

Constitutionalism – The Backbone of Objective Law

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Outline

1. Introduction
2. Rule of Law
3. Objective Law
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5. Historical Evolution of Concept (a note)
6. Threats Today: Political & Intellectual
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A crucial element of the **Rule of Law**: “The government of the day doesn’t get to set the rules. Those rules exist on a higher plane, and are interpreted by independent magistrates...”
(Daniel Hannan, *Inventing Freedom*)

Wil Waluchow, “Constitutionalism,” *Stanford Encyclopedia of Philosophy* (online):

“... a constitution consists of a set of norms (rules, principles or values) creating, structuring, and possibly defining the limits of, government power or authority. Understood in this way, all states have constitutions and all states are constitutional states. Anything recognizable as a state must have some acknowledged means of constituting and specifying the limits (or lack thereof) placed upon the three basic forms of government power: legislative power (making new laws), executive power (implementing laws) and judicial power (adjudicating disputes under laws).”

British conception of a constitution

Lord Bolingbroke, 1735:

“By Constitution we mean ... that assemblage of laws, institutions, and customs, derived from certain fixed principles of reason . . . that compose the general system, according to which the community hath agreed to be governed.”

William Paley, 18th century:

the British constitution is that set of principles and institutions of that emerge from “acts of parliament, of decisions of courts of law, and of immemorial usages.”

American conception:

Thomas Paine, 1790, *Rights of Man*:

“A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government. . . . A constitution, therefore, is to a government, what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them; it only acts in conformity to the laws made; and the government is in like manner governed by the constitution.”

Related readings

Ayn Rand, "The Nature of Government;" "Man's Rights," essays published in both her books
The Virtue of Selfishness & Capitalism: The Unknown Ideal

on the contrast between British & America conceptions of a constitution:

Brad Thompson, "Revolutionary Origins of American Constitutionalism," in *History, On Proper Principles: Essays in Honor of Forrest McDonald*, eds. Stephen M. Klugewicz & Leonore Ealy (Wilmington, DE: ISIS Books, 2010), pp. 1-27.

Tara Smith:

"Neutrality Isn't Neutral: On the Value-Neutrality of the Rule of Law," *Washington University Jurisprudence Review*, Vol. 4, No. 1, p. 49, 2011, pp. 49-95.

"Reckless Caution: The Perils of Judicial Minimalism," *NYU Journal of Law & Liberty* 5, no. 2, 2010.

"Humanity's Darkest Evil: The Lethal Destructiveness of Non-Objective Law," *Essays on Ayn Rand's Atlas Shrugged*, ed. Robert Mayhew, New York: Lexington Books, 2009, pp. 335-361.

"Objective Law," forthcoming in *A Companion to Ayn Rand*, eds. A. Gotthelf and G. Salmieri, Wiley, 2015

Some of these, & a few of my other law essays, are available at:

http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=955231#show2354371