Fundamental Rights and Institutionalism: Disharmonic Traditions in the American Founding

By
Jeffery Tyler Syck
M.A. Thesis
Department of Politics
University of Virginia

On June 26th 2015 the United States Supreme Court made one of the most consequential and controversial rulings of the twenty-first century. After decades of public debate, *Obergefell V. Hodges* legalized same sex marriage. While this historic moment is interesting in and of itself, the arguments the justices deployed to defend their respective opinions show a significant disagreement about the very nature of the Constitution itself. Writing the majority opinion, Justice Kennedy grounds the right to marriage, and the government benefits that come with this union, in the idea that marriage is vital to living a fulfilled life and is therefore a fundamental right that cannot be denied.[1] Chief Justice Roberts, writing one of the four dissenting opinions, argued that the court does not have the power to protect rights unless the Constitution or legislature legally guarantees their protection. In his view, whether or not the right to marriage is vital to living a good life is beyond the point, questions of fundamental right are not the judiciary's purview and should properly be left to the representatives of the people as the Constitution dictates.[2] In this way Roberts prioritizes the constitutional arrangement over demands for rights. These positions represent two sides of a longstanding dispute between a fundamental rights and institutionalist view of American constitutionalism.[3]

These competing claims about the Constitution are largely echoed in the scholarly literature. On one side are scholars who tacitly agree with Roberts' placement of constitutional and legal strictures above the immediate rights of the people. Harvey Mansfield, championing this position, argues that in America the animating principle of the government is that all men are created equal, but that the Constitution "is inspired by this principle while also introducing

[1] *Obergefell v. Hodges*, 14-556, U.S. (2015).
[2] *Obergefell v. Hodges*, 14-556, U.S. (2015). This does not mean that the court can never enforce rights. Chief Justice Roberts is clear that in cases of coercion the court has been empowered by law to act, but granting rights to people does not qualify. He views same sex marriage as a social policy for legislatures to consider.
[3] Neither of these are the common name used by proponents of these traditions. Because members of each tradition have belonged to various political groups with various names, I am using these two names in an attempt to descriptively classify them.

important formal qualifications to it necessary to make it serve a political purpose."[4] In other words, though the United States is founded upon a commitment to natural rights and their achievement, the Constitution restrains the radical tendencies of this doctrine by putting institutional arrangements above rights in the political order. On the other side of the debate, scholars such as Sotirios Barber and Cass Sunstein insist that the Constitution's focus on rights provides an inherent mandate for an evolving Constitution that strives to live up to those ends.[5] As Barber cogently puts it, the framer's "were right to treat the people's well-being as more important than any institutional form."[6]

Both sides of this debate, the institutionalist and fundamental rights tradition respectively, lay out not just strong theoretical arguments for their superiority, but also often contend that their view is the more accurate depiction of the American founding. This paper seeks to examine where the nation's leading founders stood in this dispute through an examination of their own writing and the constitutional text itself. In the end, this paper argues that the debate between the institutionalist and fundamental rights traditions is nothing new in American political discourse. From the earliest days of the American revolution, the United States has had an important fundamental rights tradition that articulates an understanding of rights that transcend constitutional limits and demand full implementation. This fundamental rights view has always

[4]Harvey C. Mansfield, *America's Constitutional Soul* (Baltimore, Johns Hopkins University Press, 1993). Pg. 10.
[5] See Cass Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2006); Cass Sunstein and Stephen Holmes, *The Cost of Rights: Why Liberty Depends on Taxes (New York: W.W. Norton, 2000)*; Sotirios A. Barber, *Welfare and the Constitution* (Princeton NJ, Princeton University Press, 2005). I should note that this debate is not merely conservatives vs. liberals. For notable consertative works that demonstrate this please see: Thomas G. West, *The Political Theory of the American Founding: Natural Rights, Public Policy, and the Moral Conditions of Freedom* (Cambridge University Press, 2017). And Harry Jaffa, *Storm Over the Constitution* (Lanham, Maryland: Lexington Books, 1999). Both argue on behalf of a fundamental rights view of the constitution that merely omits the living constitutionalism of Barber and Sunstein. A liberal proponent of the fundamental rights school who also has much to offer to this debate is Wilson Carey McWilliams. For his work on this see: Wilson Carey McWilliams, "Civil Disobedience and Contemporary Constitutionalism: The American Case," *Comparative Politics* 1, no. 2 (1969).
[6] Sotirios A. Barber, *Welfare and the Constitution*. Pg. XV

been countered by an equally strong tradition that argues that rights are inherently limited in constitutional regimes, and are protected first and foremost through constitutional procedures and institutions that themselves then take on the most important place in the regime.

The Two Rights Traditions Defined

Before launching into an analysis of where the founders stood on these issues or even a review of the contemporary debates in constitutional theory, it is important to clearly define both the institutionalist and fundamental rights tradition. The institutionalist tradition works under the assumption that natural rights cannot, or should not, be purely reflected in the regime. Instead, the government has the power to secure natural rights as best it can through constitutionally granted privileges that fit the particular circumstances of the polity.[7] In the eyes of an institutionalist, not only are rights more politically granted than natural in an established regime but to make questions of natural right the centerpiece of political debate opens a nation up to political instability. Because of this, supporters of institutionalism tend to place much more emphasis on institutions and following constitutional procedures.

The English statesmen and thinker Edmund Burke is perhaps the greatest theoretical advocate for the institutionalist tradition and he certainly best articulates its key features. He contends that, "Government is not made in virtue of natural rights, which may and do exist independent of it; and exist in much greater clearness and in much greater degree of abstract

[7] Both the institutionalist and the fundamental rights advocate believe in the importance of rights, but they understand how rights work a little differently. This difference has been well summarized by Steven Hayward in describing the intellectual disagreement between Walter Berns and Harry Jaffa (an institutionalist and fundamental rights advocate respectively). Both men praised the Declaration of Independence but they placed their emphasis on different lines. For Berns, and other institutionalists, the key line is "That to secure these rights, Governments are instituted among Men," whereas for Jaffa and other proponents of fundamental rights the key phrase is "We hold these truths to be self-evident, that all men are created equal." Steven F. Hayward, *Patriotism Is Not Enough: Harry Jaffa, Walter Berns, And the Arguments That Redefined American Conservatism* (New York: Encounter Books, 2018).

perfection; but their abstract perfection is their practical defect."[8] He further argues that government exists for securing the rights of the people, but this can only be done by constitutional powers outside of the authority of the people.[9] This requires that "as the liberties and the restrictions [granted to the people] vary with times and circumstances… they cannot be settled by any abstract rule."[10]

These sentiments expressed by Burke highlight almost all of the major components of institutionalism: an emphasis on politically granted privileges over inherent rights, an emphasis on the particulars of a regime impacting how these privileges are crafted, the potentially changeable nature of the rights provided by the government, and skepticism about abstraction's ability to provide guidance for political life.

The fundamental rights tradition works on the opposite premise, arguing that natural rights must be reflected within the very nature of the regime itself regardless of particular circumstance and should almost always form the centerpiece of political discourse. The primacy of natural right transcends the Constitution, and when the two conflict, natural right must prove victorious. This is generally accompanied with a belief in, or hope for, inevitable progress and great faith in humankind's perfectibility through reason.[11] The spirit that animates fundamental rights is suitably captured by the Marquis de Condorcet, a French enlightenment thinker, who said:

> Nature has set no term to the perfection of human faculties; that the perfectibility of man is truly indefinite; and that the progress of this perfectibility, from now onwards

[8] Edmund Burke in "Reflections on the Revolution in France", *Select Works of Edmund Burke*, vol 2. (Indianapolis: Liberty Fund, 1999). Pg. 151.
[9] Edmund Burke in "Reflections on the Revolution in France" Pg. 152.
[10] Edmund Burke in "Reflections on the Revolution in France" Pg. 152..
[11] In more nuanced accounts this perfectibility is not stated to be actually achievable but rather as a never-ending goal.

> independent of any power that might wish to halt it, has no limit than the duration of the globe upon which nature has cast us.[12]

He further states that for this progress we must look to nations "which not only allow man to possess rights, but allows him to exercise them."[13]

Though not all advocates of fundamental rights are quite as utopian as Condorcet, they generally agree with the views displayed in this comment. Fundamental rights are founded on the idea that with increasing knowledge of the aims of government, mankind will be better able to steer our politics towards that end. Anything, whether it be constitutional procedures or problematic cultural elements, that blocks the achievement of this principle must be ignored or actively restricted. Because of all of this, the fundamental rights tradition tends to be innately progressive and moralistic.[14]

These two traditions are not just abstract inventions of English and French enlightenment philosophers, but are an actual part of America's political history. Both of these traditions are alive and well today as evidenced by debates in contemporary constitutional theory.

---

[12] Marquis de Condorcet, *Condorcet: Political Writings*, trans Steven Lukes and Nadia Urbinati (Cambridge: Cambridge University Press, 2012). Pg. 2.
[13] Condorcet, *Condorcet: Political Writings.* Pg. 90.
[14] In fact, it seems to be the case that advocates of fundamental rights generally fit Ken Kersch's insightful definition of progressives. He defines progressive not as one monolithic political movement that existed at the turn of the twentieth century but rather as an "attitude and an inclination, not a logically coherent philosophy. At any given moment, this attitude jumbles together all manner of fashions, enthusiasms, prejudices principles, convictions, and blind spots that are often flatly contradictory, both internally and with different "progressive" outlooks in different historical periods." From Ken Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge UK: Cambridge University Press, 2004). Pg 17, footnote 24.

Constitutional Theory Today

The Fundamental Rights Tradition and Constitutional Theory

In more recent constitutional theory, the debate between institutionalism and fundamental rights originally expressed itself as a feud between those who expressed a desire to abandon the outdated principles of the American founding where practicable (fundamental rights theorists) and those who argued that the founding should remain the core of American politics (institutionalist theorists).[15] However, in recent years, both sides have embraced those aspects of the founding which support their favored tradition. This has added an historical element to the normative dispute between the two systems with both sides claiming that they better represent the true meaning of the American Constitution as originally framed.

Among contemporary scholars, the theory of fundamental rights has been expressed by a number of intellectuals. One of the most famous is Ronald Dworkin. For Dworkin, a constitutional system must be designed to protect the moral integrity of a people. In America the moral system of the people is one of equality before the law.[16] However, the idea of equality before the law is not one restrained by institutional or legal strictures, rather "it demands fidelity not just to rules but to the theories of fairness and justice that those rules presuppose by way of justification."[17] Because of this, discussions of morality and equality should not be confined to any particular portion of the regime. Instead they should be at the center of all political debate.[18] He further argues that as society changes, new understandings of justice will dominate, and it is the duty of a well-structured constitutional order to make sure that modern conceptions of rights

[15] For an analysis of this transition see: Michael Zuckert, "On Constitutional Welfare Liberalism: An Old-Liberal Perspective," *Social Philosophy and Policy Foundation*, 2007.
[16] Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1986). Pg. 185.
[17] Dworkin, *Law's Empire*. Pg. 185.
[18] Dworkin, *Law's Empire*. Pg. 185.

comport with the updated view of justice.[19] In these respects, Dworkin's view echoes the fundamental rights tradition's emphasis on morality over formality and support for living constitutionalism. It also endorses the fundamental rights view that there should be no distinction between constitutional rights and the right of equality to which all are entitled.

One of the major differences between Dworkin and other advocates of the fundamental rights tradition is that he does not trust democracy to protect rights and update the views of the people if left to its own devices. He believes that political demands tend towards compromises that leave moral principle from being truly fulfilled and therefore undercut the supreme constitutional principle of integrity. As Garry Jacobsohn has summarized, Dworkin argues that, "policy, which emerges from the political process, is fundamentally utilitarian and therefore potentially threatening to the rights of the minority."[20] In fact, for Dworkin rights are often understood to protect minorities against the whims and passions of the majority. Because of this, instead of representative bodies, he turns to the Supreme Court as the key counter-majoritarian institution to secure the rights of the nation. This leads him to argue that there is no need for judicial self-restraint when intervening on particular policy issues, and that the court must actively thrust upon the nation new rights that comport with continually updating conceptions of justice, regardless of popularity or constitutional roadblocks.[21]

These fundamental rights arguments have been taken up in a similar manner by Sotirios Barber, though he traces the general origins of his view to the American founding. This makes

---

[19] Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury, 2017).
[20] Gary Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* (Totowa, NJ: Rowman and Littlefield, 1986). Pg. 41.
[21] Dworkin, *Law's Empire*. Pg. 190. The flaw in Dworkin's view is that it cannot be easily assumed that the courts are actually the best at enforcing their own expansions of rights or that the people will acknowledge them as legitimate. As Gerald Rosenberg has argued "in a political system that gives sovereignty to the people popular will and economic decisions made through the market, it is not obvious why the courts should have the effect" people such as Dworkin assert. For more information on this see: Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 2008).

him distinct from Dworkin, who is not dismissive of the American founding as an important moment in the history of human progress, but also does not credit it with offering major lessons for understanding fundamental rights. Barber argues that the Constitution was designed by the framers to achieve the welfare of the people and that this wellbeing is "more important than any institutional form."[22] Barber sees the Constitution not as a document advocating a particular institutional arrangement designed to foster limited government, but instead as an avenue for continuous social progress. He argues that "the American Constitution makes sense (and originally made sense) only in the light of general substantive ends like national security, freedom of conscience, domestic tranquility, and the people's economic well-being."[23] This means that loyalty to the Constitution "entails a concern for more than negative constitutional rights, constitutional procedures, and institutional forms."[24] As Brutus warned, the purpose of the Constitution was stated in the Preamble – no structure superseded it.[25]

Barber does not entirely share Dworkin's doubts about the democratic process. He believes that it is perfectly possible for the majority of the nation to properly understand the rights demanded by both their own needs and the needs of the minority.[26] However, Barber concedes that many times in history the majority of the nation has failed to recognize or protect the rights of minorities. It is in these moments that the court must step in and work for the protection of the people.[27]

Barber condemns the institutionalist tradition as incapable of truly fulfilling the goals of government – to protect the rights of the citizens. He concedes that many notable institutionalists

---

[22] Sotirios A. Barber, *Welfare and the Constitution* (Princeton NJ: Princeton University Press, 2005). Pg. XV
[23] Barber, *Welfare and the Constitution.* Pg. 1.
[24] Barber, *Welfare and the Constitution.* Pg. 1.
[25] Brutus 5, December 13, 1787 in Herbert J. Storing and Murray Dry, *The Anti-Federalist Papers: The Opponents of the Constitution* (Chicago: Univ. of Chicago Press, 1985).
[26] Barber, *Welfare and the Constitution.* Pg. 23.
[27] Barber, *Welfare and the Constitution.* Pg. 23.

- such as Harvey Mansfield and Walter Berns - acknowledge that achieving the ends of government requires more than negative rights, but he disputes their claims that "the best way to pursue ends like justice and the general welfare is to talk about them less and stick to constitutional vocabulary."[28] He believes that to emphasize institutions and constitutional arrangements over rights based concerns in the end undermines the goals of the founders and of healthy constitutionalism.[29]

The Institutionalist Tradition and Constitutional Theory

For modern advocates of the institutionalist tradition, the serious danger of the fundamental rights arguments is that they open political debate up to extremism. For these scholars, such as Harvey Mansfield and Michael Zuckert, it is not that rights do not exist but that using them in political debate poses a serious problem. As James Ceaser has summarized: "Most doctrines of abstract right expressed in historical moments, have not done very well, as the occasion of the French Revolution illustrates. On that occasion, abstract doctrines of natural rights led to centralization of power rather than a limitation of power" and in the final instance led to a bloody tyranny.[30]

One of the most vocal contemporary proponents of the institutionalist argument is Harvey Mansfield. Mansfield argues that the Declaration of Independence and the idea that "all men are created equal" is the animating principle of the American regime.[31] However, this idea can be radical and lead to dangerous political upheavals and misappropriation of rights. Because of this,

[28] Barber, *Welfare and the Constitution.* Pg. 63.
[29] Barber, *Welfare and the Constitution.* Pg. 63.
[30] James W. Ceaser in panel discussion "Soft Despotism, Democracy's Drift: What Tocqueville Teaches Today." September 2, 2009 at the Heritage Foundation, Washington DC.
[31] Harvey C. Mansfield, *America's Constitutional Soul* (Baltimore, Johns Hopkins University Press, 1993). Pg. 10.

the Constitution "is inspired by this principle while also introducing important formal qualifications to it necessary to make it serve a political purpose."[32] In other words, though the United States is founded upon a commitment to natural rights and their achievement, the Constitution restrains the radical tendencies of this doctrine by prioritizing institutional arrangements and constitutionally granted privileges above fundamental rights in the political order.

Mansfield contends that the restraining nature of the Constitution will make it easier to achieve the ends of the American regime. His argument rests on the belief that to debate ideas of natural right too openly would lead to political polarization that causes the work of government to grind to a dangerous halt. Mansfield fears "the socially divisive potential of a constitutionalism self-consciously concerned with its purposes."[33] While it is possible for political debate to concern itself with questions of high principle, it is far safer that political discourse concern itself almost entirely with technical debates over constitutional provisions or policy.[34] For Mansfield, this danger is perfectly manifested in an increasingly ascendant understanding of rights that prioritizes not just the ability to exercise a right, but that all citizens can exercise their rights to more or less the same personal benefit.[35]

Michael Zuckert echoes these concerns in his advocacy for the institutionalist tradition. Zuckert argues that "the legitimate end of government – securing rights – sets an orientating direction for thinking and acting politically but not a bright and shining line. One would not and could not, limit governmental action to rights protection and only that, because there is much

[32] Mansfield, *America's Constitutional Soul*. Pg. 10.
[33] Barber, *Welfare and the Constitution.* Pg. 63.
[34] Mansfield, *America's Constitutional Soul*. Pg. 26.
[35] Mansfield, *America's Constitutional Soul*. Pg. 181.

more to securing rights than securing rights."[36] Zuckert further argues that the government ought not be too overtly concerned with securing rights on a daily basis since equality and justice are far better secured through policy creation that makes no appeal to abstraction or to the Constitution.[37]

For Zuckert there is a key difference between rights as they are found in nature and privileges that are granted by the Constitution. He articulates this difference in a discussion of the fourteenth amendment: "Privileges and immunities are over and above natural rights. The former are not natural and universal because they are incidents of citizenship; that is, they depend for their existence on the prior existence of government."[38] He further argues, "Although these procedures protect natural rights, they do not have the same status as natural rights themselves…They are specific**,** but conventional procedures that have arisen within a polity, but some other procedures could do as well or nearly so."[39] Put differently, the Constitution creates certain privileges as an attempt to achieve its goal of liberty and equality, but these privileges are designed to fit the moment and can be reconstituted or done away with as the situation demands. Institutionalist like Zuckert prefer these constitutionally granted privileges, arguing that natural rights could never be expressed in their pure form in a regime without continuous and dangerous revolution.[40] In fact, it is the very nature of government that once instituted it has limited ends and limited tools with which to achieve its ends based on the genus of the people that it is

[36] Zuckert, "On Constitutional Welfare Liberalism: An Old-Liberal Perspective," Pg. 270. As Zuckert further explains: "the Constitution of the United States was established to accomplish only certain limited ends, ends that were not coextensive with the liberal goals set forth in, for example, the Declaration of Independence." Pg. 287.
[37] Zuckert, "On Constitutional Welfare Liberalism." Pg. 271.
[38] Michael Zuckert, "Completing the Constitution: The Fourteenth Amendment and Constitutional Rights*," Publius: The Journal of Federalism* 22, no 2. (1992).
[39] Zuckert, "Completing the Constitution."
[40] Zuckert, "Completing the Constitution." And Zuckert, "On Constitutional Welfare Liberalism: An Old-Liberal Perspective."

given.[41] In the eyes of an institutionalist then, a government with the expansive and evolving nature of rights described by Dworkin and Barber is neither possible nor preferable.

Zuckert criticizes members of fundamental rights school for oversimplifying the idea of good governance. He contends that scholars such as Barber, wrongly insist "on placing higher priority on the ends of action than the means of action."[42] For Zuckert, and other institutionalist, means matter. Zuckert observes that the means used to achieve the ends of government can make the difference between a well-ordered liberal democracy and a soft despotism.[43] Zuckert goes further, arguing that by its very nature the fundamental rights doctrine leads to means that are destructive of good government. What begins as a well-meaning commitment to the "comprehensive welfare of the people," almost inevitably transforms itself into a dangerously large state.[44]

In this contemporary debate, scholars increasingly cite the American founders as the true source of their view. While many are nuanced enough to admit that both fundamental rights and institutionalism existed at the time of the founding, at least to some degree, this is not always the case. In the *Obergefell v. Hodges* case from the introduction, both the opinion of the court and the various dissents argued that their view is the proper understanding of the Constitution as it was originally intended.[45] To settle at least some of the contemporary divide between the institutionalists and the fundamental rights advocates, it seems important to look to the founders themselves. As the following sections will show, the only problem with this is that the founders were just as divided as modern constitutional theorists.

---

[41] Zuckert, "On Constitutional Welfare Liberalism: An Old-Liberal Perspective" pg. 268. For more information on the idea of a nation's genus see Chapters 3,5, and 7 of James W. Ceaser, *Liberal Democracy and Political Science* (Baltimore: Johns Hopkins University Press, 1992).
[42] Zuckert, "On Constitutional Welfare Liberalism: An Old-Liberal Perspective" pg. 285.
[43] Zuckert, "On Constitutional Welfare Liberalism: An Old-Liberal Perspective" pg. 285.
[44] Zuckert, "On Constitutional Welfare Liberalism: An Old-Liberal Perspective" pg. 276.
[45] *Obergefell v. Hodges*, 14-556, U.S. (2015).

Natural Right and the Founding

Before moving to fully examine institutionalism and fundamental rights in in the American founding, it is important to first mention that the American founders largely agreed that rights were important. Though some scholars have contended that the American regime rests on mostly traditional or religious grounds, recent scholarship shows the increasing invalidity of these opinions.[46] It is clear that the vast majority of the founders understood natural rights as the central "gravitational" force of their regime.[47] As historian Forrest McDonald summarized, the founders shared a clear and common purpose of "providing protection for the lives, liberty, and property of the citizens."[48] Joseph Bessette echoed this claim arguing that "at bottom the founding debate was a great contest over how to achieve the ends of liberty and self-government to which both sides were thoroughly committed."[49] These scholars and many others have ably shown that the American founding was designed to secure the liberal ends expounded in that most exalted of American documents - the Declaration of Independence.[50]

Even Jefferson and Hamilton, who famously disagreed on almost everything, agreed that natural right was the foundation of the American regime. Jefferson wrote the Declaration of Independence and until his very final days proclaimed, "the mass of mankind has not been born

---

[46] Russel Kirk, *The Roots of American Order*. (Wilmington, Delware: ISI Books, 2004) and Ernest Lee Tuveson, *Redeemer Nation: The Idea of Americas Millennial Role* (Chicago: University of Chicago Press, 1980). Tradition and religion are of course of immense importance to the American founding, but natural right is the foundational principle of the regime. For more information on foundations see: James W. Ceaser, *Nature and History in American Political Development: A Debate* (Cambridge: Harvard university Press, 2008).

[47] Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: University of Chicago Press, 1990). Pg. 276.

[48] Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1987). Pg 3.

[49]Herbert J. Storing and Joseph M. Bessette, *Toward a More Perfect Union: writings of Herbert J. Storing* (Washington, D.C: AEI Press, 1995). Pg 5.

[50] For more works on this topic see: Martin Daimond, As Far As Republicans Principles Will Admit ed. William A. Schambra (Washington D.C.: AEI Press, 1992), Harry V. Jaffa, How To Think About the American Revolution (Claremont, CA: The Claremont Institute, 2001), and Michael P. Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (South Bend, IN: University of Notre Dame Press, 2010).

with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God."[51] Hamilton also argued that, "the sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature."[52] Quotes such as these are littered across the writings of these two statesmen and show the strength of their conviction in nature as a foundation of government.

The Fundamental Rights Tradition in the American Founding

The Theory of the Fundamental Rights Tradition

Despite this area of accord, the American founding was defined by a substantive disagreement over how these natural rights should relate to the Constitution. The Fundamental rights tradition is grounded in a dualistic faith in natural right and a progressive view of history. This unique blend of philosophic principles does not have its origins America but instead in two prominent French enlightenment thinkers, Anne Robert Jacques Turgot and the Marquis de Condorcet. The connection between these theorists and the American tradition of fundamental rights is not hard to make. Not only were Turgot and Condorcet contemporaries of the American founders, but they were also on friendly terms with several of them. Thomas Jefferson kept a bust of Turgot in the lobby of his Virginia manor, and Condorcet was close friends with Jefferson, Thomas Paine, and Benjamin Franklin.

---

[51] Thomas Jefferson to Roger Weightman, June 24, 1826 Thomas Jefferson, The Works of Thomas Jefferson, Federal Edtion (New York and London, G.P. Putnam's Sons, 1904-5). 12 vols. Available at https://oll.libertyfund.org/titles/jefferson-the-works-of-thomas-jefferson-12-vols

[52] Alexander Hamilton, The Farmer Refuted February 23, 1775. *The Works of Alexander Hamilton,* ed. Henry Cabot Lodge (Federal Edition) (New York: G.P. Putnam's Sons, 1904).

Anne Robert Jacques Turgot was the first philosopher to offer an idea of history as the continual progress of human civilization. In his essay *On Universal History,* he contends that "through alternate periods of rest and unrest, of weal and woe, the human race as a whole has advanced ceaselessly towards its perfection."[53] Turgot thought that the incessant march of progress could best be aided through advances in the sciences which would inevitably transform society for the better.

Condorcet, Turgot's protégé, adopted his mentor's understanding of progressive history while also adding to it an element of natural right. For Condorcet, helping move forward the progress of history was not just the duty of science and happenchance but it was also the foundation of natural right. He further believed that

> "the maintenance of these rights was the sole object of men's coming together in political society, and that the social art is the art of guaranteeing the preservation of these rights and their distribution in the most equal fashion over the largest area … the means of assuring the rights of the individual should be submitted to certain common rules, but that the authority to choose these means and to determine these rules belongs only to the majority of the members of society itself, for in making this choice the individual cannot follow his own reason without subjecting others to it, and the will of the majority is the only mark of truth that can be accepted by all without loss of equality."[54]

For Condorcet, natural right demands the will of the majority be allowed to steer the political community forward towards greater progress.[55] This passage reflects both the absolutist and majoritarian nature the fundamental rights tradition would embrace in early America.

---

[53] Anne-Robert-Jacques Turgot, *Turgot on Progress, Sociology, and Economics*, trans. Ronald L. Meek (Cambridge: Cambridge University Press, 1973). Pg. 72. Rousseau is often considered the first major thinker to expound a theory of History in the philosophical sense of the term. However, for Rousseau the march of history does not move in a positive direction. Turgot seems to have lifted the general framework of Rousseau and completely inverted it.
[54] Condorcet, *Condorcet: Political Writings.* Pg. 92. Condorcet did believe that with time natural right could be abandoned in favor of simply progressive history, but this idea did not catch on among prominent American founders.
[55] One major difference between Condorcet and his American colleagues is that for the Frenchman, natural right is the key to progress for the time being. But as humanity advances, they will one day be able to rise above natural right. In other words, for Condorcet the future of natural rights is to become antiquated. Jefferson, Paine, and others

In the United States, the founders who best articulate the fundamental rights tradition are Thomas Jefferson and Thomas Paine, both of whom imported the French understanding of progress almost wholesale.[56] They both thought that the world had entered into a new age of enlightenment where the people could finally be trusted to march the polity forward by the light of natural right. It was therefore the duty of government to make this happen.

Jefferson and Paine believe that a political world governed by natural right had not existed prior to the modern era. For most of human history, man had lived under the chains of "monkish ignorance and superstition."[57] The founders, whether institutionalist or fundamental rights advocates, did not believe that natural right could occur in its purest form without the ameliorating effects of reason. This is because "in the first instance, rights are claims each is inclined to raise on his or her own behalf, that is claims based on the selfish passions" and desires that are innate to all humans.[58] These selfish claims led men to dominate one another, and before the triumph of reason the world was "overrun with tyranny" where the strong ruled the weak.[59] For this reason, governments like the British system had been acceptable for the "dark and slavish times in which it was erected" but were acceptable no more.[60]

Proponents of the fundamental rights tradition believe that the discovery of modern science improves man's ability to reason and serves as the salvation of humanity from this pitiable state. Democracy and modern science bring forth the "unbounded exercise of reason and

---

never adopted this view of natural rights as merely a means to a better future. For them natural right was the foundation of the regime and they never expected this to drastically change.

[56] This does not necessarily mean they subscribed to every aspect of the fundamental rights understanding of the Constitution. Merely that of all the founders, they best articulate the tradition.

[57] Thomas Jefferson to Roger Weightman, June 24, 1826

[58] Michael P. Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (South Bend, IN: University of Notre Dame Press, 2010). Pg. 73.

[59] Thomas Paine, "Common Sense" in *Thomas Paine: Collected Writings*. Edited by Eric Foner. (New York: Library of America, 1995) pg. 9.

[60] Thomas Paine, "Common Sense" in *Thomas Paine: Collected Writings*. Pg. 9.

freedom of opinion" that makes possible the general acknowledgment of natural right.[61] This is because, as the general populace grows more reasonable, they will come to acknowledge that the best way to secure their own rights is to institute a government that privileges no one individual over another. This progressive process in which selfish passion is transformed into natural right is well summarized by Michael Zuckert: "What derives from nature are the selfish passions, which in themselves produce only selfish claims, not yet full rights; what transforms the claims of the passions into rights is the 'civilized' figuring out of the system of mutual respect for rights."[62] Borrowing from Turgot, Jefferson believes that the study of science and the spread of education to all classes of society would increase the awareness of natural right and the "ethical obligation" it carried with it.[63] This means that from the viewpoint of many advocates of the fundamental rights tradition, the American founding is the beginning of a new epoch in which natural right can at last be fully expressed in the regime.

Jefferson and Paine believe that because the populace was increasingly enlightened, the majority must be trusted without checks to control the reins of government. Jefferson contends that the power of the people must be absolute, and that every office of government was merely a tool to implement the will of the public. As he states in a 1780 government report, the "law of the majority is the natural law of every society of men."[64] Thomas Paine echoed this sentiment arguing that an elected democracy where the majority rules was the only way to guarantee

---

[61] Thomas Jefferson to Roger Weightman, June 24, 1826.
[62] Zuckert, *The Natural Rights Republic.* Pg. 76. This sentiment is also expressed in a slightly different way by Thomas Paine in *Common Sense*: "Society is produced by our wants, and government by our wickedness; the former promotes our happiness *positively* by uniting our affections, the latter *negatively* by restraining our vices." Pg. 6.
[63] James W. Ceaser, *Reconstructing America: The Symbol of America in Modern Thought*, (New Haven, CT: Yale University Press) pg. 47. For a better understanding of Jefferson's educational goals see the Rockfish Gap Report, that serves as the founding charter of the University of Virginia.
[64] Jefferson's Opinion on the Residence Bill, July 15 1790. Jefferson's dedication to the will of the majority is such that in 1788 while serving as Ambassador to France he assumed he must be wrong when he previously stated the senate needed term limits as "the majority of the country" was against him on the issue. Thomas Jefferson to James Madison, July 1st 1788.

freedom and security, because only an elected body representing the majority will have the common interest of all the people in mind.[65] It is also important to note that both also argued that government power must be limited – society, Paine tells us, is the home of human freedom. Government is a necessary evil.[66] Jefferson seconded this claim, arguing that the "pillars of our prosperity, are the most thriving when left most free to individual enterprise."[67]

Faith both in progress and the reasoning power of the majority led to a theoretical endorsement of living constitutionalism to become part and parcel of the fundamental rights tradition. In his only book, *Notes on the State of Virginia*, Jefferson recommends that conventions should regularly be held to amend the constitution.[68] In a 1789 letter to James Madison, Jefferson went a step further. In this letter, Jefferson argues that because of the continuous advancement of humankind, justice demands that government and society must be ruled only by each successive generation. The idea of one generation, one set of founders, having sway over another is repugnant to him. Because of this, he boldly rejects the very idea of a perpetual constitution and instead declares that every constitution "naturally expires at the end of 19 years."[69]

Thomas Paine is in full agreeance with Jefferson's model of a living constitution arguing that, "The circumstances of the world are continually changing, and the opinions of men change also; and as government is for the living, and not for the dead, it is the living only that has any

---

[65] Thomas Paine, "Common Sense" in *Thomas Paine: Collected Writings*. pg. 8. Also, in the "The Rights of Man" pg. 562.
[66] Paine, "The Rights of Man" in *Thomas Paine: Collected Works*.
[67] Thomas Jefferson, First Annual Message to Congress, December 8th 1801.
[68] Thomas Jefferson, Notes on the State of Virginia, ed. Frank Shuffelton (New York, NY: Penguin Books, 1999)
[69] Thomas Jefferson to James Madison, September 6th 1789. This has another added benefit for Jefferson: In addition to better securing the rights of the people, a living Constitution also ensures that the brightest minds in politics stay interested in the running of the regime. He believes that without continuous refoundings intelligent men will turn their attention to other pursuits where they can be innovative. This would leave politics as the realm of mediocre second best minds.

right in it. That which may be thought right and found convenient in one age, may be thought wrong and found inconvenient in another."[70] He further states that: "The vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow."[71] So for Paine, just as for Jefferson, constitutions must update themselves with the progress of time so that they are able to keep up the advances in politics that each generation brings.

The Practical Application of the Fundamental Rights Tradition

It would be easy to contend that Jefferson and Paine only ever argued on behalf of progress and a living Constitution in theory, and that they never displayed a commitment to the fundamental rights tradition in practice. However, this is simply not the case. The Jefferson presidency is the perfect example of what the fundamental rights tradition looked like in practice at the start of the nation.

Jefferson's purchase of the Louisiana territory from France is the most obvious example of fundamental rights in action. By his reading of the United States Constitution, the federal government did not have the power to increase the size of the country's geographic territory.[72] However, Jefferson believed that the French possession of Louisiana, and particularly New Orleans, posed a serious long-term threat to the safety of the American Republic and its citizens.[73] When France offered to sell Louisiana to the United States at a surprising discount, Jefferson began lobbying members of Congress to ratify a treaty securing the purchase and to

[70] Paine, "The Rights of Man" in *Thomas Paine: Collected Works*. Pg. 441.
[71] Paine, "The Rights of Man" in *Thomas Paine: Collected Works*. Pg. 438.
[72] Jefferson to Albert Gallatin, January 1803
[73] Jefferson to Robert Livingston, April 18 1802 In the thought of Jefferson and Paine security is viewed as the vital factor that allows natural rights to be secured, without it there is no way man can exercise his freedom. So to secure the security of a people is in part to secure their natural right.

later affirm the act by a constitutional amendment. This amendment would make the treaty's ratification legal.[74] As Jefferson worked to rally support behind both the treaty and the amendment, rumors began to circulate that Napoleon was getting cold feet, which made a quick transaction significantly more important.[75] Since the procurement of Louisiana was vital to the country's wellbeing, Jefferson altered his recommendations to Congress. Instead of passing the treaty and later passing an amendment to make the treaty legal, Jefferson instructed Democratic-Republican Congressmen to ratify the treaty subordinating their concerns about the constitutionality of the action to the protection of the American people.[76]

The logic behind Jefferson's actions in the lead up the Louisiana Purchase was resolutely grounded in the fundamental rights tradition. Throughout the purchasing process, Jefferson was clear that since the American people were the truest guardians of natural right; they were an authority higher than the Constitution. This meant that they had the power to authorize executive and congressional actions that exceed constitutional boundaries *post hoc*.[77] As Jeremey Baily observes, Jefferson believed that "the president's prerogative power is required by the people for whom the president acts as an agent. Educated under this understanding, the people extend credit to their president, expecting them to invest for their good."[78]

Jefferson saw the security risks posed by a foreign-owned Louisiana as a significant threat to the rights of citizens who lived along the border. For decades American fishermen and traders had been preyed upon along the Mississippi. This had damaged their property and their livelihood, and because Louisiana was controlled by a foreign nation it was not a simple matter

[74] Jefferson to John C. Breckenridge, August 12 1803
[75] John Livingston to Thomas Jefferson
[76] Jefferson to John C. Breckenridge, August 18 1803
[77] Jefferson to John C. Breckenridge, August 12 1803.
[78] Jeremy D. Bailey, *Thomas Jefferson and Executive Power* (New York: Cambridge University Press, 2010). Pg. 179

of the law to receive justice.[79] Jefferson, a firm believer in the right of property, argued that such behavior could not be permitted to continue, and in the end, Louisiana must be purchased or the United States would be forced into the maelstrom of war to protect the rights of her people.[80] This view of the situation also highlights the fundamental rights belief that the violation of rights simply cannot be tolerated. Jefferson would rather violate the constitution or go to war than allow citizens to live without their rights.

Jefferson went even further than this by extending prerogative power, when it was used to protect rights, not just to the president but also to every member of society. He boldly states that "There are extreme cases where the laws become inadequate even to their own preservation," and he even suggests that he would have liked to see the law defied in protecting the nation against Aaron Burr's potential insurrection.[81] This statement has bold implications meaning "not just that the law no longer applies to an executive who must obey a higher law in a given circumstance when justice requires it but that it also should no longer apply to 'good citizens.'"[82] This capacious understanding of prerogative power is the perfect example of what fundamental rights look like in practice for the average citizen or bureaucrat. Jefferson is articulating an understanding of the polity where all good citizens have a duty to preserve the security of natural rights regardless of constitutional or legal limitation.[83]

---

[79] Thomas Jefferson to the Governor of Kentucky, January 18th 1803.
[80] Thomas Jefferson to the Governor of Kentucky, January 18th 1803 and Thomas Jefferson to P.S. Dupont Du Nemous Febuary 1st, 1803.
[81] Thomas Jefferson to Dr. James Brown, October 27 1808.
[82] Benjamin A. Kleinerman, *The Discretionary Presidency: The Promise and Peril of Executive Power* (Lawrence: University of Kansas Press, 2009). Pg. 159 – 160.
[83] The idea that the president and other members of the executive branch possess considerable power to deal with issues of national security is one that Jefferson shares with Hamilton (whose thought is explored more thoroughly in the following section). However, they defended executive prerogative on very different grounds. For Jefferson prerogative power was something that went beyond the constitution whereas for Hamilton it was something that is included in the constitution, which he simply interpreted rather broadly. For more on this see the discussion of the Helvetius papers below.

Jeffersonian prerogative power also makes possible the fundamental rights arguments on behalf of a living Constitution. In his book *The Discretionary Presidency*, Benjamin Kleinerman suggests that Jefferson's version of executive power, where the Constitution is treated in drastically different ways by each officeholder, is the less controversial path Jefferson used to create a living Constitution: "every eight years, a new president ushers in a new constitutional majority representing a new generation of people and ideas."[84] This achieves Jefferson's theoretical proposition to regularly update the Constitution "in a manner other than with amendments" or full scale constitutional conventions, by freeing the president from constitutional boundaries and holding him accountable to the natural law of the majority.[85] Reflecting many years later on how his presidency appeared to fulfill this elusive ideal, Jefferson declared that his election in 1800 was as "real a revolution in the principles of our government as that of 1776."[86]

The Institutionalist Tradition in the American Founding

The Theory of the Institutionalist Tradition

The fundamental rights and institutionalist traditions agree that for most of human history man has been unable to govern himself through reason. However, the advocates of institutionalism depart from their counterparts by arguing that this state of affairs is never going to change – not only has mankind historically been incapable of reasonable governance, they will never drastically improve. The institutionalist tradition rests on the understanding that the immovable selfish passions that motivate man require a government that restrains the people and protects the

[84] Benjamin A. Kleinerman, *The Discretionary Presidency*. Pg. 158. It is for this reason that Jefferson advocated for presidential term limits, it would make sure that this constitutional change lasted no longer than eight years.
[85] Kleinerman, *The Discretionary Presidency*. Pg. 158.
[86] Thomas Jefferson to Judge Spencer Roane, September 6th, 1819.

stability of important constitutional institutions, even if it is sometimes at the cost of natural rights. In addition, because mankind has not entered a new age of reason natural rights can no more be achieved in their pure form than they could before. In the eyes of the institutionalist, man is still very much fallible which means the nature of rights has changed little over human history. The most notable proponents of the Institutionalist tradition were John Adams, James Madison, and Alexander Hamilton.[87]

Together with Jefferson, James Madison worked to found the nation's first political party. United in their opposition to federalist policies, they worked to articulate the importance of agrarian popular governance. However, Madison disagrees sharply and consistently with Jefferson on natural rights and their implications for constitutional governance. Madison was continuously skeptical that reason can play an important role in determining the will of the people. As Madison famously states: "passion never fails to wrest the scepter from reason."[88] In other words, even if the people begin by ruling rationally, they will inevitably start to let lesser passions guide them. There is no great triumphal arc of reason in the thought of James Madison since in his eyes "a nation of philosophers" is simply a naïve wish.[89] Though he agrees with Jefferson that reason "ought to control and regulate the government," for Madison this meant checking the authority of the people.[90]

---

[87] Like their fundamental rights counterparts at the time of the founding, these three statesmen are not always absolutist in their support for fundamental rights. They merely best articulate and prove its existence at the time of the American founding. In particular, it is important to note that Madison would alter or amend many of his earlier opinions in response to the federalist policies of Hamilton. For more evidence of this shift see Madison's Essays for the *National Gazette* in James Madison, *The Writings of James Madison, Compromising His Public Papers and his Private Correspondence*, ed. Galliard Hunt (New York: G.P. Putnam's Sons, 1900). 9 vols. Available from https://oll.libertyfund.org/titles/madison-the-writings-of-james-madison-9-vols

[88] James Madison, Federalist 55. Madison, James, Alexander Hamilton, John Jay, and Isaac Kramnick. *The Federalist Papers*. Harmondsworth: Penguin, 1987

[89] James Madison, *Federalist 49* and Garrett Ward Sheldon, *The Political Philosophy of James Madison* (Baltimore, MD: Johns Hopkins University Press, 2002). Pg. 25.

[9090] James Madison, *Federalist 49*

Like Madison, Adams grounds his institutionalist thought in his general disenchantment with people. He rejects the fundamental right tradition's idea that as science progresses so does mankind. Instead, he argues that the increasing knowledge of society has merely worked to further release the pernicious passions of man.[91] Adams believes that adjusting government under the expectation that it would improve as the people did is as likely as entering the age of "dragons, giants, and fairies."[92] In his view, human nature is inflexible and man "is as incapable now of going through revolutions with temper and sobriety, with patience and prudence, or without fury and madness" as it ever was.[93] Simply put, he asserts that the general populace is just incapable of being ruled by reason rather than their own selfish desires.[94]

Hamilton echoes Adams and Madison's sentiments on reason. He argues that there are two forms of reason, experiential and speculative. Experiential reason was based in fact, and is deduced from empirical observations made in the world and the study of history. On the other hand, speculative reason derives its basis from broad philosophical principles that were then applied to the empirics of reality.[95] Hamilton unabashedly condemns this second kind of reason, and borrowing from Hume, he believes that "reason must be subordinate to experience and virtuous passions if it is to convey truth. Speculative reason engendered factiousness."[96]

This view of human nature as reliably selfish, and the proper place of government in relation to that nature, led to a strong advocacy for checks on a popular majority among advocates of the institutionalist tradition. For Madison the Constitution is not simply in existence

[91] John Adams, "Discourse on Davila", *The Political Writings of John Adams.* Pg. 351. The *Discourses on Davila* were actually written for the express purpose of refuting Jefferson and the French Enlightenment.
[92] John Adams, "Discourse on Davila", *The Political Writings of John Adams.* Pg. 355.
[93] John Adams, "A Defense of the Constitution of the United States", *The Political Writings of John Adams.* Pg. 112
[94] John Adams, "Discourse on Davila", *The Political Writings of John Adams.* Pg. 325.
[95] Michael P. Federici, *The Political Philosophy of Alexander Hamilton*, (Baltimore: Johns Hopkins Univ. Press, 2012). Pg. 71.
[96] Federici, *The Political Philosophy of Alexander Hamilton.* Pg. 71.

to help facilitate majority rule, but instead it takes on the role of a higher law. The duty of the Constitution is to secure the principles of liberal government.[97] This means that the Constitution is at once intended to secure the rights of the people while also preventing the people themselves from tampering with those rights.[98] He insists that giving citizens too much influence over the Constitution, as the fundamental rights tradition often demands, would quickly upset the important "constitutional equilibrium" that the government rests on.[99]

This equilibrium could best be maintained through institutional "auxiliary precautions" that checks the popular authority of people.[100] As Madison summarizes in Federalist 51: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[101] Madison goes on to describe the arrangement of constitutional institutions that are designed specifically as a sentinel to protect the rights of the people.[102]

Adams and Hamilton went even further in arguing the important role that institutions must play in securing rights. Adams believes that without constitutional institutions that form a political hierarchy, government always descends into "a state of anarchy and outrage."[103] It is only through the establishment of constitutional institutions and procedures that the "people's rights and liberties" can be preserved.[104] Hamilton argues that republican government had only

---

[97]Mark A. Graber, *A New Introduction to American Constitutionalism* (New York: Oxford University Press, 2015). Pg. 36.
[98] Harvey C. Mansfield, *America's Constitutional Soul* (Baltimore, Johns Hopkins University Press, 1993). Pg. 10.
[99] James Madison, *Federalist 49*.
[100] James Madison, Federalist 51.
[101] James Madison, *Federalist 51*.
[102] James Madison, *Federalist 51*. Madison shifts pretty heavily to fear minority faction, much more than majority faction, as Hamilton's treasury policies were rolled out in the Washington administration. However, his earlier writing on the danger of majorities still exerts a significant influence on constitutional interpretation in some circles.
[103] John Adams, "A Defense of the Constitution of the United States", *The Political Writings of John Adams.* Pg. 113.
[104] John Adams, "A Defense of the Constitution of the United States", *The Political Writings of John Adams.* Pg. 115.

recently been made possible by the important improvements in the science of politics made by the American founders. The genius of these institutions stemmed "from their willingness to resist the people's inclinations" and therefore protect the people from themselves.[105] Without these new institutional arrangements, popular government designed to secure the rights of citizens would be impossible.[106] These institutions became as sacred as the rights themselves, because without them, rights were merely naïve dreams.

Hamilton further argued that the notion that the Constitution did not protect fundamental rights was woefully mistaken. He believed a Bill of Rights is largely unnecessary because the institutional arrangements provided for the rights of the people on their own.[107] In a monarchy, a Bill of Rights served as a vital check on the tyranny of the king, but the United States Constitution arranged the polity in such a way as to make the risk of tyranny much lower. So, the checks provided by a Bill of Rights were simply unneeded.[108] Hamilton also argues that the inclusion of the Bill of Rights is not just unnecessary but dangerous. For any such listing of rights "would afford a colorable pretext to claim" more power than is granted and expand the legal strictures of the Constitution beyond their proper bounds.[109]

Part of giving these institutions the authority they required to perform their task was cultivating reverence for the Constitution that created them. Madison believes that reverence is a vital ingredient in building the "broad social consensus" that must exist for the Constitution to achieve the status of higher law.[110] This means that the Constitution needs to be raised above the ordinary din of politics where the fundamental rights tradition sees it. To give the Constitution

[105] Kleinerman, *The Discretionary Presidency*. Pg. 106.
[106] Federici, *The Political Philosophy of Alexander Hamilton.*
[107] Alexander Hamilton, Federalist 84.
[108] Alexander Hamilton, Federalist 84.
[109] Alexander Hamilton, Federalist 84.
[110] Mark A. Graber, *A New Introduction to American Constitutionalism* (New York: Oxford University Press, 2015). Pg. 55.

such an elevated position in the hearts of citizens can only be accomplished after it has existed for some time, so Jefferson's proposal to regularly redraft the Constitution would be particularly damaging.[111] In Madison's view, only securing the Constitution's place as the foundation of the union could ensure that the national government would be perpetuated.[112] This argument for constitutional reverence stands in direct conflict to the fundamental rights tradition's hope for a living Constitution.

Adams defends constitutional reverence on the grounds that it will work to tame the passions of the people, to the extent possible, and encourage patriotism. The continuation of the union depends on the citizens "keeping up a high sense of its own honor, dignity, and power," and the Constitution can play a role in this.[113] If the people respect the Constitution, they are more likely to be tied to the nation that it constitutes. Like Madison, Adams argues that this reverence is best built up over time rather than through reason, because of the general public's inability to reason to proper conclusions.[114]

Even Hamilton, who is not typically thought of as an advocate for constitutional reverence, objected to the fundamental rights model of a living Constitution. Hamilton approves of loosely constructing constitutional provisions because it comports with the needs of the moment and can be molded to situations as they demand using experiential reason. Given the limits of reason, it is simply impossible to craft a Constitution that foresees "all the powers that might become necessary in the future."[115] By this, Hamilton does not mean the Constitution

---

[111] James Madison, *Federalist 49*.
[112] James Madison, "Last Testament: Advice to My Country" in Sheldon, *The Political Philosophy of James Madison.* Pg. 128.
[113] John Adams, "Discourse on Davila", *The Political Writings of John Adams.* Pg. 348.
[114] John Adams, "Discourse on Davila", *The Political Writings of John Adams.* Pg. 348, 360. And John Adams "Defense of the Constitution" pg. 115.
[115] Benjamin A. Kleinerman, *The Discretionary President: The Promise and Perl of Executive Power* (Lawrence: University Press of Kansas, 2009). Pg. 96.

needs to be flouted to protect natural right. Instead, he wishes to leave an opening for prudential leaders to deploy the Constitution as they see fit so as to protect it from dangerous ideologies like those espoused by Jefferson and the French Enlightenment thinkers.[116] It is for this reason in his response to Jefferson's first annual message to Congress, Hamilton accuses the president of being unduly influenced by naive French thinkers. In his eyes, their dangerous influence will soon blow away the Constitution as "if it were mere empty bubbles" and leave behind a dangerously unstable state of affairs.[117]

The Practical Application of the Institutionalist Tradition

Just as the Jefferson administration provides an example of the fundamental rights tradition in practice, the Washington administration shows what the institutionalist tradition looks like when applied to political practice. In particular, Washington's response to the Whiskey Rebellion and his issuance of the neutrality proclamation are good examples of policies designed in accord with the institutionalist tradition.

In George Washington's first term, the secretary of the treasury proposed, and congress approved, a tax on whiskey products. This tax was controversial in many western states, such as Pennsylvania and Kentucky, where whiskey was used as a beverage but also as a form of money.[118] These westerners felt that the tax was unjust and many began to organize protests and

[116] Alexander Hamilton, *Federalist 71*. Continuously revising a constitution to comport with the current political theory, as the fundamental rights tradition recommends, is the very definition of the speculative reason which Hamilton so despised.
[117] Alexander Hamilton, The Examination 9, January 18, 1802.
[118] John Yoo, *Crisis and Command: A History of Executive Power from George Washington to the Present* (New York: Kaplan, 2011). Pg. 70. For an in-depth legal discussion of the Whiskey Rebellion see Saikirishna Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* (New Haven: Yale University Press, 2015). Pg. 92, 96-97.

some state governments refused to even collect the federal tax.[119] Those who partook in the Whiskey Rebellion, whether they were farmers or state judges, made appeals based on the same principles as the American revolution. These protestors argued that because the law usurped their natural right to govern themselves and maintain their own property, they could ignore it.[120] In so doing, the whisky rebels rejected the tax, and the federal government's power to levy it, on grounds that roughly aligned with the fundamental rights tradition.

The response of the Washington administration was quick. Washington argued that the law must be enforced, and that the claim of the rebels to private property rights were negligible in the face of federal law.[121] In the name of enforcing the Constitution, Washington called up the four state militias and "led the army personally. He rode at the head of the troops … in a show of the new government's strength."[122] Washington's actions were a clear repudiation of the fundamental rights view and made apparent that the rule of law ought to be prioritized over pure natural rights in the new regime.[123] This action also indicate a refutation of the fundamental rights notion that natural rights must be expressed purely in the regime. The Washington administration acted under the assumption that an individual's right to property, granted by nature, was superseded by the needs of civil society.

---

[119] Rihcard H Kohn, "The Washington Administration's Decision to Crush the Whiskey Rebellion," *The Journal of American History* vol 59, no. 3 (December 1972): pg. 567-584. And Mary K Bonsteel Tachau, "The Whiskey Rebellion in Kentucky: A Forgotten Episode of Civil Disobedience", *Journal of the Early Republic*. Vol. 2 no. 3 (Autumn 1982), pg. 239-259.

[120] Kohn, "The Washington Administration's Decision to Crush the Whiskey Rebellion" and Bonsteel Tachau, "The Whiskey Rebellion in Kentucky."

[121] Yoo, *Crisis and Command.* Pg. 69.

[122] Yoo, *Crisis and Command.* Pg. 70.

[123] More concretely, the Constitution clearly bestows the power to tax – see Andrew Jackson's argument in the South Carolina nullification crisis. Jackson was much more of a rights guy than Washington but argued that the right to nullification, against a clearly Constitutionally exercised power, would violate the sacred pace of Union. For a more detailed account see chapter 4 of Marc Landy and Sidney M. Milkis, *Presidential greatness* (Lawrence: University Press of Kansas, 2000).

Another instance of an institutionalist policy is the Neutrality Proclamation of 1793, and Hamilton's defense of Washington's right to issue it. Early in Washington's presidency, England and France once again found themselves at war with one another. Understanding that the young nation had little hope of doing anything but damaging its fragile economy and risking its national security, Washington issued a proclamation of neutrality after consulting his cabinet. To defend these principles Hamilton penned the now famous Pacificus letters. In these letters, Hamilton outlines an expansive view of presidential power arguing that "the general doctrine of our Constitution is, that the Executive Power of the Nation is vested in the President; subject only to the *exceptions* and *qualifications* which are expressed in the instrument."[124] For Hamilton there is a clear distinction between the carefully enumerated powers granted to Congress and the opening line of Article Two which declares that "the executive power shall be vested in a President of the United States of America."[125] Whereas Congress is limited only to the powers that are specifically granted to them, the president is empowered to do what he must to execute the law. This is because it is impossible to predict what a president may be called upon to do in the execution of his duties.[126]

Like Jefferson's defense of the Louisiana Purchase, Hamilton's defense of the Neutrality Proclamation of 1793 relies on an extensive view of presidential prerogative power. However, Hamilton rests his prerogative power on an entirely different foundation – the language and institutions of the Constitution itself.[127] Whereas Jefferson rests his defense of prerogative power on popular sovereignty and natural right, Hamilton's is far more legalistic and therefore institutionalist. In addition, Hamilton's arguments meant that the power to declare peace was not

[124] Alexander Hamilton, Pacificus One, June 29th 1793.
[125] Article Two, Section One of the United States Constitution.
[126] Alexander Hamilton, Pacificus One, June 29th 1793
[127] Kleinerman, *The Discretionary Presidency*.

held by the body that most directly elected the people. By limiting the foreign policy of the United States Congress, Hamilton also limited the foreign policy power of the people who regularly elected them. While this is not a direct violation of natural right, it can be argued that it poses a threat to the popular sovereignty of the people on which natural right relies for protection, emphasizing instead institutional and legal concepts of executive power.

These two instances show the way that the institutionalist tradition works in practice. The Whiskey Rebellion shows a clear instance of the rule of law being prioritized over what some citizens believed to be their fundamental rights. While the Neutrality Proclamation of 1793 is much less a prioritization of Constitutional and legal needs over rights, it does show a reading of the Constitution that, though broad, does at no point go beyond the parameters of the document for its power.

The Constitution and the Two Traditions

It is clear that the debate between institutionalism and fundamental rights was every bit as strong in the time of the American founding as it is in the modern day. This makes it impossible to truly settle the dispute between institutionalist and fundamental rights advocates merely from seeing which the framers supported. The next possible way to determine which side is more constitutionally accurate is to look to the text of the founding documents themselves and the events that surrounded their creation.

However, this is not as simple an inquiry as it may seem. As questions over such issues as secession and federalism show, neither the constitutional text or its original intent is as easy to

decipher as one may like.[128] This is made all the more difficult because of what constitutional theorist Gary Jacobsohn calls "constitutional disharmonies." A constitutional disharmony is a contradiction between two competing claims within a nation's constitutional identity. In many instances, these disharmonies, and the ways they attempt to resolve themselves, are the driving force of constitutional evolution.[129] Scholars of the constitution frequently, and mistakenly, ignore these disharmonies and instead try to find theoretical and political continuity even where it may not exist.[130]

At first blush, the Constitution seems to be a clearly fundamental rights document. The most significant evidence for this view is the Declaration of Independence and the preamble to the Constitution. The Declaration of Independence, and the revolution it was penned to defend, was caused in large part by a dispute over rights.[131] The Declaration famously declares "that all men are created equal" and endowed with rights.[132] Moreover, the document provides a justification for not just political change but also for revolution. It states in the second paragraph that "whenever any Form of government" fails to secure natural right "it is the Right of the

---

[128] For more information see Cynthia Nicoletti, *Secession on Trial: The Treason and Prosecution of Jefferson Davis* (Cambridge: Cambridge University Press, 2017) and Connor M. Ewing "Structure and Relationship in American Federalism: Foundations, Consequences, and 'Basic Principles' Revisited." *Tulsa Law Review* 51, no. 3 (2016).
[129] Gary Jeffery Jacobsohn, "The Disharmonic Constitution" in *The Limits of Constitutional Democracy.* Edited by Jeffery Tulis and Stephen Macedo. (Princeton NJ, Princeton University Press, 2010). Pg. 47. These disharmonies can be found in any constitutional order, and as Jacobsohn has shown, are a fundamental part of political life. Slavery is perhaps the best example of a constitutional disharmony: the constitution at once condones slavery in several of its clauses while also supporting the principle of equality for all men. The difficulty in resolving these differences shaped much of the political developments of our nation's history.
[130] Gary Jeffrey Jacobsohn, *Constitutional Identity* (Cambridge MA, Harvard University Press, 2010). Pg. 4.
[131] Some scholars, mostly institutionalists, would argue that the Declaration should not be included as part of the Constitution. However, the Declaration is an important part of constitutional theory regardless of what some may contend. As Jacobsohn as argued: "Constitutionalism in the United States in essence becomes a matter of determining the meaning of the Declaration and clarifying its principle of liberty" in Gary J. Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton University Press, 2017). Pg. 4. Lincoln, who is not a pure advocate of fundamental rights, was also outspoken in his belief in that the Declaration was an important part of the American Constitution. As Jacobsohn has observed, for Lincoln "constitutional meaning was scarcely imaginable without the Declaration's ultimate interceptive guidance." Pg. 4 in Jacobsohn, *Apple of Gold*.
[132] U.S. Declaration of Independence. A full transcript can be read at: https://www.archives.gov/founding-docs/declaration-transcript

People to alter or to abolish it."[133] In other words, when government of any kind violates the rights of the people, they are entitled to change that government regardless of the current constitutional arrangement.

The wording of the preamble also provides ample support for a more fundamental rights interpretation of American constitutionalism. Even its opening line "We the People" seems to be a ringing endorsement of the more democratic approach taken by the fundamental rights tradition. The preamble continues in this vein establishing that the goals of the new Constitution are to "provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty."[134] By placing these goals in the opening paragraph of the document that outlines the nation's constitutional arrangement, it is not hard to imagine that these should be major areas of policy concern and are more important than anything else that follows. As Brutus expresses in his fifth essay, the goals and ultimate meaning of the Constitution are "expressed in the preamble."[135]

As further proof that fundamental rights, and its revolutionary tendencies, were part and parcel of America's constitutional spirit is the creation of a new Constitution itself. The new Constitution openly supplanted the Articles of Confederation which had declared themselves to be a perpetual union requiring the assent of all states to be amended much less replaced.[136] The Constitution proposed by the constitutional convention ignored both of these provisions, and its authors blatantly argued that the inability of the Articles to secure the rights of the people provided a foundation for this replacement.[137]

---

[133] U.S. Declaration of Independence.
[134] U.S. Constitution. A full transcript is available to read at: https://constitutionus.com/
[135] Brutus, Essay 5.
[136] U.S. Articles of Confederation. A full transcript is available at: https://avalon.law.yale.edu/18th_century/artconf.asp
[137] See Madison's arguments [find right date] in the Notes on the Convention.

Perhaps the greatest argument in favor of the fundamental rights tradition is the introduction of the Bill of Rights by James Madison himself. This implies a constitutional repudiation of Hamilton's arguments in Federalist 84 and indicates that rights serve as the most significant goal of the Constitution. As Hamilton himself observes, it is not hard to understand the inclusion of a Bill of Rights as empowering the national government to do what it must to protect rights regardless of any constitutional constraints.[138]

However, the events surrounding the framing of the Constitution also lend credence to an institutionalist understanding of the document. In the years between the Declaration of Independence and the framing of the Constitution, the state governments crafted Constitutions that largely conformed with the principles of fundamental rights. As James Morone has observed, these state constitutions were designed to empower the people, foster social mobility, and government that was heavily concerned with virtue.[139] However, these fundamental rights infused state constitutions proved unstable, and in the eyes of many of the nation's founders proved inadequate to the task of good governance.[140] In his harsh critique of this system, James Madison makes clear that the root of the problem lay in, among other things, an overzealous populism, the frequent introduction or revision of law, and the flaws found in the general populace themselves.[141] The constitutional convention was called forth to repair these major defects. In the eyes of an institutionalist scholar, such as Harvey Mansfield, this serves as evidence of the idea that the Constitution is designed to repair the worst tendencies of the Declaration's fundamental rights position.[142]

---

[138] Alexander Hamilton, Federalist 84.
[139] James A. Morone, *The Democratic Wish: Popular Participation and the Limits of American Government* (New Haven: Yale University Press, 1998). Pg. 61.
[140] Morone, *The Democratic Wish.* Pg. 61.
[141] James Madison, Vices of the Political System of the United States, April 1787.
[142] Mansfield, *America's Constitutional Soul.* Pg. 10.

The technical nature of the Constitution also supports the institutionalist position. This is true even in the drafting of the Constitution. A quick read of Madison's convention notes reveals that very little time was spent considering the preamble, while the majority of convention delegates concentrated on the more particular provisions of the Constitution.[143] This implies that for those who framed the Constitution, institutions and legal provisions may have taken precedence over fundamental rights. Furthermore, the document itself is primarily concerned with the very technical details of government - the only mention of anything like fundamental rights is the preamble. This would make it easier for an advocate of an institutionalist interpretation to argue that the key to the Constitution is the body of that work, and that the preamble is merely unimportant rhetorical flourish.

Even if one were to concede the importance of the preamble, this does not prove the case for fundamental rights. The preamble merely states the aims of the American regime broadly as securing the common good. However, the common good is not necessarily the same thing as securing the fundamental rights of the people. An institutionalist easily could argue that the key to promoting the common good of the people is to take an institutionalist approach in conducting political affairs. So even the preamble is far from the straightforward endorsement of fundamental rights that it is often read as.

An institutionalist would also dispute the primacy of the Bill of Rights in understanding the Constitution. It is commonly known that for much of American history the Bill of Rights was not viewed as applying to the states. Instead of guaranteeing positive protections for the rights listed to all American citizens, the Bill of Rights merely prevented the federal government from

[143] Madison, Notes on the Constitutional Convention. And Clinton Rossiter, *1787: The Grand Convention* (New York: W.W. Norton Company, 1987).

actively infringing on these rights.[144] This more limited view of the Bill of Rights indicates that th document does not make rights central to the Constitution, and does no more than serve as an institutional limit to the powers of the national government.[145]

Though analysis such as this could go on and on, it is clear that there is no obvious or clear answer to which tradition is better supported by the text of the Constitution and the events that led to the drafting of the text. Moreover, the Constitution, and its creation, seems to actively support both arguments in various ways. This leads to the conclusion that just like slavery or federalism, the debate between institutionalism and fundamental right hearkens back to a contradiction in the Constitution itself.

Conclusion

Chief Justice John Roberts concludes his dissent in the *Obergefell v. Hodges* with a harsh condemnation not just of the majority opinion but its fundamental rights view of the Constitution: "If you are among the many Americans … who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it."[146] This statement makes clear that for Roberts, prioritizing fundamental rights is not only a legally weak concept; it is one that is unconstitutional. On the other hand, Kennedy states in the

[144] Felix Frankfurter, Memorandum on "Memorandum on 'Incorporation of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment," Harvard Law Review 78, no 4 (1965). and Zuckert, "On Constitutional Welfare Liberalism" pg. 287.
[145] This position becomes more difficulty to take in light of the 14th amendment, which even most institutionalist grant gives a much more central place to rights in the Constitution (see Zuckert, "Completing the Constitution"). Though many argue that the 14th amendment is not as radical as it at first seems (see Frankfurter "Memorandum on 'Incorporation of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment").
[146] *Obergefell v. Hodges*, 14-556, U.S. (2015).

opening paragraphs of the ruling that the court has a duty to secure "liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[147] He grounds this right not in any particular constitutional provision or law, but rather in a dualistic account of history and progress arguing that "the right to marry is fundamental as a matter of history and tradition, but rights come not just from ancient sources alone. They rise, too, from a better-informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[148] For Kennedy, this view of rights is fully sanctioned by the American constitutional system, especially in the fourteenth amendment but also in the original Constitution itself.[149]

As this paper shows, both of these sides are, to an extent, correct. The institutionalist and fundamental rights view both existed and flourished at the time of the American founding. In addition, they both exist in the document itself. Where does this leave contemporary constitutional theory and jurisprudence? First and foremost, this prevents scholars and judges from arguing that their beliefs are more representative of the "the American founding." Such arguments were doomed from the start. The likelihood of any large group agreeing on the biggest questions of politics is quite slim. When the group consists of that times leading political minds, then this tactic was doomed from the start.

This paper also shows participants in the contemporary discourse between intuitionalism and fundamental rights how nuanced and long lasting this debate has been. Perhaps by revealing the long tradition that is the feud between institutionalism and fundamental rights, scholars and

[147] *Obergefell v. Hodges*, 14-556, U.S. (2015).
[148] *Obergefell v. Hodges*, 14-556, U.S. (2015).
[149] *Obergefell v. Hodges*, 14-556, U.S. (2015) and Connor M. Ewing, "With Dignity and Justice for All: The Jurisprudence of Equal Dignity and the Partial Convergence of Liberty and Equality in American Constitutional Law," *International Journal of Constitutional Law* 16, n0.3 (2018).

judges will be able to find new approaches to their positions. Instead of digging through the musty documents of the American founding for proof that one side is right and the other wrong, constitutional theorists can focus on laying out the strongest normative arguments for their view and attempting to win over those who most shape politics.

Such a deep historical examination may also show the possibility of compromise between these two traditions. The example of great statesmen shows that, as several modern constitutional theorists acknowledge, our only options are not fundamental rights or institutionalism – there is a chartable middle ground. This middle ground has been best articulated and practiced by Abraham Lincoln. Lincoln argued that natural rights and the Declaration of Independence were fundamental to the Constitution. These rights set a goal for American politics that should "constantly be looked to, constantly labored for, and even though never perfectly attained, constantly approximated."[150] However, Lincoln did not take the fundamental rights arguments to its usual conclusion. Instead, he argued that even when natural right was blatantly violated by the institution of slavery, the Constitution could not be undermined to protect them.[151] Instead, Lincoln insisted that the only way to guarantee the rights of Black Americans was through a constitutional amendment. For Lincoln then, rights are fundamental, and it is important to frame politics in a discussion of rights, but these goals can only be achieved through institutionalist means. In our divided age then, it is important not just to remember that these traditions have long existed but that they were once combined to establish one of our nation's greatest developments and perhaps can again.

---

[150]Abraham Lincoln, Speech on the Dredd Scott Decision 1857. Available at https://www.nps.gov/common/uploads/teachers/lessonplans/House-Divided-Speech.pdf

[151]Abraham Lincoln, First Inaugural Address 1861. Available at https://liberalarts.utexas.edu/coretexts/_files/resources/texts/c/1861%20Lincoln%20First%20Inaugural.pdf

Work Cited

Adams, John. *The Political Writings of John Adams*. Edited by George W. Carey. Washington, D.C.: Regnery Pub., 2000.

Bailey, Jeremy D. *Thomas Jefferson and Executive Power*. Cambridge: Cambridge UP, 2007. Print.

Berns, Walter. "Freedom of the Press and the Alien and Sedition Laws: A Reappraisal." *The Supreme Court Review* 1970 (1970): 109–59.

Barber, Sotirios A., and Robert P George, eds. *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change*. Princeton, NJ: Princeton Univ. Press, 2001.

Barber, Sotirios A. *Welfare and the Constitution*. Princeton, NJ: Princeton University Press, 2005.

Burke, Edmund. *Select Works of Edmund Burke*. Edited by Francis Patrick S.J. Canavan. Vol. 2. Indianapolis: Liberty Fund, 1999.

Bonsteel Tachau, Mary K. "The Whiskey Rebellion in Kentucky: A Forgotten Episode of Civil Disobedience." *Journal of the Early Republic* 2, no. 3 (1982): 239–59.

Ceaser, James W. *Liberal Democracy and Political Science*. Baltimore: Johns Hopkins University Press, 1992.

Ceaser, James W. *Nature and History in American Political Development: A Debate*. Cambridge: Harvard Univ Press, 2008.

Ceaser, James W. *Reconstructing America the Symbol of America in Modern Thought*. New Haven, CT: Yale University Press, 1997.

Condorcet, Jean-Antoine-Nicolas de Caritat. *Condorcet: Political Writings*. Translated by Jean-Antoine-Nicolas de Caritat Condorcet, Steven Lukes, and Nadia Urbinati. Cambridge: Cambridge University Press, 2012.

Diamond, Martin, and William A. Schambra. *As Far as Republican Principles Will Admit.* Washington, DC: AEI Press, 1992.

Dworkin, Ronald. *Law's Empire*. Oxford: Hart Publishing, 1986.

Ewing, Connor M. "With Dignity and Justice for All: The Jurisprudence of Equal Dignity and the Partial Convergence of Liberty and Equality in American Constitutional Law." *International Journal of Constitutional Law* 16, no. 3 (2018): 753–75.

Ewing, Connor M. “Structure and Relationship in American Federalism: Foundations, Consequences, and ‘Basic Principles’ Revisited.” *Tulsa Law Review* 51, no. 3 (2016).

Federici, Michael P. *The Political Philosophy of Alexander Hamilton*. Baltimore: Johns Hopkins Univ. Press, 2012.

Frankfurter, Felix. “Memorandum on ‘Incorporation’ of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment.” *Harvard Law Review* 78, no. 4 (1965).

Graber, Mark A. *A New Introduction to American Constitutionalism*. New York: Oxford University Press, 2015.

Hamilton, Alexander. *The Works of Alexander Hamilton*, ed. Henry Cabot Lodge (Federal Edition) (New York: G.P. Putnam’s Sons, 1904). In 12 vols. 1/21/2017. http://oll.libertyfund.org/titles/1712

Hayward, Steven F. *Patriotism Is Not Enough: Harry Jaffa, Walter Berns, and the Arguments That Redefined American Conservatism*. New York: Encounter Books, 2018.

Holmes, Stephen, and Cass R. Sunstein. *The Cost of Rights: Why Liberty Depends on Taxes*. New York: W. W. Norton, 2000.

Jaffa, Harry V. *How to Think about the American Revolution*. Claremont, CA: The Claremont Institute, 2001.

Jaffa, Harry V. *Storm Over the Constitution*. Lanham, MD: Lexington Books, 1999.

Jacobsohn, Gary J. *Apple of Gold: Constitutionalism in Israel and the United States*. Princeton University Press, 2017.

Jacobsohn, Gary Jeffrey. *Constitutional Identity*. Cambridge, MA: Harvard University Press, 2010.

Jacobsohn, Gary J. *The Supreme Court and the Decline of Constitutional Aspiration*. Totowa, NJ: Rowman and Littlefield, 1986.

Jefferson, Thomas, *The Works of Thomas Jefferson*, Federal Edition (New York and London, G.P. Putnam’s Sons, 1904-5). 12 vols. 1/21/2017. http://oll.libertyfund.org/titles/1734

Jefferson, Thomas. *Notes on the State of Virginia*. Edited by Frank Shuffelton. New York, NY: Penguin Books, 1999.

Kleinerman, Benjamin A. *The Discretionary President: the Promise and Peril of Executive Power*. Lawrence: University Press of Kansas, 2009

Kirk, Russell. *The Roots of American Order*. Wilmington, De.: ISI Books, 2004.

Kohn, Richard H. “The Washington Administration's Decision to Crush the Whiskey Rebellion.” *The Journal of American History* 59, no. 3 (December 1972): 567–84.

Landy, Marc Karnis., and Sidney M. Milkis. *Presidential Greatness*. Lawrence: University Press of Kansas, 2000.

Madison, James, Alexander Hamilton, John Jay, and Isaac Kramnick. *The Federalist Papers.* Harmondsworth: Penguin, 1987. Print.

Mansfield, Harvey C. *Americas Constitutional Soul*. Baltimore: Johns Hopkins University Press, 1993.

McDonald, Forrest. *Novus Ordo Seclorum: The Intellectual Origins of the Constitution.* Lawrence: University Press of Kansas, 1987.

Mcwilliams, Wilson Carey. “Civil Disobedience and Contemporary Constitutionalism: The American Case.” *Comparative Politics* 1, no. 2 (1969): 211.

Morone, James A. *The Democratic Wish: Popular Participation and the Limits of American Government*. New Haven: Yale University Press, 1998.

Nicoletti, Cynthia. *Secession on Trial: The Treason Prosecution of Jefferson Davis*. Cambridge: Cambridge University Press, 2017.

Paine, Thomas. *Thomas Paine: Collected Writings*. Edited by Eric Foner. New York: The Library of America, 1995.

Pangle, Thomas L. *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke*. Chicago: University of Chicago, 1990.

Prakash, Saikrishna Bangalore. *Imperial From the Beginning: The Constitution of the Original Executive*. New Haven: Yale University Press, 2015.

Rossiter, Clinton. *1787: The Grand Convention*. New York: W.W. Norton & Company, 1987.

Rosenberg, Gerald N. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press, 2008.

Sheldon, Garrett Ward. *The Political Philosophy of James Madison*. Baltimore, MD: Johns Hopkins University Press, 2002.

Smelster, Marshall. “George Washington and the Alien and Sedation Acts.” *The American Historical Review* 59, no. 2 (January 1954): 322–34.

Storing, Herbert J., and Joseph M. Bessette. *Toward a More Perfect Union: Writings of Herbert J. Storing*. Washington, D.C: AEI Press, 1995.

Storing, Herbert J., and Dry, Murray. *The Anti-Federalist: Writings by the Opponents of the Constitution*. Chicago: Univ. of Chicago Press, 1985.

Sunstein, Cass R. *The Second Bill of Rights: FDRs Unfinished Revolution - and Why We Need It More Than Ever*. New York: BasicBooks, 2006.

Tulis, Jeffrey, and Stephen Macedo. *The Limits of Constitutional Democracy*. Princeton, NJ: Princeton University Press, 2010.

Turgot, Anne-Robert-Jacques. *Turgot on Progress, Sociology and Economics*. Translated by Ronald L. Meek. Cambridge: Cambridge University Press, 1973.

Tuveson, Ernest Lee. *Redeemer Nation the Idea of Americas Millennial Role*. Chicago: University of Chicago Press, 1980.

West, Thomas G. *The Political Theory of the American Founding: Natural Rights, Public Policy, and the Moral Conditions of Freedom*. Cambridge Un

Yoo, John. *Crisis and Command: A History of Executive Power from George Washington to the Present*. New York: Kaplan, 2011.

Zuckert, Michael. "Completing the Constitution: The Fourteenth Amendment and Constitutional Rights." *Publius: The Journal of Federalism* 22, no. 2 (1992).

Zuckert, Michael P. *The Natural Rights Republic: Studies In the Foundation of the American Political Tradition*. Notre Dame, IN: Univ. of Notre Dame Press, 2010.