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Steven Alan Samson
ssamson@liberty.edu

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GOVERNMENT REGULATION: FROM INDEPENDENCE TO DEPENDENCY, PART ONE

STEVEN ALAN SAMSON^{*}

Abstract

What Robert Bellah calls 'expressive individualism' has led to unprecedented social legislation in America and expanded government employment since the 1960s, helping to produce a generous supply of public services, policy entrepreneurs, and clientele groups. The legal scholar Lawrence M Friedman notes that 'the right to be "oneself," to choose oneself, is placed in a special and privileged position.' As a consequence, 'achievement is defined in subjective, personal terms, rather than in objective, social terms.' When the claims of expressive individualism are considered in tandem with the increasing reach of the modern social service state, a case may be made for their mutual dependency.

Today, the regulatory operations of central governments impinge upon virtually all areas of life, leading to widespread efforts by interest groups to have their vision of the good life implemented through law and regulatory oversight. Much of the resulting fiscal, educational, and social intervention is largely invisible to the electorate but has led to greater dependency. It also led the economist George J Stigler to offer a theory of regulatory capture when he observed that clientele groups develop a mutually beneficial relationship with the agencies that regulate their activities. Indeed, when this becomes business as usual, few will call it corruption. Thus, when examining laws and public policies, it is always wise to ask: Cui bono? Who benefits? As the Watergate whistle-blower, Mark Felt, put it: 'Follow the money.'

This article is drawn from a series of eight introductory lectures and readings for a course on government regulation. Part I is a revision of the first four lectures.

^{*} Helms School of Government, Liberty University. E-mail: ssamson@liberty.edu

I THE STATE OF INDEPENDENCE: LIFE, LIBERTY, AND PROPERTY

The subject of this essay, government regulation, is contested terrain. It is a busy intersection in a bustling centre of commerce where law, economics, property rights, and ethics converge and often conflict. It is a place where interests and boundaries are often fluid and confused, where an honest surveyor or an impartial judge may be difficult to find, where any determination of what is at stake – costs and benefits, private as well as public – is part of what is in dispute. Our best efforts to orient ourselves, to get the lay of the land, are too easily derailed or side-tracked as a result. The loss of constitutional bearings is one of the consequences of failure.

Let us start where we should wish to end and then work our way to the beginning. Following the Great Depression and the Second World War Henry Hazlitt wrote a book entitled *Economics in One Lesson*. The lesson is simply this: ‘The art of economics consists in looking not merely at the immediate but at the longer effects of any act or policy; it consists in tracing the consequences of that policy not merely for one group but for all groups.’¹ While this may be the place we should wish to reach, the challenge is how to stay on the right path and recognise the landmarks along the way in order to reach what might be called equity: that is, justice for all. Yet we are also fallen creatures. We tend to show partiality – to ‘know in part,’ as the Apostle Paul puts it in 1 Cor 13:9 – and in the end may, out of envy or anger, not even wish what is good for all.

¹ Henry Hazlitt, *Economics in One Lesson* (Arlington House, 1979) 17.

We need to prepare ourselves to think critically – that is, evaluatively – through repeated exercises in what Edmund Burke called ‘the moral imagination.’ This is not simply a matter of history, a law, economics, or philosophy. The relevant material should engage our moral imagination in all of these areas and many others. The writings of Henry Hazlitt and Frédéric Bastiat are a good place to start.

As the principal editorial writer on economics and finance for the *New York Times* from 1934 to 1946, Henry Hazlitt took aim at many of the economic fallacies – what Bastiat called *Economic Sophisms* – that had been used to justify the Franklin Roosevelt’s New Deal economic policies and what he called ‘capricious government intervention in business.’² In his chapter on ‘The Broken Window’ in *Economics in One Lesson*, Hazlitt drew upon an earlier essay by Bastiat to which we will turn later.³ So let us begin with Bastiat’s political pamphlet, *The Law*, which was published in 1850.

The confluence of law, economics, property rights, and ethics makes the subject of political intervention through regulation as wide as the world itself. In the process of mapping it we shall draw a number of great thinkers. Indeed, an intellectual genealogy links several of the writers will be touched upon in this essay. Bastiat was a mid-nineteenth century economist and member of the French National Assembly who satirized the self-absorbed character of interest group activity in ‘The Candlemakers’ Petition,’ which proposed to block the sun’s rays in view of the harm it inflicted upon their trade.⁴

² Ibid 180–1.

³ Ibid 23–4.

⁴ Letter from Frederic Bastiat to the Chamber of Deputies of the French Parliament, 1845, <<http://bastiat.org/en/petition.html>>.

Besides Bastiat, Henry Hazlitt also helped introduce the American public to the work of Friedrich von Hayek, a future Nobel laureate, whose early book *The Road to Serfdom* (1944) may be read in an abridged version.⁵ In a later book, *The Constitution of Liberty* (1960),⁶ Hayek drew upon Francis Lieber's 1849 essay, 'Anglican and Gallican Liberty,'⁷ which we will touch upon in the next section. Lieber, who at the time taught history and political economy at the University of South Carolina, also wrote a foreword to an early American edition of Bastiat's writings.

For these leaders and scholars, 'life, liberty, and property,' to use John Locke's phrase, was of critical moral importance. Thomas Jefferson's wording, 'life, liberty, and the pursuit of happiness,' in the *Declaration of Independence of the United States of America* is an excellent way of clarifying what is meant by property. Property is, among other things, a place from which a Martin Luther, for example, could launch the Protestant Reformation by saying in good conscience: 'Here I stand, I can do no other.' In fact, James Madison referred to conscience as 'the most sacred of all property' and 'a natural and unalienable right.'⁸ To claim otherwise is to make all of us dependent upon the power and whim of those in authority, which is the very definition of despotism.

Let us carefully unpack Bastiat's argument in favour of a state of social and economic independence – a part of what early Americans referred to

⁵ See Readers Digest, *Readers Digest Condensed Version of the Road to Serfdom* (originally published 1945, 2011) <<http://www.iea.org.uk/sites/default/files/publications/files/upldbook43pdf.pdf>>.

⁶ Friedrich Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960).

⁷ Daniel Gilman (ed), *Contributions to Political Science, Including Lectures on the Constitution of the United States and Other Papers: Volume 2 of the Miscellaneous Writings of Francis Lieber* (J B Lippincott, 1881) 371–88.

⁸ The Heritage Foundation, *Madison on Property* (29 March 1792) <<http://www.heritage.org/initiatives/first-principles/primary-sources/madison-on-property>>.

as ‘self-government’ – so we may clarify what is at stake, politically and economically, when we examine the many and ever-changing facets of government regulation. For the early portion of *The Law*⁹ let us engage in a close reading of the text, what the French call *explication de texte*.

Bastiat begins with an expression of dismay: ‘The law perverted! And the police powers of the state perverted along with it!’¹⁰ One synonym for ‘police powers’ is government regulation. At the time the book was written, revolution was in the air. In 1848 the monarchy had fallen and Louis Napoleon was elected president that year.

Bastiat published *The Law* in June 1850 as a warning against continuing abuses of power. Napoleon seized power outright the following year and briefly jailed Alexis de Tocqueville, a recent cabinet official who had earlier written the classic, *Democracy in America*. By then, Bastiat himself had died of tuberculosis and Tocqueville, who suffered from the same disease, was forcibly retired. *The Law* expresses Bastiat’s dismay that the world had been turned upside down:

The law, I say, not only turned from its proper purpose but made to follow an entirely contrary purpose! The law become the weapon of every kind of greed!’ The law, so to speak, has been conscripted or drafted into the service of the greedy. ‘Instead of checking crime, the law itself [is] guilty of the evils is supposed to punish!’¹¹

It is the age-old problem: Who will guard the guardians?

As James Madison put it in *Federalist* 51:

⁹ Frederic Bastiat, *The Law* (Foundation for Economic Education, 1998).

¹⁰ Ibid 1.

¹¹ Ibid.

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹²

Let us return to Bastiat's argument.

We hold from God the gift, which includes all others – physical, intellectual, and moral life. But life cannot maintain itself alone. The Creator of life has entrusted us with the responsibility of preserving, developing, and perfecting it. In order that we may accomplish this, He has provided us with a collection of marvellous faculties. And he has put us in the midst of a variety of natural resources. By the application of our faculties to these natural resources we convert them into products, and use them. This process is necessary in order that life may run its appointed course. Life, faculties, production – in other words, individuality, liberty, property – this is man. And in spite of the cunning of artful political leaders, these three gifts from God precede all human legislation, and are superior to it.¹³

A legal positivist, such as John Austin, defines law in terms of the sovereign's power to control people. Bastiat, instead, makes a natural law argument: '[I]t was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place.'¹⁴ But Jeremy Bentham, the utilitarian philosopher and legal positivist, regarded

¹² Jacob Cooke (ed), *The Federalist* (Wesleyan University Press, 1961) 349; James Madison, *The Federalist No 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments* (13 September 2013) Constitution Society <<http://www.constitution.org/fed/federa51.htm>>.

¹³ Bastiat, above n 9, 1.

¹⁴ Ibid 2.

natural rights as ‘nonsense on stilts.’ Here the intellectual battle lines have been drawn.

Bastiat next defines law as ‘the collective organisation of the individual right of lawful defence.’¹⁵ More succinctly, it is organised justice. Its purpose is to substitute a common force for individual forces to protect God’s gifts, maintain rights, and cause justice to reign. Bastiat then adds the proposition upon which his subsequent argument rests: If no individual can lawfully use force to destroy the rights of others, then the same principle applies to the common force.

When the law exceeds its proper functions, it acts in direct opposition to its own objective, destroying it and annihilating justice. It places ‘the collective force at the disposal of the unscrupulous who wish, without risk, to exploit the person, liberty, and property of others,’¹⁶ converting plunder into a right and lawful defence into a crime. Two causes motivate people to do so: greed and false philanthropy.

Bastiat observes that humanity has a common aspiration toward self-preservation and self-development. He adds that ‘if everyone enjoyed the unrestricted use of his faculties and the free disposition of the fruits of his labour, social progress would be ceaseless, uninterrupted, and unending.’ But history also bears witness to a fatal tendency of mankind: ‘When they can, they wish to live and prosper at the expense of others.’¹⁷ This covetous sort of desire is the first root cause: greed.

Bastiat then contrasts the origin of property with the origin of plunder. Property originates in the fact that ‘[m]an can live and satisfy his wants

¹⁵ Ibid.

¹⁶ Ibid 5.

¹⁷ Ibid.

only by ceaseless labour... But it is also true,' he continues, 'that a man may live and satisfy his wants by seizing and consuming the products of the labour of others. This process is the origin of plunder.' Here is where the law and the sovereign state are supposed to enter the picture. 'When, then, does plunder stop?' he asks. 'It stops when it becomes more painful and more dangerous than labour.'¹⁸

'It is evident, then, that the proper purpose of law is to use the power of its collective force to stop this fatal tendency to plunder instead of to work. But since the law is made by men and since law cannot operate without the sanction and support of a dominating force, this force must be entrusted to those who make the laws.'

This necessity, combined with the fatal tendency in the heart of man, 'explains the almost universal perversion of the law. Thus it is easy to understand how law, instead of checking injustice, becomes the invincible weapon of injustice.'¹⁹ So once again the question arises: Who will guard the guardians? How will greed be restrained?

Let us now see where the logic of Bastiat's argument impels us: 'when plunder is organised by law for the profit of those who make the law, all the plundered classes seek to enter into the making of laws.' Why? Either to stop the plunder, or to share in it. As participation in lawmaking becomes more universal, 'men seek to balance their conflicting interests by universal plunder.'²⁰ This is a pervasive pattern in all areas of politics.

To better understand this pattern it is useful to introduce René Girard's concepts of mimetic desire and mimetic rivalry, which he developed in

¹⁸ Ibid 6.

¹⁹ Ibid 6–7.

²⁰ Ibid 7.

the first chapter of *I See Satan Fall Like Lightning*, among other places. Drawing on Scripture as well as the great novelists, Girard finds expressed in this literature a dynamic process that drives human motivation. We seek what we desire – the political philosopher Thomas Hobbes calls this ‘appetite’ – but we learn our desires from other people. Other people model for us what is desirable through their own desires and we derive our own desires through imitation. This is what Girard calls ‘mimetic desire.’ If, however, we begin to desire or covet the same thing possessed and modelled by another as desirable, we are apt to provoke mimetic rivalry.²¹ The accounts of Eve and Cain in Genesis 3-4 may be carefully read to see how desire is characterised.

Although Hobbes did not use the word ‘sin,’ he saw something like this – the potential for anyone to kill anyone else – as a consequence of human equality in a pre-political ‘state of nature,’ which he described a state of war ‘of every man, against every man.’²² René Girard used the term mimetic contagion to describe this unfortunate condition, noting that the violence is usually purged only through an act of sacrifice, as when a scapegoat is identified, accused, and cast out.²³

Joseph Ratzinger, who subsequently served as Pope Benedict XVI, raises many of these same issues in an essay on the market economy and ethics in which he criticises Marxism and its reduction of man to a plaything of economic forces. He writes: ‘let me merely underscore a sentence of Peter Koslowski's that illustrates the point in question: “The economy is

²¹ René Girard, *I See Satan Fall Like Lightning* (James G Williams trans, Orbis Books, 2001) 16 [trans of: *Je vois Satan tomber comme l'éclair* (first published 1999)].

²² Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* (Michael Oakeshott ed, Basil Blackwell, 1957) 82.

²³ Girard, above n 21, 1, 19–22, 56–8; René Girard, *The Scapegoat* (Yvonne Freccero trans, John Hopkins University Press, 1986) 1–23.

governed not only by economic laws, but is also determined by men”.’ Ratzinger continues: ‘Even if the market economy does rest on the ordering of the individual within a determinate network of rules, it cannot make man superfluous or exclude his moral freedom from the world of economics.’²⁴ Man is a moral agent with the power to choose. Life, liberty, property, and ethics are forever intertwined – whether through politics and the rule of law under God or through despotism and the strong arm of man.

Thomas Jefferson and the other Founders believed in the rule of law under God, as may be seen in a careful reading of the American Declaration of Independence: ‘We hold these truths to be self-evident, that all men created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.’²⁵ The word ‘unalienable’ means that these rights cannot be given away or sold.

The story of Naboth’s Vineyard should also be read with that word ‘unalienable’ in mind. As the Apostle Paul wrote in Romans 8:38-39, ‘nothing can separate [or alienate] us from the love of God.’ God bought His people with a price and established a comprehensive system for the administration of justice. To understand the relevance of this story to the subject of this course, we should first recognise that Leviticus 25 establishes the rule of law and a system of checks and balances regarding land tenure in order to protect against oppression and injustice. According to 1 Kings 21, Naboth was the steward of the property God

²⁴ Joseph Ratzinger, ‘Church and Economy: Responsibility for the Future of the World Economy’ (1986) 13 *Communio* 199–204 <http://www.catholic-church.org/ejtyler/catholic_life/RatzingerOnTheMarket%20Economy%20and%20Ethics%20.html>.

²⁵ *Declaration of Independence* (10 November 2011) Constitution Society <<http://www.constitution.org/usdeclar.htm>>.

had given his ancestors, as established in Leviticus 25. Just as the vineyard had been passed down to him, Naboth, in turn, held it in trust for his descendants.

The larger context of the story is the reign of an idolatrous king of Israel, Ahab, and his wife Jezebel. Beginning in 1 Kings 16, the narrative covers a remarkable series of events, beginning inauspiciously with spiritual adultery and human sacrifice. Once the stage has been set, the story of Naboth begins with a covetous Ahab who wishes to purchase the vineyard. This is forbidden under Leviticus 25 and Naboth sternly rejects the offer. Afterward Jezebel finds him in a sullen mood.

Here the words of the Apostle Paul are especially helpful to understand the dynamic that is at work: ‘I would not have known sin except through the law. For I would not have known covetousness unless the law had said, ‘You shall not covet.’ But sin, taking opportunity by the commandment, produced in me all manner of evil desire. For apart from the law sin was dead. I was alive once without the law, but when the commandment came, sin revived and I died’ (Rom. 7:7-9).

Thus when Ahab’s covetous efforts to persuade Naboth to break the law fail, sin revives – it rears up – in the heart of his covetous queen. Jezebel usurps the king’s seal by misusing it to send instructions to the city fathers to elevate Naboth to a place of high honor. For their part, the city fathers conspire with her to have him accused of blasphemy by a couple of scoundrels and taken out to be stoned to death (1 Kings 21:9-13). Thus sin reproduces and multiplies and fills the land: a good description of mimetic contagion.

Here is a thought question: How does Queen Jezebel’s action differ from that of Queen Esther’s regarding the treacherous Haman in chapter 8 of

Esther? Consider how many commandments Jezebel violated and abuses of power she committed. God's wrath against and judgment of Ahab and Jezebel for the murder of Naboth and their high-handed expropriation of his vineyard should be as plain as day to anyone who reads 'the rest of the story,' as Paul Harvey used to say in concluding his commentaries on the news. This story is a microcosm of all the oppression that stains the pages of history.

Returning to the property rules in Leviticus 25 it should be clear that, even in a case where someone should sell himself into servitude, the Bible provides no reason to suppose it is a heritable status that may be passed down through the generations. The year of Jubilee proclaimed in this same chapter might, to use Madison's language, be described as an auxiliary precaution since it was so clearly designed to restore what had in fact been previously alienated. Thus we may discern a constitutional system of checks and balances even under the Old Testament regime.

So we begin our study of the police powers, the regulatory principle of government, with stories about how power can be usurped, how usurpation may be resisted, and how political rulers may be subordinated to the sovereignty of God. The question is always: Whom do you serve? The State? Oneself? Or God? Joshua made his own decision plain: 'as for me and my house, we will serve the Lord' (Josh 15:24).

II TWO CONCEPTIONS OF LIBERTY

A study of the *Declaration of Independence of the United States of America* and the other American founding documents should lead us to reflect upon something remarkable: Whence came this idea of unalienable rights? It cannot be found in the statute books and yet it runs as a thread through the history of western law generally and English law

specifically – from St Patrick to King Alfred to *Magna Carta* and the *Petition of Right*. The Founders cited the ‘Laws of Nature and of Nature’s God’ as the justification for dissolving the political bands that had, until that moment, connected them to the English Crown.

Two years before the *Declaration of Independence*, George Washington chaired a meeting on 18 July 1774 that produced the Fairfax County Resolves, which articulated these principles and bore witness to the long chain of English liberty.

Resolved, that this Colony and Dominion of Virginia can not be considered as a conquered Country, and, if it was, that the present Inhabitants are the Descendants, not of the Conquered, but of the Conquerors ... that our Ancestors, when they left their native Land, and settled in America, brought with them (even if the same had not been confirmed by Charters) the Civil-Constitution and Form of Government of the Country they came from; and were by the Laws of Nature and Nations entitled to all its Privileges, Immunities, and Advantages ... and ought of Right to be as fully enjoyed, as if we had still continued within the Realm of England ...²⁶

One of the fundamental conflicts in politics is over the nature and relationship between liberty and authority. Jesus reconciled the two in His concept of servant-leadership: ‘You know that the rulers of the Gentiles lord it over them, and their great ones exercise authority over them. It shall not be so among you. But whoever would be great among you must be your servant’ (Matt 20:25-26). Thus the perennial question: ‘How should we then live?’

²⁶ Chapter 17: *Constitutional Government: Fairfax County Resolves* (2000) The Founders’ Constitution <<http://press-pubs.uchicago.edu/founders/documents/v1ch17s14.html>>.

Institutions and entire civilisations are shaped by the choices people collectively make: what they are willing to give up in exchange for such other things as peace, security, and prosperity. René Girard, who has written so eloquently on mimetic desire and scapegoating, believes, as a matter of Christian conviction, that we must confront the dark side of what we are collectively prepared to sacrifice. Let us begin this task gently with a fable entitled *The Dog and the Wolf* collected by a Greek slave, Aesop.

A gaunt Wolf was almost dead with hunger when he happened to meet a House-dog who was passing by. ‘Ah, Cousin,’ said the Dog. ‘I knew how it would be; your irregular life will soon be the ruin of you. Why do you not work steadily as I do, and get your food regularly given to you?’

‘I would have no objection,’ said the Wolf, ‘if I could only get a place.’

‘I will easily arrange that for you,’ said the Dog; ‘Come with me to my master and you shall share my work.’

So the Wolf and the Dog went towards the town together. On the way there the Wolf noticed that the hair on a certain part of the Dog’s neck was very much worn away, so he asked him how that had come about.

‘Oh, it is nothing,’ said the Dog. ‘That is only the place where the collar is put on at night to keep me chained up; it chafes a bit, but one soon gets used to it.’

‘Is that all?’ said the Wolf. ‘Then good-bye to you, Master Dog.’

The story's moral is: 'BETTER STARVE FREE THAN BE A FAT SLAVE'²⁷

This attitude is deeply embedded within the American experience. A motto attributed to Benjamin Franklin reads: 'Those who would give up essential Liberty to purchase a little temporary Safety, deserve neither Liberty nor Safety.'²⁸ The state motto of New Hampshire makes a similar point more rudely: 'Live Free or Die.'²⁹

Liberty is one of the great themes of the *Bible*. The fear of the Lord may be the beginning of wisdom, but where does the fear of death lead? The author of Hebrews prays that God 'deliver them who through fear of death were all their lifetime subject to bondage' (Heb 2:15). Liberty – freedom from such bondage – is ultimately a spiritual matter, but, like faith, hope, and love, has its material ramifications. As the Apostle Paul wrote to the Galatians about an unavailing system of sacrifices: 'Stand fast therefore in the liberty wherewith Christ hath made us free, and be not entangled again with the yoke of bondage' (Gal 5:1 KJV).

In the third chapter of *The Constitution of Liberty* Friedrich Hayek draws on Francis Lieber's 1849 newspaper essay, *Anglican and Gallican Liberty*, to make a crucial distinction that could help dispel much of the confusion that has been infecting our political discourse. Francis Lieber, who was a transatlantic cultural missionary, held the first chair of political science at what is now Columbia University following a couple

²⁷ Charles Eliot (ed), *The Harvard Classics Volume 17: Folklore and Fable* (P F Collier & Son, 1909) 21–2.

²⁸ Letter from the Pennsylvania Assembly to the Governor, 11 November 1755; Leonard Labaree (ed), *The Papers of Benjamin Franklin* (Yale University Press, 1963) vol 6, 242. The Statue of Liberty is inscribed with a modified version of Franklin's original quotation; another inscription alludes to Aesop's fable with a quotation from Woodrow Wilson.

²⁹ New Hampshire State Government, *New Hampshire Almanac: State Emblem* (2011) <<http://www.nh.gov/nhinfo/emblem.html>>.

of decades of teaching in South Carolina.³⁰ Writing from a consciously Christian perspective, Lieber drew upon a life of self-sacrificing experience – as a soldier left for dead in the Napoleonic wars, as a young scholar who operated the first school of gymnastics in Boston, founded the first swimming school, edited the first American encyclopaedia, and served as a Public Professor in the German tradition of addressing matters of grave public concern. Lieber, whose own family was torn by the Civil War, drafted the first code of military conduct. His writings were known and used by presidents from Abraham Lincoln to Theodore Roosevelt and cited by the Supreme Court.

In his 1849 newspaper essay on *Anglican and Gallican Liberty* Lieber developed a contrast between two very different traditions of liberty: ‘one empirical and unsystematic,’ as Hayek put it in his commentary, ‘the other speculative and rationalistic – the first based on an interpretation of traditions and institutions which had spontaneously grown up and were but imperfectly understood, the second aiming at the construction of a utopia, which has often been tried but never successfully.’³¹

Lieber and Hayek here summarise the great dilemma of modern politics. These are the two poles toward which we are drawn. The first relies on the marketplace of individual initiative, giving rise to what Hayek – following Michael Polanyi – calls ‘spontaneous order.’³² In the absence of a political safety net, people usually know that sufficient resources must be held back in reserve. Such self-reliance and self-government resembles what Aaron Wildavsky called ‘resilience.’ The other side of

³⁰ See Steven Alan Samson, ‘Francis Lieber: Transatlantic Cultural Missionary’ in Charles Mack and Henry Lesesne (eds), *Francis Lieber and the Culture of the Mind* (University of South Carolina Press, 2005) 129–42.

³¹ Hayek, above n 6, 54.

³² Ibid 160.

risk management – ‘anticipation’ – represents the urge to systematically cover every need and prepare for every eventuality.³³ Taken to an extreme, the managerial state itself becomes a total package and an exclusive provider: what Hilaire Belloc called ‘the servile state.’ If we start with the definition of politics given by the political scientist Harold Lasswell – ‘who gets what, when, how’ (the subtitle of a 1936 book)³⁴ – it is reasonable to conclude that politics can never be other than contested terrain.

Lasswell gives us a definition that evades the justice described in Deuteronomy 18: ‘You shall appoint judges and officers in all your gates, which the Lord your God gives you, according to your tribes: and they shall judge the people with just judgement. You shall not pervert justice; you shall not show partiality, nor take a bribe: for a bribe blinds the eyes of the wise and twists the words of the righteous’ (Deut 16:18-19 NKJ). By contrast, Lasswell’s definition leaves open only the questions of who will win, who will lose, and whose interests will be served.

Lieber recognised that civil liberty is relative. It can follow the decentralised, case-by-case, trial-and-error of the English common law tradition. Or it can be rationally and deliberately crafted from the speculations of philosophers and the sort of false philanthropists mentioned by Bastiat into a system that may kill with kindness. Civil liberty also waxes and wanes at various stages of civilisation. For the ancient Greek, ‘man in his highest phase’ is truly human only as a citizen. ‘Man is a political animal,’ as Aristotle put it. He is a creature of the

³³ See Aaron Wildavsky, ‘If Regulation Is Right, Is It Also Safe?’ in Tibor Machan and M Bruce Johnson (eds), *Rights and Regulation: Ethical, Political, and Economic Issues* (Pacific Institute for Public Policy Research, 1983) xv–xxv.

³⁴ Harold D Lasswell, *Politics: Who Gets What, When, How* (Meridian Books, 1958).

city-state, which is the source of his identity. But this is a totalitarian conception. From the standpoint of Christian and modern liberty, the individual is the highest object and the state is a means to obtain ‘higher objects of humanity.’ The Apostle Paul answered the philosophers at the Areopagus in terms they applied to the *polis*: ‘for in Him we live and move and have our being’ (Acts 17:28). As Lieber recognised, Christianity had demoted the state from master to servant. Its purpose is to protect ‘chiefly against public power, because it is necessarily from this power that the greatest danger threatens the citizens.’³⁵ Lieber’s admonition extended to that species of privatised public power Bastiat called ‘legal plunder.’

Lieber’s ideas about civil liberty and self-government, the title of one of his major treatises, come much closer to the vision of the Founders. But such ideas are meaningful to people only as long as we are prepared to recognise and state what is usually unseen and unsaid. Their moral vision of a self-governing community must be understood in the context of the Judeo-Christian civilisation that shaped them. The *United States Constitution* of 1787 binds citizens together into a moral community. It is also a political covenant among ‘We the People.’ The opposite of the self-governing moral community it assumes at the outset is one that is ruled despotically.

In 1828 Noah Webster introduced the word ‘demoralisation’ into his *American Dictionary of the English Language* to express the great public danger that puts any such covenant as the *United States Constitution* at

³⁵ Gilman, above n 7, 372–3.

risk. Webster defined *demoralisation* as ‘The act of subverting or corrupting morals; destruction of moral principles.’³⁶

Speaker of the House Robert C Winthrop made the case for paying close attention to public morale in a speech to the Massachusetts Bible Society in 1849: ‘All societies of men must be governed in some way or other. The less they may have of stringent State Government, the more they must have of individual self-government. The less they rely on public law or physical force, the more they must rely on private moral restraint. Men, in a word, must necessarily be controlled, either by a power within them, or by a power without them; either by the word of God, or by the strong arm of man; either by the Bible, or by the bayonet. It may do for other countries and other governments to talk about the State supporting religion. Here, under our own free institutions, it is Religion which must support the State.’³⁷

Let us turn again to James Madison – this time to *Federalist 10* – to show how the principles of civil liberty and self-government were designed into the very fabric of the *United States Constitution*.³⁸ He begins his argument in favour of the new *United States Constitution* by observing what he calls its tendency to break and control the mischiefs of faction. By faction, he meant political parties, interest groups, and the very spirit of partisanship or what Erik von Kuehnelt-Leddihn called

³⁶ Noah Webster, *An American Dictionary of the English Language* (Foundation for American Christian Education, 1980).

³⁷ Robert Winthrop, *Addresses and Speeches on Various Occasions* (Little, Brown & Co, 1852) 172.

³⁸ See Cooke, above n 12, 56–65; James Madison, *The Federalist Number 10: The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection (continued)* (13 September 2013) <<http://www.constitution.org/fed/federa10.htm>>.

'*identitarianism*,' a mimetic 'herd instinct' driven by hatred and envy.³⁹ This is the sort of partiality or favouritism condemned in James 2:1-13. Likewise Micah wrote: 'what does the Lord require of you but to do justly, to love mercy, and to walk humbly with your God?' (Mic 6:8). Factionalism and favouritism threaten the enjoyment of life, liberty, and property.

Madison's argument is simple but elegant. First, he notes that there are two methods of curing the mischiefs of faction: remove its causes or control its effects. Next, he notes two methods by which to remove the causes of faction. The first remedy, to destroy liberty, he says is worse than the disease. Liberty is to faction what air is to fire. It nourishes faction but it is also necessary to political life.⁴⁰ Practically speaking, the art of state has usually meant the substitution of despotism for politics.

The alternative, to give everyone the same opinions, passions, and interests, Madison considers impracticable.⁴¹ The unreliability of reason as well as the liberty we have in using our minds lead to different opinions. The connection between our reason and self-love means that our opinions and passions have a reciprocal influence. Still, attempts to standardise opinion, whether through control of media or education, are a favoured tactic of those who seek to impose uniformity or consensus in our more democratic age, especially if done in the name of the people, the general will, or the greater good.

³⁹ Steven A Samson, *Erik von Kuehnelt-Leddihn: Leftism: From de Sade and Marx to Hitler and Marcuse Study Guide* (Liberty University, 1974) 15.

⁴⁰ Cooke, above n 12, 58.

⁴¹ Ibid.

Madison contended that the protection of the diverse faculties of men, which is the source of property rights, is the first object of government. This diversity ensures a division of society into different interests and parties. Indeed, the latent causes of faction are sown into human nature, but it is possible to control at least some of the effects. In the case of a minority faction, relief is supplied by the republican principle of indirect representation.⁴²

The case of a majority faction, however, is more challenging. The form of popular government permits it to sacrifice the public interest to its own – in the very name of the people. Once again, there are two options: either to prevent the existence of the same opinions, passions, and interests in a majority, just the opposite to the impracticable method for removing the causes of faction, or to render such a majority-by-consensus unable to oppress others.⁴³

But Madison is not finished with his analysis here. Evidently in reference to the states under the old *Articles of Confederation*, he claims that there is no cure for the mischiefs of faction in a small democracy that consists of citizens who assemble and administer the government in person. The reason is because the majority will usually feel a common passion and, as a consequence, provoke turbulence and contention.⁴⁴

Turning to the differences between a republic and a democracy, Madison notes, first, the delegation of the government to elected officials and, second, the greater number of citizens and area over which it may be extended. The advantage of a republic over a democracy is that it allows public opinion to be refined and enlarged by filtering it through a select

⁴² Ibid 60.

⁴³ Ibid 60–1.

⁴⁴ Ibid 61–2.

body of citizens.⁴⁵ Yet the notion of the presumptive virtue of a political elite soon began to favour out of favour. The disadvantage of a republic is that intemperate, parochial, or sinister men may win the votes and then betray the interests of the people. This being the case, Madison believes a balance is needed between the extremes of detachment from the people and over-attachment to local interests.⁴⁶

As David Hume recommended in his essay, *Idea of a Perfect Commonwealth*, Madison's solution is to enlarge the size of the republic. This allows greater variety and makes it less probable that a majority-by-consensus will invade the rights of the rest. Enlarging the republic also permits the influence of factious leaders to be diluted. Madison hoped thereby to create firebreaks that would confine the dangers posed by factious leaders to their original locations. Among these dangers are religious sects that degenerate into political factions and a rage for (fiat) paper money, an abolition of debts, or an equal division of property.⁴⁷

The dangers that Madison detected in 1787 have remained with us to the present day. The names of the parties and the particulars of their programs have changed over the years, but Francis Lieber regarded the underlying problem as what he called Gallican liberty. 'The fact that Gallican liberty expects everything from *organisation* while Anglican liberty inclines to *development*, explains why we see in France so little improvement and expansion of institutions; but when improvement is attempted, a total abolition of the preceding state of things – a beginning

⁴⁵ Ibid 62.

⁴⁶ Ibid 63–4.

⁴⁷ Ibid 64–5.

ab ovo [from the egg] – a re-discussion of the first elementary principles.⁴⁸

Gallican liberty is a recipe for ratcheting the growth of one overriding institution, the state, at the expense of all others. Parkinson's Law states: 'Work expands to fill the time available for its completion.'⁴⁹ A variation on that insight might read: The state expands to fill the space that impinges upon its operations. Robert Higgs discerned that the state expands in response to particular crises, such as war and depression, but fails to fully recede before the next crisis causes it to surge even further forward.⁵⁰ The danger is that other institutions will languish while the state and its agencies expand and become a total package. Anticipation and resilience are the two poles of risk management. The question to ask is this: When the state comes to the rescue and politics becomes an endless shuffling and reshuffling of the deck of life's 'chances,' will there be enough left in reserve to meet an unexpected emergency? Path dependency has left the economies of the major powers highly vulnerable to the unanticipated while the scramble for legal plunder bloats their budgets and undermines their responsiveness. The possibilities for legal plunder are virtually limitless: a wide and open field.

Here we should ask ourselves: How does such liberty – a 'freedom' Francis Lieber called 'Rousseauism' and 'democratic absolutism' – differ from what Hilaire Belloc called a 'servile state' in which man is reduced to something a lot lower than the angels? Alexis de Tocqueville used the expression 'tyranny of the majority' to describe the danger we face in a

⁴⁸ Gilman, above n 7, 385.

⁴⁹ C Northcote Parkinson, *Parkinson's Law, and Other Studies in Administration* (Ballantine, 1957) 15.

⁵⁰ Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (Oxford University Press, 1989).

democratic age. But it is merely a tyranny in the name of the majority. How can any faction, whether a majority or a minority, tyrannise the rest unless led to do so by ambitious ideologues, self-serving demagogues, and countercultural entrepreneurs? What we have here, collectively, is a problem of the soul such as the Apostle described in Eph 6:12 (NKJ): ‘For we do not wrestle against flesh and blood, but against principalities, against powers, against the rulers of the darkness of this age, against spiritual hosts of wickedness in the heavenly places.’ The tyranny that can take root in our souls is a problem that poets and philosophers from Homer and Plato to the present have meditated upon. As René Girard recognised, only the *Bible* tells us the truth about our sinful nature.

III THE CONSTITUTION OF LIMITATIONS

Matt Sieger tells a story about how Harold J Berman, a pioneer in the study of the interaction of law and religion,⁵¹ began studying law at a very early age. ‘Belief in law comes from early childhood,’ he said. ‘A child says, ‘It’s my toy.’ That’s property law. A child says, ‘You promised me.’ That’s contract law. A child says, ‘He hit me first.’ That’s criminal law. A child says, ‘Daddy said I could.’ That’s constitutional law.’⁵²

Once again let us do a bit of detective work and explore an intellectual genealogy. Berman, a specialist in Soviet law who taught at Harvard and Emory, did his undergraduate studies at Dartmouth under Eugen Rosenstock-Huessy, a legal historian who originally specialised in the

⁵¹ Harold Berman, *The Interaction of Law and Religion* (Abingdon Press, 1974); Harold Berman, *Faith and Order: The Reconciliation of Law and Religion* (Scholars Press, 1993).

⁵² Matt Sieger, Answering to a Higher Authority: The Life and Legacy of Harold J Berman (2009) *Jews for Jesus* <<http://www.jewsforjesus.org/files/pdf/issues/issues-17-09.pdf>>.

Middle Ages. Rosenstock, who devoted his life to studying the inner dynamism of Christian civilisation, anticipated the future development of a planetary society in which local customs and differences would retain their vitality.⁵³ Our efforts to reconcile the interests of the group with those of the individual, unity with diversity, the universal with the particular, and reason with experience represent a major theme that runs through many of the key ideas upon which this essay draws.

The medieval Battle of the Universals – the struggle between unity and diversity, the One and the Many, realism and nominalism – has considerable bearing upon the developmental stages through which the United States have been passing from the outset. This historical dynamic is a theme to which we will return. Let us begin by studying the historical context of the founding of the federal constitutional system of the United States.

Virtually from the beginning of the colonial period early in the 17th century, the early American provinces or states were founded and governed according to compacts, charters, covenants, and even full-fledged constitutions, as Donald Lutz has shown in a series of books. Many of these colonies drew heavily upon specific ecclesiastical traditions. All drew creatively upon English common law, of which Oliver Wendell Holmes, Jr, famously said: ‘The life of the law has not been logic; it has been experience.’⁵⁴

The New England colonies were especially innovative in fusing Puritan theological and political ideas about covenants into a coherent and very

⁵³ See Eugen Rosenstock-Huessy, *The Christian Future: Or the Modern Mind Outrun* (Harper & Row, 1966); Eugen Rosenstock-Huessy, *Out of Revolution: Autobiography of Western Man* (William Morrow, 1938).

⁵⁴ Mark DeWolfe (ed), *Oliver Wendell Holmes: The Common Law* (Little, Brown, 1963).

practical constitutional tradition, continuing and further developing an equally practical, as opposed to theoretical, Biblical republicanism modelled after the ‘Hebrew Republic.’⁵⁵

Here we can detect one root that marks the difference between Anglican liberty and Gallican liberty, between the American Revolution and the French Revolution. Among the noteworthy accomplishments of the New England clergy, as noted by Alice Baldwin and Ellis Sandoz,⁵⁶ was the creation of a vast literature of sermons for distinctly political occasions, such as days of fasting, days of thanksgiving, elections held by town, states, and artillery companies, and public ceremonies that attended inaugurations and oath-taking.

By the time of the *Declaration of Independence of the United States of America*, the *Articles of Confederation*, and the subsequent *United States Constitution* of 1787, America’s early political class had woven from many threads a distinctly American political language that has been passed down to us through the generations.

The sum of all this experience was a constitutional system of limited government and powers, in which power is both divided and shared between three branches, multiple levels of jurisdiction, and the citizenry and their representatives. Furthermore, sovereignty was not vested in either the state or the national government. Indeed, the word sovereignty is not even used in the *Constitution*. Instead, sovereignty, if we wish to use that term, appears to take form of a covenant that brings the various

⁵⁵ See Eric Nelson, *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* (Harvard University Press, 2010); Enoch Cobb Wines, *The Hebrew Republic* (American Presbyterian Press).

⁵⁶ Alice Baldwin, *The New England Clergy and the American Revolution* (Frederick Ungar, 1965); Ellis Sandoz (ed), *Political Sermons of the American Founding Era: 1730–1805* (Liberty, 1991).

parts into active relationship with the whole. It is a covenant that brings each succeeding generation into dialogue within a perpetual corporation known as ‘We the People of the United States of America.’ This ‘more perfect Union’ is defined and delineated by a Constitution that Jeremy Rabkin believes to be irrevocable.⁵⁷

The purposes of government and the duties of rulers are set forth in Romans 13. But verses 8–10 provide a critical context for understanding the first seven verses. We are not to be indebted to others except to love one another. Unfortunately, we rarely ponder the radical implications of this injunction. What is just as rarely acknowledged is that these verses provide us with a working definition of love, drawn straight from the Ten Commandments and repeating a portion of the Great Commandment. In fact, the Decalogue bears a very distinctive relationship with the English common law, which has been referred to as a ‘cradle Christian.’⁵⁸ Alfred the Great opened his late ninth century law code with the Ten Commandments. Nearly eight centuries later, some of the laws of New England, including the Massachusetts Body of Liberties, cited Biblical law by chapter and verse.⁵⁹

Today we take so much for granted that we miss the significance of the controversies over this precious legacy. In an article entitled *The Revolutionary Revelation*, Sara Yoheved Rigler puts matters into fresh perspective by asking: ‘What would a world without Torah look like?’ Her description of an alternative New York that had never been under the *Bible*’s influence is certainly interesting for what is absent, although it is

⁵⁷ Jeremy Rabkin, ‘The Constitution and American Sovereignty’ (2009) 38 *Imprimis* 1.

⁵⁸ See John Wu, *Fountain of Justice: A Study in the Natural Law* (Sheed and Ward, 1955).

⁵⁹ See Hanover College, *Massachusetts Body of Liberties (1641)* (2012) <<http://history.hanover.edu/texts/masslib.html>> 272.

hard to imagine a New York or even a New World in the absence of God's promises to Abraham and his seed. Modern advances in general literacy, the institution of hospitals and public schools, the drafting of declarations of human rights, and a widespread sense of the sacredness of life – all were once unthinkable and would be so today except for the seminal influence of the *Bible*.⁶⁰

The seedtime of the American Republic was marked by the emigration across the Atlantic of many parties to a lively debate that had been generated by the Protestant Reformation, which was further deepened in the British Isles as the Church of England subdivided into High Church and Puritan factions. Separatist groups, such as the Pilgrims who settled Plymouth, spun off into their own independent congregations. The three types of church polity – Episcopalian, Presbyterian, and congregational – resembled three types of secular polity – monarchy, the republic, and democracy – and could be viewed as distant cousins of the presidency, the Senate, and the House of Representatives.

David Hackett Fischer's *Albion's Seed* identifies four different British folkways that were transplanted to America: 1) the Puritan refugees from the Anglican political-religious establishment; 2) the defeated cavaliers who had supported the King against Parliament during the English Civil War, along with their indentured servants; 3) the persecuted Quakers and German Anabaptists; and 4) impoverished masses of immigrants from the northern borderlands of Britain and Ireland.⁶¹ Separately and together they gave distinctive character to the mosaic of American settlement patterns and political bents. *E pluribus unum*: It is out of such diversity

⁶⁰ Sarah Yoheved Rigler, *The Revolutionary Revelation* (16 May 2004) aish.com <<http://www.aish.com/h/sh/t/48962111.html>>.

⁶¹ David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (Oxford University Press, 1989).

that the American founders sought to forge a unity-in-plurality. Consequently, a system of check and balances has grown along each political axis where power overlaps and is shared. This originative diversity brings us back to James Madison and the *Federalist Papers*.

Early in the 18th century the French *philosophe*, Baron Montesquieu, had discerned in the English constitution a separation of powers between three branches of government – king, House of Lords, House of Commons – and had recommend that reformers in France follow this principle. Madison took up this theme in the *Federalist Papers*, although his argument was built up through a series of specific essays.

In *Federalist 39*, Madison focused on the specific division of power between the national and state governments. Developing the principle of federalism, Madison showed how the division and overlapping of powers was built into the arrangement of national institutions, noting that Congress was divided by a national legislature, the House of Representatives, and a federal legislature, the Senate, in which the states and their specific interests were represented.⁶²

Turning now to *Federalist 51*, let us again engage in a close reading of the text. By now Madison is expressing concern that an outward division of power is not up to the task of protecting against the abuse of power. What sort of abuse? How about Bastiat's concept of legal plunder? How about the mimetic contagion that can result from envying one's neighbours and coveting what they have? At the end of *Federalist 10*, Madison gives a good theoretical account of the advantage of an extended federal system: 'The influence of factious leaders may kindle a flame

⁶² Cooke, above n 12, 250–7.

within their particular States, but will be unable to spread a general conflagration through the other States...'⁶³

From these words it should be clear that Madison has deep concerns – ones that are not allayed by the simple architecture of a separation of powers. To paraphrase, Madison opens *Federalist 51* with a question: Given the inadequacy of a merely external separation of powers, how is the defect to be remedied? His answer is that ‘the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.’⁶⁴ Thus the separation of powers must be supplemented by checks and balances.

As he develops his argument, Madison elaborates upon this point. Each branch or department of the government should have a will of its own. From this it follows that members of each major branch should have little say in the appointment of members of the others. How can this be accomplished? In a republic the power of appointment should be drawn from the same fountain of authority, the people, but it should be drawn through separate channels.

Let us consider for a moment how the framers designed these channels or lines of authority. Members of the House of Representatives hold seats that are apportioned among the states according to population. They are directly elected by the local citizens of their home districts for a two year term of office. Corporately they make up a national legislature representing all the people and have the responsibility to introducing all bills related to taxing and spending.

⁶³ Ibid 64.

⁶⁴ Ibid 347–8; Madison, above n 12.

Until the ratification of the *United States Constitution* amend XVII in 1913 during the Progressive era, senators were elected to six-year terms by members of their home state's legislature, who, in turn, were themselves elected by the people. Thus popular representation was indirect and states were given a voice in what James Madison called the 'federal legislature.'

Even more elaborate safeguards were built into presidential elections to ensure that the presidents were representative of all the people and that they had been thoroughly vetted. The Electoral College is somewhat akin to a grand jury that is temporarily summoned for an important public service. It is also akin to the federal system of electors that once chose the Holy Roman Emperor and resembles the College of Cardinals that assembles in Rome to choose the Pope. Each state was obliged elect or appoint electors, usually prominent citizens who had some leadership experience, who could act as a political filter to sift and evaluate the qualities of the candidates. Following the general election, the electors would meet in the state capitals and cast their votes. A list of all the people voted for would be certified, sealed, and sent to the national capital. There the certificates are opened about a month later by the President of the Senate in the presence of the Speaker of the House and the votes are counted at the opening of a newly elected Congress.

Finally, the justices of the Supreme Court and judges of the lower federal courts are appointed by the president with the advice and consent of the Senate: that is, the federal legislature. The idea in each case is both to represent 'We the People' through several different channels of expression and to filter the people's sentiments, which can be both self-contradictory and highly volatile at times.

The great security against a gradual concentration of power, Madison believed, was to give the heads of agencies the constitutional means and personal motives to resist encroachments on their authority. Madison expected them to engage in turf battles: ‘Ambition must be made to counteract ambition.’ Thus their personal interest had to be connected with the rights of their office.

But another question comes to mind: How does this self-interestedness differ from Bastiat’s legal plunder or the so-called ‘honest graft’ of a machine politician? Here the political scientist J Budziszewski makes explicit what Madison only implies: ‘How can we make government promote the common good when there is so little virtue to be found?’⁶⁵ Madison suggested that self-interest could be used in the absence of better motives. His idea is to arrange a checks and balances system based on opposite and rival interests so that the private interest of every individual may be a sentinel over public rights. In the end, such filtering and channelling of self-interest are no substitutes for virtue. Unfortunately, all such contrivances can be gamed and, in the end, prove inadequate. Ambition is not easily tamed.

The political scientist Kenneth Minogue notes that, down through history, politics has been the business of the powerful. ‘It was essential to the idea of the state, in all its forms, that it should be an association of *independent* disposers of their own resources.’⁶⁶ This was equally true of the early American republic in which such independence was widespread and expandable. But this is not a natural state of affairs. It must be upheld and protected by common consent.

⁶⁵ Jay Budziszewski, *The Revenge of Conscience: Politics and the Fall of Man* (Spence, 1999) 56.

⁶⁶ Kenneth Minogue, *Politics: A Very Short Introduction* (Oxford University Press, 2000) 105–6.

The danger against which we must always protect ourselves is the confusion of the coercive tools of despotism with the persuasive arts of politics through what Minogue calls ‘political moralism.’ It reverses the norms it seeks to replace: ‘Independent individuals disposing of their own property as they please are identified with selfishness and taken to be the cause of poverty.’⁶⁷ This sort of moralism resembles what Michael Polanyi called ‘moral inversion’ and Roger Scruton calls the ‘culture of repudiation.’⁶⁸ What Bastiat called false philanthropy today takes the form today of a state that can redistribute life’s opportunities and benefits. To conclude, our contemporary dilemma is neatly summarised as follows by Minogue:

Political moralism ... takes the independence of citizens not as a guarantee of freedom but as a barrier to the project of moralising the world ... Moralising the human condition is only possible if we can make the world correspond to some conception of social justice. But it turns out that we can only transcend the inequalities of the past if we institute precisely the form of social order – a despotism – which Western civilisation has immemorially found incompatible with its free and independent customs. The promise is justice, the price is freedom.⁶⁹

Political moralism is the latest avatar of Jean-Jacques Rousseau’s concept of the ‘general will,’ the exhortation to do whatever the state determines to be in your best interest. The ‘general will’ is the command to which all subjects of the state must either submit or, as Rousseau put it, ‘be forced to be free.’ Bastiat’s false philanthropy wears many masks – Lieber’s democratic absolutism, Tocqueville’s tyranny of the majority,

⁶⁷ Ibid 106.

⁶⁸ Michael Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (Harper & Row, 1962) 231–5; Roger Scruton, *The West and the Rest: Globalization and the Terrorist Threat* (ISI Books, 2002).

⁶⁹ Minogue, above n 66, 106.

Minogue's political moralism – but, whatever form it takes, it tends to deny individual citizens standing and subvert their conscience.

Returning again to the text of *Federalist 51*, we can see that Madison offers still another safeguard. Members of each branch should be as little dependent as possible on those of the others for their salaries.⁷⁰ Here we come to the great source of political corruption down through history: dependency and, its counterpart, clientelism. In the opening chapter of the *Godfather*, Don Vito Corleone invites Amerigo Bonasera to be his friend. What did the Godfather mean by that? He meant that by accepting a favour, his protection, Bonasera would become his retainer, thus a minor member of his retinue.⁷¹

What Mario Puzo, the author, here describes is a feudal-style, paternalistic form of government that had been transplanted to and superimposed on a political system that, at least at one time, valued an independent citizenry: a people that could collectively stand on its feet like Martin Luther, who had made his famous statement, 'Here I stand, I can do no other,' when summoned before the emperor's council, the Diet of Worms. Corleone's politics of friendship, as Paul Rahe has called it, lacks the cool detachment, the individual self-government, of those who wish to remain a free people.⁷²

The political history of western civilisation is a perpetual dialogue or debate between the advocates of a politics of friendship – the cronyism that typifies corrupt political machines and ruling classes – and what

⁷⁰ Cooke, above n 12, 348. But another and somewhat related security listed in *Federalist Number 57* – that members of the House of Representatives 'can make no law which will not have its full operation on them and their friends' – has been repeatedly breached: Cooke, above n 12, 386.

⁷¹ Mario Puzo, *The Godfather* (G P Putnam's Sons, 1969) 29–31.

⁷² Paul A Rahe, 'Don Corleone: Multiculturalist' (1997) 16 *Business & Professional Ethics Journal* 133, 133–53.

Rahe calls a politics of distrust. To sum up the argument in favour of a politics of distrust, we might say that the virtue of independence requires a wariness toward those who seek out office, especially those who seek to worm their way into our confidence. As Thomas Jefferson warned a friend, once the people ‘become inattentive to the public affairs, you and I, [and] Congress [and] Assemblies, judges [and] governors shall all become wolves. It seems to be the law of our general nature, in spite of individual exceptions; and experience declares that man is the only animal which devours his own kind...’⁷³ *Homo homini lupus*: man is a wolf to man.⁷⁴ As Jefferson noted elsewhere, free government is founded in jealousy, not in confidence.⁷⁵

IV FAITH, FREEDOM, AND THE ABUNDANT LIFE

Western civilisation – once known as Christendom – arose out of a combination of Greek learning (*paideia*), Roman law, and Biblical faith and justice. The first of these elements helped shape our systems of education. The second is preserved in the European civil law codes and international law. The third element, the Biblical tradition, has been unfortunately neglected within an increasingly secularised order. Although its contribution is not well understood and has been deliberately ignored in Europe by the *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*,⁷⁶ which govern the European Union, the Bible’s vitality is everywhere felt, as Sara Rigler has shown in a previous section.

⁷³ Letter to Edward Carrington from Thomas Jefferson, 16 January 1787, <http://en.wikisource.org/wiki/Letter_to_Edward_Carrington_-_January_16,_1787>.

⁷⁴ J Huizinga, *In the Shadow of Tomorrow* (W W Norton, 1964) 151.

⁷⁵ *The Kentucky Resolutions of 1798* (4 November 2011) The Constitution Society <<http://www.constitution.org/cons/kent1798.htm>>.

⁷⁶ Opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009).

Four decades ago Goh Keng Swee, the Singaporean defence minister, recommended that developing countries should convert to a demanding form of the Protestant religion in order to encourage habits of personal thrift and public honesty.⁷⁷ He believed that it would result in great material progress. More recently Zhao Xiao, a Chinese economist, has endorsed the idea that the spread of Christianity would be good for China's economy.⁷⁸ Although such recommendations make the adoption of Christianity sound pragmatically like a formula for material success, the far-reaching consequences of the *Bible's* influence should not be lightly dismissed.

On the other hand, we should not make the mistake of trying to equate godliness with worldly success. Whatever link there may be between them is often too complicated for us to see a direct link at the individual level. It is difficult enough to see even at the societal or cultural level. Yet there are still meaningful and often indirect things that can be said this connection. For example, it seems reasonable to assume that, as opposed to a civil society that enjoys liberty, a society that is full of envy and strife of the sort the Apostle Paul describes in Rom 1:18-32 is unlikely to move forward from success to success. A society in the midst of what René Girard calls a 'mimetic contagion' is most likely to seek scapegoats upon which it can purge its violence and then marginalise or otherwise dispose of its victims. Remember the opening lines of James Madison's *Federalist 10*: 'Among the numerous advantages promised by

⁷⁷ Goh Keng Swee, (Speech delivered at the General Conference of the Methodist Church in Malaysia and Singapore, 13 November 1972).

⁷⁸ Evan Osnos, Interview with Zhao Xiao (Television Interview, 2011) <http://www.pbs.org/frontlineworld/stories/china_705/interview/xiao.html>.

a well constructed union, none deserves to be more accurately developed, than its tendency to break and control the violence of faction.⁷⁹

The *Bible* provides us with many illustrations of the mimetic character of violence generally, persecution in particular, and the need that the godly have for a place where they may take a stand. And we should always remember that, as James Madison put it: ‘Conscience is the most sacred property.’ So here is some more food for thought: What should the faithful do when their rulers fail to make a place for liberty of conscience?

Resistance to tyrannical actions takes many forms in the *Bible*. We see it in the first chapter of Exodus 1 with the captivity of Israel and the threat of genocide. But we can also see that the Egyptian midwives boldly resisted Pharaoh. The *Bible* shows that God blessed both the midwives and the children of Israel. Likewise, the first chapter of the *Book of Daniel* opens with four young men who respectfully chose to resist adopting the king’s prescribed diet in order to faithfully observe God’s dietary laws. With the help of some men of good will, they were able to demonstrate the superiority of their own diet and were permitted to continue it in good conscience.

Acts 5:17-32 illustrates yet another godly way of responding to injustice. Peter and the Apostles returned to teaching the Gospel despite having been ordered to the contrary and even imprisoned. From this account it should be clear that firmness in defence of principles has a central place in the life of faithful service.

⁷⁹ Cooke, above n 12, 56.

Now let us move the calendar to 19th century Europe. Early in 1859, Francis Lieber gave an introductory public lecture in 1859 that examined some of the threats to liberty in his day and ours.

The advance of knowledge and intelligence gives to despotism a brilliancy, and the necessity of peace for exchange and industry give it a facility to establish itself which it never possessed before ... Absolutism in our age is daringly draping itself in the mantle of liberty, both in Europe and here. What we suffer in this respect is in many cases the after-pain of Rousseauism, which itself was nothing but democratic absolutism. There *is*, in our times, a hankering after absolutism; and a widespread, almost fanatical idolatry of success, a worship of will, whose prostrate devotees forget that will is an intensifier and multiplier of our dispositions, whatever they are applied to, most glorious or most abhorrent, as the case may be, and that will, without the shackles of conscience or the reins of a pure purpose, is almost sure of what contemporaries call success. It is so easy to succeed without principle!⁸⁰

With these Biblical examples and Lieber's admonition in mind, let us now examine some of the practical consequences of a civilisation shaped by a Biblical heritage and some of the costs we incur in repudiating this bequest, just as Esau and the prodigal son spurned theirs by squandering it. At the risk of oversimplifying the many contributing causes, let us carefully consider one scholar's analysis of the economic consequences of Western Christianity, the kind of analysis that is typically narrowed to a simple formula, such as is found in Max Weber's long essay entitled *The Protestant Ethic and the Spirit of Capitalism*. In his article on the

⁸⁰ Daniel Coit Gilman (ed), *The Miscellaneous Writings of Francis Lieber Volume I: Reminiscences, Addresses, and Essays* (J B Lippincott, 1880) 383–4. Lieber's friend and correspondent, Alexis de Tocqueville, similarly wrote against democratic despotism.

‘European Miracle’ the historian Ralph Raico also addresses the question, ‘Why Europe?’

One characteristic Raico notes is its relative lack of external political control. He quotes Jean Baechler, who drew upon Montesquieu, to argue that ‘every political power tends to reduce everything that is external to it, and powerful objective obstacles are needed to prevent it from succeeding.’⁸¹ It should be evident that Baechler is recommending a system of checks and balances.

But such a shorthand answer leaves only implicit what must be made explicit to a largely uncomprehending public. It misses the leaven in the loaf. Does the internal self-government associated with the Christian ethic perhaps have something to do with this relative absence of external guidance: this *laissez faire*? Does political, economic, and moral self-discipline reduce the need for an elaborate regulatory command structure? Is politics, the art of persuasion, something that might flourish best in the absence of despotism, the technology of coercion?

Drawing upon the work of Lord Peter Bauer, David Landes, Harold J Berman, and other scholars, Raico contends that the key to understanding the success of western economic development ‘is to be found in the fact that, while Europe constituted a single civilisation – Latin Christendom – it was at the same time radically decentralised. In contrast to other cultures – especially China, India, and the Islamic world – Europe comprised a system of divided and, hence, competing powers and jurisdictions.’⁸² This is a point that is brought out especially in David

⁸¹ Ralph Raico, ‘The Theory of Economic Development and the European Miracle’ in Peter Boettke (ed), *The Collapse of Development Planning* (New York University Press, 1994).

⁸² Ibid.

Landes's *The Wealth and Poverty of Nations*.⁸³ Here again what we see at work is a harmonising of unity and diversity, an institution of checks and balances, and reliance upon talents and treasure vested in ordinary people. Raico's discussion of Latin Christianity at least demonstrates an acknowledgment of the religious dimension of this story.

Similarly, Francis Lieber attributed the successes of modern societies to the spread and development of Christianity. Among many other scholars, Eugen Rosenstock-Hessy, David Gress,⁸⁴ and Harold J Berman have looked at the Christian Middle Ages as a great wellspring of Europe's political and economic development. Kenneth Minogue notes that the kings of early Christendom were bound by oath to uphold an inherited body of laws that held their kingdoms together.⁸⁵ Thus the rule of law. Medieval Europe was decentralised and yet a common legal order spread through Germanic and English realms.⁸⁶ Thus Hayek's idea of spontaneous order.

Yet the literature on political and economic development, like so much within the social science fields, has long endured what Thomas Sowell calls *A Conflict of Visions*⁸⁷ that pits off the constrained vision, the practical-mindedness of those who promote free markets and investment, against the unconstrained vision of social utopians who emphasise domestic political intervention and international aid agencies. But what's

⁸³ David Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor* (W W Norton, 1998). Landes illustrates the decentralisation by noting the rise of Holland following its war for independence against Habsburg Spain.

⁸⁴ David Gress, *From Plato to NATO: The Idea of the West and Its Opponents* (Free Press, 1998).

⁸⁵ Minogue, above n 66, 26.

⁸⁶ Ruben Alvarado, *A Common Law: The Law of Nations and Western Civilization* (Pietas, 1999).

⁸⁷ Thomas Sowell, *A Conflict of Visions: Ideological Origins of Political Struggle* (William Morrow, 1987) 19–25.

in a name? Such terminology can be maddeningly imprecise. Sowell's two visions are merely more recent handles for what Lieber called Anglican and Gallican liberty. The 'European Miracle,' as Raico calls it, sprang from an experience that was first and foremost concrete and empirical rather than abstract and rationalistic. To paraphrase what Oliver Wendell Holmes, Jr said about the life of the law, we may say that the life of Europe's development is also experience.

Lord Peter Bauer, an adopted Englishman of Hungarian extraction, certainly epitomised the constrained, Anglican vision. In *Dissent on Development* and other works, Bauer criticised the professional tunnel vision of social scientists who were so obsessed with numbers that they have neglected such factors as '[a]bilities and attitudes, mores and institutions, [which] cannot generally be quantified in an illuminating fashion.'⁸⁸ The result is an 'amputation of the time dimension.'

Today it is the occupational disease of bureaucracies and universities to elevate specialisation over general knowledge and reward a fixation on data that can be statistically massaged. As Bauer observed of the state of academic economics: 'The historical background is essential for a worthwhile discussion of economic development, which is an integral part of the historical progress of society. But many of the most widely publicised writings on development effectively disregard both the historical background and the nature of development as a process.'⁸⁹ Here is a nice illustration of the unconstrained vision at work. Tunnel vision, anyone?

⁸⁸ Peter Thomas Bauer, *Dissent on Development* (Harvard University Press, 1972) 326; see also Peter Thomas Bauer, *From Subsistence to Exchange and Other Essays* (Princeton University Press, 2000) 18–24.

⁸⁹ Bauer, *Dissent on Development*, above n 87, 324–5.

As early as the cusp of the twentieth century, the journalist E L Godkin complained that, in Progressive reform circles, *laissez faire* economics had gone out of fashion. Furthermore, the *Declaration of Independence of the United States of America* was regarded as an embarrassment and the *United States Constitution* something to be outgrown. In *Soft Despotism, Democracy's Drift*, Paul Rahe cited Godkin's lament while echoing Lieber's and Tocqueville's earlier warnings. Rahe underscored that Godkin understood

that those who repudiate the notion of natural rights abandon thereby the principles dictating that government be limited in the ends it may pursue and in the means it may employ, and he recognised that in the name of a largely imaginary public interest – divorced from a concern with individual interests and rights, inspired by Rousseau's notion of the general will, and grounded in Hegel's vision of an ethically satisfactory public life – such men would be apt to commit what would hitherto be recognised as monstrous crimes.⁹⁰

An earlier visual rendering of this point may be found in Francisco Goya's etching, 'The Dream of Reason Produces Monsters.'

Others have lauded the ability to vote with one's feet – to escape major inconveniences if not monstrous crimes – as an additional safeguard: 'The possibility of "exit," facilitated by geographical compactness and, especially, by cultural affinity, acted to transform the state into a "constrained predator."⁹¹ Residents of states that are not friendly to

⁹⁰ Paul Rahe, *Soft Despotism, Democracy's Drift: Montesquieu, Rousseau, Tocqueville, and the Modern Prospect* (Yale University Press, 2009) 246.

⁹¹ J Anderson, *Explaining Long-Term Economic Change* (Macmillan, 1992) 28 quoted in Ralph Raico, *The European Miracle* (10 May 2013) <<http://mises.org/daily/2404>>; Albert Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970).

business – high on taxes but low on returns for investment – often have more productive uses to which they can put their time, talent, and treasure. The consequence, of course, is a shrinking tax base where emigration is high. Of course, many countries – Lenin called Russia ‘the prison-house of nations’ – seek to hold onto such ‘human resources’ by denying them an exit visa, but this merely locks everyone into preordained failure, as the dissolution of the Soviet Union illustrates. It is far better for a government to acknowledge that legal plunder is by nature predatory and then take steps to restrain and minimise it through the rule of law. Such an alternative requires a public philosophy that maintains a healthy scepticism toward grand political schemes that seduce people with pie-in-the-sky promises.

The constant element at work in all of these cases is the old demon of envy, a warped form of mimetic desire that seeks to destroy what others enjoy. Envy is certainly one possible expression of mimetic rivalry. Raico turns to the work of the sociologist Helmut Schoeck who wrote a very influential study of envy. ‘Perceived as a grave threat by those at whom it is directed, [envy] typically results in elaborate envy-avoidance behaviour: the attempt to ward off the dangers of malicious envy by denying, disguising, or suppressing whatever traits provoked it.’⁹² All of this unproductive behaviour, including superstitious attempts to ward off the ‘evil eye,’ tends to diminish everyone’s stature by breaking down the bonds of trust and community.

In his book *Envy*, Schoeck, like Max Weber, offers a pragmatic analysis of Christianity’s influence to the contrary:

⁹²

Ibid.

It must have been one of Christianity's most important, if unintentional, achievements in preparing men for, and rendering them capable of, innovative actions when it provided man for the first time with supernatural beings who, he knew, could neither envy nor ridicule him. By definition the God and saints of Christianity can never be suspected by a believer of countering his good luck or success with envy, or of heaping mockery and derision upon the failure of his sincere efforts.⁹³

This may seem like tepid praise but it acknowledges the vitality and hope inspired by a truly revolutionary revelation.

Raico cites a few of the points made by Harold Berman in the first volume of *Law and Revolution* (1983). In fact, Berman's summary of the principal characteristics of the Western legal tradition – its relative autonomy, professionalism, specialised training, and scientific mindset – provides us with a good place to wind down our survey of the building blocks of our tradition of liberty.⁹⁴

In the second part of this essay, let us retrace many of our steps and even reverse course, chiastically, as we examine how that tradition has been put at risk by relinquishing and even deprecating many of the distinctive assets of western civilisation. Berman himself witnessed and warned against these dangers decades ago. His bill of indictment is severe:

Almost all the nations of the West are threatened today by a cynicism about law, leading to a contempt for law, on the part of all classes of the population. The cities have become increasingly unsafe. The welfare system has almost broken down under unenforceable regulations. There is almost wholesale violation of

⁹³ Helmut Schoeck, *Envy: A Theory of Social Behaviour* (Liberty Fund, 1987)

76.

⁹⁴ Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 7–10.

the tax laws by the rich and the poor and those in between. There is hardly a profession that is not caught up in evasion of one or another form of governmental regulation. And the government itself, from bottom to top, is caught up in illegalities. But that is not the main point. The main point is that the only ones who seem to be conscience-stricken over this matter are those few whose crimes have been exposed.⁹⁵

What a picture he paints! Five centuries after Luther took his stand on grounds of conscience and two centuries after Madison saw conscience as the most sacred property, where do we stand today? Is the West facing foreclosure? Might the corporation we call our ‘perpetual union’ be placed into receivership? The attacks by critical legal theorists and other postmodernists on legal formalism now threaten to sweep aside rule, precedent, policy, and equity:

In the name of antiformalism, ‘public policy’ has come dangerously close to meaning the will of those who are currently in control: ‘social justice’ and ‘substantive rationality’ have become identified with pragmatism; ‘fairness’ has lost its historical and philosophical roots and is blown about by every wind of fashionable doctrine. The language of law is viewed not only as necessarily complex, ambiguous, and rhetorical (which it is) but also wholly contingent, contemporary, and arbitrary (which it is not). These are harbingers not only of a ‘post-liberal’ age but also of a ‘post-Western’ age.⁹⁶

This contempt for law – antinomianism is the word for it – is the spectre that haunts the West today. The question is whether the well-tempered engine of the American Constitution with its separation of powers and its checks and balances is any match for a post-Christian social order.

⁹⁵ Ibid 40.

⁹⁶ Ibid 41.