

THREE SIGNIFICANT FEATURES OF THE USA'S LEGAL SYSTEM

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The three features I describe can be found in other countries, but they began earlier in the US and have gone further in their influence on the US legal system. Perhaps these brief essays give some of the flavor of US law, while not oversimplifying complex processes.

1. The Constitution as Civil Religion

The US is a very religious country, but a diversity of beliefs means that religions cannot serve as a source of national unity. Jean-Jacques Rousseau coined “civil religion” to describe what he saw as the universals that government should implement. In 1967, the sociologist Robert Bellah then described an “American civil religion”: the common rituals, beliefs, and values parallel to or independent from mainstream religions. (Ben Franklin earlier referred to a “public religion”, Lincoln to a “political religion.”) Max Lerner and Sanford Levinson then attached this idea to a US Constitution widely felt to have supernatural powers to control unknown and hostile forces; the higher power of a higher law, unchanging while leaders change.

These tendencies were first seen in Rome, as attempts to unite a disparate Empire through the official religious piety stressed by Plato and Aristotle and also seen in the US. Civil religion serves as a substitute for the Church, Queen, and (to a lesser extent) Parliament in Britain. It amounts to the secular form of a state church, a folk religion stressing patriotism and subscribed to by people who are not necessarily spiritual or legally trained. As both a prophetic and revealed religion, it tends to the messianic—especially about the benefits of democracy and progress. It is often all-encompassing and is accepted on the basis of belief, without proof.

Civil religion can promote the tolerance seen in the US Constitution's First Amendment and concerning what others say and believe; the intolerance for/banning of Scientology (seen in Germany) would be impossible, for example. But unaccustomed practices like gay marriage or burning the flag can encounter stiff resistance from conservatives. The people and their institutions are both made sacred by this civil religion, and this forestalls fundamental criticisms. Civil religion can lie dormant, especially during periods of prosperity, only to flame up during Vietnam, after September 11, and during the Second Iraqi War. It can also change significantly, such as during the civil rights movement of the 1960s and the ‘war’ against terrorism, but such changes are rejected by political dissidents or the less pietistic, at home or abroad.

The US Constitution is so old (promulgated in 1789) that it is virtually silent on economic matters. (Adam Smith's 1776 *Wealth of Nations* had not yet percolated into political consciousness.) As subsequently interpreted, the Constitution came to bolster capitalism as a religion: i.e., an all-encompassing system of belief that, like other religions, caters to wants and needs. These interpretations left the politics and institutions

of the US frozen and unable to adjust to the precepts of social democracy/welfare statism that emerged elsewhere, in reaction to the unfairness of capitalism, after 1870 and especially after World War I.

Bruce Ackerman sees a “constitutional politics” arising: a constant struggle to maintain some balance between liberty and equality. Since 1980, liberty has almost always won out over equality, however. Conservatives (ascendant under Bush the Younger) and progressives have long taken different views of these politics and the sacred Constitution that underpins them, based on their different political and legal cultures and thus different concepts of moral authority. Conflicts between them have intensified in recent years, and both of their sets of arguments lost plausibility among the broader public, for being too much disputed. For example, some conservatives have long tried to de-legitimize *Roe v. Wade* (1973), a case which establishes a women’s right to choose an abortion, ignoring the facts that 80% of Americans support some such right, and that these conservatives are also de-legitimizing the Supreme Court that both decided *Roe* and serves as the lynchpin of a constitutional civil religion.

In sum, the US constitutional civil religion can represent the best in national character, can inform, motivate, and inspire. But it can also degenerate into egoism, chauvinism, hubris, and the perpetuation of injustices. For the former tendency consistently to prevail over the latter, a substantial re-thinking of the process is required.

2. Federalism

Federalism is a significant part of the US constitutional civil religion, part of a popular faith in the dispersion of governmental power that increases competition for the right to decide. Federalism is more enduring and taken more seriously when states join together to form a central government: the US, Switzerland, and perhaps the EU eventually. When an existing central government “devolves” power to its regions, the powers granted are more meager and temporary; regional governments know that powers can always be clawed back by the center. Consider Britain, and the recent history of governance in Northern Ireland in particular.

William Lloyd Garrison saw US federalism as dumb at best, and a public policy disaster at worst. But Justice Louis Brandeis saw it as a “laboratory” of comparative law and policy experimentation. California (to cite a common example) can create a new law and policy, and the other states can sit back and evaluate the results before adopting this innovation—or not. US lawyers are not much interested in an academics’ comparative law, because they are insular and because they regularly deal with up to 51 slightly or markedly different (state and federal) definitions of problems and solutions.

From Roosevelt’s New Deal reaction to the Depression and up to about 1973, national (rather than state) citizenship was stressed and (following Garrison) a relentless centralizing of power away from the states occurred. Supreme Court interpretations of the Commerce Clause and the Tenth Amendment in the Constitution tolerated this trend,

but (from 1973 on) the Burger, Rhenquist, and (so far) Roberts Courts more regularly favor states' rights (as they're called)—although the degree of state autonomy varies significantly when particular powers are examined. A “new” federalism has frequently been detected since about 1980, but consistent results and coherent theories have yet to emerge.

Counties and cities are not mentioned in the US Constitution, so their powers are devolved (as in Britain) through the relevant state constitution or statute. The Constitution is so old that no mention is made of “subsidiarity”, but it is broadly consistent with outcomes under a US federalism. Willing to be corrected, I think that the substance of subsidiarity was first elaborated by a US economist, George Stigler, in the 1960s: assign a task to the lowest level of government capable of doing a competent job. Just as there is no efficient basis for the federal government to fill a hole in a San Francisco street, there is no basis for San Francisco to end the Second Iraqi War; even if its City Council voted to do so, the effects of the War extend far beyond one City.

Much as under the World Trade Organization at the global level, rules of states in the US are (under the Commerce Clause) quite similar concerning economic matters—to facilitate ‘trade’ across state boundaries. Taxation and expenditure matters are quite complex however, with rules like the federal government cannot assign tasks to states without granting them the revenue needed to carry the tasks out, and the feds can condition state receipt of federal funds on the states observing certain uniform standards—but states are then free to reject this offer. Uncoordinated policymaking among states can impose costs and other distortions beyond the boundaries of the relevant state(s), and the federal government is expected to cure these “spillovers.” It is also expected to help impoverished states: Louisiana after hurricane Katrina or the long-term unemployed miners of West Virginia, for example.

Limitations on federal government powers (states' rights) have traditionally been sought by conservatives, while progressives have sought stronger federal controls over, e.g., civil rights and the environment. This is starting to change through a “progressive federalism”, with some states promoting the civil rights and funding the stem cell research and environmental programs that are ignored at the federal level by a (strong-state) conservative politics and Supreme Court. The liberal Louis Brandeis may thus have been right after all.

3. Lawyers' Contingent Fees and Personal Injury (Torts) Cases

To switch from matters of high theory to one of technique, the lawyers' (and realtors' or waiters'--in the US, but not doctors' or accountants') “no fee unless successful” has spawned large and small law firms advertising for and specializing in personal injury cases. Like some aspects of the two “Features” described earlier, this marks an American legal exceptionalism: Britain, Germany, France, and Roman law generally do not permit contingency fees while, unlike the US, they permit the winner to collect fees from the loser.

In one sense, contingency fees (10-50% and typically one-third of damages recovered) give poor people with meritorious cases in the US access to the courts at lower risk—and hand a powerful incentive to their lawyers. (The handling of cases for free, pro bono publico, proved inadequate because lawyers’ altruism is limited. A legal aid “movement”, that paid lawyers to handle poor people’s legal problems in the US, has been starved for funds from the Nixon Administration onwards. The reasons for this are several: in addition to the lawyers’ profitable use of the contingency fee, and thus their bar associations’ inattention to legal aid as a means of achieving justice, legal aid lawyers sometimes pursued progressive causes which annoyed conservative and moderate politicians and, as remarked earlier, the US lacks the welfare statist traditions that help to drive legal aid in many counties.

Contingent fees (reportedly obtained in 97% of successful personal injury suits) are said, by some US academics specializing in legal ethics, to turn the detachment and passivity of the ideal lawyer/client relationship into a “lawsuit hell.” The idea is that the lawyer pushes a dispute forward into court, even if it is of a low-value, “junk” variety. But domestic relations account for 33% of civil case filings in state courts in the US, contract disputes for 14%, and personal injury for (only) 9%. Even so, conservatives (funded by the corporations and insurance companies that dislike paying personal injury damages) made “tort reform” into a major issue of the 2004 election.

Such legal changes concern medical malpractice and class actions. A class action is a cost-saving device for plaintiffs, a means by which large numbers of people with similar, perhaps smaller injuries can band together to pay larger contingent fees to their lawyer if she succeeds. These were restricted by requiring the transfer of class actions to the federal courts thought more hospitable to corporate interests than are state courts, and low federal limits were placed on recoveries stemming from the negligence of doctors and hospitals. (Such a centralizing of torts cases, conventionally based on state law, is inconsistent with conservatives’ advocacy of states’ rights elsewhere.) Other reforms, such as limiting the size of the contingent fee to the value of the hours the lawyer is assumed to have spent on the case, or to a percentage of the “value added” to the defendant’s settlement offer by a lawyer who goes to trial and obtains a higher verdict, have not been very successful.

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Only when I finished these brief essays did I realize how deeply political are the “Significant Features” I tried to describe. Some readers might think I was simply injecting my own views; others might see little or no difference between law and politics, in the US and perhaps elsewhere. It might be useful to discuss how political differences affect the legal differences in the various systems we analyze.