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# **RIVAL TRADITIONS OF LIBERTY: AMERICA VS. THE EUROPEAN UNION**



Steven Alan SAMSON\*

## **THE CONSTITUTION OF LIMITATIONS**

A study of the Declaration of Independence 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 July 18, 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

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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..." (Kurland & Lerner 2000).

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). As we confront our sins, troubles, and shortcomings, we face the perennial question: "How should we then live?" (Ezek. 33:10).

Institutions and entire civilizations 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 (2001), who has written so eloquently on mimetic desire and scapegoating, believes that we must confront the dark side of what we are collectively prepared either to endorse or to sacrifice.

Harold J. Berman, a pioneer in the study of the interaction of law and religion (1974, 1993), spoke of the "essential religious foundations of a just and enduring legal system." John Witte Jr., his student and colleague, shares a story from Berman's 2006 lectures in China when Berman was asked "whether one needed to believe in God in order to have a just legal order." He replied: "It would certainly help!" but then added:

"You don't necessarily have to believe in God, but you have to believe in *something*. You have to believe in law at least. If you can't

accept God, then just focus on the law that God has written on all of our hearts. Children intuitively sense this law within us. Every child in the world will say, »That's *my* toy.« That's property law. Every child will say, »But you *promised* me.« That's contract law. Every child will say, »It's not my fault. He hit me first.« That's tort law. Every child will say, too, »Daddy said I could.« That's constitutional law. Law ultimately comes from our human nature, and our human nature is ultimately an image of God” (Witte 2013).

Let's 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 specialized in the Middle Ages. Rosenstock, who devoted his life to studying the inner dynamism of Christian civilization (1938), anticipated the future development of a planetary society in which local customs and differences would retain their vitality (1966). But can they? This is the question repeatedly asked about Europe and the West generally. 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 in both economics and constitutional law.

In the third chapter of *The Constitution of Liberty*, Friedrich A. Hayek (1960) draws on Francis Lieber's 1849 newspaper essay, "Anglican and Gallican Liberty" (1880b, pp. 371-88) to make a crucial distinction that could help dispel much of the confusion that infects our political discourse. Lieber developed a contrast between two very different traditions of liberty: "one empirical and unsystematic," as Friedrich 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.” (Hayek, 1960, p. 54)

Lieber and Hayek here summarize 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 - called “spontaneous order” (1960, p. 160). 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,” which requires holding resources in reserve. The other side of risk management - “anticipation” - represents the urge to systematically cover every need and prepare for every eventuality (1983, pp. xv-xxv). Taken to an extreme, the managerial state itself becomes a total package and an exclusive provider: what Hilaire Belloc (1977) called “the servile state.” If we start with the definition of politics given by the political scientist Harold Lasswell - “who gets what, when, how” - it is reasonable to conclude that politics is inevitably contested terrain.

Lieber recognized that civil liberty is relative. It can follow the decentralized, 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 into a system that is likely to kill with kindness. Here we may recognize the “false philanthropists” Frederic Bastiat (2007) noted in his essay, *The Law*. Civil liberty also varies at various stages of civilization. For the ancient Greek, as Lieber observed, “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 city-state, which is the source of his identity. But for moderns this is a totalitarian conception. From the standpoint of what Lieber called 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 [God rather than the City] we live and move and have our being” (Acts 17:28). As Lieber recognized, 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.” Lieber’s admonition extended to that species of privatized public power Bastiat called “legal plunder.”

Lieber’s ideas about *Civil Liberty and Self-Government* (1877), the title of his last major treatise, come much closer to the vision of the American Founders. But such ideas are meaningful to people only as long as we are prepared to recognize and state what is usually unseen and unsaid. The Founders’ moral vision of a self-governing community must be understood in the context of the Judeo-Christian civilization that shaped them. Our Constitution of 1787 binds citizens together into a moral community. It is 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 from outside by a distant king and Parliament.

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.

Virtually from the beginning of the colonial period early in the seventeenth 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 (Lutz 1988, 1992, 1998). 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” (1963, p. 5).

The New England colonies were especially innovative in fusing Puritan theological and political ideas about covenants into a coherent and very practical constitutional tradition, continuing and further developing an equally practical, as opposed to theoretical, Biblical republicanism modeled after the “Hebrew Republic” (Nelson 2010; Wines 1980).

Here we can detect one root that marks the difference between Anglican liberty and Gallican liberty, between the character of the American Revolution and the French Revolution. Among the noteworthy accomplishments of the New England clergy, as noted by Alice M. Baldwin (1965) and Ellis Sandoz (1991), 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, the Articles of Confederation, and the subsequent 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 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 (2009) believes to be irrevocable.

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.” 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 in the Capital Laws of section 94.

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 (2004) 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 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.

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* (1989) 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. 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 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* (Cooke 1961).

Early in the eighteenth 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*, where 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 (1961, pp. 250-57).

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," as René Girard called it, which can result from envying one's neighbors 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 within their particular States, but will be unable to spread a general conflagration through the other States..." (1961, p. 64).

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" (1961, pp. 347-48). 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.

Until the ratification of the Seventeenth Amendment 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 the Senate, the "federal Legislature" (1961, p. 255).

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” (1961, p. 349). 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?” (1999, p. 56). Madison suggested that self-interest can 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

channeling of self-interest is no substitute 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” (Minogue 2000, pp. 105-06). 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.

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” (2000, p. 106). This sort of moralism resembles what Michael Polanyi (1962, pp. 231-35) has called “moral inversion” and Roger Scruton (2002) the “culture of repudiation.” 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 summarized 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 moralizing the world... Moralizing 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 civilization has immemorially found incompatible with its free and independent customs. The

promise is justice, the price is freedom" (2000, p. 106).

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, Minogue's political moralism - but, whatever form it takes, it tends to deny individual citizens standing and to 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 (Cooke 1961, p. 348). But another and somewhat related security listed in *Federalist 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 (1961, p. 386).

Here we come to the great source of political corruption down through history: dependency and its partners, clientelism, cronyism, and rent-seeking. 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 favor, his protection, Bonasera would become his retainer, thus a minor member of his retinue (Puzo 1969, pp. 29-31).

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 (Rahe 1997, pp. 133-53).

The political history of western civilization 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 Rahe calls a politics of distrust. To sum up the argument in favor of a politics of distrust, or what Thomas Hobbes called "diffidence," 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, & Congress & Assemblies, judges & 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..." *Homo homini lupus*: man is a wolf to man (Huizinga 1964, p. 151). As Jefferson noted in 1798, "free government is founded in jealousy, and not in confidence" (Kentucky Resolutions).

### **FREEDOM AND THE ABUNDANT LIFE**

Western civilization - 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 secularized order.

Soon after the death of his friend and correspondent Alexis de Tocqueville, who had earlier been forced into retirement from public life during the reign of Napoleon III, 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!" (1880a, pp. 383-84)

Lieber had the reign of Napoleon III in mind when he spoke in 1859, but the 20th century was to supply countless examples of "democratic absolutism" taken beyond "Gallican liberty" to the extreme of despotism.

Ralph Raico draws upon the work of Lord Peter Bauer, David Landes, and Harold J. Berman in his article "The European Miracle." He holds that the key to understanding the success of western economic development "is to be found in the fact that, while Europe constituted a single civilization - Latin Christendom - it was at the same time radically decentralized. In contrast to other cultures - especially China, India, and the Islamic world -

Europe comprised a system of divided and, hence, competing powers and jurisdictions” (Raico). This is a point that is brought out especially in David Landes’s *The Wealth and Poverty of Nations* (1998). Landes illustrates the role of division and decentralization by noting the rise of Holland following its war for independence against Habsburg Spain. Here again what we see at work is a harmonizing of unity and diversity, the institution of a system of checks and balances, and a reliance upon the time, talent, and treasure vested in and invested by ordinary people.

Similarly, Francis Lieber attributed the successes of modern societies to the spread and development of Christianity (1880b). Among many other scholars, Kenneth Minogue, David Gress (1998), and Ruben Alvarado have looked at the Middle Ages as the 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 (2000, p. 26). Thus the rule of law. Medieval Europe was decentralized and yet a common legal order spread through the English and Frankish realms (Alvarado 1999). Thus Hayek’s idea of spontaneous order (1960).

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” 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 emphasize domestic political intervention and international aid agencies (Sowell 1987, pp. 19-25). But what’s 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. What Raico calls the “European Miracle” sprang from an experience that was

first and foremost, as Hayek also noted (1960), concrete and empirical rather than abstract and rationalistic. To paraphrase what Oliver Wendell Holmes, Jr. said about the life of the law, we may likewise say that the life of Europe's development has not been logic; it has been experience. It is a point made earlier by the Scottish common sense realists who influenced the American Founders (Curry 2015).

Lord Peter Bauer (1972, 2000), an adopted Englishman of Hungarian extraction, certainly epitomized the constrained, Anglican vision. In *Dissent on Development* and other works, Bauer criticized 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” (Bauer 1972, p. 326). The result is an “amputation of the time dimension.”

Today it is the occupational disease of bureaucracies and universities to elevate specialization 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 publicized writings on development effectively disregard both the historical background and the nature of development as a process” (1972, pp. 324-25). Here is a nice illustration of the unconstrained vision at work. Tunnel vision, perhaps?

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 was regarded as an embarrassment and the 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 recognized 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 recognized as monstrous crimes" (2009, p. 246).

An earlier visual rendering of this point about the "unconstrained vision" may be found in Francisco Goya's etching, "The Dream of Reason Produces Monsters." No one is altogether immune to its blandishments.

Indeed, Francis Lieber's successor to the political science chair at Columbia University, John W. Burgess, similarly warned that the United States itself was "on the point of substituting despotic government at home and imperialism abroad for our original distinctly American system of popular sovereignty, limited government, individual immunity, and non-interference abroad" (Burgess 1923, p. 111).

So let us begin to compare the American tradition of constitutionally-limited government, which is today mostly hidden under a welfare-warfare state overlay, with the European version of Gallican liberty, which appears to be a "stalking horse" for global governance. Here I wish to cite a few witnesses before concluding.

## PHILADELPHIAN SOVEREIGNTY VS. A COMMON EUROPEAN HOME

J. H. H. Weiler, director of the Jean Monnet Center at NYU, believes constitutions are supposed to do three things: organize state functions, define the relationship between citizens and the state, and embody “the *ethos* and the *telos*” of a given political community. As George Weigel notes: “What Europe’s secularists seem to have forgotten, Weiler suggests, is the third function of constitution-making... Constitutions are the repository, the safe-deposit box, of the values, symbols, and ideas that make a society what it is” (2005, p. 65).

Let us next examine what the American constitutional scholar, Jack Rakove (2009), had to say about the earlier Constitutional-Treaty, which was rejected by the French and Dutch electorates at referenda held in 2005. The former French president, Valéry Giscard d’Estaing, compared his role in drafting it at the Convention on the Future of Europe in 2003 with the contributions of Benjamin Franklin and Thomas Jefferson at the Philadelphia Convention of 1787. But Jefferson was only a distant observer and he later advocated a canon of constitutional interpretation that favored the reserved powers of the states over the expansive view of federal authority held by his predecessors as president. In this regard, Giscard d’Estaing was closer to Hamilton, who favored a loose construction of the constitutional language.

Rakove claims that early state constitutions were actually nothing more than statutes created by legislatures. Instead, Jefferson and others concluded that a true constitution had to be framed by a body appointed for that sole purpose and then submitted to the people for their approval. Rakove argued that the EU’s original constitutional treaty was, by contrast, more of a treaty among nation-states than a constitution for a common people. It

would not deprive these states of the power to opt out of the union. In 2003 the EU had little authority even over war and diplomacy, and lacked the power to tax; but its economic and social authority already went well beyond anything the US founders envisioned.

From an American perspective, the proposed constitution is easy to disparage, especially its long list of social rights, its weak protection of “subsidiarity” or a decentralized federalism, the lack of political accountability to the people, and its creation of a dual presidency. Still, Rakove believed that the proposed constitution was a significant step toward the centralization of public policy, especially the federalization of economic and social “competences.”

Unlike the early American states, all EU members are nation-states possessing full political sovereignty and a self-conscious sense of their historical people hood; each is aware of the consequences of losing its capacity to assert its national interests. Rakove believed that the new, intensely nationalistic members entering the EU from the old Soviet bloc would be loath to see their stature as sovereign nation-states, capable of acting on the world stage, so soon submerged to an amorphous entity. As a result, he believed that 1) member states would be unlikely to cede their right to conduct their own foreign policy to the EU, and 2) the formal requirement for unanimity would place the entire project in jeopardy (2009).

The American framers got around a similar problem by abandoning the rule of unanimity and requiring the ratifying conventions to vote on the Constitution in its entirety rather than piece by piece. Two advantages resulted: 1) it produced a completely unambiguous decision that bestowed a deep legitimacy upon the whole process; and 2) the direct appeal to the sovereignty of the people powerfully affirmed that the U.S. Constitution would be the supreme law of the land.

On the European side, the political identity of this new entity that Euro-federalists sought to create was left undefined. Critics charged that the EU's political vision is indelibly elitist, bureaucratic, and technocratic and that the new Europe would never mobilize the patriotic affections of the citizens whose lives were to be regulated. Rakove expected that the process would develop incrementally closer to the British model. But now that Britain is seeking to secede, Brexit might leave the centralizers in even greater control.

“The project of European integration has always been more an exercise in improving coordination than in achieving genuine political integration; Alexander Hamilton and James Madison could have their argument for and against an expansive interpretation of presidential authority in foreign affairs because the main issue, national authority over foreign relations, had already been settled; but no such consolidation of external relations is proposed for the EU” (Rakove, 2009).

Todd Huizinga (2016), a retired American foreign service officer who worked directly with agencies of the European Union, has written a book entitled *The New Totalitarian Temptation: Global Governance and the Crisis of Democracy in Europe*. Europeans themselves have long complained about a “deficit of democracy.” But European institutions were never designed to reflect the will of the public - either a general European public or the will of the citizens of its member states. Instead, like Rousseau's general will, these institutions represent something resembling what children's rights advocates have called “the best interests of the child.” It is ultimately the vision of what the Frankfurt School philosopher, Jürgen Habermas, has described as “a global domestic politics without a world government... embedded within the framework of a world organization with the

power to impose peace and implement human rights” (Huizinga 2016, p. 23). This sounds very much like Gallican liberty for an age of global governance. But, as John Fonte has objected, “the effect of [such] policies would be fundamentally at odds with the basic principles and practices of self-government.” This raises a question: “Do Americans, or other peoples, have the moral right to rule themselves or must they share sovereignty with others?” (Huizinga 2016, p. 21; Fonte 2011, pp. 342, 366)

Huizinga addresses the practical implications of what Fonte calls the “Philadelphian sovereignty” (Fonte 2011, pp. 36-38) reflected in the American Constitution written in Philadelphia in 1787. As Fonte put it in his book *Sovereignty or Submission*:

“For most of the past half century, the U.S. State Department has routinely qualified American ratification of international treaties with stipulations (in written ‘reservations, understandings, declarations,’ or RUDs) that the United States will not accept anything in the treaty as valid if the treaty provisions violate the U.S. Constitution. If there is a point dispute between an international treaty and the Constitution of the United States, the Constitution trumps the international convention” (2011, p. 8).

Huizinga echoes the Declaration of Independence when he notes that that “sovereignty resides in the citizens of a nation, ‘endowed by their Creator with certain unalienable rights,’ not in the government of the nation. The power and authority of the U.S. government are derived from the American people, and the American people alone. This is what John Fonte calls ‘Philadelphian sovereignty,’ or ‘democratic sovereignty,’ which means ‘the sovereignty of a self-governing free people’” (Huizinga 2016, p. 120).

The American Constitution describes itself as the “supreme law of the land,” a phrase that is derived from the English Magna Carta. “By contrast,” as Huizinga notes, “the EU’s goal of creating a

post-nation-state, supranationally governed world - in which nations give up key aspects of their national sovereignty to a web of international institutions that administer and enforce a body of international law - is diametrically opposed to Americans' instinctive refusal to recognize as legitimate any international organization, law, or treaty that claims any authority over Americans above the U.S. Constitution, particularly if that organization, law, or treaty claims any authority over Americans above the U.S. Constitution, particularly if that organization, law, or treaty contradicts the Constitution or violates Americans' constitutional rights" (2016, p. 121).

The touchstones of the American tradition of "Philadelphia sovereignty," much like Francis Lieber's Anglican liberty, are the rule of law, consent of the governed, and constitutionally limited government. Americans have an aversion to signing a blank check over to anyone. And yet, we see much the opposite on the eastern shore of the Atlantic. Here is the Polish philosopher Ryszard Legutko:

"Poland shook off the Communist yoke at a time when the Western world had already reached a phase of considerable homogeneity and standardization. Therefore as soon as the Poles liberated themselves and started aspiring to the liberal-democratic world, Poland lost its previous exotic charm as a country in which workers, intellectuals, and priests defied communism, prayed to God, and risked their freedom in defense of truth, good, and beauty. The liberal-democratic world did not want such exoticism in their midst, and would have been embarrassed if the Poles had persisted in their initial ambitions. It expected a different Poland, the one that was indistinguishable from other nations, following this or that pattern of liberal-democratic order, provided it covered all areas of social life. The

Poles grasped this quickly and the majority of them adapted to the expectations without protest and without regret” (2016, p. 40).

The British philosopher Roger Scruton similarly addressed what he called “The Totalitarian Temptation” and devoted a chapter in *A Political Philosophy* to “Newspeak and Eurospeak” (2006, pp. 161-75). By contrast, in *Democracy without Nations?*, the French political philosopher Pierre Manent has observed that America unapologetically acts like a nation-state while, in Europe, the idea of the nation is giving up the ghost (2007, pp. 24-25).

Finally, we may note that the Italian philosopher and politician, Marcello Pera, raised concerns similar to Weiler’s when he addressed Jürgen Habermas’s concept of constitutional patriotism, which is supposed to be Europe’s politically unifying and binding element. Pera cited Habermas’s 2004 debate with then Cardinal Ratzinger in terms that recall Francis Lieber’s distinction between Anglican and Gallican liberty:

“Cardinal Ratzinger replied to Habermas, ‘[In Europe] there are no longer any motivations for our great ethical principles or for human dignity, and we have finally ended up with positivism because Habermas’ constitutional patriotism is positivism. The constitution by itself produces morality. But that is untrue. It cannot do so, it needs power from the past and we must find and reawaken those powers.’ This is true. Constitutional patriotism is constitutional positivism. Presenting its principles as procedural and discursive axioms cannot change its substance. In the view of Habermas, it is the Charter that produces identity, and not the other way around.”

“Thus the ethical deficit of constitutional patriotism (and of the Charter [of Nice], which has adopted its philosophy) must be filled. But with what shall it be filled? There is no doubt that in speaking of the ‘powers from the past’ Cardinal Ratzinger was referring to the Judeo-Christian tradition. It is in this tradition that the concept of the

person, endowed with dignity because it was created in the image of God, sinks its deepest roots. If constitutional patriotism wishes to become *thick* and relevant to Europe, and appropriate for its history, why not fill its deficit with an appeal to that tradition? Why not recognize Christianity as its own basis or as a part of itself? The official answer is that any reference to its history would be divisive and not inclusive. But the real answer is: because liberal European culture accepts the secular equation [*i.e.*, equating “liberal” with “secular”] and rejects Christianity. But by doing so, and in the absence of adequate substitutes (constitutional patriotism is not an adequate substitute because it contains a deficit it cannot fill), liberal European culture can produce no notion of European identity, either religious or secular. In the end, it opposes the very thing it wishes to promote: the unification of Europe” (Pera 2011, pp. 94-95).

Pera concludes by urging Europe and the West to save liberalism and liberal freedoms by appreciating their Christian heritage and roots.

## CONCLUSION

In his masterful summary of “The European Miracle,” Ralph Raico cited 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, specialized training, and scientific mindset (Berman 1993, pp. 7-10) - provides us with a good place to wind down our survey of the building blocks of our tradition of what Francis Lieber called “institutional liberty” (Samson 1996).

Berman himself witnessed and warned decades ago of the direction and dangers posed by the modern administrative state. 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 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” (Berman 1983, p. 40).

What a picture Berman 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 heritage of 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” (1983, p. 41).

This contempt for law - antinomianism is the word for it - is

the specter that haunts the West today. The question is whether the well-tempered engine of the American Constitution with its separation of powers and the European Union with its “democratic deficit” are any match for a post-Christian social order.

### APPENDIX: SOVIET ARCHIVES

A very intriguing but neglected witness to the pre-Maastricht phase of the European project is a booklet by Vladimir Bukovsky and Pavel Stroilov entitled *EUSSR*, which was published in London in 2004. Bukovsky, a well-known Soviet-era dissident who was exiled in 1977, returned to the Soviet Union around the time of the August coup in 1991 in an effort to get access to Soviet archives. Although his initial attempts were thwarted, Bukovsky subsequently wrote an account, entitled “The Night Belongs to the Marauders,” of how he succeeded in bringing a collection of thousands of pages of documents, “The Soviet Archives,” back to the West. After failing to find a publisher, he posted the archives on the Internet and added this account to the website in place of a formal introduction (Bukovsky, c. 1998).

Stroilov has his own story to tell. Posing as “a naïve, shy, and respectful student,” Stroilov committed his own “grand theft aggravated by high treason” when he “covertly copied thousands of secret Politburo documents from the Gorbachev Foundation Archive, and then smuggled them out of Russia” (Stroilov 2011, pp. 9-10). *EUSSR* is one of the first fruits of the two men’s collaboration. Claire Berlinski (2010) later published an article entitled “A Hidden History of Evil” that asks: “Why doesn’t anyone care about the unread Soviet archives?”

What follows is a sampling of passages from the authors' narrative in the 44 page booklet, *EUSSR*, as well as excerpts from Soviet leader Mikhail Gorbachev's conversations with members of various delegations that met with him to discuss the future of Europe. These conversations reveal much of the vision and political maneuvering that guided those who designed the European Union. Direct quotations by the various speakers are indicated by italics.

On March 26, 1987, the Soviet Politburo officially embraced the concept of a "Common European Home." "Gorbachev formulated the gist of this policy briefly and clearly, like a battle order: *To strangle in embrace.*" Gorbachev announced that "*in foreign policy Europe is irreplaceable. It means the strongest bourgeoisie in the world, not only economically, but politically as well*" (2004, pp. 3-4).

Why did Gorbachev embrace Europe? "He had no choice," according to Bukovsky and Stroilov. The "'cost of Empire' had become virtually unsustainable... The only way to modernize the Soviet economy was to use the 'class enemy's' technological potential." On the one hand, Gorbachev "feared the growing economic dependence of the Soviet satellites on the West. So he hoped his friendship with Europe would secure the western borders of his empire. On the other hand, once the other communist regimes in Europe were already fraternizing with the West, he felt it necessary to strengthen their embraces with the strangling grasp of the Soviet Union" (2004, pp. 4-5).

"Gorbachev mentioned the Soviet experience of relations with Finland, and with Austria as well, as a good example of *constructing new international relations*. Now he planned to expand them to continental scale." But "NATO kept preventing finlandization of the whole of Europe" (2004, pp. 5-6).

Gorbachev stated as his first objective: “*Not to split Western Europe from the USA, but rather to oust the USA out of Europe.*” Here he cited two realities to be seen, analyzed, and used in setting this goal: 1) the “diversity” of Europe required suitable approaches to every country, to every political party, to various circles of various societies. 2) European integration required analyzing which aspects of this integration were good for the Soviet Union and which were not (2004, p. 6).

“Before the mid-80s,” the authors observe, “Soviet leaders and most of the Western Left were hostile towards the European Communities, seeing them as a result of a conspiracy between multinational corporations and liberal politicians” (2004, p. 7). The world-wide crisis of socialism of the late 1970s, however, made them start reconsidering this attitude, perhaps in light of the United Front strategy that had been pursued decades earlier.

Alessandro Natta, secretary of the Italian Communist Party, noted that “*the ideas of markets and competition are getting stronger roots... The position of the communist parties in the West is at a critical stage... There is a retreat, a loss of influence in the masses.*” The problem, he noted, is that it is difficult to introduce socialism into a country like France unless “*accompanied by similar attempts in other countries. Any progressive reform needs support from other progressive forces in Europe. Indeed, trying to build socialism just in one country one would face a very unpleasant choice; if you keep building socialism you lose competitiveness; if you take care of competitiveness, you have no socialism; you cannot combine these two things, even armed cordons along the borders and other kinds of iron curtains do not help; the only solution is to impose socialism on your competitors as well*” (2004, pp. 7-8). This last point is a very revealing admission that lends further support to Bastiat’s assertion that socialism is a form of “legal plunder.” Thus these European rivals needed to be held to the same disadvantages.

As Bukovsky and Stroilov recognized: “The new attitude of the Left to European integration was predetermined by this very consideration; this attitude used to be cold, if not worse, for many decades, but now they realized that integration was about the only way to salvation; many years of their struggle for power in independent European countries proved fruitless; the only thing left to do was to try to seize control over the whole of Europe at once” (2004, p. 9).

Natta remarked: *“The creation of a Single Market is not just a project but a reality of Europe’s development... However, in making these alliances we must preserve the communist identity of the party; the communist identity is a living process, not determined once and forever”* (2004, pp. 9, 11).

Gorbachev agreed: *“We should seek points of interface, temporary alliances are possible as well; but the true alternative to the bourgeois parties are the communists”* (2004, p. 11).

Natta: *“We must recognise that the ‘welfare state’ brought great achievements to the working people”* but he also noted critically that *“a bureaucratic apparatus, which serves itself, has swelled. It is interesting that a certain similarity with situation, which you call stagnation, can be seen here”* (2004, p. 12).

Gorbachev: *“‘Parkinson’s law’ works everywhere [work grows to fill the time available to complete it]”* (2004, p. 12).

Natta: *“Any bureaucratisation encourages the apparatus to protect its own interests and to forget about the citizens’ interests. I suppose, that is exactly why the Right’s demands of re-privatisation are falling on a fertile ground in Western public opinion”* (2004, pp. 12-13).

At this juncture Bukovsky and Stroilov drive home a key point: “Indeed, the cadres of ‘welfare state’ devastated the European economy no less than a military invasion would do. But its architects were not honest enough to recognize they had made

basic mistakes in their calculations. They preferred to move to opposition, gloomily leaving the others to clean out the debris of this beautiful construction and lament the ensuing 'infringements on the working people's interests.' Nevertheless, the picture was clear even to them. The experiment of the century had failed. Now they had to retreat, reshuffle the forces and try again. As Gorbachev said, *let the conservatives take responsibility for the re-organization of the economy. The communists ought to bring home more topical slogans*" (2004, p. 13).

The authors concluded from this conversation that the Left decided to step back and unite its forces in order to hold power for a longer time in the future. They noted that Natta looked ahead to 1992 when the planned single market would erode "*all the national frontiers: geographic, fiscal, economic. This will lead to the creation of a single European currency and [a] European Central Bank. This process will be complex and will inevitably cause collisions of different opinions. The Left has a chance for success*" (2004, p. 13).

Bukovsky and Stroilov underscore Natta's grasp of the strategic dimension: "The same reasons which made the Western communists reconsider their policy this way, led their Eastern comrades to the conclusion about the need for 'perestroika.' The difference was that the socialist experiment in the East had gone further, than in the West. This made the task of healing the economy much more difficult there. In addition, the Communists in the East had to do this dirty work themselves, as there were no conservatives to pass the buck to. And, of course, the Soviet 'perestroika' was a failure, while the Western 'perestroika' was a success. The Western Left really managed to create this wide alliance, which is still growing in Europe" (2004, pp. 13-14).

Gorbachev's *perestroika* reforms thus helped make the European Left's pro-Soviet stance acceptable. For Bukovsky and

Stroilov, this is a matter of crucial importance: “For that alliance of the European Left was originally supposed to have been pro-Soviet. Therefore, it was important to make the pro-Soviet stance respectable first, and that was what Gorbachev’s reforms were about... Judging from these archive documents, it was international problems rather than internal ones which made the Soviet leaders start reforms. Not a big surprise, bearing in mind that the purpose of the Soviet Union’s existence was world revolution. The Soviet people lived in an eternal struggle. Even the most peaceful points of the Soviet agenda would always be formulated as a ‘declaration of war’” (2004, p. 14).

On January 18, 1989, two days before a new American president was due to take the oath of office, a high-level delegation representing the Trilateral Commission visited Mikhail Gorbachev, ostensibly to encourage the Soviets to begin integrating into the world’s economic and financial institutions (GATT, IMF, etc.). They included David Rockefeller, Henry Kissinger, and PM Nakasone. Former French President Valéry Giscard d’Estaing said the following to Gorbachev: “*Nowadays Western Europe is experiencing a perestroika, changing its structures. It is difficult to say when this will happen: five, ten or twenty years later. But a new modern federal state will emerge in Western Europe. That is where we are going, and the USSR should be prepared to communicate with a large single state of Western Europe. This future state will be open, ready for all forms of co-operation. But then, perhaps, an issue of accession of some other states, de jure or de facto, will emerge... We are not going to ‘stir up’ East European countries, to shake the basis of their stability... [W]e would like to know, if some East European countries, while preserving the ties of security with the USSR, wish to become associate members of the EEC, what would be your attitude to that idea?*” (2004, p. 215)

Henry Kissinger added: *“My colleagues in the Trilateral Commission and I want to contribute in a constructive manner to the building of this Europe, in which both the USSR and the USA would have played a similarly positive role”* (2004, p. 26).

Bukovsky and Stroilov react indignantly: “Please note that this conversation was taking place in January 1989, when even the Treaty of Maastricht was not drafted yet, let alone the Treaty of Amsterdam, the Treaty of Nice, or the European Constitution, not to mention the fact that no referenda on any of them was held yet. How did they know, much before we have expressed any consent to these dramatic changes in our homelands, what will definitely happen in 20 years? Who are these people? Why do they have such enormous power over our lives that we all feel irrelevant, our wanted democracy notwithstanding?... What is Giscard’s role in the construction of [the] European super-state? And what is the connection between this and his recent authorship of the notorious European Constitution? Above all, what has the Trilateral Commission to do with all that?” (2004, p. 26)

These questions remain today. Short of finding and giving careful scrutiny to archival records, such as those obtained from Soviet archives by Vladimir Bukovsky and Pavel Stroilov, it is not unreasonable to conclude with the authors that ‘the whole [EU] project is nothing but a clever attempt by a bankrupt socialist nomenklatura to salvage their bankrupt utopian dream and their unearned position of power.’”

“When they ask us to vote for their numerous treaties, why don’t they simply say: Vote for Socialism!”...

“When they force impoverished nations of Eastern Europe to join their shining city on the hill by false promises of prosperity, why don’t they say in plain language: Here is a chance for you to live under socialism again!”

“When they offer us this monstrous grossbuch (big book) of a Constitution, as unintelligible and as lengthy as Karl Marx’s *Das Kapital*, why don’t they just say: Here is a roadmap to the European Union of the Soviet Socialist Republics. Vote for it!”

“But they don’t because they know very well that no nation on earth will ever vote voluntarily for this bankrupt idea. Instead, they use every deception possible to conceal the true nature of the beast” (2004, pp. 41-42).

As noted by John Fonte: “From the 1950s through the first decade of the twenty-fifth century, European integration proceeded by what has been called the ‘Monnet method’... The Monnet method has been called ‘integration by stealth,’ even by supporters of the European Union” (2011, p. 121).

Perhaps the best advice for unearthing a hidden agenda is to scrutinize any such political initiative - under whatever guise it assumes - with a “gimlet eye.” We must endeavor to discern the purposes of a policy not so much from the reasons for it that are publicly stated but from the consequences that result. We should always ask: *Cui bono?* Who benefits?

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