

FRANCE AND THE UNITED STATES: NOT SO FAR FROM EACH OTHER

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When I first learned the topic of this panel, I thought it was perhaps quite risky to ask a French attorney to talk about limited government and spreading democracy. I looked at our history of monarchy, revolution, empires, and modern authoritarian leaders, and I found people who are not exactly true models of democracy and limited government.

Nevertheless, I could have given a very academic talk (at least forty minutes in our country) about the French Enlightenment, human rights, the sun rising on French Republics and the world. Too long, too boring. Let me take you, gently, instead, for ten minutes to the south of our beautiful country. Try to close your eyes and feel as if you were on the terrace of a lovely café listening to one Frenchman and one American talking about these interesting issues: limited government and spreading democracy.

THE UNITED STATES AND THE EU SEEM SO REMOTE FROM EACH OTHER

The American: You French are great humanists and believe the State can do everything but change a man into a woman. Have you heard of the U.S. doctrine of spreading democracy? And, first, have you heard of limited government?

The Frenchman: I've no clue at all about limited government. It must be an American idea dealing with . . . federalism? The Tenth Amendment? Yes, we know about that, states rights, limits on the federal government. We have none of that here, and Europe is very far from being a federation. But why do you want to *limit* government? The will of the majority is everything to us; then all decisions become political. Remember Mr. Prodi's recent declaration that *Europe is on the left*. Governments have to be strong, respected, acting almost everywhere, including in matters related to social questions—culture, welfare state, solidarity, etc. Plus, we have that fantastic and superb Brussels technocracy. It is nice to have 15,000 civil servants only in Brussels taking care of our community!

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The American: Hey, you sound optimistic! Don't you think there is a deficit of democracy in the EU mess? Don't you think it's time to get more legitimacy into EU laws? Do you actually see any logic in the search for "international consensus"?

The Frenchman: Don't be so critical, my friend. You said democracy? Well, it may work. *Government is in the free consent of the people.*¹ But I understand from James Madison and Tocqueville that "democracy" and "republic" may have different meanings.² We do have that accessory in our baggage. Good effects from democracy are not guaranteed! Free elections guarantee a happy future? Think of the French Terror and "democratic" ideas forwarded then to support violence and crime. Consider the Weimar Republic. Very modern and sophisticated institutions. A wonderful springboard for Nazi power!

The American: You French are so cynical!

The Frenchman: And why do you want to *spread* democracy? Did you hear our President on September 4, 2006 at the United Nations? *International law and sovereignty*, not intervention!³ Democracy has to rise on its own. How can you Americans talk about the rule of law and violate international law? How can you promote limitation of power inside the nation—private enterprise and citizenship—and expand power outside through public policies? And what about sovereignty, the very first freedom you got in this country, before any other liberties, when you left Mother England?!

The American: So you prefer to let Albanians be killed in Kosovo, to have Iraqis murdered by Saddam, genocides, atrocities, failing states . . . and you do nothing? I thought you Europeans, especially the French, had a universal idea of human rights! And by the way, I thought that the right to intervention was a European idea, developed by Mario Bettati (student of a

¹ Statements of John Wildman at the Putney Debates (1647), in John Morrill & Philip Baker, *The Case of the Armie Re-stated*, in *THE PUTNEY DEBATES OF 1647: THE ARMY, THE LEVELLERS AND THE ENGLISH STATE* 118 (Michael Mendel ed., Cambridge Univ. Press 2001).

² See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 379–80 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chicago Press 2000) (1835); *THE FEDERALIST* NO. 10, at 75–79 (James Madison) (Clinton Rossiter ed., 1961).

³ See Jacques Chirac, President of France, Remarks at the 61st United Nations General Assembly (Sept. 19, 2006) ("But given the seriousness of what is at stake, the international community must stand firm and united. We do not aim to call regimes into question. We aim to ensure security in accordance with international law and with due regard for the sovereignty of all countries.").

Frenchman, Chief Justice René Cassin)⁴ in 1974 and taken over by French doctor Bernard Kouchner.⁵ What did you do with the eight post-Communist states that joined the EU in 2004? You did not promote democracy for them? And, my friend, don't you think that defense of human rights sometimes becomes political and a super-legality overruling international law?

The Frenchman: Alright, well said, but intervention often denies geopolitics and never goes against the one who is strong! Are you going to try to liberate the Tibetan people from Chinese yoke? You just *cannot* standardize democracy in its Western form. In pretending to order the world you just make it messier. Think of the destabilization of Iraq and the new tyranny of the Shia majority government. Political institutions are not spreading worldwide like iPods, gas stations, or computer geeks!

The American: So we do agree on some things! We are both attached to individualism, freedom, free enterprise, separation of powers, democracy, and limitation of power by the rule of law. And we disagree on other things. So what is our common message about limited government and democracy?

THE UNITED STATES AND THE EU MAY BE SO CLOSE TO EACH OTHER

The Frenchman: I've got an idea!

The American: It happens sometimes, even to you. But, good! I've got one too!

The Frenchman: Okay. If we say individuals come first, and government therefore has to be limited, can't we agree that spreading democracy *is the work of individuals first before any public policy*? Let's take my compatriot Montesquieu. He was one hundred percent French and belongs to the Founding Fathers of America's constitutional identity. So what, you say? Well, Montesquieu was not acting as a French agent. He was an individual, without any governmental support. He wrote the *Spirit of the Laws* (1748), all alone in his château.⁶

⁴ See generally MARIO BETTATI, *LE DROIT D'INGÉRENCE: MUTATION DE L'ORDRE INTERNATIONAL* (Gérard Jorland ed., Éditions Odile Jacob 1996).

⁵ See generally MARIO BETTATI & BERNARD KOUCHNER, *LE DEVOIR D'INGÉRENCE: PEUT-ON LES LAISSER MOURIR?* (1987).

⁶ See ROBERT SHACKLETON, *MONTESQUIEU: A CRITICAL BIOGRAPHY* 230–31 (1961).

The American: You are right: Revolution was made here first “in the minds and in the hearts of the people,” as John Adams said.⁷ James Madison has to be mentioned, too, in individual references.⁸

What should we say about the Founding Fathers as individuals? Democracy is spread by individuals first. Yes, civil society and outside powers do have a major role in spreading democracy! From the eighteenth century circulation of ideas to the twenty-first century global world, democratic ideals are spread by intellectuals; individuals, before governments. So being a Federalist and spreading democracy are compatible!

The right way to spread good democracy is first to encourage and develop individual and conservative minds, especially among law professors, judges, and attorneys!

The American: Now, can we agree on other things regarding the *content of ideas* that have to be spread?

Can we find a kind of *convergence*?

The Frenchman: Not sure it exists, but let's try!

The American: May I ask you some questions? First, what does “subsidiarity” mean in the EU?⁹

The Frenchman: It means essentially that member states are *first*: what belongs to them has to be respected, and the Community must act within the limits of its powers, and furthermore, only if the action is better achieved by the Community.

The American: Good. That reminds me of something. How do you limit power in Europe?

The Frenchman: As we learned from our compatriot Montesquieu (again), by power!¹⁰ We think that only power can stop power and also that separa-

⁷ Letter from John Adams to Hezekiah Niles (1818), in SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 262 (2d ed. 2004).

⁸ See generally RICHARD ELLIS & AARON WILDAVSKY, DILEMMAS OF PRESIDENTIAL LEADERSHIP: FROM WASHINGTON THROUGH LINCOLN 222 (1989) (describing Madison's notion that individualism provides the best means of breaking from the English crown).

⁹ See Treaty Establishing the European Community art. 5, Dec. 24, 2002, 2002 O.J. (C325) 42.

¹⁰ CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 155–56 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

tion has to be strict, even rigid—it must tend toward a balance, but it has to be rigid—not for the efficiency of government, but to protect individual freedom.

Also, limitation of power comes within the rule of law (e.g., the Constitution, the Bill of Rights). There can be no liberty without the rule of law.

Europeans know all about the “encroaching nature” of power and of the need to limit its aggressiveness, to contain it within legitimate boundaries, as you do in America. We like our nations to be nations of laws and not of men. And you know, there is something we think is very basic in your Constitution, the Guarantee Clause: “The United States shall guarantee to every State in this Union a Republican Form of Government”¹¹

The American: Good. Another question: With whom does sovereignty rest?

The Frenchman: Not necessarily with Parliaments: it rests with *the people!* Sovereignty belongs to the people and is given on loan to government!

The American: Good, good, good!

The American: Let’s just ask some basic questions and give me some European answers: Why does the state exist?

The Frenchman: Not for itself. To preserve freedom.

The American: Which is the best economic system consistent with human freedom and dignity? Free enterprise!

Why do we have to promote the supremacy of the rule of law—the Constitution and Bill of Rights especially: to limit government powers and functions, to protect from the majority! These basic ideas may contribute to a true “vision” of spreading democracy by the rule of law.

Finally, I’ve heard of great European thinkers named Descartes, Montaigne, Montesquieu, Tocqueville, Bastiat . . . What do they say?

The Frenchman: Descartes was the champion of personalism and self-thinking, a wonderful approach to personal and social responsibility;¹² Mon-

¹¹ U.S. CONST. art. IV, § 4.

¹² See, e.g., RENE DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY 16–23 (John Cottingham ed. & trans., Cambridge Univ. Press 1996) (1641) (explaining *cogito ergo sum* argument).

taigne: a true individualist, too, and a unique thinker about human nature;¹³ Tocqueville: *Democracy in America*, the best book ever written not only on democracy and on America, but also on the influence of democracy.¹⁴ Like James Madison,¹⁵ Tocqueville feared majority tyranny. Bastiat: a champion of the free market and free enterprise!¹⁶ We do have lots in common!

The Frenchman: Now, let me ask you a final question: To supporters of limited government, what is democracy made for?

The American: I would recommend you go to a foreign and individual thinker: Friedrich A. Hayek.¹⁷ He is very clear: do not make democracy a fetish; do not talk too much about democracy; democracy is not a goal, the finality, the end.¹⁸ Democracy is a means, a way. The final goal is freedom. It is very important to understand that democracy may avoid arbitrariness but also can be a dictatorship of the majority and of ideas. The value, the true value, is individual freedom.

The Frenchman: Now let's have another glass of French wine. But before we make a toast, can you tell me about a place where we could meet to discuss such ideas?

The American: I give you just one name: The Federalist Society!

¹³ See generally MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS (M.A. Screech ed. & trans., Penguin Books 2003) (1580).

¹⁴ Harvey C. Mansfield & Delba Winthrop, *Introduction* to TOCQUEVILLE, *supra* note 2, at xvii.

¹⁵ See, e.g., THE FEDERALIST NO. 51 (James Madison).

¹⁶ See generally FREDERIC BASTIAT, ECONOMIC SOPHISMS (Arthur Goddard ed. & trans., Found. for Econ. Educ., Inc., 5th prtg. 1996) (1845).

¹⁷ See generally 3 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY (1979).

¹⁸ *Id.* at 5–8.