

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

Faculty Scholarship

---

2004

# Executive Power Essentialism and Foreign Affairs

Martin Flaherty

*Fordham University School of Law*, [mflaherty17@yahoo.com](mailto:mflaherty17@yahoo.com)

Follow this and additional works at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship](http://ir.lawnet.fordham.edu/faculty_scholarship)



Part of the [Law Commons](#)

---

### Recommended Citation

Martin Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Michigan L. Rev. 545 (2004)

Available at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship/736](http://ir.lawnet.fordham.edu/faculty_scholarship/736)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## HISTORY "LITE" IN MODERN AMERICAN CONSTITUTIONALISM

*Martin S. Flaherty\**

Let experience, the least fallible guide of human opinions, be  
appealed to for an answer to these inquiries.

—*The Federalist* No. 6<sup>1</sup>

### INTRODUCTION

Americans love to invoke history, but not necessarily to learn it. Typical, perhaps transcendental, in this regard was Ronald Reagan, who gloried in blithely rendered historical misstatements.<sup>2</sup> What applies to

---

\* Associate Professor of Law, Fordham Law School. B.A. 1981, Princeton University; M.A. 1982, M. Phil. 1987, Yale University; J.D. 1988, Columbia Law School.

Earlier versions of this article were presented to the Fordham Faculty Works-in-Progress Colloquium and the New York University Legal History Colloquium. I would like to thank Bruce Ackerman, Richard Bernstein, Jon Butler, Chris Eisgruber, Jill Fisch, James Fleming, Robert Kaczorowski, James Kainen, Larry Kramer, William La Piana, Frank Michelman, Edmund S. Morgan, William Nelson, Liam O'Melinn, Russell Pearce, John Phillip Reid, Dan Richman, William Michael Treanor, Mark Tushnet, and Lloyd Weinreb for reading and commenting on earlier drafts. My thanks as well to Richard Epstein and Cass Sunstein for useful and constructive exchanges as they prepared their published responses. Finally, I would like to record my debt to Zain E. Hussain and Hwan-Hui Helen Lee for invaluable research assistance.

1. *The Federalist* No. 6, at 57 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. President Reagan, for example, once spoke of how the desegregation of America's military came about "in World War II . . . largely under the leadership of generals like MacArthur and Eisenhower.'" James D. Barber, *The Presidential Character: Predicting Performance in the White House* 495 (3d ed. 1985). Recounting one memorable scene, the President stated:

When the Japanese dropped the bomb on Pearl Harbor there was a Negro sailor whose total duties involved kitchen-type duties . . . . He cradled a machine gun in his arms, which is not an easy thing to do, and stood at the end of a pier blazing away at Japanese airplanes that were coming down and strafing him and that [segregation] was all changed.

Id. When an observant reporter pointed out that Truman had ordered the prohibition of the practice of segregation at least three years after the war had culminated, the President wistfully responded, "I remember the scene . . . . It was very powerful." Id.

This phenomenon is hardly confined either to President Reagan or to those who supported him. As one historian notes, "[W]e have had a series of prominent public figures, from Harry S Truman to Ronald Reagan, who have misread, distorted, or trivialized the national past for self-serving purposes or for the vindication of misguided policies, foreign and domestic." Michael Kammen, *Selvages and Biases: The Fabric of History in American Culture* 19 (1987); see also Ernest R. May, *"Lessons" of the Past: The Use and Misuse of History in American Foreign Policy* (1973).

American history likewise applies to the history of the American Constitution. In his landmark work about the Constitution in American culture, *A Machine That Would Go of Itself*, historian Michael Kammen persuasively argues that though “America is always talking about its Constitution,”<sup>3</sup> its “fulsome rhetoric of reverence [has been] more than offset by the reality of ignorance.”<sup>4</sup>

For better and for worse, a similar theme of allure and apathy characterizes the work of constitutional “professionals.” Lawyers, judges, and—the ultimate concern of this Article—legal academics regularly turn to history when talking about the Constitution, and not merely as a rhetorical trope.<sup>5</sup> This point obtains most strongly for originalists, for whom the use of history is dispositive in settling constitutional questions.<sup>6</sup> Yet some affinity for history, while not necessarily universal, cuts across various axes. It is apparent in works both recent<sup>7</sup> and classic.<sup>8</sup> It issues

---

3. Michael Kammen, *A Machine That Would Go Of Itself: The Constitution In American Culture* 3, 217–314 (1986).

4. *Id.* at 3. Kammen’s study concentrates on the perceptions of “ordinary” Americans, whom he identifies as “nonprofessionals” who do not practice law or teach constitutional law. *Id.* at xi. Kammen’s work does not make a sharp distinction between ignorance of the Constitution and ignorance of constitutional history, but instead views these two subjects as intertwined. See *id.* *passim*.

5. With regard to the bar, some of the more recent and lengthy—and more rigorous—historical treatments include the following: Brief of 250 American Historians as Amici Curiae in Support of Planned Parenthood of Southeastern Pennsylvania, *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791 (1992) (Nos. 91-744 and 91-902); Brief Amicus Curiae of Eric Foner, John H. Franklin, Louis R. Harlan, Stanley N. Katz, Leon F. Litwack, C. Vann Woodward, and Mary Frances Berry, *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989) (No. 87-107).

With regard to the bench, some more recent and lengthy—and self-evidently problematic—historical treatments include the following: *New York v. United States*, 112 S. Ct. 2408, 2417–23 (1992) (O’Connor, J.); *Lee v. Weisman*, 112 S. Ct. 2649, 2668–70 (Souter, J., concurring) (1992); *Harmelin v. Michigan*, 501 U.S. 957, 962–75 (1991) (Scalia, J.); *Gregory v. Ashcroft*, 501 U.S. 452, 456–60 (1991) (O’Connor, J.); *Dennis v. Higgins*, 498 U.S. 439, 452–58 (1991) (Kennedy, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 192–95 (1986) (White, J.); *id.* at 196–97 (Burger, C.J., concurring). For a cautionary antidote, see *New York v. United States* at 2444 n.3 (White, J., concurring in part and dissenting in part).

6. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 143–60 (1990).

7. See, e.g., Paul W. Kahn, *Legitimacy and History: Self-government in American Constitutional Theory* (1993).

8. See, e.g., Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

not only from the Right<sup>9</sup> but also from the Left.<sup>10</sup> It is even evident among theorists whose work is often seen as antithetical to originalism.<sup>11</sup>

Despite this propensity, or maybe because of it, constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers. Robert Bork's *The Tempting of America* is filled with authoritative historical conclusions yet cites scarcely any primary or, for that matter, secondary sources.<sup>12</sup> Paul Kahn, in a study entitled *Legitimacy and History*, boldly divides American constitutional thought into six successive "models of construction," but does so on the basis of few primary works for any given period and with scant reference to secondary literature.<sup>13</sup> Steven Calabresi and Saikrishna Prakash, relying on early state separation of powers clauses, confidently state that "a separate category of administrative power to be apportioned by the legislature did not exist in the Framers' world," without pausing to consider how the very constitutions they single out dramatically undercut their claim.<sup>14</sup> The il-

9. See, e.g., Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

10. See, e.g., Jesse H. Choper, *Judicial Review and the National Political Process* (1980); David A.J. Richards, *Foundations of American Constitutionalism* (1989); David A.J. Richards, *Toleration and the Constitution* (1986).

11. Even Ronald Dworkin, as steadfast a foe of originalism as exists, will occasionally make an historical assertion. See, e.g., Ronald Dworkin, *Law's Empire* 360 (1986) ("In fact the Fourteenth Amendment was proposed by lawmakers who thought they were not outlawing racially segregated education.").

12. See Bork, *supra* note 6. For a short and devastating critique on this score, see Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 *Yale L.J.* 1419, 1422–25 (1990) (reviewing Bork, *supra* note 6, arguing that Bork has "cast off the constraints of the judge without accepting the disciplines of the scholar").

13. Kahn, *supra* note 7, *passim*. Gordon S. Wood provides a telling methodological contrast in *The Radicalism of the American Revolution* (1992) [hereinafter Wood, *Radicalism*]. There, he divides American political culture between 1750 and 1850 into three general periods, but relies on hundreds of primary sources and dozens of secondary works to make the point. This is not to say that a theorist like Kahn must engage in the same rigorous research undertaken by a leading historian. Kahn's avowed project, however, is to derive a morphology of constitutional discourse over time based on a descriptive account of the development of American constitutional discourse. To the extent that his argument rests on history (or historiography), it would be more convincing if his methodology relied more heavily on intellectual history monographs at least.

For a discussion of basic methodological standards for making convincing historical assertions, see *infra* text accompanying notes 122–143.

14. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Law*, 104 *Yale L.J.* 541, 607 (1994). More specifically, Calabresi and Prakash quote the separation of powers clauses of the Virginia Constitution of 1776 and the Massachusetts Constitution of 1780 to conclude that, for the Framers, "[t]he Executive alone was empowered to execute all laws." *Id.*

With regard to Virginia, Calabresi and Prakash ignore a wealth of historical scholarship demonstrating that most of the state constitutions framed in 1776 and 1777 gave rhetorical support to the formalistic conception of separation of powers that the authors assert but in fact established governments that approached legislative supremacy largely at the expense of executive authority. As Gordon Wood notes, "[w]hat more than anything else makes the use of Montesquieu's maxim [that the legislative, executive, and

lustrations could go on.<sup>15</sup> The point of most (though not all) of them is not that the particular assertion may or may not be tenable. Rather, it is that habits of poorly supported generalization—which at times fall below even the standards of undergraduate history writing—pervade the work of many of the most rigorous theorists when they invoke the past to talk about the Constitution.<sup>16</sup>

---

judicial departments ought to be separate and distinct] in 1776 perplexing is the great discrepancy between the affirmations of the need to separate the several governmental departments and the actual political practice the state governments followed. It seems, as historians have noted, that Americans in 1776 gave only a verbal recognition to the concept of separation of powers in their Revolutionary constitutions, since they were apparently not concerned with a real division of departmental functions.” Gordon S. Wood, *The Creation of the American Republic 153–54* (1969) [hereinafter Wood, *Creation*]; see *id.* at 127–61; see also Willi P. Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 275* (1980) (arguing that James Madison could easily refute as irrelevant the charge that the Constitution failed to keep the three governmental powers separate and distinct).

The reliance of Calabresi and Prakash on the Massachusetts Constitution is similarly problematic. In fact, Massachusetts’s political practice fell short of its near absolute separation of powers clause in much the same way that Virginia fell short of its earlier, more cryptic version. The document, for example, provided for a “council, for advising the governor in the executive part of the government,” which would further assume the governor’s authority, and was chosen by the assembly. Mass. Const. of 1780, ch. II, sec. 3, arts. I–VII. More striking, the assembly also appointed what in a modern formalist conception would be a fair portion of the executive branch, including: “the secretary, treasurer, receiver-general, commissary-general, notaries public and naval officers.” *Id.* sec. 4, art. I. That said, the Massachusetts Constitution did reflect an enhancement of executive authority, in part as a reaction to the legislative excesses of constitutions like Virginia’s, though Calabresi and Prakash do not note this point. See Wood, *Creation*, *supra*, at 446–53. For a treatment that comes far closer to capturing the complexity and nature of Founding commitments in this area, see Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 138–53 (1994).

15. See, e.g., Dworkin, *supra* note 11, at 360 (arguing, on the basis of a single statement from the floor manager of the 1866 Civil Rights Act and the fact that the same Congress continued to segregate District of Columbia schools, that the Framers of the Fourteenth Amendment could not have intended abolition of segregated schools); Choper, *supra* note 10, at 244 (arguing, without relying on primary sources other than *The Federalist*, that “the assertion that federalism was meant to protect, or does in fact protect, individual constitutional freedoms . . . has no solid historical or logical basis”).

16. One reason for the lack of standards among many constitutional theorists is the difficulty of interdisciplinary exchange. As William E. Nelson has observed, lawyers and historians do not share a professional ethos. Lawyers, including legal academics, place a premium on making arguments. By contrast, historians emphasize explanation, context, and secondary works, as well as primary sources. See William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 Va. L. Rev. 1237 (1986).

From this divergence several practical differences flow. Where historians must sift through primary sources, lawyers need concern themselves with only minimal research, and then mostly in prepackaged reporters or databases. The classic article on how differently lawyers and historians approach the past is Alfred Kelly, *Clio and the Court*, 1965 Sup. Ct. Rev. 119, 155–58; cf. Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. Pitt. L. Rev. 349 (1989); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 Yale L. J. 1017 (1981); Charles Miller, *The Supreme Court and the Uses of History* (1969). Conversely, where the historical

While historical scholarship itself for a long time exacerbated these ahistorical habits, it now provides unprecedented opportunities for informing our constitutional present with our constitutional past. Such, at any rate, is the case with the Founding<sup>17</sup> and, no less important, the developments that led to it.<sup>18</sup> Earlier historians too readily looked abroad to England and the Continent to make sense of early American experience and in the process ignored or denigrated the distinctive constitutional achievements that this experience produced. Many theorists followed and still follow suit.<sup>19</sup> In the past two generations, however,

---

profession generally allows far more time for pursuing a project, its legal counterpart places a premium on speed and productivity. See Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 *Harv. L. Rev.* 926 (1990).

Legal academics, in short, generally lack the perspective, time, or knowledge of sources to pursue historical study well. As John Hart Ely wryly notes, "Now I know lawyers are a cocky lot: the fact that our profession brings us into contact with many disciplines often generates the delusion that we have mastered them all." John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 56 (1980). If the foregoing sampler is any indication, Ely's observation applies with special force to the use of history in constitutional discourse.

17. I employ the conventional labels when referring to periods and events relevant to early American constitutional history. Thus, the "Revolution" refers to the late eighteenth-century American struggle, both rhetorical and armed, against British claims of authority over the colonies; "Independence" refers to the successful American assertion of autonomy from Great Britain; "Critical Period," refers to the era between Independence and the framing of the Constitution; "Founding" refers to the efforts that culminated in the drafting and ratification of the Federal Constitution.

By contrast, I do not follow the usual practice in using "Founders" rather than "Framers." Strictly speaking, "Framers" applies only to the fifty-five men who participated in the Philadelphia Convention, which drafted the document. In historical terms, speaking of the "Framers" leaves out numerous individuals—John Adams and Thomas Jefferson to name two—who were critical to early American constitutional thinking. Cf. 1 *The Founders' Constitution* at xiii (Philip B. Kurland & Ralph Lerner eds., 1987). According to most theoretical accounts, moreover, the views that merit greater weight are not those of the Framers, who merely proposed a plan of government, but those who ratified that plan in state conventions. See, e.g., Charles Lofgren, *The Original Understanding of Original Intent?*, 5 *Const. Commentary* 77, 79–85 (1988) (arguing that the relevant intent for original intent analysis is ratifier intent). Finally, for the purposes of this Article, "early American" refers to the period starting with American resistance to British Parliamentary rule and concluding with the ratification of the Federal Constitution.

18. Where the history of the Founding itself "has not flourished in the last half century," the Revolution has long been the brooding omnipresence over much early American scholarship. Just as the Revolution has overshadowed the Founding, it has dominated study of the colonial period. As Joyce Appleby notes, "The generations of colonial life merged into a preparatory stage for the sequence of national events that began with the Revolution. And since the Revolution itself was treated as a precedent-shattering moment in world history, interest was always skewed toward the exceptional." Joyce Appleby, *A Different Kind of Independence: The Postwar Restructuring of the Historical Study of Early America*, 50 *Wm. & Mary Q.* 245, 246 (3rd ser. 1993).

19. Set forth most recently in his ongoing *We the People* project, Ackerman declares that "[w]hile our civic practice remains rooted in the distinctive patterns of the American past, sophisticated constitutional thought has increasingly elaborated the genius of American institutions with theories fabricated elsewhere—to the point where these rivals

numerous scholars have instead taken seriously the ideas that early American political thinkers espoused. A few of these have even attempted to do justice to the legal and constitutional facets of those ideas. Together, their work goes a long way toward the rediscovery of American constitutionalism as it existed before Independence, which in turn illuminates the "Critical Period" under the Articles of Confederation, which further elucidates the Founding itself.

The rediscovery of America's formative constitutional traditions promises a wealth of historical insights closer to home for any theorist inclined to look at the past. So far, that wealth has been only partially tapped. Theorists such as Richard Epstein, committed to at least one version of foundational rights, claim to look at the American past but see little more than John Locke. Other thinkers, including Cass Sunstein, Susanna Sherry, and other "neo-," "modern," or "civic" republicans, themselves committed to democratic discourse, actually acknowledge the historical complexity that current scholarship recounts.<sup>20</sup> Too many, however, effectively disregard those elements of early constitutional thought that fail to echo the polis of Athens or the republics of the

---

are more familiar than [America's own distinctive] framework." 1 Bruce Ackerman, *We the People: Foundations* 5-6 (1991) [hereinafter Ackerman, *We the People*].

These "theories fabricated elsewhere" broadly fall into two camps: one Anglophilic; the other, Anglo-German. One, which Ackerman calls "monist democracy," presumes that "[d]emocracy requires the grant of plenary lawmaking authority to the winners of the last general election," and features thinkers such as Woodrow Wilson, James Bradley Thayer, Oliver Wendell Holmes, Jr., and John Hart Ely. *Id.* at 7. In overt and subtle ways, these and other monist democrats turn for inspiration to "the brooding omnipresence [of] an idealized version of British parliamentary practice." *Id.* The other school, which Ackerman terms "rights foundationalism," posits that the American Constitution is "first and foremost" about the protection of fundamental rights. This school is represented by such diverse theorists as Ronald Dworkin, Richard Epstein, and Owen Fiss. On Ackerman's view, foundationalist thinkers draw on philosophers such as "Kant (via Rawls) and Locke (via Nozick)." *Id.* at 11.

What follows from this deep engagement with political thought developed in other nations, Ackerman argues, has been a cursory, almost embarrassed encounter with the constitutional past that emerged in the United States. Or, as Ackerman puts it, the problem is not

that modernist commentators disdain the use of selective quotations from the *Federalist* and other canonical sources. They simply do not use these sources to elaborate the distinctive political ideal that they contain. Instead, they cast the Founders as derivative social engineers, the makers of a better mousetrap from plans prepared elsewhere.

*Id.* at 36.

20. Some of the most prominent works of the "civic republican" school include: Frank I. Michelman, Foreword: Traces of Self-Government, 100 *Harv. L. Rev.* 4 (1986); Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 *Va. L. Rev.* 543 (1986); Cass R. Sunstein, Interest Groups in American Public Law, 38 *Stan. L. Rev.* 29 (1985) [hereinafter Sunstein, Interest Groups]; see generally, Kathryn Abrams, *Law's Republicanism*, 97 *Yale L.J.* 1591 (1988); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 *J. Am. Hist.* 11, 33-34 (1992).

Renaissance.<sup>21</sup> Somewhere in between, Bruce Ackerman offers an interpretive theory of the Founding that is hardly less intricate or provocative.

This Article explores the historiography of early American constitutionalism to suggest the insights that have yet to emerge fully from a serious engagement with America's own formative constitutional experience. Part II looks to earlier historical work to show that this current rediscovery was long in coming because historians themselves had been dominated by English models on the one hand, and by Continental models on the other. Part III explores the recent rediscovery of early American constitutionalism and the rich possibilities it presents for historically-minded theorists. It first recounts how this rediscovery proceeded, with special emphasis on material as yet ignored by modern constitutional thinkers, and then examines the main themes advanced by the resulting historical scholarship. Part IV begins with a discussion of the basic standards that should be used to measure the historical assertions made by constitutional theorists, and then applies these standards to a sampling of the efforts by several of the leading theorists working today. It continues by suggesting that modern constitutional theory itself has yet to make full use of the opportunity that recent historical scholarship presents because it retains the earlier historians' habit of looking elsewhere. Specifically, "neo-liberals" such as Richard Epstein overplay the early American commitment to rights, and "neo-republicans" such as Sunstein overemphasize the Founding commitment to civic virtue and political participation. Only Ackerman, the Part contends, attempts to reconstruct how the Founding generation reconciled various strands of constitutional thought in a historically credible fashion, though even his work falls short in certain respects. The Article concludes that any theory opting for reductive simplicity, especially for the sake of either democratic process or individual liberty, is likely to forfeit its claim to historical credibility, at least to the extent it purports to rest on the nation's nascent constitutional experience. If early American constitutional development reveals anything, it reveals that neither those who would base their theories preeminently on rights and autonomy, nor those who would ground their paradigms exclusively on self-government and democracy, can lay easy claim to the traditions that the Constitution itself embodies—try though they might.

## II. HISTORIES FABRICATED ELSEWHERE

For much of this century (and the last), few historians took early American constitutional thought seriously. In part for this reason, theorists like Edward Corwin often had to invent the historical wheel themselves.<sup>22</sup> This historiographical blind spot, in turn, stemmed in no small

---

21. See Rodgers, *supra* note 20.

22. A notable example in this respect is Corwin's rigorous historical critique—much of which is based on his own research—of Chief Justice Taft's assertions in *Myers v. United States*, 272 U.S. 52 (1926). See Edward S. Corwin, *The President's Removal Power Under the Constitution* (1927).



degree from the tendency of earlier historians to look outside the United States—in particular, either to England or the Continent—for models to explain how the nation became independent and established a successful central government. Understanding this tendency helps to explain why theorists had relatively little historical material to consult for so long. More importantly, such an understanding helps account for the parallel habit of constitutional theorists of looking abroad for their own models—a habit that is only now breaking down as it did for historians forty years ago.

#### A. *Rule (Onward) Britannia*

Colonial Whigs undertook the resistance that would lead to revolution. But it was a later set of Whigs, indebted to their scholarly counterparts in England, that would first record that process exhaustively. Nowhere did the views of this “Whig School” find more authoritative or eloquent expression than in the works of George Bancroft. With a doggedness that is the envy of any successor, Bancroft combined an encyclopedic command of available sources with a muscular narrative style to produce his epic ten-volume *History of the United States*, originally appearing between 1834 and 1874.<sup>23</sup> Although this work may have set new standards of rigor, its conclusions have not endured.

Yet one stance taken by the Whig historians persists, and that is Bancroft’s practice of overlooking the constitutional arguments made in the years surrounding the Revolution itself. This habit followed because the Whig conception of the struggle, unlike that of the original Whigs who participated in it, had little place for constitutional explanations. For Bancroft, a Yankee nationalist, Jacksonian Democrat, Navy Secretary under Polk, and minister to Britain and Prussia, the Revolution was a chapter in a much larger, all but predestined story. In that story, English settlers in the New World found themselves blessed to inhabit a land with enough empty space and with sufficient distance from Old World decadence to give full vent to the natural human yearning for liberty. On this account, revolutionary resistance took shape as a conflict between an American population dedicated to freedom on one side, and, on the other, a rigid monarch and venal Parliament bent on controlling the colonies, even at the price of imposing tyranny. In the Whig rendition, therefore, American complaints were not seen as specific constitutional grievances so much as a general outcry against a “war on human freedom.”<sup>24</sup>

Far from rehabilitating constitutional thought, the initial challenge to the Whigs only made matters worse. By the turn of the twentieth cen-

---

23. Bancroft condensed the work into six volumes in his final revisions. See George Bancroft, *History of the United States of America, From the Discovery of the Continent* (New York, D. Appleton & Co. 1886).

24. 3 *id.* at 482.

tury, Bancroft's romantic patriotism had produced scholarly reactions which, along with attendant claims of dispassionate, professional, and "scientific" methods of historical craft, set in motion the yin and yang of revisionism and counterrevisionism that have been the hallmark of the field ever since. Itself influenced by a Wilsonian-style Anglophilia prominent in American universities and in U.S. foreign policy prior to the First World War, the foremost response to the Whig view not surprisingly adopted an English perspective. Out of the ranks of this Imperial School came some of the foremost colonialists from the first half of this century, including Herbert Levi Osgood, George Louis Beer, Charles McLean Andrews, Leonard Larabee, and finally, Lawrence Henry Gipson.

Despite important differences, common themes pervaded the works of these men. Each rejected the simple tale of British tyranny oppressing America, instead emphasizing that imperial policies that led to the conflict were a reasonable response to the colonies' refusal to contribute an adequate share to the upkeep of the Empire. From this viewpoint, independence arose not because the British government was bent on imposing tyrannical control, but because geography inevitably led Americans to have different interests than their English counterparts an ocean away. Once France and Spain had been removed from North America as threats in 1763, little remained to prevent the colonists from going their own way. For each side, the point was not constitutional principle, but pragmatic self-interest.<sup>25</sup>

Ironically, Imperial historians could dismiss the importance of American constitutional arguments, not because they ignored them, but precisely because others in their ranks considered those arguments and mistakenly found them to be wanting. Matters seemed to begin promisingly enough with the pioneering efforts of Charles McIlwain. In his 1923 volume, *The American Revolution: A Constitutional Interpretation*, McIlwain argued that Parliament had not legislated outside the realm of England until well after the colonies had been settled, that subsequent imperial legislation constituted an innovation without required colonial consent, and that therefore the colonists had legitimate constitutional complaints about Parliamentary interference.<sup>26</sup> Shortly after McIlwain's thesis appeared, however, Robert Livingston Schuyler attempted not only to refute, but to demolish it. Citing one act of Parliament after another,

---

25. See Herbert L. Osgood, *The American Revolution*, 13 *Pol. Sci. Q.* 41 (1898); George L. Beer, *British Colonial Policy, 1754-1765* (1922); Charles M. Andrews, *The Colonial Background of the American Revolution: Four Essays in American Colonial History* 62-66 (1964); Leonard W. Larabee, *Royal Government in America* (1930); Lawrence H. Gipson, *The British Empire Before the American Revolution* (15 vols. 1958-70). Gipson, whose multi-volume opus is the most comprehensive of all the works cited, distilled the basic argument of the Imperial School. See Lawrence H. Gipson, *The American Revolution as an Aftermath of the Great War for the Empire, 1754-1763*, 65 *Pol. Sci. Q.* 86 (1950).

26. See Charles H. McIlwain, *The American Revolution: A Constitutional Interpretation* 186-98, *passim* (1966).

Schuyler's *Parliament and the British Empire* established that Parliament in fact had legislated for the dominions outside England since at least the fourteenth century.<sup>27</sup> In short order, the same scholarly community that had cheered McIlwain's Pulitzer Prize winning conclusions turned away from his thesis in embarrassment.<sup>28</sup> That said, not all historians felt compelled to take sides. Andrew C. McLaughlin, for one, sagely implied that the very disagreement between "[s]cholars of unquestioned skill and learning" over rival American and British claims indicated that neither side could claim "indubitable legal correctness."<sup>29</sup> In the main, however, the Imperial School had apparently confirmed that whether sincere or disingenuous, colonial arguments that the Sugar Act, the Stamp Act, or the Townshend duties amounted to constitutional violations were simply wrong, and that the causes for the Revolution lay outside the arena of legitimate constitutional quarrel.

### B. *The Continental Divide*

With the Progressives, the fate of constitutional scholarship hit bottom. It also became the victim of approaches derived not from English Whigs, but from German Marxists and "scientific" historians.<sup>30</sup> For the Progressives, American constitutional claims were more than erroneous or even irrelevant. They were deceitful. This conclusion logically followed from Progressive premises. Whereas the Imperial historians rejected the Whig view by looking outward and emphasizing policy and administration, the Progressives responded by looking inward with a view towards economics and social division. In this emphasis, Progressive historians reflected their contemporary political namesakes.<sup>31</sup>

Following up pioneering studies by Charles Kendall Adams, Charles H. Lincoln, Carl Becker, and not least himself,<sup>32</sup> Arthur M. Schlesinger,

27. See Robert L. Schuyler, *Parliament and the British Empire: Some Constitutional Controversies Concerning Imperial Legislative Jurisdiction* 1-39 (1963).

28. For an initially favorable response to McIlwain, see G.B. Adams, Book Review, 33 *Yale L.J.* 567, 568 (1924). For a representative assessment of McIlwain in light of Schuyler's work, see Julius Goebel, Jr., Book Review, 30 *Colum. L. Rev.* 273, 273 (1930). For an overall account of the "Schuyler/McIlwain" debate, see Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 *U. Pa. L. Rev.* 1157, 1158-62 (1976); Martin S. Flaherty, Note, *The Empire Strikes Back: Annesley v. Sherlock and the Triumph of Imperial Parliamentary Supremacy*, 87 *Colum. L. Rev.*, 593, 594-96 (1987); Liam S. O'Melinn, Note, *The American Revolution and Constitutionalism in the Seventeenth-Century West Indies*, 95 *Colum. L. Rev.* 104, 105-14 (1995).

29. Andrew C. McLaughlin, *A Constitutional History of the United States* 82 (1935).

30. See Kammen, *supra* note 3, at 114-15.

31. For a general account, see Richard Hofstadter, *The Progressive Historians: Turner, Beard, Parrington* (1968).

32. See Carl L. Becker, *The History of the Political Parties in the Province of New York, 1760-1776* (1909); Charles H. Lincoln, *The Revolutionary Movement in Pennsylvania, 1760-1776* (1968); Arthur M. Schlesinger, *The Colonial Merchants and the American Revolution, 1763-1776* (1957); Charles K. Adams, *Some Neglected Aspects of the Revolutionary War*, 82 *The Atlantic Monthly*, 174-89 (1898).

Sr. rendered the blueprint on which the Progressives would build in an article entitled "The American Revolution Reconsidered."<sup>33</sup> Schlesinger contended that the colonies themselves were divided into commercial and slaveowning aristocracies along the seaboard, and democratic elements in the cities and the interior; the aristocratic classes, he asserted, opposed Parliamentary interference on economic grounds, but this very opposition gave yeomen and mechanics the opportunity and rhetoric to press for more radical democratic reforms at the expense of both the imperial and domestic ruling classes. Not long after, J. Franklin Jameson provided a comprehensive version of this picture in *The American Revolution Considered As A Social Movement*.<sup>34</sup> Charles Beard's already pervasive view that the Federal Convention codified a Thermidorian victory of the propertied classes over revolutionary radicalism seemingly confirmed the notion that the Progressive approach could account for the entire era.<sup>35</sup>

Accordingly, serious concern for the actual constitutional arguments that Americans had employed all but vanished. Schlesinger himself sounded the theme in claiming that far from being a great forensic controversy over abstract governmental rights, aristocratic resistance to British policy was "contemptuous, if not fearful, of disputes upon question[s] of abstract right[s]."<sup>36</sup> Subsequent studies by Becker and Randolph G. Adams would go further in suggesting that American constitutional arguments shifted to suit American economic needs.<sup>37</sup> No other plausible explanation seemed to account for claims that Parliament had no authority to levy an "internal" tax like the Stamp Act, only later to oppose the Townshend duties by denying Parliament any authority to tax at all, only at last to oppose the Boston Port Act with the argument that Parliament lacked even the authority to legislate. Further stops on the road to skepticism came in the years leading to World War II with John C. Miller's *Sam Adams: Pioneer in Propaganda* and Philip Davidson's *Propaganda and the American Revolution*.<sup>38</sup> As the titles implied, these works treated patriot rhetoric as a device to manipulate public opinion in the service of deeper economic motives. This assessment accorded with the times, as the Great Depression spawned totalitarian regimes that seemed to have perfected propaganda as just this type of device. From the viewpoint of historical plausibility, the thesis more importantly dovetailed with the Progressive

---

33. See Arthur M. Schlesinger, *The American Revolution Reconsidered*, 34 *Pol. Sci. Q.* 61 (1919).

34. See J. Franklin Jameson, *The American Revolution Considered as a Social Movement* (1973).

35. See Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1986).

36. Schlesinger, *supra* note 33, at 66-71.

37. See Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (1958); Randolph G. Adams, *The Political Ideas of the American Revolution* (1958).

38. See Philip Davidson, *Propaganda and the American Revolution, 1763-1783* (1941); John C. Miller, *Sam Adams: Pioneer in Propaganda* (1960).

tale of domestic aristocrats resisting Britain for economic reasons, only to see the fight co-opted by democratic radicals who had economic scores of their own to settle. Prophets shunned in their own land at least have the comfort of being ahead of their time. The triumph of the Progressive conception robbed the patriots' ghosts of even this solace.

The fortunes of American constitutionalism in many ways returned to square one with the ascent of a new kind of social history in the aftermath of the Second World War. Here inspiration, in part, also came from Germany, in the form of Max Weber's *Protestant Ethic and the Spirit of Capitalism*,<sup>39</sup> and, in part, from England through the work of such Cambridge scholars as Peter Laslett and Quentin Skinner.<sup>40</sup> Mostly, though, influential approaches issued from the French *Annales* School, in large part consolidated by Fernand Braudel.<sup>41</sup> In Europe, these strategies turned to social history as nothing less than a means for "comprehend[ing] past society in its totality,"<sup>42</sup> especially the relationship of environment to economic development, family life, and everyday existence. In America, these developments prompted historians to view early America as a society, or societies, to be explained for its own sake rather than as a prelude to independence. As Joyce Appleby recently observed, "early American historians of the last generation have attached themselves to a European frame of reference that, perversely, has had a liberating effect on their scholarship."<sup>43</sup>

What resulted is the return of American constitutional thought to the margins, amidst an exploration of social history far richer than anything the Progressives could have imagined. Local studies by scholars like Philip Greven and Kenneth Lockridge still stand as early landmarks reflecting new concerns for comprehensive social study.<sup>44</sup> Such historians as Gary Nash, Winthrop Jordan, Peter Wood, and Francis Jennings, a number of whom also employed new and imaginative techniques, likewise attempted to recapture the experiences of African-Americans and

---

39. Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Talcott Parsons trans., 1958).

40. See Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 *Hist. & Theory* 3 (1969). See generally, Appleby, *supra* note 18, at 248–49, 261 (discussing the influence of scholars such as Weber and Skinner in examining history through social structures).

41. The name derives from the journal, *Annales: Economies, Sociétés, Civilizations*, which highlighted the group's work. For an account of the *Annales* school, see Traian Stoianovich, *French Historical Method: The Annales Paradigm* (1976).

42. Appleby, *supra* note 18, at 248.

43. *Id.* at 245.

44. See Philip J. Greven, Jr., *Four Generations: Population, Land, and Family in Colonial Andover, Massachusetts* (1970); Kenneth A. Lockridge, *A New England Town, the First Hundred Years: Dedham, Massachusetts, 1636–1736* (1970); see generally John M. Murrin, *Review Essay*, 11 *Hist. & Theory* 226 (1972) (reviewing Greven and Lockridge, among others).

Native Americans.<sup>45</sup> More recently still, Carol Karlsen, Nancy Cott, and Laurel Thatcher Ulrich have done the same for women.<sup>46</sup> This new mainstream may indeed be "liberating" for early American history in general. But it is not hard to see how a mainstream that places a premium on social history in the first instance, and minimizes the importance of the Revolution in the second, at best returns the constitutional commitments of American patriots to a state of salutary neglect. A number of historians, moreover, worked to insure that this situation did not remain "at best." New Left scholars like Jesse Lemisch and Gary Nash merged older Progressive stances with *Annales* School approaches to argue that the driving force behind the commitment to self-government came not only from the ideas of the elite but from the concerns of sailors, artisans, the urban poor, and the otherwise "inarticulate" as well.<sup>47</sup>

### III. REDISCOVERING AMERICAN CONSTITUTIONALISM

Whatever else prompts many constitutional theorists to fumble the history of the Founding, the lack of historical scholarship is no longer one of them. At least such is the case with regard to the origins of American constitutionalism.<sup>48</sup> For the past two generations, historians have produced studies of imagination and rigor that have rediscovered first the ideological and then the legal world in which early American constitutionalism emerged. The result is an immense body of work that provides theorists an unprecedented opportunity to recapture for themselves the experience and ideas present at the creation of our constitutional

---

45. See Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (1975); Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550–1812* (1977); Gary B. Nash, *Red, White, and Black: The Peoples of Early America* (1974); Peter H. Wood, *Black Majority: Negroes in Colonial South Carolina from 1670 through the Stono Rebellion* (1974).

46. See Carol F. Karlsen, *The Devil in the Shape of a Woman: Witchcraft in Colonial New England* (1987); Nancy F. Cott, *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780–1835* (1977); Laurel T. Ulrich, *A Midwife's Tale: The Life of Martha Ballard, Based on Her Diary, 1785–1812* (1990).

47. See Jesse Lemisch, *The American Revolution Seen from the Bottom Up*, in *Towards a New Past: Dissenting Essays in American History* 3 (Barton J. Bernstein ed., 1968); Jesse Lemisch, *Jack Tar in the Streets: Merchant Seamen in the Politics of Revolutionary America*, 25 *Wm. & Mary Q.* 371 (3rd ser. 1968); Gary B. Nash, *Social Change and the Growth of Prerevolutionary Urban Radicalism*, in *The American Revolution: Explorations in the History of American Radicalism* 3 (Alfred F. Young ed., 1976).

48. Though beyond the scope of this Article, another candidate in this regard is work on the Civil War and Reconstruction. A select but by no means exhaustive list of important studies includes: Chester J. Antieau, *The Original Understanding of the Fourteenth Amendment* (1981); Michael K. Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986); Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (1988); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 *N.Y.U. L. Rev.* 863 (1986); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988).

order. Coming to grips with this opportunity first requires some idea of how it came about, especially the critical yet undervalued role played by scholarship on the Revolution. Appreciating this opportunity likewise requires considering at least the main works and themes this scholarly renaissance has produced.

#### A. *The Constitutional Origins of American Independence*

Before American constitutional thought could be taken seriously, American thought in general had to be taken seriously. And before that could happen, American thought in general simply had to be taken into account. One of the first works to attempt this claimed to do it all. In *The Liberal Tradition in America*, Louis Hartz reduced the American society—and with it both the Revolution and the Constitution—to a tale of unique liberal consensus grounded in the political philosophy of John Locke.<sup>49</sup> Perfectly pitched for Eisenhower's America, Hartz's message was that "Locke dominates American political thought as no thinker dominates the political thought of a nation."<sup>50</sup> For Hartz, Lockean thought meant a system that enshrined individual rights, laid the groundwork for capitalism, and left a legacy of moderate political discourse. On this view, the Revolution became a happy anomaly and the Constitution a blueprint for a stable liberal democracy. The Revolution and Constitution also became symbols of a general American exceptionalism against the backdrop of a Europe historically plagued by royalism and radicalism. That American liberalism rested on the shoulders of an English philosopher was less a contradiction than a paradox, since it was America's nonfeudal past that permitted it to embrace Locke more fully than any other nation. In that embrace, Locke became American.

Hartz's liberal account, however, proved to be too grand an explanation based upon too little investigation. In short order the vision of America as an applied version of the *Two Treatises of Government*<sup>51</sup> fell victim to exacting scholarly criticism by specialists in early American history. Too seldom noted in this regard is *The Stamp Act Crisis: Prologue to Revolution*, by Edmund S. and Helen M. Morgan.<sup>52</sup> This work would have signaled a new tack had it done nothing more than provide a detailed survey of the principal American claims against Parliament as expressed in speeches, pamphlets, resolutions, and newspaper articles.<sup>53</sup> But *Stamp Act*

---

49. See Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (1955).

50. *Id.* at 140.

51. John Locke, *Two Treatises of Government* (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

52. See Edmund S. Morgan & Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution* (1953).

53. Edmund Morgan underscored the importance of reclaiming the colonists' position by editing a selection of the principal sources. See *Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764–1766* (Edmund S. Morgan ed., 1959).

*Crisis* did more. The Morgans examined the full range of colonial objections—economic, legal, and constitutional. As part of this endeavor they also challenged the Imperial School's view that the Grenville ministry, which imposed the Stamp Act on the colonies, had given the colonies a genuine opportunity to vote financial contributions to the Empire, and its corollary—that the American failure to do so represented mere tightfistedness.<sup>54</sup>

Most importantly, *Stamp Act Crisis* closely scrutinized the American constitutional case that Parliament lacked the authority to tax the colonies. In accomplishing this, the Morgans refuted the notion that Americans had objected merely to "internal" taxes, only to reverse their position the moment the Townshend duties imposed "external" taxes. Rather, they contended that the colonists adopted a principled position that would remain consistent throughout the Anglo-American controversy. Nor, in contrast to Hartz, did the Morgans jettison Progressive concerns. *Stamp Act Crisis* took pains to demonstrate the complex interplay between the leaders of American resistance and the crowds that prevented the Stamp Act from being enforced, an interplay producing a shared concern with Parliament's constitutional encroachments. In this way, their volume at once declined to write the less well-to-do out of the story entirely and anticipated New Left calls to examine the motivations of just these groups. Taken together, the lessons of the Stamp Act controversy promised a radically new approach to the Anglo-American crisis in general. The "Prologue to Revolution" thus promised also to serve as a prologue to scholarship.

Making good on that promise in the first instance fell to Bernard Bailyn. Bailyn happened into this task by serving as the editor of *Pamphlets of the American Revolution*,<sup>55</sup> a projected multi-volume collection that has yet to go past the first volume, but that required Bailyn to immerse himself in the massive polemical literature that the American opposition produced. Nor was he alone, for what here appears as happenstance was in fact part of a larger trend. Apart from the Morgans, other scholars were also turning to the pamphlets of the day with fresh eyes. In particular, Caroline Robbins had already immersed herself in the immense polemical literature produced by a marginal yet persistent English opposition to the eighteenth-century Parliament. Rather than a collection, her efforts yielded the important monograph *The Eighteenth-Century Commonwealthman*.<sup>56</sup> The significance of the work lay not in any thesis Robbins advanced; it lay instead in the sheer vastness of her subject, one she set out in encyclopedic fashion. Her further implication, that the fervent writings of men like Robert Molesworth, John Trenchard,

---

54. For an example of the Imperial School, see, e.g., Andrews, *supra* note 25, at 133–41.

55. See 1 *Pamphlets of the American Revolution*, 1750–1765 (Bernard Bailyn ed., 1965).

56. See Caroline Robbins, *The Eighteenth-Century Commonwealthman* (1959).



Thomas Gordon, and Lord Bolingbroke somehow mattered, was not lost on Bailyn.

Bailyn transformed his own expertise into more pointed interpretation. The result was the seminal *Ideological Origins of the American Revolution*.<sup>57</sup> This famous volume is not three paragraphs old before it commits the ritual sacrifice of its forebears, declaring that “the American Revolution was above all else an ideological, constitutional, political struggle and not primarily a controversy between social groups.”<sup>58</sup> Principles mattered, and it was Parliament’s violation of those principles which the Americans held dear that prompted their eventual rebellion. The precepts that mattered most derived from nearly all the sources Americans could get their hands on, running the full range of “Enlightenment abstractions and common law precedents, covenant theology, and classical analogy—Locke and Abraham, Brutus and Coke.”<sup>59</sup> The harmonizing force for these voices, the “framework” within which they could all be “brought together into a comprehensive theory,” was the very same Commonwealth thought salvaged by Robbins.<sup>60</sup> Viewed through this medium, the regulations that Parliament sought to impose after 1763 took on a sinister spin. In the logic of the Commonwealth ideology, proposals for an American episcopate, perceived constitutional violations such as the Stamp Act, royal opposition to colonial proposals giving American judges life tenure, the suppression of John Wilkes, and the landing of British troops in Boston, all pointed inexorably to a conspiracy against English liberty mounted by a venal ministry. It was to prevent enslavement to this corrupt junto that more than any other reason led the Americans to take up arms.

In all of this, constitutional arguments at last play a role, but only a subsidiary and ambiguous one. For Bailyn it matters that the colonists believed certain Parliamentary measures exceeded limits on its authority and violated guarantees of colonial rights based upon constraints higher than any Act of Parliament itself. Yet these beliefs mattered in the same way that worry about an American episcopate mattered. They counted not so much because they could have prompted resistance, but because they served as evidence of a “deliberate assault of power upon liberty.”<sup>61</sup> Why Bailyn treats constitutional principles this way is not hard to guess. *Ideological Origins* never deals with the issue of how sound American constitutional arguments were. It does, to be sure, describe measures such as the Stamp Act as “unconstitutional taxing.” Approving references to certain historians who did express views on the matter, however, suggest that Bailyn did not find much reason to challenge the conclusion of the Impe-

---

57. See Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967).

58. *Id.* at vi.

59. *Id.* at 54.

60. *Id.*

61. *Id.* at 117.

rial School that the colonists were simply wrong on the law.<sup>62</sup> The preface to the "silver anniversary" edition of *Ideological Origins* makes this suggestion more strongly. In this update, Bailyn states that the revolutionaries concluded that the preservation of their freedom required "the destruction of the political and constitutional system that had hitherto governed them."<sup>63</sup> This statement does not easily square with the view that the colonists made a plausible constitutional case. Instead it implies that the colonists put forth claims that were legally dubious, that they lost on the merits, and that they had no choice but to free themselves of the settled constitutional framework. Yet implication does not amount to a considered argument, despite the conclusions that scholars commonly attribute to Bailyn's work. *Ideological Origins* can be read for the proposition that what the colonists perceived to be constitutional violations were no more than that—their own perceptions. However, nothing in the book forecloses the finding that the American and British conceptions of the constitution, each of them tenable, simply diverged.

The same goes for Gordon S. Wood's magisterial *Creation of the American Republic*.<sup>64</sup> In part this is because *Creation* is chiefly a study of the Critical Period and Founding rather than the Revolution. In the main it picks up just where *Ideological Origins* leaves off, examining how American ideology after 1776 shaped the Federal Constitution. From here *Creation* makes its central point: The newly independent American citizenry experimented with radically republican state constitutions, only to reject the conventional understandings on which they were based and to invent "a new science of politics" that culminated in the Federal Constitution.<sup>65</sup> This claim, to say nothing of Wood's encyclopedic research, has greatly influenced how historians have approached the period ever since. This is not to say that many of the book's assertions have gone unchallenged.<sup>66</sup> Nor has the book garnered a monopoly. In particular, Forrest McDonald, whose earlier work did much to clear the way for ideologically minded historians, offers a significantly less tidy account of ideological development in his important *Novus Ordo Seclorum*.<sup>67</sup> No one, however,

---

62. Id. at 94–143.

63. Bernard Bailyn, *The Ideological Origins of the American Revolution* vii (enlarged ed. 1992) (1967).

64. See Wood, *Creation*, supra note 14.

65. See supra text accompanying notes 23–31, and infra text accompanying notes 102–114.

66. For a critique of *Creation* from a number of perspectives, see generally Forum: *The Creation of the American Republic, 1776–1787: A Symposium of Views and Reviews*, 44 *Wm. & Mary Q.* 549 (3rd ser. 1987).

67. See Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (1985).

has seriously challenged the essentials of *Creation's* central claim;<sup>68</sup> nor has anyone removed *Creation* from its preeminent place in the field.<sup>69</sup>

Despite its focus, or perhaps because of it, Wood's project demonstrated the debt that study of the Constitution's origins owed to the rediscovery of Revolutionary thought. For one immediate yet symbolic thing, Wood's work began as a follow-up study to the work of Bailyn, who served as Wood's dissertation advisor. More importantly, Wood's work—and for that matter, McDonald's—proceeds on the premise that the ideas underlying the Constitution cannot be understood without also understanding the constitutional ideas that came before. *Creation* therefore commences with a background treatment of the political thought that led to the Revolution.<sup>70</sup> There Wood generally follows his mentor; while noting that the colonists perceived constitutional violations, he generally fails to assess the worth of those claims.<sup>71</sup> To do this would have required Wood, or Bailyn, not only to resurrect the colonists' ideology, but to reconstruct contemporary constitutional law as well. This task by its nature requires not only considerable research, but legal training as well. Thus, it would fall to others.

Just as it was doing so, one further landmark work of ideological history appeared. This was *The Machiavellian Moment* by J.G.A. Pocock.<sup>72</sup> Pocock's work stands alongside the studies of Bailyn and Wood insofar as it, too, takes the ideas of the revolutionaries and their constitution-making successors seriously. But unlike that of Bailyn and Wood, Pocock's orientation had less to do with rejecting the Progressives or challenging Hartz than with seeking to examine the language of politics as "a social construction of reality that determines how men and women interpret events, assign value, and decide to act."<sup>73</sup> In this Pocock looked to Europe, specifically to those Cambridge scholars who were attempting to uncover deep societal structures generally.<sup>74</sup>

This commitment led Pocock to make central a particular body of thought that Bailyn and Wood had portrayed as simply important. For Pocock, American revolutionary thought in particular, and early Ameri-

---

68. McDonald, who is quick to point out his disagreements with Wood, see *id.* at 67 n.25, nonetheless agrees that the Constitutional Convention in large part arose as a response to perceived excesses of the state governments and that it produced a document reflecting a fundamental departure in political thought. See *id.* at 143–83.

69. See Richard B. Bernstein, *Charting the Bicentennial*, 87 *Colum. L. Rev.* 1565, 1594–97 (1987) (hailing Wood's *Creation* as "the most influential single work of historical scholarship on the Founding Period to appear in the past two decades").

70. See Wood, *Creation*, *supra* note 14, at 3–45. So, too, does McDonald. See McDonald, *supra* note 67, at 1–142.

71. See Wood, *Creation*, *supra* note 14, at 10–45. Wood does, however, suggest that American views of the English constitution were idiosyncratic. See *id.* at 13–15.

72. See J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975).

73. Appleby, *supra* note 18, at 263.

74. See *id.* at 247–48, 261.

can ideas in general, were "country"—or as the term was later recast, "republican." By this Pocock meant that early Americans spoke a conceptual language in which individuals gained meaning as citizens committed to the common enterprise of self-government. Much of *The Machiavellian Moment* traces the pedigree of this intellectual heritage through the English political thought that flourished during the Commonwealth period of the seventeenth century to Niccolò Machiavelli's rediscovery of the classical Greek polis in Renaissance Italy. In England, this republican or "country" ideology did constant battle with the "court" ideology usually advocated by those who controlled the central apparatus of government. But in America nearly all was "country" thought.<sup>75</sup> Thus, when various "court" measures like the Sugar and Stamp Acts issued forth, American colonists inevitably assessed and opposed them on the basis of their republican understandings.<sup>76</sup>

As Daniel Rodgers has explained, the republican model put forth—by Pocock, in particular—met many scholarly needs and gained swift ascendancy.<sup>77</sup> But it also created its own problems. Since most historians ultimately conceded that America eventually became the land of liberalism that Hartz said it was, Pocock's republicanism spawned an increasingly "acrid" debate as to when and on what level of society the transformation from republicanism to liberalism occurred.<sup>78</sup> Despite this challenge, or perhaps because of it, Pocock's republicanism became the historical model of choice for legal academics arguing their own points with reference to early America.<sup>79</sup>

With respect to the arguments that patriots actually made, however, the republican model left out a good deal. Much of what was left out was clear from the start, such as religion and culture generally.<sup>80</sup> Much was only becoming clear, namely the law. Central in this latter category was the work of historians who were often located down the same hall from

75. See Pocock, *supra* note 72, at 525 (stating that "[t]here was no American Court").

76. See *id.* at 506–52.

77. See Rodgers, *supra* note 20, at 11–38.

78. See Rodgers, *supra* note 20, at 33. See generally Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* (1992); Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 *Wm. & Mary Q.* 334 (3rd ser. 1982) (discussing the clash of current scholarly views regarding the place of republicanism in early America); Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 *Wm. & Mary Q.* 49 (3rd ser. 1972) (discussing the evolution of a dominant view of the role of republicanism in early American history).

79. See, e.g., Michelman, *supra* note 20, at 17–55; Sherry, *supra* note 20, at 550–62, 574–79; Sunstein, *Interest Groups*, *supra* note 20, at 30 n.7; see generally Abrams, *supra* note 20 (criticizing the use that legal scholars have made of historical research on republicanism); Rodgers, *supra* note 20, at 33–34.

80. In Rodgers's phrase, the republican model "squeezed out massive domains of culture." Rodgers, *supra* note 20, at 17. One stunning omission was religion, the point of Edmund S. Morgan's famous essay, *The Puritan Ethic and the American Revolution*, 24 *Wm. & Mary Q.* 3 (3rd ser. 1967).

the constitutional theorists who embraced republicanism. Among those still too often neglected in this regard are Julius Goebel, Thomas C. Grey, Barbara Black, and John Phillip Reid. The legal backgrounds of these historians set them apart from those historians associated with the Imperial School who (except for the Morgans) had last examined constitutional questions. Many of those earlier scholars, including Charles H. McIlwain, Robert Livingston Schuyler, and Andrew C. McLaughlin, were professors of government or history.<sup>81</sup> The legal historians would also set themselves apart from their predecessors in another way. Whereas the earlier group generally saw American constitutional claims as dubious, the more the later group learned, the more it disagreed. Their conclusions, however, usually appeared in the backwaters of legal publications. It would take time before they would find their way into the historical mainstream.<sup>82</sup>

Reexamining American constitutional claims first meant rehabilitating them. Doing this, in turn, required culling the "touch of rightness" in McIlwain's original thesis. This phrase comes from Barbara Black's important article, "The Constitution of Empire: The Case for the Colonists."<sup>83</sup> Black's essay refuted the seemingly irrefutable notion that Schuyler's citation of medieval precedents in which Parliament bound dependencies outside the realm belied McIlwain's assertion that Parliament never legislated for the dependencies before the colonies were settled. Black countered with the critical point that Parliament in the Middle Ages made laws as the King's Council rather than as a representative body.<sup>84</sup> This conciliar model had only begun to change to a representative one by the time the colonial settlement took place. Schuyler consequently attributed the acts of Parliament, the royal council, to its nominal but not functional successor, Parliament, the legislature. "Constitution of Empire" did much to repeal Schuyler as the last word, and to revivify McIlwain's main contention. When the colonists first left England, the only imperial authority over them that was beyond question lay with the King and his Council. American patriots were not necessarily "wrong on the law" after all.<sup>85</sup>

But this did not mean that they were right, either. Parliament, perhaps, could not have established imperial authority as a legislature when English settlers began their conquest of the New World. On the eve of the Revolution, however, the English constitutional world had changed. The twin turning points of the Glorious Revolution of 1688 and the Han-

---

81. See *supra* text accompanying notes 26–29 (discussing views of McIlwain, Schuyler, and McLaughlin).

82. For a thoughtful survey, see Jack P. Greene, *From the Perspective of Law: Context and Legitimacy in the Origins of the American Revolution*, 85 *S. Atlantic Q.* 56 (1986).

83. See Black, *supra* note 28.

84. See *id.* at 1171.

85. See *id.* at 1170–72.

overian Succession of 1714<sup>86</sup> signalled that Parliament, at least domestically, had made the shift from a subordinate advisory body to a dominant legislative one.<sup>87</sup> For the dependencies, this shift could have produced one of two general corollaries: either Parliament would fill the vacuum left by the retreating monarchy and simply replace the crown as the sovereign overseas policymaker, or it would follow the constitutional principles on which it claimed its own power against the monarchy and defer to local representative assemblies outside the realm. Parliament not surprisingly opted to fill the vacuum by laying claim to the crown's imperial authority. By the time of the American Revolution, respectable Parliamentary advocates could argue that Britain's legislature was not subject even to constitutional limits that had previously bound the monarch either in or beyond the realm.

It still does not follow that American Whigs were wrong in arguing the contrary position. Parliament's assertion of its authority alone did not establish its legitimacy. Then as now, the United Kingdom lacked any mechanism for the authoritative resolution of constitutional conflicts. The answer to which side was "right on the law" can thus never be known in the sense of looking up a considered decision handed down by an ostensibly impartial tribunal. Despite the lack of a "Supreme Court," or perhaps because of it, a vast body of constitutional discourse existed against which American and British claims could be considered. The question for the new breed of constitutional scholars was not therefore which side was "correct." Rather, the query was whether American patriots asserted sound claims as measured by the accepted constitutional principles of the day.

The answer to this question has been a resounding yes, and no historian has been more resolute in articulating it than John Phillip Reid. For over three decades Reid has kept the legal and academic presses humming with articles, reviews, and monographs too numerous to mention.<sup>88</sup>

---

86. In 1714, the Elector of Hanover, a German prince, acceded to the British throne upon the death of Queen Anne, to become King George I. George's accession marked the end of the Stuart dynasty. See generally H.T. Dickinson, *Walpole and the Whig Supremacy* 45-49, 70-71, 113-14, 121-26 (1973).

87. For a discussion of the shift and its consequences, see Flaherty, *supra* note 28.

88. A Reid sampler includes the following: *The Apparatus of Constitutional Advocacy and the American Revolution: A Review of Five Books*, 42 N.Y.U. L. Rev. 187 (1967); *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U. L. Rev. 1043 (1974); *In Accordance With Usage: The Authority of Custom, The Stamp Act Debate, and the Coming of the American Revolution*, 45 Fordham L. Rev. 335 (1976); *In Legitimate Stirps: The Concept of "Arbitrary," the Supremacy of Parliament, and the Coming of the American Revolution*, 5 Hofstra L. Rev. 459 (1977); *In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution* (1981); *In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution* (1977); *The Concept of Liberty in the Age of the American Revolution* (1988); *The Concept of Representation in the Age of the American Revolution* (1989).

If there is anything in the field to rival Reid's prolific output it is his own encyclopedic command of constitutional sources, whether case law, official pronouncements, or pamphlets. Reid puts both his persistence and learning on display in his multi-volume *Constitutional History of the American Revolution*,<sup>89</sup> which also represents the culmination of the long effort to resurrect American constitutional arguments.

To begin with, Reid shows that the colonial case was far more than just tenable. American Whigs, he argues, espoused what might be termed a "Commonwealth" version of the English Constitution that was grounded in traditional concepts already commonplace by the seventeenth century. Under this constitution any sovereign power—including Parliament—labored under numerous limits designed to safeguard a well-known and well-defined set of English rights. The constraints included: the consent of the governed; various fundamental contracts, first between the ruler and the ruled, and then between the ruler and those sent out to colonize new lands; custom, in the sense of practices that over time had acquired their own authority; and various binding precedents and analogies. The set of rights included property, jury trials, personal security, and freedom from arbitrary government.<sup>90</sup>

Reid's development of these themes challenges the understandings of previous generations of historians. In particular, he argues that neither Locke nor "natural law" framed American constitutional discourse. As a corollary, he contends that, at least in England, a different version of the Constitution must have developed to do combat with the Commonwealth—or seventeenth-century—version.<sup>91</sup> Otherwise, there would not have been the constitutional battle that took place. Especially within the ministry, the constitutional vision that emerged supplanted the concept of constraints with a newer "Absolutist Constitution" that called for Parliament's supremacy and ultimately, its sovereignty. In this way Reid at least implicitly turns the traditional view upside down. If anything, *Constitutional History* hints, the older version of the English Constitution is the better one.

Legal historians also push their conclusions to a different logical extreme, and once more no one does it more forcefully than Reid. Each volume of *Constitutional History* begins with the disclaimer that the project speaks only to constitutional aspects of the Revolution, and not to its social, economic, or political causes. This is, however, a caveat honored only in the breach. Throughout his work Reid writes as if the constitutional aspects explain all. Frequently he says as much. "What America

---

89. See generally John P. Reid, *Constitutional History of the American Revolution* (1986–93). The project consists of four volumes: 1 *The Authority of Rights* (1986); 2 *The Authority to Tax* (1987); 3 *The Authority to Legislate* (1991); 4 *The Authority of Law* (1993).

90. See 1 *id.* *passim*.

91. On this point, and certain questions it raises, see Eben Moglen, Book Review, 9 *Law & Hist. Rev.* 389, 391–92 (1991).

was constitutionally compelled to defend," he at one point opines, "the British could not constitutionally concede. The difference might be a mere abstraction of law, but once stated, civil war was inescapable."<sup>92</sup> In this way Reid and his fellow legalists turn the traditional view upside down once more. Where earlier historians saw a revolution accounting for constitutional rhetoric, legal historians see constitutional rhetoric accounting for a revolution.

Whether anyone else will is another question. Not long ago, the growing body of work by legal historians began to filter its way into the awareness of historians generally. Much credit for this translation must go to Jack P. Greene, who was among the first "mainstream" historians to appreciate the work of the Legal School.<sup>93</sup> Recently he went a step further and, with *Peripheries and Center*, presented an extended sketch of the main themes constitutional scholars have been emphasizing.<sup>94</sup> For reasons unclear, however, Greene's work appears to have served as a summation rather than as an invitation to further work. At any rate, so it seems with regard to those historians who first suggested that Americans may have meant what they said. For his part, Bailyn long ago left the field of ideas to concentrate instead on social movements in the literal sense.<sup>95</sup> Wood has followed suit.<sup>96</sup> Even Greene has joined what appears to be the ongoing *Annales* preoccupation with social history.<sup>97</sup> This development is ironic in many ways, not least because constitutional history requires much more to be done.

### B. *Constitutional Reconstruction*

What has been done nonetheless allows for certain conclusions. First, the current reconstruction of early American constitutionalism permits a more complete picture of the Revolution. But the import of this project does not stop at 1776, because the more complete picture that the Legal School permits in turn illuminates the received account of American thought leading to the Constitution. That is, a received account that centers around the work of Gordon Wood, which is itself the product of the past generation's turn toward the study of ideas, and a

---

92. 2 Reid, *supra* note 89, at 282.

93. See Greene, *supra* note 82, at 56–77.

94. See Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607–1788* (1986).

95. See generally Bernard Bailyn, *The Peopling of British North America* (1986); Bernard Bailyn, *Voyagers to the West: A Passage in the Peopling of America on the Eve of the Revolution* (1986).

96. See generally Wood, *Radicalism*, *supra* note 13. While this work powerfully complements Wood's earlier *Creation of the American Republic*, it does so by focusing on themes of culture and economics rather than constitutional principles.

97. See generally Jack P. Greene, *Imperatives, Behaviors, and Identities: Essays in Early American Cultural History* (1992); Jack P. Greene, *Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture* (1988).



version of which has already worked its way into the thought of numerous constitutional theorists. This enhanced understanding in turn should ultimately yield a richer historical backdrop against which to critique the work of these theorists.

Americans, it now seems clear, marched towards independence armed with a coherent and tenable constitutional brief. This brief consisted of a set of principles, derived from the English Constitution of the previous century, which emphasized constraints on government authority in order to protect traditional English rights, and which tied governmental legitimacy to representation.<sup>98</sup> Seen from one perspective, the evident commitment to rights might be termed "liberal." In this regard, the constitution the Americans advanced was fully consistent with Locke, and at times augmented with Lockean references, though as Reid has tirelessly argued, it owed little to the philosopher directly. Seen from another perspective, though, the patriot constitution appears "republican" in its devotion to representation and self-rule.

But in truth either label has its problems, a point understood by those historians—many of whom are often labeled "republican"—who first delved into these matters seriously. As Bailyn pointed out in *Ideological Origins*, Americans drew from a multitude of traditions that may look contradictory today, but did not at the time.<sup>99</sup> Wood himself has never fully abandoned the point, stating just recently that the question whether republicanism or liberalism dominated in late eighteenth-century America is not only "badly put [but also] . . . assumes a sharp dichotomy between two clearly identifiable traditions that eighteenth-century reality will not support . . . . Jefferson, for example, could believe simultaneously and without any sense of inconsistency in the likelihood of America's becoming corrupt and in the need to protect individual rights from government."<sup>100</sup> What mattered to the patriots was not the conflict of two distinct conceptions of government, still less the dominance of any one. What mattered, rather, was Westminster's violation of a plausible constitutional framework under which these and other conceptions had a place.<sup>101</sup>

Independence changed this. For one thing, it rode in tandem with an armed struggle that placed a premium on public spirit, virtue, and sacrifice of individual interests for the greater good.<sup>102</sup> For another, it deprived Americans of exactly the constitution on which they had relied in making their case against Westminster. Gone was the monarch; gone was the aristocracy; and so, gone was any hope of replicating the "mixed

---

98. See *infra* text accompanying notes 100–107.

99. See generally Bailyn, *supra* note 63.

100. Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 *Wm. & Mary Q.* 628, 634 (3rd ser. 1987).

101. See 4 Reid, *supra* note 89, at 3–8.

102. See generally Charles Royster, *A Revolutionary People at War: The Continental Army and American Character, 1775–1783* (1979).

government" of which Britons were so proud. The only familiar materials remaining lay in the legislature, and from these the logical structures to build were republics as classically understood. Thus even Daniel Rodgers, who is mostly bemused by republicanism's academic faddishness, is open to the possibility that the "cognitive roadmap" it can provide may be "effective in describing a revolutionary moment," whatever its difficulties in accounting for the "quarrels and compromises of normal politics."<sup>103</sup>

The constitutional commitments Americans brought to independence underscore many scholarly themes about how those commitments developed subsequently. The most influential theme, pioneered by Wood, holds that while "republican principles" may not have "dominated" in a sharply defined contest with liberalism, they did account for much that occurred in the first flush of state constitution-making after May 10, 1776.<sup>104</sup> In rhetoric, republican precepts became manifest in the idealization of the states as "Christian Sparta," in growing anxiety about American virtue, and in marshalling religion and education to insure that such virtue as did exist endured.<sup>105</sup> In structure, these led to an emphasis on representation. Nowhere was this tendency better highlighted than in the 1776 Pennsylvania Constitution, which featured a one-house legislature, annual elections, a multiple executive, and the posting of bills for public debate.<sup>106</sup> In each provision republican precepts led to a marginalization of the notion that a constitution meant external constraints on what government could do. That concept may have made sense when reining in a monarch or unrepresentative Parliament. It seemed less central in dealing with a state legislature ostensibly responsible to a virtuous citizenry.<sup>107</sup>

From this critical point, scholarship on the constitutional thought that preceded the Constitution also supplies a richer backdrop for considering the framing of the Constitution itself. Starkly put, the constitutional case that led to independence presumed that representative government and individual liberty complemented one another. Independence revealed—and practically speaking, revealed for the first time—that representative government could endanger rights rather than protect them. This backdrop supports the central thesis in Wood's account that too many constitutional theorists somehow miss: that the Federalists who conceived the Constitution reacted to the excesses seen in republican state governments by transforming the very concept of consti-

---

103. Rodgers, *supra* note 20, at 35.

104. On that date the Continental Congress recommended to the several colonies to draft new constitutions. See Richard B. Morris, *The Forging of the Union, 1781–89*, at 58–59 (1987).

105. See Wood, *Creation*, *supra* note 14, at 421–29.

106. See Pa. Const. of 1776, §§ 2, 9, 15, 19, 23; see also Wood, *Creation*, *supra* note 14, at 132–42.

107. See Wood, *Creation* *supra* note 14, at 162–88; Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America 239–62* (1988).

tutionalism.<sup>108</sup> This transformation rested in large part on the unhappy insight that even the American citizenry could not be counted upon to muster sufficient virtue to prevent the republican model from encroaching on liberty.<sup>109</sup> Its success in turn rested on the Federalists' ability to offer a less republican framework by relocating sovereignty away from all government, placing it instead in "We the People," whose approval during extraordinary times would give this new framework a more fundamental stamp of legitimacy.<sup>110</sup> For some, the first part of this story confirms the Beardian notion that the Constitution heralded a Thermidorian triumph which cleared the ground for a pluralistic land of self-interested, liberal go-getters.<sup>111</sup> For others, it confirms the persistence of the republican model for daily governance.<sup>112</sup>

Both assessments miss large points. The first overlooks the way in which the great Federalist innovation of relocating sovereignty in "We the People" arguably preserved a role for a republican politics of virtue in the creation of constitutional norms. The second ignores Wood's main point that the perceived failure of republicanism is what prompted the soon-to-be Federalists to congregate at Annapolis in the first place. Either assessment, in short, misses the complexity of the Federalist achievement and the possibility that it represented a synthesis of different traditions.

It is in this way that the scholarship concentrating upon the Revolution reenters the picture. For it seems not just plausible but likely that Federalists drew both on the recent American understandings in creating republican governments on the state level, and on their older conceptions of constitutionalism predating Independence. This point appears

108. Wood writes:

The Federalists' achievement was not in creating a totally new set of ideas, for this they could never have done. Rather their achievement lay in their ability to bring together into a comprehensive whole diffuse and often rudimentary lines of thought, to make intelligible and consistent the tangles and confusions of previous American ideas.

Wood, *Creation*, supra note 14, at 564; see also *id.* at 519–615 (discussing the Federalists' positions, as well as their campaign in favor of the Constitution); Morgan, supra note 107, at 263–87 (discussing republicanism and the U.S. Constitution).

109. In *The Federalist* No. 10 Madison famously noted:

Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.

*The Federalist* No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

110. See *The Federalist* No. 49, at 315 (James Madison) (Clinton Rossiter ed., 1961); Wood, *Creation*, supra note 14, at 306–43; Morgan, supra note 107, at 267–77. For a discussion of the modern theoretical implications of this point, see *infra* text accompanying notes 188–191.

111. Richard Epstein in part adopts just this kind of account. See *infra* text accompanying notes 162–187.

112. See *supra* note 20.

doubly plausible insofar as this older brand of constitutionalism itself combined various conceptions whose tensions would not become manifest until after 1776. On the institutional level, the patriot constitution uniting local legislatures into a larger polity offered a precedent for federalism.<sup>113</sup> More fundamentally, the patriot conception offered a strong vision of a constitution serving as a constraint designed to protect traditional rights against the power of government, a conception at times eclipsed in the flush of early state constitution-making, yet a vision that nonetheless valued self-government as an end in itself. In this respect, recent work on the many steps leading to 1787 contributes to a growing literature that, taken together, views the Founding as a union of ideological trends rather than the triumph of any one.<sup>114</sup>

#### IV. HISTORIES "LITE" TO WEIGHTY

##### A. *History and Theory*

The rediscovery of early American constitutionalism, so long in coming, promised great things for modern American constitutionalism. After decades of looking predominantly elsewhere, historians began at last to take early American ideas seriously, and more recently even to treat early American constitutional ideas respectfully. These efforts have for the first time allowed a reconstruction of the constitutional thought underlying the Revolution, which has in turn permitted a better understanding of the Founding. Modern theorists inclined to rely on early American history<sup>115</sup> therefore found themselves presented with an unparalleled opportunity, and there was every reason to believe that they would seize it. As Kathryn Abrams notes generally, "[l]egal scholars are natural scavengers," and here was much to scavenge.<sup>116</sup> Daniel Rodgers has observed more specifically that historians offered these rediscoveries of early American thought at a time when many theorists found these reconstructions especially useful to their projects.<sup>117</sup> In part this need arose because the

113. See Greene, *supra* note 94, at 91, 103, 172–74, 198–207.

114. For a list which is by no means comprehensive, see, e.g., *Beyond Confederation: Origins of the Constitution and American National Identity* (Richard R. Beeman et al. eds., 1987); McDonald, *supra* note 67; Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1979); Richard R. Beeman, *Deference, Republicanism, and the Emergence of Popular Politics in Eighteenth-Century America*, 49 *Wm. & Mary Q.* 401 (3rd ser. 1992); Forum, *supra* note 66; James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 *J. Am. Hist.* 9 (1987); Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 *Wm. & Mary Q.* 3 (3rd ser. 1988); see also Bernstein, *supra* note 69, at 1578–97 (discussing the complexity of recent work on the Founding).

115. The extent of this promise, of course, turns on the extent to which modern theorists find it necessary to invoke history. The promise is therefore immense for thinkers such as Ackerman, who find history dispositive in the derivation of constitutional principles, but minuscule for writers like Dworkin, who invoke history almost not at all.

116. Abrams, *supra* note 20, at 1591.

117. See Rodgers, *supra* note 20, at 30–31.

view of law as a self-sufficient discipline had begun to break down. In larger part it arose from the challenge issued by politically conservative originalists to derive constitutional principles from the intentions of the Founders.<sup>118</sup>

In theory this turn to history is a good thing. Developing a normative case to defend why this is so, however, is a task better pursued elsewhere. For the purposes of the critique that follows, what matters is that the individuals who introduce history into legal discourse to enhance their claims are the theorists themselves. That said, some notion of why history ought to be consulted in constitutional theory should be sketched, lest any criticisms of how this has actually been done appear as an argument against doing it at all.

American constitutional theorists are correct to turn to the history of the Founding for a number of reasons. Most generally, situating ideas in the context in which they arose enables us to comprehend and assess those ideas better than we would by viewing them as free-floating principles. This follows because the original historical setting almost invariably suggests reasons to accept or reject a given idea that would not otherwise be apparent. Understanding separation of powers as originally a considered response to majoritarian tyranny, for example, aids us in considering the doctrine's ongoing relevance, depending upon how serious we believe the threat that gave rise to it continues to be.<sup>119</sup> Beyond this, contemporary theorists do well to reconstruct the ideas of the American Founders in particular because these thinkers were not only individuals of great ability—which may not set them apart from other thinkers—but also because many of them spent two decades applying their principles first to a resistance movement and then to the task of framing new governments.<sup>120</sup> Having to face both tasks makes the Founders close to unique. Finally, and most specifically, American theorists do well to turn to our early constitutional history precisely because it is ours. As Ronald Dworkin contends, a given theory should broadly comport with our constitutional document and culture.<sup>121</sup> None of these reasons compels the originalist view that the ideas of the Founders should be dispositive. They do, however, confirm the almost universal historicist practice of turning to those views for guidance.

---

118. This phenomenon has been especially apparent with regard to the Ninth Amendment. See Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 *Chi.-Kent L. Rev.* 131, 134–39 (1988); Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 *Chi.-Kent L. Rev.* 1001, 1001 (1988). As Sherry aptly notes, the “reactive foray into the origins of the ninth amendment—and to an even greater extent, into the eighteenth century idea of unenumerated rights generally—has rewarded historically-minded non-originalists beyond their wildest dreams.” *Id.* at 1001.

119. For an excellent discussion developing these themes, see Don Herzog, *Happy Slaves: A Critique of Consent Theory* 27–33 (1989).

120. See *supra* text accompanying notes 49–113.

121. See Ronald Dworkin, *A Matter of Principle* 140 (1985).

Notwithstanding both the practical and normative incentives for appealing to the Founding, the promise of recent historical scholarship has not been entirely fulfilled. A sampling of work by some of the most prominent and productive constitutional theorists writing today reveals a startling range of historical sophistication—running from the problematic, to the plausible, to the provocative.

Assessing how well a given theorist has relied on history presupposes that there are standards for making this assessment. Those standards most plausibly come from the discipline of history itself. This conclusion follows not so much because historians determine what is historically true,<sup>122</sup> but because they commonly resolve what is historically convincing. Constitutional interpretation is itself, after all, preeminently "a discourse of argument and persuasion."<sup>123</sup> Among the academics and professionals who make up the audience which constitutional theorists seek to persuade, it is axiomatic that any argument drawing from another established discipline is convincing to the extent that it abides by the conventions of that discipline. As William Nelson argues, "At a theoretical level, the assumption that scholarly standards can emerge out of a consensus of individual scholars with quite different ideological and aesthetic preferences retains respectability today."<sup>124</sup> Likewise remaining respectable is a belief in specialization. University departments, professional associations, topical journals, and electronic mail "listservs" all testify to the ongoing assumption that the overall community needs smaller groups of experts to develop more specialized standards for the exploration of narrower fields.<sup>125</sup> A final widespread assumption involves deference to these groups of specialists. Perhaps even more dramatically than other fields, the law has formalized this principle in relaxing the general evidentiary prohibition against opinion testimony for experts.<sup>126</sup>

Consider a typical example involving legal theory and economics. An academic lawyer seeks to advocate nonrestrictive corporate takeover laws. To do so, she contends that, as a matter of economics, such a régime benefits shareholders with higher stock prices yet does not harm employees through the migration of jobs. She could base this contention on personal anecdote, a citation to the Second Circuit, or the say-so of her astrologer. Or she could rely on empirical studies—either her own, or more realistically, those undertaken by economists—which abide by

---

122. Whether a matter can be deemed historically "true" in an objective sense need not be resolved to assert the utility of historical standards. For a discussion on historical objectivity, see Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* (1988); see also Thomas L. Haskell, *Objectivity Is Not Neutrality: Rhetoric vs. Practice in Peter Novick's That Noble Dream*, 29 *Hist. & Theory* 129, 130 (1990) (disagreeing with Novick's assessment that objectivity as an ideal is essentially confused).

123. H. Jefferson Powell, *Rules for Originalists*, 73 *Va. L. Rev.* 659, 695 (1987).

124. William E. Nelson, *Standards of Criticism*, 60 *Tex. L. Rev.* 447, 478 (1982).

125. See *id.* at 477.

126. See, e.g., *Fed. R. Evid.* 702 (providing for opinion testimony by expert witnesses).

established conventions of economic study.<sup>127</sup> It is hard to imagine any legal theorist, regardless of her own scholarly practices, who would not consider the last of these options as the most convincing.<sup>128</sup> Similar examples, moreover, could be drawn from the law's encounter with any number of other disciplines.<sup>129</sup>

History is no different, or at least not sufficiently different that its conventions may be blithely ignored. A catalogue of such standards might well partake of the prolixity of a graduate school bulletin.<sup>130</sup> For present purposes, this catalogue need include only the most basic standards, if only because lawyers and legal scholars frequently make basic mistakes. It may be edited down still further to mention just those basic standards that appear to cause the legal community the most problems. Of these, one set has to do with convincing historical methods. The other has to do with convincing historical conclusions. Dressed up in legal jargon, some historical standards sound in procedure, and others in substance.

All sorts of "procedure" signify a persuasive historical assertion in the making. Perhaps the most basic is simply getting elementary facts straight.<sup>131</sup> Former Chief Justice Burger, for example, states in his origi-

127. This example is drawn from Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 *Fordham L. Rev.* 843, 856-60 (1993).

128. There is, in fact, a cottage industry of scholars who subject law and economics works to economic critiques. See, e.g., J.M. Balkin, *Too Good To Be True: The Positive Economic Theory of Law*, 87 *Colum. L. Rev.* 1447, 1454 (1987) (reviewing William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (1987), paying particular attention to positivist theory); see also Charles J. Goetz, *Law and Economics: Cases and Materials*, 463-66 (1984) (emphasizing the professional utility of economic literacy in the study of law); C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 *Phil. & Pub. Aff.* 3, 4 (1975) (pointing out the inherent biases and inconsistencies in the Posner school of law and economic methodology); Duncan Kennedy & Frank I. Michelman, *Are Property and Contract Efficient?*, 8 *Hofstra L. Rev.* 711, 712 (1980) (justifying private property and enforceable contract through economic analysis); Mario J. Rizzo, *The Mirage of Efficiency*, 8 *Hofstra L. Rev.* 641, 642 (1980) (information requirements in pursuit of the normative case for legal efficiency are so high as to render such pursuit impractical).

129. Martha Nussbaum, for example, casts a cold eye on current lawyerly invocations of philosophy, stating:

The professional standards of philosophy for philosophy are very different from the standards applied to the philosophical articles one finds in such [law] journals. Most of what I have read on emotion and empathy in the law, for example, would not even get a very high grade as an undergraduate paper written for a course of mine at Brown.

Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 *Stan. L. Rev.* 1627, 1644 (1993).

130. For an attempt to set forth just some of these standards, see Powell, *supra* note 123, at 662-91.

131. I call getting a basic fact right a matter of "procedure" or method rather than "substance" because the accuracy of such a fact does not reflect on the substance of a larger assertion so much as indicate the methodological rigor underlying the assertion. For example, getting right the exact date of the Puritan massacre of the Pequots near

nal introduction to the "official" bicentennial edition of the U.S. Constitution that "[t]he work of 55 men at Philadelphia in 1787 marked the beginning of the end of the concept of the divine right of kings."<sup>132</sup> Now, many things can be said about what is wrong with this statement, not the least of which is that "the concept of divine right of kings" ceased to be a part of mainstream Anglophone political thought—and failed to command a significant fringe—on either side of the Atlantic not long after the Glorious Revolution of 1688 and arguably earlier.<sup>133</sup> Moreover, so distant was the Revolution—much less the Founding—from the divine right of kings that, as noted, American patriots entered the fighting with a constitutional understanding that denied the authority of Parliament precisely because it posited a connection to the Empire through the authority of a monarch considered on all sides to be limited by law.<sup>134</sup> Coming from a former Chief Justice of the United States in an official publication issued to rekindle interest in the Constitution and its origins, the statement is unfortunate.<sup>135</sup>

More importantly, the legal community notoriously ignores the principle that the individual historical questions that its members commonly seek to answer cannot be understood except as "part[ ] of a larger historical . . . whole."<sup>136</sup> Two methodological requirements follow. One is the necessity of thorough reading, or at least citation, of both primary *and* secondary source material generally recognized by historians as central to a given question. Too often, legal scholars make a fetish of one or two famous primary sources, and consider their historical case made.<sup>137</sup> An-

present-day Mystic, Connecticut, does not materially affect the thesis that English Settlers from New England were bent on exterminating indigenous peoples. Getting it right, however, would instill in the reader a certain confidence that the person making the assertion about extermination knew what he or she was talking about. See Jennings, *supra* note 45, at 219–25.

132. Warren E. Burger, Foreword to *The Constitution, the Law, and Freedom of Expression, 1787–1987* (James B. Steward ed., 1987).

133. See Morgan, *supra* note 107, at 71–98.

134. See *supra* text accompanying notes 85–88.

135. For these and other errors in the former Chief Justice's introduction, see Bernstein, *supra* note 69, at 1566–67; see generally Morgan, *supra* note 107, at 17–39 (discussing the fate of the doctrine of "divine right of kings" in Anglo-American political thought).

William Nelson points out that this type of basic factual error is rare among legal historians. See Nelson, *supra* note 124, at 482–85. Whether that is true of lawyers and legal theorists, however, is another matter.

136. Powell, *supra* note 123, at 674.

137. This is a consistent problem, for example, in Paul Kahn's *Legitimacy and History*. In particular, Kahn follows the lead of many a theorist before him to make sweeping points about the Founding period based almost solely on *The Federalist*. More problematically, he does so with virtually no direct citation to a secondary historical article or monograph. See Kahn, *supra* note 7, at 9–31.

With regard to *The Federalist* generally, Richard Bernstein has aptly written, "To use *The Federalist* as a means to understand the Constitution and its underlying philosophy is a risk-laden pursuit, especially if undertaken for the purpose not of historical understanding



other procedural corollary requires viewing, or at least attempting to view, events, ideas, and controversies in a larger context. Here legal scholars, in what in its worst form is dubbed "law office history," notoriously pick and choose facts and incidents ripped out of context that serve their purposes.<sup>138</sup> In a phrase, persuasive historical procedure dictates genuine concern for facts, sources, and context. Abiding by just these standards is hard and time-consuming work, often too hard and time-consuming to meet the imperatives of legal scholarship.<sup>139</sup>

Substantive concerns that signify convincing historical assertions turn on the substantive area under consideration. If historical scholarship in a given area has settled on a certain account, or more likely, on a framework for debate, historical assertions that acknowledge that account or framework will simply be more persuasive. That, at least, is the case for a history scholar; it is no less the case for a legal scholar arguing history. Here the framework, if not the account, arises from exactly those scholarly achievements that resulted when American historians began to take American ideology seriously. Its chief expositors, among others, include Morgan, Bailyn, Wood, McDonald, Pocock, and Reid. Its main features

---

but of prescription for modern constitutional law and politics." Bernstein, *supra* note 69, at 1588. For monographs that engage in this pursuit, see Vincent Ostrom, *The Political Theory of a Compound Republic* (rev. ed. 1987); Morton White, *Philosophy, The Federalist, and the Constitution* 3-9, 193-207 (1987).

138. Robert Bork's *Tempting of America* is especially rich in just this type of noncontextual historical assertion. One in particular arises in his argument that the ratifiers of the Fourteenth Amendment did not understand the privileges and immunities clause to provide judicial protection for a range of fundamental liberties. This would have been unthinkable, he contends, because "[t]he only significant exercise of judicial review in the past century had been *Dred Scott*," which gave the notion of judicial review for the protection of rights a bad name. Bork, *supra* note 6, at 181-82. But making an inference from the undisputed fact that *Dred Scott* occurred is to slight several larger points that, in context, make this ostensibly important fact at best irrelevant and at worst cut the other way. The assertion overlooks that, by 1867, the North had won the Civil War and, in controlling Congress and the judiciary, commanded the mechanisms for enforcing national conceptions of fundamental rights dramatically different from a property right over human beings. It ignores the expansive role lower Federal courts played in Reconstruction. And it omits any even-glancing awareness that these and other matters uncongenial to his conclusions have been central to the past generation of scholarship. For sources addressing the larger context, see *supra* note 48.

139. Professor Powell ably articulates this challenge with reference to originalists seeking to invoke the Founding:

We can understand the original meaning of the Constitution, in whole or in part, only by "plunging [ourselves] into the systems of communication in which [the Constitution] acquired meaning." If the originalist interpreter is unwilling or unable to undertake this difficult and time-consuming task, either personally or at least through intense familiarity with the original sources and scholarly literature, he ought to drop the claim that he is conforming his constitutional thought to that of the founders. The "law office history" of systematic anachronism and quotation out of context is unconvincing advocacy and unacceptable scholarship.

Powell, *supra* note 123, at 675 (citations omitted).

emphasize the patriot constitutional case keyed to rights and representation, reaction and retrenchment.<sup>140</sup> This is not to say that this account or framework will always be the only story. The Whigs, the Progressives, and the Imperial historians, after all, had their day too. William Nelson rightly argues that one sign of outstanding historical scholarship is work that shifts a given substantive paradigm.<sup>141</sup> But, if the past is any guide, *that* type of scholarship is not likely to come from constitutional theorists with other lives to lead.

While the standards just sketched—procedural and substantive—provide a basis for a historical critique, they do not necessarily do anything more. In particular, they offer little if any guidance in assessing a given theorist's ultimate normative claims. A particular constitutional theory may hold, for example, that the events of the Founding are relevant in resolving constitutional questions, but that factors such as subsequent practice are dispositive. Under the terms of that type of theory, even a miserable account of the Founding would only marginally affect the normative answers put forward. That said, historical standards still matter for the simple reason that, as noted, nearly every constitutional theorist believes history adds something to her account. To the extent that the history such theorists put forward falls short, whatever they had hoped to add to their theoretical accounts evaporates. To the extent that they want to recapture it, they must at least modify and, more likely, clarify their original historical assertions.

Weighed against these standards, the use of recent historiography in legal theory has yielded mixed results. For a sense of that mix one need turn no further than certain historical claims advanced by three of today's most prominent constitutional thinkers: Richard Epstein, Cass Sunstein, and Bruce Ackerman.<sup>142</sup> As will become clear, assessing historical claims can take up as many pages as the claims themselves. Considering how well any of these prolific scholars appeals to the past in his work taken as a whole cannot be done in anything short of an extended study. All that can be attempted here, therefore, is a critique of selected historical assertions. Such a project is legitimate so long as the selection is representative, or at least not misleading. Toward this end, the accounts to be considered come only from each theorist's major works and deal with the Founding in ways in which recent historical scholarship is directly relevant.

Viewed together, the selected historical assertions which these scholars make replicate the pattern set by historians in the days before scholars began taking early American discourse on its own terms. On one hand,

---

140. See *supra* text accompanying notes 52–97.

141. See Nelson, *supra* note 124, at 485–89.

142. As has been suggested, one could find any number of other constitutional theorists with a habit of turning to history as well. See *supra* text accompanying notes 2–14. As will be seen, considering any more than just a few would require a monograph rather than an article.

Epstein, a champion of “neo-liberal” thinkers, invokes the eighteenth century mainly with an eye to England, the better to argue for stringent protection of individual contract and property rights. On the other hand, Sunstein, a pioneer of “neo-republican” thought, invokes the eighteenth century chiefly with a view toward what are ultimately Continental models, the better to promote a communitarian polity checked less by claims of rights than by appeals to civic virtue and public-regarding reason.<sup>143</sup> In between, Bruce Ackerman invokes the eighteenth century to consider how the Founding generation itself sought to reconcile received traditions in potentially novel ways, the better to advocate a framework that—at least in “normal” times—is neither primarily rights-based nor entirely democratic.

### B. *The Strange Career of Liberal Constitutionalism*

Some of the most influential works invoking the past fall into the category of “neo-liberal.”<sup>144</sup> Of these, perhaps the most important issue from Richard Epstein, one of the academy’s foremost defenders of property rights.<sup>145</sup> The sheer volume of Epstein’s work—as with that of Sunstein and Ackerman—precludes a critique of his entire opus in a few pages.<sup>146</sup> The impracticality of considering everything should not, how-

143. Interestingly, the “English/Continental” dichotomy inverts depending on whether it is applied to constitutional theory or constitutional history. Thus, democratic “monists” commonly invoke English parliamentary models when making theoretical arguments, but stress the works of polemicists who themselves looked to Italian and Greek republics when making historical arguments. Conversely, “rights foundationalists” commonly look to the Continent (Germany in particular) when they argue theory, but invoke writers who themselves looked to English thinkers (Locke in particular) when they assert history. This inversion occurs largely because the same thing happens with historiography.

144. By this term I refer to “liberal” in its classical economic sense, that is, a commitment to property rights against governmental attempts at physical takings, economic regulation, or redistribution of wealth. I do not mean “liberal” in the philosophical sense as articulated by, for example, John Rawls. See generally John Rawls, *Political Liberalism* (1993).

145. For an account of modern case law on takings which builds on Epstein’s approach, see Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 *Colum. L. Rev.* 1630 (1988). Epstein himself notes, critically but with “odd comfort,” Laurence Tribe’s and Michael Dorf’s “use of Lockean notions of private property,” similar to those put forward by Epstein, “in structuring the proper interpretation of the Takings Clause.” Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 *B.U. L. Rev.* 699, 702 n.15 (1992) (citing Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution*, 70–71 (1991)).

146. This opus includes the following: *On the Optimal Mix of Private and Common Property*, 11 *Soc. Phil. & Pol’y*, 17 (Summer 1994); *The Federalist Papers: From Practical Politics to High Principle*, 16 *Harv. J.L. & Pub. Pol’y* 13 (1993); *Exit Rights Under Federalism*, 55 *J.L. & Contemp. Probs.* 147 (Winter 1992); *A Common Lawyer Looks at Constitutional Interpretation*, supra note 145; *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 *J. Legal Stud.* 1 (1992); *International News Service v. Associated Press: Custom and Law As Sources of Property Rights in News*, 78 *Va. L. Rev.* 85 (1992); *The Utilitarian Foundations of Natural Law*, 12 *Harv. J.L. & Pub. Pol’y* 713

ever, prevent the consideration of anything. In this light, two manageable candidates for present purposes are Epstein's important monograph, *Takings*,<sup>147</sup> and his no less significant article, "Toward A Revitalization of the Contract Clause."<sup>148</sup> Each study meets the criteria, previously noted, for examination. Each is a major work in the author's body of scholarship. Each, moreover, makes historical claims about the Founding—and for that matter about the eighteenth century generally—that invite consultation of relevant historical studies. Whether a consideration of Epstein's historical assertions in other works would yield different results would depend on an examination of those works.

Unfortunately, an examination of the pertinent assertions in *these* works shows history at something less than its weightiest. Procedurally, Epstein's statements about the Founding and its context are conclusory. Substantively, they would lead a casual observer to believe that nothing much had changed in the study of early America since Louis Hartz. Now, none of this may matter much for Epstein's ultimate theoretical conclusions, if those conclusions in the end do not rest on his views of the Founding or of history generally. But even if they do not, this hardly means that the problems with Epstein's appeals to the past themselves do not matter. To the contrary, they count precisely to the extent that Epstein himself—rightly—invokes the authority of history to enhance, reinforce, and embellish his prescriptions. Any failure to make the relevant historical assertions in a credible fashion diminishes his overall project in just the proportion he hoped to strengthen it.

As it happens, Epstein's relationship with history, at least in the works under scrutiny, is at best ambivalent. As an initial matter, he evinces a certain skepticism about history in his explicit refusal to consider how the Founding generation might have specifically understood or applied the constitutional provisions at issue. In *Takings*, Epstein declares that his analysis "does not take into account the actual historical intention of any of the parties who drafted or signed the document."<sup>149</sup> Likewise, in "Revitalization" he rejects any close examination of "the social and political context of the [Contract] clause . . . [or] . . . the histori-

---

(1989); *The Classical Legal Tradition*, 73 *Cornell L. Rev.* 292 (1988); *Modern Republicanism—Or The Flight From Substance*, 97 *Yale L.J.* 1633 (1988); *Luck*, 6 *Soc. Phil. & Pol'y* 17 (1988); *The Mistakes of 1937*, 11 *Geo. Mason U. L. Rev.* 5 (Winter 1988); *The Proper Scope of the Commerce Power*, 73 *Va. L. Rev.* 1387 (1987); *Self-Interest and the Constitution*, 37 *J. Legal Educ.* 153 (1987); *Taxation in a Lockean World*, 4 *Soc. Phil. & Pol'y* 49 (Autumn 1986); *Possession as the Root of Title*, 13 *Ga. L. Rev.* 1221 (1979).

147. Epstein, *Takings*, *supra* note 9; see also Richard A. Epstein, *A Last Word on Eminent Domain*, 41 *U. Miami L. Rev.* 253 (1986); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 *Stan. L. Rev.* 1369 (1993); Richard A. Epstein, *An Outline of Takings*, 41 *U. Miami L. Rev.* 3 (1986);

148. See Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 *U. Chi. L. Rev.* 703 (1984) [hereinafter Epstein, *Revitalization*].

149. Epstein, *Takings*, *supra* note 9, at 26.

cal accounts of the debates at the drafting and ratifying conventions.”<sup>150</sup> Epstein dodges these concerns mostly on theoretical grounds, positing that not only the best, but indeed the only reliable evidence of original understanding is the “plain meaning” of the Constitution’s text in light of the common linguistic usages of the day and of the document as a whole.<sup>151</sup> As a matter of interpretive theory, this stance is his prerogative.<sup>152</sup> Whether to look into history at all is properly a matter of theory and is not a matter that history itself can determine.<sup>153</sup> Only once a historical assertion is made to support an interpretive claim do basic historical standards matter.

Those standards still matter here, however, because Epstein also relies on history to avoid history. The “historical particulars” surrounding the Takings Clause, he asserts, are “likely to generate more confusion than [they] eliminate[ ].”<sup>154</sup> Looking into the specific history of the Contract Clause, he states more confidently, can “only distract us.”<sup>155</sup> Epstein, in other words, contends that the relevant historical sources may (Takings) or do (Contracts) add more raw “data,”<sup>156</sup> but fail to increase understanding. That may well be the case, but Epstein gives few historical reasons to believe it. His Takings discussion simply assumes historical confusion; his treatment of Contracts seeks to prove “irreducible uncertainty” on the basis of a monograph and an article—each written before 1945—plus a student law review note.<sup>157</sup> Not surprisingly, the substantive

150. Epstein, *Revitalization*, supra note 148, at 706.

151. His main objection is the theoretical difficulty of discerning collective intent, a point made explicit in his discussion of takings, but merely hinted at with regard to contracts. See Epstein, *Takings*, supra note 9, at 27–28 (“Where the number of parties is large and the divergence of views great, the best evidence of textual intention is the language of the text itself.”); Epstein, *Revitalization*, supra note 148, at 707 (“More reliable is to treat the Constitution as a whole as the best evidence of that intention, and to try to make sense of what the framers did, not of their motives for doing it.”).

152. Epstein’s theoretical disavowal of history on a relatively specific level, at least in service of original intent, has curious parallels with the interpretative method advocated by Ronald Dworkin. Both theorists reject as inherently problematic any attempt to discern what Dworkin has famously termed the specific conceptions of given constitutional norms. Both prefer, instead, reliance on constitutional text and structure to infer more what Dworkin has again famously termed the concept of a constitutional norm. Both, finally, are open to invoking the past to help derive a constitutional concept, though Epstein commonly does so more aggressively than Dworkin. See Dworkin, supra note 121, at 34–56.

That said, one cannot resist the feeling that both Epstein and Dworkin eschew undertaking “conceptional” history not only for their stated theoretical reasons, but because they assume that history on this level simply will not support their larger projects.

153. See, e.g., Cass R. Sunstein, *The Partial Constitution* 96–104 (1993) (noting that interpretative theories must be justified by substantive principles) [hereinafter Sunstein, *The Partial Constitution*].

154. Epstein, *Takings*, supra note 9, at 26.

155. Epstein, *Revitalization*, supra note 148, at 706.

156. *Id.*

157. The sources cited are: Benjamin F. Wright, Jr., *The Contract Clause of the Constitution* (1938); Robert L. Hale, *The Supreme Court and the Contract Clause* (pts.

discussion fares no better. Epstein frames the relevant debate as between those arguing that the Framers viewed the Contract Clause as vaguely important, and those who contend that the Framers thought it to be inconsequential. There is no hint of how patriot constitutionalism, early state experiments, or Federalist reactions do or do not illuminate the Founding conception of property and contract rights. This failure to justify what is a fairly broad assertion could be dismissed as simply a perfunctory attempt to bolster what is, in any event, mainly a theoretical point. In truth, however, it is better seen as a dress rehearsal for Epstein's use of history where he does seek to employ it affirmatively.

Epstein's main historical performance takes place on a stage far more broad than the debates concerning particular clauses. Instead, he makes clear that the relevant place on which to focus is the general background of the era, an area far too often neglected by legal scholars. In *Takings* Epstein demonstrates his focus more than he proclaims it by devoting a chapter to examining how trends in English philosophy and law provide the setting against which to consider the Constitution intelligently. In "Revitalization," he usefully makes his approach explicit at several points. He writes:

In order to overcome these historical weaknesses and interpretative gaps [on more specific questions], it seems not only proper, but necessary, to look beyond the debates over the particular clause, to more general and widely shared conceptions of government and contract, on the theory that they influenced the basic constitutional structure.<sup>158</sup>

Put another way, concentrating on the general context yields benefits that examination of more narrow topics does not. As he explains further, "A focus on the eighteenth-century background puts us at one remove from the document itself, but it has the compensating advantage of allowing us to look to a body of insights and shared understandings, many of which are on the public record."<sup>159</sup> For Epstein, one example of the kind of general topic that might be usefully explored is the Founders' attitude toward factions. On this point he notes that "[the framers] sought to control those abuses [of faction] by adopting a scheme of limited government."<sup>160</sup> It is this type of general historical point that can yield valid constitutional insight. As Epstein argues the point, "If this sketch [about the abuses of faction] captures something of the general mood of the time, then it seems quite impossible to infer that the framers

---

1-3), 57 Harv. L. Rev. 512, 621, 852 (1944), and Note, A Process-Oriented Approach to the Contract Clause, 89 Yale L.J. 1623 (1980). Of these, only Wright devotes any sustained attention to the framing of the Contract Clause, and then only at the outset of his work. See Wright, *supra*, at 3-26.

158. Epstein, *Revitalization*, *supra* note 148, at 754.

159. *Id.* at 711.

160. *Id.* at 715.

intended judicial deference to the legislature on all economic matters."<sup>161</sup>

In each work the general background, as Epstein perceives it, is plain, and oriented toward rights: property rights above all. In *Takings* he declares that the "Lockean system,"—by which he means a commitment to just compensation for the taking of property for any public use other than to provide for external defense and internal order—"was dominant at the time when the Constitution was adopted."<sup>162</sup> Concerning the Contract Clause, the shared understandings are scarcely less plain: the Framers designed the government as they did out of a general fear that the governmental decisionmaking processes fall easy prey to factions which "can use the mantle of government power to deprive persons of their liberty and property," particularly property broadly defined.<sup>163</sup>

Against this historical backdrop, the Constitution's basic features come into proper focus as ways to safeguard the basic Lockean conception of rights that Epstein proffers. In *Takings* the many familiar structural devices in the Constitution—including separation of powers, the complex provisions on selecting public officials, the principle of limited enumerated powers—were expected to serve the substantive end of protecting the "private property, of 'lives, liberties, and estates' that Locke considered the purpose of government."<sup>164</sup> Epstein's study of the Contract Clause likewise casts these structures as mechanisms for securing rights, particularly the rights of property broadly understood.<sup>165</sup> In each work the specific protections of rights—including the Takings Clause and the Contract Clause—bolster these devices by identifying expressly and in a judicially enforceable manner the ends of government that the Constitution's distinctive framework is designed to protect.<sup>166</sup>

Such is the broad background case that Epstein considers important enough to put forward. He does not, however, put it forward convincingly. The problems again begin with his methods. To his credit, he gets no basic fact wrong,<sup>167</sup> in large part because his interpretative approach

161. *Id.*

162. Epstein, *Takings*, *supra* note 9, at 16.

163. Epstein, *Revitalization*, *supra* note 148, at 711.

164. Epstein, *Takings*, *supra* note 9, at 17.

165. See Epstein, *Revitalization*, *supra* note 148, at 711–16. The differences that exist between this account and that of *Takings* center on two points. First, "Revitalization" does not rely on Locke as the source of the Founders' commitment to property rights, though that commitment is fully consistent with Epstein's interpretation of Locke in *Takings*. Second, "Revitalization" emphasizes that, as an intermediate step, the Constitution's structural devices served property rights by helping to control self-interested factions. *Id.*

166. See Epstein, *Revitalization*, *supra* note 148, at 716; Epstein, *Takings*, *supra* note 9, at 18.

167. There are two arguable exceptions. One arises in *Takings* when Epstein states that he will consider the Takings Clause to apply against the states. In part he justifies this move because it "is consistent with the basic Lockean design, as is reflected by the inclusion of some version of the eminent domain [i.e. Takings] clause in all state constitutions." Epstein, *Takings*, *supra* note 9, at 18. This justification, in other words, relies on the

precludes him from making specific factual claims to begin with. To his greater credit, this same interpretive approach causes him to focus on the larger eighteenth-century context of the Constitution, normally a good thing. The real trouble arises with his approach to the available evidence.

Nowhere is that approach more problematic than in *Takings*. To support his sweeping claim about the "dominant . . . Lockean system" of 1787, Epstein makes two evidentiary assertions.<sup>168</sup> First, he argues that Locke's "theory of state"—which presumably includes the philosopher's thinking about just compensation<sup>169</sup>—was "adopted in Blackstone's *Commentaries*." Yet Epstein has nothing to say about how Blackstone did so, where the *Commentaries* makes this adoption clear, or how the *Commentaries* relate to American constitutional thought in the 1760s. In fact, the

---

argument that the states currently reflect the "Lockean design" of the Federal Constitution. The words "inclusion" and "the" eminent domain clauses aside, the highlighted passage in context implies that the states always had such clauses. If the Lockean design was "dominant" in the eighteenth century, it would be surprising if any of the original states did not have one. The problem for Epstein is that only two states in 1787 had takings clauses (along with Congress in the Northwest Ordinance). See *infra* text accompanying note 192. Thus, to the extent Epstein means only to discuss current state constitutions, his articulation is unclear. To the extent he seeks to imply that the original states were "Lockean" in this sense, he is incorrect.

Epstein's other arguable error—which admittedly falls well outside the history of the Founding—arises in his other justification for applying the Takings Clause to the states. Here the justification is that: "Limitations against the powers of the states have been answered in practice by incorporating specific protections against the states, including the eminent domain clause" in *Chicago, Burlington, and Quincy R.R. v. Chicago*, 166 U.S. 226 (1896). Epstein, *Takings*, *supra* note 9, at 18. But this is neither the only nor the best reading of the case. Justice Harlan's opinion for the Court does not rest on the argument that the Takings Clause of the Fifth Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment. Rather, the Court characterizes the right not to be deprived of property for public use without just compensation as inhering in the concept of due process. The Court comes to this conclusion not by relying on the Takings Clause but instead by discussing principles of republican institutions, the common law, natural equity, universal law as well as case law, and treatises relying on these sources. *Chicago* 166 U.S. at 235–41. Epstein may mean that *Chicago* indirectly or in effect incorporated the eminent domain clause against the states, but that is not what he says.

168. To quote the affirmative proposition: "The Lockean system was dominant at the time when the Constitution was adopted. His theory of state was adopted in Blackstone's *Commentaries*, and the protection of property against its enemies was a central and recurrent feature of the political thought of the day." Epstein, *Takings*, *supra* note 9, at 16.

169. This conception is problematic since, as Epstein admits, Locke himself rested the legitimacy of government on a doctrine of implied consent rather than on doctrines of restitution and just compensation. See *id.* at 14–16.



*Commentaries'* reliance on Locke,<sup>170</sup> the work's position on takings,<sup>171</sup> and its influence on American constitutionalism<sup>172</sup> are all complex matters that fall far short of affording Epstein the simple support he seeks.

As a measure of just how complex this situation is, consider the matter of Blackstone's own position on property. Blackstone does state that "the law permits no man, or set of men, to [take private property for public use] without the consent of the owner of the land . . . [or without] giving him a full indemnification and equivalent for the injury thereby sustained."<sup>173</sup> But, while supporting a right to just compensation, the passage fails to resolve a number of ancillary issues. For one, it is unclear whether Blackstone is talking about a right that is judicially enforceable or merely aspirational. It is likewise unclear whether the passage aims to limit local authorities alone, or Parliament as well. No less important, the *Commentaries* elsewhere take positions that manifestly run counter to at least Epstein's version of Locke. First, Blackstone frequently recognizes the legitimacy of regulation that diminishes the value of property.<sup>174</sup> Forrest McDonald amplifies this point in a concise yet exhaustively researched treatment of English and American property law generally. He concludes that "the crucial fact is that ownership did not include the absolute right to buy or sell one's property in a free market; that was not a part of the scheme of things in eighteenth-century England and America."<sup>175</sup> Second, the *Commentaries* famously declare that Parliament is sovereign, which among other things precludes the judicial enforcement of *any* fundamental right against an act of that national legislature. On this last point, moreover, Blackstone specifically rejects Locke's position that "the people" retain a power to remove or alter the legislature under the British Constitution.<sup>176</sup>

---

170. Edward S. Corwin, for example, viewed Blackstone as ultimately a disciple not of Locke but of Hobbes. See Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* 85–87 (1965). The point is not that Corwin is correct (though his use of sources is comparatively far more rigorous). Rather, the point is that Epstein fails to see that the relationship between Blackstone and Locke is a far more complicated matter than his conclusory assertions allow. See also Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buff. L. Rev.* 205, 264–72 (1979) (explaining the ways in which Blackstone was not a Lockean liberal).

171. For nuanced discussions of Blackstone on property, see Daniel J. Boorstin, *The Mysterious Science of the Law* 167–87 (1958); Kennedy, *supra* note 170, at 313–50.

172. See Bailyn, *supra* note 57, at 171–75; Boorstin, *supra* note 171, at 3–4; Stanley N. Katz, *Introduction to 1 William Blackstone, Commentaries on the Laws of England*, at xi–xii (1979 facsimile ed.); Wood, *Creation*, *supra* note 14, at 265.

173. 1 Blackstone, *supra* note 172, at \*135.

174. See, e.g., 4 *id.* at \*154–60 (discussing laws prohibiting "offenses against public trade"); 4 *id.* at \*170 (discussing sumptuary laws); 1 *id.* at \*187–98, 334 (discussing reservation of public property and resources). For that matter, so too, arguably, does Locke. See John Locke, *Second Treatise*, in *John Locke, Two Treatises of Government* § 139, at 188 (1965 ed.).

175. McDonald, *supra* note 67, at 14.

176. See 1 Blackstone, *supra* note 172, at \*156–58.

Beyond Blackstone, Epstein also attempts to bolster his assertion about Lockean dominance with the contention that "the protection of private property against its enemies was a central and recurrent feature of the political thought of the day."<sup>177</sup> For this proposition he relies on Charles Beard's 1912 *The Supreme Court and the Constitution*<sup>178</sup> together with a book review and a manuscript by Jennifer Nedelsky.<sup>179</sup> Leave aside the problem that, then or now, not all defenses of property were necessarily "Lockean." More troubling, in terms of sources, is Epstein's reliance on a dated work by a historian whose main thesis has since been eclipsed by generations of subsequent work<sup>180</sup>—a problem mitigated but not eliminated by citation to Nedelsky.<sup>181</sup> The general problem, in short, remains: Epstein provides support for his major historical claim about Locke in almost inverse proportion to the boldness of the claim he asserts.

Matters improve in Epstein's discussion of the Contract Clause, but not sufficiently for his assertions to be persuasive on their own terms. Here Epstein spends more time developing an argument consistent with his general claim that a Lockean view of property dominated contemporaneous thinking.<sup>182</sup> What also drove the Founders to embrace the strategies of limited government and enumerated rights, he contends, was a specific fear of self-interested factions controlling the legislatures.<sup>183</sup> For support, Epstein first trots out three of James Madison's oft-cited essays from *The Federalist*: Nos. 10, 44, and 51.<sup>184</sup> This is on the right track, just not far enough down it. In a marked improvement upon his cryptic use of Blackstone's *Commentaries*, Epstein does make specific reference to passages that support his general proposition. What he also does, however, is to assume that simply citing James Madison, without more, suffices as a basis for making grand points about the Founding. In this Epstein is hardly alone among legal scholars, yet such a basis would leave him a solitary figure among competent history students—which is pre-

177. Epstein, *Takings*, supra note 9, at 16.

178. See Charles A. Beard, *The Supreme Court and the Constitution* (1912); Epstein, *Takings*, supra note 9, at 16 n.24.

179. See Epstein, *Takings*, supra note 9, at 16. Later editions add a cite to a Nedelsky book review. See *id.* (1993 ed.).

180. For Beard's work and the works that have superseded it, see supra text accompanying notes 35, 50–114.

181. Since Epstein first cited her, Nedelsky has established herself as an important scholar of property rights during the Founding era. See, e.g., Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (1990).

182. In "Revitalization," Epstein refers to the Founders as "men schooled in Hobbes and Locke," for the proposition that they knew government had to exist to constrain the use of private force. He does not, however, rely on Locke's overall influence with regard to the Founders' solutions as much as he does in *Takings*. See Epstein, *Revitalization*, supra note 148, at 711.

183. See *id.* at 711–16.

184. See *id.* at 711, 712 n.27, 714.

cisely the point. In fairness, Epstein also supports his claim with a reference to self-interested state legislation enacted at the time of the Federal Convention.<sup>185</sup> Substantively this is a plausible point, especially in light of the historical work done in the last twenty-five years.<sup>186</sup> Methodologically, however, the trouble is that Epstein refers to none of this work in making the point, preferring instead to rely on two pages from a monograph that is nearly fifty years old.<sup>187</sup> Once more, a point about the past that is important enough to urge is not necessarily important enough to urge persuasively.

As procedure goes, so does substance. It is, moreover, exactly on the level of “general mood” where Epstein’s historical assertions run into scholarly trouble. In his writings on both takings and contracts, Epstein—while nowhere relying on Hartz *per se*—nonetheless writes as if scholarship ceased with *The Liberal Tradition in America*. But Hartz was only the beginning of the contemporary encounter with early American ideas. If the past two generations of historical work have settled on any point, it is that Lockean political philosophy was *not* “dominant” in the eighteenth century, and certainly not in the straightforward way that Epstein sketches. Interestingly, this colossal historiographical fact hurts Epstein’s overall project in ways he ignores, yet could nonetheless help it in ways he fails to seize.

The potential harm, which is potentially insurmountable, arises from the evident patriot commitment to common-law rights and republican representation apart from Lockean liberties. Start with rights. John Phillip Reid’s massive body of scholarship, in particular, challenges the claim that Lockean notions of natural property rights, still less Epstein’s version of Locke, significantly fueled early American defenses of property. Reid and others suggest rather that American Whigs, then patriots, and later republicans drew not on Locke but on positive English law. On Reid’s account, English law, including English property rights, in turn derived from doctrines of custom, ancient “original” contracts between the rulers and the ruled, and contemporaneous representation.<sup>188</sup> As will be seen, only the last of these sources made either the law, or still less legal rights, a direct function of “deliberative democracy.” What should be seen here, however, is that these sources did serve as bases for legitimacy in themselves, reflecting the general “consent of the governed.”<sup>189</sup> To the extent they did so, the law that resulted could not provide a judicially enforceable remedy for an uncompensated taking by a representa-

185. See *id.* at 712.

186. See *supra* text accompanying notes 98–114.

187. The citation, again, is to Wright, *supra* note 157. This criticism should not be taken to mean that Wright’s work is inapposite or obsolete. To the contrary, it remains perhaps the leading work on that subject. The point is, rather, that Epstein neglects subsequent research and analysis; this failure precludes him from placing Wright’s insights in modern scholarly context.

188. See *supra* text accompanying notes 91–92; see generally 1 Reid, *supra* note 89.

189. See *infra* notes 190–191 and accompanying text.

tive legislature, because the act of such a legislature reflected—and, if anything, reflected more directly—the same consent of the governed on which the right itself was based. Blackstone notwithstanding, English law does not seem to have afforded such a right even in a hortatory sense.

The problems multiply with the question of republican representation. Here modern scholarship is far more extensive than it is on English rights, in many ways forming the core of recent work on American constitutionalism. And here Epstein's Lockean paradigm runs directly counter to the constitutional strategies that this body of scholarship identifies as preeminent in the years following Independence. Chief among these strategies was a deepening commitment to representative legitimacy that was far more thoroughgoing than anything realistically mooted across the Atlantic.<sup>190</sup> With regard to property, this republican commitment pointed toward—not away from—robust exercises of legislative power. American constitutional thought during the Critical Period to a great extent viewed representative legislatures, which consequently reflected the will of a virtuous populace, as sovereign. Legislative sovereignty won champions both as an end in itself, insofar as it realized the value of self-government, and as the best means of ensuring liberty, including property and contract rights.<sup>191</sup> It followed that property and contract protections *against* republican legislatures had to be given a narrow scope, if indeed any scope at all, because such protections made no sense by definition. The people, through their assemblies, simply could not tyrannize themselves.

---

190. To the contrary, those who argued for Parliamentary reform in either Britain or Ireland had a peculiar combination of notoriety and impotence. For British reformers, see George Rudé, *Wilkes and Liberty: A Social Study of 1763 to 1774* (1962). For their Irish counterparts, see Francis G. James, *Ireland in the Empire, 1688–1770*, at 182–85 (1973). See generally Robbins, *supra* note 56.

191. Nedelsky ably summarizes the views of the late Herbert J. Storing, probably the greatest expert on the Constitution's opponents, as holding that the Antifederalists viewed republican self-government not as an end in itself, but as a means to protect rights independent of democratic process:

Storing cautions against a misunderstanding of the Anti-Federalists' treatment of civic virtue and the common good: for him, these values were important to the Anti-Federalists, but the values were merely instrumental to individual liberty. He concludes that the Anti-Federalists were liberals "in the decisive sense that they saw the end of government as the security of individual liberty, not the promotion of virtue or the fostering of some organic common good." Storing thus shares the Federalist view that the two groups' differences over the nature of the citizen's role in public affairs were essentially disagreements about the best means for protecting rights under limited government.

Jennifer Nedelsky, *Confining Democratic Politics: Antifederalists, Federalists, and the Constitution*, 96 *Harv. L. Rev.* 340, 344–45 (1982) (reviewing Herbert J. Storing, *The Complete Anti-Federalist* (1981) (citations omitted)). Nedelsky is quick to add that Storing undervalues, indeed overlooks, the "high value" that the Antifederalists placed on "the citizen's active participation in the affairs of state." *Id.* at 145. She does not, however, dispute the view that the Antifederalists adhered to classical republican tenets as a way to protect rights as well.

As if all this were not bad enough, not only were these republican commitments nearly antithetical to Epstein's vision of Locke, but they flourished on Epstein's own chosen terms of "general mood" as much as in the context of specific debates and applications. For that matter, the same point holds for constitutional text, the area Epstein considers even more probative in actually applying the Constitution than general background history. Of the available constitutional texts, only two state constitutions (plus the Northwest Ordinance) included any protection against legislative takings,<sup>192</sup> and none included any protection of contracts,<sup>193</sup> by the time the Federal Convention convened. Nor do the problems end here. Probably most Antifederalists, and even a number of their Federalist counterparts, carried these republican commitments past 1787.<sup>194</sup> These commitments are still reflected in that part of the constitutional text which to a significant extent owes its existence to Antifederalist agitation, the Bill of Rights.<sup>195</sup>

Yet if recent scholarship takes away, it also offers in return. The cornerstone of recent work on the Founding, itself building on Revolutionary scholarship, remains Gordon Wood's insight that the Federalists in fundamental ways rejected the republican assumptions especially evident in the first state constitutions.<sup>196</sup> This is not to say that the rejection was total or final. Nor is it to say that the Federalist rejection of legislative sovereignty in particular meant a turn, or return, to Lockean conceptions of property and contract rights.<sup>197</sup> An account faithful to the sources, which scholars such as William Michael Treanor are trying to construct, probably points somewhere between these extremes.<sup>198</sup> Yet the point remains that however extensive the Federalist reaction to the republican excesses of the Critical Period, any reaction to legislative control of property and contract cuts Epstein's way. Epstein, moreover, seems dimly aware that his case benefits in just this fashion with his passing reference, albeit vaguely made and poorly supported, to "much of the state legisla-

---

192. See Vt. Const. art. II; Mass. Const. art. X; Northwest Territory Ordinance of 1787, art. II, 1 Stat. 50, 52 (1961). Vermont, moreover, was not truly a state insofar as it was not admitted into the Union until 1791. See William Michael Treanor, Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 702 n.38 (1985).

193. See generally 2 *The Roots of the Bill of Rights* 231-382 (Bernard Schwartz ed., 1980).

194. Moreover, the procedural safeguards Epstein attributes to the Framers for many Federalist advocates cut against substantive judicial protection. See Wood, *Creation*, supra note 14, at 536-42. For an argument that this view persisted through the drafting and ratification of the Bill of Rights, see Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991).

195. See generally Morris, supra note 104, at 298-320; Herbert J. Storing, *What the Anti-federalists Were For* 64-70 (1981).

196. See supra text accompanying notes 108-112.

197. See supra text accompanying notes 98-101.

198. See Treanor, supra note 192, at 702 n.38.

tion passed about the time of the Constitutional Convention"<sup>199</sup> as one reason for the drafting of an explicit clause protecting the obligation of contracts. The last generation's reassessments of early American constitutionalism offer Epstein the opportunity to advance this position far more credibly than he does, though perhaps far less completely than he might wish. As with historical propositions uncongenial to his agenda, however, this is one offer that in these two works Epstein seems indifferent about accepting.

### C. *Behind the Republican Revival*

From here, appeals to history could only become more convincing, especially if they took on board any cargo at all from recent historical scholarship. A number of theorists have exploited this opportunity under the banner of "modern" or "neo-republicanism."<sup>200</sup> Of these, perhaps the most influential and evidently the most prolific, though not necessarily the most historically minded,<sup>201</sup> has been Cass Sunstein, much of whose early work<sup>202</sup> recently culminated in his landmark *The Partial Constitution*.<sup>203</sup> As a leading "neo-republican," Sunstein seeks to shift constitutional reform away from the courts "to administrative and legislative bodies, and to democratic arenas generally."<sup>204</sup> In part, this move reflects a disillusionment with the Warren Court's perceived inability to translate high ideals into broadly supported social commitments;<sup>205</sup> in part it re-

199. Epstein, Revitalization, *supra* note 148, at 712.

200. See *supra* note 20.

201. That title—and nearly the title of most prolific—would have to go to Akhil Reed Amar. Some of Amar's principal works include the following: *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457 (1994) [hereinafter Amar, Consent]; *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L.J.* 1193 (1992); *The Bill of Rights*, *supra* note 194; *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 *U. Pa. L. Rev.* 1499 (1990); *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U. Chi. L. Rev.* 1043 (1988); *Our Forgotten Constitution: A Bicentennial Comment*, 97 *Yale L.J.* 281 (1987); *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425 (1987).

202. A by no means exhaustive list of Sunstein's works includes the following: *Free Speech Now*, 59 *U. Chi. L. Rev.* 255 (1992); *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 *Colum. L. Rev.* 1 (1992); *Lochner's Legacy*, 87 *Colum. L. Rev.* 873 (1987) [hereinafter Sunstein, *Lochner's Legacy*]; *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689 (1984).

203. See Sunstein, *The Partial Constitution*, *supra* note 153.

204. *Id.* at 9–10. In this Sunstein echoes the call made a century earlier by James Bradley Thayer, who attempted to limit the scope of judicial review and thus increase the arena for progressive democratic reform. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129, 155–56 (1893); cf. James E. Fleming, *Constructing the Substantive Constitution*, 72 *Tex. L. Rev.* 211, 240 (1993) (observing that "Sunstein has made his own plea to be the Thayer for the next generation").

205. The now classic work in this regard is Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991); see also Donald L. Horowitz, *The Courts and Social Policy* (1977).

sponds to dispiriting interest-group pluralistic accounts of political behavior put forward by Sunstein's law and economics colleagues at the University of Chicago and elsewhere;<sup>206</sup> and in part it stems from the pre-Clinton expectation that an anti-progressive ethos would dominate the Supreme Court into the next century.<sup>207</sup>

Whatever its origins, Sunstein's modern republican agenda fits well with certain themes coming out of early American constitutionalism. But this partial fit came with a built-in temptation to be partial, that is, to invoke only those themes that provide support. Rather than look to England, Locke, and rights, Sunstein looks mainly to the Continent, implicitly to Machiavelli, and self-confidently to the classical republican tenets of self-government. Procedurally, the results represent a substantial improvement over Epstein, but are nonetheless flawed in important ways. Substantively, Sunstein's use of history is likewise more sophisticated yet one-sided.

Sunstein refuses to be ruled by history, but he does like to have it on his side. He is no originalist. Using Bork's *The Tempting of America* as the stand-in,<sup>208</sup> he has rejected the view that the intentions of the Framers should dictate constitutional interpretation. But Sunstein may accurately be called a historicist.<sup>209</sup> As such, he has argued that the "future of American public law depends in significant part on the way that its tradition is understood."<sup>210</sup> His own work, especially the work that led up to *The Partial Constitution*, commonly includes more than a perfunctory appeal to the views of the Founders. To take one example, Sunstein's important

---

206. See, e.g., James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962); Robert A. Dahl, *A Preface to Democratic Theory* (1956); Richard A. Posner, *The Problems of Jurisprudence* 276–78, 354–55, 359–60 (1990); Symposium on the Theory of Public Choice, 74 Va. L. Rev. 167 (1988).

207. See Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 Conn. L. Rev. 205 (1991) [hereinafter Sunstein, *Judge Bork*].

208. See Sunstein, *The Partial Constitution*, supra note 153, at 96–110; see also Sunstein, *Judge Bork*, supra note 207. This strategy is not without its problems, largely because it gives Sunstein too easy a target. Sunstein rightly points out that Bork cannot justify reliance on original intent by relying on original intent without falling prey to obvious circularity. He also correctly notes that Bork's attempts to justify originalism with reference to democratic theory are thin and conclusory. Having dispensed with Bork, Sunstein nonetheless fails to consider whether more sophisticated defenses of originalism must likewise fail. See, e.g., Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226 (1988).

209. For present purposes, a historicist may be defined as one who thinks history is important. See Nelson, supra note 124, at 459 n.57.

210. Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539, 1563 (1988) [hereinafter Sunstein, *Beyond the Republican Revival*]. Along these lines Sunstein specifically asserts that "the importance of Madison for current constitutional controversy does not depend solely on the quality of Madison's thought" but also on his role as a major figure in American constitutional tradition. *Id.*

article, "Beyond the Republican Revival,"<sup>211</sup> which contains some of his most thorough historical invocations, contains numerous passages attempting to relate "modern historical scholarship . . . of the role of republican thought in the period before, during, and after the ratification of the American Constitution" to his own "particular version of republican thought, one that avoids some of the difficulties associated with competing conceptions of public life, both republican and antirepublican."<sup>212</sup> Nor is *The Partial Constitution* itself any exception. The body of the work commences with a brief but prominent consideration of what "the framers of the American Constitution sought to create," by "set[ting] out certain ideas that [played] a prominent role in the founding period."<sup>213</sup> For these reasons, the following examination will focus on these two works.

In each, Sunstein prefaces his accounts of the Founding with declarations of balance over partiality.<sup>214</sup> In stark contrast to Epstein, he proclaims that "[t]here can be little doubt that elements of both pluralist and republican thought played a role during the period of the constitutional framing."<sup>215</sup> In fact, Sunstein continues, "[t]he opposition between liberal and republican thought in the context of the framing is . . . largely a false one."<sup>216</sup> Multifaceted thought, moreover, translated into a multifaceted framework. "What emerged is in several respects a hybrid," composed of a number of competing elements "in the theory of politics embodied in the American Constitution."<sup>217</sup>

Sunstein makes the character of this hybrid especially clear when he recounts the Founders' understanding of society. On his view, many of the Founders moved beyond the classical republican position that civic virtue could be the primary basis for representative government. Citing John Adams, Noah Webster, and Patrick Henry, Sunstein notes that Adams in particular was "quite skeptical about the idea that anything other than self-interest could be the basis for political behavior."<sup>218</sup> In Madison and Hamilton he observes a certain "skepticism about important elements of classical republican thought."<sup>219</sup> But if the Founders were no longer classical republicans, Sunstein continues, neither were they "lib-

211. See *id.*

212. *Id.* at 1540–41; see also *id.* at 1548–51, 1558–64, 1566–67.

213. Sunstein, *The Partial Constitution*, *supra* note 153, at 18.

214. The emphasis on historical balance and complexity described in this paragraph appears mainly in "Beyond the Republican Revival"; it all but disappears by the time of *The Partial Constitution*.

215. Sunstein, *Beyond the Republican Revival*, *supra* note 210, at 1558.

216. *Id.* at 1567. As the previous two passages make clear, Sunstein sometimes uses "liberalism" and interest-group "pluralism" interchangeably, especially when speaking of the Founding. Nonetheless, he clearly rejects the notion that "liberalism" necessarily, or even primarily, entails interest group pluralism. See *id.* at 1541, 1566–71.

217. *Id.* at 1561.

218. *Id.* at 1558 (footnote omitted).

219. *Id.*



eral" interest-group pluralists. They did not abandon certain traditional republican beliefs, in particular the "belief in deliberative government and the need for civic virtue."<sup>220</sup> Instead "[t]hey attempted to carry forward the classical republican belief in virtue—a word that appears throughout the period—but to do so in a way that responded realistically, not romantically, to likely difficulties in the real world of political life."<sup>221</sup> In consequence, Sunstein asserts, "the framers' conception of human nature synthesized elements of classical republicanism with its emerging interest-group competitor."<sup>222</sup>

The hybrid nature of the account begins to fade, however, when Sunstein shifts from the Founders' translation of their descriptions of society into prescriptions for government. For Sunstein, the Founders' intellectual inheritance above all led them to seek "a republic of reasons."<sup>223</sup> In this they responded to three related evils: monarchy, corruption, and faction. With the Revolution, Americans rejected the "monarchical legacy" of England, which Sunstein defines as the traditional belief in a natural order in society.<sup>224</sup> The Founders likewise repudiated self-interested representation by government officials, whether "corruption" in the modern sense of bribery or "corruption" in the eighteenth-century meaning of officials aggrandizing their own powers at the expense of the people as a whole.<sup>225</sup> Yet most importantly, in Sunstein's estimation, the Founders attempted to create a system that would limit the power of self-interested private groups or factions because "on their view, even an insistent majority should not have its way, if power was the only thing to be invoked on its behalf."<sup>226</sup> This last lesson in particular arose out of the unhappy reign of factions in the states during the Critical Period. A republic of reasons, otherwise known as a "deliberative democracy," would combat these evils by ruling out of bounds the justification of any government action with reference to private interest or to nature, as opposed to the common good. In this way, deliberative democracy reflected an ongoing commitment to the idea of civic virtue that was central to classical republicanism. On this account, for the Founders, "[t]he basic institutions of the resulting Constitution were intended to encourage and to profit from deliberation."<sup>227</sup> Thus, what Epstein views as mechanisms to serve Lockean rights,<sup>228</sup> Sunstein sees as means to promote a "Republic of Rea-

---

220. *Id.* at 1558–59.

221. Sunstein, *The Partial Constitution*, *supra* note 153, at 21.

222. Sunstein, *Beyond the Republican Revival*, *supra* note 210, at 1561.

223. See Sunstein, *The Partial Constitution*, *supra* note 153, at 17.

224. See *id.* at 19.

225. See *id.* Sunstein, in distinguishing between "[a]ctual corruption" and general self-aggrandizement, apparently is unaware of the broader eighteenth-century meaning of "corruption." For discussions of "corruption" in the broader sense, see Lewis Namier, *England in the Age of the American Revolution* (2d ed. 1961); Bailyn, *supra* note 57.

226. Sunstein, *The Partial Constitution*, *supra* note 153, at 19.

227. *Id.* at 23.

228. See *supra* text accompanying notes 162–166.

sons."<sup>229</sup> Checks and balances, bicameralism, presentment and the Presidential veto, federalism, the election of Senators by the state legislatures, the selection of the President by the Electoral College—all of these familiar mechanisms came into being primarily, if not exclusively, to insure that no government action could occur without the thorough airing of different perspectives aimed at advancing the common good.<sup>230</sup> Judicial review, too, would safeguard deliberation by protecting the considered judgments of the people, embodied in constitutional law, against the transitory, ill-considered actions of public officials. Even the Founding concern for many, if not most, rights arose from the commitment to deliberation. "What is distinctive about the republican view is that it understands most rights"—Sunstein typically mentions freedom of speech, the right to vote, and trial by jury—"as either the preconditions for or the outcome of an undistorted deliberative process."<sup>231</sup> By each of these means the Founders sought "to promote deliberation and to limit the risk that public officials would be mouthpieces for constituent interests."<sup>232</sup>

These same points apply to Founding strategies that Sunstein concedes at least at first blush look like repudiations of classical republican commitments. The Federalists thus turned on its head the notion that civic virtue sufficient for public-spirited deliberation could flourish only in small republics, by arguing that in large republics, factions would cancel one another out.<sup>233</sup> Sunstein notes that the Federalists likewise rejected the traditional commitment to homogeneous republics by contending that the clash of perspectives in a heterogeneous land would promote deliberation.<sup>234</sup> By these means, Sunstein concludes, the Founders not only maintained their commitment to deliberation, but also "modernized the classical republican belief in civic virtue."<sup>235</sup>

In procedural terms, Sunstein makes his case more persuasively than Epstein in almost every way. As with Epstein, simple factual accuracy is largely beside the point, since Sunstein also makes few specific factual assertions. By contrast, Sunstein seizes the opportunity that the rediscovery of early American constitutionalism presents. Not surprisingly—though frustratingly—this is more evident in the articles that led to *The Partial Constitution* than in the book itself, but it is sufficiently prominent

---

229. Sunstein, *The Partial Constitution*, supra note 153, at 17, 24.

230. See id. at 23.

231. Sunstein, *Beyond the Republican Revival*, supra note 210, at 1551. Sunstein later, and somewhat ambiguously, notes that "[m]any of the original constitutional rights provide spheres of private autonomy to be insulated from government interference; . . . some of [these rights] are more easily understood as an outgrowth of Lockean ideas," even though "such rights can be [and were?] justified in republican fashion." Id. at 1562.

232. Sunstein, *The Partial Constitution*, supra note 153, at 21–22.

233. See id. at 20–21.

234. See id. at 24.

235. See id. at 20.

in both.<sup>236</sup> Consider first the use of primary sources. In neither the book nor the articles does Sunstein lean solely on the totemic *Federalist*. Rather, he relies extensively on letters, papers, and pamphlets written not just by the Madisons and Hamiltons,<sup>237</sup> but by less familiar yet important figures such as John Witherspoon and Benjamin Rush.<sup>238</sup> In so doing, Sunstein makes use of recent primary source collections that are themselves a result of current scholarly interest.<sup>239</sup> His case is even more impressive with reference to secondary works. Present and accounted for are Hartz, Wood, Bailyn, Pocock, and Appleby, along with numerous other important historians.<sup>240</sup> It is, moreover, a tonic to see the *William and Mary Quarterly*, perhaps the leading professional journal of early American history and culture, cited in a law review piece discussing early American constitutionalism.<sup>241</sup>

Sunstein's command of sources in turn promises a special sensitivity to context. In both his articles and his book Sunstein acknowledges that there is a far bigger picture than any of his brief historical treatments can adequately paint. He ostensibly addresses this problem first by sketching in those parts of the canvas relevant to his main account. As noted, Sunstein glances back toward the Revolution to note that the Founders' republican solutions in important ways moved beyond certain traditional republican strategies, such as the commitment to small polities. In similar fashion, Sunstein offers a glimpse past the Founding to show how Madison's brand of republicanism partially anticipated, but more importantly differed from, the interest-group pluralism that many historians argue later took root in American society.<sup>242</sup> More generally, Sunstein further deals with the problem of context by sounding general caveats. *The Partial Constitution*, in particular, laudably warns that "[i]n light of the sheer diversity of influential ideas, any description of the framing com-

236. The transition from law review article to legal monograph commonly entails "streamlining" the footnotes by deleting citations. This practice is frustrating with regard to legal works discussing history insofar as historical persuasiveness in particular turns on how thoroughly the evidence is presented. It is doubly problematic for theorists like Ackerman, who are more heavily reliant on history than either Epstein or Sunstein. See *infra* text accompanying notes 285–290.

237. See Sunstein, *The Partial Constitution*, *supra* note 153, at 19–21; Sunstein, *Beyond the Republican Revival*, *supra* note 210, at 1558–63.

238. See Sunstein, *The Partial Constitution*, *supra* note 153, at 22–24; Sunstein, *Beyond the Republican Revival*, *supra* note 210, at 1540 n.1, 1566 n.151.

239. For example, Sunstein relies on Herbert J. Storing's important multivolume collection, *The Complete Antifederalist*. See, e.g., Sunstein, *Beyond the Republican Revival*, *supra* note 210, at 1556 n.91. For a discussion of developments in primary source materials, see Bernstein, *supra* note 69, at 1569–78.

240. Others include Lance Banning, Martin Diamond, Jackson Turner Main, and Thomas Pangle. See Sunstein, *The Partial Constitution*, *supra* note 153, at 359 n.8; Sunstein, *Beyond the Republican Revival*, *supra* note 210, at 1540 n.3, 1558 n.108, 1566 n.153.

241. See, e.g., Sunstein, *Beyond the Republican Revival*, *supra* note 210, at 1540 n.3.

242. See *id.* at 1558–64.

mitments will have to be selective. It will inevitably downplay certain elements and emphasize others."<sup>243</sup>

The promise of concern for context, however, is not the same thing as concern itself, and it is here that the problems with Sunstein's approach begin. For all his talk of the bigger picture, Sunstein actually addresses few aspects of it. Troubling enough is the "glancing" manner in which Sunstein approaches what is his main topic, republicanism. His brief treatments of classical republicanism, to say nothing of its role in the Revolution and flowering during the Critical Period, do little to situate the subsequent "Madisonian" republicanism he describes. Why the Antifederalists clung to the "traditional" republican model, why the Federalists transformed it, and what the overall differences were between the two remain unclear. Even more sketchy is Sunstein's description of the origins and nature of republicanism's main "competitor": liberal, interest-group pluralism, which, however uncongenial to many of his theoretical commitments, he acknowledges to have formed an important component of Federalist thought.<sup>244</sup>

But more troubling is what he does not address. Showing laudable candor, Sunstein acknowledges that his historical account simply will not deal with contemporaneous beliefs in ideas such as "aristocratic rule . . . agrarian populism . . . interest-group warfare . . . radical centralization of politics in the national government . . . racial and sexual hierarchy . . . Calvinism . . . [and] natural rights," to name a few.<sup>245</sup> Giving an adequate sense of the Founders' constitutional world may be possible without reference to a number of these concepts.<sup>246</sup> But it is not possible without those that are central to that world. Of those he mentions, the Founding commitment to natural rights<sup>247</sup>—and more generally, rights conceived as distinct from or even in tension with deliberative democracy—would

243. Sunstein, *The Partial Constitution*, supra note 153, at 18.

244. See Sunstein, *Beyond the Republican Revival*, supra note 210, at 1561; Sunstein, *Interest Groups*, supra note 20, at 39.

245. Sunstein, *The Partial Constitution*, supra note 153, at 18; see also Sunstein, *Beyond the Republican Revival*, supra note 210, at 1539–40 (noting difficulties of "modern efforts to revive principles of classical republicanism").

246. For example, Calvinism arguably played at best a muted role in constitutional deliberations in the late eighteenth century, especially among Enlightenment theists like Jefferson. See Bailyn, supra note 63, at 32–33. But see Morgan, supra note 80, at 34–43 (suggesting that the legacy of Puritanism was important to American Revolutionary thought).

247. Sunstein is well-known for his attack on the idea of natural or "pre-political" rights as a matter of theory. See Sunstein, *The Partial Constitution*, supra note 153, at 4–7, 40–92; Sunstein, *Lochner's Legacy*, supra note 202, at 885. By contrast, his discussion of natural rights as a matter of history is all but non-existent. The most he has to say in either *The Partial Constitution* or "Beyond the Republican Revival" is: "Many of the original constitutional rights provide spheres of private autonomy to be insulated from government interference; such rights can be justified in republican fashion, but some of them are more easily understood as an outgrowth of Lockean ideas. Other rights can be read as straightforwardly republican in inspiration." Sunstein, *Beyond the Republican Revival*, supra note 210, at 1562.

make any shortlist of essentials. Caveats, however laudable, simply cannot salvage a historical account so highly selective that it omits critical pieces of the structure it needs to rebuild.

Nor is the prerogative of deciding what counts as critical Sunstein's; rather, it is the decision of those whose legacy he has undertaken to describe. Try though he might, Sunstein does not, and perhaps cannot, succeed in limiting his description to "certain ideas that did play a prominent role in the founding period and that are especially well suited to those of us now in search of a usable past."<sup>248</sup> This strategy might have worked had Sunstein invoked the Founders solely as one might cite Antonio Gramsci or Michel Foucault, that is, on the strength of the usefulness of ideas put forward by thinkers who otherwise have no direct connection to our constitutional culture. But Sunstein invokes the Founders for something more, namely the authority that springs from their historical connection with a document and the culture it continues to shape.<sup>249</sup> Given this historicist commitment, even the most explicit disclaimers almost inevitably fail. As an initial matter, it seems doubtful that most readers would expect that a historical sketch about the Founding would omit ideas that the Founders themselves thought were part of their core understanding of the Constitution (or, for that matter, that were directly relevant to contemporary theories challenging the author's own).<sup>250</sup> More tellingly, Sunstein's account belies his caveats in any case. To claim, for example, that the Constitution was designed to establish a republic of reasons "[a]bove all,"<sup>251</sup> confirms the expectation that any themes the Founders thought basic to their achievement not only have been considered but would have been considered expressly.<sup>252</sup> In these circumstances, neither Sunstein nor any other theorist can freely pick and choose what ideas to recount merely on the grounds of usefulness.

To do so necessarily runs the risk of mischaracterization. Consider a potential modern example. A student decides that an account of modern constitutional theorists will help the project she has undertaken not only because they furnish certain ideas she finds useful, but also because their prominence adds authority to the project. Despite caveats that she will be necessarily selective in her treatment of individual works, she makes clear that her account will be descriptive and effectively gives rise to the expectation that she will not omit ideas that are central to a particular thinker. She then characterizes *The Partial Constitution's* theory of deliberative democracy almost exclusively in terms of its commitment to government

---

248. Sunstein, *The Partial Constitution*, supra note 153, at 18.

249. See supra text accompanying note 213.

250. Sunstein mentions Epstein's rights-based theory in exactly this regard. See Sunstein, *The Partial Constitution*, supra note 153, at 21, 359 n.9.

251. *Id.* at 19–20.

252. Likewise, repeatedly referring to what "the framers" collectively thought, sought, and established also tends to confirm this expectation. See *id.* at 18–24; see also Sunstein, *Beyond the Republican Revival*, supra note 210, at 1558–64 (discussing the Framers' conception of representation and its relation to elements of republican thought).

regulation, calling it "mainly a framework of regulatory reinvigoration." The student's account, however, all but omits Sunstein's central concern for an array of rights as preconditions for deliberative self-government.<sup>253</sup> When Sunstein fails to include at least those concepts the Founders made clear were integral to constitutional understanding—at a minimum "non-deliberative" rights—he inadvertently does to that understanding what the student has inadvertently done to his theory.

Perhaps not surprisingly, Sunstein's methods yield substance that is in many respects balanced, yet in others—often the more important ones—is one-sided. The balance in Sunstein's account emerges most notably where he demonstrates the hybrid nature of the Founding most convincingly—his treatment of the Founders' understandings of human nature and society.<sup>254</sup> By arguing that the Founders retained the belief that virtue could still form a basis for government, Sunstein clearly acknowledges the continuing legacy of the classical republicanism reconstructed above all by Pocock.<sup>255</sup> Yet, by acknowledging that the Founders had also become skeptical of that legacy, Sunstein not only refuses to abandon the "touch of rightness" in earlier liberal accounts but also effectively picks up Gordon Wood's insight that the Critical Period hastened this skepticism.<sup>256</sup> Particularly convincing in this regard is Sunstein's reliance on *The Radicalism of the American Revolution*,<sup>257</sup> in which Wood moves beyond *Creation's* preoccupation with government to focus on early American understandings of society.<sup>258</sup>

Government, however, remains the focus of constitutional history and theory alike, and it is here that Sunstein's problems begin. Unlike the Founders themselves, he does not translate this more synthetic view of human behavior to the problem of setting up institutions that would balance power and liberty. Viewed against the sweep of early American constitutional scholarship, the description he advances gives short shrift to those "non-republican" ideas that the Founders themselves viewed as central to American constitutional development, but which had little to do with the deliberative democracy he recounts. This is not to say that Sunstein's account is merely the civic republican analogue to Epstein's tale of Lockean liberalism. In stark contrast to Sunstein, Epstein neither notes the last quarter-century of scholarly work nor acknowledges the complexity of the world that work depicts.<sup>259</sup> Even so, the substantive

---

253. See Sunstein, *The Partial Constitution*, supra note 153, at 133–41; James E. Fleming, *Constructing the Substantive Constitution*, 72 *Tex. L. Rev.* 211, 241–79 (1993); Cass R. Sunstein, *Response, Liberal Constitutionalism and Liberal Justice*, 72 *Tex. L. Rev.* 305, 305–13 (1993).

254. See supra text accompanying notes 218–222.

255. See supra text accompanying notes 72–79, 235.

256. See supra text accompanying notes 218–222.

257. Wood, *Radicalism*, supra note 13; see Sunstein, *The Partial Constitution*, supra note 153, at 18–27 nn.1, 2, 5, 8, 21 & 24.

258. See supra note 96 and accompanying text.

259. See supra text accompanying notes 182–187.

problems with Sunstein's account remain. Contrary to H. Jefferson Powell, the difficulty is not that Sunstein advances a "hybrid" liberal/republican Founding that cannot "serve as a corrective to concepts that it already embodied," such as interest-group pluralism, which Sunstein would like to correct.<sup>260</sup> Rather, the problem is that Sunstein speaks of a historical "hybrid," but talks only about its deliberative democratic aspects when he considers governmental institutions and the ideas underlying them.<sup>261</sup>

This problem emerges most clearly by looking first at institutions, then to ideas. Recall that Sunstein views the principle Founding devices—checks and balances, federalism, bicameralism, presentment, even judicial review—all but exclusively in a republican light, as means to promote deliberative democracy. Recall, too, that Sunstein concedes that certain other strategies, especially Federalist acceptance of large and heterogeneous republics, rejected the contrary traditional republican "prescriptions," but reflected an ongoing republican commitment to the goal of marshalling sufficient civic virtue to sustain a "republic of reasons." Had Sunstein's method been less selective, however, he would have pointed out that nearly all the mechanisms the Federalists proffered were to some extent repudiations of classical republican devices. Nowhere were these earlier devices more evident than in the first state constitutions such as Pennsylvania's. As noted, that state's 1776 constitution featured, among other stratagems: a powerful unicameral legislature; a weak multiple executive; a dependent judiciary; annual elections; rotation in office; even a requirement that pending bills be posted on the statehouse door to facilitate public discussion.<sup>262</sup> In rendering Pennsylvania's government more representative than nearly any other government on earth, these devices reflected a profound belief in the people's capacity to engage in deliberative, virtuous, self-government. Yet, just eleven years later, the national Constitution's architects treated each of Pennsylvania's republican solutions as outmoded failures.

Sunstein's failure to place Founding institutions in sufficient context has important implications for his account of Founding theory. Sunstein, of course, could reply that his institutional treatment is harmless error. That is, he could contend that checks, balances, bicameralism, and the rest were like the new-fangled commitment to large, heterogeneous polities—"modernized" prescriptions that reflected an ongoing, though not necessarily exclusive, commitment to the goal of virtuous, deliberative democracy. And were he to say this, he would have significant scholarly

---

260. H. Jefferson Powell, *Reviving Republicanism*, 97 *Yale L.J.* 1703, 1707 (1988).

261. James Fleming recently pointed to a similar theoretical one-sidedness in Sunstein's work, observing, "Sunstein's liberal republicanism . . . represents a flight from giving effect to substantive liberties to perfecting processes [of self-government]." Fleming, *supra* note 253, at 260, 256–60.

262. See Pa. Const. of 1776 §§ 2, 9, 11, 19, 23. See generally Wood, *Creation*, *supra* note 14, at 132–42 (discussing the formation of state constitutions and governments).

support.<sup>263</sup> Yet so dramatic a repudiation of classical republican institutions suggests something beyond mere tinkering with new means to the same end. At the very least, it implies that the "republican" end either had changed or was more complicated to begin with. On just this point Sunstein's account runs headlong into scholarly themes that are, if not "liberal," then surely not "republican."

One theme concerns rights. Had Sunstein looked back more fully, he would have seen that early American constitutionalism centrally featured a commitment to rights understood neither as "the preconditions [n]or the outcome of an undistorted deliberative process." Part of this commitment had to do with natural law. For all that their work marginalized Locke, Bailyn and Wood agree that Americans viewed natural rights as a constraint on sovereign power.<sup>264</sup> But—and this point is critical—probably a greater part of the commitment to rights had to do with nondeliberative positive law. Here Reid's work convincingly argues that Americans approached the Revolution in the belief that English law defined and protected rights through accumulated custom as well as through foundational contracts between the rulers and the ruled, external constraints having little to do with deliberative self-government in Sunstein's sense.<sup>265</sup> Moreover, greater attention to the prevailing narra-

263. See Pocock, *supra* note 72, at 526–31.

264. See *supra* text accompanying notes 59, 98–100; Bailyn, *supra* note 63, at 27–34; Morgan, *supra* note 107, at 289–91; Wood, *Creation*, *supra* note 14, at 3–10.

265. See *supra* text accompanying notes 188–189. Non-deliberative positive law has several important consequences for Sunstein's work. First, Sunstein cannot invoke it as support for his conception of rights as the outcome of deliberative processes. The problem is that custom and contract were seen as sources of law that could serve as benchmarks for legislative misconduct, however deliberative, but which were themselves the products not of deliberation but of experience. Rights derived from contract or custom, therefore, were not results of deliberative self-government in any straightforward way. (Conversely, for Epstein the problem is that these sources of rights nonetheless broadly reflect the "consent of the governed," as evidenced in the governed's ongoing acquiescence, and thus did not provide the grounds for a judicially enforceable limit on legislative action that itself reflected consent through representation. See *supra* text accompanying notes 188–189.)

Second, Sunstein has yet to refute the possibility that non-deliberative positive law as used here did or can identify rights unrelated to deliberative democracy. Sunstein does, to be sure, reject the notion that the Constitution necessarily adopts "common law baselines" as the reference point for neutral adjudication. "Common law baselines," however, should not be confused with English rights derived from custom and contract. What Sunstein attacks refers to legal arrangements which presume that the existing distribution of wealth, income, and preferences reflects a natural pre-political order. See Sunstein, *The Partial Constitution*, *supra* note 153, at 3–4, 40–92. What Reid describes are constraints on governmental action that Anglo-American legal (and thus post-political) culture over time recognized as essential to individual liberty, regardless of their connection to deliberation. See *supra* text accompanying notes 89–91.

Finally, Sunstein might well have to acknowledge that other rights which he characterizes as "straightforwardly republican" were in fact themselves hybrid. Sunstein, *Beyond the Republican Revival*, *supra* note 210, at 1562. Take for example, the right considered preeminent at the time of the Revolution—the right to trial by jury of the



tive from the Revolution to the Founding would have revealed the Constitution as more than simply a reaction to the emergence of factions during the Critical Period. It would have further shown the document as a response to the attacks mounted by these factions on rights understood, at least in part, in the non-deliberative ways just recounted. Put another way, the problem with factions was not simply that they were self-interested. The problem was that they were self-interested in a way that infringed rights conceived of as either natural or dating from time immemorial.<sup>266</sup>

One further “nonrepublican” theme relating to government involves another facet of the Federalist reaction that current scholarship describes. Sunstein’s central ongoing commitment to republican virtue is precisely what the reigning narrative of the Founding denies, a denial strengthened by the Revolutionary background to that narrative. Wood’s *Creation*, among other works, quotes dozens of historical actors who by the late 1780s came to doubt America’s capacity for an overarching commitment to the public good.<sup>267</sup> As Washington put it as early as 1776, “The few . . . who act upon Principles of disinterestedness, are, comparatively speaking, no more than a drop in the Ocean.”<sup>268</sup> By 1791, certain thinkers, including Madison and James Wilson, at least arguably no longer viewed civic virtue as the primary organizing principle for daily government. For them, “America would remain free not because of any quality in its citizens of spartan self-sacrifice to some nebulous public good, but in the last analysis because of the concern each individual would have in his own self-interest and personal freedom.”<sup>269</sup> Sunstein follows Wood’s recent work in arguing that even the hard-headed Madison was no interest-group pluralist in the modern sense.<sup>270</sup> Although it is not entirely clear, there is good reason to believe that

---

vicinage. Sunstein correctly notes that this right safeguarded and promoted civic virtue and local participation in the administration of law. See, e.g., McDonald, *supra* note 67, at 40–41 (noting that “juries were the government, and it was upon them that the safety of all rights to liberty and property depended”). He fails to consider, however, the possibility that this right was also considered an individual’s entitlement largely unrelated to the republican values just mentioned. For example, when the patriots protested against Parliament’s revival of a statute of Henry VIII mandating that treason trials take place in the “realm”—their ire was directed less at a loss of local governmental control than it was focused on the distressing possibility that individual Americans would be transported 3,000 miles to be tried and probably convicted before a panel of strangers, and thus be deprived of their liberty. See I Reid, *supra* note 89, at 54–55; see generally *id.* at 47–64.

266. See *supra* text accompanying notes 98–114.

267. See Wood, *Creation*, *supra* note 14, at 413–24; see generally Morgan, *supra* note 107, at 239–62 (discussing early efforts of the American Revolutionaries to fashion a representative government).

268. Letter from George Washington to the President of Congress (John Hancock) (Sept. 24, 1776), in 6 *The Writings of George Washington* 106, 108 (John C. Fitzpatrick ed., 1932).

269. Wood, *Creation*, *supra* note 14, at 612.

270. See Sunstein, *The Partial Constitution*, *supra* note 153, at 21; Wood, *Radicalism*, *supra* note 13, at 253–62.

America's constitutional experiences from the Revolution through the Critical Period to the Founding resulted in greater skepticism as to the role of public-regarding deliberation than Sunstein allows. Sunstein, however, fails to acknowledge this possibility.

In the end, the one-sidedness of his account calls into question whether Sunstein adequately recounts the Founding in the way he in effect promises. Powell, for one, has answered that question in the negative, suggesting that "Sunstein does not offer us historical republicanism [or, more relevantly, Federalism] and commend its virtues to us; he offers us a contemporary political theory and notes that at times the founders said similar things."<sup>271</sup> In one sense, this method is better than Epstein's procedure. Sunstein never claims that he is describing the age's "general mood," ostensibly oblivious to other, often contrary material, and thus unaware of the need to make intelligent selections in the first place. Yet in another sense, Sunstein's approach is more frustrating precisely because he gives short shrift to material that is central to the "liberal republican" sketch he offers. Sunstein might plausibly respond that his ultimate concern is the "contemporary political theory." But the fact remains that he offers an account of history to bolster that theory. No more than any other theorist can he invoke history in this way while escaping historical censure.

#### D. *Look Homeward, Publians*

The prospect of something better comes from a source that is both surprising and expected. For much of his early career, Bruce Ackerman wrote as a comparatively ahistorical political philosopher in the manner of John Rawls and Ronald Dworkin. This focus, while Ackerman has hardly abandoned it, culminated in the well-known *Social Justice in the Liberal State*.<sup>272</sup> By contrast, for the past ten years, Ackerman has concentrated on American constitutional theory in a dramatically historicist fashion. This concentration has produced his ongoing *We the People* project, in which he has preached the utility of searching for distinctively American solutions to the problem of self-governance. The project's place in Ackerman's work and its historicist approach make the major articles and one volume that so far comprise it ideal for consideration.<sup>273</sup> The result is a substantial advance in the historical credibility of constitutional theory. Not that the advance is linear. Procedurally, the breadth of Ackerman's research does not match its depth, especially at points where it matters most. Substantively, however, his work remains significantly—and compared to many other theorists, significantly more—faithful to

---

271. Powell, *supra* note 260, at 1707.

272. Bruce A. Ackerman, *Social Justice in the Liberal State* (1980).

273. See Ackerman, *We the People*, *supra* note 19. Two articles in particular prefigured the monograph: Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *Yale L.J.* 453 (1989); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013 (1984) [hereinafter Ackerman, *The Storrs Lectures*].

the themes of both rights and self-government that are central to the prevailing historical narratives.<sup>274</sup>

It had better. For Ackerman, “fit,” to borrow a term from Dworkin,<sup>275</sup> is everything—in particular, the fit of American constitutional theory to American constitutional tradition.<sup>276</sup> Fit in this sense matters on two levels, each of which leads Ackerman to rely heavily on history and historical scholarship. First, as a background consideration, Ackerman assumes that the American citizenry, bench, and bar all share a traditional commitment to democratic positivism and a weakness for at least some version of originalism. In his words, “Americans routinely treat the constitutional past as if it contained valuable clues for decoding the meaning of our political present.”<sup>277</sup> *We the People* and its forebears consequently adopt these theoretical stances to address citizens, judges, and lawyers on what are stipulated to be their own terms. Ackerman, at least in the works considered, does not really make these assumptions clear; still less does he defend them. These lapses have left him open to a considerable amount of criticism from fellow theorists.<sup>278</sup> Yet what matters here is that these are the theoretical tenets his project in effect adopts.

These democratic, positivist, and originalist tenets make fit matter in a second, more explicit way. As with any theory that relies on the intentions of those who adopted constitutional norms, the critical question becomes how well a given interpretation of those norms comports with the adopters’ intentions.<sup>279</sup> The *We the People* project consequently sets out to do nothing less than rediscover a distinctive American constitutionalism “by reflecting on the course of its historical development over the past two centuries.”<sup>280</sup> Ackerman’s mostly implicit theoretical commitments

---

274. In this Ackerman may be unusual but not alone. Mark Tushnet, for example, is similarly conscious of what recent scholarship has to say about the Founding’s central commitment to both rights and republican self-government. See Mark Tushnet, *Red, White, and Blue*, 4–17 (1988). Tushnet, moreover, relies on key historical and historiographical works in making this point. See *id.* That said, Tushnet disputes at least one of Ackerman’s contentions—that constitutional politics are of a different order than ordinary politics—on both historical and theoretical grounds. See *id.* at 26. For a discussion of Ackerman’s distinction, see *infra* text accompanying notes 279–284.

275. See, e.g., Dworkin, *supra* note 121, at 34–38, 143–45 (distinguishing fit and political morality as the two dimensions of justification of theories underlying legal systems).

276. See Bruce A. Ackerman, *Remarks at the New York University School of Law Colloquium on Constitutional Theory* (Nov. 16, 1993) (colloquy between Bruce Ackerman and Ronald Dworkin).

277. Ackerman, *We the People*, *supra* note 19, at 5.

278. See, e.g., David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 *Iowa L. Rev.* 1 (1990); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 *Stan. L. Rev.* 759 (1992); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 *Harv. L. Rev.* 918 (1992) (reviewing Ackerman, *We the People*, *supra* note 19).

279. For an originalist discussion placing primacy on the intentions of the Ratifiers rather than the Framers of the Constitution, see Lofgren, *supra* note 17, at 77.

280. Ackerman, *We the People*, *supra* note 19, at 5.

to fit have forced him into explicit examinations of, among other matters, the Founding, the Civil War and Reconstruction, and the New Deal, which for him have been the nation's three most fruitful periods in articulating constitutional norms. Put another way, because fit is everything, everything must fit, or at least the more that fits the better.

What matters most, both for Ackerman and for this Article, is the Founding. On Ackerman's view, the Founding gave rise neither to a "Lockean liberal" regime nor to a civic republican regime, but instead to one he sometimes describes as a "dualist democracy" or, significantly, as "Neo-Federalism."<sup>281</sup> Ackerman uses these terms to describe a system in which two types of decisions are made. One type entails decisions made by the government day in and day out, which ultimately derive their authority from the electoral process. This "normal lawmaking" reflects politics grounded mainly, but not exclusively, in individual self-interest. The other type of decisionmaking involves judgments of the American people during rare moments of national crisis as expressed either through Article V<sup>282</sup> or a complex process that serves as Article V's structural counterpart. This "higher lawmaking" reflects a more evanescent form of politics in which grave challenges to the nation promote greater consideration of the common good.<sup>283</sup> Ackerman appears clearly sympathetic to dualism on normative grounds. More importantly, for him the theory does not reflect either an English natural rights philosopher like Locke, nor Continental communitarians like Machiavelli, but instead embodies the considered judgment of "We the People" of the United States from 1787 to 1791.<sup>284</sup>

Ackerman's historical understanding is more notable for its depth than its breadth. He thoroughly discusses the work of a few key historians, but only a few. *We the People* itself, for example, contains short, considered essays on Beard, Hartz, Wood, and Pocock, rarities in a work of

281. *Id.* at 3–33, 254–65.

282. Article Five in relevant part provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or other Mode of Ratification may be proposed by the Congress.

U.S. Const. art. V.

283. See Ackerman, *We the People*, *supra* note 19, at 173–79.

284. In certain senses, Ackerman does not view the Founding as complete until 1804. On his account, Jefferson's election in 1800 fine-tuned the Constitution by transforming the Presidency from an office predicated on demonstrated public virtue to a post based on ideological popularity—a transformation obliquely acknowledged in the Twelfth Amendment. Conversely, the Jeffersonians were unsuccessful in attempting to force the Federal judiciary to renounce judicial review. See *id.* at 70–73.

constitutional theory.<sup>285</sup> Conversely, other historians receive passing reference, but frequently no more than that. This problem grows the further Ackerman strays from 1787 itself. In particular, *We the People's* extended discussion of the Revolution, though mostly theoretical rather than historical, nonetheless slights such important scholars as Morgan, Greene, Reid, and Black. If anything, Ackerman is even more thorough yet selective in his treatment of the ever popular *The Federalist*.<sup>286</sup> As is so often the case, however, none of the dozens, if not hundreds, of writers who debated the Constitution along with "Publius" makes an appearance. Off toward the horizon further still are any writings from the Revolution or Critical Period out of which "Publian" solutions emerged.

Not surprisingly, Ackerman's circumscribed rigor cuts in opposite directions. Along one path, the method renders his specific assertions convincing within their sphere. He commits no tell-tale factual errors and ably supports his reading of one vital work and of certain historiographical developments. Along the other path, Ackerman's basic procedure by definition renders his use of sources, especially primary materials, more limited and so less persuasive than it might be. Likewise, and more significantly, the policy of depth over breadth necessarily handicaps Ackerman's contextual assertions about the Founding as opposed to his specific interpretation of *The Federalist*. To take one example, critical for Ackerman's dualist account is the assertion that "Publius," *and the Founders generally*, believed that constitutional lawmaking could occur only in rare periods of national crises during which danger repressed passion.<sup>287</sup> This may be a fair reading of Publius in *The Federalist* No. 49 (here Madison) but, unlike many of Ackerman's other Publian claims, it is a controversial interpretation of the Federalist position generally.<sup>288</sup> On balance, Ackerman's reading does plausibly echo key themes sounded by Wood. Still, one passage from one essay in one collection is a shaky foundation on which to build a major wing of a model constitutional structure. Less dramatically, Ackerman's reliance on but a handful of historians—though a choice handful—sustains his larger contextual points less effectively than he otherwise could, doubly so given his habit of overlooking work on the Revolution. Too often these kinds of shortcuts signal an

---

285. See *id.* at 25–27 (Hartz), 27–29 (Pocock), 213–21 (Wood), 219–23 (Beard). Ackerman also offers similar treatments of Douglass Adair, *id.* at 223–24, and Martin Diamond, *id.* at 224–27.

286. The Storrs Lectures provide by far the most rigorous citations. See Ackerman, *The Storrs Lectures*, *supra* note 273, at 1021–33. In contrast to Sunstein and in stark contrast to Epstein, *We the People*, its precursors, or both, make specific and usually thoughtful reference to Numbers 1, 8, 9, 10, 14, 28, 31, 37, 39, 40, 41, 42, 46, 51, 53, 55, 57, 58, 60, 63, 65, 69, 71, 76, and 78.

287. Ackerman begins his central discussion of the Founding by speaking of "the Founders," but then quickly shifts to talking almost exclusively about *The Federalist* or "Publius." See Ackerman, *We the People*, *supra* note 19, at 165–99.

288. See Amar, *Consent*, *supra* note 201 (disputing that amendments outside Article V are confined to infrequent periods of national crisis).

insouciance about historical standards of the type problematic in Sunstein's work and rampant in Epstein's.

The irony in all this is that Ackerman appears to know better, yet chooses not to exploit the advantage. Even his passing references make clear that he has surveyed the secondary literature of at least the Founding more extensively than most contemporary theorists.<sup>289</sup> Ackerman's general command of secondary material also implies familiarity with primary works other than *The Federalist*, since much of this literature tracks an encyclopedic array of contemporary sources closely and explicitly.<sup>290</sup> This evidently wider learning, combined with narrowly applied rigor, suggests a tactical decision not to "bog down" an already complex account with "arcane" detours and specifics.

The price in terms of historical credibility, though hardly prohibitive, is needlessly costly. Ackerman's policy of circumscribed thoroughness has left him open to several published criticisms of his historical methods which, coming from lawyers, have not exactly been models of professional rigor themselves.<sup>291</sup> More importantly, it has left him open to a degree of unpublished skepticism among legal and constitutional

289. See *supra* text accompanying notes 1–19, 144–271.

290. Gordon Wood's work especially is noted for its dense use of primary source quotations within the text. A typical passage reads:

"An Aged Farmer" of New Jersey in 1770 urged his fellow farmers to stop complaining about the gentry's fox-hunting on their land. "Begrudging the young Men [Philadelphia] the Use of this Diversion in our Woods" was shortsighted, he said. These gentlemen more than made up for "all the little injuries that they may do by Accident, in Pursuit of those *noxious Animals*," by consuming our produce. Who else, he asked, would purchase our watermelons if not these gentry? Fox-hunting may have been a "Luxury" as charged, but so were watermelons. "They are of no Kind of Use as Food," and yet the gentry "pay us *some Thousand Pounds a Year*" for them. The Jersey farmers were indebted to the gentry's luxuries. Being able to dispose of his "*Truck*" in "the Philadelphia Market . . . for Cash, without paying . . . *Toll* for having the Liberty of selling it," was for this old Jersey farmer an "Indulgence" that had brought him "much good living in my Time," for which he acknowledged his gratitude, "as should also my Countrymen, who are mostly under the same Obligations."

Wood, *Radicalism*, *supra* note 13, at 34–35 (citation omitted).

291. Suzanna Sherry, for example, dismisses Ackerman's "sloppy history" in a fashion which itself is conclusory and cites neither Appleby, Bailyn, Morgan, Morris, Reid, Wood, nor, for that matter, any other professional historian. Sherry, *supra* note 278, at 923. To take one specific instance, Sherry castigates Ackerman for interpreting *The Federalist* to recommend that "constitutional politics" may often best be conducted through irregular mechanisms such as conventions, saying, "[a]bsolutely no evidence exists that Publius was speaking of what Ackerman calls 'irregular' constitutional politics as opposed to the formal method of amending the Constitution." *Id.* at 926. Among other things, Sherry's charge fails to acknowledge that "the People" had just engaged in exactly such a form of irregular constitutional politics, an act that itself echoed earlier irregular acts of constitutional change in Anglo-American history. These contextual points may not demonstrate that Publius thought no future acts of constitutional lawmaking would take place outside the orderly framework of Article V. But they count for something more than "[a]bsolutely no evidence." For a further discussion of these issues, see *infra* text accompanying notes 296–297.

historians.<sup>292</sup> More significant still, it ironically masks the genuine substantive fidelity of Ackerman's dualist account to critical themes in the work of historians who themselves looked to reconstruct early American constitutional thought and law.

Ackerman's account passes substantive muster, at least as a preliminary matter,<sup>293</sup> because it follows how recent historical scholarship has reconstructed a distinctively American conception of government that at least reconciles, and at most synthesizes, the principal constitutional currents evident in the late eighteenth century. In this quest, *We the People* comes down on the side of synthesis, contending that "We the People," for whom the work is named, consciously embraced a new type of constitutionalism.<sup>294</sup> This proposition is debatable yet plausible. Debate has proceeded over the question whether any grand understanding, or understandings, of government emerge from the thousands of pages of early American constitutional discourse. Conversely, generalization does not mean reductionism. If recent scholarship suggests anything, it is that American constitutional thought, taken as a whole, did undergo discernable shifts from the Revolution to the Critical Period to the Framing, culminating in what Wood calls a new "American [s]cience of [p]olitics."<sup>295</sup>

---

Beyond the Founding, David Dow likewise chides Ackerman (as well as Akhil Amar) for the "abuse of history." Dow, *supra* note 278, at 46. In particular, Dow challenges Ackerman on his interpretations of the Civil War and Reconstruction. By misreading Ackerman and focusing on the wrong election, Dow specifically challenges Ackerman's contention that certain national elections may signal constitutional politics outside Article V. Thus, in one sentence he argues that the 1860 election was too confusing to stand for any constitutional point, and in the next criticizes Ackerman for claiming that the nation understood the Reconstruction Republicans of the Thirty-Ninth Congress to be engaging in constitutional politics. See *id.* at 51. As Ackerman himself points out, if one is to look at any election to figure out popular constitutional understandings in 1866, it is the election of 1866. See Ackerman, *We the People*, *supra* note 19, at 93.

292. I have personally noted informal skepticism about the *We the People* project voiced by some at various legal history conferences and colloquia. Often, however, the doubts expressed go not to any discrete point Ackerman has made, but instead voice a general concern about keeping legal theorists off historians' "turf." Against this viewpoint Ackerman offers a strong rejoinder:

[A] small, but devoted, band of professional historians . . . are so intent on elaborating the vast gulf separating 1787 from 1987 that they verge on condemning as unhistorical any suggestion that modern Americans may have something to learn about themselves by establishing a meaningful relationship to the Founding. . . . And yet, the fact is that today's constitutional language and practice can be traced back to the Founding. Americans will lose a vital resource for political self-understanding if we estrange ourselves from these origins.

Ackerman, *We the People*, *supra* note 19, at 166–67. Moreover, historians who have looked into the substance of Ackerman's project have been favorable to his approach. See *infra* text accompanying notes 304–309.

293. "Preliminary" because, as has often been pointed out, the first volume of *We the People* promises more historical detail in the future.

294. This position is evident at numerous points. See, e.g., Ackerman, *We the People*, *supra* note 19, at 67–70, 165–68.

295. Wood, *Creation*, *supra* note 14, at 593–615. Wood concludes *Creation*, stating:

More importantly, Ackerman's account of this conscious synthesis concentrates on more than just one constitutional vision or tradition. Unlike Epstein, Ackerman acknowledges—even celebrates—the Constitution's republican pedigree. He does this first in viewing higher lawmaking as the intended preserve for a periodic politics of civic virtue and revolutionary selflessness. As previously described, *We the People* suggests that such periods of "constitutional politics" will be few and far between, in part because only times of great national crisis can "jolt" Americans into mass civic activity and public-spirited discourse. As also noted, the only primary source Ackerman invokes to support this proposition is *The Federalist* No. 40. But, as should be acknowledged, Ackerman's argument receives indirect yet significant support from the work of Wood and Morgan on the historical synecdoche for constitutional politics, "popular sovereignty." As these historians have pointed out, early American constitutionalists eventually hit on the idea that procedurally irregular—even extralegal—conventions paradoxically conferred more legitimacy on constitutions than legislatures could, in part because their very irregularity suggested greater civic fervor and representativeness.<sup>296</sup> This insight helps Ackerman first because irregularity in the abstract suggests infrequency, and second because conventions in this sense had occurred only during times of crisis in fact, at least as far as Anglo-American history to 1787 is concerned. Ackerman, moreover, wisely notes these points.<sup>297</sup>

*We the People* further recognizes the continued legacy of republican constitutionalism in considering various Constitutional mechanisms as ways to "economize" on virtue even during long stretches of "normal" lawmaking. Here Ackerman's work at least partially accords with Sunstein's analysis in arguing that the Federalists utilized an array of devices for promoting self-government based upon public-regarding reasons. For Ackerman, these devices begin with a scheme of representation that gives elected officials "incentives to engage in public-spirited deliberation. . . ."<sup>298</sup> The scheme achieves this goal by multiplying the number and nature of representative bodies, casting the House as the guardian of

---

So piecemeal was the Americans' formulation of this system, so diverse and scattered in authorship, and so much a simple response to the pressures of democratic politics was their creation, that the originality and the theoretical consistency and completeness of their constitutional thinking have been obscured. It was a political theory that was diffusive and open-ended; it was not delineated in a single book; it was peculiarly the product of a democratic society, without a precise beginning or an ending. It was not political theory in the grand manner, but it was a political theory worthy of a prominent place in the history of Western thought.

Id. at 615.

296. See id. at 306-43; Morgan, *supra* note 107, at 94-96, 107-13, 267-87.

297. See Ackerman, *We the People*, *supra* note 19, at 173-79. In an audacious yet plausible move, Ackerman moves beyond this point to suggest that Wood himself fails to realize that "constitutional politics" reflects an ongoing role for revolutionary/republican politics rather than a cynical Federalist manipulation of populist rhetoric. Id. at 219-21.

298. Id. at 198.



“popular opinion,” the Senate as the locus for “knowledgeable judgment,” and the President as the embodiment of “energy and decisiveness.”<sup>299</sup> Further devices to make the most of what public spirit exists include separation of powers, which will promote virtuous government by insuring that no single institution can claim that it speaks for the nation without that claim first being subject to the counterclaims of the other branches.<sup>300</sup> Finally, judicial review promotes the values of virtuous self-government by commanding that judges give special weight to the constitutional choices previously made by popular majorities during times of national crisis.<sup>301</sup>

While the specifics may be debated, the general theme of economizing on virtue itself has the virtue of reflecting central points in current scholarship. It corresponds with the thesis that virtuous self-government mattered—in fact that it mattered so much it formed the central organizing principles of America’s first written constitutions. It further reflects the thesis that experience showed this organizing principle to be in need of important reforms. In these ways, *We the People*’s dualist model acknowledges that the republican currents that were at flood tide in the first round of state constitution-making did not evaporate, but were instead directed in new ways, however much they ebbed.

But they did ebb. Unlike Sunstein, Ackerman also stresses that the Constitution was launched while new and different currents flooded national discourse. These currents, *We the People* contends, proceeded with the profoundly sobering recognition that Americans lacked sufficient public spirit to make virtue the sole, or even primary, basis for self-government. Any attempt to do so would only expose individual rights and the public good to majoritarian excesses. As Ackerman puts it, “during normal times, groups will form on the basis of passion or interest to use state power at the expense of the rights of other citizens and the permanent interests of the community.”<sup>302</sup> The constitutional trick therefore became designing a system that, at least during normal times, would recognize the electorate’s newly discovered penchant for faction and insure that rights were placed beyond the reach of majoritarian tyranny. In this new, darker light, both unfamiliar and familiar constitutional devices take on a different hue. No longer can they be seen solely as mechanisms for restoring public-spirited politics pure and simple. Instead, they indicate that—again, at least during normal times—neither the national nor the state electorates can be trusted entirely. Instead, the very division of constitutional and normal politics suggests the qualitative superiority of the former. Further, devices such as divided representation, separation of powers, and judicial review serve as “fail-safe” mechanisms against hope-

---

299. *Id.* at 184.

300. *See id.* at 184.

301. *See id.* at 191–95.

302. *Id.* at 187.

fully infrequent yet surely inevitable breakdowns of public-spirited politics.<sup>303</sup>

In these ways, *We the People* further situates the Constitution in the narrative of early American constitutional development. First, Ackerman's work implicitly—or to be accurate, inadvertently—reflects recent scholarship on the Revolution, particularly insofar as dualism suggests a more structured *return* to a framework in which concern for both rights *and* self-government coexisted before Independence revealed the deep tensions between them. Further, it explicitly acknowledges the now basic historical point that the Federalists developed their "new science of politics" as a reaction to the excesses of classical republicanism previously evident in the state legislatures and in the people who voted for them.

Dualist democracy thus rests on an appeal to experience that appears substantively plausible. In contrast to legal commentators, historians themselves have recognized this. Edmund S. Morgan has stated that the first volume of *We the People* "deserves to stand with Beard's . . . as a landmark" in constitutional scholarship, which offers "us a fresh and convincing view . . . of our constitutional history."<sup>304</sup> Morgan, in fact, goes so far as to say that Ackerman's sense of the past is more persuasive than his theoretical models.<sup>305</sup> In similar though more guarded fashion, Eben Moglen allows that "there are profound attractions in Ackerman's [dualist] resolution," both in terms of the secondary works and *The Federalist*.<sup>306</sup> Likewise, Richard Bernstein has written that Ackerman's work is "ambitious and largely successful."<sup>307</sup> This is not to say that these historians find no flaws.<sup>308</sup> Bernstein nonetheless sums up the views of all three historians in stating that "Ackerman . . . uses the materials he draws on,

303. See *id.* at 190–95, 198.

304. Edmund S. Morgan, *The Fiction of "The People,"* N.Y. Rev. of Books, Apr. 23, 1992, at 46, 46, 48 (book review).

305. "Ackerman is much more persuasive in his intuitive recognition of the phenomenon [i.e., "We the People" engaging in higher lawmaking] in the past . . . [than he is] . . . when he proposes a test for successful constitutional politics in our own time. . . ." *Id.* at 48.

306. Eben Moglen, *The Incomplete Burkean: Bruce Ackerman's Foundation for Constitutional History*, 5 Yale J.L. & Human. 531, 541 (1993) (book review).

307. Bernstein, *supra* note 69, at 1600.

308. Morgan states,

Ackerman, I think, accepts a little too readily Madison's contention that the people themselves acted in creating the Constitution. The calling of the Constitutional Convention came about without any visible popular demand, its members were not popularly elected, and ratification was achieved in the several state conventions by dubious means . . . .

Morgan, *supra* note 304, at 48. Moglen contends that "a constitutional history predicated on the entire absence of counter-revolutionary elements from Federalist thought [as Ackerman's threatens to be] would be as misleading as the Progressive historiography to which Ackerman objects." Moglen, *supra* note 306, at 542. Bernstein notes that Ackerman's research strategy is overly "selective." Bernstein, *supra* note 69, at 1602.

however selective his research, with ample sensitivity to their arguments and historical contexts."<sup>309</sup>

That said, *We the People* might have put forward an even better substantive case had it examined recent scholarship still further. At least two general concerns bear mention, each of which arises most clearly in light of recent work on the Founding's revolutionary background. For starters, Ackerman skimps on what Edward S. Corwin termed "the '[h]igher [l]aw' [b]ackground of American Constitutional law."<sup>310</sup> As a matter of theory, *We the People* has little patience for "natural law"—or "right reason"—as a source of constitutional rights or values.<sup>311</sup> Of greater relevance here, still less does the work have any place for natural law as a matter of history. Rather, Ackerman attributes to the Federalists a belief that vestigial American virtue, marshaled during times of national crisis, would suffice to insure that positive higher law that "We the People" make would reflect a considered commitment to fundamental values and rights. Any strategy for protecting rights outside constitutional politics can only be an ahistorical and essentially un-American import.

But virtuous higher lawmaking may not be all the Federalists believed in. As Bailyn pointed out a generation ago, American Whigs marched toward revolution with "the law of nature" as one of several arrows in their quiver.<sup>312</sup> Though Reid strongly argues that English constitutional principles all but eclipsed American reliance on natural law, his position has yet to carry the day; nor does Ackerman rely on his work. Moreover, it is implausible that natural law dropped out of the picture after 1776 any more than republicanism disappeared after 1787. To the contrary, reliance on natural law—or something like it—remains a theme in scholarship moving past the Revolution. It further appears evident in numerous well-known contemporary articulations, including the Declaration of Independence,<sup>313</sup> Roger Sherman's draft bill of rights,<sup>314</sup>

309. Bernstein, *supra* note 69, at 1602.

310. Corwin, *supra* note 170, at 85.

311. Ackerman, for example, concedes that—at least in most cases—the considered judgments of "We the People" must be honored even should they prove unpalatable or violate tenets derived from rights "foundationalism." Ackerman, *We the People*, *supra* note 19, at 13–15. For a thorough theoretical critique of this stance, see James E. Fleming, *We the Exceptional American People*, 11 *Const. Commentary* 355 (1994):

312. See Bailyn, *supra* note 57, at 26–30.

313. See *The Declaration of Independence* para. 1 (U.S. 1776).

314. Roger Sherman, then a representative from Connecticut, wrote a working draft of a Federal Bill of Rights in July 1789. Article 2 declared:

The people have certain natural rights which are retained by them when they enter into Society, Such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the united States.

Justice Chase's opinion in *Calder v. Bull*,<sup>315</sup> on up to notable opinions by Chief Justice Marshall.<sup>316</sup> The historical evidence clearly suggests that early American constitutionalism relied on natural law traditions in more than a trivial way. For all that *We the People* recognizes the Federalists' "liberal" diagnosis of self-interested factionalism during normal times, it fails to come to terms with the arguably older "liberal" commitment to rights outside any majoritarian decisionmaking process, however infrequent, representative, and virtuous those decisions may be. To the extent that *We the People* ignores this commitment—in failing even to make an attempt to discount it—Ackerman's account cannot claim the total "fit" to the Founding it seeks.

Conversely, Ackerman misses a second substantive point that would surely help him. As those historians who take American constitutionalism most seriously demonstrate, Americans engaged in a rich constitutional discourse well before Independence. In this way, Ackerman's account overlooks how the Constitution, far from being the American people's first break from a previous constitutional regime, was in fact one of a series of epic splits. From the patriot constitution's break from the emerging English Constitution of parliamentary sovereignty, to the state republican constitutions' breaks from the patriot constitution, and only then to the Constitution shaped in Philadelphia in 1787, the early American people were not strangers to constitutional upheaval. From this perspective, Ackerman's scheme of three irregular "constitutional moments" becomes less jarring. On examination, that scheme may well fit a much longer American tradition.

Neither of these points, either natural law traditions or pre-Constitution constitutionalism, should cloud the overall assessment. In part procedurally, more so substantively, the *We the People* project merits serious consideration in its use of history. To the extent that history matters, therefore, Ackerman's work further merits consideration normatively, as theory. As one historian commented, dualism may even "have interesting implications for historical discourse . . ."<sup>317</sup> Whatever its specific defects or whatever will be its eventual revisions, Ackerman's account bears a suf-

---

Reprinted in *The Rights Retained by the People* app. A at 351 (Randy E. Barnett ed., 1989).

315. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–88 (1798) (opinion of Chase, J.); see also David P. Currie, *The Constitution in the Supreme Court: 1789–1801*, 48 U. Chi. L. Rev. 819, 872 (1981).

316. See, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 212, 332 (1827) (Marshall, C.J., dissenting); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (invalidating state legislature's rescission of previous land grants on the basis of both the Contracts Clause and of "general principles which are common to our free institutions"); see also John P. Roche, *Natural Law and Contracts in John Marshall, Major Opinions and Other Writings*, 147–48 (John P. Roche ed., 1967); James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 Buff. L. Rev. 381, 421–24 (1982); Nathan Isaacs, Note, *Marshall on Contracts: A Study in Early American Juristic Theory*, 7 Va. L. Rev. 413 (1921).

317. Bernstein, *supra* note 69, at 1602.

ficient "touch of rightness" to serve as a basis for further dialogue between past and present constitutionalists.

#### CONCLUSION

No longer must American constitutional thinkers look beyond America when seeking insight from the past. Colleagues across the courtyard in history departments, by taking the arguments earlier American constitutionalists made seriously, and by considering arguments other than just those made one summer in Philadelphia, have achieved stunning success in reconstructing the constitutional discourse that led to revolution, to independence, and to the document we live under today. The success presents a singular opportunity to modern theorists. Some, like Ronald Dworkin, decline the invitation. But many others do not. The early returns, at least those considered here, are mixed yet promising. Procedurally, they indicate that legal academics themselves may never be expected to pursue the often tedious work that keeps historians employed. They can and should, however, be expected to do their basic homework now that the materials are there for the taking. Substantively, the initial results suggest that constitutional theory can neither rest solely on a commitment to self-rule or to rights. Early American constitutional scholarship indicates to the contrary that the Founders were among the first to perceive concretely the conflict between these two values. It therefore no longer seems safe to say that their solution came down exclusively on the side of rights, "liberalism," or "autonomy." Yet neither does it appear safe to say that their "new science of politics" came down exclusively on the side of democracy, "civic republicanism," or "democratic process." In avoiding either extreme in substance as well as rhetoric, Bruce Ackerman may well be on to something. But whether dualism is sound as either history or theory, one thing more seems clear. The work of early American constitutional thinkers merits our attention not just because they outlined the framework we still follow, nor merely because many were brilliant individuals in extraordinary times, but as well because they did confront and again can offer a fresh perspective on problems that still challenge their modern heirs.