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Postmodernism and Its Discontents: Whither Constitutionalism After God and Reason?

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Abstract: Modern institutions rely on philosophical appeals – specifically the ideas of the Enlightenment Project (Modernity). Truth exists, along with natural rights, and we are to use the human faculty of reason to discover them and conduct our affairs accordingly. Institutions follow. After three centuries of dominance, the modern project is now facing serious challenges from two sources. First, the post-modern alternative rejects the notion of a knowable truth in favor of radical relativism; reason has serious limitations, and there is no absolute appeal. Second, a pre-modern claim, in the form of a fundamentalist religious revival, has been calling for a return to Covenant; an appeal to Scripture and tradition is increasingly challenging modern claims. An attack on modern philosophy, and the replacement of modern mental models with pre- or post-modern alternatives, will necessarily have deep constitutional implications – for the way we organize our affairs, but also for the liberties that modern institutions are meant to protect. In sum, whither constitutionalism after God and Reason?

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Introduction

We may very well be coming to the end of an intellectual era. At the very least, new forces are challenging the shared philosophical foundations and mental models that have characterized Western Civilization for the past three centuries. Even if it is not facing its twilight, the Enlightenment Project (Modernism) is undergoing radical shifts.

On the one-hand, *Post*-modernism is emerging as a serious challenger to the modern project. More than a mere academic parlor-game, more than a technical and obscure fad for the salons of Europe, more than a fancy for a select few high priests at departments of cultural studies and English at scattered US universities, the Postmodern contender has been throwing its weight around. The effects of the radically relativist philosophy are evident in Western thinking, conscious and unconscious, from the unspoken mental models of popular culture to the explicitly articulated models of high culture.¹

On the other hand, parallel to the *post*-modern rejection of modernity's bold claims, there is emerging a *pre*-modern religious radicalization in the West. Whereas mainstream religion has been dwindling over the past century in the West, there has been a significant migration towards more fundamentalist churches, especially in the US (where religious scholars speak of a Fourth Great American Awakening).² Like Postmodernism, this shift towards religious fundamentalism makes claims against the modern worldview, and is proposing to supplant at least a portion of the modern appeal to reason with a *pre*-modern appeal to the presumptive authority of tradition. But, as we will see, the *pre*-modern backlash is mostly relevant for explaining the rise of Postmodernism.

The transformation is clearly not complete, and the Modern has not been supplanted, nor is it certain that it will ever be. But, increasingly, *post*- and *pre*-moder-

¹ The new metaphysics, epistemology, and ethics that are emerging are the subjects of much vaster studies. I will thus focus this paper on a general postmodern worldview, which includes elements of all three of these fields of philosophy. Beyond institutions, the likely implications for all of civilization could be staggering, from the arts and sciences, to politics and education, to social norms, and beyond. For philosophical details, see Pippin (1999), Harvey (1989) or Yack (1986).

² The international phenomenon of radical Islam falls under this category, but it is complex enough to be the subject for another paper; see Wenzel (2008).

nism are coming to represent challenges to the prevailing modern worldview, with new mental models, and new heuristics for engaging and understanding the world, the individual's place in it – and the ensuing institutions, formal and informal.

This paper examines the possible consequences of shifts in philosophy on the modern constitutional project, from post- and pre-modern tensions. Section one starts with the philosophical foundations of the modern project, and Section two examines the postmodern challenger to Modernism. Section three looks at the pre-modern backlash to help explain the postmodern phenomenon. Section four offers a case study on postmodernism and constitutionalism, that of the proposed EU Constitution. The final section concludes.

But, first, a methodological disclaimer.

Disclaimer

It is always with some trepidation that I, a political economist and not a trained philosopher, venture into the realm of philosophy. I am, after all, reminded of Buchanan's (1975, xvi) warning that "I have read some, but by no means all of the primary and secondary works [in political philosophy]. To have done so would have required that I become a professional political philosopher at the cost of abandoning my own disciplinary base. As an economist, I am a specialist in contract." I am also called to methodological humility by Rothbard's (1995) lament that "it is no crime to be ignorant of economics, which is, after all, a specialized discipline... But it is totally irresponsible to have a loud and vociferous opinion on economic subjects while remaining in this state of ignorance." I sincerely hope I am not engaging in this very behavior vis-à-vis philosophy.

And, yet, as an economist, I must study philosophy to make sense of human action, and I am convinced there are strong gains from trade to be reaped in the interaction between political economy and philosophy. After all, F.A. Hayek – himself an economist – reminds us that the "facts of the social sciences" are the opinions and beliefs that people hold (Hayek 1979[1952], 47 and 64 and the eponymous essay in Hayek 1948, 57-66); individuals build up an understanding of the world based on their

“views and concepts” thereof (Hayek 1979[1952], 40). Philosophy is thus supremely relevant – nay, crucial – to understanding the process of economic choice, especially for such fundamental, value-laden decisions as constitutional political economy and the institutions adopted to deliver the desired political goods. I will thus ask readers trained in philosophy to bear with me and forgive my rough-around-the-edges, practical approach – while also begging the indulgence of more technical economists whose comparative advantage leads them to a specialization that includes infrequent examination of the philosophical foundations of economic choice.

1 Philosophical Foundations of Modernity and Contemporary Challenges

So, why does all of this philosophical stuff matter for constitutionalism? Simply put, modern institutions rely on philosophical claims. They are a manifestation of the overall modern worldview regarding the proper organization of human affairs.

Starting roughly in the 17th century, Modernism³ substituted the pre-modern appeal to faith with an appeal to reason – human reason to find a knowable truth. Without lapsing into details, the implications for political theory and everyday life ring familiar, as they are still with us today: the modern nation-state, with legitimacy derived from the people rather than the monarch’s divine right; the supreme authority of reason (over tradition or faith); natural rights and the states instituted for the explicit purpose of protecting them; free markets; and the mastery of nature through science and technology (Pippin 1999, 4-5). Harvey (1989, 12) explains how the purpose of the modern project was

to use the accumulation of knowledge generated by many individuals working freely and creatively for the pursuit of human emancipation and the enrichment of daily life. The scientific domination of nature promised freedom from scarcity, want, and the arbitrariness of natural calamity. The development of rational forms of social organization and rational modes of thought promised liberation from the irrationalities of myth, religious superstition, release from

³ Out of simplicity, I am lumping together two very different – and often antithetical – strains of Modernity, *videlicet* the Scottish/British/American and the French/German/Continental. See below for details.

the arbitrary use of power as well as from the dark side of our human natures. Only through such a project could the universal, eternal, and the immutable qualities of all humanity be revealed.

Habermas (1983, 9) adds that the early Moderns had “the extravagant expectation that the arts and sciences would promote not only the control of natural forces but also understanding of the world and of the self, moral progress, the justice of institutions and even the happiness of human beings.” Modernism was a hopeful, excited project, an optimistic unleashing of the human spirit and previously untapped human creativity, after an earlier stifling by the bonds of tradition and faith – an “enthusiastic alternative to a static and contemplative system” (Kors 1998).

Modernism offered a new epistemological appeal, detached from earlier religious confines and the presumptive authority of tradition. Kors (1998), in a deliberate simplification and distillation of Aristotle’s *Metaphysics*, explains the pre-modern epistemology as follows:

Europe in the seventeenth century still had a traditionalist and subsistence culture. For that culture, past inheritances had a presumptive authority because they had stood the test of time and been successful parts of what had permitted mankind to survive... In the educated world, that intellectual inheritance was a fusion of Aristotelian (and other Greek) philosophy and of Christian theology; it was known as “scholasticism” or, more precisely, as Aristotelian scholasticism. Its means of teaching and persuasion was the *disputatio* (disputation), based upon (in order of importance) intellectual authorities, logical deduction from these authorities, and the appearances of the world. This system dominated the universities and schools of Europe. Thinkers believed that it brought coherence to the world, explaining the nature of all things... By distinguishing among all beings in terms of the degrees of their “perfections,” scholasticism created a “great chain of being” that permitted us to know contemplatively the value of all things. The science of final causes (teleology) permitted us to know contemplatively the purposes of things, and to grasp how, under God’s design, all things strove for God’s created order. The seventeenth century marked a momentous assault upon all aspects of the Aristotelian scholastic synthesis.

Kors (1998, 11) further explains that “supernatural authority was based on Scripture, as correctly understood by appropriate authorities. Natural authorities were based on

the presumptive authority of the past (what had stood the test of time) – above all, the Greeks.” In the next step, “the authority of ancient authors and texts was integrated into Christian theology and intellectual life, especially when the thought of those ancient authorities helped to explicate the truths of the Christian faith.” The pre-modern system was not, then, devoid of reason. Rather, reason was used in a process “by which one derived what follows logically from things known by authority.”

Harvey (1989, 13) explains that the subsequent shift to Modernity was “a secular movement that sought the demystification and desacralization of knowledge and social organization in order to liberate human beings from their chains.” Even as it broke from the earlier religious monopoly, Modernity did not shed transcendent foundations entirely. Rather, the Enlightenment can be described as a felicitous marriage between God and Reason, with its most vivid expression in Jefferson’s Declaration of Independence: “We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness.” Truth and rights exist exogenously, and we must endogenously use the human faculty of disciplined reason to discern them. Modern institutions, especially constitutions, follow. Again in the words of Jefferson, “to secure these rights, governments are instituted among Men.” Although the ultimate political good to be secured was different, the same broad principle applied in the French tradition of the state as expression of Rousseau’s general will, later picked up and refined in Hegel’s philosophy of the state.

Constitutions originate in human reason and effort, but they rely on meta-appeals. Philosophy underlies institutions, both consciously and unconsciously. As Pippin (1999, 43) explains, “if the principles appealed to in political life are to be justified, they must be justified as much more than the way we go about things; the principles must be binding ‘for any rational agent.’”

For all the prevalence of the modern project, and its firm grip on our collective mental models, two powerful challengers are emerging. The first is postmodernism, the second a pre-modern appeal to religious fundamentalism. Both of these philosophical challenges are significant because they make claims on our mental models, our way of engaging the world (generally, see Harrison and Huntington 2000, North 1990, and Pejovich 2003). Instead of struggling with each new situation we

face, reinventing the proverbial wheel on a case-by-case basis, we employ heuristics (meta-skills of understanding and action). Philosophical systems constitute the very foundations that shape our conscious and subconscious understanding of, and approaches to, the world. A change in the prevalent worldview – our predominant sense of who we are, what truth is and how it is to be known, what is right, and how human society ought to be organized – will necessarily have implications for the way we lead our lives. A questioning of Modernity’s philosophical foundations thus implies, *ipso facto*, a questioning of modern constitutional arrangements.

For the sake of clarity, the following table summarizes the basics of each philosophical current; section two offers details on postmodernism, and section three on fundamentalism.

	Modernism	Postmodernism	Pre-Modernism
Summary	Reason	Radical relativism	Fundamentalism
Philosophical Appeal	Reason to discover natural rights	Competing and contingent narratives	Presumptive authority of the past
Purpose of Government	Protect natural rights	Imperialistic attempt to impose narratives	Fulfill natural order

In closing, I should note immediately that, out of simplicity, I am conflating two very different (and often contradictory) schools of Enlightenment thought, *videlicet* the Scottish and Continental Enlightenments. This is admittedly a dangerous conflation – if far too common (even such serious thinkers as Bauman 1989, Giddens 1990, and Gellner 1992 conflate the two enlightenments); but it bears important consequences for understanding postmodernism, a point to which I return below.

2 The Postmodern Challenger

2.1 Postmodernism – A Primer

Postmodernism emerged from the horror and destruction of World War II in Europe, but its roots extend back to the 19th century.⁴ The philosophy stands in stark contrast to Modernism. As explained above, Modernism substituted the pre-modern appeal to faith with an appeal to reason – human reason to find a knowable truth. It was a hopeful, excited project, an optimistic unleashing of the human spirit.

But the modern project was not without its doubters. As early as the 19th century, the very premises of Modernism began to be called into question. What began as doubts about the limitations of reason (initially brushed aside by Modernism’s confident optimism) evolved into a fuller critique. Modernism was seen to be spiritually weakening at best and downright destructive at worst. Pippin (1999, xii) describes “the widespread nineteenth century suspicions (at least on the European continent) that ... the two greatest accomplishments of world civilization, modern natural science and technology, and a progressive, liberal democratic culture, were ... slowly and inexorably enervating and spiritually destroying that very culture.” In many ways, such early grumblings foreshadowed much of the 20th century’s ugliness.

The horrors of World War II galvanized the theoretical concerns. Pippin (1999, 7) explains that

the great self-confidence and progressivism characteristic of the modern enterprise and especially what seemed its nineteenth-century fruition, all looked even more difficult to accept after the historical horrors of the twentieth century. The fact that “art, intellectual pursuits, the development of the natural sciences, many branches of scholarship flourished in close spatial, temporal proximity

⁴ The focus of this paper is the effect of postmodernism on constitutionalism, rather than a detailed explanation of postmodern theory. Terms such as simulacra, *différance*, the Other and (k)nots are thus eschewed, as are such technical subtleties as described by Connor (2004: 4): “How one capitalized or hyphenated – ‘post-modern,’ ‘Post-Modern,’ ‘postmodern,’ or ‘Postmodern’ – seemed to many to matter a great deal, along with whether one chose to refer to ‘Postmodernism,’ ‘postmodernity,’ or simply ‘the postmodern.’” Such details are beyond the present scope, and the interested reader is invited to visit the literature for greater depth that goes beyond the limited scope of this review (see, e.g., Lyotard 1981, Habermas 1983, Huyssens 1984, Harvey 1989, Bauman 1992, 1995 and 1997, Bertens 1995, Natoli 1997, Sim 2001 or Connor 2004).

to massacre and the death camps” has raised for many doubts about not only modernity’s self-assurances, but about all of Western culture, has raised the issue: “Why did humanistic traditions and models of conduct prove so fragile a barrier against political bestiality?”

Harvey (1989, 13) echoes this thought, explaining that “whether or not the Enlightenment project was doomed from the start to plunge us into a Kafkaesque world, whether or not it was bound to lead to Auschwitz and Hiroshima, and whether it has any power left to inform and inspire contemporary thought and action, are crucial questions.”

According to the alternative school of *Post-modernism*, the modern project, “laudable though it may have been at one time, has in its turn come to oppress humankind, and to force it into certain set ways of action” (Sim 2001, vii). Where some saw aberrations or challenges within the modern project, Postmodernism saw necessary and logical consequences: colonialism; fascism/communism and industrially planned genocide; the destruction of the natural environment in the name of unfettered progress and technology; the North’s “exploitation” of the South; the horrors of modern warfare, compounded by the methodical application of the very science and technology initially meant to liberate us; and the spiritual poverty and alienation of mass consumerism. Harvey (1989, 13) explains that “there are those – and this is... the core of post-modernist philosophical thought – who insist that we should, in the name of human emancipation, abandon the Enlightenment project entirely.” The postmodern rejection of the modern project is thus both (a) theoretical and methodological, and (b) applied and political.

On the theoretical and methodological side, we see a “rejection of many, if not most, of the cultural certainties in which life in the West has been structured over the last couple of centuries” (Sim 2001, vii). Specifically, Postmodernism attacks the very core of the modern project, questioning the existence of the truth and the ability of human reason to find it. As a radical alternative, Postmodernism holds that all knowledge is a product of environment, and that we should thus speak of contingent “narratives” rather than absolute truths. Naturally, different people will have different narratives, as they have different cultural, intellectual, economic and sociological backgrounds. So, instead of a modern contest between absolutes, we see a postmod-

ern comparison of narratives, where none has a legitimate right to exclude any other. Everything is contingent on context and background, and there is no “inside track” to truth (see Natoli 1997).

On the applied and political side, Postmodernism rejects any claim of absolute truth as the attempt to impose one worldview over others. In the vocabulary of Postmodernism, such claims are referred to as attempts to impose a “master voice” or “meta-narrative.” “Postmodern politics then becomes a continuous negotiating of various compromises as to what meanings and values are to be represented in the social order and to what degree. Outcomes here are relative to time and place and the already established dispositions of power” (Natoli 1997, 18). There follows a suspicion of certainty, a predilection for dialogue and process over decisive result, and the replacement of absolute “meaning” with relative “interpretation.” Pippin (1999, 41) explains that “for many so-called postmodernists, modernism represents the last game played by Western bourgeois high culture, an elitist code designed only to preserve and celebrate the ... point of view of an exhausted but still immensely powerful middle class.” Postmodernism thus challenges the main tenets of modern political economy. The modern nation-state becomes an instrument of centralized repression of minority voices; the supreme authority of reason ends up being but the “voice” of those in power attempting to impose their views as “the master voice” over all other narratives; natural rights are not universal values, but a Western concept, imposed on the rest of the world by “cultural imperialism” or simply brute force; free markets are seen as the freezing of one particular institutional arrangement that benefits those who have the power to expand their wealth; and the mastery of nature through science and technology becomes an excuse for “ecocide” in the empty name of progress.

2.2 A Sidebar Note: Post-“Modernism”... But Which “Modernism”?

As indicated above, “modernity” is often used as a catch-all for parallel, if antithetical, philosophical movements. Most strikingly, Giddens (1990, 172) asserts that “totalitarianism and modernity are not just contingently, but inherently, connected.” Perhaps... but which modernity? Totalitarianism as a consequence of the Continental Enlightenment, certainly; of the British Enlightenment, unequivocally not. The

British (Locke, Hume, Ferguson, etc.) emphasized humility, reason grounded in faith (and vice-versa), and a healthy acceptance of human nature, whereas the Continentals (Rousseau, Hegel, Comte, etc.) lapsed into a hubristic cult of reason, leading to social engineering, a complete negation of the individual in favor of some putative “common” good – and, bluntly, Auschwitz and the Gulag. For details on the two Enlightenments, see Hayek 1948, 1967, 1978 and 1979[1952], Boettke 2000, and Himmelfarb 2004.

As much as I shudder to conflate the two lines of thought, I must resign myself to the fact that they are indeed conflated in the popular – and intellectual – mind. The postmodern reaction – if it is indeed a reaction to Auschwitz, the Gulag, the growth of the state at the expense of individual autonomy, the destruction of the environment through ill-defined property rights, and the industrialization of war, all of which are necessary and inevitable consequences of the Continental Enlightenment – makes perfect sense. In other words, Postmodernism is indeed “the highest form of Modernity,” if only of the Continental type.⁵ However, if we return to the humility of the Scottish Enlightenment, grounded in self-inquiry, honest doubt and a foundation of “faith within reason,” then there is room to question the vast shortcomings of (prevalent/conflated/Continental) Modernity, without lapsing into the nihilism and linguistic obscurantism of Postmodernism. As in so many other cases, Hayek (1967, 120) captures the problem neatly: “it was Rousseau and not Hume who fired the enthusiasm of the successive revolutions which created modern government on the Continent and guided the decline of the ideals of the older liberalism and the approach to totalitarian democracy in the whole world.”

Although it is a necessary sidebar note, this is ultimately a problem best left for another forum.

2.3 Constitutional Implications of Radical Relativism

Constitutionalism, if it is to be successful, must rely on an acceptance of some notion of principles over expediency. Elster (2000) writes of a *sine qua non* for successful constitutionalism: a polity’s willingness to be bound. Without that willingness, that

⁵ To use the phrase from an anonymous reviewer.

deferral of immediate power in the name of long-term constitutional order, there can be no binding, and thus no constitutionalism. Whether a constitution is ultimately a contract (Buchanan 1975, Brennan and Buchanan 2000) or a coordinating mechanism (Hardin 1999, Wenzel 2007b), constitutionalism requires an acceptance that rules, long-term stability and constitutional principle, must all prevail over the temptations of in-period politics. If the validity of an appeal to principle is discarded – as it is by postmodern claims – constitutionalism will be weakened, or destroyed.

Constitutionalism rests not only on an appeal to principle over expediency,⁶ but also on dynamic sacrifice in the name of stability and rights. If Postmodernism prevails, constitutionalism is apt to wither away into a set of by-laws, with the good increasingly defined by those who have the votes. Or the guns. In the recent words of a popular news magazine, constitutionalism may increasingly become “politics by other means.” This is already the case in most European countries, whose Kelsen-style constitutional councils many consider to be essentially third chambers of the legislature (see, *e.g.* Stone 1992 and Provine 1992). Their nomination, by the executive and legislature, is temporary rather than lifelong, and they are often approached by legislative political factions that fear they might lose through traditional parliamentary channels. Generally, see Kelsen (1942).

On the US side, we are starting to see much the same thing. In response to a recent Supreme Court ruling on takings,⁷ a leading member of the US Congress declared that “it is a decision of the Supreme Court ... so this is almost as if God had spoken.” Asked if she agreed with the decision, the Representative asserted “the Supreme Court has decided ... that that was appropriate, and so I would support that.”⁸ No mention of rights or principle. No mention of abuse of human power against natural rights. Note the subtle but troubling difference between such a postmodern hagiographic claim and

⁶ See Buchanan’s (1981) enjoiner that “what is now needed is widespread adoption of a genuine ‘constitutional attitude,’ a proclivity or tendency to examine issues from a constitutional perspective, as opposed to the pragmatic, short-run utilitarian perspective that seems to characterize modern academic scholarship as well as day-to-day political discussion and action.”

⁷ *Kelo v. City of New London* (2005). This decision vastly broadened the definition of “public interest,” allowing local governments much more latitude in claiming eminent domain to seize and redistribute private property for the purpose of increasing tax bases. An outrageous violation of natural rights, individualism and the spirit of the Declaration of Independence and Constitution ... and a quintessential example of expediency over principle.

⁸ US Representative (now Speaker of the House) Nancy Pelosi, press conference, 6/30/05.

the alternative (modern) explanation that we accept to be bound by the Court's bad and immoral decision in the name of stability and constitutionalism (while continuing to fight it). The state and procedure have been raised to a quasi-religious status. This is not surprising, as the emergent postmodern worldview denies the very existence of truth. All is narrative and competing at that. Might makes right. Neuhaus (1986) observes that in *Roe v. Wade* (the US Supreme Court decision legalizing abortion), "for the first time in American jurisprudence, the Supreme Court explicitly excluded philosophy, ethics, and religion as factors in deliberation..." Regardless of one's views on *Roe*, it seems rather uncontroversial that the debate did have philosophical bases and ramifications. The Court backhandedly recognized this, explains Neuhaus: "Knowing that such a decision should nonetheless have the appearance of moral justification, the court searched for some covering 'value' and came up with the value of privacy. Much of the course of public reasoning in America can be read from the fact that our highest appeal is no longer to Providence but to privacy."⁹

3 A Return to Covenant? The Pre-Modern Challenge

The literature points to a decline in mainstream religion (Repstad 1996, Roof and Agedal 1996, Iannaccone 1998, Greeley 1996), with a parallel rise in fundamentalism (Roof and McKinney 1987, Johnson 1986, Neuhaus 1986, Iannaccone 1998, Greeley 1996). Johnson (1986) explains that

What seems to have happened is that as the mainline churches began to decline they sought the protection of ecumenicalism ... and the common platform of ever more extreme forms of liberalism. This move provoked an angry conservative response from their disenfranchised rank-and-file that took the form of a new ... variety of ecumenicalism... This popular ecumenicalism is based upon a common reassertion of traditional moral values and of belief in the salient articles of Christianity not as symbols but as plain historical fact.

⁹ This explanation has a distinct pre-modern (rather than modern) flavor – but speaks elegantly about postmodern trends.

On the American side, some authors even speak of a Fourth Great Awakening (see Johnson 1986) or a “neocon reformation.”¹⁰

Before the Enlightenment revolution, religion formed the bulk of Western mental models, as appeals were made to faith, Scripture, tradition and the authority derived from them. The Modern project tempered and modified this exclusivity, but did not entirely reject an appeal to religion. Rather, the Enlightenment project blended the two, grounding appeals to human reason within a sense of the eternal and human use of that very reason to discover natural law and live according to it. The current trend in religious fundamentalism is different, and does not fit comfortably within the modern tradition. Rather, it would increasingly supplant Scripture and the presumptive authority of tradition for secular debate and reason. Neuhaus (1986) writes that “intellectually, what is now called neoconservatism not only represents disillusionment with earlier liberal policies but in many cases stands as a challenge to reigning assumptions of the secular Enlightenment.” He continues, explaining that the

movement is sometimes called “traditionalist” or the “back-to-basics movement.” But that is to define it much too narrowly, in terms that register specific “issues” on the political screen of today and tomorrow. The movement is in large part a mood, the protest in large part an uneasiness – about the public loss of transcendence, about a perceived moral vacuum at the heart of our public life, about the absence of a sense of interest-surpassing content...

To be sure, fundamentalism is not, *per se*, a postmodern phenomenon – quite the contrary, it rejects Modernism’s secularism and Postmodernism’s rejection of truth; in fact, fundamentalism could best be described as pre-modern, as it returns to an appeal to faith and authority over reason. But fundamentalism is, in many ways, a reaction to Postmodernism, and thus bears mention in this review – not for the details of fundamentalism, which are best left to other essays, but to demonstrate how fundamentalism emerged, in large part, as a reaction to the radical relativism of Postmodernism.

On this point, generally, see Stark and Bainbridge (1985) and Berger (1999). Although the verdict is not entirely clear, it strikes me that the rise in fundamentalism

¹⁰ This trend includes not only traditional religious groups, but also others concerned with the overall decline in American values and morality (Neuhaus 1986).

represents the reverse of the postmodern medal. Just as Postmodernism questioned, then rejected, the Modern project after the upheavals of the 19th century and the horrors of the 20th began to cast doubt on the strength and viability of modern claims, the rise in religious fundamentalism can be seen as a reaction to both Modernism and Postmodernism. If the horrors of the 20th century are seen as fundamental failures (and inevitable) of Modernism, a pre-modern rejection makes just as much sense as a post-modern one. The direction of the counter-claim is just that – a question of direction. In fact, Neuhaus (1986) writes that the current rise in fundamentalism goes beyond traditional religious forces, to incorporate many who are troubled by a perceived decline in values. It may thus make sense to label the current fundamentalist trend as an anti-postmodern backlash (as the two are not only mirror opposite responses to the same perceived problem, but also exhibit a stunning chronological overlap). Just as the Modern project was borne largely of a religious reformation and followed by a counter-reformation, the current intellectual landscape can be divided into three competing forces, three heuristics, three overarching mental models: prevailing but struggling Modernism; the postmodern “Reformation” of radical relativism; and the pre-modern “Counter-Reformation” of tradition, faith, and scriptural literalism. See Wenzel (2008).

Interestingly, this pre-modern phenomenon is not confined to any one religion. Just as Christianity was inextricably associated with the pre-modern view, it also fed many modern staples, such as the inherent dignity of the individual or limited government. The same can be said of the other major religions, which can be made to fit within pre-modern, modern or post-modern epistemologies (again, see Wenzel 2008).

4 A European Case Study

As an illustrative case study, the EU Constitution can be seen as the result of the emergence of postmodern thought from the university to the statehouse (Petroni 2003 and 2004, and Wenzel 2007a). Likewise, many aspects of the current transatlantic divide can be explained as an intellectual clash between a postmodern Europe (with its insistence on listening to competing narratives, diplomacy over force, and shying away

from what it sees as “simplistic” absolutes in international relations) and a modern US (with its rhetoric of “axis of evil,” and efforts at bringing human rights to the world). Standard Public Choice stories and geopolitical/economic realities go some way in explaining these phenomena – whether one views the EU as a coordination game, or as the unintended consequence of a supra-national bureaucracy (see, *e.g.* Langlois 1992 and 1994, Anderson 1984 and Kagan 2002). But, for all their descriptive powers, these two traditional stories of institutional change do not sufficiently explain the overall thrust of the European Constitution.

4.1 The EU Constitution – a Bizarre Document

Beyond length and lack of clarity, the EU Constitution is bizarre at best; in fact, Pini (2003) has gone so far as to describe it as “a constitutionalist’s delusion,” “a political aberration,” and “not a constitution – not theoretically, not practically.” As the 126-page behemoth reads more like a spending bill than a constitution, I simplify the analysis into three salient representative themes: citizenship, rights, and strategic obfuscation.

4.1.1 Citizenship and Identity

In the American model, government derives its legitimacy up from the people. There is no such sense in the European case, where the constitution comes first, then citizenship derives from the document. The oddity continues with a tautological definition of identity: the constitution is based on a sense of “Europeanness” that is itself derived from the constitution. European identity – rather than natural law in the American tradition, or the popular will in the continental Rousseau-Hegelian tradition – has become the philosophical foundation (see, generally, Petroni 2004). Similarly, delegates to the Constitutional Convention agonized over the proper wording and substance for the philosophical foundations of Europe. Although some delegates pushed for inclusion of a reference to Europe’s Christian heritage, that wording was deemed too controversial, and was replaced by a milder acknowledgement of Europe’s “Graeco-Roman and Enlightenment tradition” (de Jasay 2003a and 2003b).

4.1.2 Rights

The fundamental purpose of a constitution is to establish the basic parameters of sound government and protect rights – to “impose significant constraints on government, whatever form it takes (majority rule or otherwise)” (Barry 1990; see also Hayek 1960, Pini 2003, and European Constitutional Group 2004). The European constitution does neither. By its sheer size, it cannot be said to set up basic parameters. Instead, it attempts to set up the detailed mechanics of European federalism. Furthermore, Pini (2003) worries that the constitution, instead of limiting state power and protecting rights, is not sufficiently abstract and removed from the foibles of in-period politics (as a good constitution should be), and that it “adds rules, as always” (see also European Constitutional Group 2004). The length and detail of the document underscore the radically different philosophies of the American and European documents. The former sets forth the limits of state action, establishing “islands of regulation in a sea of liberty.” Its European cousin, conversely, establishes “islands of liberty in a sea of regulation” (see Barnett 1991 and 2004). Just as citizenship is granted from the top down, so are rights. Petroni (2003) explains that there are no individual rights under the EU constitution: rights are those given by the constitution to the people. In this top-down spirit, the EU constitution places greater emphasis on (so-called) positive than negative rights – along with the governmental responsibilities in “guaranteeing” them.

4.1.3 Muddle, obscurity and subterfuge

The mere length of the EU Constitution makes it a delight for sadistic law professors. The text of the US Constitution is comparatively simple and straightforward, yet has generated volumes of controversy and interpretation. So one can only imagine the seeds of confusion, conflict and interpretation strewn in the long and complex European text. A plausible story has been told that the lawyers and judges co-opted the original European project (see Petroni 2003 and Wenzel 2007a for details). By making things more legalistically complicated, these high priests of constitutional interpretation stand to gain.

But the story does not end there. Howe (2004) explains the institutional mission creep and jurisprudence of European legal interpretation. The European Commission (the EU's executive arm) has been "using powers for one purpose to serve a quite different ... purpose." The EU Constitution's "general provisions ... will encourage the Commission and the ECJ [European Court of Justice] to interpret EU powers even more broadly than they do at present." Furthermore, the Court has not been an innocent bystander in this process. In addition to expanding its own powers and Union powers through creative interpretations and through the principle of *acquis communautaire*,¹¹ the Court has been manipulating jurisdiction. Howe (2004) explains how the Court "interprets the legal texts which it enforces largely by reference to their 'objects and purposes.' This means ... that identically worded provisions in two different treaties can be interpreted to have very different effects." In a telling example, Petroni (2004) describes how the Constitution clearly defines "human health" as a function specifically reserved for the member-states and shielded from EU jurisdiction. Simultaneously, the Constitution enumerates "public health" as a European Union function – but does not define a distinction between "human health" and "public health"!

Robinson (2004) explains that such "constitutional muddle" is intentional, and has served the purposes of European centralizers. Unable to obtain their political goals immediately, they have resorted to legalistic obfuscation and unclear constitutional verbiage to achieve their aims through "subterfuge," "confus[ing] the citizens of various member states [in Europe's] 'Journey to an Unknown Destination.'" Again, the lawyers, judges and Convention delegates remain the high priests in the interpretation of an intentionally confusing document; the incentives are clear. Such self-serving interpretation would seem to parallel the political sleight of hand we are now witnessing in the constitution's imminent ratification. Having failed to convince the people, and having failed by referendum, politicians of EU member countries are now adopting the constitution via the back door of parliamentary majority.

¹¹ Basically, once an EU-level power, always an EU-level power, even in different but "similar" cases – as defined, of course, by the Court.

4.2 A Postmodern Explanation

4.2.1 Citizenship and Identity

In a postmodern context, which eschews one “overarching story” in favor of competing narratives, Europe is the new galvanizing factor. Rather than the modern nation-state, postmodern Europe is an umbrella that gives voice to regional and personal interests; “one of the main points of postmodernism ... is that ‘the most particular is the most universal.’ So when it comes to ‘identity’ the trick for the constitutional experts writing the constitution was to express that by being very much themselves, they would be more European” (Prado 2004). The European umbrella, along with the constitutional refusal to derive legitimacy from the people or nation-states, is a reflection of “[Postmodernism’s] ‘anything goes’ pluralism and its delirious celebration of difference.” (Sim 2001, 28)

4.2.2 Rights

In a Postmodern worldview, natural rights are viewed with a great deal of suspicion, as culturally contingent impositions. Far better to emphasize positive “rights” (which are much more fluid and subject to interpretation). The same goes for the safe, descriptive allusion to the “Graeco-Roman and Enlightenment heritage” over any appeal to Christianity and its tendency to impose a “meta-narrative.” Naturally, a more traditional explanation would point to a pragmatic catering to Europe’s large Moslem minorities or Turkey’s possible entry into the EU. But, again, the traditional story makes more sense with an added ideological/philosophical explanation.

4.2.3 Textual Obscurity

The lack of clarity in the European Constitution goes beyond mere lawyers’ games and is better understood as postmodern interpretation over clear meaning. Prado (2004) explains that

[a] Constitution is, like every text, made out of language. Thus, given the metaphoric nature of language ... a Constitution written in the 21st century is very open to a postmodern ... analysis... Plus, given the fact that many governments will ask their citizens to approve the Constitution via referendum, the openness to interpretation of every text (a main issue in postmodernism) will play a big role. Every government will have to 'interpret' the Constitution in a certain way to make it palatable to its own citizenry. That's postmodern practice – "meaning" is never "closed".

Again, the referendum is now moot, but the intent remains. Postmodernism sheds a whole new light on the EU Constitution's textual obscurity and the European Court's interpretation of a treaty's purpose over its text.

4.3 Other European Preferences

Space considerations prevent more detail, but other aspects of European policy are also made clear within a postmodern understanding. Europe's quasi-religious preoccupation with environmental protection over economic growth, along with its adoption of the precautionary principle over rational, mathematical risk assessment, reflects the postmodern concern with scientific apprentices turning against their modern sorcerers. Europe's lack of military power and reluctance to use force can be understood as a (postmodern) state of "perpetual peace" through diplomacy, in contrast to the (very modern) Hobbesian world of military force in which the US continues to live (Kagan 2002). Europe's predilection for diplomatic and bureaucratic process and dialogue – over results – can be understood as a postmodern consideration of competing narratives rather than imposition of one narrative as the "meta-narrative." And the list goes on.

As for the actual document, a critical mass of its voters has rejected the proposed Constitution of 2003. But we have not heard the last from the European constitutionalists and centralizers. We are already witnessing a new constitutional incarnation, if in the form of a treaty to be ratified by compliant legislatures rather than fickle voters. In the meantime, the draft Constitution offers great insight into the prevailing *Weltanschauung* in Europe. From the university to the statehouse, ideology has

emerged. For details on the EU Constitution as Postmodern document, see Wenzel 2007a.

Possible Futures and Concluding Thoughts

A change in worldview, a change in the heuristics employed to make epistemological and ethical decisions (consciously or not), means a change in the intellectual foundations and underlying claims of institutions. As heuristics and philosophical appeals change, we may see a postmodern rejection of constitutionalism in favor of increasingly unfettered rule of the “popular will” (constitutions are, after all, claims of principle over majoritarian power). Alternatively, we may see a move towards pre-modern religious elements (with a commensurate decline in attention to real meta-issues). We are already seeing elements of both.

As explained above, the fundamentalist backlash is mostly useful for understanding Postmodernism.¹² Postmodernism, on the other hand, already goes a long way towards explaining current intellectual movements. It also presents great leverage for understanding certain institutional changes. Beyond the European case study presented above, Postmodernism also helps to understand the current trend of extra-constitutional amendment of the US constitution. If Postmodernism has not overtaken prevailing US mental models completely, this does not mean that the ideology has been quarantined in Europe or resides exclusively at isolated departments in scattered American universities. Postmodernism is not just a cute way of interpreting literature, to the delight of sadistic faculty and the terror of students. Postmodernism is slowly creeping into the American worldview, as it already has in Europe. The intel-

¹² Woodberry and Smith (1998) explain that, although fundamentalists have great public visibility and “impressive mobilization of activists, [their] political impact has been minimal. Many of [their] victories have been symbolic, such as influencing the working of the [US] Republican party platform... Most scholars now believe that [fundamentalism as a political force] will not disappear but will not become a dominant influence in politics either.” Furthermore, fundamentalist activists “have little power to determine how their movements will be framed in the national media or to influence which people and statements will be highlighted to represent their causes.” The worries from the ideal-type pre-modern revolution would thus appear to be exaggerated. Conversely, the first three religious awakenings in America were strong factors in sociopolitical changes of great historical weight: the US Revolution, the Civil War, and 20th Century Progressivism (see Johnson 1986). So the verdict is still open. And, again, this holds in the West; see Wenzel (2008) for more detailed speculation on Islam.

lectual landscape and subconscious heuristics are changing, as Postmodernism gains ground. Huysens (1984) asserts that

What appears on one level as the latest fad, advertising pitch and hollow spectacle is part of a slowly emerging cultural transformation in Western societies, a change in sensibility for which the term “post-modern” is actually, at least for now, wholly adequate. The nature and depth of that transformation are debatable, but transformation it is. I don’t want to be misunderstood as claiming that there is a wholesale paradigm shift of the cultural, social and economic orders; any such claim clearly would be overblown. But in an important sector of our culture there is a noticeable shift in sensibility, practices and discourse formations which distinguishes a post-modern set of assumptions, experiences and propositions from that of a preceding period.

It is, naturally, impossible to predict exactly what will happen to constitutionalism in the face of such tectonic shifts in the intellectual landscape. It is, however, certain that there will be effects (some are already visible). Simply put, ideas have consequences. Institutions, generally, have philosophical foundations; they represent the political implementation of the prevailing worldview about the proper arrangements of human affairs. Modern institutions, specifically, rest on the Enlightenment Project’s premises, including a clear vision of Man in the Universe, the use of reason to discover natural rights, and the use of constitutions (and other institutions) to protect those rights.

Either way, the intellectual landscape is undergoing radical changes. There will be changes in the institutions that govern human affairs. That much is certain. The pre-modern, religious fundamentalist challenge to modern institutions appears to be currently limited. Postmodernism, on the other hand, is already gnawing at the very core of our mental models and institutions.

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