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THE SEPARATION OF PEOPLE AND STATE

RANDY E. BARNETT*

The subject of American exceptionalism, about which much has been written, is extremely complex. There is no simple way to describe all the ways in which America differs from the other nations of the world. Steven G. Calabresi provides a wonderful and wide-ranging summary in his article "*A Shining City on a Hill*."¹ In his conclusion, Professor Calabresi writes:

American exceptionalism is thus absolutely exceptional among all the exceptionalisms of the world because of the belief that anyone of any race or nation can become an American just by believing in a set of ideas. Ours is a universal creed, and it is not predicated on the nationalist belief that we are superior because of who we are. Americans think America is superior because of what Americans believe.²

And what is that creed? In his book *American Exceptionalism: A Double-Edged Sword*,³ Seymour Martin Lipset offers the following summary:

Born out of revolution, the United States is a country organized around an ideology which includes a set of dogmas about the nature of a good society. . . . [The American] ideology can be described in five words: liberty, egalitarianism, individualism, populism, and laissez-faire. The revolutionary ideology which became the American Creed is liberalism in its eighteenth- and nineteenth-century meanings, as distinct from conservative Toryism, statist communitarianism, mercantilism, and *noblesse oblige* dominant in monarchical, state-church-formed cultures.⁴

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1. Steven G. Calabresi, "*A Shining City on a Hill*": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006).

2. *Id.* at 1415.

3. SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1996).

4. *Id.* at 31.

Professor Calabresi is indeed correct that the United States Constitution is a central part of the creed that defines, creates, and preserves American exceptionalism. The American vision of constitutionalism includes at least four distinctive elements. Each of these elements has come under challenge by American constitutional law professors, at least some of whom prefer the European model of constitutionalism to the American one.⁵ To the extent that these elements are eroded, America becomes less exceptional, which is a welcomed development among some of those same legal academics.⁶

First is the belief in adherence to a founding document: *a written Constitution*. The novelty of a written constitution has now been widely imitated around the world, but not necessarily imitated is the accompanying American ideology of faithful adherence to a document that both empowers and limits a government. Perhaps this is why the peoples of other countries do not revere their constitutions as Americans traditionally have.

This, in turn, highlights a second distinctly American belief in *constitutionally limited government*. The written Constitution limited the powers of government in two complementary ways: First, what might be called the “Federalist Constitution” divided powers among the branches of the national government and between the national government and the States;⁷ and second—and contrastingly—the “Anti-Federalist Constitution” provided specific protections of enumerated rights in the form of a Bill of Rights, along with express protections for the unenumerated rights, privileges, and immunities of the people.⁸

A third characteristic of American constitutionalism stems from the second: The written limits on the powers of government invite not only the *legal enforcement of these limits* by an independent judi-

5. See, e.g., Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); see also Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, in THE BILL OF RIGHTS IN THE MODERN STATE 519 (Geoffrey R. Stone et al. eds., 1992) (describing American constitutional exceptionalism).

6. See, e.g., Michael Kammen, *The Problem of American Exceptionalism: A Reconsideration*, AM. Q., Mar. 1993, at 1 (arguing that American exceptionalism has decreased); Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.–Dec. 2000, at 9 (arguing the same, and welcoming this development).

7. See U.S. CONST. art I, § 1; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1; U.S. CONST. amend. X.

8. U.S. CONST. amends. I–X, XIV.

ciary, but also the invocation of these limits by the Congress, the Executive, state governments, and the People themselves. Although the judicial enforcement of constitutional limits on legislative powers was a major feature of the original Constitution,⁹ since coming under assault by Progressives during the early twentieth century, judicial nullification has been challenged increasingly as “countermajoritarian” and, therefore, illegitimate.¹⁰

This leads to a fourth characteristic of the American creed, one defined by our 200-year-old written Constitution yet still controversial today: the anti-democratic nature of the Constitution’s republican form of government, or what Sandy Levinson has called “our undemocratic Constitution.”¹¹ If there is one constitutional feature that has preserved the United States as an exception to the various ideological trends of rest of the world, it is this: The Constitution established a highly idiosyncratic system of rule by institutions that were checked by popular forces. Yet, these popular forces did not claim to rule directly. By design, the Congress and state legislatures are not identified as “the People,”¹² and those who seek to locate the People in Congress or legislatures are mistaken about the nature of American constitutionalism. Elections serve as a popular check on government power. Apart from state referenda (which are also a check on state legislatures), the People do not rule directly, and even in referenda only a subset of the People constitute the “electorate” who actually vote.

The separation of People and State is preserved by the Constitution because *no one* can claim to speak for the People: neither the President (unlike various dictatorships) nor the Congress (unlike the parliamentary systems that dominate throughout the rest of the world).¹³ This separation, like the separation of Church and State,¹⁴ provides the space for the rest

9. See Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115 (2004).

10. See generally Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001).

11. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

12. See, e.g., U.S. CONST. amend. X (powers not delegated to “the United States” are reserved “to the States respectively, or to the people” (emphasis added)).

13. *Id.*

14. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1946) (noting the “wall of Separation between church and State”).

of the American ideology of classical liberalism to survive. In contrast, the rest of the world's democratic regimes, whether or not they have written constitutions, are far more susceptible to capture by interests and also by the ideological fashions of the day. In my view, the separation of People and State has served America well.

Here, the People do not truly purport to rule.¹⁵ Here, the People are empowered to check those who do rule and never completely identify with their rulers. That our form of government significantly differs from those of other Western "democracies" is a very good reason why our Constitution should not be interpreted to import the constitutional law of other countries.

Sadly, when American intellectuals are called to advise other countries on democracy, they fail to promote the form of government that has made America exceptionally successful. Instead, they bemoan the undemocratic nature of our system of governance and largely endorse European-style parliamentary systems on the ground that those systems are more "democratic."¹⁶ Ironically, American intellectuals, who fail to recommend the American Constitution to others because they dislike the idiosyncratic combination of America's Federalist and Anti-Federalist Constitutions, are indirectly responsible for perpetuating America as an exception in the world.

15. Cf. RICHARD D. PARKER, *HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* (1994).

16. See, e.g., Esther Pan & Sharon Otterman, Council on Foreign Relations, Background: Iraq: The Transitional Government (Apr. 7, 2005), <http://www.cfr.org/publication/8078/iraq.html> (identifying Professor Noah Feldman as "constitutional advisor to the Iraqi government" and stating that "Iraq's transitional government is a parliamentary democracy with a . . . prime minister . . . who 'exercises almost all the real power' . . . [and a] presidency [which] remains 'primarily symbolic [and] much more like a chairman of the board than a CEO'"); *Tufts Scholar Helps Draft Kosovo Constitution*, TUFTS E-NEWS, Mar. 3, 2005, <http://enews.tufts.edu/stories/527/2005/03/03/TuftsScholarHelpsDraftKosovoConstitution> (stating that the draft constitution "calls for a parliamentary democracy, a strong prime minister, and an emphasis on individual rights").