

The Small-c constitution, Circa 1925

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Herbert W. Horwill, **The Usages of the American Constitution** (1925).

A great deal of recent work distinguishes the small-c constitution from the Constitution. The latter is the written document, whereas the former is an amorphous and ever-changing body of constitutional norms, customs, and traditions – “constitutional conventions,” to use the umbrella term that Commonwealth lawyers have developed to talk about unwritten constitutions. The recent work on small-c constitutionalism, however, has almost invariably neglected a classic and illuminating book on constitutional conventions in the United States: Horwill’s *Usages of the American Constitution*. A “neglected classic” sounds like an oxymoron, but Horwill’s book is proof that such a thing can exist.

Horwill was an English writer who lived and traveled in America and reported upon its natives and their curious customs for an audience in the Old World; his book thus falls into a genre defined by Tocqueville and Bryce. Because the past is another country, many of the constitutional usages that Horwill discussed in 1925 seem exotic today. In the 19th century, there was apparently a constitutional convention that the President should not travel outside the territory of the United States during his term of office. The convention was sufficiently powerful, Horwill relates, that presidents would meet their Mexican counterparts half-way across a bridge over the Rio Grande. Woodrow Wilson shattered the convention with his extended stay in Paris after the First World War, and it has now vanished from view altogether.

Wilson also shattered another convention, which held that the President should deliver messages to Congress in writing, never orally and in person. The Constitution’s text requires a State of the Union message, but does not specify the form it should take. Washington and Adams delivered speeches in person, but Jefferson switched to written messages – according to Bryce and Horwill, either from the high republican principle that the president should not overawe Congress with his quasi-monarchical presence, or because Jefferson disliked public speeches. Jefferson’s practice became encrusted with a constitutional aura and lasted for over a century.

In these examples and more generally, the central theoretical question is how constitutional usages arise and then persist, change or disappear over time. Horwill explicitly defines “usages” to refer to conventions in the Commonwealth lawyers’ sense – not mere behavioral regularities, but behavioral regularities resting on a “general agreement” that the behavior is “the proper thing to do.” (P. 22.) But how do such general agreements with normative force develop and change? Much of the literature on small-c constitutionalism skates over these questions, and thus works with ill-specified concepts or posits conventions and norms without specifying any underlying causal mechanisms.

The puzzles are numerous and daunting. If the conventions against presidential travel abroad and against oral delivery of messages to Congress existed, how could Wilson violate both of them without serious political repercussions? Perhaps the near-costless violation of a purported convention shows that it never existed at all, as Jon Elster suggests in a recent paper on unwritten constitutional norms. Conversely, however, some conventions seem to come into existence only when and because they are violated. After President Obama chastised the justices of the Supreme Court, sitting at his feet during a State of the Union Address, some claimed that Obama had violated a constitutional norm protecting the justices’ independence. Before Obama acted, however, no one claimed that such a norm existed because presidents never publicly confronted the justices in person, face-to-face, and so no one thought about the issue. The norm crystallized only after and because it was shattered.

Horwill devotes a chapter to how and why constitutional usages change, and offers some acute observations. His

main theory is straightforward: constitutional usages are shaped by the anticipation of sanctions from public opinion, which constrains officials and politicians through fear of public shaming or loss of an election or a job. Every four years, presidential electors, who the framers thought would exercise independent judgment, instead vote slavishly along party lines and thus, as a group, vote for the candidate of whichever party prevailed at the polls. They do so in part because other electors have done so in the past, but mainly because the parties and indeed the general public would be outraged if they did otherwise. Furthermore, political actors under the shadow of public opinion will make “mutual concessions for the avoidance of a deadlock in the government,” (P. 209), presumably because constitutional showdowns are a risky game in which either side may come out worse – as the Republican congressional majority discovered when it forced a government shutdown in 1995, and suffered for it politically. The concessions needed to avoid such a fate establish new usages, which in turn become focal points that shape future behavior.

Yet Horwill also explores complications. Public opinion is often inert or nonexistent on a given issue. “If the questions involved do not arouse general interest, a new usage may easily be established or an old one easily abrogated.” (P. 207.) Moreover, public opinion is partially endogenous and can be molded by political actors to some degree. Wilson was able to shatter the convention against oral addresses to Congress because he was reverting to the earlier convention of oral address established by Washington, and then changed in turn by Jefferson. In effect, Wilson appealed from traditional norms to the higher authority of the even more remote past.

Finally, and most importantly, Horwill suggests that usages can prove sticky over time just because they shape the perceived boundaries of political possibility. What propped up the post-Jefferson convention against oral addresses to Congress was not fear of public opinion, but lack of imagination: “[A]lthough the [Jeffersonian] tradition had come to be generally recognized as an unfortunate one, it did not occur to any President, until Mr. Wilson took office, that he had the power to break away from it.” (P. 199.) The cognitive hegemony of convention persists until some extraordinary actor sees that there is an unexploited opportunity to turn the unimaginable into fact.

Here and throughout, Horwill’s book is humbling. At any given time the set of unwritten conventions seems fixed, yet from the standpoint of history they have a short half-life, and many of today’s conventions will be gone a century hence. Indeed, conventions are fragile and might pop like a soap bubble instead of decaying gradually. Who knows what central unwritten usages of our constitutional order, seemingly unassailable today, might “disappear[] suddenly, almost at a touch”? (P. 207.)

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