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The Blunt Sword and the Sheath: Mindset of the American Proposal, Rule of Law, and Liberal Democracy

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Introduction

In 2021, Brandon L. Christensen, editor of the academic volume *Polycentric Federalism and World Orders* (2025), published an article entitled "Reviving the Libertarian Interstate Federalist Tradition: The American Proposal" (Christensen 2021). In this piece, Christensen argues that the idea of interstate federalism in the form of a transatlantic federation can be traced back to Adam Smith, the founding figure of classical liberalism in political economy. Yet whereas the founding architects of the American Proposal—Alexander Hamilton, James Madison, and John Jay, writing chiefly in the *Federalist Papers* between 1787 and 1788—sought to lay the foundations of a post-Westphalian order, subsequent designs for governance architecture have gradually abandoned the core elements of this original inspiration.

Hamilton, Madison, and Jay were in fact fully aware of the difficulty of the task. Thus Madison, in a famous passage, underscores the potential shortcomings of the proposed constitutional theory and thereby reveals the intellectual sincerity of the project: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself" (James Madison, *The Federalist Papers No. 51*). Although some limited endogenous and contextual features might suggest a partial convergence with the American Proposal of the Compound Republic (Reho 2025), contemporary federalist or federalizing projects, of which the European Union is perhaps the most representative, bear witness to the failure of modern governance architectures (Christensen 2021, 438).

In order to understand both the centrality of the Westphalian system in the European mindset and why the founding fathers of the American Proposal grounded their defense of the American constitutional system in a rejection of this

Westphalian solution, one must first return to political history. To do so, the article first examines the consecration of the Westphalian model, and then how the Compound Republic of America and interstate federalism, i.e., the American Proposal, offer a counter-model. It is then necessary to recognize that the mindset of the founding fathers of the American Proposal with regard to the rule of law and liberal democracy must be properly reconstructed. Particularly in the case of liberal democracy, five axioms can be sorted out as starting points and pillars of the logic of liberal democracy. On this account, it is, among other factors, the transformation of these two concepts that constitutes one of the driving forces behind the abandonment of the transitional dimension—thus, the suspension of an "extended federalism" and of the radical anticipation of the American Proposal towards a Philadelphian global order.

A (Brief) Political History of European Westphalianism

On the European continent, the Nation-State remains the primary framework within which the very notion of sovereignty has developed (Solis-Mullen 2024). In France, beginning with the

"*beau treizième siècle*" (literally the "fair thirteenth century"), the work of the Capetians consisted precisely in consolidating the Kingdom of France against the power of both the lords and the Pope. It started with the fixation in Paris of the previously itinerant King's Court the reign of Philip Augustus (who in 1204 shifted his title from *Rex Francorum* to *Rex Franciae*, "King of the Franks" to "King of France") and up to the reign of Philip the Fair, Saint Louis's grandson, around the end of the 13th century. After the Thirty Years' War (1618-1648), i.e., the first large-scale European war involving all the major continental powers, the Treaties of Westphalia were signed on October 24, 1648. The European balance that emerged from these treaties enshrined the "French" solution: that of the Nation-State. This model proved so dominant that Henry Kissinger could write in 2014, in his *World Order*, that "Westphalian principles are, at this writing, the sole generally recognized basis of what exists of a world order" (Kissinger 2014, 6)—even though one can easily stress that "what Kissinger does not see is that the present world now requires a post-Westphalian solution" (Jeangène Vilmer 2015, 121).

The Westphalian system nevertheless failed to eliminate the causes of the War of the Spanish Succession (1701-1714), the War of the Austrian Succession (1740-1748), the Seven Years' War (1756-1763), i.e., the first truly global conflict, and—setting aside the revolutionary upheavals marking the transition from the eighteenth to the nineteenth century—the two World Wars. Paradoxically, however, the Westphalian system came to be conceived as the stabilizing element in the aftermath of the revolutionary tumults. Thus in France, where the revolutionary events had begun, Napoleon is praised to have stabilized a regime exhausted by successive forms of government between the Tennis Court Oath of 1789 and the proclamation of the Empire in 1804 (Monarchy from 1789 to 1792; National Convention from 1792 to 1795; Directory from 1795 to 1799; Consulate from 1799 to 1804). He achieved this stabilization by instituting unitary and centralizing solutions—ranging from the Civil Code to the Conseil d'État, and the system of prefectural authorities—as well as by reshaping monarchical institutions in the same direction, such as the Cour des Comptes. The Third Republic (1870-1940) perpetuated these solutions as evidenced, for

example, by compulsory schooling based on curricula defined by a Ministry of Public Instruction and by the gradual eradication of regional languages (Roussellier 2015). The paradox is as follows: "Westphalian sovereignty causes many security problems globally yet is also a useful tool for keeping the imperial temptation, to which large polities inevitably succumb, to a minimum" (Christensen 2024, 40-41).

The American Proposal that accompanies the Declaration of 1776 emerges precisely at the heart of this revolutionary transition. It acknowledges the failure of the Westphalian system to resolve the succession of *casus belli* over nearly a century and a half. The year 1776 is also the year in which Smith advances his idea of a "transatlantic federation" between England and the North American colonies. And as Christensen notes, "After all, the American republic was patched together using the European model of Westphalian state sovereignty as a guide for what not to do." Yet federalism in itself was not a novel solution as it already appeared in embryonic form in the 16th century—the very century in which the term "panarchy" first surfaced under the pen of Franciscus Patricius (De Bellis 2023) and saw the publication of Thomas More's *Utopia*—and even as

early as 1300 in France. Is it any wonder that this federalist project directed against the Pope's power arose when the unitary consolidation of the Kingdom of France was under its way? It is to such an extent an important concept of governance that Bodin himself could not ignore it, only to reject it in his 16th century theorization of absolute monarchical power (Dietze 1960, 290-308). Therefore, the form of federalism that emerges in the medieval European world of the 13th century constitutes a form of "hidden tradition" alongside unitarism and centralism, that is, models that not only enjoyed the favor of those in power but also, retrospectively, won the historiographical battle in the history of political ideas. At least for now.

The American Proposal

To revive this project of giving concrete form to the federalist ideal, Christensen emphasizes that the founding fathers of the American Proposal advanced a distinctive idea: that of the *compound republic of America,* to use Madison's phrase (James Madison, *The Federalist Papers No. 51*). The "compound republic" constitutes an organizational framework for the administration and protection of individual liberties based on two

pillars. The first is the senatorial institution. The American Senate rests on a *sovereignty-for-equality bargain* mechanism, i.e., each State regardless of its size, receives equal representation in the Senate. Thereby, it turns the Senate into an institution of interstate diplomacy rather than merely an upper legislative chamber. The second is the principle of the constitutional framework as the supreme law placed above the federal Union. This principle of superiority was by no means self-evident within the legal doctrine of the time.

Christensen's ambitions are far-reaching. For him, the model of the compound republic is not merely tied to the historically contingent experience of the North American territory. The deterritorialization (or rather, the a priori "nonterritoriality") of the model leads him to envisage a transcontinental federation initially extending to Europe, East Asia, the Pacific, and North America. In parallel, the encouragement of secession by major urban territories—such as Buenos Aires or Rio de Janeiro, in the manner of Singapore—could enable them to join directly what Christensen, in a fictional scenario which reminds Nick Land's hyperstitions (Brassett & O'Reilly 2025) on his blog *Notes on Liberty* calls the "Madisonian constitutional order,"

which can become "global" (Christensen 2022). This is, in fact, a fundamentally panarchy-oriented intuition: in the long run, the sovereignty of a State should not amount to a monopolistic territorial sovereignty. Hence, this global, Philadelphian, post-Westphalian, panarchy-oriented order represents a realistic intermediary between the Westphalian system and a fully panarchic system.

One must however understand the logic of liberal democracy to properly reconstruct this radical project of the American Proposal.

Rule of Law and Liberal Democracy: A Tale of Two Misunderstandings

As with the "rule of law" (improperly though tellingly rendered in French as "*État de droit*," literally "State of Law"), there are certainly multiple conceptions of "liberal democracy." Yet in both cases, it is possible to adopt a minimalist and functionalist definition.

The primary difficulty with the rule of law lies in the fact that, historically, it does not correspond to the rule of legislation (*regula legis*), but rather to the rule of justice (*regula juris*). For this reason, strictly speaking, it would be clearer to abandon the

very notion of the "rule of law," since it has been almost entirely corrupted by legal positivism. Indeed, in mainstream legal opinion, the term "law" in "rule of law" is generally understood in a positive sense; simply meaning that in mainstream legal opinion, the "rule of law" refers to legislation (*lex*) rather than law (*jus*) to adopt Hayek's dichotomy. As just noted, this is not historically the precise meaning of the "rule of law." In fact, the rule of positive law (*regula legis*) is nothing more than an empty shell without the rule of justice (*regula juris*), i.e., the genuine rule of law.

For the rule of law understood as the rule of justice (*regula juris*), the clearest, most minimalist, refined definition is arguably that of Brian Z. Tamanaha, professor at Washington University: "The rule of law means that government officials and citizens are bound by and abide by the law. I repeat: government officials and citizens are bound by and abide by the law" (Tamanaha 2012, 233). Nothing more, nothing less. It should be noted here that Tamanaha's definition is optimal precisely because it does not specify what kind of law is in view: positive law or natural law? In fact, whether the *content* is a matter of positive or natural law, the definition is timeless, because what is at stake is

simply *law regarded as legitimate*, and it might either be natural law or positive law, religious or secular, and so forth. And this is precisely what makes "rule of law," in its core, a *principle of justice* deriving from an institutionalization of at least one of Hume's logical antecedents, i.e., natural conventions of justice, and, namely, here, *promise-keeping*. Tamanaha's definition is equally applicable to Bodin's 16th century argument that the King cannot abolish monarchy in the name of the very logic of law (Holmes 1995) and to Kelsen's 20th century claim that it is logically impossible for an institution of positive law, whose authority is grounded in the presupposed validity of the Constitution, to abolish that very Constitution on which it depends (Kelsen [1934] 2005).

The analytical task to understand liberal democracy is more complex. It is so because it necessarily rests on a specific account of democracy and a specific account of liberalism. In other words, the notion of "liberal democracy" is already a composite, an "unlikely synthesis," to use Raymond Aron's phrase, and moreover a composite of two poles that were originally antagonistic (Aron [1965] 2001, 129; Berstein 1998, 5). Hence, the difficulty of arriving at a single, unified definition of liberal

democracy—from a genetic point of view, for example, Habermas distinguishes at least three versions of liberal democracy, including his own (Habermas 2003).

The Five Axioms of Liberal Democracy

In order to avoid a genetic approach and to remain instead with a focused, analytical perspective akin to the minimalist definition of the rule of law, one of the most stripped-down functional formulations is that proposed by David Beetham, formerly professor at the University of Leeds. Beetham summarizes liberal democracy, from a functional and structural standpoint, in five axioms (Beetham 1993, 56-57):

1. Rights and freedoms of individuals
2. Separation of powers
3. Representative regime
4. Limited State and separation of public and private spheres
5. Epistemological relativism in the pursuit of collective or social ends

What would a definition look like on the basis of these five points? Liberal democracy may be defined as *the representative regime, coordinated by a limited state, that organizes the non-ethical*

defense of individual rights within a framework that combines the separation of powers with the separation of public and private spheres. This is a definition that is long, but consistent with Beetham's five points.

To each of these axioms of the regime of liberal democracy, the rule of justice (*regula juris*) is a background principle. Yet whereas a first subset of these axioms requires that the rule of justice be directly made public *ex ante* through the rule of legislation (*regula legis*), a second subset does not call for this same kind of direct *ex ante* publicity, but rather for a more casuistic, even *ex post*, form of publicity via the market process. To put it more clearly, in the first case, the rule of justice is rendered directly explicit by the rule of legislation; in the second, the rule of justice remains implicit with respect to the rule of legislation, but becomes directly explicit within the rule of contract (*regula conventionis*). In other words, the rule of justice is embedded in the market process: The intercoordinated exchange between individuals (or the contractual relationship) functions as an equivalent substitute for the rule of legislation, in accordance with the principle *pacta sunt servanda*, i.e., the binding force of contract. It becomes

directly explicit in relation to the rule of legislation precisely at the point where a contractual dispute arises between the parties.

Rule of justice directly made explicit through the rule of legislation — Axiom 1, concerning the rights and freedoms of individuals, requires no further elaboration. The reference to the rule of law is immediate: The existence and exercise of these individual rights presuppose their constant recognition, both explicit and implicit, in all forms of relations between individuals. The second part of Axiom 4, namely the separation of public and private spheres, and Axiom 5, are somewhat less straightforward. Yet they too necessarily invoke the rule of justice through the *ex ante* proclamation of the rule of legislation. The separation of public and private spheres implies that certain rules, according to a principle of exceptionality and imperativeness, must be made public. Whether the body of rules is secular or religious in inspiration, the rule of law necessarily entails a distinction between (1) norms that prohibit or command specific behaviors within a public sphere and (2) a private sphere that remains free from encroachment by norms whose objectification depends on the publicity of legal rules. As for Axiom 5, it may be described as a

subsidiary, or minor axiom to the first part of Axiom 4, that is, to the limitation of the State. In fact, however, it imposes a rule of law in the form of a negative obligation: It is not permitted to the State to be definitively and objectively committed, in axiological terms, to one or more cognitive foundations in the pursuit of collective ends. Put simply, in determining collective goals, the State may not claim a monopoly on any epistemological truth deemed objective and final. The grounds and orientation of such goals must remain permanently open to debate.

Rules of justice directly made explicit through the rule of contract — Axioms 2, 3, and the first part of Axiom 4, are not founded *ex ante* directly on the rule of legislation. Genuine separation of powers is not merely a matter of legislation; it is also, and above all, of an economic nature. If, as Rothbard aptly suggests, one cuts off subsidies to the courts by way of tax revenues authorized by the legislature and collected by the executive, the judiciary will cease to be either functional or "separate." This is why the separation of powers in fact depends far more on the market process than on the positive law of monopolistic structures such as the State (Bell 2018). The notion of "economy" here, of course,

includes a fundamental notion of law, and in particular of property rights. For this reason, the radical interweaving of the two cannot be denied. One must not adopt a standpoint drawn exclusively from legislation or exclusively from economics, but rather a broader, eunomic perspective grounded in the study of intercoordinated exchange processes (Gauderie 2026). This perspective appears explicitly in Hamilton's claim that "The complete independence of the courts of justice is peculiarly essential in a limited constitution," and in Madison's remarks on the emoluments of the executive, legislative, and judicial branches: "It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal" (Alexander Hamilton, *The Federalist Papers No. 78*; James Madison, *The Federalist Papers No. 51*).

In practical life, out of the world of legal textbooks, the same holds true for representativeness and the limitation of the State. Both are subject to the private sphere, that is, through the sphere of the

market process. Here again, there is no reason to separate law and economics, since a *functional* market (not to be mistaken with a *perfect* market, which obviously does not exist and contradicts the very concept of market as a creative process) always presupposes principles of justice. Madison himself makes this point (*The Federalist Paper No. 51*). More specifically, the market process plays a central role in representativeness. "Factions," to use Madison's term, are rooted in the very fact of human nature (Stocker 2024). These factions are, for the most part, the product of differences relating to property, and these differences are a fact of civilization (Loncarich 2014). For Madison, the task is not so much to transform human nature by eradicating this tendency to faction and division, as to harness it appropriately within the composition and functioning of government: "The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government" (*The Federalist Papers No. 10*). Finally, in all three cases (separation of powers, representative regime, and limited State), contemporary technology plays a major role in endowing liberal democracy with

practical solutions, especially since the emergence of digital forms of sociability (Bell 1998).

With these clarifications in mind, it becomes easier to grasp the corruption of liberal democracy when viewed against the backdrop of Beetham's five axioms. These axioms constitute dominant strands in the contemporary *Weltanschauung*.

The Abandonment of the Transitional Dimension of Liberal Constitutionalism

As far as the American Proposal is concerned, the result is a contemporary rejection of the transitional dimension of liberal constitutionalism. Liberal constitutionalism is no longer regarded as a *means*, but *as an end in itself*: an end aimed at stabilizing the Westphalian system in both domestic and foreign policy. But as shown above, it is not true—at least from the point of view of the American Proposal.

To return to the example of European federalization (which stands in sharp contrast to American federalization):

1. There is the favorable presupposition, already mentioned, in support of the

Westphalian system within the institutional edifice of the European Union.

2. There is an unfavorable presupposition toward popular sovereignty in the various waves of European integration that underlie federalist proposals: the historical launch of the project on the basis of technical specificities within the European Community beginning with the Treaty of Rome of 1951; the very late emergence of a concrete legislative power vesting the Parliament only with the Single European Act of 1986; the adoption of the Lisbon Treaty of 2007 by parliamentary means after the constitutional treaty had been rejected by referendum in France and the Netherlands; and the tightening of the system of sanctions for decisions of the Commission primarily through the Court of Justice of the European Union, which effectively constrains the real scope of popular sovereignty.

Five dynamics lie at the heart of the evolution of the representational architecture of individual rights. These five dynamics affect the whole interpretation of the axiomatic structure of liberal democracy, and eventually erode its original conception.

Firstly, the transformation of legal culture has proceeded through the discrediting of natural law theory and the consecration of positivist theory, including in the United States (Banner 2021). This shift has been noted in Europe in the form of the consecration of Hans Kelsen's theory in a relationship of symbiosis with the institutional architecture of the Union (Kustra-Rogatka 2019). The result has been the abandonment of the rule of justice in favor of the rule of legislation alone—the latter conception having ultimately come to be identified, without distinction, with the "rule of law." This misunderstanding has had disastrous consequences for federal integration (Kosec 2022).

Secondly, the shift from a natural-law conception of individual rights to a foundational conception grounded in positive law is decisive. Natural rights (in the Lockean sense) are now more commonly understood as fundamental rights (in a Hobbesian sense). Thus, mainstream legal opinion has moved from declarations modeled on the 1776 Declaration of Independence to constitutions and declarations modeled on the 1948 Universal Declaration of Human Rights (Van Dun 2001).

Thirdly, the disentangling of political economy and principles of justice in legal education, and in particular in the teaching of constitutional law at the beginning of the twentieth century (Oppetit 1998, 169-181). In 1925, John Commons could still argue: "Having the same foundation in the Principle of Scarcity, the question arises, why have not the two sciences of law and economics been treated as one and been advanced together? In our Anglo-American universities they have been separated, but on the continent of Europe we know that they are more closely united" (Commons 1925, 371). Today, the situation is almost exactly reversed: "law and economics" is scarcely present on the European continent, whereas it has gained much greater prominence in the Anglo-American world since its Posnerian revival from the 1970s onward.

Fourthly, the substitution of the limited State by the Welfare State. In this conception, the State assumes responsibility for protecting an ever-expanding catalogue of social rights, such that the normative system is no longer grounded in the individual protection of natural rights but in the institutional protection of social rights. The institution thus becomes *primary*, while the rights of individuals are

only *secondarily* affirmed through it (Médevielle 2008).

Fifthly, the abandonment of the doctrine of laissez-faire which enshrined the separation between private initiatives and public ones, in favor of interventionism and central planning. This shift is exemplified, in the United States, by the end of the Lochner era in Supreme Court case law, coupled with New Deal policies. For Randy Barnett and Evan D. Bernick, "the New Deal Court's expansion of federal power was accomplished not by expressly abandoning the original meaning of the letter of the Constitution, but by adopting constitutional constructions that undercut its spirit" (Barnett & Bernick 2018, 45; Choudhry 2004, 3). In Europe, this abandonment is manifested in the postwar turn toward socialist-leaning public policies and in the doctrine of "ordoliberalism," which has structurally accompanied the consolidation of the EC and then the EU in both legal and economic terms (Dold & Krieger 2020). As Leonhard Miksch, an ordoliberal disciple of Walter Eucken, put it: "What separates us from the economic liberalism of the 19th century is that we have learned to distinguish between laissez-faire and competition, that we very definitely want to shape an 'Ordnung' and that we

think in terms of economic constitutions" (Miksch 1947, 20).

Conclusion

From all of these observations, it is clear that restoring the transitional foundations of liberal constitutionalism as envisaged by Hamilton, Madison, and Jay requires (1) a revival of the original understanding of liberal democracy and of (2) the rule of law as a rule of justice. To appreciate the American Proposal at its true worth and from both a historical and structural standpoint, one must once again bring the sheath into view and walk towards it. However, one must also cease to be satisfied with merely blunting—or, in some cases, even sharpening—the sword of the Leviathan. A sword that contemporary legal opinion has come to regard as little more than another name for the horn of plenty, or as the sword of the Archangel Michael

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