

# The Wrong Rights, or: The Inescapable Weaknesses of Modern Liberal Constitutionalism

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*My thesis is that modern progressive or social-democratic liberal constitutionalism invites economic decline and political polarization, even if it avoids the massive institutional rot that pervades authoritarian regimes. Its key omission is its conscious decision not to specify the protected individual rights, of which individual autonomy, private property, and contractual freedom are key. Yet ironically, not one of these is typically listed in the standard human-rights statutes, which instead focus on three different factors: positive rights to education, health, and housing; overcoming the widening inequality of wealth; and demarcating an ever-larger list of improper grounds for discrimination. Regrettably, the modern progressive hunt for social-democratic rights becomes a major source of its own undoing. Indeed, its wholesale indifference to the classical liberal agenda will tend to close off avenues for personal and economic advancement, and thus fuel the rise of the dangerous populism and intolerance on both the left and the right, leading to a decline of respect for the democratic institutions.*

## INTRODUCTION

Professors Tom Ginsburg, Aziz Huq, and Mila Versteeg (GHV) have written a mile-a-minute, and decidedly one-sided, account of the decline and fall of liberal constitutionalism throughout the world in the past generation. There is of course much to lament in the recent trends in world affairs, which have shown as of late a depressing tendency to reward authoritarian and bankrupt regimes across the globe. Many of the traditional bastions of liberal constitutionalism have fallen on hard times. Inside the European Union there are high levels of instability on a variety of fronts. The repeated monetary crises in the PIIGS—Portugal,

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Ireland, Italy, Greece, and Spain<sup>1</sup>—have created endless tensions with Germany, which has emerged as the dominant financial and political EU power. Closer to home, the surprising decision of the United Kingdom to leave the European Union in June 2016 offers further evidence of the breakdown in the establishment's dominance. That development was matched by the surprise election of Donald Trump as president of the United States, which has led to intense and prolonged clashes between progressives and conservatives. The nonstop gyrations of the Trump administration on everything from immigration reform to national security to healthcare give little reason for optimism. And it takes no genius or learned empirical study to see that the situations on the ground in China, Iran, Iraq, North Korea, Russia, Syria, Turkey, and Venezuela are surely worse than they were a decade ago, given the potent mix of political tyranny on the one side and economic backsliding on the other. Cuba is scarcely any better.

That said, it is important at the very least to draw this simple distinction: there are places where liberal constitutionalism has failed because it has never been tried; and there are places where liberal constitutionalism has failed, or at least has come under stress, because it has been tried and has been found wanting. In this short Essay, I will address the latter and ignore the former, except to say that authoritarian rule is not made more palatable when dressed up in either constitutional rhetoric or democratic clothing. But what is critical is that the nub of the problem is that so-called liberal constitutionalism has little in common with classical liberal constitutions that prioritize the protection of rights of property and contract. Instead, most liberal constitutions today allow (but rarely require) governments to offer a broad array of positive rights to housing, education, and healthcare, which, given the low level of economic productivity in such regimes, are better regarded as aspirational rather than strictly enforceable. Scarce government resources are routinely dissipated by converting competitive markets into monopolistic ones by imposing entry barriers and regulating wages and prices.

My thesis is that modern progressive or social-democratic liberal constitutionalism invites economic decline and political polarization, even if it avoids the massive institutional rot that pervades authoritarian regimes. Much of the sharp criticism that

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<sup>1</sup> See Stephen Beard, *Eurozone Hopes PIIGS May Fly* (Marketplace, Aug 3, 2017), archived at <http://perma.cc/5PMD-T6ZL>.

GHV deliver against Brexit and the Trump administration overlooks the simple point that these protest movements have taken place in large measure because of the failure of the progressive and human-rights agenda of liberal constitutionalism that GHV defend and that I have long opposed.<sup>2</sup> In broad strokes, they speak about the need to protect *some unspecified* enumeration of individual rights through judicial review, along with commitments to the rule of law that are intended to cabin the operation of the modern administrative state.<sup>3</sup> At one point, this liberal-democratic synthesis was thought, erroneously, to be so stable that it led Francis Fukuyama to speak, prematurely it seems, of the “end of history,” because “there are no serious ideological competitors left to liberal democracy.”<sup>4</sup> In this optimistic scenario, one authoritative and stable institutional equilibrium is believed to work for a diverse range of nations with vastly different ethnicities, geographies, economies, histories, political traditions, and religions.

Given the large differences among the types of states that need some workable constitutional order, any ostensible claim for universality on matters of structure should be suspect on its face. This is particularly true with respect to the structural features of any constitution. GHV are clearly right to note that the usual list of protective devices—federalism, separation of powers, judicial review, and electoral reform—do not offer, either alone or in combination, a magic bullet that will solve political ills of complex modern societies.<sup>5</sup> Federalism cannot work in many small countries for the simple reason that subunits are extremely difficult to create and maintain unless there is already some strong territorial division in place prior to the formation of the federation, as in Switzerland. It did, after a fashion, work with the separation of India from Pakistan in 1947 and the division of Ireland into Northern Ireland, which remained with the United Kingdom, and Ireland, which has remained independent since 1921. More specifically, nations with strong religious divisions may need, if separation is not an option, elaborate structural constraints to

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<sup>2</sup> For one of many such accounts, see generally Richard A. Epstein, *How Progressives Rewrote the Constitution* (Cato 2006) (detailing how progressivism undermined the Framers' vision of limited federal powers).

<sup>3</sup> See generally Tom Ginsburg, Aziz Huq, and Mila Versteeg, *The Coming Demise of Liberal Constitutionalism?*, 85 U Chi L Rev 239 (2018).

<sup>4</sup> Francis Fukuyama, *The End of History and the Last Man* 211 (Free Press 1992), quoted in Ginsburg, Huq, and Versteeg, 85 U Chi L Rev at 240 n 3 (cited in note 3).

<sup>5</sup> See Ginsburg, Huq, and Versteeg, 85 U Chi L Rev at 248–49 (cited in note 3).

prevent them from being ripped apart by internal strife, as happened in Lebanon, Iraq, and Syria.

In this Essay, however, I put structural issues to one side. Instead, I want to address what I regard as the key omission in their formulation of liberal democracy—namely, their conscious decision not to specify the protected individual rights. To my mind, the key building blocks of any free society begin with the acceptance of notions of individual autonomy, private property, and contractual freedom, none of which GHV mention by name, and none of which is typically listed in the standard human-rights statutes, which tend to worry much more about creating positive rights to education, health, and housing; overcoming the widening inequality of wealth; and demarcating an ever-larger list of improper grounds for discrimination. In my view, the modern progressive hunt for social-democratic rights embedded in the supposed liberal constitution is a major source of its own undoing. Indeed, this wholesale indifference to the classical liberal agenda, with its effort to expand, not foreclose, opportunities for personal and economic advancement, has much to do with the rise of populism on both the left and the right, as well as the decline of respect for the democratic institutions and practices that GHV detailed in their Essay. In Part I of this Essay, I briefly set out what I regard as the fundamentals of a sound constitutional order. In Part II, I explain why the rejection of this agenda has led to the effort to find scapegoats for the economic stagnation and political resentments attributable to the central tenets of liberal constitutionalism.

## I. BACK TO FUNDAMENTALS

The familiar rights of personal autonomy, private property, and contractual freedom form the starting point of any sound social structure. These key notions are not a set of absolutes that must always be respected, come what may. But by the same token, these rights are sufficiently central that they should not be overridden for weak or overtly political reasons.

In brief, the basic argument runs as follows. As a matter of general economic theory, the best way to maximize human welfare writ large is to first limit the use of force and fraud and then to encourage and foster cooperation and competition in the markets for goods, services, and ideas. This last element applies not only to profit-making activities, but also to the full range of religious, social, and charitable activities. Force and competition in

all of these areas are polar opposites for this simple reason: force is a negative-sum game; in contrast, cooperation and competition are positive-sum games. Increase the number of players in a competitive market—players whose only weapons are offers of superior goods, lower prices, better terms, and greater personal and spiritual satisfaction—and the overall level of social welfare goes up. Increase the number of persons who are free to use force and fraud at will, and life itself becomes “solitary, poore, nasty, brutish, and short.”<sup>6</sup> It is hard to imagine any successful normative order that does not put the control of aggression and the protection of cooperative and competitive behavior at the top of the list of collective social obligations. The common protectionist response to protect some groups by tariffs only hurts others, and it also removes the important external check on the weaknesses of the domestic market, which shrinks under the weight of its own entry barriers and transfer payments, all too easily leading to an “America First” attitude that cuts out international trade and cooperation.

In order to achieve that objective, it is necessary to adopt a two-part agenda. First, it is necessary to develop rules that control not only the use of force but its close relatives, such as the setting of traps and the using of poison. It also becomes important to understand that each individual is both an autonomous agent who is responsible for his or her own actions and one who is entitled to reap the gains that come from the acquisition of property and the creation of successful contractual and social relations. The respect of these rights is a vast improvement over any social or pre-social order that imposes no limits on aggressive forms of human behavior. This control thus represents a decisive first step out of a state of nature, both historically and normatively, which is why these rules have been, since Roman times, said to be based on a natural law that applied across time and across nations.<sup>7</sup> It

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<sup>6</sup> Thomas Hobbes, *Leviathan* 89 (Cambridge 1991) (Richard Tuck, ed) (originally published 1651).

<sup>7</sup> See Gaius, *The Institutes of Gaius: Part I* bk I, § 1 (Clarendon 1946) (Francis de Zulueta, ed). This theme is picked up in Joseph Story, *Natural Law*, in Francis Lieber, ed, *2 Encyclopedia Americana* 151 (1844):

We call those rights *natural*, which belong to all mankind, and result from our very nature and condition; such are a man's right to his life, limbs and liberty, to the produce of his personal labor, at least to the extent of his present wants, and to the use, in common with the rest of mankind, of air, light, water, and the common means of subsistence.

may well be that there are complex differences in structural protections across the globe, but the set of fundamental individual rights exhibits far less variation, such that, comparatively, most of the different variations that one sees across systems reflect difficult substantive choices that cause as much difficulty within systems as across them.<sup>8</sup>

This set of natural rights functions only as an initial baseline from which further gains are possible, both by voluntary private contract and public action. The former is easy enough to understand. Any private voluntary transaction generates mutual gains for the parties, for otherwise, why enter into it? More importantly, as a general matter the externalities from trade are *positive* for third persons, except in a few cases (conspiracies to kill or steal, or to restrain trade, which are accordingly proscribed). But in addition to these contract rules, there are at least four key areas in which private property rights may be appropriately limited. The first is that the rules of occupation that work for the original acquisition of land, animals, and chattels do not work for rivers and beaches, where the basic formulation of property rights is inverted: these are *ius communes*, common resources from which everyone has the right *not* to be excluded, given their necessity for human communication and transportation.<sup>9</sup> There is no credible argument that the right of a single person to dam a river and bottle the water produces enough social gain to outweigh the result that water no longer moves in its customary path.<sup>10</sup> Second, the presumptive exclusivity of private property can be breached under conditions of necessity, defined as those involving an imminent loss to person or property. Third, social order requires centralized resources, so it is perfectly acceptable to tax individuals on their labor and property in order to provide for the common defense, the preservation of internal order, and needed social infrastructure. But at the same time, it is critical to curb abusive transfers from taxation, such that in a classical liberal society the ends for taxation are largely limited to the provision of public goods. In addition, the source of taxation extends over a broad

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<sup>8</sup> For a nice demonstration in connection with the tension between the original owner and the bona fide purchaser, see generally Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J Legal Stud 43 (1987).

<sup>9</sup> See Justinian, *The Institutes of Justinian* bk 1, title II, ¶ 1 (Oxford 4th ed 1906) (J.B. Moyle, trans).

<sup>10</sup> See Richard A. Epstein, *Property Rights in Water, Spectrum, and Minerals*, 86 U Colo L Rev 389, 399–400 (2015).

base of labor and property transactions, preferably through a flat tax on either consumption or income.<sup>11</sup> (I prefer the former.) Fourth, while the state may condemn private property, the eminent domain power should be exercised sparingly and only for the acquisition of particular properties needed to supply public functions, and only upon payment of just compensation equal to the value of the property to its private owner, plus compensation for the consequential damages from the taking. These rules allow governments to operate when they are needed, but to constrain public officials from singling out friends for special favors and enemies for special burdens, thereby constraining the famous rent-seeking problem that leads to faction and discord in modern western democracies that have abandoned these principles.<sup>12</sup>

Given these strong rights considerations, structural protections have a far greater chance of success than do the delineation of rights implicit in the modern theories of liberal constitutionalism, which regard all of these substantive constraints as nettlesome interferences with the rights of government to advance some general benevolent conception of society writ large, often as determined by experts responding to some general democratic command.<sup>13</sup> One familiar example of liberal constitutionalism is to supply each person with a minimum level of social security, as with the American Social Security system—the choice of name is a matter of political brilliance—that guarantees some minimum standard of support that goes well beyond the protection of all individuals from aggression by others. Even small-government thinkers like F.A. Hayek, writing less than a decade after Social Security was established, spoke of two kinds of security, which “are, first, security against severe physical privation, the certainty of a given minimum of sustenance for all; and, second, the

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<sup>11</sup> See Richard A. Epstein, *We Need a Real Flat Tax* (Hoover Institution, Oct 13, 2014), archived at <http://perma.cc/5GXW-864L>:

The flat tax . . . offers the most attractive option, because it allows the government to set the overall levels of revenue as high or as low as seems necessary, without inviting various factions to game the system for partisan advantage. The flat tax also tends to reduce the overall tax burden, because people are on average more reluctant to raise taxes on others if they have to raise them on themselves.

<sup>12</sup> For the classic statement, see generally James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Michigan 1962).

<sup>13</sup> For an early defense of the administrative state written just after the American constitutional revolution of 1937, see James Landis, *The Administrative Process* 46 (Greenwood 1938).

security of a given standard of life, or of the relative position which one person or group enjoys compared with others.”<sup>14</sup>

In practice, however, this distinction is only one of degree. The sharper difference is between providing protection against the aggression of others and offering any positive state benefits. The classical liberal theory kept to this line, and sought, with some serious success, to handle the question of minimum security, as Justice Joseph Story wrote, through “imperfect” obligations of benevolence, in contrast to the perfect rights to liberty and property, that are required as a matter of conscience and of social convention for people to aid those in need, as by tithing or charitable constitution.<sup>15</sup> The difference between these two approaches is enormous, because there is far less room for slippage under the classical liberal conception as articulated by Story than under the Hayekian view, in which the social minimums can, and have, creep up for all sorts of reasons, as with Medicare and Medicaid in the American context.

From the guarded Hayekian position, it is easy to observe the slippage to a more robust version of positive rights that covers health care and unemployment insurance.<sup>16</sup> Most modern writers do not have Hayek’s obvious ambivalence toward the creation of these positive rights.<sup>17</sup> So in most progressive circles, the class of affirmative rights goes far further, weakening the protection of property rights by allowing politically motivated legislatures to redistribute property and opportunity among its citizens. It is not possible here to give a full account of how this transformation of rights theory emerged, but it is useful to pick up on a key element that passes without complaint from GHV, who take it for granted that a liberal constitutional order protects “the right to unionize,” without stressing what correlative duties individuals have with regard to this newly asserted right and why.<sup>18</sup> That right is of course found, along with other positive rights, in the UN Universal

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<sup>14</sup> F.A. Hayek, *The Road to Serfdom* 133 (Chicago 1944).

<sup>15</sup> See Story, *Natural Law* at 151 (cited in note 7) (emphasis omitted). Note that his treatment is heavily theistic and does not offer any theoretical grounding for rules that have in fact huge functional advantages.

<sup>16</sup> For my criticism of Hayek on these grounds, see Richard A. Epstein, *Hayekian Socialism*, 58 Md L Rev 271, 298–99 (1999).

<sup>17</sup> See generally, for example, Cass R. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever* (Basic Books 2004).

<sup>18</sup> Ginsburg, Huq, and Versteeg, 85 U Chi L Rev at 251 (cited in note 3).



Declaration of Human Rights.<sup>19</sup> In ambition, the UN delineation matches the parallel claims for universality of the natural law. But in its content it is far more dangerous, as it contains the seeds for the breakdown of the liberal-democratic order.

It is easy to see how an impasse can arise if the UN declaration (and similar pronouncements) sets the ground rules for employment relations. The Trade Disputes Act of 1906<sup>20</sup> led to massive distortion of labor markets that, before Margaret Thatcher became prime minister, severely retarded labor-market growth. The National Labor Relations Act<sup>21</sup> (NLRA) in the United States had less dire consequences, but it allowed the strike wave in the aftermath of World War II to create profound labor-market dislocations that were only partially negated by the passage of the Taft-Hartley Act<sup>22</sup> in 1947. The UN declaration does not specify whom the correlative duties fall on, what they are, and why they are imposed. There are no obvious limits on what can be done under this framework, and in the labor markets, this result can easily lead to a system in which jobs become so protected that dismissal, if it is obtainable at all, requires compliance with onerous administrative procedures, in contrast to the common-law rule that allows people to enter into contracts at will, and with respect to all future services an employee may quit and an employer may fire for good reason, bad reason, or no reason at all. The breakdown in European labor markets stems from just

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<sup>19</sup> See *Universal Declaration of Human Rights*, UN General Assembly (Dec 10, 1948), UN Doc A/RES/217A 75:

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

<sup>20</sup> 6 Edw 7 ch 47, reprinted in 44 *The Public General Statutes* 246 (Eyre & Spottiswoode 1906).

<sup>21</sup> 49 Stat 449 (1935), codified as amended at 29 USC § 151 et seq.

<sup>22</sup> Labor Management Relations Act of 1947, 61 Stat 136, codified at 29 USC §§ 141–87.

these restrictions, which among their many vices create a privileged in-class that cannot be dislodged, necessarily leaving scant opportunities for those who are shut out of the market.<sup>23</sup>

These dangerous developments stand in sharp contrast with classical natural-rights theory, in which private property imposes on all individuals the duty to forbear from entering or destroying it, regardless of their wealth or social status. These traditional rights are largely invariant to three key elements: the size of the population, the change in overall wealth, and changes in technology.<sup>24</sup> This set of rights is easily knowable and enforceable, and it does not suffer from uncertain transitions and redefinitions that are part and parcel of the modern administrative state, for which tinkering with statutory commands is a daily part of the overall vision.

Wholly apart from its indefinite structure, the modern version of positive rights for workers omits any explicit (or indeed implicit) reference to the simple proposition that unions seek to raise wages by exercising monopoly power over the labor markets of which they are a part, for which at one time they were subject by the Supreme Court to the antitrust laws in the United States.<sup>25</sup> But that legal regime did not last. Unions received immunity from the operation of the antitrust laws under the Trade Disputes Act in England of 1906<sup>26</sup> and under § 6 of the Clayton Act.<sup>27</sup> To make

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<sup>23</sup> See Elena Holodny, *This Chart Highlights One of Europe's Biggest Problems* (Business Insider, Nov 9, 2017), online at <http://www.businessinsider.com/youth-unemployment-europe-eu-2017-11> (visited Jan 23, 2018) (Perma archive unavailable) (comparing Europe's overall unemployment rate of 8.9 percent to the unemployment rate for youth ages 15 to 24 of 18.7 percent as of September 2017).

<sup>24</sup> For discussion, see Richard A. Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* 73–76 (Harvard 2011).

<sup>25</sup> See *Loewe v Lawlor*, 208 US 274, 306–09 (1908). *Loewe* was part of a consistent intellectual order, which included such decisions as *Adair v United States*, 208 US 161, 180 (1908) (striking down a federal collective bargaining law); *Coppage v Kansas*, 236 US 1, 26 (1915) (striking down a state collective bargaining law); *Hitchman Coal & Coke Co v Mitchell*, 245 US 229, 261–62 (1917) (finding that inducement of breach of contract lies against unions). For my unrepentant defense of the old order, see generally Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 Yale L J 1357 (1983).

<sup>26</sup> 6 Edw 7 ch 47 § 4, reprinted in 44 *The Public General Statutes* at 246–47 (cited in note 20).

<sup>27</sup> 38 Stat 730, 731 (1914), codified as amended at 15 USC § 17:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or

the point more broadly, the overgeneralized vision of liberal democracy grants full legitimacy to those states that foster and protect monopoly power in some areas while denying it in others, and thus allows radically different rules to apply to concentration of power by firms and unions. In the United States, the adoption of the NLRA in 1935 led to a massive strike wave after the end of the Second World War,<sup>28</sup> which in turn led to legislation—the Administrative Procedure Act<sup>29</sup> and the Taft-Hartley Act—that tempered the force of union power so that it did not lead to the breakdown of the state. But England was not so lucky, for the labor market almost broke the country when Margaret Thatcher became prime minister.<sup>30</sup> There is no way that any liberal democracy can hope to prosper if it turns over that level of monopoly power to one of its groups. What happened in England in 1980 is happening again today: the success or failure of President Emmanuel Macron's new French government will turn on whether he is able to reform the rigid labor laws by making it easier to hire and fire.<sup>31</sup>

Today, in many markets, unions are not the main source of dislocation, but other systems of regulation, minimum wages, maximum hours, family leave, required healthcare coverage, and antidiscrimination laws contribute to labor-market rigidity that liberal constitutionalists tend to ignore, just as they ignore the powerful empirical evidence that the period of greatest prosperity and economic growth—roughly speaking, 1870 to 1940 in the United States<sup>32</sup>—corresponded perfectly with the classical liberal constitutional order that has always attracted the scorn of liberal constitutionalists, which includes not only progressives but also many traditional conservatives who continue to think that

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to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

<sup>28</sup> See midtowng, *The Great Strike Wave of 1946* (Economic Populist, Apr 5, 2009), archived at <http://perma.cc/W3WU-SCPP>.

<sup>29</sup> 60 Stat 237 (1946), codified as amended in various sections of Title 5.

<sup>30</sup> See Adam Taylor, *Margaret Thatcher Fought One Huge Battle That Changed the UK Forever* (Business Insider, Apr 8, 2013), archived at <http://perma.cc/6NT2-GVHT>.

<sup>31</sup> For a discussion of the issue, see Chloe Farand, *Emmanuel Macron Kicks Off Controversial Attempt to Reform France's Labour Laws* (The Independent, June 28, 2017), archived at <http://perma.cc/RD94-FV76>.

<sup>32</sup> For the empirical evidence, see Robert Gordon, *The Rise and Fall of American Growth* 25–318 (Princeton 2016).

*Lochner v New York*<sup>33</sup> was an unmitigated constitutional disaster.<sup>34</sup> Tellingly, the word “growth” never appears in GHV’s account of liberal constitutionalism. And yet it is precisely the lack of growth, combined with the manifest rise of the political corruption in a large state, that has led to widespread disenchantment in both the United States and the European Union. Nor should these developments come as any surprise. When times are bad, groups look at the jobs that are lost and hope for some protectionist maneuver to shield them from foreign shocks. But in virtually all cases, the gains from free trade across national borders will, if allowed to flourish, swamp these parochial maneuvers, at least if it can overcome a broadscale consensus that includes in the United States such notables as President Trump, Hillary Clinton, and Senator Bernie Sanders, and of course union groups that see free trade as the mortal enemy of their monopoly wages.

On this issue, there should be a powerful litmus test that rules these protectionist motives out of bounds. To be sure, there are always cases in which restriction on the import or export of goods may well be justified.<sup>35</sup> Excluding toxic goods is perfectly acceptable so long as it is not a ruse for protectionist activities. But abuse of this principle is rampant, as when the European Union invokes the precautionary principle to impose strict restrictions on GMOs,<sup>36</sup> notwithstanding a complete lack of evidence that they are harmful. Similarly, requiring export licenses for advanced goods with clear implications for national security is yet another important exception to the general rule. However, most such restrictions are intended to secure advantages for local producers, but can do so only at the expense of local consumers and local manufacturers who need to import goods and services from overseas in order to remain competitive as sellers of goods and providers of services in both domestic and international markets. GHV’s definition of liberal constitutionalism is consistent with strongly anti-free-trade positions precisely because it makes no substantive commitments on individual rights, and thus opens

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<sup>33</sup> 198 US 45 (1905).

<sup>34</sup> See, for example, *Obergefell v Hodges*, 135 S Ct 2584, 2621 (2015) (Roberts dissenting) (referring to “the debacle of the *Lochner* era”). For a rather different account, see David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* 8–39 (Chicago 2011).

<sup>35</sup> For a good treatment of these issues, see General Agreement on Tariffs and Trade Art XX, 55 UNTS 194, 262–63, TIAS 1700 (1947) (GATT).

<sup>36</sup> Theresa Papademetriou, *Restrictions on Genetically Modified Organisms: European Union* (Library of Congress, March 2014), archived at <http://perma.cc/WG3D-CSG5>.

the way for the advancement of the wrong rights, like those in the UN declaration, that create extensive cross subsidies, restraints on entry, and other forms of monopoly power.

A similar difficulty arises in connection with the knotty question of redistribution of wealth through state action. It is difficult, even within the framework of classical liberalism, to argue that any system of redistribution should be banned as a matter of first principle, given the case for at least a set of imperfect obligations. But it is important to note that one of the great difficulties of modern social life stems from the size of the redistributive state insofar as it provides massive subsidies for pensions, healthcare, education, and housing that are not supportable by resources available to the public. Yet it is important to note that there are some important ways to curb the strong appetite for these subsidies even when they are state provided.

First, it is always a mistake to fund various transfer payments from specific taxes on unrelated businesses or industries. One recent American example of that practice was the excise tax imposed on medical devices under Obamacare, suspended for two years, which imposed huge costs on one particular industry.<sup>37</sup> The invariable rule in these cases is that welfare benefits should come from general revenues so that their cost is brought to bear, however imperfectly, by the parties who support the program. The use of general revenues thus helps steady the political game of intrigue that arises when all interest groups seek to duck potential liabilities with the same enthusiasm that they seek to attract special benefits. But even here, so long as there are no constraints on the objects for which taxes can be spent, huge transfers, as through pension programs, can negate many of these benefits. It is a sobering reminder that a state like Illinois has both huge unfunded pension liabilities and a flat state income tax.<sup>38</sup>

Second, it is never proper to seek to raise moneys for these programs by making an aggressive use of governmental powers to license or permit. One of many examples is the requirement that the builders of new properties for sale or lease agree to reserve some fraction of their new supply for affordable residences. The conceit is that they can always make up the difference by

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<sup>37</sup> *Medical Device Tax Suspended for Two Years* (AAMI, Dec 21, 2015), archived at <http://perma.cc/RY2H-M84U>.

<sup>38</sup> For the juxtaposition, see Mike Klemens and Ralph Martire, *Illinois Issues: Flat vs. Graduated Income Tax* (NPR Illinois, Aug 24, 2017), archived at <http://www.perma.cc/G6WJ-HDCR>.

raising the price on the market-rate units in the mix. The reality is that the burden on sales and rentals operates like an indirect form of price control that reduces the private willingness to invest in the first place, leading to systematic housing shortages, which become especially acute when the rates are set too high for businesses to continue. A similar risk arises in the United States in connection with the Community Reinvestment Act of 1977<sup>39</sup> (CRA) and similar programs that insist that large subsidies be poured into underserved neighborhoods for banks that wish to expand their operations by opening branches or acquiring local banks.<sup>40</sup> These obligations clearly spilled over into lending markets, in which it was, and is, impossible to expand high-risk loans without impairing the safety and security of the member banks.<sup>41</sup> These pressures (along with the lack of appreciation of correlated risks) helped bring about the collapse of the mortgage market in 2007 and 2008, which once again affirms the importance of imposing some strong constraint on redistributive politics. The monetary consequences of off-budget changes are not made explicit until it is too late. Yet the standard model of liberal constitutionalism has nothing to say in opposition to that practice.

It might well be said that these examples are all too anecdotal, and in a sense they are. But within the United States the evidence from competitive federalism supports the same point by looking at the aggregate impact of taxation and regulation on individual behavior, here in the context of the movement of populations across state lines. On this matter, there is no contest: the migration moves from high-tax, high-regulation states to low-tax, low-regulation states. One recent study notes that the outmigration from high-tax, high-regulation states virtually matches the in-migration to low-tax states—the bottom ten states have lost about 3.78 million people over the last decade, while the top ten have gained about 3.75 million.<sup>42</sup> The differences are all the more impressive because both groups of states have to struggle with

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<sup>39</sup> Pub L No 95-128, 91 Stat 1147, codified at 12 USC § 2901 et seq.

<sup>40</sup> For a critique, see Jonathan R. Macey and Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 Va L Rev 291, 294–97 (1993) (arguing that the Act does “more harm than good”).

<sup>41</sup> For an analysis of the impact of the CRA, see Sumit Agarwal, et al, *Did the Community Reinvestment Act (CRA) Lead to Risky Lending?* \*21 (National Bureau of Economic Research Working Paper 18609, Dec 2012), archived at <http://perma.cc/DQM3-4T54>.

<sup>42</sup> See Jonathan Williams, *Business-Friendly States Are Growing at the Expense of Those That Tax and Spend* (National Review, Apr 22, 2017), archived at <http://perma.cc/FAM4-8VJ3>.

the same large system of federal regulation, so that the differences in total impact are smaller than those that would arise if the only determinant of economic success were the state regulation. It is not possible to present more exhaustive data here, but it is possible to insist that the flaw in modern liberal constitutionalism lies in this compound failure: it first shrinks the economic base, then increases the transfer payments that it runs on that base. The point here is not that maximum productivity and zero redistribution are the ideal mix. Nor is it that all states must fall from grace if they make any concession on either margin. It is rather that there is likely to be a continuum in practices, such that the cumulative impact of increases in regulation, taxation, and transfer payments carries economic risks that the defenders of liberal constitutionalism tend to overlook. And make no mistake about it, the decline of economic growth carries with it major opportunities for political instability, an issue to which I now turn.

## II. FINDING SCAPEGOATS

There are then good reasons to be pessimistic about the future of liberal constitutionalism in the face of rising populism. But in light of the above analysis it is necessary to recognize why so many of the populist forces are strongly opposed to the system, given its defense of the wrong right. In this regard, it is important to comment on one particular passage, which contains in my view some truth but much error about the behavior of the opponents of that system. That passage reads in full:

By the end of 2016, however, it was not merely possible, but even en vogue for aspiring politicians to question the hegemony of liberal democracy. Although warning signs aplenty might now be discerned, it is possible to single out the June 2016 Brexit referendum in the United Kingdom and the November 2016 presidential election in the United States as marking, in different ways, globally resonant repudiations of the liberal-democratic norm.

In both contests, right-of-center populist positions hostile to international migration, international and supranational organizations, and the liberal tolerance of different ethnicities and faiths prevailed. Their triumphs were part of a wider, right-leaning “populist explosion” in Europe and Asia, albeit one that trails an earlier left-leaning populist shift in Latin America. Although they have typically ascended to power via democratic, electoral means, populists on both the

left and right have departed from liberal-democratic norms in several ways.<sup>43</sup>

I am not sure whether GHV would have written this passage in exactly the same way today. But I take strong exception to the claim that Brexit has unleashed strongly antidemocratic and intolerant forces. The vote itself was very close—less than four points separated the two sides—which makes perfectly good sense because the case was close: there are advantages in remaining in the European Union as part of a free-trade zone, but less insofar as it operates as a central government capable of issuing binding law on its member nations.<sup>44</sup> Anyone who has followed Prime Minister Theresa May knows that she has tried to preserve cooperative relations with the European Union, by endorsing three of its four critical freedoms: the free movement of capital, goods, and services. Even though the UK decision to leave the European Union was irrevocable, the United Kingdom hoped to preserve “the deep and special partnership” as the European Union’s “closest friend and neighbour.”<sup>45</sup> The movement of people within the European Union raises far more complex issues, but is orthogonal to the explosive issue of immigration and refugees, which under the EU agreements is left for individual member states to decide for themselves.<sup>46</sup> The UK motivations for pulling out of the European Union were mixed, but high on that list was the belief that the European Union trampled on sensible British parliamentary autonomy.<sup>47</sup> Much sovereign power was transferred to the European Commission, a remote and unsympathetic body that was all too keen on intervening in the United Kingdom’s affairs.<sup>48</sup>

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<sup>43</sup> Ginsburg, Huq, and Versteeg, 85 U Chi L Rev at 240–41 (citations omitted) (cited in note 3).

<sup>44</sup> For my views, see generally Richard A. Epstein, *The Role of Exit Rights: What the Theory of the Firm Says about the Conduct of Brexit Negotiations*, 39 *Cardozo L Rev* (forthcoming 2018).

<sup>45</sup> Theresa May, *Prime Minister’s Letter to Donald Tusk Triggering Article 50* (gov.uk, Mar 29, 2017), archived at <http://perma.cc/N28X-6S4S>.

<sup>46</sup> *Explaining the Rules* (European Commission, June 12, 2016), archived at <http://perma.cc/YX9K-KWPR>.

<sup>47</sup> See Ambrose Evans-Pritchard, *Brexit Vote Is about the Supremacy of Parliament and Nothing Else: Why I Am Voting to Leave the EU* (The Telegraph, June 13, 2016), archived at <http://perma.cc/25TZ-GYWV>.

<sup>48</sup> Joshua Rozenberg, *Does the EU Impact on UK Sovereignty?* (BBC, Feb 23, 2016), archived at <http://perma.cc/QKU7-RMPT>.



Next, the Brexiters chafed at the United Kingdom's inability to enter into free-trade agreements with non-EU members, including the United States, Australia, and other parts of the British Commonwealth.<sup>49</sup> Brexiters have no objection to remaining in the World Trade Organization, whose rules will govern the relationship between the European Union and the United Kingdom if no separation arrangement is concluded under the Article 50 framework before the clock runs out on March 29, 2019.<sup>50</sup> The extent to which EU regulation bears major responsibility for the United Kingdom's own problems is an open question. Indeed, many Remainers believe that access to European markets are well worth the regulatory burdens that might be imposed. Yet at the same time, many Remainers were left-wing Labour Party members under the leadership of Jeremy Corbyn. His political star rose after May frittered away her legislative majority.<sup>51</sup> It is also worth noting that leading voices inside the European Union, most notably that of Michel Barnier, its chief negotiator, have to date shown little willingness to address new treaty relationships going forward until the United Kingdom satisfies its debts to the European Union on key matters of budget commitments, pension liabilities, loan guarantees, and EU spending on UK projects.<sup>52</sup> Barnier puts that figure at the tidy sum of €60 billion (£51 billion).<sup>53</sup> It is a grotesque overstatement to claim that Brexiters are closet supporters of Carl Schmitt, driven by their desire to wipe out their enemies by physical force if necessary.<sup>54</sup> Indeed, the success or failure of Brexit will depend on whether and how the European Union and United Kingdom negotiate some follow-on deal.

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<sup>49</sup> See Peter Lilley, *The Truth about Britain's Trade outside the European Union* (The Telegraph, May 26, 2016), archived at <http://perma.cc/8DWZ-DNE8>.

<sup>50</sup> See Consolidated Versions of the Treaty on European Union Art 50, 55 J EU C326 13, 43–44 (2012).

<sup>51</sup> See John Curtice, *Theresa May Failed to Gain a Majority Because She Grossly Misunderstood the 'Will of the People'* (The Independent, June 9, 2017), archived at <http://perma.cc/2JMP-NVL6>.

<sup>52</sup> See Michel Barnier, *The Conditions for Reaching an Agreement in the Negotiations with the United Kingdom* (European Commission, Mar 22, 2017), archived at <http://perma.cc/BPA9-T9QQ>.

<sup>53</sup> See Will Martin, *The EU Expects to Spend a Massive Chunk of the Article 50 Period Negotiating a Single Element of Brexit* (Business Insider, Feb 20, 2017), archived at <http://perma.cc/LC9V-36SD>.

<sup>54</sup> See Ginsburg, Huq, and Versteeg, 85 U Chi L Rev at 241 (cited in note 3).

President Trump is always more difficult to analyze. To say that he is a divisive force is to understate the obvious. It was appropriate to wince at his jingoistic “America First” inaugural address and his indefensible first order on the entry of noncitizens into the United States, both of which led me to call at the time for his resignation.<sup>55</sup> After relative quiescence on this issue, his “hire American and buy American”<sup>56</sup> line is a form of protectionist folly that has to be opposed every step of the way. His now-futile efforts to tie up the entire budget process until he got funding for his Mexico wall makes many people, myself included, pine for a Republican administration headed by Vice President Mike Pence. Finally, his endless personal indiscretions, abusive and mindless tweets, nasty insults, and other erratic behaviors make him less than an ideal presidential figure.

Yet it is a mistake to ignore the positive side of the ledger. Trump has appointed many highly competent people—think National Security Advisor H.R. McMaster. On the political front, Trump has done many things that are right, including allowing the construction of the Keystone XL and Dakota Access pipelines. He did so in ways that corrected the legal shenanigans of the Obama administration, especially on Dakota Access (a case in which I worked as a consultant for a consortium of labor and business groups supporting the pipeline). At times the Obama administration took actions that were a massive affront to the most rudimentary requirements of the rule of law, including its unprecedented government refusal to enforce a judgment in their favor that had been issued by Obama-appointed district-court judge James Boasberg after painstaking deliberations.<sup>57</sup> Thereafter the assistant secretary in the Department of the Army refused to issue the necessary permit for an easement over a small tract of government land, even after the Air Corps of Engineers had found

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<sup>55</sup> See Richard A. Epstein, *Trump's Immigration Insanity* (Hoover Institution, Jan 30, 2017), archived at <http://perma.cc/7XY8-P78V>.

<sup>56</sup> See Connor DiGregorio, *Buy American, Hire American: How Renewed Protectionism Is Reshaping Supply Chains* (Industry Week, Sept 13, 2017), archived at <http://perma.cc/85WM-YDFQ>.

<sup>57</sup> See Richard Epstein, *Why the DOJ Order to Shut Down Construction on the DAPL Pipeline Is Legally Indefensible* (Forbes, Sept 14, 2016), archived at <http://perma.cc/AAR2-W7KB>; Richard Epstein, *Lawless Bureaucratic Obstruction Is No Substitute for the Rule of Law in the Dakota Access Decision* (Forbes, Dec 9, 2016), archived at <http://perma.cc/C9VE-99S4>; Richard Epstein, *Trump's Big Move on Dakota Access Pipeline* (Forbes, Jan 26, 2017), archived at <http://perma.cc/6EWG-29WN>.

that the easement met all regulatory standards.<sup>58</sup> Trump was also right in my view to pull out of the ill-conceived Paris accords.<sup>59</sup> On the international front Trump has, at least for the moment, come around to the view that we should take at least some modest steps to stop the carnage in Syria, and, hard as it is, reaffirm the importance of NATO and drop charges of currency manipulation against the Chinese in order to get some leverage over them with respect to North Korea.<sup>60</sup> The man is too difficult to capture in a broad denunciation that lacks any bill of particulars.

Finally, GHV misunderstand much of the support of Trump just as they misunderstand the appeal of Brexit. Trump's support was nourished by a widespread hostility, if not downright revulsion, toward Hillary Clinton, his rival. She had the support of the fashionable eastern elites and was solidly progressive on every issue from race to campaign finance to taxes to crime. Yet her natural base was wary of her because of her involvement in Whitewater, Travelgate, Benghazi, and of course the multiple issues surrounding her email server and former FBI Director James Comey's hot-and-cold investigation of her behavior. At the same time, Clinton alienated massive numbers of people in flyover country by calling Trump supporters "deplorables" and refusing to acknowledge the enormous economic reversals that hit people in these less privileged places.<sup>61</sup> Nor do GHV make any reference to the excesses of Black Lives Matter, the shrill invectives of Senator Sanders, or the left-wing protestors who have managed in short order to disinvite or shout down people like

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<sup>58</sup> See Courtney Kube and Daniel A. Medina, *Army Corps of Engineers Had Actually Recommended Dakota Access Pipeline Route Approval* (NBC News, Dec 7, 2016), archived at <http://perma.cc/4UA7-248Z>.

<sup>59</sup> See Richard A. Epstein, *Forget the Paris Accords* (Hoover Institution, May 30, 2017), archived at <http://perma.cc/YX9Z-TSQ9>.

<sup>60</sup> See Stephen Collinson, *Trump's Stunning U-turns on NATO, China, Russia and Syria* (CNN Politics, Apr 13, 2017), archived at <http://perma.cc/B8TW-JH25>.

<sup>61</sup> See Amy Chozick, *Hillary Clinton Calls Many Trump Backers 'Deplorables,' and G.O.P. Pounces* (NY Times, Sept 10, 2016), online at <http://www.nytimes.com/2016/09/11/us/politics/hillary-clinton-basket-of-deplorables.html?mcubz=0> (visited Oct 18, 2017) (Perma archive unavailable).

Ayaan Hirsi Ali,<sup>62</sup> Heather McDonald,<sup>63</sup> Charles Murray,<sup>64</sup> and the vile Milo Yiannopoulos.<sup>65</sup> In the United States at least, no one should overlook the dangers of political extremism from the left as well as from the right. Put that package together and much of the Trump appeal was a refusal to accept the status quo of the modern progressive administrative state that embraces liberal constitutionalism.

Yet in many ways the most troubling message of GHV's piece is their relative indifference to the atrocities that have routinely taken place in socialist countries like China, Cuba, Russia, and Venezuela, which dwarf by orders of magnitude any supposed sins of the Brexiters or even Trump. These socialist havens feature one-man arbitrary rule that is quite willing to jail and torture dissenters, rig presidential elections, and drive an economy to ruin. I quite agree with GHV that peaceful mass demonstrations may well be the best way to take after corrupt governments.<sup>66</sup> And one should not look with indifference at the concerted long-term effort of the Chinese government to reduce the level of political and cultural independence in Hong Kong, where massive demonstrations have yet to stop the apparatchiks in Beijing from squeezing the life out of the region.<sup>67</sup> Nor do they show much worry about the decision of the Russian autocrat Vladimir Putin to gobble up Crimea.<sup>68</sup> Perspective really matters, and the ostensible enemies of liberal constitutionalism in the West are child's play compared to the oppression, intolerance, and

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<sup>62</sup> See Jason Linkins, *Brandeis University's Decision to Cancel Ayaan Hirsi Ali Appearance Has Done Liberals No Favors* (Huffington Post, Apr 20, 2014), archived at <http://perma.cc/6ZJK-KEQ2>.

<sup>63</sup> See Cleve R. Wootson Jr, *She Wanted to Criticize Black Lives Matter in a College Speech. A Protest Shut Her Down*. (Wash Post, Apr 10, 2017), archived at <http://perma.cc/4X3L-3X6S>.

<sup>64</sup> See Peter Beinart, *A Violent Attack on Free Speech at Middlebury* (The Atlantic, Mar 6, 2017), archived at <http://perma.cc/YX8U-U3VX>.

<sup>65</sup> See James Doubek, *Breitbart Editor's Event Canceled as Protests Turn Violent at UC Berkeley* (NPR, Feb 2, 2017), online at <http://www.npr.org/sections/thetwo-way/2017/02/02/512992000/breitbart-editors-event-canceled-as-protests-turn-violent-at-uc-berkeley> (visited Oct 10, 2017) (Perma archive unavailable).

<sup>66</sup> See Ginsburg, Huq, and Versteeg, 85 U Chi L Rev at 252–53 (cited in note 3).

<sup>67</sup> See John Lyons, *China's Xi Promises to Protect Hong Kong's Status as Beijing Tightens Grip* (Wall St J, June 29, 2017), online at <http://www.wsj.com/articles/chinas-xi-promises-to-protect-hong-kongs-status-as-beijing-tightens-grip-1498726544> (visited Oct 10, 2017) (Perma archive unavailable).

<sup>68</sup> See Steven Lee Myers and Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West* (NY Times, Mar 18, 2014), online at <http://www.nytimes.com/2014/03/19/world/europe/ukraine.html?mcubz=0> (visited Oct 10, 2017) (Perma archive unavailable).

arbitrary power in so many totalitarian regimes. The best way to fight them, moreover, is not to appeal to a frayed and tattered progressivism, but to reaffirm the dominance of liberty, property, limited government, and the rule of law, as properly understood in the classical liberal tradition.

#### CONCLUSION

In this short Essay, I have tried to pour some cold water over the modern claims for the intellectual dominance of liberal constitutionalism. On first inspection, there seems much to like in liberal constitutionalism. But on closer look, the clear weaknesses of that position are legion. The most important of these is the gap in the specification of the individual rights that it seeks to defend. GHV have not written a defense of traditional limited government. Instead they have penned a defense of the wrong set of rights, which is ultimately unstable, both for the economic stagnation it engenders and for its heavy reliance on unbounded administrative interventions that, for all their procedural formalities, are inconsistent with the rule of law.

Indeed, that critical concept can be read in dramatically different ways. The thin version of the doctrine contains no substantive commitments and is satisfied by having neutral judges administering internally consistent rules generated by a supposedly benign combination of popular democratic will backed by administrative expertise. That version will disintegrate in the face of constant and uncontrollable political pressures. It should therefore be emphatically rejected in favor of the strong conception of the rule of law that ties that conception to a particular substantive vision that features limited government, strong private property rights, and freedom of contract, subject to the limitations set out above. The differences between these two systems is enormous. The seeds for the destruction of the fashionable versions of liberal constitutionalism lie in its weak substrate of substantive rights. Stemming today's massive unease will not come from an uncritical defense of an outmoded theory that rests on progressive principles. It lies in making strong substantive commitments to the classical liberal position that is all too often overlooked and deprecated today.