

AMERICAN LESSONS FOR EUROPEAN
FEDERALISM

BY

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PREFACE

This essay was originally delivered as a lecture at the Cass Business School in London in October 2004. It was the first of a series that was intended as the opening salvo in a campaign to spark a renaissance of British political thought concerning our own Constitutional development and its relationship to the European Union.

Professor Epstein is one of the most respected lawyers in the world. In this essay he weaves together several entwined subjects. He first addresses the relationship of federalism to the advantages of competitive markets. He then examines the evolution of the American Constitution to expose the flaws of the now-defunct new Constitution for the European Union in order to supply a much-needed intellectual foundation for further thought about any future attempts to reform or replace the now dysfunctional EU.

We have been frequently told for many decades that the purpose of the EC / EU was to increase trade and international cooperation in Europe. The actual purpose of the EU's architects, however, has been to impose supranational limits on competitive markets and to subsume international cooperation within supranational governance. The vast implications of this new system for the protection of individual rights and for the organisation of political life were systematically ignored or misstated.

Professor Epstein's essay exposes the errors of the EU's advocates. The lesson of two centuries of American federalism is that even the American Constitution – a document among the finest of mankind's political achievements – proved unable in many ways to inhibit the inherently centralising tendencies of modern democratic politics that have undermined the protections of individual rights, including property rights, at the heart of the Constitution. His conclusion is that neither British nor other member states' economic or constitutional interests are served by the current EU machinery. Nor are matters improved by the proposed Constitution, which would encourage and allow much greater damaging centralisation than has the American Constitution.

Professor Epstein's argument can be briefly summarised...

First, the US Constitution is predicated on the fact that, as Madison observed, "if men were angels no government would be necessary". The Constitution exists to guard individuals both from each other and from the State that it creates and which is prone to the failures of man inherent in his nature. Consequently, the principle of *division of powers* is enshrined in the Constitution's structure.

Second, the US Constitution is predicated on an explicitly Lockean theory about the objectives and methods of Government: individual liberty is the main objective and the constitutional protection of political, and property, rights is the main method for its realisation.

Third, there is, therefore, both on political and economic grounds, an assumption in favour of local decisions over centralised bureaucracy, with federal government theoretically limited to preventing local blockades of competitive markets that operate on a national scale. Private property is to be protected against regulation without just compensation (subject to exceptions concerning such matters as nuisance and trespass) and freedom of contract is similarly protected (subject to similar exceptions concerning third parties, and those concerning monopoly, fraud, duress etc).

Fourth, despite the Lockean philosophy of the Founding Fathers, the Constitution provided mechanisms which, when extended beyond their original boundaries, have allowed enormous centralisation. While the original Articles of Confederation (after the Declaration of Independence)

did not provide the national government with the power to regulate the internal commercial practices of states and simply decreed non-discrimination, the Constitution made crucial and extremely far-reaching changes, such as the Commerce Clause, which permitted the direct regulation of “commerce among the several states”. By the time the New Deal reforms had run their course, this power to regulate trade *between* states was profoundly reinterpreted to mean power to regulate trade *within* states, by such simple devices as arguing that, for example, feeding one’s own corn to one’s own cattle *affected* an interstate price and therefore fell within the power of the national government to regulate. Soon, the courts allowed a wave of regulations concerning all other forms of local activity, even that which was not commerce, and, as a matter of empirically observable fact, a vast extension of the power of the federal government and courts. (Notwithstanding its other weaknesses, the original Articles of Confederation may, therefore, be a superior model for structuring federal trade relations than the Constitution.)

Fifth, the EU Constitution (a) is not as clear as the American in its Lockean orientation, providing greater scope for executive and judicial encroachment; and (b) in any event builds in at the ground floor large swathes of state regulation and centralised power. Whereas the Tenth Amendment to the US Constitution explicitly reserves those powers to the states that are not conferred to the centre by the Constitution, the EU Constitution approaches from the opposite perspective: the members are “allowed” to do what the EU does not. Further, the “objectives of the Union” are so widely drawn, from animal rights to family life to protection of sexual preferences, that almost no activity can be confidently guaranteed as outside the EU’s jurisdiction.

In light of the parallel American experience, this broad definition of central power inevitably means that the EU’s executive and judiciary would expand the competences of the EU even beyond the enormous sphere imagined in the Constitution. Given references to “fair trade” and to a myriad of “rights”, it is equally certain that huge restrictions on property rights would be effected beyond the control of any national power to resist impositions from the EU machinery. Given that such formulations have been used to weaken individual rights and competitive markets even in an American culture that values individual rights more than the Continent, these elements of the EU’s development can only continue to undermine European prosperity and, even worse, those shaky foundations of liberal society that have been painfully constructed since 1945.

The fact that such a Lockean constitution as the American, which was so well drafted relative to others, has nevertheless yielded so much unexpected complexity and allowed such huge concentrations of power in centralised institutions stands as a grave warning to those who support the structure of the current EU and advocate an extension of its powers, either *via* the proposed Constitution or *via* other methods. After just thirty years of membership of the EC / EU, the consequences for Britain have already been a far greater transfer of power to institutions beyond local democratic control than were anticipated by the electorate thirty years ago. Professor Epstein warns us to consider this dynamic when considering other EU constitutional innovations.

Sixth, these reflections ought to make us ponder the fundamental questions concerning the EU’s dynamics. There is not that desire or rationale for a centralised state to provide external security that provided the impetus for the American experiment. Whereas the member states of the USA were culturally homogenous, the member states of the EU are culturally heterogeneous, and therefore they have, slavery to one side, a heterogeneous set of preferences in comparison with 1787 America. The two principal purposes of a federation concern (a) how to bind states together for the purpose of unifying foreign and security policy; (b) how best, within a single state, to maximise trade gains.

Since there is little prospect of the current EU members (especially Britain) agreeing on a federation for security reasons (and such a federation would suffer its own turmoil), and the trading

arrangement of the EU is far below optimal from a commercial perspective, we are left with the question: how should trading arrangements in Europe be changed? Professor Epstein's answer is simple: Europe should replace the EU structure with a simple agreement on non-discrimination, along the lines of the Articles of Confederation, which would maximise trade gains without damaging markets, individual rights, or democratic accountability. The diversity of institutional structures and the competition between them that would follow would enable faster and more effective adaptation to globalisation's challenges than the current trend towards a bureaucratic uniformity.

In considering EU reform or replacement, we move into territory not explored by Professor Epstein but which is crucial if Britain is to alter course and revive an increasingly dysfunctional political system.

Notwithstanding its modest origins, over time, the EC / EU was primarily constructed not to extend the power of competitive markets *viz* the centralised state but to provide for supranational control of them – not to liberalise à la Hayek but to forestall Hayek. The unfortunate truth is that the Anglo-American tradition of cultural and intellectual support for Locke – a tradition which is dim and growing dimmer in Britain – has little purchase on the European Continent. Neither the public nor intellectual classes have enthusiasm for Hayek and the Chicago School. The political classes like the EU *precisely because* it is a bulwark against competitive markets and against democratic accountability.

The British debate has been misdirected by various connected developments in our political culture which are partly homegrown and partly products of the influence of Continental philosophy and politics. Within fifteen years of 1945, the global intellectual shift towards collectivism combined with a collapse of British elite confidence in their own governing capacity and in the capacity of competitive markets and national democracy. In contrast with British failure, the “inevitable” success of the “modern” EC / EU project became axiomatic – Britain, it was thought, had no alternative national strategy to membership in order to “influence” the grand supranational project.

Any new, realistic British foreign policy has to dispense with the elite illusions of decades past. The Customs Union, as opposed to a Free Trade Area, prevents members from reducing trade barriers against third countries (eg. Britain cannot now reduce trade barriers that damage Asian commerce or Africa's poor). The Single Market was *sold* in Britain and to European businesses as a mechanism for expanding free trade and liberalising Europe. However, it was *intended* by Delors primarily as a means of transferring legislative power to the EU – something which neither the British political elites, nor the Foreign Office, nor business realised until it was too late. The Single Market has allowed an incompetent (sometimes corrupt) and unaccountable bureaucracy, sheltered by a supranational judiciary, to remake somewhere over half the laws now made affecting European citizens.

European growth has been much slower in the decade since the Single Market than in the decade before 1992. While intra-North American trade has increased rapidly since 1992, intra-EU trade has not – yet this was the heart of the rationale for the Single Market. The House of Commons Library recently estimated that about 80 percent of the cost of regulation on UK businesses since 1998 stems from the EU, and the New York Fed has estimated the cost of EU regulation at 12 percent of GDP.

The imminent demographic crunch in Europe will combine with already stagnant growth, already high unemployment, and a growing educational and technological gap with America. This

dangerous brew will produce an institutional matrix dominated by a remote bureaucracy which believes that markets and democracy are the problem while centralised EU power is the only answer. The result will be a vicious circle of shrinking workforces, shrinking growth, growing pension commitments, growing debts, rising interest rates, rising unemployment, and political conflict.

It is no surprise, therefore, to see rising business and public opposition to the EU, Single Market, and EMU. Large majorities now oppose replacing the pound, oppose the central principle of the Single Market (that free trade in Europe requires harmonising regulation by the EU), and support taking back power from the EU over trade and employment policy. The EU's biggest supporters are big businesses and big unions that seek to find shelter in the EU's power to help monopolies, and in those political groups who hope to capitalize on the EU's capacity for reducing the power of democratic votes.

A new system, once justified primarily on the ground that it could produce increased prosperity, has failed in its own terms. Its failure has simultaneously weakened the rule of law and democratic accountability. Looking forward to the threats of terrorist application of technology and the geopolitical consequences of Asia's rise, it is clear that the dysfunctional EU has proved itself unable to make the necessary adaptations. British elite expectation of "influence" has not been justified by experience. That practical impotence ought to be no surprise given the other players have mostly been attempting to create an anti-Lockean structure, about which elites have misled themselves and the public. The chimera of "influence" has simply meant handing ever more crucial power to a failing institution. The proposed Constitution and similar projects already under development in Europe would not only entrench this failed model but would extend its power to do harm.

If Britain is to prosper in the 21st Century, it must recover the power to adapt fast to a changing environment – the *sine qua non* of any successful entity. We must seek the transformation of our relationship with the EU *and the nature of the EU* by making clear our determination to take back crucial powers over trade and the economy and our desire to see the EU change to include (a) a core based on EMU, Single Market harmonisation, and supranational government (assuming we will not persuade all countries to support us), and (b) a majority of European nations who prefer free trade, mutual recognition (rather than harmonisation), and international cooperation.

Britain should therefore seek to persuade America and others in Europe to pursue this transformation which could include the concept of a *Global Organisation for Security and Trade (GOST)* – a global alliance offering free trade, mutual defence, a pooled force for counter-terrorism, counter-insurgency and "state building." In time that network could offer a global alternative to the UN's incompetence and lack of moral legitimacy by tackling the hard questions of technology diffusion and defence procurement. This shift in emphasis would allow a major liberalisation of our economy and would, by restoring an independent UK trade policy, open up new international constellations – it is absurd that EU membership indefinitely blocks liberalising trade with India and China.

The clear determination to transform our own relationship, unilaterally if necessary, is not only the best mechanism for exerting real influence and gaining allies but is the best approach whether we can build European alliances in the short-term or not. The most powerful influence comes by successful example. That is why the Thatcher – Reagan reforms spread so fast and so wide; that is

what will ultimately drive reform in health and education. Nothing would influence Europe more than the demonstrated success of a more Hayekian Britain engaging in the geopolitical and technological issues of tomorrow – nothing will influence Europe less than our current trajectory of growing domestic dysfunction and, in Brussels, sullen complaint followed by resentful concession.

Dominic Cummings
September 2005

(For further thoughts on these issues, cf. *New Frontiers in Defence*, December 2004, on the NFF website.)

A Belated Introduction:

The Breakdown of the EU Constitution

By Richard Epstein

On October 14, 2004 it was my great privilege to be asked by New Frontiers to deliver the first in a series of lectures at the Cass Business School, under the Title, “American Lessons for European Federalism: Doubts about the Proposed EU Constitution.” The basic point of that lecture was to critique the proposed EU Constitution from the point of view of someone who believed that the American Founding Fathers got it about right on the two key questions of government structure: federalism and individual rights.

The federalism question asks how is power to be distributed across different and overlapping government entities that share the same territory, and answers broadly that local matters should be subject to local decision, while the network aspects of communication and transportation across state lines should be subject to federal regulation whose major purpose is to prevent local blockades of interstate transactions that promise to expand the scope of a general free trade zone. The lesson that one learns from the American experience is that it is difficult to keep that limited conception in place against the enormous, if misguided, political forces that see centralized regulation of local activities as a desirable way to forestall competitive activities in separate states, not promote them.

The individual rights question, insofar as it applies to economic activity, derives from the same underlying Hayekian conviction of the superiority of competitive markets over centralized planning. Its key elements are the protection of private property from occupation or regulation that diminishes its value unless just compensation is provided. There is a critical police power exception to this rule that allows for regulation that is intended to prevent tort-like harms (chiefly trespasses and nuisances) to other individuals, but otherwise it does not afford an implicit benediction to government action that leaves owners in possession of their property, but through one stratagem or another removes the key rights for present use and future development that give property its great value.

The second portion of the system is a commitment to a solid regime of freedom of contract that allows individuals to make and enforce contracts free from the arbitrary impositions of the state. Exceptions also apply to this doctrine, but these are chiefly limited to the control of nasty

external effects — wrongs to third parties again, the control of monopoly and the protection against advantage taking by fraud and duress, especially against the vulnerable portions of the population.

It takes little ingenuity to realize that these programmes are not realised in full either in England or the United States today. Yet by the same token these principles still resonate in political discourse on both sides of the Anglo-American Atlantic, where the moral and economic superiority of socialism, far from being taken as a moral given, is a contestable truth whose validity is subject to ever-greater doubt. The situation on much of the Continent, especially in France and Germany, is quite different. The level of scorn or at least indifference to the principles stated here should be evident in nations that flirt with mandatory maximums for work weeks, guaranteed vacations, and strong protections for local unions.

Viewed from the perspective of the median French or German intellectual, there is much to dislike about the EU Constitution. As I pointed out in the principal lecture, there are many clauses in the Constitution that speak of the creation of open borders and free-trade zones. I have spent much time with serious journalists and intellectuals on the continent who argue that the EU Constitution would work an extensive liberalisation of their own local economies, relative to the *status quo ante* that features a heavy statist hand in all matters great and small. I have no doubt that they are correct in their assessment, and thus sign on to the conventional explanation that the French voted out the EU Constitution because it gave too much scope for open labour and product markets rather than too little. That explanation may not explain the Dutch rejection of the same doctrine, which could easily have been spurred by a deep suspicion that no small country could survive in a large European Union that gave such a diffuse set of powers to the various government agencies housed in Brussels.

Some people might assume that the response of the French vote falsifies the analysis that I gave in the principle lecture. After all, they will say, how can the EU Constitution be too statist if voted down by the French! I am inclined, however, to view it as a confirmation of my earlier views, and for two reasons.

First, there is enough looseness in the joints of this cumbersome agreement for both sides to have genuine doubts as to the extent that their own national visions would have been captured on the ground if the EU Constitution had been put into place. Here, as a general matter, no one should sign on to the pig-in-the-poke in light of the endless degrees of freedom that remain after passage and before implementation.

Second, the refusal of the French to go along with this proposal only confirms the view that a close union cannot take place between sovereign nations with long traditions of governance that are fundamentally at odds with each other. The usual rule on partnerships, whether commercial or political, is that they do not survive solely because they contain some formal mechanism that allows for the resolution of inevitable differences that crop up along the way. Let those differences be great, and no dispute mechanism will be able to paper over the fundamental disagreement, nor allow the reaching of some compromise that leaves each side feeling good about its own self-image. In straight business terms, the gap between the potential partners was too great for the deal to work.

The result here should therefore be welcomed on both sides: the French did the British a favor by knocking out an agreement that neither side could live with. The important business now on the agenda is to make sure that neither fortress France or fortress Great Britain spring up in consequence of this welcome political breakdown. The idea of an expansive trading network that allows for exchange of goods and services among EU members, each of which can subject its own internal economy to whatever regulation (or the absence of regulation) that it chooses, is still an important step on the road to free trade. We do not want any nation to set the labour or environmental standards for its trading partners.

The great risk here is that the removal of internal barriers to trade will be matched by a protectionist wall that surrounds the entire EU. In wake of the failure of the EU Constitution, the next agenda is to make sure that free trade, without shared governance, becomes the goal both within the EU, and between the EU and the rest of its trading partners. Good luck.

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AMERICAN LESSONS FOR EUROPEAN FEDERALISM: DOUBTS ABOUT THE PROPOSED EU CONSTITUTION.

FEDERALIST STRUCTURES AND INDIVIDUAL RIGHTS

The purpose of this essay is to ask what lessons the members of the European Union might learn from the history and evolution of American Constitutionalism. Those lessons could prove of assistance in the decision on whether to ratify the proposed EU Constitution. Putting the question as I have done represents an odd inversion of the usual course of business. Europe has a longer history than the United States, and we Americans usually have to take our cue from the other side of the Atlantic. But the vagaries of history are such that the USA (with a nod to the Swiss) hit on the system of federalism from the start of our constitutional history and has long watched its many twists and turns with both awe and consternation. The overall estimation is that our grand experiment has proved itself a success, for, as they sang nearly thirty years ago in Robert Altman's *Nashville*, "You must be doin' something right to last 200 years." But something is not everything, and success is not perfection. People on both sides of the Atlantic would do well to learn from our mistakes as well as from our achievements. And to do this we must start with fundamentals about how constitutions are put together.

At the outset, it is useful to note that the American vision of constitutional theory — and it was conscious theory that drove our Constitution — is divided into two parts, each of which is an essential part of the entire picture, and both of which, together, translate well into the European context. The first of these deals with the structural provisions of the Constitution. The second deals with the direct protection, usually through constitutional entrenchment, of particular substantive individual rights against legislative or executive nullification. Both of these are implicated in the current drive toward an EU Constitution, so it is worthwhile to give a brief outline of the place that each component occupies in the overall scheme of the American constitutional law.

On the first front, one key structural element of the American Constitution requires the division of power among different layers of government under the federal principle.¹ The key

¹ In this essay I do not discuss the separation of powers, which give different branches of government different roles. That division among the legislative, executive, and judicial branches has helped stem hasty and ill-considered laws, but its force has been diluted, for example, by the rise of independent administrative agencies, such as the Federal Communications Commission and the National Labor Relations Board, that have both administrative and judicial powers. The vast power of the European Commission raises concerns on this issue that I shall not address here.

political principle that animates this division is in some sense more important than the particular strategy for its implementation. Quite simply, the American Constitution starts from an assumption about the flawed character of human beings, many of whom are driven by a form of self-interest that allows them to achieve great heights in the one moment and to do horrible things in the next. Individuals can misbehave not only as private citizens, but also as lawmakers or administrative officials. Political agencies are imperfect operations, subject to capture by faction, so that on average it becomes sensible to slow down the law-making process, even at the cost of blocking some desirable legislation.

The evolution of American federalism is of relevance because a federalist structure is contemplated in the current EU Constitution. In the United States, this layered division of authority is a throwback to an administrative structure that operated in colonial times. Before independence, each of the thirteen colonies had the power to govern locally, subject to some general oversight by the Crown. Come the American Revolution, the Crown was displaced by the United States government in Washington. But on the original view, the federal government had only few and enumerated powers, while the diffuse mass of general powers remained in the states. That division slowed down the operation of government, but over time it has been transformed, so that powers that were once definite and limited have become largely unbounded through an aggressive reading of the so-called Commerce Clause: “Congress shall have the power...to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”² Here, the changes in the relationship between the two levels of government have been all the more dramatic because the underlying textual provision has itself remained unaltered. The question whether this transformation is evidence of a prudent judicial evolution or lawless constitutional behavior is quite up for grabs, and depends critically on the view as to the proper use of government power in the first place—that most ultimate of political questions.

Our basic federalist provisions, then, offer their fair share of transformative surprises. So too does the second set of basic provisions in the United States Constitution, namely, those that guarantee various individual rights against either the federal government, the states, or both. Here the theory was that liberty and property were in general the primary goods, so that laws that impaired the obligation of contract, interfered with the free exercise of religion, abridged the freedom of speech, deprived people of their property without just compensation, or deprived them of due process of law were beyond the power of Congress or the states to enact—at least without some strong reason for so doing. Just what kind of reason counts as strong enough offers enough complexity to last a lifetime.

² U.S. CONST. art I., § 8, cl. 3.

Within the American framework, the protected rights have a Lockean cast, with a stress on liberty and property that is not found, at least in equal measure, in the proposed EU Constitution. Yet even the relatively consistent intellectual orientation embodied in the text has not prevented a judicial transformation in the treatment of individual rights. Not surprisingly, that transformation has been driven by the same intellectual world-view—the rise of the modern welfare state—that drove the parallel changes in the American conception of its federalist institutions. Historically, the protection of property and contract insulated wide swaths of competitive conduct from state regulation, while allowing the state to control private monopolies.

Since the New Deal, it is a matter of politics whether the state should create or suppress monopolies, and it has done as much of the former as it has of the latter in agriculture, labor and business. The traditional guarantees of individual rights remain strong for the most part in areas of speech and religion, but they have largely eroded on questions of property and economic liberties. Mixed cases, such as those which regulate campaign finance, draw an uncertain response, although as of late, the Progressive influence (which sees a need to keep money out of politics) has led the Court to sustain complex legislation against constitutional challenge. Looking back over the entire package, it is hard to understand how all these changes came about, or whether everything had to happen the way it did. Looking forward it is well-nigh impossible to predict the further evolution of these broad provisions, all of which cry out for a degree of precision that the constitutional text itself does not, and in all likelihood cannot, provide.

On every dimension, then, there is, as a brute political fact, less predictability about the business of constitutional law than one might have supposed. Certainly anyone who thinks that the law evolves independent of the will of the judges has not encountered the work of the most influential, and often the most able, members of the United States Supreme Court. Adopting a constitution, even a well-drafted constitution, is a bit like buying a pig in a poke. The question here is not whether there are right and wrong interpretations of particular provisions. I think that typically there are. But the operative question is the extent to which the “right” interpretations will dominate in practice, or be pushed aside as other views take over. There are many views in line with the American New Deal that I am happy to dismiss as wrong, but the positions that I deplore are frequently well accepted and often fiercely defended within the profession, often on grounds that insist on both their fidelity to text and their functional validity in modern circumstances. As a descriptive matter, the range of possible variance in interpretation of provisions is in practice always larger than some rule-bound vision of law might suggest.

The proposed European Constitution bears some relationship to the American version at least insofar as it contains both structural provisions and guarantees of individual rights. Both of these assume forms that are quite different from the American because of historical and intellectual

differences. The first difference is that the separation of the various nation-states of Europe is deep and enduring. The current rapprochement has taken place in the aftermath of two bloody wars in the last century. And even when those wounds have healed, the differences in tradition and language among the various EU members will be far greater than they are among the various states of the United States: I have lived in Illinois for over 30 years, but do not think of myself as a citizen of that state, even though the Fourteenth Amendment to the Constitution so provides.³ State citizenship in the United States matters much less in practice than national citizenship in the EU, which no one can ignore.

The second difference relates to orientation. There is little question that the original design of the American Constitution stressed strong protections for liberty and property as these terms were understood by John Locke, for example, so that limited government was the order of the day. With time, and over much resistance, the Constitution received an interpretation that allowed the social welfare elements of Franklin Roosevelt's New Deal to be incorporated into the legislation of the day.⁴ But the EU Constitution builds in broad swaths of the strong-government tradition at the ground floor, so that its provisions speak both to the protection of individual rights and to the advancement of some broad conception of the common good in the same breath, which creates an internal textual tension that makes interpreting the EU Constitution a trickier affair than interpreting the American Constitution.

Given the limits on interpretation, the larger task of constitution building is fraught with inescapable difficulties. The question is whether that undertaking is worth the candle. In my view, the answer to that question is an emphatic no. So long as the individual nation states wish to keep their own military and foreign affairs operations separate and distinct from each other's, then a modest EU that creates a free-trade zone is likely to do better than a more extensive constitutional system that provides the Brussels establishment with a strong dose of legislative and administrative power. I reach this conclusion not as a neutral observer of either American or European affairs, but as a believer in the original choices of the American Constitution who is deeply troubled by the conscious twentieth century departures from eighteenth century principles. That said, my deep misgivings about key substantive aspirations of the proposed EU Constitution, when combined with any realistic assessment of the difficulties of constitution making, counsel for caution: work for open trade in goods and services, but beware of the perils of full constitutional integration.

³ "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

⁴ For discussion of these trends, see RICHARD A. EPSTEIN, *FREE MARKETS UNDER SIEGE: CARTELS, POLITICS AND SOCIAL WELFARE* 28-32 (Institute of Economic Affairs 2004).

In order to see how these themes play out, let me take in turn the questions of federation and separation of powers, and then address those of individual rights.

FEDERALISM: Rather than plunge into the particulars of any given constitutional scheme it is useful to start with the prior general question: why might a group of individuals or states (that difference sometimes counts as critical) choose to embrace the federal solution at all? To that query, we should be cautious about accepting some self-evident truth that two or more political entities should align themselves in this fashion whenever they perceive gains from cooperation. Cooperation is a necessary condition for thinking about closer ties. But it is hardly a sufficient condition for federation in any form. By way of analogy, when we look at the behavior of non-territorial firms, we see that they adopt all sorts of different cooperative arrangements. At one pole, some firms choose to merge, which would be the equivalent of establishing a single larger state without any federal features at all. At the other pole, some firms decide that no long term relationship is appropriate. They retain frosty relations at a distance or enter into spot contracts with each other over particular transactions or problems, but every joint project remains on a regime of case-by-case consent. Between those two extremes, it is possible for firms to enter into long term contracts with each other, such as pooling agreements or joint ventures. And these have the analogy of entering into leagues or perhaps customs unions, in which entities trade and cooperate without any explicit governance structure that covers the transactions. Federalism is analogous to only the fourth alternative, in which two corporations become subsidiaries of a third which holds some degree of control over them. That is not precise, but for our purposes, the federal solution presupposes at least two levels of governance, where the sovereignty of each level is preserved in at least some domains. Federalism generates by far the most complex structure of any of the arrangements that we have seen. The question is what potential gains would justify the use of that general approach.

One key to answering this question turns on the level of heterogeneity among the various groups within the overarching political entity. If the relevant differences, whether on attitudes, language, or wealth, are exceedingly large, then few gains from permanent cooperation are likely to be achieved even if the populations are geographically close to each other. Quite the opposite, the situation is like that of France and Germany in 1900. The long border was a source of anxiety for both.

At the other extreme, if there is a perfect identity of interest along ethnic and social lines, then often the formation of a single nation is appropriate, where the difficulties of running a large nation are met by the creation of administrative districts that do not possess the level of autonomy that is

found in independent states: the formation of Germany and of Italy might fall into that category. Hence the federalist situation often comes about where there is agreement on some issues, and disagreement on others, so that the separate units are willing to cede some but not all power to the center. Yet even this is not a fully accurate statement of current affairs, because there has to be some reason to think that the centralization will lead to a more efficient discharge of the relevant functions. How might that be?

Here there are by and large three different kinds of issues that could arise. The first of these is military, and the question is whether the federalist solution confers some advantage on that front over separate entities. The second is economic, and the issue here is whether the federal situation allows for the coordination and/or expansion of markets. The third is social, which asks whether any differences in language, religion or tradition preclude the level of trust that is needed for the limited cooperation required by a federalist entity? Using this prism it becomes possible to examine some of the concrete historical issues that faced the United States when its leaders came together to discuss the difficulties of the Articles of Confederation and consider the formation of a more perfect union.

The first question is that of military engagement. The key condition that led to the creation of the United States was the strong perception that the loose alliance and treaty of friendship that had been the order of the day under the Articles of Confederation were not strong enough to allow the nation to ward off external threats, of which the British and the French were surely the main ones. So here the centralization deviated from the old rules of the Confederacy and allowed the use of national taxes (not found under the Articles of Confederation) to raise and maintain an army and navy.⁵ The states were still in the picture because one of the key provisions of our Constitution was the creation of state militias that were trained under a regimen, or discipline, that had been provided by the United States, but was implemented by the states individually.⁶ These militias could be called up into national service for specified causes, including the suppression of rebellion and

⁵ U.S. CONST. art. I, § 8, cl. 11: (“Congress shall have the power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years”); *Id.* art. 1, § 8, cl. 12 (“To provide and maintain a navy.”).

⁶ *Id.* art. 1, § 8, cl. 15 (“To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according the discipline [training rules] prescribed by Congress.”).

repelling external invasion,⁷ but not to fight an aggressive war overseas, as they did in World War I, when the entire structure collapsed.⁸

With the concentration of military power at the center came a second feature, the centralization of control over foreign affairs. In dealing with this issue, the Articles of Confederation gave the individual states some running room to enter into various alliances and treaties, subject to Congressional oversight. But the United States Constitution places a flat prohibition on the practices, which is strongly structural in that the Congress is not allowed to grant its consent to them.⁹

These two features reflect major changes in American sentiment on the critical issues of federal power over foreign affairs and the use of military force. But neither change, it seems to me, is on the cards for the EU. The point is surely correct even if we focus attention only to the original members of the EU, given the strong differences on these matters between the British on the one hand and the Germans and the French on the other. A unified foreign policy and military posture becomes politically impossible with the expansion of the alliance, creating even greater heterogeneity. Nor does any such change seem strictly necessary for defensive purposes. It would not do much against terrorism. Given the implosion that is taking place in Russia, with its declining population, low birth rate, shorter life expectancy, and high disease rate, the EU faces no strong military threat from the East that calls for unification. There are in a word no military reasons to form the EU. Rather, there are strong separate military traditions, and while the proposed EU Constitution calls for some general strengthening of the cooperative work, it leaves the ultimate control over the use of force in the hands of its member states.¹⁰ Even so, that is not likely to be a major agenda item given the tendency to free-ride on the United States and to a lesser extent Great Britain. But if so, then the question is why bother with the Union at all?

⁷ *Id.* art. 1, § 8, cl. 15 (“Congress shall have the powerTo provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”).

⁸ *See* *Selective Draft Law Cases*, 245 U.S. 366 (1918).

⁹ U.S. CONST. art. I, § 10, cl. 1 (“No state shall enter into any Treaty, Alliance, or Confederation”). There is no provision for a Congressional waiver such as that which is found in Art. I, § 10, cl. 2, dealing with taxation of imports and exports: “No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws.” Note, nothing is said as to how that consent is determined: majority of each house or what; I am not aware that this has been ever tested, so strong has the prohibition been.

¹⁰ *See, e.g.*, Treaty Establishing a Constitution for Europe, Art I-41(2) (“The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides.”).

The answer to this question has to lie in the realm of trade. It was one of the great features of the United States that it worked hard to create some form of free-trade zone. On this point there is much to be said in favor of the version found in the Articles of Confederation. Here I note that the mutual friendship and intercourse provision in Article IV guaranteed free citizens, vagabonds, paupers and fugitives from justice excepted, access to all the privileges and immunities of free citizens (i.e. not slaves) in the several states.¹¹ It gave protection to ingress and regress, what we should call entry and exit, and made it clear that the general rule was that the duties, imposts and restrictions on outsiders - a phrase that I should read comprehensively – should be identical those on insiders. That nondiscrimination regime means that we can have certain degrees of difference in the internal constitution of each state, but these variations should not work to the advantage of the insiders against the outsiders. It is a powerful theme to which we shall return.

Of equal importance in the Articles of Confederation is the want of any power in the central government to regulate the trade and commerce among the several states, so much so that one weakness in the Articles of Confederation is that they provide no mechanism, and no centralized system of judicial review, to respond to claims that some local rules violate the basic provisions, or to design and implement some form of relief in the event that a violation is found. But even though the nondiscrimination provision in the Articles of Confederation may have been too weak—the Articles were in effect for only about eight years—we do know that the provision was not too strong in its content. The block on state power did not create a comprehensive form of national power.

With the adoption of the United States Constitution, the perceived weaknesses of the Articles of Confederation led to a strong increase in the level of coordinated power at the center. I have already referred to the dominance of the federal government in military and foreign affairs. To that development, we have to add changes in the system of taxation, which gave the federal government a direct source of revenue that was independent of the generosity of the states.¹² In

¹¹ Articles of Confederation art. 4 (1781) (“The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.”)

¹² U.S. CONST art. I, § 8, cl. 1 (“The Congress shall have Power To lay and Collect Taxes, Duties, Imposts and Excises . . .”).

addition, it had a Supreme Court and the possibility (immediately exercised) to create an independent system of lower federal courts.¹³ It also adopted a unitary chief executive to allow for the expedition in the enforcement of the laws that matched the caution in enacting them.¹⁴

Even with those changes, the challenges to free commerce and trade come from two sources, both of which had to be addressed. The first of these is the several states, each of which could be tempted once the ink on the agreement is dry, to adopt various restrictions that favor them over all others. The second is from the federal government which could put some uniform scheme in place that might have served the interests of this or that industry but which would have retarded the free trade within the union that Article IV of the Articles of Confederation helped to preserve.

The first challenge was handled through explicit limitations placed on the power of the states. The first of these, which is a slimmed down version of the privileges and immunities clause of the Articles of Confederation, reads: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”¹⁵ That does not give any protection to aliens, which is a mistake. On its face, it is unclear whether it applies only to natural persons or whether corporations are included, a position that was ultimately rejected;¹⁶ and it lacks the particular provisions on ingress and regress, and any explicit reference to the nondiscrimination principle found in Article IV of the Articles of Confederation. It is an important provision, but it is hard to resist the temptation to conclude that on balance it amounts to a retreat from the earlier version. That loss, however, is made up in part by other provisions in the United States Constitution. Among these, one of great note is that no state shall pass any law “impairing the obligation of contract.”¹⁷ The scope of that provision was untested when it was drafted, and in the end by the narrowest of margins, it was read in *Ogden v. Saunders* only to protect existing contracts from state nullification by laws altering property rights, but to have no impact on those contracts that were

¹³ *Id.* art. III, § 1.

¹⁴ *Id.* art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”) One person, not a committee, would be in charge.

¹⁵ *Id.* art. IV, § 2, cl. 1.

¹⁶ *See* *Paul v. Virginia*, 75 U.S. 168 (1868). Here again there is nothing inexorable about the decision. The term citizen appears also in Article III, section 2, which defines the scope of the judicial power to hear controversies “between citizens of different states.” The complications of this head of diversity jurisdiction are enormous, but it has never been held that corporations are systematically excluded from federal courts under this provision. Rather for these purposes a corporation is “deemed” a citizen of the place where it is incorporated or where it has its principal place of business. 28 U.S.C. § 1332(c)(1).

¹⁷ U.S. CONST. art. I, § 10, cl. 1.

created after the passage of such laws.¹⁸ Settled expectations thus received protection (which was eroded in the New Deal),¹⁹ but the provision was not read to protect trade and intercourse generally, by forbidding state interference in property rights for contracts that had not yet been made, although Justices Marshall and Story, dissenting in *Ogden*, both read the provision in that fashion.

A third provision of some importance was the import/export clause, which placed sharp limitations on the power of the states to impose these various levies.²⁰ And just to make sure that the laws were properly restricted, the states were not allowed to keep the profits from these exactions. These proceeds had to be remitted to the Congress, which dulled the incentive to impose levies, even if it did not eliminate it. Of course provisions of this sort would be subject to evasion. One such effort in *Brown v. Maryland* was to impose a tax on importers for the privilege of doing business that was not tied explicitly to the volume of business so done.²¹ But Chief Justice Marshall took a hostile view of the provision in the decision for two reasons. He opposed it because it undermined congressional power to control interstate trade: the effort to avoid congressional consent was pretty thin, but not wholly idle. He was committed to the ideal of an open free trade union along the lines of that in the Articles, at least insofar as that trade was threatened by the actions of individual states, and not the United States. In so deciding, he set out a theme that remains true in the US until this day. Free trade is the highest good against state regulation of interstate commerce. Free trade is one value that stands tall among many in the face of federal regulation of the same activities. Ironically, I suspect that Maryland's statutory scheme would have been inconsistent with Article IV of Articles of Confederation, but, given their short history no one can be sure.

Fourth, the limitations on state power were expanded in the aftermath of the Civil War with the passage of the 14th Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."²² Among the many protean applications of this

¹⁸ 25 U.S. 213 (1827).

¹⁹ See, e.g., *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934) (allowing suspension of the collection of mortgages during the depression).

²⁰ U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.").

²¹ 25 U.S. 419 (1827).

²² U.S. CONST. amend. XIV, § 1.

provision was its application to efforts to impose extraterritorial taxes or differential taxes on outsiders.²³

Taken as a whole, the decided cases on this topic have gone a long way to replicate the nondiscrimination regime that is found in the Articles of Confederation, and to insulate free trade across state boundaries from provincial legislation. In dealing with interstate transactions, the level of judicial scrutiny is high, so high in fact that it reaches taxes that are neutral in form but which are intended to impose a differential burden on the outsiders for the benefit of the locals.²⁴ It is hard to identify these taxes at the outset, but once they are detected they can be neutralized, and with some exceptions the courts have worked fairly well on this element.

The rules here do allow for some deviation for the nondiscrimination principle that carries over from international agreements, such as those from the World Trade Organization. The movement of goods and people across borders not only facilitate gains from trade but could also carry infection and disease that any state should be able to guard against. If the only peril comes from without, then it is wasteful and counterproductive to impose restrictions on local individuals and firms. Suppose a threat to local flora and fauna only comes from out-of-state plants or animals. Tough restrictions are appropriate, but it is senseless to impose them on locals who do not have the same condition, almost by definition.²⁵ It is a bit like a requirement that all citizens, including males, undergo pregnancy tests. Some discrimination is necessary for the rule to work. The only question is whether there is a legitimate justification for its use.

The impact of local preferences on interstate commerce has also arisen in other contexts, including in the great case of *Gibbons v. Ogden*, where New York state provided one favored firm an exclusive franchise to use steam engines in local waters.²⁶ That does not look like any tax or impost on commerce, but it surely will reduce the ability of outsiders (and insiders) to take advantage of the efficient modes of transportation. Yet there is nothing explicit in the Constitution that deals with the spillovers that these domestic restraints have on interstate commerce. The resolution of this dispute thus directs the inquiry to the Constitution's affirmative grant of power to the United States, which has no counterpart under the Articles of Confederation.

²³ See, e.g., *Nippert v. Richmond*, 327 U.S. 416 (1946) (stating general prohibition on discriminatory taxation).

²⁴ See, e.g., *American Trucking Ass'n v. Scheiner*, 483 U.S. 266 (1987) (invalidating discriminatory tax on trucks).

²⁵ See, e.g., *Maine v. Taylor*, 477 U.S. 131 (1986).

²⁶ 22 U.S. 1 (1824), discussed *infra*.

As noted earlier, the question with regard to the Constitution's principal enumerated power is what it means to say that Congress has the power to regulate commerce "among the several States." Here, in an object lesson for the EU, the law has evolved in response to two issues, decided seriatim: first, we ask what Congress can do under this power; and second whether the Commerce Clause of its own force imposes any restrictions on what the states can do on their own initiative. In both these questions, the interpretation of the clause has taken the law down novel paths that could not have been foreseen by anyone who confined their attention to the language and structure of the basic text. The response to the first question led the huge and unexpected expansion of the federal power - let the EU beware - that distorted the basic relations between the federal and state governments. The response to the second is a happy tale whose chief consequence has been to impose further limitations on the state power to disrupt interstate trade and commerce, which has been one of the successes of the Union. It is useful to talk about each in some degree.

The first point to know about the Commerce Clause is that it meant what it said. This gave Congress the power to regulate. That regulation could be for good purposes or for bad. It might count as a good purpose if Congress had passed a uniform commercial code dealing with sales of goods and contracts of carriage that involved deals with more states than one. But the ironic history has been that the various uniform sales and carriage of goods acts have usually been state undertakings inspired by the National Conference of Commissioners on Uniform State Laws, which by and large has been in favor of standardization and free exchange. The provisions have been supported by key national players, such as the banks, and at least in commercial contexts have operated as forces for good. The United States Congress has played little or no role in this development except perhaps in those cases where the United States or one of its instrumentalities is a party to the particular transaction, where it has a more parochial interest that is at stake. All this is not to say that there are no early statutes passed under the Commerce Clause that have sensible purposes. It could easily be that the early licensing statutes that gave federal registration to ships engaged in commerce could have had desirable effects, but licenses should make one nervous because their inherent power of exclusion could be used for protectionist purposes, such as requiring only American crews on boats that ply American waters.

On the other side of the ledger, the power to regulate commerce could be used for purposes that are wholly inconsistent with free trade. The risk here is not one that emerged only after the Constitution was adopted. Quite the opposite, this mercantile project was one of the reasons why the Federalists, led by Alexander Hamilton, wanted to secure a strong power for Congress over commerce in order to protect American interests from competition by foreign nations. These are Hamilton's words: "By prohibitory regulations, extending, at the same time, throughout the States,

we may oblige foreign countries to bid against each other, for the privileges of our markets.”²⁷ In this regard, it seems clear that the purpose of regulation was, in the strong modern sense, to control access to markets, and to limit the terms and conditions on which trade took place. Regulation was not used solely in the benign Lockean sense that allows government to “regularize” transactions in property, as the English Statute of Frauds did in 1677 when it eased the challenges for conveyancing, making wills and dealing with guarantees.²⁸ Given that extensive federal clout was contemplated on the foreign side, it is hard to read the power to “regulate commerce” as implying a different meaning for interstate transactions than it has for foreign ones. The federal government had the option of imposing strong control over commerce that fell within its power, but the reach of that option was limited. It applied only to commerce among the several states. So the question is what it means to talk about commerce, and when is it among the several states?

On this score it was apparent from the outset that there was a serious tension between the powers of the federal and state governments. Yet the issue only came to a boil in the Supreme Court in 1824 when Chief Justice Marshall handed down his decision *Gibbons v. Ogden*,²⁹ where the fates put him on the good side. At issue in that case was whether New York state could grant a valid exclusive license to use steam power in New York waters in ways that would block another carrier’s interstate journey from Elizabethtown, New Jersey to New York City. Here the tension could be viewed as one between the forces of free trade and state monopoly, or it could be viewed as one between state and federal power. Chief Justice Marshall was the champion of federal power and was uncertain whether the powers conferred on the central government were strong enough to allow the Union to endure (which it almost did not). His overriding concern placed him squarely on the side of Union, which meant that in *Gibbons* he had to defend free trade against the local franchise. So he made two moves. His first was to insist that the power over commerce covered both trade among the several states and navigation, e.g., the entire journey from its start in the interior of one state to its conclusion in the interior of another. He therefore found it clear that the proposed interstate journey of *Gibbons* was subject to congressional regulation.

But did Congress exercise that power? In fact Congress had passed “an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same.”³⁰ There is nothing that makes it crystal clear that the federal licensing scheme precludes the state monopoly. It could be treated as a safety measure that required minimum standards for boats

²⁷ THE FEDERALIST NO. 11, at 63 (Alexander Hamilton) (Clinton Rossiter ed., 1962).

²⁸ Statute 29 Car, C. 3 (1677). AN ACT FOR THE PREVENTION OF FRAUDS AND PERJURIES

²⁹ 22 U.S. 1 (1824).

³⁰ *Id.* at 2.

in interstate commerce but did not interfere with the state's power to decide what kind of ships could ply in local waters. But Chief Justice Marshall took the view that the federal statute ousted the state law under the Supremacy Clause of the Constitution, which makes federal law the "supreme Law of the Land."³¹ His fellow judge, Justice Johnson, took this logic one step further, and held that the simple existence of the federal power excluded the operation of the state power.³² In effect he reversed the burden: now states could prohibit transportation only if they received a congressional dispensation. In fact the position was somewhat more complicated than this, for the logic that limits states' power to impose explicit prohibitions on interstate commerce could apply to other state laws that had some independent health or safety justification but also restricted interstate commerce. For these, some balancing of federal and state interests has remained the norm, at least when the Congress was silent.³³

The object lesson for the EU, however, rests on the transformation of the commerce power after the initial decision by Justice Marshall. His original decision contemplated some forms of local commerce that lay outside the scope of federal power and it surely meant to exclude manufacturing and agriculture from federal control. After all, state inspection laws were explicitly protected under the Constitution, and it is unlikely that Congress could use its supreme powers to limit a power that the Constitution had reserved explicitly to the states.³⁴ But the history of the Constitution showed that all apparent guarantees of local autonomy could not resist the pressure for expansion once the justices were convinced that only national solutions could deal with the complexities of modern commerce and the dislocations of the depression.

In the first step in the expansion, the justices held that all portions of the transportation system were involved in interstate commerce, even if they only involved journeys that began and ended within a particular state. One rationale was that it was necessary for Congress to regulate local lines that were in competition with interstate lines.³⁵ A second was that Congress could impose a uniform rate of return regulation over the entire system.³⁶ It seems clear to me that one of

³¹ U.S. CONST. art VI cl. 2 ("This Constitution, and the Law of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

³² 22 U.S. at 227.

³³ *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

³⁴ U.S. CONST art.I, § 10, cl. 2.

³⁵ *Shreveport Rate Cases*, 234 U.S. 342 (1914).

³⁶ *Wis. R.R. Comm'n v. Chi., Burlington & Quincy R.R.*, 257 U.S. 563 (1922).

the chief benefits of a federal system is that it allows for competition between sovereigns as an antidote to government power. Under that view it is a healthy thing for some portions of the transportation grid to remain free from federal power.

But during the Progressive Era, which ran from around 1900 to 1930, this view of competition was rejected. No longer was competition perceived as a means to secure innovation and to reduce prices. Now the word “ruinous” was inserted before it, so that the losers in the competitive system were held entitled to seek a reversal of the outcome through legislation—even if that required the creation and perpetuation of state-run monopolies and state-supported cartels at the federal and state levels. To my view, this affection for state monopolies all depends on the elementary confusion between size, which is of no consequence in economic affairs, and market power, which is. But the Progressives knew better and, in the words of Louis Brandeis, were confident that competitive forces operated as a crude form of social Darwinism. Thus in speaking of the rise of the large firm in the industrial revolution he castigated the conservative judges who exerted extensive control over the legal landscape:

“Courts continued to ignore newly arisen social needs. They applied complacently 18th century conceptions of the liberty of the individual and of the sacredness of private property. Early 19th century scientific half-truths like “The survival of the fittest,” which translated into practice meant “The devil take the hindmost,” were erected by judicial sanction into a moral law.”³⁷

Just why the principles of gains from trade and competition do not apply when firms get larger was never explained. Brandeis and his fellow Progressives longed for the days when two individuals would haggle over the price of a cow by a farmyard fence. Their view was tantamount to a proposition that the road to prosperity lay through high transaction costs and a low volume of transactions. They therefore missed the key point that the low transactions cost world with fungible products (for which market prices are easy to establish without endless haggling) would provide higher levels of human satisfaction. Hence they did all that was within their power to protect small businesses against the dangerous encroachment of large chains that could supply better goods and lower prices.

This atavistic view of economic relations had a profound influence on the interpretation of federal power. The Progressives realized that their control of national and international markets could not be effectively achieved simply by regulating cross-border transactions, or even by

³⁷ Louis D. Brandeis, *The Living Law*, 10 ILL. L REV. 461, 464 (1917).

applying federal antitrust laws to firms that did business across the several states. They instinctively understood that local manufacture was subject to intense competitive pressures in a federal system and did all that they could to prevent the operation of competitive forces. To control child labor, for example, they proposed a statute that forbade any firm from shipping goods in interstate commerce so long as any part of its operations used child labor at ages below those set by federal statute. The key argument in favor of the statute was that without it competition among states would reduce the minimum age for child labor, and this at a time when the practice was becoming rarer because of rising economic prosperity in any event. The Supreme Court by a five-to-four vote struck this legislation down on the grounds that it was an indirect effort to regulate forms of manufacture that had been left to the states.³⁸ But when that law failed, Congress came back with an effort to tax the goods that it was not able to keep out of interstate commerce, an effort that was also rebuffed on the ground that it extended national regulation beyond its permitted scope.³⁹

Yet none of these barriers could hold against the demand for comprehensive federal regulation. One of the tenets of the Progressives was that the courts should defer to the Congress about the nature and scope of its powers in light of the complex economic social issues at hand. This low “rational basis” standard of review has been invoked time and time again in analyzing the scope of federal power. And it is an open secret that a court will sustain any legislation that comes before it when it defers to the wisdom of Congress or state legislatures. In just this vein, the learned debates over federal regulation of goods that were shipped in interstate commerce were laid to rest in *United States v. Darby*, which held that the class of powers that the Constitution had reserved to the states was essentially empty.⁴⁰ Hence Congress could impose direct regulations on local manufacture without any interstate hook. The direct regulation of labor and agricultural products quickly followed on the view that the aggregate effects of small transactions could influence the quantity and price of goods in interstate commerce and thus were proper subjects of federal regulation. One case soon held that all intrastate sales could be subject to federal regulation because the prices of these transactions influenced the national price.⁴¹ The same logic was then applied to uphold agricultural acreage restrictions (imposed to keep the price of grain artificially high) on the ground that feeding one’s own grain to one’s own cows influenced interstate

³⁸ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

³⁹ *Child Labor Tax Case*, 259 U.S. 20 (1922).

⁴⁰ 312 U.S. 100 (1941).

⁴¹ *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942).

commerce.⁴² The gist of these decisions was that all economic activity was now subject to direct federal regulation. The initial principle of enumerated federal powers, which had been affirmed in the Tenth Amendment, had passed into history.⁴³ There have been some efforts to cut back the scope of the commerce power in some highly specialised circumstances, such as carrying a gun near a local school.⁴⁴ But this counterrevolution is of little structural consequence since the broad principle that all economic transactions count as interstate commerce has, far from being repudiated, been affirmed.

I think that these principles should give pause to anyone who thinks that the power of the European Union could be effectively curbed even by ideal constitutional draftsmanship. It can't be done, because illicit expansions of power are hard to root out while narrow interpretations are subject to constant attack. But in some sense this theoretical discussion is a giant aside, for the EU draft constitution is far from ideal.

The first and most obvious point about the EU draft is that it is far longer and more prolix than the American Constitution. Yet many of its provisions are not specific commands that can be read in only one way. Many of these use broad principles similar to those found in the American constitution. Taken as a package, the EU draft leaves judges with more running room to make whatever decision they think comports with the sound principles of governance. The second point is that it embodies no consistent philosophy as it embraces elements of both the classical liberal and the social democrat position, without any inclination to choose between them even when they are flatly inconsistent. The American experience shows that the Progressive view can win out against a text calculated to curb its influence. That tension between consistent text and strong political impulse does not arise in the EU Constitution, so the dominance of social democratic principles with the hefty dose of state involvement on economic matters should be taken as a given.

A brief look at the structure of some key jurisdictional elements of the EU drives the point home. Article I-11 holds that the operative principle for the analysis of union competences is the

⁴² Wickard v. Fillburn, 317 U.S. 111 (1942)

⁴³ U.S. CONST. amend. X (“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.”). Speaking of this provision, Chief Justice Stone wrote: “The amendment states but a truism that all is retained which has not been surrendered” *Darby*, 312 U.S. at 124. The point has a surface analytical appeal. There are no additional limitations that the Tenth Amendment imposes on the powers of the national government. But to read it this way ignores the functional question: why would anyone bother to stress the preservation of states rights on these matters if the federal power under the Commerce Clause was all inclusive.

⁴⁴ United States v. Lopez, 514 U.S. 549 (1995).

principle of conferral, which in turn has two components, subsidiarity and proportionality.⁴⁵ The former of these principles allows the Union to act within the limit of its competences “to attain the objectives set out in the Constitution.”⁴⁶ The latter holds that on the broad range of issues over which the Union does not have an exclusive competence — which includes multiple areas⁴⁷ — the Union may act whenever local actions are insufficient to achieve the desired end, or alternatively, where Union action is superior to local action.⁴⁸

At this point, it seems clear that any action that the Union wishes to propose will trump any local decision to the contrary, if the European Court of Justice has only a fraction of the imagination that the United States Supreme Court exercised in turning the far punier Commerce Clause into a comprehensive charter of national government. All that is needed is a decent respect for the considered judgment of either of the central branches of the EU, be it the Commission or the Parliament, for a Court to say that it cannot decide authoritatively which form of regulation works better. The trope of deference will find a congenial home in these provisions in which matters of jurisdiction are stated to be questions of degree, which is the only reasonable interpretation of the phrases “sufficiently achieved” or “better achieve.” And that running room will be enormous since the objectives of the EU Constitution do not trumpet the virtues of limited government, but range far and wide, so as to include—in the official list—economic development, balanced growth, price stability, social progress, full employment, environmental protection, scientific and technological advances, while combating social exclusion and promoting social justice, equality between men and women, solidarity between generations, protection of children, and respect for diversity as well

⁴⁵ Treaty Establishing a Constitution for Europe, Art I-11(1) (“The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.”).

⁴⁶ *Id.*, Article I-11(2) (“Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.”).

⁴⁷ *Id.*, Article I-14(2) (“Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; b) social policy, for the aspects defined in Part III; c) economic, social and territorial cohesion; d) agriculture and fisheries, excluding the conservation of marine biological resources; e) environment; f) consumer protection; g) transport; h) trans-European networks; i) energy; j) area of freedom, security and justice; k) common safety concerns in public health matters, for the aspects defined in Part III.”).

⁴⁸ *Id.*, Article I-11(3) (“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”).

as defending Europe's heritage.⁴⁹ To be sure, strong statements of a pro-market variety are mixed prominently into the stew: one is the guarantee of the "free movement of person, services, goods and capital" under Article I-4. But these guarantees are never absolute and must be reconciled with the myriad of objectives and principles that lie side by side with them. It is anybody's guess what survives of this last guarantee in light of Article I-15, which provides that "[t]he member states shall coordinate their economic policies within the Union. To this end, the Council of Ministers shall adopt measures, in particular broad guidelines for these policies."

Again we have a two-edged sword. The uniform policies in question could either reduce trade barriers or reestablish them by requiring uniform minimums that undermine the effectiveness of competitive federalism. These amorphous provisions offer an open invitation for standardization of norms from the center that, over time, will work to negate one of the key advantages of a trade union. The trade union allows each member state to adopt its own measures and policies, so that restrictive practices in the one state are effectively undercut by less restrictive measures elsewhere. This principle survived for close to 150 years in American federalism until it was overwhelmed in a constitutional twinkling by federal minimum wage laws and federal rules for national labour relations. That competitive principle will be stillborn under the European Union Constitution, which from the outset concedes so much power to the center that the principle of subsidiarity is sure *not* to apply to the case of a single farmer who wants to feed his own grain to his own cows. The great failure of the American federal experience – its utter inability to counteract the relentless expansion of national power – is certain to repeat itself in the EU under its misshapen Constitution.

Before leaving this topic of federalism, there is one other issue that bears brief mention, which is the question of a uniform currency. In the United States, one element of national governance that was introduced early on was a prohibition on the states to "coin money [or] emit Bills of Credit."⁵⁰ Effectively this created a national currency which within the American context is defensible on the ground that it facilitated nationwide trade. The net effect of this system was to give exclusive power to the federal government over the currency so that no one could take refuge from the profligate policies of central government or other states. Yet I think that it is fair to say that few if any of the dislocations under the American experience are tied to any fiscal or monetary portion of our Constitution. Indeed, to the contrary, the single currency has been a stable feature of a nation that sees wide disparities across states in all relevant measures of income, education, and health.

⁴⁹ *Id.*, Article I-3(3).

⁵⁰ U.S. CONST. art. I, § 10, cl. 1.

The Euro raises similar issues for Europe. But it does not call for the same conclusion. Textually, the EU Constitution allows for a local option on the Euro, so that its monetary provisions only apply to those member states that adopt the Euro.⁵¹ And the question is whether this should be done. As a matter of abstract principle it is hard to say. There is much to be said for both a unified currency within a given jurisdiction. But by the same token a unified currency is really the same as having fixed exchange rates, which led to all sorts of unhappy rigidities, for example, in the period when the pound was in systematic decline against the dollar.

So which to choose? If I thought that the EU constitution contained policies that would satisfy its pro-growth and pro-competition goals, then I could see the advantages of a uniform currency. But if I am correct in thinking that the cartel-building and statist impulses will dominate under the new Constitution, then my advice to the UK is exactly the opposite. Keep out: do not tie your fates to a ship that is likely to sink. Keep a separate currency which floats against the Euro. The conversion features today are no big deal. My cash card and credit card are denominated in dollars and every transaction that I have made in Europe works the conversion effortlessly. Friction therefore is not a real issue. But competition across nations that embody different principles of government still matters. If the UK departs from the EU on economic matters (which it does, even if its policies do not track my own views), then the dual currency will provide discipline for the Euro and independence for the pound, both of which should prove essential. There is no reason why the creation of a free trade zone requires a common currency.

⁵¹ Treaty Establishing a Constitution for Europe, Art. III-194.

INDIVIDUAL RIGHTS

I have spent the vast majority of this paper speaking about the evolution of federalist structures in the United States. In principle it is possible to spend every bit as much time talking about the complex evolution of the American constitutional law that deals with individual rights. As on the federalism side, some of these developments are entirely welcome. The American courts have in general done a good job in protecting freedom of speech and religion, although even here the strong Progressive influence has muddied the waters somewhat by inducing the Court to sustain extensive, perverse and futile forms of campaign finance regulation.⁵² But in other areas, I think that too little protection has been afforded. The same lax safeguards for private property and economic liberty against government intervention are likely to be replicated under the proposed EU Constitution, which reads more like an invitation to misguided government regulation than a barrier against it.

Rather than talk about the full range of issues on this occasion I shall confine myself to a discussion of two issues that go to the heart of the matter. The first is the relationship between free and fair trade. The second is the level of protection that is afforded private property. Overall the lesson tracks that which is gleaned from the federalism discussion. Within the American framework strong constitutional safeguards have been frittered away by ingenious interpretation. Within the EU spongy guarantees, when interpreted by judges with strong collectivist inclinations, will provide no protection for free trade, and little or no protection for private property.

Free Or Fair Trade?

The discussion of free trade starts from a single provision of the EU Constitution, which in one noble phrase announces that the Union shall uphold and promote “free and fair trade.”⁵³ But once again the question is whether these two notions are consistent or contradictory. It all depends on how we read the two terms. For these purposes, the tension is not with the term “free,” which we can take to mean that each individual may choose whom to trade with, and the price, terms and conditions under which goods and services are obtained. We can even assume that some competition (or antitrust) policy is consistent with free trade, and perhaps required by it—although

⁵² See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

⁵³ Treaty Establishing a Constitution for Europe, Art. I-3(4) .

even here the aggressive application of a competition policy often thwarts competition, as for example in the use of theories of predatory pricing.

These difficulties will arise in any system. But what about fair trade? If terms are used only in the classical liberal sense, then there is no problem. Individual trades are not fair when they are induced by force or fraud, or when they take advantage of the impaired competence of the very young, mentally disturbed or infirm. The sense of fairness invoked here is intended to knock out of the legal system those individual cases where it is unlikely that the enforcement of the apparent contract will work to the mutual advantage of both parties.

Yet this is surely not the only sense that the term fair carries with it. Here again, we need look no further than the key progressive statutes that defined the New Deal. The National Labor Relations Act contains elaborate provisions that define the unfair labor practices that it is illegal for employers (and, after 1947, unions) to engage in. Many of these practices, such as a refusal to deal with a union, go to the core of the notion of free trade: the right to choose with whom you do business. And the Fair Labor Standards Act imposes minimum wage and many other requirements on the employment contract that are equally antithetical to the notion of free trade.⁵⁴

Nor does the potential mischief stop here. The New Deal specialized in codes of “fair competition,” which in the end were nothing more than crude attempts to bar entry and raise prices in the fashion of a state-run cartel.⁵⁵ One powerful desire of the fair trade movement is to stop trade with nations that do not meet our environmental or labor standards on the ground that either deviation amounts to exploitation. The substantive claim is groundless. Lower wages reflect lower productivity, and to insist on high wages for unskilled labor is just a disguised way to disadvantage those workers. Likewise, on the environmental side there is no reason for one nation to set minimum standards for its trading partners. As national wealth rises, they will have more resources to devote to these public goods. Most people do not want to live in mansions that are built on streets with open sewage. They will therefore tax themselves to get the right mix of public and private goods. The effort to push mandates through fair trade procedures is meant to force the purchase of more public goods than their internal finances can support. Back of it all is the protectionist impulse that these tough conditions will keep them from exporting goods to the domestic market. The fair trade movement thus is yet another reflection of the protectionist impulse that is found in other codes of fair practice. The tragedy here is simple: trade barriers reduce the

⁵⁴ 29 U.S.C. § 201-219 (2005).

⁵⁵ For the details of the rules of “fair competition” in the poultry trade, see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

gains from trade. But we have no idea whether the EU Constitution accepts or rejects that proposition.

Private Property.

As noted above, my confident prediction is that the EU Constitution will provide incomplete protection for private property against either confiscation or regulation. Why, one might ask, is this a tragedy of major importance? To the American Progressive or the European Social Democrat private property often functions as an obstacle for the rationalization of the economic and social order through central planning. But to one who is schooled in the British tradition that runs from Locke through Blackstone and Smith, the opposite conclusion is far more accurate. The institution of private property is not a covert tool that allows any one individual to thwart the public interest. It is a way to organize efforts in society so that the public interest is advanced. The system allows those who labor to get the benefit of their labor. That provides the needed incentive for productive activity from which others can benefit through trade that improves their joint welfare. The system of private property therefore aims to maximize voluntary transactions *and* to support them by creating legal institutions that protect the rights of exclusive possession and the practice of voluntary exchange as well as supplying the needed social infrastructure. These public functions are financed through general (preferably flat) taxes while needed properties are assembled by the use of a condemnation power that allows property to be taken for public use, when the risk of private holdout is great, upon payment of just compensation.

This brief account of the function of property fits like hand in glove with the Takings Clause of the United States Constitution, which reads: “nor shall private property be taken for public use, without just compensation.”⁵⁶ As with all broad provisions, this clause bristles with interpretive choices. The first question is what counts as a taking of private property. Here everyone agrees that outright dispossession of land is covered. Intellectual property such as trade secrets, copyrights and patents are clearly covered as well. But there are limitations. Start with land, and ask about the situation where the owner is left with some of his initial holdings while deprived of others. In some cases that seems easy as well: after all a person who loses the right to occupy land for a term of years should not be denied compensation for those losses simply because he will recover the use of the land at some later date. But the issue becomes truly difficult in those cases of what is termed “regulatory takings,” that is, situations where a party is left in possession of land, but subject to restrictions on its use and disposition that are not normally found under common law rules. Thus a

⁵⁶ U.S. CONST. amend. V.

zoning ordinance could prevent the construction of anything other than a single-family home even when a factory may be more congenial for the site, or impose restrictions on the use of air rights protected at common law.⁵⁷ A key feature of the American Constitution is that these various forms of regulation are met with much deference (again!) so that state restrictions on use or disposition that wipe out seventy or eighty percent of the value of land, or more, are routinely held to be noncompensable.

The same narrow reading of takings protection applies to the just compensation requirement, which is not read to require that the state provide the owner with payment that renders him indifferent between the property surrendered and the compensation provided in exchange. The gaps in compensation are impressive. It is well settled under American law that no owner is entitled to compensation for the loss of any site-specific business goodwill or subjective value, including the unique attachments associated with owning a home.⁵⁸ When the government comes knocking at the door, the owner of property typically has to hire appraisers and lawyers on matters of valuation. Too bad, he must bear those costs himself.⁵⁹ The net effect is that takings are frequently consummated at bargain rates, a process that results not only in palpable injustice in the individual case, but also in a major social misallocation of resources. The unquestioned legal right to low-ball an owner on the compensation issue induces the state to engage in too many takings, many of which generate social gain that is less than the private value lost. Only the judicial blind faith that governments at all levels do not misbehave explains this narrow reading of the constitutional requirement. No sensible normative theory that addresses the proper interaction between private property and social control countenances today's dominant judicial result.

The principle of judicial deference to legislative decisions has also undermined the protection against arbitrary takings found in the requirement that a taking be "for public use." No one objects categorically when property is taken for roads, government buildings or parks. The private dislocation is no barrier to the state behavior. There is also much to be said for allowing the government to take property to assemble useful *private* projects such as mills and mines that are blocked by holdout problems.⁶⁰ The state can condemn land needed to create a head of water to

⁵⁷ For the broad constitutional blessing of these zoning laws, see *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁵⁸ *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

⁵⁹ *United States v. Bodcaw Co.*, 440 U.S. 202 (1979) (appraisal fees); *Dohany v. Rogers*, 281 U.S. 362 (1930) (attorney fees).

⁶⁰ *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885) (grist mill); *Clark v. Nash*, 198 U.S. 361 (1905) (waterways for mining and irrigation).

operate a dam, or an easement over scrub land to allow transport of the ore from the mine to the nearest railroad track. But these cases that allow for the use of state power in cases of genuine necessity are a far cry from the modern decisions that bless any taking whose “conceivable” indirect benefit counts as a public use.⁶¹ If the state wants to force a landlord to convey his interest to a sitting tenant at a state-appointed price it may do so—to break the landlord’s oligopoly of course. If the state wants to engage in slum clearance, then it can condemn perfectly fit buildings.⁶² If it thinks that the *New York Times* should occupy a key downtown location, then it can force the existing landowner to sell.⁶³ And we now know, as of June, 2005, that a bare majority of the Supreme Court held the great cause of economic renewal and development allows the state to displace longtime residents on the vague expectation that their homes will perhaps be used at some time for some upscale project.⁶⁴

Each of the three explicit components of the Takings Clause has been watered down by judicial construction. But there is more: the Takings Clause has, as it must, an implied exception which allows the state to take or regulate property under the police power without paying compensation. No one should have to compensate a private owner who is stopped from polluting private or public property. But the class of ends that is included in the police power often expands to block perfectly customary uses of property. Thus it has been held appropriate to require landowners to minimum one-acre building plots in order prevent the evils of urbanization, even in the face of widespread concern about the urban sprawl that these zoning ordinances increase.⁶⁵ There is, in a word, no really strong account of what kinds of reasons justify taking or regulating without compensation.

So where does it all end? The Takings Clause has been interpreted as though it says: “nor shall private property be taken outright, for any conceivable public use, without just compensation that ignores subjective value, goodwill, and legal and appraisal fees, unless there is in legislative estimation some good reason for simply regulating its use or disposition without any compensation

⁶¹ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

⁶² *Berman v. Parker*, 348 U.S. 26 (1954).

⁶³ *West 41st Street Realty LLC v. New York State Urban Development Corporation*, 744 N.Y.S.2d 121 (N.Y. App. Div. 2002).

⁶⁴ *See* 125 S. Ct. 2655 (2005). For my involvement in the case, see Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, *Kelo v. City of New London*, at <http://www.cato.org/pubs/legalbriefs/kelovcityofnewlondon.pdf>. Happily, the *Kelo* decision prompted a nationwide backlash, which is reported in Tresa Baldas, States Ride Post-‘Kelo’ Wave of Legislation, *The National L.J.*, August 1, 2005, at 1.

⁶⁵ *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

at all.” The hostility toward classical liberal ideas has skewed the interpretation of every key element of the clause.

What then can be made of the watered-down provision of the EU Constitution that is supposed to cover the same ground? Here the clause starts with a strong protective element that is watered down by the exceptions.

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.

2. Intellectual property shall be protected.⁶⁶

The first clause picks up from the Roman law of the subject insofar as it identifies the key incidents of property. But lest it be thought that this stirring declaration is sufficient to carry the day, it is worth noting that American case law has similar broad declarations.⁶⁷ The similar protection for intellectual property is subject to the same kind of erosion. For example, it has been held that any regulator can require the owner of trade secrets to share them with his competitors without compensation in order to obtain a license to sell his products in the first place.⁶⁸ It is as though the government said that a firm could sell its products only if it first deeded its corporate headquarters to the state free of charge.

The rest of the protections afforded by this property clause are systematically weaker than those found in the United States Constitution. The state here can deprive any individual of property when it is found to be in the public interest, a term that is left undefined, but which on any reasonable reading has to be at least as broad as public use. We can be confident that few actions of government will be stopped by such a nebulous standard, especially when the EU Constitution is set up against the Continental tradition of strong government power. The “conditions provided for by

⁶⁶ Treaty Establishing a Constitution for Europe, Art. II-77.

⁶⁷ *See* *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

⁶⁸ *Monsanto v. Ruckelshaus*, 467 U.S. 986, 1007 n.11 (1984) (“Because the market for Monsanto’s pesticide products is an international one, Monsanto could decide to forgo registration in the United States and sell a pesticide only in foreign markets. Presumably, it will do so in those situations where it deems the data to be protected from disclosure more valuable than the right to sell in the United States.”). Just imagine what would happen if every jurisdiction took the same line!

law” should be understood as introducing a welcome measure of procedural regularity into the system. But so long as the legislature can establish the conditions in question, it is not even clear whether an individual is entitled to notice of the taking or a hearing before it is completed. Perhaps yes, but perhaps no. But once a property is taken, the language of “fair compensation” does not mean anything like the phrase “full and perfect compensation for the property taken” which is used in American courts (subject to the caveats about subjective value, goodwill and legal and appraisal fees). Rather it invites the use of some lesser measure of compensation, without giving any clue as to how that sum will be determined. And once it is determined, the phrase “in good time” could be read to require the state to pay interest for any delay in the compensation, but the more likely reading is that it just permits some degree of delay, without interest, before payment is made.

Finally, the last sentence of the first clause here draws a distinction between the occupation of land and the restriction by law of the owner’s rights of use and disposition, which may be allowed in the name of the general interest. The United States Supreme Court refused to allow a statute to prohibit any construction on a beachfront lot when the prohibition denied the owner all economic value of its use.⁶⁹ They have yet to decide what happens when elaborate conditions on the ability to build on an ordinary plot of land reduces the value of that land by fifty, seventy or ninety percent, where the sole justification offered is that the empty plot of land makes the region more attractive for tourists. Yet under the EU Constitution, in this scenario it looks as though the state need not take pay a single Euro for any land-use regulation that confers benefits on outsiders, because the general interest will always trump the individual interest. If so, then the constitutional protection is so minimal that the protection of property will rest on political and not constitutional considerations. This is no way to write a constitution.

⁶⁹ Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

CONCLUSION

The above analysis of both the structural and individual rights provisions of the proposed EU Constitution should count on the ultimate question of whether the UK or any other country should sign up to this document, if and when it is put to a popular referendum. For those who want a strong state with weak individual rights, then this Constitution achieves many of their goals. But for those who think that private markets and private property are the keys to social progress and stability, this Constitution should be stillborn. It promises little gain from the federation of defense that was so central to the American Founding, and its internal structures are sure to invite power dominance from the center.

A good federal system allows for competition between its different units as a check against sovereign power. But this Constitution allows for such dominance at the center that it will take a political miracle for that competition to play a powerful role in the affairs of the EU. By giving rights with one hand and taking them away with the other, this proposed EU Constitution lacks any clear definition and structure. Virtually any result is consistent with the myriad clauses, values and objectives that permeate the document. But when the dust settles, there will be more government and less freedom for all. One does not have to adopt my own classical liberal views to realize that this Constitution moves too far in the wrong direction. My recommendation is therefore this: Opt for the economic free trade zone and consign the EU Constitution to the dust heap.

