the taste for material enjoyments"\(^{68}\) to such an excess that materialism could destroy the soul and limit the possibilities for a satisfactory spiritual life.\(^{69}\) This tendency did not appear problematic in the America of the 1830s, but Tocqueville never offered a confident resolution of this possible contradiction other than to hope that at least in Europe the traditions of aristocracy and centralized governments might maintain some kind of appropriate balance between the nobility of great acts that aristocracies made possible and the mundane qualities of democratic life.\(^{70}\)

Several other key findings help structure Tocqueville's view of democracy in America. Three such findings relate to his claim, or observation, that American

---

\(^{62}\) See id. at 479-88.

\(^{63}\) See id. at 485-86, 661-65.

\(^{64}\) Id. at 487.

\(^{65}\) See id. at 486-87.


\(^{67}\) See TOCQUEVILLE, supra note 1, at 199-206 (discussing the desires for low tax governments in a growing middle class democracy); See also id. at 507-10 (discussing materialism and its beneficial economic effects).

\(^{68}\) Id. at 519.

\(^{69}\) See id. at 519-20.

\(^{70}\) See id. at 599-604, 673-76.
democratic government is a very limited kind of government, especially in terms of centralized regulations adopted by either national or state governments. First, he observed that by the 1830s, Americans had developed a strong, historically-driven reliance upon local governments to accomplish public tasks, with the New England township featured as the paradigm and main evidence of this practice. This reliance on local government had encouraged the equality of conditions and other democratic values among the populace, who could contribute most actively and most equally to their local governments. Importantly, this reliance had also produced a division of responsibilities between “government,” or legislation, and “administration,” or the execution of the laws; the former responsibility resided largely with state governments and the latter responsibility, including the administration of state laws, had been delegated to township and county governments. Thus, at the local level, citizens could participate in government in important ways by selecting and holding accountable local public officials with responsibility for administering most state laws, and Tocqueville’s praise of decentralized government in American democracy focuses substantially upon local governments, not states.

Second, Tocqueville actually says very little about state governments, and he seems in general to view them as relatively unstable and limited governments. Shifting majorities of voters and legislators tend to change laws and expenditure patterns abruptly; outstanding leaders are discouraged from seeking public offices in an atmosphere of equality; and over confidence in the power of the majority, which assumes the majority’s control over public officials, too often leaves public officials unsupervised in their actions. The major role of state governments, in Tocqueville’s account, seems to have been to pass legislation concerning the operation of local governments and other laws (for instance criminal laws) that were to be administered by local governments. State governments at the time were not much engaged in direct economic regulations although they were heavily involved in the complex, contentious (and unstable) politics of internal development, constructing turnpikes, canals and banking systems. Tocqueville only alluded generally to the complexity of state issues in the 1830s, although he certainly viewed the states as an integral, mediating part of America’s federalist system. But he does not celebrate their powers or accomplishments as he celebrates local governments.

Third, Tocqueville observed that the national government had been delegated only a relatively few powers by the Constitution, including the powers of war, diplomacy and maintaining an internal free market among the states. But he also noted that the national government of the United States, since the War of 1812, had not needed to exercise its external powers because, unlike European States, the United States was not threatened by any neighboring foreign power. For Tocqueville, then, the idea and success of a limited or weak national government in American democracy were much

71. See id. at 57-63.
72. See id. at 63-65.
73. See id. at 82-93.
74. See id. at 79-93, 187-205, 235-43.
75. See WIEBE, supra note 48, at 194-208.
76. See TOCQUEVILLE, supra note 1, at 107-13.
77. See id. at 118, 265.
more a matter of fortunate historical circumstances than wise political theory.\footnote{Id. at 118-19; see also PIERSOHN, supra note 32, at 129-30. Here the author quotes from Tocqueville's letter to E. Chabrol dated June 9, 1831:}

Indeed, he worried about the weakness of the federal government and the possibility that in times of crisis (over slavery for example) it would prove too weak \textit{vis-a-vis} the more popular state governments to engage in effective national action.\footnote{See TOQUEVILLE, supra note 1, at 359-62.} And the Nullification Crisis of 1829-1831, when South Carolina threatened to declare void federal tariff laws that it deemed too high, was surely reason for Tocqueville to raise this fear even though President Andrew Jackson prevailed in this case and South Carolina stood down.\footnote{See SELLERS, supra note 48, at 131-39, 161-70, 343-45, 353-54.}

Two other findings or theoretical assertions are significant in Tocqueville's analysis, although these claims are more complicated, more speculative and less supported by evidence than his findings about limited central government and activist local governments. First, he argued that the democratic forms of government in America, those of activist local governments and limited central governments, were important to economic prosperity and the operations of a market economy—not only because of the relative absence of economic regulations from weak central governments, but also because activist local governments, in Tocqueville's view, provided instructive education for Americans in the entrepreneurial and business skills of initiating new projects to solve immediate problems and organizing cooperative behavior to implement the projects.\footnote{See id. at 19-44, 266-74.} Of course, as Tocqueville recognized, other important factors causing American economic prosperity were rich natural resources, open frontiers and the character of European immigrants to the United States.\footnote{See id. at 19-44, 266-74.}

Moreover, the American economy from the end of the War of 1812 had experienced some marked boom-and-bust cycles, although by the early 1830s it was expanding at an impressive rate.\footnote{See SELLERS, supra note 48, at 326-31 (on the Nullification Crisis).} Tocqueville's views about the relationships between economic growth, a limited central government, and activist local governments, while supported by the theories of Adam Smith, other contemporary writers, and his own historical observations in America, are nonetheless best understood as slender theoretical speculations rather than findings in view of the absence of any persuasive empirical evidence. Moreover, any relationships between economic growth and the nature of...
government that existed in the 1830s would seem to have little relevance to today's economy of large-scale private organizations and large-scale government programs that regulate and support these organizations.  

Toqueville also asserted that the religiosity of Americans was an important source of democratic success in America, especially because of religion's generation or instruction of a widespread morality that supported obedience to laws, discipline in the workplace, a tempering of materialist urges, and, thus, more effective uses of freedom. Tocqueville accordingly, while praising the separation of church and state as a means to enhance universal religious beliefs, commended politicians who displayed their religious convictions as a useful means of supporting American religiosity in general. Yet Tocqueville's view of religion in America in the 1830s seems partial, perhaps too heavily influenced by the establishment churchmen who helped entertain Beaumont and Tocqueville in major East Coast cities. Moreover, the 1820s and 1830s were a time of religious peace in America when religious activities focused on the home and women and there was little public divisiveness among America's different religions. In these circumstances, it is perhaps understandable that Tocqueville would follow Locke's and Jefferson's vision of separate religious and political domains that should rarely if ever be in conflict.  

Tocqueville's discussion of American religion in particular ignores or discounts the passions and fundamentalism of the Second Great Awakening that was in full swing at least in rural parts of America by the 1820s and was beginning to support contentious political reforms that would protect the Sabbath and punish drinking. He also fails to note the anti-Catholicism aimed at Catholic immigrants in coastal cities that was appearing by 1830, although anti-Catholicism did not become a major issue in American politics until the 1840s. Thus, Tocqueville was able to depict a religious landscape in America that was pluralistic and tolerant of religious pluralism, church-going but non-dogmatic, to some extent deist, and willing to accept a general idea of separation between church and state that included the clergy staying out of politics. Left out of this discussion or discounted in Democracy in America are different views among Americans about the importance of religious doctrine and the appropriate

84. See Peter H. Lindert, Growing Public (2004) (arguing that high government spending on social programs in modern industrial economies creates no statistically significant deterrent to economic growth); Joel Slemrod & Jon Bakija, Taxing Ourselves: A Citizen's Guide to the Great Debate over Tax Reform (2003) (asserting that there is no demonstrated empirical relationship between the size of government or level of taxes and economic growth in modern industrial economies).
85. See Tocqueville, supra note 1, at 275-88.
86. See id. at 283-86, 423-24.
87. See id. at 517-21.
89. See Wiebe, supra note 48, at 280-81, 305-06.
91. See Sellers, supra note 48, at 202-36.
92. See id. at 390.
93. See Philip Hamburger, Against Separation, The Public Interest, Spring 2004, at 177, 183-84.
94. See Tocqueville, supra note 1, at 275-88.
relationships between church and state, as well as the significant efforts by religious reformers at state and local levels to obtain restrictive regulations that would enforce morals upon members of the working and lower classes who were drinkers or were licentious or undisciplined.95 Tocqueville's views of religion in America and its democratic role, like his views of the American economy, thus seem to be idealized in ways that might make the religion-democracy connection appeal to his European readers without raising concerns about the more problematic and more violent aspects of religious politics. In any event, Tocqueville's views on religion and government surely do not capture or take account of the powerful, contentious positions that exist today in relationships between religion and governments in American politics and law.96

There are also inherent tensions or contradictions in Tocqueville's larger perspectives on democracy in America. The central problem of democracy in Tocqueville's view was that democracy's passion for equality was compatible with either a tyrannical government, which employed both legislation and administration to destroy the freedom of individuals, or a government devoted to the liberty of equal individuals.97 Prescriptively, Tocqueville wanted to show how men can be both equal and free, and he proposed a two-part resolution for obtaining appropriate liberties in a democratic society.98 As Melvin Zetterbaum put it, the first part of this resolution consisted of Tocqueville's belief, or hope, that the equality of conditions of the kind he observed in America engenders in people's minds and hearts "an instinctive inclination for political independence" of each equal individual, although this passion for "equality in freedom" was itself of unequal strength with a democratic people's "passion for equality."99 The passion for freedom thus needed support from the art of politics, which in America of the 1830s had been achieved by the emphasis and reliance upon local governments, juries, an independent judiciary, the separation of church and state, a very diffuse and decentralized free press, and the importance of many civic associations accomplishing publicly useful tasks.100

So Tocqueville resolved the contradiction between freedom and equality, at least in theory, by relying upon the historical circumstances in America of both a widespread equality of conditions that engendered an inclination for liberties, of the self if not others, and a broad set of free institutions like the decentralized press, decentralized government, and many small civic associations. Certainly his sense that American democracy produces a passion for individual liberty has in the main held true, although today respect for the liberties of others does not seem prevalent on issues like abortion, physician-assisted suicide, gay rights or welfare reform. Yet one can say without contradiction, I believe, that the passion for liberty of self has in recent years tended to overwhelm any passion for the government promotion of an equality

95. On the moral reform efforts, especially against drinking, that engaged government regulations at state and local levels, see SELLERS, supra note 48, at 259-66; WIEBE, supra note 48, at 230.
96. See infra Part V.
97. Zetterbaum, supra note 50, at 659; See also TOCQUEVILLE, supra note 1, at 235-49.
98. See Zetterbaum, supra note 50, at 659, 668-69.
99. Id. at 668.
100. Id. at 669.
101. Id.
102. Id. at 668-69.
of conditions in American society. Moreover, the free institutions that in Tocqueville’s view were necessary to maintain a balance between equality and liberty have changed dramatically over the past two centuries, as regulations by state and national governments have brought about the administrative state; as first the telegraphic revolution and then the televisual revolution have centralized the powers of the press and turned the news media to providing many fragmented bits of entertaining news; as religions have entered the public sphere with passion and power; and as many civic associations have become something like public utilities in their provision of services to eager consumers.103 Some of course would say that some of these developments represent the passion for equality overriding the passion for liberty, as Tocqueville feared, but the new imbalances of power also trample on equality and serve only the liberties of the powerful, as we shall see.

Another larger perspective that Tocqueville brought to his analysis was methodological. His political theory of America and of democracy was consciously grounded in a historical and sociological approach, like Montesquieu but unlike many previous political theorists such as Hobbes, Locke and Rousseau.104 On the one hand, this suggests that any helpful application of Tocqueville’s ideas to contemporary constitutional issues should be relentlessly historical and sociological itself. On the other hand, Tocqueville’s penchant for making generalizations without empirical support and for idealizing democracy seems in many places to diminish the accuracy and power of his observations of America in the 1830s. These are methodological qualifications we need to bring to our analysis of Tocqueville’s more specific ideas about the interactions of law and society.

In summary, Tocqueville’s central insights into the nature of democracy in America included his theory that the social state, or primary social forces, in any society play an important role in determining the form and operations of its government; that as of the 1830s the social state of America included an equality of conditions that meant a rough equality of attitude and self-esteem, as well as relatively equal material opportunities, that supported the democratic forms of government Tocqueville observed; that America’s social state included strong tendencies towards materialism, individualism, and relatively private kinds of religion that on balance affected American democracy in favorable ways; and that historical circumstances, including the social state, had provided American democracy by the 1830s with strong local governments, relatively limited and unstable state governments, and a somewhat inoperational national government. Further, Tocqueville’s overriding normative perspective sought to adjust the appropriate liberties of individuals with democracy’s passion for equality. This is the context in which we should consider Tocqueville’s more specific ideas and arguments.

III. DEMOCRACY, THE MAJORITY WILL, AND RIGHTS

When Tocqueville refers to democratic government as distinct from democracy as a social movement, he equates “democratic” with the majoritarian process or, in other words, with the election of public officials by a majority or plurality of votes and

103. See infra Parts IV-VI for discussion of these developments.
104. See WOLIN, supra note 3; Wood, supra note 34.
the majority voting by legislators that enables legislative action.105 At the same time, however, he approves the distinctive American innovation of the power of judicial review and the active use of this power by courts to enforce constitutional allocations of power between the different branches of government and to protect individual rights, particularly property rights, against the excesses or omnipotence of the majoritarian process.106 Moreover, although he is neither very specific nor technical about this, Tocqueville’s interpretation of the relationships between the majoritarian process, the power of judicial review, the process of judicial interpretation and decisionmaking, and individual rights appears to support a relatively robust and flexible judicial recognition of individual constitutional rights, especially rights against state governments.

Tocqueville perceived both advantages and adverse effects from a pure democracy that is conceived of as both a social movement and majoritarian form of government. Among the advantages, which in Tocqueville’s view stem in good part from the equality of conditions, are the development of a widespread “public spirit”107 to accomplish useful and important government tasks (particularly by actions of local governments); a related enthusiasm for cooperative efforts among individuals in civil society (by the actions of economic, religious, and other voluntary associations); respect for the law (for among equals, only law can provide social cohesion and order); and, importantly, the “idea of rights”108 (for among equals, everyone deserves equal autonomy).109

But there are also vices of a pure democracy, which Tocqueville perceived in several forms. First, there is the “legislative instability”110 from democracy’s frequent elections that bring “new men to power,”111 and also the “administrative instability”112 that results from a majority’s tendency to write laws and then shift attention to other matters, leaving administrators largely unsupervised.113 Since most government power was exercised by state governments in the 1830s, this criticism seems directed in particular against state governments, which possessed relatively more legislative power and held more frequent elections than the federal government. Second, following Madison, Tocqueville describes and fears the “tyranny of the majority,”114 which he defines broadly as the majority’s imposition of unjust law upon the interests or rights of individuals that causes “freedom to be in peril.”115 While Tocqueville did

105. See TOCQUEVILLE, supra note 1, at 235-37. Tocqueville writes, “It is of the very essence of democratic governments that the empire of the majority is absolute; for in democracies, outside the majority there is nothing that resists it.” Id. at 235.
106. See id. at 93-98, 133-35, 248-57.
107. Id. at 225-27.
108. Id. at 227-29.
109. See id. at 220-35.
110. Id. at 238.
111. Id.
112. Id. at 198-99.
113. Id. at 238-39.
114. Id. at 239-42.
115. Id. at 239-42. Tocqueville specifies, “I regard as impious and detestable the maxim that in matters of government the majority of a people has the right to do everything, and nonetheless I place the origin of all powers in the will of the majority. Am I in contradiction with myself?” Id. at 240.
not perceive much of this tyranny in America of the 1830s, neither did he perceive any guarantee against this tyranny; he says only that "one must seek the causes of the mildness of government in circumstances and mores rather than in the laws." Third, official arbitrariness is another vice of democracy that is favored by the omnipotence of the majority for, according to Tocqueville, the majority, perhaps overwhelmed by its omnipotence, "regards public officials as its passive agents and willingly deposits in them the care of serving its designs," without specifying "the details of their duties." Fourth, democracy as a social movement produces the milder despotism of the conformity of thought about what is right to shifting, fickle majority opinions. Without an authoritative religious or political doctrine, and with everyone's opinion equal to everyone else's in a democracy, intellectual uncertainties and anxieties about what to believe or what to think produce a herd instinct among Americans; only what is authorized by majority public opinion can be truthful or useful. Thus Tocqueville says, "in America the majority draws a formidable circle around thought. Inside those limits, the writer is free; but unhappiness awaits him if he dares to leave them." This conformity of thought discourages high quality leadership in public life and is also likely to be a cause of the tyranny of the majority and resulting unjust laws that unfairly oppress individuals and their liberties. In sum, the vices of democracy can threaten democratic governments in two principal ways: by a "complete enslavement of the legislative power to the will of the electoral body" and by a "concentration in the legislative power of all the other powers of government." These events may override the legitimate rights of individuals in a democracy and ultimately produce illegitimate government.

Although Tocqueville saw no guarantee against the tyranny of the majority or oppressive conformity of thought, he did theorize that three factors in the circumstances and mores of American life might temper the tyranny of the majority. Two of these factors, the absence of administrative centralization and the jury as a political institution, will be considered later as shifting features of American government and its federalist system. The third factor, lawyers, speaks more directly to Tocqueville's theory of rights as an important counterweight to the majority will. The lawyer factor included the importance to American government of judges and the power of judicial review, and this factor, when combined with Tocqueville's theory of democracy, supports the vigorous protection of individual constitutional rights against the oppressive conformity of majority opinions that are adopted for no other reason than the desire to be right in the eyes of the current majority within a democratic society.

Tocqueville did not develop a full-blown theory about the judicial protection of individual constitutional rights, and his perspective on this issue must be constructed

116. Id. at 242.
117. Id. at 242-43.
118. Id. at 244.
119. See id. at 235-49, 661-65.
120. Id. at 146.
121. See id. at 246-49.
122. Id. at 250-64.
123. See infra Part IV.
from several of his observations. First, he praised the special American power of judicial review as a necessary constraint upon majoritarian excesses while recognizing both the special legal qualities and political importance of this power. 124 He recognized, that is, that the power of judicial review is confined to deciding only cases and controversies which litigants properly bring before the courts. 125 But he appreciated the political importance of this power in maintaining an appropriate balance of power between federal and state governments 126 and in protecting individuals from unjust or oppressive laws. 127

Second, like Chief Justice Marshall in McCulloch v. Maryland, 128 Tocqueville recognized that the written Constitution was incomplete at the time of its making due to the impossibility of fixing "beforehand, in an exact and complete manner, the portion of power that would fall to each of the two governments between which sovereignty was going to be apportioned" or foreseeing "in advance all the details of the life of a people." 129 The written Constitution thus marks only the great objects of government and individual rights, and the details of constitutional law will necessarily depend upon reasonable interpretations by the courts to ensure that governments can relate appropriately to their changing circumstances. 130 To accomplish this, federal judges "must not only be good citizens, educated and upright men—qualities necessary to all magistrates," but they must also be "statesmen . . . [who] know how to discern the spirit of their times, to confront the obstacles they can defeat, and to turn away from the current when the flood threatens to carry away with them the sovereignty of the Union and the obedience to its laws." 131

Finally, the interpretive process for constitutional issues will be successful only if prudent, statesmen-like judges engage in debate and deliberation over competing and shifting principles and weigh these principles in the light of the relevant circumstances in ways which ultimately satisfy the sovereignty of public opinion in the long run and thereby obtain legitimacy. For Tocqueville:

In the hands of . . . federal judges rest ceaselessly the peace, the prosperity, the very existence of the Union. Without them, the Constitution is a dead letter; to them, the executive power appeals to resist the encroachments of the legislative body; the legislature, to defend itself against the undertakings of the executive power; the Union, to have itself obeyed by the states; the states, to repel the exaggerated pretensions of the Union; the public interest against private interest; the spirit of 124. See TOCQUEVILLE, supra note 1, at 93-98, 130-42, 146, 257.
125. See id. at 93-98.
126. See id. at 107-08.
127. Id. at 257. Tocqueville writes, "Armed with the right to declare laws unconstitutional, the American magistrate constantly enters into public affairs. He cannot force the people to make laws, but at least he constrains them not to be unfaithful to their own laws and to remain in accord with themselves." Id.
129. TOCQUEVILLE, supra note 1, at 107.
130. See id. at 107-08, 141-42.
131. Id. at 142. In supporting judicial resistance to "the flood" of public opinion that can threaten "the sovereignty of the Union and the obedience to its laws," Toqueville was following both Chancellor Kent and Justice Story in their support for judicial review that protects constitutional principles against mere public opinion. See, e.g., Larry D. Kramer, Marbury and the Retreat from Judicial Supremacy, 20 CONST. COMMENT. 205, 219-20 (2003) (Kent's view); Newmyer, supra note 47, at 114 (Story's view).
conservation against democratic instability. Their power is immense; but it is the power of opinion. They are omnipotent as long as the people consent to obey the law; they can do nothing when they scorn it. Now, the power of opinion is that which is most difficult to make use of, because it is impossible to say exactly where its limits are. It is often as dangerous to fall short of them as to exceed them.\textsuperscript{132}

Whatever one may think about the openness or apparent subjectivity of Tocqueville's perspective on constitutional judging,\textsuperscript{133} it clearly is not consistent with either the maintenance-model or legal science approach to constitutional law of Joseph Story, who emphasized close textual analysis, historical explications of textual meanings, and reliance on the common law in order to preserve the fundamental principles of the founders,\textsuperscript{134} or the strict originalist theories of jurists like Roger Taney,\textsuperscript{135} Antonin Scalia,\textsuperscript{136} and Robert Bork\textsuperscript{137} who have wanted to tie constitutional law to clear and specific original meanings. Perhaps the forward-looking qualities in Tocqueville's view of judging suggest that he was endorsing (or would have endorsed) something like Michael Perry's theory about the constitutional interpretation of individual rights as a kind of "moral prophecy."\textsuperscript{138} But Tocqueville also praised the American legal profession for constituting a conservative, "aristocratic," or liberal constraint upon the majority will,\textsuperscript{139} and his analysis of democracy in America gives significant weight to history or time in explaining and understanding public opinion. Tocqueville's endorsement of flexible, evolving constitutional interpretation thus appears to be more like the jurisprudence of John Marshall, who emphasized reasoning from the first principles of government to help rationalize the constitution,\textsuperscript{140} and the jurisprudence of Ronald Dworkin, who emphasizes applying moral principles that are embedded in legal authorities in order to resolve hard cases in a way that is both backward-looking (as a matter of the "fit" between the embedded moral principles and constitutional authorities) and forward-looking (as a matter of "justification" by

\begin{itemize}
\item \textsuperscript{132}TOQUEVILLE, \textit{supra} note 1, at 146.
\item \textsuperscript{133}For a negative view, see Matthew J. Franck, \textit{Statesmanship and the Judiciary}, 51 REV. POL. 510 (1989).
\item \textsuperscript{134}See PAUL W. KAHN, \textit{Legitimacy and History: Self-Government in American Constitutional Theory} 38-45 (1992) (describing Story's constitutional theory as articulated in Story's Commentaries on the Constitution of the United States); \textit{see generally McCLELLAN, supra} note 47 (describing Story's "common law constitutionalism").
\item \textsuperscript{135}See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 399-454 (1857); KAHN, \textit{supra} note 134, at 46-53; CHARLES W. SMITH, JR., ROGER B. TANEY, JACKSONIAN JURIST 155-76 (1936).
\item \textsuperscript{136}See generally SCALIA, \textit{supra} note 19; Scalia, \textit{supra} note 18.
\item \textsuperscript{138}See MICHAEL J. PERRY, \textit{The Constitution, the Courts, and Human Rights} 112 (1982).
\item \textsuperscript{139}See TOQUEVILLE \textit{supra} note 1, at 251-58.
\item \textsuperscript{140}See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 146-52 (1803) (arguing from the first principles of a written constitution to help justify the power of judicial review); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 353 (1819) (arguing from the first principles of the constitutional text and its framing to help justify the implied powers doctrine and the authority of Congress to create a national bank); KAHN, \textit{supra} note 134, at 24-31 (describing Marshall's jurisprudence as reasoning from the first principles of government).
\end{itemize}
choosing an interpretation of moral principles that would make law "the best that it can be").

How might a Tocquevillian jurist today contemplate cutting edge constitutional cases that involve restrictions on, say, abortions, homosexuality or pornography? In assessing the relationships of these issues to evolving but contested public opinion, the majority will, and individual rights, she would in the first place want to take into account that "democracy" is both a social movement and a form of majoritarian decision-making by government. This would require developing a conception of democracy that is more complex and richer than mere majority voting and one that makes some fair sense of contemporary democracy as a social movement. This conception might incorporate a democratic commitment to the constitutional history of the American people, a commitment which engages the courts as a democratic rather than anti-democratic institution in preserving the fundamental principles of American society as they have been shaped and revealed throughout history by the writing of the constitutional text and its major judicial interpretations. Or this conception might incorporate a democratic commitment to the idea that a democracy's fundamental purpose and obligation are to respect and promote the interests and values of all persons, which are best served by resolving issues of basic moral principle (as distinct from issues of policy or expediency) through constitutional decisions by the courts rather than by majority voting of legislatures. Or one's conception of democracy might attempt to incorporate and balance both of these democratic commitments together with a third democratic commitment to the power of majority voting.

More specifically, a Tocquevillian jurist will need to interpret the conflicting opinions and social movements that swirl around the constitutional issues of abortions, gay rights, and pornography in order to determine what kinds of decisions promise to promote an equality of conditions that will support a vibrant healthy democracy. This jurist might begin by characterizing these conflicts as integral aspects of America's contemporary "culture wars." Justice Scalia of course believes that such conflicts should be relegated to legislatures where a majoritarian process can decide the winners and losers. He asserts, but without elaboration, that the majoritarian process, unlike the courts, provides the losers at least with "the satisfaction of a fair hearing and an honest fight." Justice Scalia's metaphor of a playground brawl reveals, however,
perhaps unintentionally, both the absence of an impartial decisionmaker and the likelihood that neither side is listening to the other within the legislative process. Allocating such issues to legislatures rather than courts, then, would seem to provide a rather strange sort of “fair hearing” and “honest fight” in terms of how we expect democracies to proceed. Democratic deliberation over today’s hot-button cultural issues may be better served by the courts rather than state legislatures.

Most importantly, these cultural conflicts in public opinion are asymmetric; one side wants to impose its opinion on others (about the time at which human personhood begins, or the sanctity of heterosexual marriages, or the offensiveness of pornography), while the other side in these issues just wants to be let alone, free from any majority opinion that the democratic forms of government may register and wish to impose upon them. In the Tocquevillian perspective, regulations based on majority opinions that would merely enforce conformity to a majority public opinion about what is right are just the sorts of situations that constitutional law should invalidate unless the government can provide convincing evidence of harms to other persons that would occur without regulation. In these situations the mild despotism of majority opinions in democracies that Tocqueville feared merges with the tyranny of the majority by legislative regulations that Tocqueville also feared. Of course, in the 1830s, when most constitutionally questionable legislative regulations involved contracts and property, Tocqueville seemed to think that opinions alone would restrict morals while oppressive legislation would concern property rights. But given the modern merger of opinions and restrictive legislation on cultural matters, it seems that the Tocquevillian jurist today would want to provide the same robust protection for individual social and cultural rights as Tocqueville recommended for property rights in the 1830s.

In the case of abortions, as Justice Blackmun reasoned in Roe v. Wade, the argument that abortions cause specific harm to another person reduces to a question of faith or opinion—religious or otherwise—about whether (or when) the fetus is a person. Similarly, public opinion that gay marriages may be prohibited without violating equal protection or the privacy right under the due process clause seems to be based only upon opinions with no convincing showing of specific harms to persons. To be sure, it is claimed that heterosexual marriages are necessary to promote “the welfare of children and the stability of society,” but since such marriages have been the only marriages in history there is no evidence that allowing homosexual marriages would diminish the welfare of children or social stability.

149. Id. at 161-62. See also RONALD DWORKIN, LIFE’S DOMINION (1993); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE, 112-14, 120-43 (1988); Arnold H. Loewy, Morals Legislation and the Establishment Clause, 55 ALA. L. REV. 159, 175-81 (2003). Greenawalt and Loewy argue that religious faith about the “fact” or “purpose” of when a human life begins deserves consideration in constitutional argument because different “faiths” of a similar sort figure into all kinds of factual or purposive interpretations in constitutional law.
150. Cf. Lawrence, 539 U.S. at 571 (rejecting the argument that moral opinions about sodomy between homosexuals is a justification for banning such sodomy); Romer, 517 U.S. at 633-36 (rejecting argument that moral opinions that disfavor homosexuality are justification for prohibiting laws that would protect homosexuals from discrimination).
Regulating pornography is a more difficult issue in my view because of the argument that pornography of many kinds subordinates women and thus may have a wide range of effects that disadvantage women. Regulating pornography may thus tend to promote the equality of conditions that is the hallmark of Tocquevillian democracy. But even here, given the uncertain nature of pornographic effects and, importantly, the weakness of remedies that are aimed at hard core pornography but leave vast quantities of soft core pornography untouched, there is room to conclude that the prohibition of pornography essentially would constitute the imposition of majority opinions designed to coerce conformity to these opinions. In all three situations, then, the democratic measure of equality of conditions that includes respect for the opinions of each person may be satisfied by judicial decisions that invalidate government restrictions that are based merely on majority opinions about the harms of abortions, homosexuality, and pornography.

The Tocquevillian perspective on constitutional rights throws light on other issues as well. Consider, for example, the religion clauses. Under the free exercise clause, regulations with a purpose or animus to disadvantage particular religious practices are unconstitutional, and this rule clearly is aimed at preventing majority religious opinions from justifying coercive regulations of non-conforming views. But overtly secular government actions, like building a road over an Indian burial site in a national forest or applying drug laws to the religious use of peyote, may or may not be animated by a distaste among public decision-makers for minority religious beliefs and practices. It would be appropriate, therefore, for courts to apply heightened scrutiny to such actions in order to "smoke out" illegitimate cases of animus or bad purpose while leaving alone legitimate secular decisions. Although a narrow majority of the Supreme Court seemed to hold otherwise in Employment Division v. Smith, the Court’s subsequent readiness to find religious animus in the face of claims about secular purposes in Church of the Lukumi Babalu Aye suggests that the Court may be willing to smoke out cases that have been animated by conformity-seeking majority religious opinions even without a formal rule of heightened scrutiny. This would be a Tocquevillian resolution.

Under the Establishment Clause, recent Supreme Court decisions have revealed a Court interested in continuing to invalidate officially sponsored religious exercises in public schools, but willing to allow substantial public funding of individuals who


156. See RUBENFELD, supra note 142, at 206-07 (interpreting the concept of strict scrutiny in constitutional law as designed to smoke out illegitimate purposes).

157. 494 U.S. 872 (1990) (holding that city ordinances that prohibited animal sacrifice were violations of the Free Exercise Clause).


choose religious forms of education that include religious practices.\textsuperscript{160} The first situation, in essence, involves various kinds of officially sponsored prayers in public schools that, in effect, impose a conformity-seeking majority opinion or just the sort of mild despotism of majority opinions that Tocqueville decried. Non-conforming students are not formally coerced by officially-sponsored prayers into praying with others, but they are exposed to implicit criticism by the majority for their non-conforming views if they refuse to participate. In the second situation, however, there is no direct coercion or criticism of non-conforming individuals unless one considers the payment of taxes that support religious views to be coercive on the taxpayer in some relevant constitutional sense.\textsuperscript{161} Here too we see apparent Tocquevillian resolutions of difficult constitutional issues that would promote the equality of conditions in contemporary American democracy.

IV. DEMOCRACY AND FEDERALISM

Tocqueville clearly perceived decentralized government as a foundational aspect of American democracy.\textsuperscript{162} The focus of his analysis, however, was much more on local governments rather than state governments.\textsuperscript{163} In Tocqueville's view, local government provided opportunities for individuals to participate in policy-making and administration, enhanced the potential accountability of office holders to voters, and allowed the construction of appropriate government responses to diverse local conditions and problems. Active local governments, including local courts and the jury system, also promoted an entrepreneurial and cooperative spirit among the people that spilled over into civil society and the economy, thus enhancing both the democratic and economic prosperity of Americans outside the formal bounds of government. State governments, on the other hand, were described with some ambivalence. These governments, especially their legislatures, embodied the democratic idea of majority rule and the freedom of individuals to participate in government,\textsuperscript{164} and they provided "strong governmental centralization" in terms of adopting general laws, including laws to help organize local governments,\textsuperscript{165} that was necessary to address the "multiple and complicated" rights and duties that state governments were charged with administering.
governments faced in the American system. But Tocqueville perceived that states had granted excessive power to their legislatures and electorates, and that this power could become the site of oppressive legislation adopted by fickle, unstable majority opinions or, in other words, a central site for "the tyranny of the majority." It thus would be wrong to think that Tocqueville's appreciation of decentralized government provides plentiful support for arguments on behalf of states' rights or state powers against the national government in the kinds of federalism issues that the Supreme Court has had to deal with throughout our constitutional history. It would also be wrong to think that Tocqueville believed that the power of states in American federalism somehow justifies judicial deference to state legislatures whenever "the majority will" desires to regulate individual behavior. Three themes in his analysis of decentralized American government in the 1830s suggest that Tocqueville's perspective on American federalism was quite different from the one that states' rights advocates imagine.

First, as noted, Tocqueville's emphasis on decentralized government focused on active local or township governments and paid relatively little attention to state governments. It was in local governments, especially the paradigmatic New England township meeting, and the jury that Tocqueville located the merits of decentralized government: participation, accountability and education in entrepreneurial and cooperative actions. Moreover, the Frenchman's knowledge and experience of centralized French government helped him perceive that a major feature of American state governments lay in their separation of "government," or lawmaking, for which state legislatures were responsible, from "administration," or the enforcement of laws, which tended to be delegated to county and township officials, thus enhancing the responsibility and activities of local governments vis-a-vis the states. As some of Tocqueville's informants told him, democracy in America consisted essentially of a linked group of local republics or small city-states or, in other words, local governments, which had pre-existed and helped construct state governments and thus established the distinctive character of American government.

Second, Tocqueville clearly appreciated the principle of subsidiarity—the principle that central government authority should act, and only act, when a government function cannot be performed competently at a more local level. But

166. Id. at 107.
167. Id. at 236 (describing the short terms and similarity of representatives in both houses of state legislatures and the diminished executive and judicial powers).
168. See id. at 235-49.
169. See supra text accompanying notes 71-75, 163.
170. See TOCQUEVILLE, supra note 1, at 82-93. See also SCHLEIFER, supra note 46, at 129-37 (describing Tocqueville's discovery of this important distinction).
171. See PIERSON, supra note 32, at 405-13 (describing the influence of Josiah Quincy, President of Harvard University, and the Reverend Jared Sparks, a historian and publisher of the North American Review, on Tocqueville's thinking about the importance of local governments, especially the New England township, to American government).
of course this principle is not the same as the principle of state sovereignty—the principle or idea that constitutional law should protect some core notion of independent state government functions from national regulation. The principle of state sovereignty has been used by the Supreme Court to justify its contemporary constitutional limitations on national government in cases like United States v. Lopez, United States v. Morrison, New York v. United States, and Printz v. United States that have carved out domains of regulatory activity that are reserved for the states free from national regulation. In fact, the principle of subsidiarity endorsed by Tocqueville would place the responsibility of deciding what functions to delegate to states, and what functions to regulate by national laws, primarily in the hands of the national legislature rather than the courts because the national legislature would appear to be the most appropriate body for determining when national regulations are needed to address social problems and when functions may be delegated.

Third, Tocqueville does not seem to have thought very highly of the capacity of state governments to govern wisely, innovatively, or experimentally as states' rights theorists like to claim. State governments in Tocqueville's account tended to be relatively unstable and weak due to the frequency of state elections, populist politics at the state level, frequent shifts in voter opinions, and the tendency of American politics and its "equality of condition" attitudes to drive exceptional leaders away from politics and government. He also noted the inherent popularity of state governments by comparison to the more distant national government, and he worried that in times when the exercise of strong national powers should become necessary that the national government might not have either the legitimacy or power to claim and execute such powers successfully. Tocqueville thus never endorses any strong principle of state sovereignty, nor does he particularly applaud state policymaking. Local governments, juries, and administrative decentralization of state governments are featured instead as the foundational aspects of American federalist government and democracy.

The relevance to modern constitutional law of Tocqueville's distinctive take on American federalism may seem unclear but at least two observations are pertinent. First, at the beginning of the twenty-first century local governments are still an important, often overlooked part of American government, although they no longer resemble Tocqueville's paradigm of the New England town meeting with its small size, its homogenous polity, its substantial possibilities for citizen participation, the close accountability of public officials, and the education of citizens for participation in the larger civil society. Local governments today tend to be relatively large and

FEDERALIST NO. 14, at 82 (Alexander Hamilton, John Jay & James Madison) (Robert Scigliano ed., 2000) ("The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity.").
175. 505 U.S. 144 (1992) (invalidating a federal law regulating the disposal of low-level radioactive waste by state governments).
176. 521 U.S. 898 (1997) (invalidating a federal law requiring the temporary use of state and local police officers to check information on gun purchasers while a new federal gun-control program was established).
177. See generally Koppelman, supra note 172.
178. See TOCQUEVILLE, supra note 1, at 238-43.
179. See id. at 348-79.
 impersonal organizations that serve diverse, complex and multi-cultural constituencies by administering complex regulatory schemes that rarely engage citizens other than as subjects of regulation. Similarly, notwithstanding its often mythic presentation in popular culture, the jury today hardly seems to be a center of democratic education when juries have reduced powers (by comparison to the early 1800s when, for example, juries decided questions of law as well as fact and decisions notwithstanding the verdict were unheard of),\textsuperscript{180} many persons desire to flee jury service, and most persons who are called to jury service are never empanelled.\textsuperscript{181} Tocqueville praised the relative autonomy of local governments in the 1830s, but today's complex forms of local government would appear to deserve relatively close judicial supervision in many cases in order to protect several types of constitutional rights.

For example, the significant local government agencies that tend to serve relatively homogenous populations in suburban areas often arrogate state powers to coerce conformity among their residents, to exclude others from the community by exclusionary zoning measures, and to retain control of the property tax as a local privilege.\textsuperscript{182} In this context, the close constitutional supervision of local governments that courts often provide under the free speech, free exercise, due process and equal protection clauses\textsuperscript{183} and the constitutional supervision of public school financing that some state courts have provided\textsuperscript{184} make good sense in terms of ensuring the basic fairness and inclusiveness of local government operations. The policymakers and administrators of local governments are likely to be operating under the pressure of particular interest groups and taxpayer demands for efficiency or low taxes that displace any traditional local government concerns for basic fairness and the interests of all persons.\textsuperscript{185} Furthermore, appreciating the close and intertwined modern relationships between state and local governments and applying careful judicial scrutiny to these relationships, as many state courts have done in school financing litigation\textsuperscript{186}—but as the Supreme Court failed to do in its leading school financing case of San Antonio Independent School District v. Rodriguez\textsuperscript{187} and its leading urban/


\textsuperscript{182} See Schnagger, supra note 66.

\textsuperscript{183} See, e.g., Church of the Lukumi Bablu Aye, Inc. v. City of Hileah, 508 U.S. 520 (1993) (applying free exercise analysis to a city’s ban on animal sacrifices); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying equal protection analysis to a city’s affirmative action contracting program); Frisby v. Schultz, 487 U.S. 474 (1988) (applying free speech analysis to a city’s ban on picketing before residential properties); Moore v. City of E. Cleveland, Ohio, 431 U.S. 494 (1977) (applying due process analysis to a zoning regulation prohibiting a grandmother living with two grandchildren who were cousins).


\textsuperscript{185} See EISGRUBER, supra note 143, at 87-96.

\textsuperscript{186} See Enrich, supra note 184; Levy, supra note 184; Ryan, supra note 184.

\textsuperscript{187} 411 U.S. 1 (1973) (denying an equal protection challenge to unequal public school financing in Texas that relied basically on the local control of property taxes for school financing).
suburban school desegregation case of Milliken v. Bradley\(^\text{188}\) — would appear to be an important area of local and state government that deserves close judicial supervision.

In these various conditions, the principle of subsidiarity suggests that federal and state courts rather than local governments or permissive state legislatures may be the effective agencies to ensure a constitutionally fair provision of government services. To be sure, standards to promote an equality of conditions in suburban zoning and public school financing are not easy to ascertain. But courts can at least invalidate egregious situations of inequality in these arenas and promote democratic discourse about constitutional fairness by forcing state legislatures to consider and provide regulatory schemes that are less unequal.

The Tocquevillian perspective on American federalism also invites taking a second look at the New Federalism cases decided by the Rehnquist Court. When Congress enacted the Gun-Free School Zones Act of 1990,\(^\text{189}\) it appears to have made no finding under the principle of subsidiarity that state and local governments could not adequately use their criminal and civil laws to regulate and sanction guns in schools.\(^\text{190}\) Thus, the Court’s decision in United States v. Lopez\(^\text{191}\) that Congress did not have constitutional authority to invade the state’s traditional criminal law functions is perhaps a useful signal to Congress to take federalism and the principle of subsidiarity seriously and not to act merely on the basis of political grandstanding.\(^\text{192}\)

The tenuous theoretical case for connecting the possession of guns in schools to interstate commerce, although one could be made,\(^\text{193}\) allowed the Supreme Court the freedom to send this federalism signal to Congress that traditional state functions, which have seemed to work adequately under the subsidiarity principle, should not be lightly dismissed or regulated by Congress without good cause.

But under the principle of subsidiarity, the constitutionality of national legislation looks quite different in three other cases: United States v. Morrison,\(^\text{194}\) New York v. United States\(^\text{195}\) and Printz v. United States.\(^\text{196}\) The federal laws challenged in these cases were adopted only after Congress considered the potential increased effectiveness of new federal laws to supplement or mandate state actions and, at least in the cases of Morrison and New York v. United States, a large number of state public officials agreed with the need for the new laws. Moreover, each of these cases could be justified under Congress’s power to regulate interstate commerce much more easily than the gun-free school zone law at issue in Lopez. In Morrison, Congress adopted a federal civil remedy for gender-related violence after findings (supported by many state Attorneys General) that state laws against domestic violence and rape were not

---

188. 418 U.S. 717 (1974) (limiting inter-district school desegregation remedies for racially discriminatory acts that are a substantial cause of inter-district segregation, despite the state’s overall responsibility for local school districts).
191. Id. at 549.
192. See BOBBITT, supra note 24, at 190-95 (describing the cueing function of judicial review as illustrated by Nat’l League of Cities v. Usery, 426 U.S. 833 (1976)).
193. See Lopez, 514 U.S. at 615-18 (Breyer, J., dissenting).
working adequately to protect women and additional findings that at least some women hesitated to travel or take jobs interstate because of their fears of urban violence. In New York v. United States, Congress passed a law forcing certain policy decisions by states regarding the disposal of low-level radioactive waste after states had failed to agree among themselves on depository states and state governments had negotiated with Congress for the new law. In Printz, Congress had required state and local police and sheriff officers to temporarily assist the federal government in the establishment of background checks on gun purchasers, to make the law effective before a fully-run federal system could be established. Tocquevillian federalism and the subsidiarity principle appear to support contrary results to those produced by the originalist theorizing of the Supreme Court’s majority in each of these cases.

V. DEMOCRACY AND RELIGION

Tocqueville saw and praised religion as another foundational aspect of American democracy, especially because of religion’s capacity to generate a morality that supported social order, obedience to democratic laws, discipline in the workplace, and spiritual desires that could mitigate democracy’s incentives towards pure individualism and materialism. He also alluded in a general way to the role of religious dissenters who settled the American colonies as forming part of the point of departure for the creation of America’s democracy. In fact, if Tocqueville, a committed Catholic, had been able to explore the dissenting Protestant traditions in American religions during the colonial, revolutionary and early republican eras more fully, he might have been able to make a more specific case that the anti-authoritarian attitudes and practices among dissenting Protestant sects constituted a significant cause of the equality of conditions and democratization of American society and government.

But Tocqueville’s views on American religion and government were idealized and based firmly on the historical circumstances of the 1830s. His views about religion certainly do not support the turn to “political religion” that has occurred in the United States today, nor do they support all the constitutional claims that are made today on behalf of political religion. Tocqueville’s views on religion thus deserve a careful examination, both for their possible insights and to guard against their possible

197. See Morrison, 529 U.S. at 615.
198. See New York, 505 U.S. at 150-51.
199. See Printz, 521 U.S. at 902-04.
200. See Tocqueville, supra note 1, at 274-88, 417-26, 517-21; supra text accompanying notes 85-96.
201. See Tocqueville, supra note 1, at 29-30, 276.
204. On the potential for contemporary political religion to influence a good deal of modern constitutional law, see, Greenawalt supra note 149, at 112-14; Michael J. Perry, Under God? Religious Faith and Liberal Democracy (2003).
misuse when they are taken out of context to support contemporary ideas about the proper role of religion in politics.

Although Tocqueville did not distinguish between the concepts, he in effect recognized two different kinds of religious phenomena as important to the healthy functioning of American democracy. One was the widespread existence of pluralistic "private" religious beliefs that can be associated with the many different churches and other religious institutions in America. These beliefs, practices and institutions, Tocqueville argued, are important to democracy because they generate a strong morality among the public that laws should be obeyed, that individuals should be ethical in their relationships to others, that restraints on materialist desires are appropriate, and that individuals have duties to themselves, their families, and their God to become and remain both politically free and disciplined prosperous workers. Democracy, the economy, and individuals can thus prosper with this sort of religious-backed morality in the background.205 Moreover, widespread religious pluralism in Tocqueville's view supports a pervasive tolerance for religious diversity and general acceptance of "the separation of church and state," even or especially among American Catholics about whose place in American society the Catholic Tocqueville seems to have been particularly interested.206 Tocqueville noted approvingly, for example, that the American clergy including Catholic priests approved of "the separation between church and state" and that the clergy refrained from politics, or at least from running for public offices.207 He also noted with approval the relative lack of dogmatism in American religious beliefs.208 These various restraints on religious ideas and practices supported the tolerance of religious pluralism and absence of religiously-motivated political divisiveness in America.

Tocqueville's view of private religion in America in the 1830s is an attractive one but is also idealized. He and his companion Beaumont, visiting mostly in large American cities and entertained by the urban elites, appear to have essentially overlooked or discounted the Second Great Awakening of the 1820s and 1830s and its effects in educating many Americans in dogmatic fundamentalist beliefs and encouraging political movements at state and local levels to legislate the morality of drinking and sexual behavior.209 He also made no mention of the anti-Catholic sentiments that were beginning to be raised against Catholic immigrants to American cities by the 1830s.210 Nor had public schools and the conflicts between public and Catholic schools developed by the 1830s into the caldron of religious disputes that would occur later in the 19th and 20th centuries. Tocqueville's depiction of private religion then could easily separate politics and law, on the one hand, from religious beliefs and practices on the other. Private religion conflicting with issues in the public

205. See Tocqueville, supra note 1, at 275-82, 422-24, 517-21.
206. See id. at 275-77; Pierson, supra note 32, at 68-69, 72-73, 137-38, 155-56, 298-300.
208. Id. at 423.
209. On these political movements stimulated by the Second Great Awakening, see Sellers, supra note 48, at 259-68.
210. On anti-catholic sentiments in America of the 1830s, see id. at 387, 390-91, 393.
sphere was simply never a problem or significant constitutional issue in Tocqueville's analysis.\footnote{211}

Tocqueville also appears to have been attracted by a second religious concept as well—that of civil religion. This concept, first defined by one of Tocqueville's mentors, Jean-Jacques Rousseau,\footnote{212} is that a government's legitimacy is enhanced by a widely-shared public belief—or profession of faith—that a "beneficent Divinity" oversees civil government, punishes the wicked, enforces the sanctity of the social contract and the laws, and rejects religious intolerance that makes civil government more difficult in a diverse society.\footnote{213} This public or civil religion is a different phenomenon from private religion—it is less dogmatic, more general, and aimed at political and civil life rather than an individual's salvation. Such a public or civil religion, Rousseau believed, was necessary to educate the public in the virtues of republican or democratic citizenship. Indeed, Rousseau thought this idea so important to good government that he advocated imposing civil religion by coercion against any competing private religions.\footnote{214} Tocqueville did not follow Rousseau in advocating civil religion by coercion, nor did he even employ the term "civil religion." But he did consider religion to be a political institution and emphasized that the democratic and republican nature of Christianity in America supported a government devoted to the liberty and equality of individuals.\footnote{215} He also commended political leaders to promote religion and teach citizens to "know, love and respect religious morality," especially by setting a good example in acting "every day as if they themselves believed" in "the immortality of the soul" and by "conforming scrupulously to religious morality in great affairs."\footnote{216}

The traditions of such a civil religion have continued from the 1830s until today, especially in terms of the implicit requirement that American politicians display some kind of personal religious belief as a necessary credential or condition for election to public office.\footnote{217} But the civil religion in Tocqueville's idealized view of American religion in the 1830s has turned into or been largely displaced by a kind of political religion in the modern era—where politically oriented religious leaders are willing participants in the political arena on issues that range from abortion to homosexuality to the death penalty, where religious leaders and believers invite or even demand satisfaction from politicians on specific political positions, and where politicians feel obligated to appeal in explicit, dogmatic terms to their religious bases.\footnote{218} As with

\footnotesize{\begin{itemize}
\item \footnote{211. See supra text accompanying notes 85-96.}
\item \footnote{212. On Rousseau's general influence upon Tocqueville's political thought, see Mansfield & Winthrop, supra note 2, at xxxvi-xxxix; WOLIN, supra note 3, at 171-72; Wilhelm Hennis, In Search of the "New Science of Politics," in INTERPRETING TOCQUEVILLE'S DEMOCRACY IN AMERICA 27, 40-48 (Ken Masugi ed., 1991).}
\item \footnote{213. See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 186-87 (Maurice Cranston ed., Penguin Books 1968) (1762).}
\item \footnote{214. See id.; CRISTI, supra note 203, at 17-30.}
\item \footnote{215. See TOCQUEVILLE, supra note 1, at 275-77; CRISTI, supra note 203, at 81-83.}
\item \footnote{216. See TOCQUEVILLE, supra note 1, at 521.}
\item \footnote{217. See Robert N. Bellah, Civil Religion in America, in RELIGION IN AMERICA (William G. McLaughlin & Robert N. Bellah eds., 1968); Billings & Scott, supra note 203.}
\item \footnote{218. See, e.g., Frank Bruni, Vatican Exhorts Legislators to Reject Same-Sex Unions, N.Y. TIMES, Aug. 1, 2003, at A1; Kerry, Candidate and Catholic, Creates Uneasiness for Church, N.Y. TIMES, Apr. 1, 2004,}
\end{itemize}}
Tocqueville’s analysis of private religions, his concept of civil religion and its relationship to American democracy needs questioning and reconstruction if it is to be a useful and attractive concept for contemporary constitutional law.

How should American constitutional law treat the modern turn to political religion? Should all religious views and votes be counted equally with the views and votes of others in determining public regulations, operating public programs, and making judicial decisions, as some would maintain? Or should only public reasons that are accessible to all persons be recognized in the construction of law? Or should some middle ground be sought and maintained?219

Tocqueville’s perspective on democracy, religion, and the relationships between them suggests three overlapping principles. First, the general moral support that private religion can provide to a democracy suggests that constitutional law (and political discourse) should not be employed to discourage citizens, voters, and legislators from expressing and voting upon their religious convictions to the extent they wish to do so.220 In Michael Perry’s words, we should in general be “inclusionists” rather than “exclusionists” or “agnostics” with regard to the expression of religious discourse in the public sphere,221 and both the speech and religion clauses of the First Amendment would seem to demand nothing less. But this is not to say, as some would, that government officials, legislators, or judges should be able to justify any official action by relying on their religious convictions. For religious convictions, like any other kind of conviction, should have to withstand not only the majoritarian process of legislatures but also the constitutional process of judicial review in the courts. If the expression of religious convictions for particular government actions is merely evidence of the imposition of majority religious convictions upon others, such expressions may constitute evidence of an Establishment Clause violation.222 Or if such expressions are only evidence of the imposition of majority moral views upon others, these expressions may constitute evidence of due process or equal protection violations.223 In other words, in the Tocquevillian perspective, religious views in constitutional law do not deserve more protection or more judicial deference than other moral views that are simply part of a conformity-inducing majority public opinion.

219. Compare Greenawalt, supra note 149 (advocating an expansive reception of religious convictions in politics and law), with John Rawls, POLITICAL LIBERALISM (1996) (arguing that politics and law should be based only on public reasons).

220. See Greenawalt, supra note 149; Perry, supra note 204. Cf Philip C. Kismm, Let’s Bring Religion into the Public Schools and Respect the Religion Clauses, 49 U. KAN. L. REV. 593 (2001) (proposing ways in which religious discussions might be brought more fully into public schools, including the curriculum, without violating either the Free Exercise or Establishment Clauses).

221. See Perry, supra note 204, at ix-x, 35-44 (supporting inclusion of religious ideals in political discourse).


223. See supra Part III.
Second, Tocqueville’s perspective on religion and democracy would surely disfavor discriminating between religious expressions and convictions, on the one hand, and secular expressions and convictions on the other. For one thing, as just indicated, religious and secular moral convictions that support government actions should be treated the same way, included in our political discourse but incapable of justifying laws that merely impose majority moral views upon other persons. Conversely, individuals wishing to pursue religious beliefs and interests in the course of their education or other public programs should not be denied public funding when other individuals qualify for funding to support their pursuit of equivalent secular beliefs and interests.224 To be sure, the Supreme Court recently upheld a state’s denial of public funding to a graduate theology student under the state’s establishment clause.225 But this decision can be justified not only by the federalism principle of state sovereignty, as expressed in a state’s constitution, but also by the more specific distinction between a student pursuing her own religious beliefs and interests and a government’s determination that a particular pursuit is likely to support the institutional practice of religion.226 Prohibiting government support, legal and financial, for organized religious practices was a core concern of the Establishment Clause,227 and this is also a basic idea that underlies Tocqueville’s endorsement of a general separation between church and state.228

Third, with religious expressions protected and encouraged by the first two principles, the third principle sets a contrary course by turning analysis towards a consideration of the “mild despotism” of majority opinions in American democracy that encourage conformity. Although these opinions, when nothing more, are simply a discouraging feature of American democracy, when such opinions, religious and/or secular, constitute the effective justification for conformity-inducing laws, the laws should be invalidated as violations of the Due Process, Equal Protection or Establishment Clauses.229 Political religionists will of course argue that such decisions discourage or discriminate against religious expression and convictions by overturning their effects. But this ignores the special circumstance where opinion and morality are used asymmetrically to seize government power and enforce upon others conformity to the moral views of the majority. Tocqueville’s democracy would guard against this possibility.

224. See Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (no Establishment Clause violation by the public provision of vouchers for private religious schools where vouchers are provided for public schools and other private schools); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995) (no Establishment Clause violation by including a student religious publication in a publicly-funded student activities program).
226. See id. at 719.
228. See TOCQUEVILLE, supra note 1, at 282-88.
229. See supra text accompanying notes 142-161.
VI. DEMOCRACY AND CIVIC ASSOCIATIONS

Tocqueville also admired American civil society, or the role that private and civic associations play in promoting democratic politics and economic prosperity. Narrowly defined, civic associations may be thought of as non-economic organizations such as churches, reform societies, cultural organizations, amateur sports organizations and ad hoc groups that assemble to accomplish specific projects. But Tocqueville did not distinguish between non-economic and economic private organizations in his praise for how private initiative and private diversity was encouraged by American democracy, especially local governments, and enhanced the success and prosperity of both American politics and the American economy. The proliferating civic associations in America, in Tocqueville's view, complemented or supplemented government actions (thus limiting the need for government actions and spending), helped guard against abuses of government power (particularly by the means of a diffuse critical press), powered the American economy, softened the harshness of market calculations by business and the people who managed and worked within these businesses (this was a particular value of religion), and enriched the lives of individuals by providing spiritual benefits, diverse activities, and outlets for cooperating with others in performing socially valuable acts.

Tocqueville only alluded generally to the constitutional implications that arise from the value of civic associations. He recognized the American press as a "free press" by comparison to the European media of the times, but regulations of the press were not an issue during the early years of the American republic apart from the Alien and Sedition Act controversies in the late 1790s which Tocqueville did not consider. He also recognized in a general way and approved of the role of lawyers and the American judiciary in protecting property and contract rights from unreasonable majoritarian regulations. But the more specific constitutional implications of Tocqueville's perspective on civic associations, like his views on constitutional interpretation and individuals rights, must be drawn out or pieced together from different aspects of his analysis.

Tocqueville's analysis certainly justifies careful judicial protection under the free speech clauses of the many kinds of "political speech" that can be critical of government, and this is what the modern Supreme Court has in the main aimed to provide. Yet the American media today is no longer as decentralized as the localized printing press of the 1830s, and it purveys its messages by the suasive, diffuse, and fragmented forms of television, radio, and the Internet in addition to the

231. See Tocqueville, supra note 1, at 172-80, 489-500.
232. Tocqueville noted that the American press by the 1830s was extremely decentralized by comparison to the European press, in part because the decentralization of American government invited or required local commentary on local government business, and that the American press was much more valuable for its negative or critical commentary on government actions than for its positive commentary on social mores which tended to reinforce the mild despotism of majority opinions in American democracy. See id. at 172-80.
233. See id. at 93-98, 130-38, 251-58.
printed word.\textsuperscript{235} As Neil Postman has argued, the "telegraphic revolution" which started in the 1840s, and then the photograph, the radio, the phonograph, and ultimately television have transformed public discourse—taking it from a "typographic" focus upon the systematic or sustained presentation of information and ideas upon which a reader can act (in local government for example) and transforming it into a very fragmented, visually oriented form of entertainment that acts upon passive viewers who perceive or have no or few opportunities for responsive actions.\textsuperscript{236} Furthermore, the capitalist development of the media since Tocqueville's time has restructured the media into large, profit-sensitive bureaucracies with considerable market power and many motivations to please mass popular audiences, corporate advertisers, and policy-makers.\textsuperscript{237}

The rough equality of conditions that might have existed among speakers, writers, listeners, and readers in the public discourse of Tocqueville's America surely no longer exists, and yet the modern conditions of powerful media monopolies and the influence of money on public discourse have in general not been recognized by contemporary free speech jurisprudence. Constitutional rights to political speech in the media have been prescribed by narrowly drawn statutes and disfavored in significant cases that, if otherwise decided, could have led to greater equality of conditions among opposing sides in political issues and campaigns.\textsuperscript{238} The Supreme Court's general protection of money as speech ever since its 1976 decision in \textit{Buckley v. Valeo}\textsuperscript{239} has gutted major campaign finance regulations and hardly seems designed to promote an equality of conditions in modern American politics.\textsuperscript{240} Furthermore, both commercial advertising

\begin{enumerate}
\item \textsuperscript{236} See Postman, supra note 235, at 64-80. Perhaps the Internet may transform public discourse once again, and a typographic focus in internet communications certainly seems possible. On the other hand, Internet communications with a typographic focus require hard work to produce and to consume, and the power of the televisual revolution may still dominate this new forum ultimately.
\item \textsuperscript{238} See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating a state law that required newspapers to give free reply space to political candidates whom they had attacked in their columns); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) (holding no general constitutional right of access to the airwaves beyond narrowly defined rights of reply to personal attacks and political columns as prescribed by statute or administrative regulation); Syracuse Peace Council v. FCC, 867 F.2d 654, 660 (D.C. Cir. 1989) (upholding the FCC's 1987 decision to repeal the "fairness doctrine," a requirement that broadcasters give fair coverage to both sides of public issues that was endorsed by the Supreme Court in \textit{Red Lion Broadcasting Co. v. FCC}, 395 U.S. 367, 369 (1969)). See generally John E. Nowak & Ronald D. Rotunda, \textit{Constitutional Law} 1188-1204 (7th ed. 2004) (surveying free speech rights of access jurisprudence).
\item \textsuperscript{239} 424 U.S. 1 (1976).
and pornography are obtaining substantial First Amendment protection today, where again the power of persuasive visual images may have particularly anti-democratic effects upon largely passive audiences.241 In a Tocquevillian perspective, these various kinds of constitutionally protected speech and rejections of Constitutional rights for a more equal public discourse appear to allow imbalances of power that seem likely to promote the mild despotism of majority opinions and unlikely to promote a greater equality of conditions in contemporary America.

The disappearance of an even rough equality of conditions in the American economy since the 1830s also suggests that Tocqueville’s general approval of protecting property rights against majoritarian legislation should not be applied in a straightforward manner to constitutional law. To be sure, government regulations or regulators may at times treat individual property owners or small businesses unfairly in the rush to achieve public purposes with limited budgets, and the courts may be justified in striking down such actions.242 But the modern rule that courts should defer to policy judgments by legislatures and administrative agencies as long as their economic regulations are rationally related to a legitimate government purpose243 seems sound in the Tocquevillian perspective. In view of the substantial and increasing inequalities of economic power in contemporary America, providing legislative and administrative bodies with ample discretion to act in ways that just might mitigate some of these inequalities and promote some kind of equality of conditions would be to promote Tocqueville’s conception of democracy.

Regarding civic associations more narrowly, how should modern constitutional law treat the constitutional rights of associations such as the Boy Scouts244 or parade organizations which are subject to complaints under anti-discrimination laws for excluding particular groups?245 In his article on Tocqueville and the Rehnquist Court, John McGinnis suggests that Tocqueville’s appreciation of diverse local norms generated by autonomous civic associations helps to explain and justify the Court’s recognition of First Amendment freedom of association expressive rights that protect such associations from anti-discrimination laws.246 But McGinnis’s argument lifts Tocqueville’s praise of civic associations quite out of context and disregards the somewhat leniently in upholding the Bipartisan Campaign Reform Act of 2002, and this decision possibly represents a recognition by some Supreme Court Justices that there is a constitutional need to allow more effective legislative regulations to promote equality in voting.


246. See McGinnis, supra note 4, at 526-43.
inequality of conditions that seems to affect many non-profit civic associations today just as much as private economic organizations. His argument ignores the context and premise for praising American civic associations in the 1830s—the rough equality of conditions among Americans of the time which manifested itself in many diverse, pluralistic, and localized civic associations in which many citizens participated in cooperative and democratic ventures. McGinnis’s argument thus ignores the transformation of American civic associations since that time, first into the large face-to-face membership organizations of the early 20th century, like the Boy Scouts and League of Women Voters, and then into our many modern subscription organizations that are run by managers, oriented towards lobbying governments, and where dues are paid by members, some letters or emails are perhaps written, and members are expected to do little else.247 Certainly some of these organizations, especially large membership organizations like the Boy Scouts and St. Patrick’s Day parade organizations in large cities, appear to wield a kind of monopoly power over particular cultural activities that many Americans desire.248 These organizations also benefit substantially from government support—not only in terms of municipal willingness to support large-scale parade organizations but more generally in terms of tax benefits for donors to civic associations and the provision of the free use of many public facilities. Such civic associations, far removed from Tocqueville’s conception, would seem to constitute a particular kind of public utility. It thus seems reasonable from a Tocquevillian perspective to allow the application of anti-discrimination laws and broaden the democratic possibilities for individuals to participate and express themselves within the cultural activities that are promoted by these very public kinds of organizations.

VII. DEMOCRACY AND ORIGINALIST CONSTITUTIONAL THEORY

Originalist constitutional theory, or the idea that constitutional law should stick closely to the original meanings of the constitutional text, has become popular today among both judges and many constitutional scholars.249 The impact of this theory can be found in numerous decisions of the Rehnquist Court. It is manifest, for example, in the Court’s recent decisions that have protected state governments from federal regulations,250 limited national regulations under the commerce power by the principle that traditional areas of state regulatory functions should be respected,251 and limited the constitutional right to privacy under the 14th Amendment’s due process clause.252 These decisions and others can also be justified by arguments that somewhat resemble

247. See Putnam, supra note 230; Skocpol, supra note 66.
248. See Koppelman, supra note 172, at 27-29 (describing the power of the Boy Scouts to crush dissenting views within the organization).
249. See supra text accompanying notes 3-11.
Tocqueville's ideas about federalism, religion, civic associations and the values of localized social norms. Thus the Rehnquist Court has recognized that democratic voters deserve the opportunity to hold local officials accountable for local government actions under our federal system; that democratic voters deserve the opportunity to have their representatives vote for legislation that regulates complex social/moral issues like the right to die on the basis of majority votes and majority opinion; that state governments have certain traditional or core regulatory functions such as the enforcement of basic criminal law and the provision of education that should be protected from national regulations; and that civic associations like the Boy Scouts deserve constitutional protection from anti-discrimination rules. Originalists might understandably perceive close connections between these results and the political theories of Alexis de Tocqueville about democracy in America.

For several reasons, however, these connections are misconceived. First, originalist theory's conception of democracy as a form of majoritarian voting, first by voters and then by representatives, that is limited only by "clear" and "specific" values in the original text is much too sparse and formalistic to match Tocqueville's much richer conception of democracy, which focuses upon both the forms of government and underlying social conditions. Thus originalists simply ignore Tocqueville's emphasis upon the "equality of conditions" and other social mores of Americans in the 1830s in his analysis of democracy, and they ignore too the consequences of these social forces such as the mild despotism and tyranny of majority opinions that simply seek to impose conformity with themselves. More generally, originalists also ignore Tocqueville's attention to shifting historical circumstances, which would enrich our analysis of both democracy's operations and constitutional law. Tocqueville's conception of democracy and his method of analyzing democracy, in sum, support a contemporary constitutional law that would be quite different from the one that originalist theory prescribes.

Second, Tocqueville's approved theory or method of constitutional interpretation, as inferred from his specific observations about constitutional law, is not at all like originalist interpretive theory. As described above, Tocqueville believed that constitutional interpretation needed to fill in "the details" under the general principles of the constitutional text, that a shifting or flexible interpretive method was preferable to match constitutional law with changing historical circumstances, and that accordingly judges would have to act at times in a prudent, statesmanlike manner, to read the social forces of democracy as it were in order to constrain and guide public opinions in a reasonable manner. This approach to constitutional interpretation is a far cry from what originalist constitutional theory proposes: that judges (somehow) can

253. See generally McGinnis, supra note 4.
256. Morrison, 529 U.S. at 617-18 (dealing with criminal law); Lopez, 514 U.S. at 561 (dealing with education and criminal law).
258. See generally McGinnis, supra note 4.
259. See supra Parts III, IV and VI.
260. See supra text accompanying notes 128-141.
be bound tightly by the original meanings of the constitutional text in order to allow
the majoritarian forms of government maximum opportunities to legislate as they wish.

Finally, and importantly, asking Tocqueville's fundamental questions about the
social forces of democracy in play at the time when constitutional issues must be
addressed, about the nature of regulatory legislation and its relationship to the possible
mild despotism of majority opinions in American democracy, and about the proper
application of the subsidiarity principle in allocating powers between the national and
state governments, produces quite different results from originalist constitutional
argument. These results, I have argued, fit a richer, more attractive conception of
democracy in action, Tocqueville's conception, than the formalistic originalist
conception of providing maximum discretion for the elected or majoritarian forms of
government. In any event, theories of constitutional law and constitutional
interpretation should to an extent fit existing practices and should to an extent produce
results that comply with our substantive sense of justice.261 In the end, then, this essay
invites its readers to choose between Tocquevillian and originalist conceptions of
American democracy and constitutional law.

(1999).