Is Constitutionalism Liberal?

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Let me begin with the obvious: I am not claiming that any scholar, or educated person, believes that the only constitutions that have ever existed have been liberal. Everyone knows or should know that, for example, the Greek constitutions of Solon, Lycurgus, and others discussed in Aristotle's Politics predate liberalism by many centuries. Moreover, constitutions come in a wide variety of forms, and many of these, whether written or unwritten, have explicitly been illiberal.

What I maintain is that there is a prejudice among lawyers in particular that constitutions must be liberal in order to be worthy of the name. To be fully legitimate, likely to last, and worthy of support, on this view, a constitution must embody certain principles, namely rule by consent, the rule of law, mechanisms limiting governmental power, and individual rights. Yet none of these putatively liberal goods are in fact liberal. Indeed, all that is liberal in “liberal” constitutionalism is an insistence that only individual rights be recognized, and that these rights be read so as to maximize individual autonomy and equality. The result is a concentration of power in the state that undermines the essential virtues of and necessary for constitutionalism. Here I begin by reviewing the monolithic nature of liberal constitutional interpretation, proceed to review the claims and reality of “liberal” constitutional goods, then examine the impact of liberal individualism on the essentials of constitutionalism.

THE INTRA-LIBERAL CONVERSATION

It is first necessary to make clear what I mean when using the term “liberalism.” Most obviously, liberalism is an ideology committed to liberty and the rights of individuals—as John Locke famously put it, the natural rights to “life, liberty and property.” In contemporary discourse Lockean liberalism may be seen as having been displaced by a newer,
more egalitarian form set forth perhaps most famously by John Rawls, who argued that liberal societies can and should achieve an overlapping consensus, according to which, whatever their moral and religious beliefs, citizens join in privileging a conception of justice as fairness defined as the provision of equal and adequate rights and liberties along with a principle of equality requiring that differences in well-being be justified as improving the lot of the least well-off.³

It would be easy to emphasize the differences between these two conceptions of liberalism. But there is a common principle of justice involved in liberalism—the justness of individual liberty is taken for granted, in that no one is seen as having the right to dictate for others how they ought to live. Here one might reference the classic Jeffersonian observation that no one set of people had been born with saddles on its back, to be ridden and ruled by another set of people.⁴ Laws, including constitutions, for liberals properly aim to protect individual liberty from excessive constraint and maintain freedom of action in the face of potential threats.³

This is not to say that there is no contemporary debate over the proper nature of constitutionalism. But it is a debate that takes place almost exclusively within liberalism. The primary debate concerns whether “old” or “new” liberalism is the basis of proper constitutionalism and, more often, how best to construct mechanisms and reconstruct cultures to make new liberal constitutions work. The “old” version of liberal constitutionalism, identified (wrongly) with the original American constitution as drafted in the late 18th century, is seen as one of limited government, aimed at limiting state power to police and security functions intended solely to protect private liberty and especially economic markets.⁵ “New” liberal constitutionalism is defined in terms of democratic governance, with a positive state dedicated to the protection of rights, including economic rights as well as “older” individual rights to freedom of expression and privacy.

Contemporary defenders of “old” liberalism ground their constitutionalism, often quite explicitly, in a particular form of Lockean


⁴. Thomas Jefferson, The Life and Selected Writings of Thomas Jefferson xlii (Adrienne Koch & William Peden eds., 1998) (“The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few, booted and spurred, ready to ride them legitimately, by the grace of God.”).


⁶. Id.
natural rights. On this view, the John Locke of the *Second Treatise of Civil Government*, who emphasized all persons’ natural rights, including the right of peoples to “appeal to heaven” through rebellion against governments failing to protect their life, liberty, and property, was the intellectual founder of the American republic. These commentators highlight those sentences in the second paragraph of the Declaration of Independence citing truths held to be self-evident—most especially regarding natural rights to “life, liberty, and the pursuit of happiness,” with the latter interpreted in Lockean terms as largely concerned with property. This extraordinarily succinct set of values is argued to be the ultimate statement of the founding philosophy of the United States. As to the constitution itself, it is seen as overwhelmingly an attempt to secure the rights set forth in the Declaration, and to secure and protect them, particularly against the federal government.

This rather un-nuanced view of the origins and purpose of American constitutionalism has come in for significant criticism concerning its historical accuracy. I make my own critique on these grounds below, but most relevant at this stage is the “republican school,” whose adherents have argued that classical ideals of virtue and commitment to citizen participation and loyalty to the “public good” played a larger than acknowledged role in spawning the American revolution and its constitutional legacy. This critique overstresses the role of republican ideas at the founding, and especially the eighteenth century American commitment to governmental power. But this is what makes the republican critique most relevant: it is an attempt to read into American constitutionalism a form of liberalism more accepting of political participation as the goal of the state, more attached to “positive” rights such as those to governmental support in terms of welfare, medical care and the like—in a word “newer” in its liberal values.

Sadly, the historical facts are largely irrelevant to contemporary constitutional debates, which are more about justifying the participants’ policy preferences than capturing the truth of historical practice. Decades ago Lon Fuller pointed out the origins of both “old” and “new”

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7. The most overt example of this genre is THOMAS G. WEST, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* 175, 177–79 (2000).
8. *Id.* at 43.
9. *Id.* at 38.
10. *Id.* at 18.
12. *Id.* at 1218–19.
liberalism as interpreted by most lawyers in a single, 19th century volume: J.S. Mill’s *On Liberty*.\(^\text{13}\) Himself operating within liberal categories, Fuller argued that “freedom is both a meaningful and valid standard for the ordering of human relations.”\(^\text{14}\) Unfortunately, Fuller argued, lawyers’ understanding of freedom has become confused by the false dichotomy between negative (or “old”) and positive (or “new”) liberty.\(^\text{15}\) According to Fuller, it is both common and incorrect to posit a stark choice between the negative liberty of privacy, or being let alone, and the positive liberty of participation in decision making, particularly in the political process.\(^\text{16}\) But this is precisely what post-World War II legal thought emphasizes—the necessity of both positive and negative freedom, and the need for constitutional structures (and courts in particular) to guarantee both and, most difficult, mediate tensions and conflicts between the two.\(^\text{17}\)

Fuller’s solution to the dilemma of conflicting freedoms is for all of us to see each type of freedom as dependent on the other. He points to the secret ballot as a prime example of the necessity of negative liberty or freedom from constraints (secrecy defending the individual from coercion and the like) to effectuate positive liberty or freedom of participation (in this case effective, rational choice in determining who will serve or what policies will be implemented).\(^\text{18}\) According to Fuller, the tension between old and new liberalism can be resolved through recognition of the proper goal of effective choice—of legislators constructing mechanisms such that individuals will be able to put their desires into action.\(^\text{19}\) Cass Sunstein picks up this theme in arguing for the consistency of constitutionalism with democracy.\(^\text{20}\) Presuming that constitutionalism would be illegitimate were it not consistent with democracy (which he equates with self-government), Sunstein proceeds to argue, along lines familiar from Fuller, that various individual rights in fact protect and facilitate democratic participation.\(^\text{21}\)


\(^{14}\) Id. at 316.

\(^{15}\) Id. at 317. This is the distinction made most powerfully and famously in Isaiah Berlin, *Four Essays on Liberty* (1990).

\(^{16}\) Fuller, supra note 13, at 322.

\(^{17}\) Id. at 323.

\(^{18}\) Id. at 322.

\(^{19}\) Id. at 325.


\(^{21}\) Id. at 637.
Old liberal values rooted in the notion of a “private sphere” to be cordoned off from “majoritarianism” through juridical rights remain with Sunstein. But the overall picture is one in which individual privacy rights facilitate public participation. Sunstein argues for constitutional provisions as “precommitment strategies” facilitating the democratic process by protecting individuals’ choice making and by taking certain contested policies off the political agenda. Whatever one makes of this rosy picture of constitutional agenda setting, Sunstein’s point clearly is that somehow lawyers can square rights of political participation with those to privacy and so make liberal constitutionalism be all that it can be. Just as clearly, the point is that constitutions can only be valid—fulfill their proper goals—if they are liberal.

Of course, the world is filled with regimes—many of them claiming to operate under written constitutions—that do not respect liberal demands for governments respecting and protecting life, liberty, and property. Liberals thus may see themselves as seeking reform between a rock and a hard place. On the one hand they do not want to be seen as supporting regimes that commit enormities upon their citizens. On the other hand, liberals do not want to be seen as “ethnocentric” in their calls for specific institutional arrangements. Thus we now hear much of the need for constitution making processes to be carried out with at least some attempt at respect for pre-existing realities of politics and culture. Obvious examples of application of this view can be found in South Africa and in the “roundtable” discussions in Hungary. In both cases stakeholders were brought to the table to in essence bargain and come to agreement concerning the appropriate structure of the constitution.

In both instances, pre-existing groups and power structures were recognized and given a voice in the design of constitutionalism, thereby winning peace in transition—arguably at the price of establishing a new regime that was less than perfect in its adherence to principles of legal equality. In addition to the criticisms of such processes, one should not overlook the extent to which even these modest successes are embraced only as useful means to begin the process of “development”

22. Id. at 638.
23. Id.
25. See Istvan Pogany, Constitutional Reform in Central and Eastern Europe, in Comparative Constitutional Law, supra note 24, at 278–79.
26. Id.
toward new liberal regimes.\textsuperscript{27} There exists some recognition of non-liberal uses of constitutionalism; constitutions can be seen as expressions of sovereignty and societal aspirations and are useful practical devices for mapping power relationships.\textsuperscript{28} But without more such constitutions generally are seen as mere shams. Moreover, even formally effective constitutions, should they be for example theocratic in character, are deemed defective and liable to failure.\textsuperscript{29}

Part of the reason for the prejudice against non-liberal constitutions is understandable attachment to the idea that liberal democracy constitutes the highest form of political and constitutional development. This is understandable given the innate preference commentators from western countries are likely to have toward their own preconceptions. But, in looking toward the possibilities of constitutionalism in our contested age, it is useful to consider what we should and should not value, constitutionally speaking in modern liberalism, and what of value is and is not liberal.

\textbf{“LIBERAL” VALUE \#1: RULE BY CONSENT}

Rule by consent has been taken to be a fundamental liberal value for centuries. Lockean social contract theory rests governmental legitimacy on common assent. Famously, the Declaration of Independence asserts that government’s gain their just powers from the consent of the governed. But liberals did not invent the concept of consent; indeed, the question is what exactly they have added to an ancient ground for government.

The ancient republics of Greece and Rome, incorporating as they did a variety of laws regarding voting on issues of public importance, could be deemed to exemplify a commitment to rule by consent; as Plato noted, democracies are ruled by opinion.\textsuperscript{30} But there were clear and substantial limitations on this consent. Most important, the vast majority of those residing within any of these republics were denied any say in public affairs on account of their sex, national origin, or status

\textsuperscript{27} McWhinney, supra note 24, at 232; see also Mark Tushnet, \textit{Federalism and Liberalism}, 4 CARDOZO J. INT’L & COMP. L. 329, 329 (1996) (arguing that federalism is always a temporary structure on the way to centralized liberalism).


\textsuperscript{30} Plato, \textit{The Republic} 488b (Benjamin Jowett trans., 1960).
(e.g. as slaves). Thus such republican governments are dismissed as
undemocratic by modern liberals.

We should not be too quick to dismiss the notion of consent on the
grounds of limitations on just who consents, however. As Joseph
Schumpeter has pointed out, all regimes limit those to whom they grant
the right to vote.\footnote{31} Even today, few observers seriously advocate
extending the right to vote to young children or those involuntarily
residing in a variety of institutions.

A liberal also might object to the notion of an ancient right to
consent on the grounds that there was no actual right involved in any
meaningful sense. The claim would be that ancient republics granted or
denied the right to take part in public life on purely utilitarian grounds
rooted in political needs and the outcome of political conflicts. Liberalism, meanwhile, explicitly grounds political legitimacy on the
consent of the governed, which may be taken away should “a long train
of abuses”\footnote{32} lead the people to believe they should change regimes. This
is a not unimportant distinction between modern and ancient
constitutions, but it is one with compelling antecedents long predating
liberalism. Here I refer to the often-overlooked strain of medieval
thought explicitly grounding the ruler’s jurisdictional legitimacy in
popular consent. A series of fourteenth century thinkers in particular
developed a constitutional theory in which popular consent served as
the ground for monarchs’ power as heads of their people, deeming any
other view of the source of rulership to be rooted in illegitimate
violence.\footnote{33} Some went so far as to make clear the right of a people to
revoke this consent when necessary for the common good.\footnote{34}

Rather than a fundamentally liberal principle, then, consent is an
old concept which liberals have attempted to stretch to meet their own
needs. In particular, the increasing emphasis of new liberals on various
forms of “direct democracy” in the early twentieth century brought
reforms to electoral systems including the referendum and split ticket
voting, intended to break the “deadlock of democracy” instantiated by
constitutional limitations.\footnote{35} And there has been somewhat of a push
back against this movement in the name of minority rights and various

\footnote{31. \textit{Joseph Schumpeter, Capitalism, Socialism, and Democracy} 243–45 (1994).}
\footnote{32. \textit{The Declaration of Independence} (U.S. 1776).}
\footnote{34. \textit{Id.}}
\footnote{35. \textit{Willmoore Kendall \& George W. Carey, The Basic Symbols of the American Political Tradition} xi–xiii (Catholic Univ. Press 1995).}
“counter-majoritarian” imperatives, including judicial review. Thus the new liberal emphasis on consent as direct application of majority will (with the majority broadly defined) creates tension within liberalism due to its conflict with another value we will examine later, namely individual rights. But consent itself, as both concept and practice, cannot be termed purely or solely liberal.

“LIBERAL” VALUE #2: THE RULE OF LAW

Because liberals see liberty as being impossible in conditions of insecurity, they are particularly concerned that laws be established to protect individuals, and that they be known and enforced. Concerned to facilitate individual pursuit of individual ends, liberal constitutionalism is highly procedural in nature, concerned principally “that no citizen be above the law; that the law be well settled and duly promulgated; that the forms of popular consent be respected; that the judges be known and impartial; that the judgments of courts be fully and equitably enforced; and so on.” Indeed, liberalism comes to be, for many, that ideology which is devoted to the rule of law.

Such a view may be seen as being grounded in the American founding era for, in The Federalist, Publius justifies Supreme Court review of legislation by pointing out that the Constitution itself is a kind of law, against which more ordinary legislation must be measured if the rule of law itself is to be preserved in a republic; that is, the constitution is a kind of super-law intended to structure, confine and bring under law the institutions and political actors of the government. But this is not an argument for any particularly liberal rule of law. Rather, it is an argument for the inherent connection between constitutionalism more generally and the rule of law. And if the rule of law is inherent in constitutionalism, it seems apparent that it is not purely and solely liberal. Liberalism is not unique in valuing the rule of law, though it clearly values it quite highly. Indeed, any student of early Rome will note the role played by the rule of law in achieving (distinctly illiberal) constitutional development from the conflicts between patricians and

36. Kautz, supra note 5, at 449.
37. Id. at 450.
38. See, e.g., FRANKLIN & BAUN, supra note 29, at 5.
plebeians in that republic—and their embodiment in distinctly illiberal laws regarding issues such as class divisions.  

Moreover, the liberal rule of law is of a particular type. The liberal search for order and certainty (a direct outgrowth of its concern for security) creates a demand, not just for law, but for ever more precise laws. Thus the claim that judges actually make laws every time they apply a law to a new set of facts. Thus Jefferson’s demand that judges’ discretion be tied down by settled rules and precedents. Thus the more general attachment to two related and, when taken to the extreme, destructive propositions: legal positivism and codification. Both these propositions, particularly when combined with the liberal drive for political consolidation, in the end undermine the rule of law itself.

The various codification movements of the nineteenth century, as well as the more successful move toward model and uniform codes of various sorts in the twentieth, have clear liberal roots in the drive for constancy, surety, and uniformity. But these movements also have roots in the more pervasive movement of legal positivism, itself committed to key liberal ideals. Within liberalism, the absolute right of the state to rule is essential because political legitimacy comes from the social contract. In the liberal view, naturally autonomous individuals only (legitimately) enter civil society and incur obligations to the state by entering into a contract with one another. These individuals join together to protect their natural rights by agreeing to create a state and hand over those rights to it, receiving in return greater protection of their individual persons and of the civil rights granted by the state. Natural rights may continue to exist and legitimate individual action

43. GEORGE H. SABINE & THOMAS L. THORSON, A HISTORY OF POLITICAL THEORY 490–92 (1972); The concept of the social contract stemmed from Locke’s view in the Seventeenth Century that government directly resulted from society’s need for a means of preventing chaos by restraining persons from acting out of their own naturally selfish interests. According to Locke, because persons in their natural state recognize the destruction that comes from selfish acts the social contract developed as a means by which these persons looked to law and government for security and as a way to maximize private good and peace. Id. at 484–85; see also Edward Rubin,Judicial Review and the Right to Resist, 97 GEO. L.J. 61, 81–85 (2008).
44. SABINE & THORSON, supra note 43, at 490–92.
against a rights-violating state, but the state, on this liberal view, is the locus of legal and political authority. By positing public life as (preferably law-bound) conflict between rights-bearing individuals and the state, liberalism emphasizes the power of law, and statutory law in particular, to structure public life, as well as the source of this law as the unitary, sovereign state.

The positivism of nineteenth century Austinian and succeeding jurisprudence rests on the insistence that we cannot have law without an undervived authority. Law, on this view, must come from somewhere and is in its nature a command, so a commander must issue the laws and to do so must be in a position subservient to no one, that is, absolute. There are two fronts on which this supremacy must act and be recognized: external and internal. Externally, sovereign statehood is seen as an absolute category cast in binary terms, one either has it or one does not—as one either is or is not married, is or is not an American citizen, and so on. More generally modern than specifically liberal, this conviction’s root lies in Jean Bodin’s true innovation from earlier views, that sovereignty is indivisible; that only one person or institution can have it because it cannot be divided or shared. In practical terms, the state must have control, which in the international context means autonomy from outside or “foreign” law. The result is insistence on the unquestioned ability of the nation state to abide only by its own rules. As Chief Justice Marshall opined in the Schooner Exchange Case: “The Jurisdiction of the nation within its own territory is necessarily exclusive

45. Id. at 492–93, 608.
46. See id. at 608–12.
47. Crawford Young, The African Colonial State in Comparative Perspective 20–21 (Yale Univ. Press 1994) (“The Austinian doctrines of jurisprudence, which argued that positive law could only exist in conjunction with a determinate locus of power, an undervived authority . . . .”); see also Heinrich A. Rommen, The Natural Law 10, 136 (Thomas R. Hanley trans., Liberty Fund 1998) (1936) (distinguishing between two types of positivism—the first denoted “world positivism” according to which human law is merely a projection of a legal force that is the command of a sovereign, with the sovereign’s decree resembling the forces of nature and history; the second denoted “methodological positivism” being concerned to study and describe the law essentially as it is).
48. Young, supra note 47, at 20–21.
52. Id.
and absolute. It is susceptible to no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source would imply a diminution of sovereignty.”

Thus fundamentalist notions of sovereignty and legal certainty combine to produce a conception of law as fact. As the legal positivist Hans Kelsen argued: “A national legal order begins to be valid as soon as it has become, on the whole, efficacious, and ceases to be valid as soon as it loses efficacy.” Absolute power in the state is necessary for law because law can rule only when there is no need for negotiation or compromise, and this power can come only from an unquestioned state. Sovereignty itself is instantiated through law; “the abstract power of the state attains concrete form in its standing code of commands, or law.” And this power, viewed internally in terms of the nation state’s dominion over its subjects, specifically through statutes or regulatory codes, is unlimited. “Land without an owner belongs to the state; property without an heir escheats to the state. A helpless individual is a ward of the state. The state may conscript labor for its projects or personnel for its armies. The possessions of the individual are subject to taxation; behavior is open to regulation through law.”

The state as sovereign creates law, and its law takes on the status of a metaphysical order of being. As Kelsen put it, a “scientific theory of the State is not in a position to establish a natural limit to the competence of the State in

53. Schooner Exch. v. McFadden, 11 U.S. 116 (1812). The doctrine of foreign sovereign immunity states that a foreign state is free from the jurisdiction of the courts of another sovereign state. The doctrine, which developed as a result of the United States Supreme Court decision in Schooner Exchange v. McFadden, has become part of both civil and common law among international sovereign nations. In Schooner Exchange, American plaintiffs claimed to be the rightful owners of an armed French ship that was spotted in a United States port. Basing his decision in part on international custom, Justice Marshall established that state immunity was based upon the “perfect equality and absolute independence of sovereigns and [a] common interest impelling them to mutual intercourse.” In addition, the Supreme Court held that state immunity is founded on international comity between sovereign nations. Today, Schooner Exchange stands for the notion that the United States adopted a broad, absolute form of state immunity as the court recognized the difference between an armed public vessel (such as the Schooner Exchange) and private merchant vessels entering the United States for purposes of trade. Tom McNamara, A Primer on Foreign Sovereign Immunity (Mar. 2006) (unpublished manuscript, on file with Davis Graham & Stubbs LLP), available at http://www.dgslaw.com/attorneys/ReferenceDesk/McNamara1.pdf.
54. J ACKSON, supra note 49, at 34.
55. Id.
56. YOUNG, supra note 47, at 21.
57. Id. at 28.
58. Id. at 30.
relation to its subjects. Nothing in the nature of the State or the individuals prevents the national legal order from regulating any subject matter in any field of social life, from restricting the freedom of the individual to any degree.  

This legal positivist view of sovereignty is in obvious contrast with older, natural law understandings of the limits of legitimate rule. According to natural law theorists, the political ruler was answerable to a higher law emanating from God or, particularly in later versions, the normative nature of the universe. In terms of rights, such a conception has the advantage of positing all persons as possessed of them by nature, that is, by reason of their very humanity, and so not as grants from the sovereign. Thus law itself is limited, on the natural law view, in that it has an intrinsic nature and purpose against which it may not be designed, meaning that “an unjust law seems like no law at all.” Of course, such a conception was riddled with problems of interpretation and enforcement. The result was conflict among competing interpretations of human and higher law, and between jurisdictions such as the royal and the ecclesiastical. It was this multiplicity of jurisdictions that Bodin attacked in political-theological terms before Austin (and Hobbes) did so in jurisprudential terms.

Liberals see medieval conceptions of government are illogical because their notions of the rule of law rest in no small measure on the insistence that not all laws can or should be written down in clear, precise, and limited terms. Critical to limitation of the monarch’s right to legislate was the high status accorded custom during the early middle ages especially. Legitimate rule being based in consent, it was critical to find this consent, lacking any formal mechanism such as voting, in the practices of a people. Thus the people were taken to consent to

59. Id. at 29.

60. Rubin, supra note 43, 67, 91–92; see also Sabine & Thorson, supra note 43, at 175 (defining natural law in terms of the rise of Christianity during the Golden Age of Cicero and Plato, arguing that it was a common Christian belief that “government arises solely from the human wickedness and yet that it is the divinely appointed means for ruling mankind in its fallen state and so has an indefeasible claim upon the obedience of all good men”)


63. Rubin, supra note 60, at 63.

64. Id. at 67–68.

65. Id. at 81.
custom—no long stretch given the inherent rooting of custom itself in common, habitual practice. Thus the monarch could change law only when and insofar as the new law remained congruent with custom. Constraints on monarchs’ legislative powers were extensive. As late as the thirteenth century the French king could only make law during or in preparation for war, and then only with reasonable cause, for the benefit of the commonweal, with consent, and not in violation of the law of God or morals.

Indeed, the ability to promulgate was taken as the ultimate, highest and most dangerous act of sovereignty, calling for vigilance and protection. In the middle of the sixteenth century English statutes gained the status of orders to be enforced by the courts, as was the case in the diocese of Coventry and Lichfield which began to enforce Henry VIII’s statute regulating the choice of testamentary executors; soon implementations of acts of Parliament became “normal parts of ecclesiastical litigation.” Only with the English Reformation did statutes become law superior to and to be interpreted more strictly than custom.

Liberalism did indeed destroy the vagaries of much of the common law; but at a price. For example, by the late eighteenth century William Blackstone, a Tory, would claim Parliament’s power to “change and create afresh” even the constitution of the realm, including Parliament itself. Parliamentary sovereignty, a constitutional state in which Parliament would have truly “despotic” power, including the power to pass ex post facto laws, would take decades to be fully established. But the point is not one of governmental form; it is one of constitutional jurisdiction. By the early eighteenth century, Great Britain was a single

67. Id.
68. Id. at 92.
69. Id.
72. Id.
realm with a government claiming modern, absolute sovereignty over its people, both within the kingdom and in its colonies around the globe.\footnote{Declaratory Act of March 18, 1776, reprinted in The American Republic: Primary Sources 191–92 (Bruce Frohnen ed., Liberty Fund 2002).}

It was in opposition to this absolutist vision that the American revolution was fought and American independence declared. Americans refused to accept that Parliament had the right to legislate for it in all things as it saw fit, deeming such subservience to what they considered a legislature not their own, to be slavery.\footnote{Jack Greene, The Glorious Revolution and the British Empire 1688-1783, in The Revolution of 1688-89: Changing Perspectives 270–71 (Lois G. Shwoerer ed., Cambridge Univ. Press 1992).} It was opposition to the liberal vision of law as the will of the legislator—be it the monarch or Parliament—that informed the framing of the American constitution and the investing of that constitution with the status of a law above the will of any particular ruler or rulers. And arguably it is on account of this liberal vision of law as fact that our constitutional structures are being undermined as customs, including judicial restraint and the constitutional morality that once dictated adherence to fundamental structural prescriptions like the separation of powers, die out. When added to this are inherent conflicts among values (e.g. equality and liberty) once smoothed over through customary forebearance, the result is a system that no longer acts according to the rule of law.\footnote{This is the theme of Bruce P. Frohnen & George W. Carey, Constitutional Morality and the Rule of Law, J.L. & Pol. (forthcoming).}

In modern states particular rulers may have limits placed on their power. But, within liberalism, such limits come from inside, from the sovereign itself; they are embodied most prominently in constitutions which are seen as contracts between the state and civil society.\footnote{Rubin, supra note 60, at 81–86; Young, supra note 47, at 30.} “By legal compact, substantial limits are placed upon state power. A state is rendered subordinate to its own public law: a degree of autonomy is guaranteed to civil society through the interdiction of state action that intrudes on defined individual and group rights.”\footnote{Young, supra note 47, at 30.} Thus, it is less accurate to say that a liberal constitutional government has split or defeated absolutism than to say that it has domesticated it.\footnote{Id.} The powers of each branch of government are dictated by a super-statute issuing from the will of the sovereign people which possesses the right (though
perhaps not the means) to alter that statute at will. 79 This “sovereign” people being generally passive and under-informed, the real struggle takes place between branches seeking sovereign power; even in the “popular sovereignty” account of law, it is the legislature that acts for the people. 80

“LIBERAL” VALUE #3: LIMITATIONS ON GOVERNMENTAL POWER

Identification of constitutionalism with liberalism has deep roots, including in the liberal reading of the genesis of the American constitution. Some of the most powerful and influential language of The Federalist Papers consists of criticisms of the instability of the ancient Greek republics. 81 And the answer to this instability is presented in The Federalist as a set of mechanisms for limiting state power, including separation of powers and checks and balances—mechanisms contemporary observers see as fundamental features of liberal constitutionalism. 82

Having founded a republic, on this view, the framers of the American constitution feared that majority factions would destroy liberty and so constructed constitutional mechanisms to limit, direct, and dilute the role of majorities in the political process. 83 The general liberal model is of a society of diverse and conflicting values seeking peace through tolerance, enforced by a constitutional state. 84 Liberty, the sine qua non of liberalism, on this view is good because it leads to peace and it is for this defensive reason that the state, the purpose of which is to see that citizens do not harm one another, provides liberty. 85 Even property rights are to be protected primarily on account of their

79. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (Asserting that governments are instituted to secure people’s natural rights and “that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.”).


81. THE FEDERALIST NO. 9 (Alexander Hamilton).

82. Kautz, supra note 5, at 438.

83. Id. at 440.

84. Id. at 438 (“Classical liberalism is the view that liberty is the fundamental political good because it is the most certain means to peace among natural foes who must learn to live together as civil friends.”).

85. Id. at 439.
utility in promoting peace (including peace between rich and poor) and not on any moral grounds.\textsuperscript{86}

But one should not lose sight of the fact that the contemporary liberal reading of the constitution and its mechanisms is vastly different from that of the framers. In particular, those who wrote and early on defended the mechanisms of the constitution did so on the grounds that they were “auxiliary precautions.”\textsuperscript{87} The constitution was drafted, as John Adams famously remarked, “for a moral and religious people;” no other, he deemed, would be able to be governed under it, whatever its mechanisms.\textsuperscript{88}

Contemporary judgments as to the efficacy of constitutional structures may be suspect to begin with, given the rise of ‘functionalist’ attacks on these mechanisms (especially separation of powers) in the name of efficiency. But the role of virtue has been noted as being essentially absent from liberal theory and its reliance on constitutional mechanisms. The result, then, is a liberal ideology which intentionally undermines the grounding of its own systemic checks, resulting in a system that cannot last over time.\textsuperscript{89}

Moreover, checks and balances long predate liberal notions of government. Earlier conceptions of constitutional checks often are dismissed as insufficiently “law like” for liberal acceptance.\textsuperscript{90} But these medieval structures provided the means by which the powers of rulers could be limited, provided a certain amount of virtue remained in the citizenry. It is a vision not unknown to the American constitutional drafters, or to Montesquieu, their intellectual father in this regard.

To begin with, the medieval constitution provided only a more limited form of sovereignty, in which the sovereign is one who merely does not recognize a superior; that is, the sovereign may have equals with whom it must bargain—including equals who consider themselves its superior.\textsuperscript{91} This constitutional structure may be seen in a more recent constitution like that of the United States, in which powers are divided among various branches of government and the division is buttressed by

\textsuperscript{86} Id. at 442.
\textsuperscript{87} \textit{The Federalist No. 51} (James Madison).
\textsuperscript{90} Philip Hamburger, \textit{Law and Judicial Duty} 70–71 (Harvard Univ. Press 2008).
\textsuperscript{91} Joseph Canning, \textit{A History of Medieval Political Thought}: 300–1450 168 (Routledge 1996).
institutional separation of powers precluding, through mechanisms such as federalism and Congressional removal of judges from office, any single, unquestioned mastery over law. Clear parallels, if not roots, of such a structure may be found in arguments of late-medieval conciliarists who sought to instantiate within the Church a sovereignty according to which in an emergency a council could be called without Papal approval, itself to be replaced if needed by the bishops, then, if necessary, by the whole Church. This theory itself has significant parallels in the medieval English view of the king-in-parliament as more fully sovereign than the king alone—in which the king was considered to exercise full legislative jurisdiction under conditions where he must discuss law and policy with representatives of the various parts of the realm. One result, as we have seen, was substantial limitation of the king's power to make law.

The medieval conception of a constitution was of the fundamental laws, procedures and customs of a realm, particularly though not exclusively as embodied in the institutional arrangements of the state. As Philip Hamburger has pointed out, contemporary commentators tend to dismiss this form of constitution as less than law—or to lump it together with any more-or-less active restraint on the power of the monarch as vaguely “constitutional” though, due to its lack of statutory form and enforceability, sub-legal. But, while many medieval constraints on the monarch, such as the coronation oath or promise to uphold pre-existing laws and customs, were not strictly forms of law, many were, in fact, overtly law, and many others, given the emphasis on the binding nature of custom at the time, had an authority and enforceability that can only properly be termed legal. For example, as late as the mid-seventeenth century Justice Hale held that the king had...
no legislative power outside of Parliament, and that this limiting principle was established “by the constitution of this realm”\textsuperscript{98} And that constitution was no different from others in its need for defenders both inside and outside the structures of the state willing in extremity to go beyond the confines of legal processes to protest, Civil War, and revolution to protect the overall structure of the realm.

The key to constitutionalism and its vibrant limitation of centralized power was jurisdiction. To medieval jurists, jurisdiction itself meant the right to rule—sovereignty—at least in its weaker sense. The power to rule was by nature limited; it did not mean ownership of the land, let alone its people.\textsuperscript{99} Moreover, jurisdictional sovereignty was complicated and subject to varying cross-pressures in medieval Europe. It contained checks and balances—and separation of powers—within itself. Prior to the development of sovereign-centric nation states, a European person or community could have a number of duties and loyalties, both as an individual and as a member of various groups, running in quite different directions.\textsuperscript{100} “A local warlord might have held feudal obligations to a superior noble and to the Church, while he, himself, may have been owed obligations by nearby vassals and townships. Merchant guilds and university colleges may have reported to higher secular or religious authority, even as they exercised substantial power of their own.”\textsuperscript{101}

At the top of the (secular) hierarchy was the Holy Roman Emperor—the German high king who claimed universal sovereignty on account of his putative succession to the jurisdiction of the Roman Emperors. But the Emperor had to compete or compromise with the Pope (who claimed his own earthly authority), with “lesser” monarchs, and with the various nobles, prelates, and even cities that held rights against him on account of custom, theology, or contract.

For example, kings during the medieval era referred to the Holy Roman Emperor as their “lord” on account of his title and formal headship of all Rome’s succeeding realms, but this did not stop kings from going to war with Emperors on a rather regular basis.\textsuperscript{102} Moreover,

\begin{itemize}
\item \textsuperscript{98} Hamburger, supra note 90, at 202 (quoting Sir Matthew Hale, The Prerogatives of the King 141 (D. E. C. Yale ed., Selden Society 1976)).
\item \textsuperscript{99} Tierney, supra note 50, 30–33.
\item \textsuperscript{100} David J. Bederman, Diversity and Permeability in Transitional Governance, 57 Emory L.J. 201, 213 (2007).
\item \textsuperscript{101} Id.
\item \textsuperscript{102} Pennington, supra note 66, at 17; see also Tierney, supra note 50, at 32–33 (during early 13th century Emperor was held to be head of all kingdoms).
\end{itemize}
claims regarding the supremacy of Emperors and, later, kings were constrained by generally shared assumptions regarding constitutional structures—juridical norms, natural law, custom, reason, and a variety of obligations to various corporate groups including the people as a whole that laid out the lines and limits of power and authority. Indeed, his very title, “lord of the world,” which would seem to place the Emperor beyond all restriction, at the time was seen as constitutional in nature, expressing his corporate jurisdiction, higher than that of mere kings or councils in various lesser kingdoms, but not above restraint.

The relationship between kings of various realms, a variety of semi-sovereign city states, and the Holy Roman Emperor limited the jurisdictional authority of each. In the fourteenth century there were 1,000 or more political entities in Europe, encompassing a wide range of sizes, powers, and levels of autonomy. Depending on the exact location of a particular dominion within the checkerboard of geographical and governmental units in medieval Europe, the Emperor might have more, less, or no jurisdiction over a particular person or matter. And the Emperor’s jurisdiction often was challenged in practice even where it was his in theory, showing that he was not “lord of the world,” or even of Europe in an absolute sense, but rather head of one jurisdiction competing among many.

The importance of this competition among constitutional jurisdictions is made clear in the case of the other “lord of all”—the Pope. A significant literature has grown up setting forth the implications for legal development of the investiture crisis of the late eleventh century. The Pope, by winning the right to appoint his own bishops and govern church officials and lands, gained constitutional space that allowed for formation of a separate, ecclesiastical jurisdiction with its own laws and courts. At about the same time, Popes also gained the dispensing power over these laws, establishing them as sovereigns in the

103. TIERNEY, supra note 50, at 76.
104. Id. at 19; see also HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 407–08 (Harvard Univ. Press 1983) (arguing that kings had become constitutional figures, leaving behind their former theological status, by the early medieval era).
106. PENNINGTON, supra note 66, at 217.
107. See BERMAN, supra note 104, at 32–33.
108. Id. at 43.
109. Id.
jurisdictional sense over canon law. And the Pope’s power over this jurisdiction, combined with his theological claim to supranational power as the vicar of Christ, allowed him to act in competition with secular sovereigns; Pope’s did, in fact, depose monarchs on the grounds of “un-Christian” misgovernment, as Innocent IV deposed Emperor Frederick II in 1245.

The power of the Pope, like the secular monarchs with whom he competed for authority, was far from absolute. Political and military realities meant that a Pope might officially “depose” a king and find himself incapable of making the proclamation real, as Pope Pius V discovered after he “deposed” England’s Queen Elizabeth. Even within earlier, universally Catholic Europe such declarations could be dangerous, as Pope Gregory VII, the “victor” in the Investiture Crisis, found to his dismay when he later deposed the “defeated” Emperor Henry IV and was himself deposed and driven from Rome by Henry’s troops. But, of course, other Emperors lost similar struggles.

There was no one, unquestioned “sovereign” in Europe, ruling all others and answering to no one; consequently there was competition among constitutional jurisdictions, and particularly between church and state, such that both secular and theocratic claims to tyrannical power were kept in check. Pope and Emperor, as well as Pope and king, Emperor and king, and king and king, all had their separate offices and dignity. The conflicts among them encouraged freedom rather than stifling it because they bred significant instances of cooperation and compromise.

The complicated nature of royal power during the medieval era can be summed up in Bracton’s view that the king is under the law, and yet has no superior. In assessing this situation, Tierney has argued that the king was loosed from the laws in that, not having a superior, no one could enforce his obedience thereto, though it was his duty to maintain

110. Pennington, supra note 66, at 58.
111. Id. at 147.
112. Helmholz, supra note 61, at 319.
114. Tierney, supra note 33, at 636.
115. But see Canning, supra note 91, at 88–89 (recognizing that the emperor, as a layman, was seen by the Pope as subject to his judgment as to his fitness to rule).
117. Pennington, supra note 66, at 92–93.
that obedience on his own.  But, while there clearly was a call for such self-restraining virtue, as reflected in the mirror of princes literature focusing on the formation of good character in the ruler, over-emphasis on personal virtue overlooks the broader, somewhat looser, but nonetheless real checks provided by medieval constitutionalism.

Of particular importance was the binding force of natural law. Now often dismissed as mere verbiage, there were real consequences to a generally accepted natural law vision—most particularly in establishing the illegitimacy of a king’s violation of his promises, including those embodied in charters and covenants. Coronation oaths, along with charters such as Magna Carta, gained power to bind the king from the generally held view that the king’s failure to abide by them was a violation of natural law, hence unjust. Indeed, King John attempted to evade adherence to Magna Carta by securing from the Pope a declaration that the monarch’s assent being gained through coercion rendered the “contract” invalid; yet he and his successors were bound by the document in practice, largely because it was seen by powerful barons as a restatement of pre-existing, customary obligations. Even in the area of royal prerogative, the personal jurisdiction of the monarch within which he could act outside the law, natural law was deemed to cabin the sovereign will; individual rights such as that to property could not be violated by the monarch except with proper cause and in the public interest. Thus Bracton’s argument that the king could make law and was not susceptible to its sanctions, but still must observe laws once established, can be seen as setting forth what one commentator in a modern context has referred to as “constitutional morality”—a norm binding constitutional figures to abide by the limits of their office or jurisdiction. So long as such a constitutional morality is generally held to, it has real force, particularly when, as in medieval Europe, a monarch’s actions contrary to natural law could be declared null by the Pope, releasing subjects from their duty to obey it.

118. Id. at 83.
120. CANNING, supra note 91, at 163.
122. PENNINGTON, supra note 66, at 211.
124. PENNINGTON, supra note 66, at 187.
Popes and church officials held significant juridical power and authority rooted in their theological status but having concrete effects. For example, excommunication, a sentence separating a person from the sacraments of the church and potentially the company of all Christian people, was a sentence of real power in an age of faith. But the level of cooperation from secular kings varied. In German speaking lands any person who failed to repent and re-establish communion with the church after a year fell under the Emperor’s ban as well. But in France the practice was rejected in the late thirteenth century by the king and fell into disuse. As in most exercises of sovereignty at this time, excommunication was a process that opened up rather than closed off dialog. Whereas church law stated that an excommunicated king thereby lost the fealty of his people, in practice the ties were held to be merely suspended “until the lord sought absolution and made restitution to the church,” though failure to seek such eventually would lead to the freeing of his vassals.

Medieval Europeans lived within a web of more or less formal constitutional structures setting forth jurisdictional boundaries and procedural rules. Constitutional documents like Magna Carta and various local charters spelled out the lines of royal, church, and baronial jurisdiction while canon law delineated the institutional rights of Popes, Cardinals, and cathedral chapters. And cities’ charters not only defined their rights in relation to kings, but also spelled out the rights and duties of mayors, councils and other officers. The law itself was in important respects systematized by documents and commentaries, including Bracton’s work in England and the Sachsenspiegel in Germany, which not only rationalized local law but also institutionalized constitutional law by defining limits on and the location of jurisdictional competence, rules on selection of rulers, and the rights and duties of subjects. But the lines of jurisdiction were neither impermeable nor clear. The result was a loose constitutional

125. HELMHOLZ, supra note 96, at 366.
126. Id. at 357.
127. Id.
128. Id. at 382–83.
129. Filippo Sabetti, Local Roots of Constitutionalism, 33 PERSPECTIVES ON POLITICAL SCIENCE 70, 73–75 (2004) (providing overview of a plethora of local charters establishing constitutional government in places like Sicily and binding monarchs in a manner similar to that of Magna Carta well before that charter’s promulgation).
130. Frohnen, supra note 121, at 111.
131. Berman, supra note 104, at 313.
132. Id. at 205.
system of perforated sovereignty and competing jurisdictions, fostering competition and conflict. Critically, this competition took place within an overarching consensus among lawyers that each competitor had a duty to abide by the norms of legal process and pursuit of the common good. While the particulars of that common good were open to significant dispute, the lack of any final judge necessitated cooperation and compromise, producing amidst the conflict significant limitations on institutional power.

What is more, monarchs were kept in check by the simple but powerful fact that they did not have a monopoly on the means of waging war. Dispersion or separation of arms limited centralized power. In practical terms the way was paved for the assertion of royal power in Britain only by Henry VII, whose Statute of Liveries strictly limited and regulated retainers other than household servants—reducing the capacity of local notables to defend their lands and rights.133

Of course, such local liberties tend to be associated in the new liberal mind with various moral enormities perpetrated by local elites. Often well-intended and in many ways beneficial attempts from the center to eliminate oppressive local structures have been accompanied by a broader undermining of the rights of localities and smaller units of government. But the intentional restriction of the local liberties and formalistic mechanisms of most constitutional structures in recent decades has undermined pre-liberal defenses for ordered liberty in the name of liberal values of governmental efficiency and uniformity aimed at establishing greater equality. The result is an extremely powerful centralized state held in check only by the occasional use of the very blunt instrument of general elections—themselves highly limited in their capacity to manifest even the popular will.134 And, as I note I the following section, the most critical liberal value driving the undermining of these structures is the single-minded concern for individual rights.

“LIBERAL” VALUE #4: INDIVIDUAL RIGHTS

There is a common misconception, often refuted but never fully laid to rest, that rights and individual rights in particular, did not exist prior to the modern era, when they were conceptualized by early liberal

133. Statute of Liveries, 1504, 19 Hen. VII, c. 14 (Eng.).
John Locke in particular has been portrayed as a central figure in the development of constitutional thought precisely because of his supposed role in producing a clear and substantial break with medieval conceptions. On this reading, Locke was the founder of modern liberalism, and as such he was the theorist of individual rights *par excellence*. He constructed a theory of the state and of political legitimacy rooted thoroughly in the protection of individual rights where before there had been only various types of communalism, committed more or less to a particular form of religion and/or a particular emphasis on the secular power of the king.

Brian Tierney has criticized this quaint interpretation of Locke, marshalling historical evidence to show the presence of a substantial emphasis on individual rights in medieval political thought. Rights, understood as the moral power of individuals to discern a sphere of personal autonomy within which to act, licitly, as they see fit, were developed by medieval decretists—commentators on law whose views were diffused widely in European law schools by the end of the twelfth century. Individual rights grew, not from philosophical speculation, but from analysis of legal texts and existing practices, producing the ius commune, an amalgam of Roman and canon law, mixed with practical considerations of public and private life.

Also overlooked is the depth and extent of Locke’s dependence on older thinkers and practices. Far from a mere proponent of atomistic individualism, Locke recognized the necessity of people coming together to form civil society before more formal, legalistic consent to a particular government could take place. In doing so Locke carried on a tradition going back at least to the twelfth century, according to which individual and community both were seen as crucial to any decent public life. Rights, too, developed out of this understanding of the importance of

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135. BRIAN TIERNEY, CHURCH LAW AND CONSTITUTIONAL THOUGHT IN THE MIDDLE AGES 42 (Variorum 1979).
137. Id. at xi.
138. TIERNEY, supra note 135, at 5.
140. HELMHOLZ, supra note 61, at 301–02.
141. BRIAN TIERNEY, BEFORE LOCKE AND AFTER, in RETHINKING RIGHTS 34, 40–43 (Univ. of Missouri Press 2009).
142. Id. at 42–43.
both individual autonomy and common goods. The intimate connection between the “negative” right of the individual to be left alone and the “positive” right of officials to exercise their powers and various corporate groups to exercise self-rule was essential to the formation of constitutional government in Europe.

Medieval society had a legal and constitutional structure much looser and more cognizant of communal ties than today’s liberal constitutionalism. But medieval jurists were more willing to challenge power and the medieval web of authorities and jurisdictions was friendlier toward individuals and their rights than is recognized in late liberal theory. Moreover, early liberalism owed much to medieval thought and practice, particularly in its development of individual and communal rights and constitutional protections. The caricatures of medieval “communalism” have expanded to the point where there is thought to have been no such thing as an “individual” until modern times—this despite clear indications of individual self-awareness and a drive for the assertion of individual personality in various forms throughout the middle ages and renaissance.

People of this time in fact acted in a manner combining the drive for individuation with a realization of interdependence and the need for mutual support. Thus bodies of people would covenant with one another to form new communities (“communes”), then act directly to secure both individual and group rights within their corporate group. The end of government was seen as that of preserving “each one in his right.”

Rights in the medieval era differed from their liberal counterparts primarily in their clear indebtedness to institutional tensions. One example of a significant development in the history of rights came as the direct result of conflict between Emperor and kings: In 1313 Henry VII, then Holy Roman Emperor, sought to punish Robert of Naples, King of Sicily and in part of his territory a vassal of Henry’s. Henry summarily sentenced Robert to death on the charge of treason. But Pope Clement V declared the sentence invalid because Henry had failed to deliver a summons to Robert, thereby denying him what was by this time deemed

143. Bruce P. Frohnen, Self-Government and Claims of Right in Historical Practice, in Rethinking Rights, supra note 141, at 106.
144. Id. at 107–08.
146. Tierney, supra note 141, at 37–38.
147. Id. at 38.
148. Id. at 39.
his natural right to self defense.\textsuperscript{149} Clement followed this action by declaring that Robert was ordinarily domiciled in Sicily, outside the boundaries of the Roman Empire from which Henry derived his lordship, hence not Henry’s vassal; and, more importantly, that justice required the accused to be accorded a legitimate defense, subject to necessary proofs.\textsuperscript{130} This constituted an important development within the ius commune of the right of due process.

More generally, the development of rights had its roots in the conflict between localities and more universal groups. This development comes out clearly in the medieval English context, in which the conflict between boroughs (relatively important towns) and the monarch was instrumental in bringing about due process rights. Charters—grants of rights from the crown—had their origins in antiquity, but became subjects of increasing conflict during the early parts of the middle ages. As municipal corporations asserted their corporate rights to control their own commerce and self government there was increasing push back from the monarchy. The result was a royal drive to regularize and enforce the duties of local charters through quo warranto proceedings. But, in pursuit of increased leverage over local charters, the monarch had to submit to a regularized process for challenging local governmental conduct, and even admit the possibility that his granting and revocation of charters itself was subject to law.\textsuperscript{151}

Local corporations sparred with the monarchy out of a deep, much-evidenced desire to maintain control over their own governance. And this desire manifested itself throughout the following centuries. Most relevant, it produced a series of local charters among the colonists in America, beginning with, but not limited to the Mayflower Compact, through which Puritan colonists formed themselves into a civil body politic and agreed to abide by such rules as they would thereafter deem best suited for their self-government.\textsuperscript{152} Faced with the attempts of the British to regularize their imperial arrangements in a manner dangerous to such local rights, the Americans declared independence and formed their own union of states, careful to maintain significant jurisdictional authority in more local units of government.

\textsuperscript{149} CANNING, supra note 91, at 165–66.
\textsuperscript{150} Id. at 166; see also PENNINGTON, supra note 102, at 265 (Popes and Princes subject to natural law and law of nations requiring formal summons in criminal cases unless acting with fullness of power and in just cause).
\textsuperscript{151} FROHNEN, supra note 121, at 814–20.
\textsuperscript{152} Mayflower Compact November 11, 1620, in THE AMERICAN REPUBLIC: PRIMARY SOURCES (Bruce Frohnen ed., Liberty Fund 2002).
Up through the founding era in America rights were rooted in recognition of the interdependence of individual with community. Moreover, a clear basis in natural law reasoning according to which rights by nature are limited by their proper, natural ends, maintained a balance between the drive for individual expression and autonomy and the requirements of public order and the rights of the community, as well as other individuals. This has changed, of course, as rights increasingly have been seen as attaching only to individuals. Rights in contemporary discourse are pieces of property owned by individuals, to be used as swords or shields in conflicts with other individuals and/or the state. Inevitably, the result is a concatenation of conflicting rights which must be “balanced” by the state and its judicial functionaries acting outside the law. This vision reaches its heights in the writings of Ronald Dworkin, for whom Herculean judges are to impose their morality on the texts in front of them by divining their meaning through a process of extensive abstraction and re-concretization in accord with their own moral sense. The theoretically absolute power and authority of the state is to be “check” (or “balanced”) by employees of the state who happen to wear black robes and consider themselves to be great philosophers.

CONCLUSION: INDIVIDUALISM AND THE EMPOWERED STATE

Modern liberalism has a generous notion at the heart of its theory: that rights belong to each of us merely on account of our existence, with, as it were, no strings attached. Sadly, this generosity does not extend to those whose substantive visions of the good may be troublesome to the central liberal values of equality and autonomy. The result is an untenable constitutionalism resting on the empowerment of political elites and various neo-governmental “facilitators” and the enervation of local corporate groups.
Liberalism’s valuation of the rule of law is unique on account of the reasoning and goals at the root of its emphasis. Liberalism values constitutions as a means of facilitating a particular kind of personal freedom—individual autonomy. That facilitation is provided through social peace rooted in a splintering of interests and a bracketing of moral and especially religious convictions so as to render moral consensus of a very thin kind possible and sustainable.\footnote{Kautz, supra note 5, at 447.} The stability necessary for liberal individualism is seen by its proponents as being made possible by leaching out foundational beliefs from the public square, in part through a legal/constitutional structure banishing beliefs regarding moral ends and the nature of existence from consideration in politics.\footnote{Id. at 451–54.} The result is a form of constitutionalism (like its supporting ideology) committed to individualism and centralization and hostile toward intermediary groups and decentralized structures as well as the moral and religious beliefs which give so many such structures their reason to exist.

Liberal constitutional demands are painted in purely procedural terms—of “trust” and “consensus” regarding the manner in which decisions will be made rather than their substance.\footnote{Franklin & Baun, supra note 29, at 236–37.} But to make this consensus stick requires radical cultural transformation. The liberal ideal of autonomous actors requires that rational individuals give only rational consent to political policies and regimes, meaning that political forms of authority, and especially religious orthodoxy, must be marginalized or destroyed.\footnote{Kautz, supra note 5, at 451–53.}

The problem for liberalism, then, is not just illiberal beliefs—including religious faith. It also, and more primarily, is the intermediary institutions, including religion, but also local associations, trade associations, and even unions, that are the real enemy of liberal constitutionalism and its ultimate good of democracy. As one observer put it: “the main threats to the consolidation of democracy are the pressures of the so-called ‘corporative’ groups—the military, the Church, the trade unions, and entrepreneurial conglomerates.”\footnote{Carlos Santiago Nino, Transition to Democracy, in Constitutionalism and Democracy: Transitions in the Contemporary World 53 (Douglas Greenberg et al., eds., 1993).}

Loyalties to groups other than the nation are seen, in this light, as dangerous, tending to undermine the equality of democracy and the liberty of autonomous individuals to be defended by the centralized
state. This view and its dangers are made most clear in Western attitudes toward developing countries. The proper goal in such countries, for liberal observers, is to get the elites to exercise strong executive power to jump-start political and economic development; centralization is seen as essential to form a proper, liberal political culture in which citizens make rational choices among political and economic programs.  

Localism, ethnicity and other ties to groups other than the state on this view are dangerous to liberal constitutionalism. The argument, of course, is that local attachments lead to corruption—placing the interests of the clan above the interests of the nation. Thus “the main threats to the consolidation of democracy are the pressures of the so-called ‘corporative’ groups.”

Unfortunately, such hostility toward the more local, natural attachments of people leads to tragedy rooted in high but disappointed expectations, alienation, and violence as local groups, stripped of their civilizing influences and goals, seek merely to take over the institutionally weak but often rich and well-stocked central government. More broadly, the result of the push for centralized political direction is executive tyranny. In Africa in particular, where constitutions have incorporated “aspirational” economic and political rights, too many presidents have been elevated above the law in part on account of their status as the embodiment of national hopes. One is reminded, here, of the development of modern “sovereign” absolute monarchs in early modern Europe, often portrayed as embodying the state tasked with achieving national greatness at the expense of “selfish” local loyalties. The multiplicity of loyalties and authorities in sub-

163. McWhinney, supra note 24, at 233.
165. Nino, supra note 162, at 256.
166. Yemi Osinbajo, Human Rights, Economic Development, and the Corruption Factor, in Human Rights, the Rule of Law and Development in Africa (Paul Tiyambe Zeleza & Philip J. McConnaughay eds., Univ. of Penn. Press 2004) (regarding Nigeria, the state’s control over “virtually all the national income has led to a situation where government is the purveyor of livelihood for all. Political power therefore simply means economic power”). On Kenya, see Joel Ngugu, The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa, 20 Wis. Int’l L.J. 297, n. 146 (2002) (pointing out that at independence all land not registered in the names of individual proprietors was declared to be in trust for all those ordinarily resident in the area).
168. ALEXIS DE TOCQUEVILLE, THE OLD REGIME AND THE REVOLUTION 261–62 (1955) (discussing the Prussian legal code of the late 18th century as part of a general absolutist
Saharan Africa is hardly unique or “primitive” in global terms. What is different is the set of legal and cultural assumptions—as well as the firepower of military technology—empowering those who manage to gain control over the mechanisms and symbols of the state. Perhaps most crucially however, faith in sovereign power as a source of peace and security has reached unrealistic and damaging proportions.

It is time for American lawyers in particular to ask themselves whether Anglo Saxon traditions of common law, with its conceptions of equality before the law, fairness and the necessity of an absence of surprise in legal process and procedure, are parts of an abstract ideology of individual autonomy and equality, or something deeper and more important. If, as I have argued, the rule of law predates and is in important ways undermined by liberal ideology, and if the same goes for other values central to our conception of good government, perhaps it is time to stop insisting that all countries (including our own) conform to the abstractions of public reason and begin developing an appreciation to—and ability to foster—a wider variety of institutions, beliefs, and practices capable of fostering human flourishing within a multiplicity of authorities that together are capable of cabining power while empowering people.

169. N. Barney Pityana, Toward a Theory of Applied Cultural Relativism in Human Rights, in Human Rights, the Rule of Law and Development in Africa, supra note 166.