

AMERICAN CONSTITUTIONAL THEORY AND HISTORY: IMPLICATIONS FOR EUROPEAN CONSTITUTIONALISM

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It is perhaps not impertinent to suggest that American constitutional theory and history, owing to the longevity of the document that is their subject, hold lessons for constitutionalism everywhere, but especially for European constitutionalism—the more recent and ever evolving treaties that serve as a “Constitutional Charter” for the European Union. An American constitutionalist looking east today, seeing everything from Brexit to Grexit plus the reactions in European capitals, must be struck by the tension in the EU between exclusion and inclusion in its many forms, including individualism and collectivism. Those themes underpin my discussion here. The issues surrounding them are universal. They are at the heart of the human condition.

In America we wrestled with them at our founding over 200 years ago, again in the aftermath of our Civil War, and yet again with the

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advent of Progressivism, which culminated in our New Deal constitutional revolution. And we are still wrestling with them. Because America was founded on philosophical principles—First Principles, coming from the Enlightenment—it is particularly appropriate that we look at that experience to shed such light as we can on this more recent European constitutional experience.

But my more immediate concern is this: In liberal democracies today—nations constituted in the classical liberal tradition—we see the same basic problem, albeit with significant variations. It is that the growth of government, responding mainly to popular demand, has raised seemingly intractable moral and practical problems. First, increasing intrusions on individual liberty; and second, the unwillingness of people to pay for all the public goods and services they are demanding. Therefore, governments borrow. And that has led to massive public debt that saddles our children and grandchildren, to bankruptcy, and to the failure of governments to keep the commitments they have made.

In Italy, we need only look east, to the birthplace of democracy. But Greece is not alone in this. Nor are we in America immune. Cities like Detroit have gone bankrupt. So too, just recently, has the American territory of Puerto Rico. The state of Illinois has a credit rating today just above junk status, and Connecticut and New Jersey, among other states, are not far behind. At the national level, America's debt today exceeds \$20 trillion—that's trillion—more than double what it was only a decade ago. And our unfunded liability vastly exceeds that (Cogan 2018).

What has this to do with constitutionalism? A great deal. Constitutions are written, after all, to discipline not only the governments they authorize but the people themselves. The point was famously stated by James Madison ([1788] 1961), the principal author of the U.S. Constitution. "In framing a government which is to be administered by men over men, the great difficulty lies in this," he wrote: "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," Madison concluded, "but experience has taught mankind the necessity of auxiliary precautions."

The principal such precaution, of course, is a well-written constitution. But no constitution is self-executing. It is people who

ultimately execute constitutions. In the end, therefore, the issue is cultural, a point I will come back to.

America's Founders were deeply concerned with the problem of undisciplined, unlimited government. After all, they had just fought a war to rid themselves of distant, overbearing government. In drafting the Constitution, therefore, they were not about to impose that kind of government on themselves. In fact, during the ratification debates in the states, there were two main camps—the Anti-Federalists, who thought the proposed Constitution gave the government too much power, and the Federalists, who responded by pointing to the many ways the proposed Constitution would guard against that risk. The Federalists eventually won, of course, but the point I want to secure is that there was not a socialist in the group! There were *limited* government people, the Federalists, and *even more* limited government people, the Anti-Federalists.

So under a Constitution that has not changed that much, how did we go from limited to effectively unlimited government? The answer lies in the fundamental shift in the climate of ideas that began with Progressivism at the end of the 19th century, which the New Deal Supreme Court institutionalized in the 1930s. To illustrate that, I will first look closely at America's founding documents: the Declaration of Independence, signed in 1776; the Constitution, ratified in 1788; the Bill of Rights, ratified in 1791; and the Civil War Amendments, ratified between 1865 and 1870, which corrected flaws in the original Constitution. Together, those documents constitute a legal framework for individual liberty under limited government, however inconsistent with those principles our actual history may have been.

I will then show how progressives rejected the libertarian and limited government principles of America's Founders and how they eventually turned the Constitution on its head, not by amending it but through political pressure brought to bear on the Supreme Court. The problems that have ensued include the ones just noted: less liberty and increasing debt. But perhaps of even greater importance, for eight decades now the Supreme Court has struggled to square its post-New Deal decisions with the text and theory of the Constitution. That amounts to nothing less than a crisis of constitutional legitimacy.

And again, the basic reason for that crisis is the fundamental shift in outlook. Many Americans today no longer think of government as

earlier generations did. Whereas the Founders saw government as a “necessary evil,” to be restrained at every turn, many today think that the purpose of government is to provide them with vast goods and services, as decided by democratic majorities.

The Importance of Theory

I come, then, to the first important point I want to flag. You cannot understand the U.S. Constitution unless you understand the moral and political theory that stands behind it. And that was outlined not in the Constitution but in the Declaration of Independence (Sandefur 2015). The Constitution was written in a context, as were the later Civil War Amendments, and that context was one of natural law, Anglo-American common law, and even elements of Roman Law, all of which are captured succinctly in those famous words of the Declaration that I will quote in a moment. Indeed, President Abraham Lincoln’s famous Gettysburg Address, written in the throes of a brutal Civil War, begins with these words: “Fourscore and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.” Lincoln was reaching back to the Declaration, not to the Constitution.

Yet no less than my good friend and Italy’s gift to American constitutionalism, the late Justice Antonin Scalia, all but dismissed the Declaration as “philosophizing,” contrasting it with the Constitution’s “operative provisions” (Scalia 1997: 134). And his conservative colleague when the two served on the nation’s second highest court, the late Judge Robert Bork, wrote that “the ringing phrases [of the Declaration] are hardly useful, indeed may be pernicious, if taken, as they commonly are, as a guide to action, governmental or private” (Bork 1996: 57). Is it any wonder that there is constitutional confusion in America today when the document that is essential to understanding it plays little or no part in that understanding?

Let me now flesh out the argument by focusing on the underlying moral, political, and legal principles at stake, after which I will offer just a few reflections on how those principles might illuminate issues in the European context. Again, I want to show how the shift from limited to effectively unlimited government took place in America, despite very few constitutional changes. I should note, however, that it will be some time before I get to the Constitution. If a proper

understanding of the Constitution requires a proper understanding of the theory behind it, and if that theory is found implicitly in the Declaration, then that should be our initial focus, and will be for some time. That will take us into some of the deeper reaches of moral and political theory, the aim being to better understand the Constitution itself—and especially the broad principles that underpin it.

The first thing to notice about the American constitutional experience is how relatively different its beginnings were from those of many other nations. Constitution making and remaking often take place in the context of a stormy history stretching back centuries, even millennia. By contrast, America was a *new* nation. We came into being at a precise point in time, with the signing of the Declaration of Independence. To be sure, American patriots had to win our independence on the battlefield. And before that we had a colonial history of roughly 150 years. But America was created not by a discrete people but by diverse immigrants with unique histories all their own.

A second, crucial feature distinguishing America's constitutional experience is that it unfolded during the intense intellectual ferment of the Enlightenment, including the Scottish Enlightenment, with its focus on the individual, individual liberty, and political legitimacy, all of which reflected the sense of "a new beginning." Indeed, the motto on the Great Seal of the United States captures well the spirit of America's origins: *Novus ordo seclorum*, "a new order of the ages."

The Declaration of Independence

Let us turn, then, to that new order, as outlined in the Declaration. Penned near the start of our struggle for independence, the Declaration in form is a *political* document. But were it merely that, it would not have so endured in our national consciousness. Nor would it have inspired countless millions around the world ever since, leading many to leave their homelands to begin life anew under its promise, including millions from Italy who now enrich America. It has so inspired because, fundamentally, it is a profound *moral* statement. Offered from "a decent Respect to the Opinions of Mankind" and invoking "the Laws of Nature and of Nature's God," it was written not only to declare but to *justify* our independence. And it did so not simply by listing the king's "long Train of Abuses and

Usurpations,” which constitute the greater part of the document, but by first setting forth the moral and political vision that rendered those acts unjust.

And so we come to those famous words that flowed from Thomas Jefferson’s pen in 1776, words that capture fundamental principles concerning the human condition:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.

The first thing to notice about that passage is that its propositions are asserted as “truths,” not mere opinions. The Founders were not moral relativists. They were confident in their claims. And why not? Their truths were said to be “self-evident,” grounded in universal reason, accessible by all mankind—and the evidence supports that.

Notice too the structure of the passage: There are two parts—and the order is crucial. The moral vision comes first, defined by equal rights. The political and legal vision comes second, defined by powers, as derived from the moral vision. And right there is the second major point I want to flag: Unlike today, where politics, grounded in will, so often determines what rights we have, for early Americans, morality, grounded in reason, determined our rights. The Founders were concerned fundamentally with moral and political *legitimacy*. Rights first, government second, as the means for securing our rights (Barnett 2016, Pilon 1999).

Given that order of things, the Founders were engaged in “state-of-nature theory,” a rudimentary form of which can be found in the writings of Seneca (see Corwin 1955: 15). A fuller discussion came much later in the work of Thomas Hobbes (1651) and, especially, John Locke (1690)—often said to be the philosophical father of America.

State-of-nature theory is a thought experiment. The idea is to show how, without violating any rights, a legitimate government with legitimate powers might arise from a world with no government. Thus, the first step is to show, from pure reason, what rights we would have in such a world.

For that, as the Declaration implies, we turn to the natural law tradition—more precisely, the natural rights strain coming from the Reformation and the Enlightenment. Simply put, natural law stands for the idea that there is a “higher law” of right and wrong, grounded in reason, from which to derive the positive law, and against which to criticize that law at any point in time. There is nothing suspect about that idea, as modern moral skeptics argue. We appeal to natural law when the positive or actual law is thought to be morally wrong. In America, the abolitionists, the suffragists, and the civil rights marchers all invoked our natural rights in their struggles to overturn unjust law.

The origins of this law are in antiquity. Many of its particulars are in Roman Law, especially the law of property and contract. Over some 500 years in England, prior to the American Revolution, this law was refined and reduced to positive law by common-law judges consulting reason, custom, and what they knew of Roman Law as they adjudicated cases brought before them by ordinary individuals (Corwin 1955: 26; Leoni 1961). And John Locke drew largely on that body of common-law rights as he crafted a theory of natural rights, much as Jefferson drew on Locke when he drafted the Declaration.

To correct a common misunderstanding, these are the rights we hold *against each other*, and would hold in a state of nature. Later, once we create a government, they will serve as rights we hold against that government, and likely be included in a bill of rights.

To discover and justify these rights in detail, as I and others have done (Pilon 1979; Epstein 2003), we would need to delve into the complex issues of moral epistemology and legal casuistry, and this is not the occasion for that. Suffice it to say that, when that foundational work is done, the conclusion one reaches is the same one America’s Founders reached through reason and experience—namely, that our basic right is the right to be free from the unjustified interference of others, and all other rights are derived from that basic right, as the facts may warrant. What results approximates largely the judge-made common law of property, torts, contracts, and remedies, a law that defines our private relationships, as it did in early America both before and long after the Revolution. It is a law that says, in essence, that each of us is free to pursue happiness, by his own subjective values, either alone or in association with others, provided we respect the equal objective rights of others to do the same. In short, it is a live-and-let-live law of liberty.

And I can summarize it with three simple rules, so simple that even a child can understand them.

- Rule 1: Don't take what belongs to someone else. That is the whole world of property, broadly conceived as Locke did—our property in our “Lives, Liberties, and Estates.”
- Rule 2: Keep your promises. That is the whole world of contracts and associations.
- Rule 3: If you have wrongly violated rules 1 or 2, give back what you have wrongly taken or wrongly withheld. That is the whole world of remedies.

There is a fourth rule, however, but it is optional: Do some good. You're free not to be a Good Samaritan, but you should be one if you are a decent human being and the cost to you is modest. Unlike much continental law, Anglo-American law never compelled strangers to come to the aid of others (Ratcliffe 1966). It did not because individual liberty is its main object. And it saw that there is no virtue in forced beneficence. We are free to criticize those who don't come to the aid of others, and we should, even as we defend their right not to.

Why have I mentioned this fourth, voluntary rule? Again, it is because, when we start from a theoretical state of nature, we need to know what rights we do and do not have for government to enforce once we bring government into the picture. And the Good Samaritan is the modern welfare state writ small. If there is no right to be rescued, there is no correlative obligation for government to enforce. Recognizing that raises important questions about the very legitimacy of the welfare state.¹

Leaving the State of Nature and the Problem of Political Legitimacy

To get to the Constitution, however, we need now to take the last step in the argument. We need to derive a legitimate government

¹That is not to say that, as a *practical* matter, elements of the welfare state may not be justified as a *last resort*. Rather, such elements are not brought into being “by right.” Put differently, there is a strong moral presumption *against* such measures—against *forcing* people to assist others through taxation or otherwise—and a strong presumption in favor of voluntary *private* assistance and *private* charity.

with legitimate powers—and that is no easy matter. I have said little about enforcement so far. The Declaration says that government’s purpose is to secure our rights, its *just* powers derived “from the consent of the governed.” Thus, the Founders invoked the social contract, which grounds political legitimacy in consent.

But there are well-known problems with consent-based social-contract theory as a ground for political legitimacy. The question is how to move legitimately from self-rule to collective rule. Unanimity will achieve legitimacy, of course, but rarely if ever do we get it. Majoritarianism will not solve the problem, because it amounts to tyranny over the minority that has not consented. Nor will the social contract work, except for those in the original position who agree thereafter to be bound by the will of the majority. Nor, finally, will so-called tacit consent work—“you stayed, therefore you’re bound by the majority”—because it puts the minority to a choice between two of its rights, its right to stay where it is and its right not to be ruled by the majority, precisely what the majority must justify on pain of circularity. As for elections, an occasional vote hardly justifies all that follows.

As a *practical* matter, the social contract argument may be the best we can do, but recognizing its infirmities leads to a compelling conclusion—and to the third basic point I want to flag, namely, that there is an air of illegitimacy that surrounds government as such. Government is not like a private association that we can join or leave at will. It is a *forced* association. Its very definition entails force. And once we recognize its essential character, that should compel us, *from a concern for legitimacy*, to do as much as we can through the private sector where it can be done voluntarily and hence in violation of the rights of no one, and as little as possible through the public sector where individuals will be forced into programs they may want no part of.

In short, as a *moral* matter, there is a strong presumption against doing things through government. We should turn to government not as a first but only as a *last* resort, when all else fails.

Still, we can refine this conclusion. We can distinguish three distinct powers in decreasing degrees of legitimacy. The first is the police power—the power, through adjudication or legislation, to more precisely define and enforce our rights. As such, it is bound by the rights we have to be enforced, although it includes the power to provide limited “public goods” like national defense, clean air, and

certain infrastructure—goods described by nonexcludability and nonrivalrous consumption, as economists define them (Cowen 2008).

When we leave the state of nature, we give government that power to exercise on our behalf. But because we had the power in the state of nature—Locke called it the “Executive Power” each of us has to secure his rights—to that extent it is legitimate. Only the anarchist who would prefer to remain in the state of nature can be heard to complain. Fortunately, there are few of those.

Less legitimate is the eminent domain power—the power to condemn and take private property for public use after paying the owner just compensation—because none of us would have such a power in the state of nature. Such legitimacy as this power enjoys, at least in America, is because we gave it to government when we ratified the Constitution’s Fifth Amendment, which includes the Takings Clause; and it is “Pareto optimal,” as economists say, meaning that at least one person is made better off by its use—the public, as shown by its willingness to pay—and no one is made worse off—the owner, provided he is indifferent as to whether he keeps the property or receives the compensation, which he rarely is, unfortunately.

The third great governmental power, ubiquitous today, is the least legitimate. In fact, from a natural rights perspective, it enjoys no legitimacy. It is the redistributive power, and it takes two forms, material and regulatory. Through redistributive taxation, government takes from *A* and gives to *B*. Through redistributive regulation, government prohibits *A* from doing what he would otherwise have a right to do or requires him to do what he would otherwise have a right not to do, all for the benefit of *B*. Those powers describe the modern redistributive and regulatory state. No one would have them in the state of nature. How then could government get them legitimately, since governments, in the classical liberal tradition, get whatever powers they have from the people, who must first *have* those powers to yield up to government?

There are three main answers. First, if that redistribution arose through unanimous consent, there would be no problem; but again, rarely if ever does that occur in the public domain. Second, majorities gave governments those powers. That raises the classic problem of the tyranny of the majority, as already mentioned. And third, special interests have learned how to work the system for their benefit,

as public choice economists have long explained.² That is the tyranny of the minority—and the main source today of such schemes.

We can conclude this examination of the moral foundations of the classical liberal vision by imagining a continuum, with anarchy or no government at one end—our state of nature—and totalitarianism at the other end, where everything possible is done through government. At the anarchy end, individuals are free to plan and live their lives as they wish, alone or in cooperation with others. They will soon find, however, that there are some things best done collectively, like the provision and enforcement of law, national defense, clean air and water, limited infrastructure, and the like—public goods—and most will consent to the public provision of such goods. But as we move up the continuum toward totalitarianism and try to bring more and more *private* goods under *public* provision—education, health care, child care, jobs, housing, ordinary goods and services—people start voting with their feet. The Berlin Wall was not built to keep West German workers out of the workers' paradise to the east.

The moral, political, and legal vision implicit in the Declaration of Independence is closer to the anarchy end of that continuum. America's Founders envisioned a land in which people were free to live as they wished, respecting the equal rights of others to do the same, with government there to secure those rights and do the few other things it was authorized to do.

That basic moral vision is perfectly universalizable. How to secure it through the rule of law is another matter. Certain basic legal principles are themselves universalizable and are common to most legal systems, but whether a nation has a parliamentary system as in much of Europe, or a republican form of government as in America, or some other arrangement is not a matter of natural law. Let us now see how the Founders framed a constitution to secure the Declaration's moral vision.

The Constitution

After we declared independence, and during our struggle for it, we lived under our first constitution, the Articles of Confederation. As its name implies, it was a loose agreement among the 13 states, authorizing a national government that hardly warranted the name.

²The classic arguments are by Buchanan and Tullock (1962).

Three main problems lay ahead. Surrounded on three sides by great European powers, our national defense was painfully inadequate. Second, states were erecting tariffs and other barriers to free interstate trade. And finally, our war debts remained unpaid. After 11 years, the Framers met in Philadelphia to draft a new Constitution.

The main problem they faced was how to strike a balance. They needed to give the new government enough power to address those problems and accomplish its broad aims, yet not so much power as to risk our liberties. Those aims were set forth in the Constitution's Preamble:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Notice: states aside, regarding the proposed new government, we are right back in the state of nature, about to "ordain and establish" a constitution to authorize it and bring it into being. All power rests *initially* with "we the people." *We* bring the constitution and the government that follows into being through ratification. *We* give it its powers, such as we do. The government does not give us our rights. We already have our rights, natural rights, the exercise of which creates and empowers this government.

How, then, does Madison strike the balance between power and liberty in service of those aims? First, through federalism: Power was *divided* between the federal and state governments, with most power left with the states, especially the general police power—the basic power of government to secure our rights, as just discussed. The powers we delegated to the federal government concerned national issues like defense, free interstate commerce, rules for intellectual property, a national currency, and the like.

Second, following Montesquieu, Madison *separated* powers among the three branches of the federal government, with each branch defined functionally. Pitting power against power, he provided for a bicameral legislature, with each chamber constituted differently; a unitary executive to enforce national legislation and conduct foreign affairs; and an independent judiciary with the

implicit power to review legislative and executive actions for their constitutionality—a novel institution at that time, and a crucial one as time went on.

Third, although the Constitution left most of the rules for elections with the states, it provided for periodic elections to fill the offices set forth in the document, thus leaving ultimate power with the people.

But while each of those provisions and others struck a balance between power and liberty, the main restraint on overweening government took the name of the *doctrine of enumerated powers*. And I can state it no more simply than this: if you want to limit power, don't give it in the first place. We see that doctrine in the very first sentence of the Constitution, after the Preamble: "All legislative Powers *herein granted* shall be vested in a Congress . . ." By implication, not all powers were "herein granted." Look at Article I, section 8, and you will see that Congress has only 18 powers or ends that the people have authorized. And the last documentary evidence from the founding period, the Tenth Amendment, states that doctrine explicitly: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In other words, the Constitution creates a government of delegated, enumerated, and thus limited powers. If a power is not found in the document, it belongs to the states—or to the people, never having been given to either government.

As noted earlier, when the Constitution was sent out to the states for ratification, it met stiff resistance as Anti-Federalists thought it gave too much power to the national government. Only after the Federalists agreed to add a bill of rights was it finally ratified. During the first Congress in 1789, Madison drafted 12 amendments, 10 of which were ratified in 1791 as the Bill of Rights. That document sets forth rights that are good against the federal government, such as freedom of religion, speech, press, and assembly, the right to keep and bear arms, to be secure against unreasonable searches and seizures, to due process of law, to compensation if private property is taken for public use, to trial by jury, and more.

But it is important to note that the Bill of Rights was, as Justice Scalia (2017: 161) said, an "afterthought." Unlike with many European constitutions, which begin with a long list of rights, many aspirational, the Framers saw the Constitution's *structural* provisions as their main protection against overweening government (National

Lawyers Convention 2017). And on that score, it is crucial to mention the Ninth Amendment, which reads: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The history behind that amendment is instructive. During the ratification debates, there were two main objections to adding a bill of rights. First, it would be unnecessary. “Why declare that things shall not be done,” asked Alexander Hamilton ([1788] 1961), “which there is no power to do?” Notice that he was alluding to the enumerated powers doctrine as the *main* protection for our liberties: where there is no power, there is a right.

And second, it would be impossible to enumerate all of our rights, yet, by ordinary principles of legal construction,³ the failure to do so would be construed as implying that only those rights that were enumerated were meant to be protected. To guard against that, the Ninth Amendment was written. It reads, again, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Notice: “retained by the people.” You can’t retain what you don’t first have to be retained. The allusion is to our natural rights, which we retained when we left the state of nature, save for those we gave up to government to exercise on our behalf, like the right to enforce our rights.

For a proper understanding of the Constitution, the importance of the Ninth Amendment, which speaks of retained rights, and the Tenth Amendment, which speaks of delegated powers, cannot be overstated (Pilon 1991: 1). Taken together, as the last documentary evidence from the founding period, they recapitulate the vision of the Declaration. We all have rights, enumerated and unenumerated alike, to pursue happiness by our own lights, to plan and live our lives as we wish, provided we respect the rights of others to do the same; and federal and state governments are there to secure those rights through the limited powers we have given them toward that end. There, in a nutshell, is the American vision, reduced from natural to positive law.

But apart from our failure too often to abide by that vision, there was a structural problem with the original design. There were too few checks on the states, where most power was left. And the reason

³*Expressio unius est exclusio alterius.*

was slavery. To achieve unity among the states, the Framers made their Faustian bargain. They knew that slavery was inconsistent with their founding principles. They hoped it would wither away in time. It did not. It took a brutal civil war to end slavery and the Civil War Amendments to “complete” the Constitution by incorporating at last the grand principles of the Declaration, especially equality before the law (Reinstein 1993).

The Thirteenth Amendment, ratified in 1865, rendered slavery unconstitutional. The Fifteenth Amendment, ratified in 1870, protected the right to vote from being denied on account of race. And the Fourteenth Amendment, ratified in 1868, defined federal and state citizenship and provided *federal* remedies against a state’s violating the rights of its own citizens.⁴

Unfortunately, only five years after the Fourteenth Amendment was ratified, a deeply divided 5–4 Supreme Court eviscerated the principal font of substantive rights under the amendment, the Privileges or Immunities Clause.⁵ Thereafter the Court would try to do under the less substantive Due Process Clause what was meant to be done under privileges or immunities, and the misreading of the Fourteenth Amendment has continued to this day. Among other things, the upshot was Jim Crow racial segregation in the South, which lasted until the middle of the 20th century.

Progressivism

We turn now to the great ideological watershed, the rise of Progressivism at the end of the 19th century. Coming from the elite universities of the Northeast, progressives rejected the Founders’ libertarian and limited government vision (Pestritto and Atto 2008). They were social engineers, planners enamored of the new social sciences. Insensitive when not hostile to the power of markets to order human affairs justly and efficiently, they sought to address what they saw as social problems through redistributive regulatory legislation. They looked to Europe for inspiration: Bismarck’s social security scheme, for example, and British utilitarianism, which in ethics had replaced natural rights theory. The idea was that policy, law, and

⁴Prior to that time, the Bill of Rights applied only against the federal government. *Barron v. Baltimore*, 32 U.S. 243 (1833).

⁵*Slaughterhouse Cases*, 83 U.S. 36 (1873).

judgment were to be justified not by whether they protected our natural and moral rights but by whether they produced the greatest good for the greatest number—often by *giving* rights to some, taken from others.

A particularly egregious example of that rationale concerned a sweetheart suit brought against a Virginia statute that authorized the sterilization of people thought to be of insufficient intelligence.⁶ Part of the bogus “eugenics” movement, the law was designed to improve the human gene pool. Writing for a divided Supreme Court in 1927, the sainted Justice Oliver Wendell Holmes upheld the statute, ending his short opinion with the ringing words, “Three generations of imbeciles are enough.” There followed some 70,000 sterilizations across the nation.

Some of what the progressives did was long overdue, like promoting municipal health and safety measures and attacking corruption. Yet they also sowed the seeds for later corruption, especially through regulatory schemes ripe for special interest capture, replacing markets with cartels (Epstein 2006). And their record on racial matters was abysmal (Sowell 2016).

During the early decades of the 20th century, progressives directed their political activism mostly at the state level, but they often failed as the courts upheld constitutional principles securing individual liberty and free markets. With the election of Franklin Roosevelt in 1932, however, progressive activism shifted to the federal level. Still, during the president’s first term the Supreme Court continued mostly to uphold limits on federal power, finding several of Roosevelt’s programs unconstitutional.

With the landslide election of 1936, however, things came to a head. Early in 1937, Roosevelt unveiled his infamous Court-packing scheme, his threat to pack the Court with six new members. Uproar followed. Not even an overwhelmingly Democratic Congress would go along with the plan. Nevertheless, the Court got the message. The famous “switch in time that saved nine” justices followed. The Court began rewriting the Constitution, in effect, not through amendment by the people, the proper way, but by reading the document as it hadn’t been read for 150 years—as authorizing effectively *unlimited* government (Leuchtenburg 1995).

⁶Buck v. Bell, 274 U.S. 200 (1927).

The Court did that rewrite in three basic steps. First, in 1937 it eviscerated the very centerpiece of the Constitution, the doctrine of enumerated powers. Then in 1938 it bifurcated the Bill of Rights and gave us a bifurcated theory of judicial review. Finally, in 1943 it jettisoned the nondelegation doctrine. Let me describe those steps a bit more fully so you can see the importance of recognizing and adhering to the theory that stands behind and informs a constitution.

The evisceration of the doctrine of enumerated powers involved three clauses in Article I, section 8, where Congress's 18 legislative powers are enumerated: the General Welfare Clause, the Commerce Clause, and the Necessary and Proper Clause. All were written to be shields against government. The New Deal Court turned them into swords of government through which the modern redistributive and regulatory state has arisen.

The first of Congress's enumerated powers, where the General Welfare Clause is found, authorizes Congress, in relevant part, to tax to provide for the "general Welfare of the United States." As Madison wrote in *Federalist* No. 41, that qualifying language was simply a general heading under which Congress's 17 other powers or ends were subsumed, for which Congress may tax, but only if they serve the *general welfare of the United States*, not particular or local welfare.

Instead, the New Deal Court read the clause as an *independent* power authorizing Congress to tax for whatever it thought might serve the "general welfare."⁷ That reading could not be right, however, because it would enable Congress to tax for virtually any end, thus rendering Congress's other powers superfluous, as Madison, Jefferson, and many others noted when the issue arose early in our history. Indeed, it would turn the Constitution on its head by allowing Congress effectively unlimited power. Such is the result from ignoring the document's underlying theory of limited government.

Similar issues arose that year with the Commerce Clause, which in relevant part authorized Congress to regulate interstate commerce. Recall that, under the Articles of Confederation, states had begun erecting tariffs and other protectionist measures, and that was leading to the breakdown of free trade among the states. Thus, the Framers gave Congress the power to regulate—or *make regular*—commerce among the states, largely by negating state actions that

⁷*Helvering v. Davis*, 301 U.S. 619 (1937).

impeded free trade, but also through affirmative actions that might facilitate that end (Barnett 2001).

Over several decisions, however, beginning in 1937,⁸ the New Deal Court read the Commerce Clause as authorizing Congress to regulate anything that “affected” interstate commerce, which of course is virtually everything. Thus, in 1942 the Court held that, to keep the price of wheat high for farmers, Congress could limit the amount of wheat a farmer could grow, even though the excess wheat in question in the case never entered commerce, much less interstate commerce, but was consumed on the farm by the farmer and his cattle. The Court held that the excess wheat he consumed himself was wheat he would otherwise have bought on the market, so “in the aggregate” such actions “affected” interstate commerce.⁹ Such were the economic theories of the Roosevelt administration.

The last of Congress’s 18 enumerated powers authorizes it “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.” Thus, the clause affords Congress *instrumental* powers—the *means* for executing its other powers or pursuing its other enumerated ends. “Necessary” and “proper” are words of limitation, of course: Not any means Congress desires will do. Yet the New Deal and subsequent Courts, until very recently, have hardly policed those limitations (Blumstein 2012: 86).¹⁰

Turning now to the second step, despite the demise in 1937 of the doctrine of enumerated powers, one could still invoke one’s rights against Congress’s expanded powers. So to address that “problem,” the New Deal Court added a famous footnote to a 1938 opinion.¹¹ In it, the Court distinguished two kinds of rights: “fundamental,” like speech, voting, and, later, certain personal rights; and “non-fundamental,” like property rights and rights we exercise in “ordinary commercial relations.” If a law implicated fundamental rights, the Court would apply “strict scrutiny” and the law would likely be found unconstitutional.¹² By contrast, if nonfundamental rights were at

⁸NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

⁹Wickard v. Filburn, 317 U.S. 111 (1942).

¹⁰For a recent exception, see NFIB v. Sebelius, 567 U.S. 519 (2012).

¹¹United States v. Carolene Products Co., 304 U.S. 144 (1938).

¹²To satisfy the strict scrutiny test, the government must have a “compelling interest,” and the means it employs must be “narrowly tailored” to serve that interest.

issue, the Court would apply the so-called rational basis test, which held that if there were *some* reason for the law, if you could *conceive* of one, the law would be upheld. Thus was economic liberty reduced to a second-class status. None of this is found in the Constitution, of course. The Court invented it from whole cloth to make the world safe for the New Deal programs (Pilon 2003).

Finally, in 1943 the Court jettisoned the nondelegation doctrine,¹³ which arises from the very first word of the Constitution: “*All* legislative Powers herein granted shall be vested in a Congress” Not some; all. As government grew, especially during the New Deal, Congress began delegating ever more of its legislative power to the executive branch agencies it was creating to carry out its programs. Some 450 such agencies exist in Washington today. Nobody knows the exact number.

That is where most of the law Americans live under today is written, in the form of regulations, rules, guidance, and more, all issued to implement the broad statutes Congress passes. Not only is this “law” written, executed, and adjudicated by unelected, non-responsible agency bureaucrats—raising serious separation-of-powers questions—but the Court has developed doctrines under which it defers to *agencies’* interpretations of statutes, thus largely abandoning its duty to oversee the political branches. Governed largely today under administrative law promulgated by the modern executive state, we are far removed from the limited, accountable government envisioned by the Founders and Framers (Hamburger 2014, 2017).

This completes my overview of American constitutional theory and history. From it, as I mentioned early on, the main lesson to be drawn is that culture matters. The Founders and Framers were animated by individual liberty under limited government. When the post-Civil War Framers revised our original federalism, they did it the right way, by amending the Constitution to make it consistent with its underlying moral and political principles. The New Deal politicians, having less regard for the Constitution and its underlying principles, rejected that course, choosing instead to browbeat the Court into effectively rewriting the Constitution, undermining its moral and political principles in the process.

¹³National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

But don't take my word for it. Here is Franklin Roosevelt (1935), writing to the chairman of the House Ways and Means Committee: "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation." And here is Rexford Tugwell (1968: 20), one of the principal architects of the New Deal, reflecting on his handiwork some 30 years later: "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document intended to prevent them." They knew exactly what they were doing. They were turning the Constitution on its head.

Thus, the problem today is not, as so many American progressives think, too little government. It is too much government, intruding on our liberties and driving us ever deeper into debt. And it isn't as if our Founders did not understand that. As Jefferson famously wrote, "The natural progress of things is for liberty to yield, and government to gain ground" (Boyd 1956: 208–10). The remedy for that "progress" is a good constitution, but it must be followed. And that takes good people at every stage—including, ultimately, the people themselves.

A Few Implications for European Constitutionalism

So what lessons might we draw from the American experience for European constitutionalism? Recall my mentioning earlier of being struck by the tension in the EU between exclusion and inclusion in its many forms, including individualism and collectivism. As we have seen, that same tension runs through America's constitutional history as well. To address deficiencies in the Articles of Confederation, the original Constitution moved toward greater inclusion to form "a more perfect Union." But the resulting federalism did not get the balance right either. It left too much power with the states, enabling the southern states to continue enforcing slavery. So the Civil War Amendments increased the inclusion, correctly. The adjusted federalism gave more power to the federal government, enabling it to block states from oppressing their own citizens—a higher power checking a subsidiary power.

But that balance, reflecting the nation's underlying principles, was upended again by the far more inclusive New Deal constitutional revolution. Giving vastly more power to the federal government, contrary to the nation's limited government principles, this change swept

ever more Americans into public programs, leading many to want out. They wanted to be *excluded* from the socialization of life, as reflected by the rise of the conservative and libertarian movements in the second half of the 20th century.

Are there parallels with post-War developments in Europe? To this sometime-student of European affairs, there seem to be; but the inclusion that began with the 1951 Treaty of Paris and continued through the many treaties since makes it difficult if not impossible to speak of three distinct periods, as in America, much less point to a “golden mean” in this evolution akin to America’s post-Civil War settlement. In recent years, however, the impetus toward exclusion, in many forms, is unmistakable, Brexit being only the most prominent example, the ongoing refugee resettlement crisis being another.

Federalism *within* nations is a delicate balance. Federalism *among* sovereign nations, which is what the EU amounts to, is far more difficult, especially when cultural differences loom large. And on that score, here is a paradox. Europeans have always been more comfortable than Americans with collectivization in the form of the welfare state, certainly within their respective nations (Rhodes 2018). But with collectivization *among* nations, cultural differences—rich and poor being only one axis—can easily exacerbate the cooperation that is required if collectivization is to work at all, much less with any measure of efficiency. The evidence suggests that the EU has gone too far in that direction. At the same time, the evidence is equally clear that the failure to make EU border security an EU responsibility, leaving it instead to individual members, has raised serious problems, too (Rohac 2016).

In America, border security became a federal government function once the Constitution was ratified. Within our borders, however, to keep states honest, the Founders instituted *competitive* federalism, whereby states compete for the allegiance of citizens; and it has largely worked as states with high taxes and excessive regulations lose firms and people to states with low taxes and reasonable regulations. People vote with their feet, much as in the Schengen Area. But the federal income tax plus the direct election of senators, both enacted as constitutional amendments in 1913 and both promoted by progressives, unleashed *cooperative* federalism whereby federal and state officials collude, using federal funds and enacting federal regulations, to undercut state autonomy and the discipline that competitive federalism was meant to secure (Greve 2012; Buckley 2014).

Earlier I said that you cannot understand the American Constitution unless you understand the theory behind it. Well, what is the theory behind the treaties that compose the EU Constitution? Peace through trade and cooperation, yes—given Europe’s long history of wars. But beyond that, what? We have seen how a radical shift in the climate of ideas in America, especially in the direction of collectivism, has led, as many lonely voices predicted, to a reaction that today reflects a deeply divided nation, unable to restrain its appetite for “free” goods and services, even in the face of crushing debt. The divisions surfacing recently in Europe are no accident. People and peoples yearn to breathe free—in an earlier understanding of that idea. The balance needed to ensure that freedom may be difficult to find. But to discover it, as we celebrate Italy’s Constitution today and reflect on Italy’s place within the larger European Community, we could do no better than to repair to the First Principles that are the very foundation of civilized nations.

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