REVIEW ESSAY

The Neglected Politics of the American Founding

ANDREW RUTTEN

Americans treat the Founders, those who created their constitutions, the way that junior-high-school boys treat girls. Just as the boys are obsessed by the girls, we are obsessed by the Founders. Even those who reject a strict Borkean originalism continue to grant the Founders some authority. At the same time, like the boys, most of us find the objects of our obsession threatening. We wonder, "What if they really aren't on our side?" To resolve our ambivalence, we, like the boys, simply avoid the objects of our desire. Instead of digging deep into history to find out what the Founders were really up to, we console ourselves with comfortable myths that give us the Founders we want. As a result, we face a paradox of our own creation: while we claim to respect the Founders, we remain densely ignorant of them. Thus, we cannot give deep or satisfying answers to such questions as: What did the Founders really want? Why did they choose the constitutions they did? How did those constitutions evolve over time? What do they tell us about today's issues?

To answer these questions, we need to do more than simply learn more facts. We also need to come to grips with the peculiar roles of politics in the Founding. First, and most obvious, politics was the subject of the Founding: whatever else they did, the Founders chose the basic rules of our polity. Second, and less obvious, politics was the method of the Founding: whatever else they were, the Founders were politicians, working hard to find a set of rules that would attract and retain the support of a winning coalition. Thus, to understand the Founders, we need to ask both what political problems they were trying to solve and how they reconciled their differences to arrive at an acceptable solution. Only then can we make sense of what they said and

Andrew Rutten is an assistant professor of government at Cornell University.

The Independent Review, v.II, n. 4, Spring 1998, ISSN 1086-1653, Copyright © 1998, pp. 579-595

wrote and did.

Two recent books on the constitutions of the Founding era show the importance of both roles of politics in the history of that period. Marc Kruman's *Between Authority and Liberty: State Constitution Making in Revolutionary America* (1997) and William Novak's *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996) complement each other in many ways. Both are about state constitutions, documents that our post–New Deal understanding of federalism has led most of us to ignore. The books fit together chronologically, giving the reader a view of almost a century. Kruman deals with the very first constitutions that Americans wrote, the state constitutions of the revolutionary period. Novak examines how these constitutions fared during the early nineteenth century.

Both writers are explicitly revisionist, arguing against what they take to be the party lines on these topics. Kruman argues that, contrary to Gordon Wood and others, Americans did not wait until 1787 to use the constitutional tools that we associate with the Founding—separation of powers, checks and balances, and bills of rights—to limit the abuse of power by elected officials. As his title suggests, he argues that the earliest Americans wanted a government with enough authority to carry out its tasks but so limited that it would not needlessly intrude on liberty. Novak argues that, contrary to many modern liberals, early America was full of regulations.[1] That regulation was justified by a coherent and widely accepted constitutional theory, which he calls the theory of the well-ordered society.

Despite the books' obvious complementarities, however, the careful reader will notice that their arguments do not really fit together. Kruman's story—in which constitutions are written to empower and limit government—is incompatible with Novak's story—in which constitutions simply reflect the notion of a well-ordered society. Underlying their different accounts is a deep disagreement over the nature of constitutional politics during this period. Kruman's Founders are sophisticated and experienced realists, who are trying to bootstrap themselves into limited popular government, using democracy to create limits on democracy. In Novak's world, the concerns that animate Kruman's constitution makers have simply disappeared, as judges and others allow local officials to exercise their power unchecked. In contrast to Kruman's skeptics, Novak's characters seem naive and unworldly, as if they were living in a high-school civics text, where governments are benign and paternalistic.

Had Novak taken a broader view—had he not concentrated on traditional regulatory activities—he would have found plenty of people who had the same worries

1. Readers of this journal might be puzzled by Novak's failure to cite Jonathan Hughes, a libertarian, exactly the sort of person who is supposed to be laboring under delusions. In *The Governmental Habit Redux* (1989), Hughes wrote what could have served as a motto for Novak's book: "We have a history, and it really isn't what you seem to think." His thesis was simple: "If market clearing contracting by private bargaining be considered a superior method of achieving economic efficiency . . . then what we have always done and still do, massively, makes sense as history, politics, and sociology, but not as economics" (xiii).

about politics that Kruman found so pervasive in the revolutionary period. Granted, people did not worry much about regulations of the sort that Novak discusses; after all, these were jobs that Americans had long entrusted to their governments. However, even these traditional activities were hedged about by a variety of constitutional requirements. The most important of these was that American governments had to rule through laws, general rules that applied to the future and served the public good. And when these same governments moved to develop new sorts of regulations, their actions were subject to other, stricter requirements. Often the new regulatory actions were upheld, but often they were not. By focusing on a small (but important) piece of the constitutional world, Novak misses these complexities.

What Did Americans Want, and When Did They Want It?

Kruman argues that from the very beginning, Americans wanted to create a limited popular government; that is, they wanted a government vigorous enough to do its job but controlled enough not to abuse its power. To figure out how to achieve that goal in a democratic, independent America, the authors of the first constitutions drew on a theory of politics familiar to readers of this journal. In that theory, constitutions are treated as incentive systems that shape political decisions by molding the incentives and opportunities of everyone from voters to politicians to judges. Reduced to a bumper sticker, this theory commands us: "Get the incentives right!"

To compare the efficacy of various constitutions, Americans began by examining the motives of their fellow citizens. From observation, they concluded that Americans were self-interested and diverse. Because they were self-interested, they would be willing to trench upon the rights of others if doing so benefited them; because they were diverse, they would often find such abuses beneficial. And because they lived in a democracy, they could violate rights whenever they could get a majority to join them.[2] To deal with these problems, Americans drew on their experience with the Imperial Constitution. From the British ideal of a mixed government, in which each branch represented a different class, they took the idea of separated powers supported by checks and balances, adapting it to a republic by giving each branch a different constituency. In place of the unwritten British constitution of custom and precedent, they substituted written constitutions. In those constitutions, they included bills of rights—statements of the rights of citizens—to force politicians to keep their eyes on the ball.

While most historians would agree with this account, Kruman thinks they flub the timing. His colleagues, he says, believe that Americans did not develop these views until after almost a decade of experience with popular government. Under that view,

2. Ironically, given our worship of *Federalist* no. 10, the links between diversity, faction, and tyrannical majorities were first worked out by the Loyalists. They argued that as disinterested outsiders, the British made a perfect "umpire." They predicted that without this umpire, factional conflict would reduce the colonies to "a field of blood, a scene of terror and desolation" (Potter 1983, 35).

the first constitution writers, in the middle of a war against an overburdening executive, wrote constitutions tilted toward legislatures. Their experience with these governments in turn taught Americans that legislatures, too, could abuse their power. In this account, the genius of the Founders lay in their recognition of the need to tame both branches of government.

Kruman argues that the American suspicion of popular governments began at the end of the Seven Years' War and developed over the course of the crisis that led to independence. For him, as for historians such as Jack Greene (1994), John Phillip Reid (1995), and others, the crisis leading up to independence was the first American constitutional crisis. At that time the colonists began to hammer out a distinctly American theory of constitutional government. Armed with this experience, Americans went into the confederation period ready, willing, and able to write constitutions that we would recognize.

To prove his claim, Kruman dives into the historical record and brings back a host of treasures. In addition to the constitutions themselves, Kruman offers quotations from a variety of sources to convince us that he has not simply imagined his conclusions. The heart of the book is a series of chapters examining the early treatment of bills of rights, representation, suffrage, separation of powers, and checks and balances. Over and over, Kruman shows that soon after 1776, Americans had moved beyond the simple analysis often imputed to them.

To take one example, many historians have concluded that the early constitution writers did not fully grasp the distinction between a statute and a constitution. In this view, the Americans were still relying on the British model of legislative supremacy, in which the constitution was whatever Parliament said it was. Not until later did the Americans realize that this approach did little to constrain legislatures, because what one legislature can pass, another can repeal.

Kruman shows that this claim simply is not true. Contrary to the received wisdom, the early state constitution makers understood clearly the difference between a statute and a constitution. However, with war imminent, calling a convention was a luxury that few could afford. To cope with these conditions, the states often empowered the colonial assembly to draft a new constitution. When they did so, they made clear that it was sitting as a convention, not a legislature. The book is full of such examples, in which Kruman shows that a closer look reveals things that were not as we thought they were.

From the title, a potential reader might conclude that Kruman's book is dry and pedantic, of only academic interest. Nothing could be farther from the truth. When read in context—as a chronicle of American constitutional politics during the great crises that ended in independence and constitutions—the book emerges as a gem. By showing Americans grappling with the issues of liberty and authority right after independence, Kruman forges another link in the chain binding colonists to Founders. He suggests that only by seeing the Founding in context can we really understand all that

happened during the long period of creating the United States.

Given Kruman's revelation of the continuity of constitutional development, it is natural to ask what happened next. On this foundation, what sort of constitutional law would we expect to see erected in the early nineteenth century? How would Americans react to the experience gained from the practical application of their theories? Would they still worry about balancing authority and liberty? Or were the Founders so successful that these problems went away? To search for answers to these questions, we turn to Novak.

Was the Early Republic a Libertarian Paradise?

Novak's picture of nineteenth-century America is not what a thoughtful reader of Kruman would expect. Indeed, Novak argues that early constitutional law was not about balancing authority and liberty to prevent abuse of power. Instead, it was about using the power of government to promote the common good. If it had a motto, it was the common-law maxim *Salus populi est suprema lex* [The good of the people is the supreme law]. Inspired by this motto, state and local governments interfered with private property rights all the time. And when they did so, the courts backed them up, reasoning that private rights were subordinate to the rights of the community.

To support this characterization, Novak has compiled a great deal of evidence. These include extensive surveys of local regulations, of which there were many. For example, early in the book, Novak lists the regulatory powers granted to Chicago by the Illinois legislature in 1837. The thirty-four entries range from the power "to regulate the burial of the dead" to the power to "suppress and restrain…groceries…billiard tables, nine or ten pin alleys" (see Novak 1996, 3–6). This list alone should convince even the most hardened skeptic that whatever else nineteenth-century Americans did, they regulated themselves and their neighbors.

Of course, laws on the books and laws in practice are not always the same. To show that these regulations were effective, Novak has scoured state courts for cases involving regulations. The search bore fruit—his bibliography lists more than five hundred cases! To render this collection accessible, Novak arranges the cases topically, giving us chapters on regulation of public safety, morality, and health and of markets and public spaces. These chapters show extensive regulations in all of these areas. They also show that judges repeatedly upheld the regulations against constitutional challenges. In their decisions, the courts usually relied on a coherent, consistent constitutional vision.

This vision is clear: rights are protected only so long as they do not interfere with those of others, whether those others are identifiable individuals or the community as a whole. To protect the rights of others, the state is invested with the police power, the power to regulate. Drawing on the common law of nuisance, this power gives the state the right to tell people how to use their property so that it benefits others.

As the canonical example of this reasoning, Novak points to a case in the Supreme Judicial Court of Massachusetts, *Commonwealth v. Alger* (7 Cush. 53, Mass. [1851]). The case involved a Massachusetts statute limiting the length of piers in Boston Harbor. Alger, whose property stuck out past the wharf line, attacked the statute for violating his right to use his property as he saw fit. The Massachusetts court rejected Alger's claim. In a decision written by Chief Justice Lemuel Shaw, one of the most distinguished jurists of the century, the court treated the statute as a simple exercise of the police power, the power to make "all manner of laws…for the good and welfare of the Commonwealth." Shaw believed that "it is a settled principle, growing out of the nature of a well ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community" (quoted in Novak 1996, 19–20).

From this and other decisions, Novak makes sweeping inferences about the relation of regulation and rights in the early nineteenth century. Most important, he argues that our modern fascination with liberalism, the political doctrine that treats the state as a necessary evil, has led us to completely misread our past. In the liberal view, the state is necessary to keep us from each other's throats; it is evil because it can use its power to destroy as well as to protect. To resolve this dilemma, liberals since John Locke have focused on individual rights, in the hope that these can protect us from each other and from the state. Novak argues that because our ancestors were not liberals, they were not as obsessed with rights as we are. In his America, people were not worried about preventing abuses of state power; they were interested in using state power to promote the public good. The strong concern about abuse of power, he claims, arose later, when the constitution of public good disappeared and was replaced by the constitution of private rights.

Is this claim true? Do the cases that Novak cites give a complete picture of early American constitutional law? And if constitutional principles were as clear-cut and uniform as he says, why did the plaintiffs even bother? If we can see that their claims were bound to fail, why couldn't they? And why, we might wonder, did they always say the same things? If constitutional thinking during this period was dominated by the approach that Novak sketches, where did plaintiffs get their goofy ideas? Was a liberal underground keeping them alive? Or did they have some other source? If so, what was it?

What Does It Mean to Give Due Process of *Law*?

The answer to these questions is simple: plaintiffs brought these cases because they were not obvious losers. Contrary to Novak's assertions, plaintiffs could point to a lot of decisions going their way. Novak misses these decisions because he focuses on a

biased sample of cases, those involving traditional regulatory activities such as the fixing of prices for bakers and innkeepers. Even the innovations he discusses involved easy extensions of these traditional powers—for example, using the power to regulate public morality to justify prohibiting the sale of liquor. A more extensive sampling of the historical record shows just how atypical these decisions were.

Casting a net wider than Novak's shows that regulations were subject to a variety of restrictive requirements. Many of these derived from the requirement that the state not deprive anyone of life, liberty, or property without due process of law (or, equivalently, without the law of the land). Nineteenth-century jurists read this clause with the emphasis on *law*. To them, a regulation was not a law simply because it had been passed by both houses of the legislature and signed by the executive. To be a law, a statute also had to have a certain form: it had to be a general rule that applied prospectively to everyone. Thus, a statute that resolved a particular dispute, applied retrospectively, or applied to only a few people was not a law. Moreover, because the states were republics, constituted by citizens for their own benefit, laws had to serve the public good. Thus, regulations that benefited a few at the expense of the many (or the many at the expense of a few) were not laws but acts of tyranny.

From these simple principles, nineteenth-century jurists built a rich and complex body of law. Because Novak has completely ignored this law, it will be useful here to examine examples of it in some detail. Although I cannot do justice to that law in a few pages, even a brief survey should convince the reader that it mattered.

A good place to start this survey is with *Commonwealth v. Alger,* the very decision Novak treats as canonical. In his discussion of *Alger,* Novak misses a crucial feature of the case: In arguing against the wharf statute, Alger raised two distinct claims. The first (discussed earlier) was that Massachusetts had no power to regulate his use of his property. As Novak notes, Alger lost this argument; the court held that under the police power, the legislature could regulate the use of private property to promote the public good. In addition, Alger argued that even if the state could regulate his use of his land, it could do so only prospectively. Thus, the state could not make him tear down those parts of his pier built before the statute was passed. Such an order, he argued, would be a taking of his property for public use, an act for which he must be compensated.

Novak's readers might be surprised to learn that Chief Justice Shaw agreed with this line of argument. In the final pages of his decision, Shaw held that "any laws, made to punish acts lawful at the time they were done, would be *ex post facto,* contrary to the constitution and to the plainest principles of justice, and of course inoperable and void" (103–4). And throughout the opinion, Shaw pointed to a feature of the statute that Novak does not discuss. According to Shaw, the existing framework for regulating the harbor—the common law of nuisance—was so vague and obscure that it was impossible to tell what was or was not allowed. Thus, for Shaw, one of the most important justifications for the statute was that, by creating certainty where none had existed

before, it made the harbor regulations more lawful.

In holding that regulations must take a certain form to be law, Shaw was following a tradition that ran back almost to the Founding. One of the earliest cases, decided by the Court of Conference of North Carolina, was *The Trustees of the University of North Carolina v. Foy* (5 N.C. 58 [1805]), which involved a statute changing the university's charter without its consent. The university's attorney argued that because the statute took the university's property, it could be justified only "because *salus populi est suprema lex*." However, because this justification could "only be resorted to, where the maxim applies—in cases of extremity; and when an abstinence from the use of private property, would endanger the public safety," he argued that it obviously did not apply to the case at hand (63).

The court accepted his reasoning. In interpreting the law-of-the-land clause, it denied that the legislature, like Parliament, was "capable of making the law of the land" (87). If the law of the land meant simply whatever bills the legislature passed, then liberty and property would be "subject to the arbitrary will of the Legislature" (89), an outcome that would frustrate the people's goal in writing the constitution, their desire to have "some rights secured to them, beyond the control of the Legislature" (83). In this instance, the court held that the constitution required that corporations, like people, could have their property taken without compensation only as punishment for wrongdoing. And they could do wrong only by violating statutes in place when they acted. A statute changing property rights was not a law but a taking and, as such, required compensation.

In the years after *Foy*, state courts continued to use (and develop) this interpretation of due process in a variety of settings.[3] For example, in 1833 the Supreme Court of North Carolina once again reined in its legislature, in *Hoke v. Henderson* (15 N.C. 1). In this case the court struck down a statute abolishing life tenure for clerks in county courts. The court held that opening the jobs up to election took the property of the clerks. And as in *Foy*, only courts could take property without compensation, and then only as punishment for violating existing laws; legislative taking of property without compensation would amount to usurpation of judicial powers.

Similar reasoning underlay the decision of the Alabama Supreme Court *In the Matter of J. L. Dorsey* (7 Porter 295 [1838]). This case involved a statute outlawing dueling, precisely the sort of social regulation that Novak focuses on. The statute required attorneys seeking a license to swear that they had not dueled since 1826. The court held that because the statute prevented people from practicing law without a trial, it deprived them of a valuable right contrary to the due-process clause.

This line of cases culminated in a case that Novak discusses at some length, *Wynehamer v. New York* (13 N.Y. 378 [1856]), which involved the constitutionality of

3. For further details on the development of due process, see Ely 1992, Gilman 1993, or Mendelson 1956.

a New York law prohibiting the sale of liquor. The New York Court of Appeals struck down the statute on the grounds that by applying to liquor that people already owned, it changed rights unconstitutionally. A majority of the court made clear that if the statute had affected only future purchases of liquor, it would have passed constitutional muster.

In addition to striking down regulations that failed to meet the formal requirements of laws, courts also struck down regulations that did not serve a public purpose. For our purposes perhaps the most telling of these decisions came in *Dunham and Daniels v. Rochester* (5 Cowen 462 [1826]). The case, decided by New York's Supreme Court of Judicature, involved a Rochester ordinance requiring grocers to get a license from the village trustees. Dunham and Daniels, who refused to apply for a license, appealed when they were fined. The court agreed with them. It held that the statute incorporating the village required the trustees to pass only laws that were "prudential; and aimed at the correction of some probable evil" (465). The court held that the law was unconstitutional because the trustees had "not shown how [groceries] could be an evil, if conducted under proper regulations; nor can we see judicially that any restriction was necessary" (465). The judges argued that although the trustees had the power to create "a more efficient police on these subjects…than is given by the state law in like case…it does not follow that any man is to depend, for the fair and innocent exercise of his business, on the will of the corporation; that they have the power of licensing his trade, at their pleasure; prohibiting it altogether; or crippling it by heavy charges and grievous penalties" (466). This sort of reasoning is not consistent with Novak's characterization of the nineteenth-century constitutions.

In considering these decisions, it is important not to repeat Novak's mistake by concluding that these decisions were typical. In fact, they were not. In each of these cases, attorneys argued for and against the regulations. Both sides could point to precedents supporting their positions, and both got judges to agree—in plenty of cases the courts rejected the sorts of claims just discussed.[4] The truth is that nineteenth-century constitutional law was both more complex and less settled than Novak claims.

Even with these caveats, the decisions I have noted suggest the limited nature of Novak's conclusion. They also raise some obvious questions: If Novak's account is wrong, did some other coherent theory of constitutional government underlie these decisions? What possible justification could be offered for the strange mixture of cases I have discussed? Did these decisions constitute an unprincipled hodgepodge without any rhyme or reason? Although giving a proper answer to these questions would take more than a few pages, the outlines are clear enough.

4. For an especially interesting example, see *Mayor and Aldermen of Mobile v. Yuille,* 3 Ala. 137 (1841), in which the Alabama Supreme Court held that although Mobile could set the price of bread, it could not impose an open-ended fine for violation; due process required that fines be specified.

Was the "Well-Ordered Society" Really Inconsistent with Lockean Liberalism?

Many of the regulations Novak discusses were reactions to the external effects that are inescapable when people live together—no matter how careful we are, almost everything we do has an impact on others. As everyone who has taken Economics 101 knows, when spillovers are occurring, some people will find they can do better for themselves by free riding—benefiting at the expense of others. Of course, as the well-known prisoner's dilemma of game theory shows, when we all reason this way, each of us may be made worse off. Under these conditions, even the most ardent supporter of private rights might follow Locke and agree to empower a third party such as the state to police free riding. Indeed, this exact reasoning is central to Locke's argument. After all, he claims that rights are least secure when they are most absolute—in the state of nature. For him, the resolution of this paradox is to give up some rights and empower government.

Seen from this perspective, many of the regulations Novak discusses do not appear to be inimical to a liberal regime of private rights. Rather, rights can actually be reinforced by regulations such as those allowing governments to tear down houses to prevent the spread of fires, to quarantine people with infectious diseases, or to prevent them from storing gunpowder in residential areas, because they force people to take account of the impact of their actions on others' rights. As Foy's attorney told the North Carolina Supreme Court in 1805, in such cases "it is better that one should suffer than all be ruined" (*Foy*, 63), especially if the sufferers are compensated for their losses.

The courts in such a regime might also defer to custom and tradition, as the courts did in nineteenth-century America. This deference did not spring from simple nostalgia, the desire to retain the trappings of a simpler and better past. Rather, liberal jurists respected longevity because it showed that the regulation belonged to the established rights and obligations in place when the constitution was adopted. There was little reason to fear that such regulations would alter rights. Innovative policies, by definition, could not claim such constitutional lineage, so their consistency with the constitution had to be established by argument. Thus, it should not surprise us that courts interceded more actively when states claimed new regulatory powers.

The formal requirements—the idea that statutes had to be general rules serving the public good—did not conflict with the Lockean vision of limited government. Over and over throughout his *Second Treatise of Government* ([1690] 1980), Locke argues that the state must govern through "settled standing rules, indifferent, and the same to all parties" (46). Moreover, like the nineteenth-century judges, Locke wanted these rules to be applied by "known authorized judges," not by the legislature (71).

Taken together, these considerations suggest that despite Novak's claims, the state constitutions of the early nineteenth century were consistent with a liberal re-

gime designed to protect private rights from other citizens and the government. Why, then, did the suspicion of government that motivated Kruman's Founders continue into the nineteenth century? Was this suspicion well founded? Did state governments misbehave during this period? Did they restrict their activities to the sorts of rights-reinforcing interventions just sketched? Or did they undertake other, less noble actions? And how, if at all, did the behavior of those governments reflect the peculiar circumstances that they faced? To answer these questions, we need to turn to the history of the period.

What Constitutional Problems (if Any) Does Economic Growth Create?

Much of the constitutional activity during this period can be understood only in light of its economics and politics. During the early nineteenth century, Americans began to transform their country away from the one they had inherited from the British. They built factories and canals, moved into the West, and expanded the cotton economy. Given these changes, it is not surprising that much of the controversy over economic policy during this period concerned the proper role of government in a growing economy. Should governments subsidize development projects? If so, how could ordinary citizens be sure that the government would choose projects that benefited them and not just some politically powerful group? How could those who made investments be sure that the government would keep its side of the bargain? In particular, how could they trust that governments would not confiscate the completed projects? In the jargon of game theory, how could governments credibly commit themselves to respect the rights of both citizens and investors, especially when the interests of the two groups clashed?

Although the term "credible commitment" was not used in the nineteenth century, the idea certainly was common at all levels of politics. In national politics, it lay behind the critique of the North developed by John C. Calhoun and other Southerners. They claimed that the North's record made its commitment to respecting Southern property rights incredible. In state and local politics, the idea appeared every time governments had to clean up messes created by their entanglement in investment schemes. When the projects failed, investors often ended up in court trying to get the government to make good on its promises of support. And when the projects succeeded, investors often ended up in court trying to prevent the government from appropriating their assets.

It would be difficult to exaggerate the magnitude of government reneging. During the nineteenth century, several waves of local improvement defaults occurred, as governments moved to protect themselves from obligations for failed investments. Perhaps the most egregious of these occurred in the late 1850s in Wisconsin. In reaction to the problems created by direct government backing of bonds, the Wisconsin

constitution prohibited state and local governments from backing improvement schemes. To get around this ban, farmers began to trade mortgages for railroad stock. The results, rather predictably given the amount of fraud in the granting of railroad charters, were massive bankruptcies as the projects failed. Eventually, farmers got statutes offering relief from foreclosure, statutes that the Wisconsin Supreme Court consistently found unconstitutional. In this case the commitment failure had two sides, as both farmers and companies tried to get the government to relieve them of their obligations (Hunt 1958, chap. 2).

Successful projects created a different set of commitment problems, as governments were tempted to exploit investments by changing the terms once the projects had been completed. For example, in the 1820s and 1830s New Jersey spurred the construction of railroads by offering a variety of inducements, including tax breaks and local monopolies. After the railroad lines were built, the state tried to renege on its agreements by raising taxes and chartering competitors. But because the inducements had been written into the corporate charters of the railroads, they were considered contractual and thus protected by the constitutional bans on *ex post facto* legal changes in contracts. As a result, the courts consistently rejected the reneging statutes as unconstitutional. To get around this impediment, the state threatened to use powers it retained, such as the power to investigate alleged tax fraud, to force the railroads to relinquish their special privileges (for details, see Grandy 1989).

Such harassment was not restricted to state governments or large projects. For example, most companies providing services to cities faced exactly the same pattern of promise and harassment. Thus, in Chicago the gas market experienced almost constant turmoil for much of the nineteenth century as the city made and then attempted to renegotiate deals with a variety of companies. Of course, given the corruption of local politics, one may wonder whether any of these deals served the public interest (Troesken 1996).

The difficulty of solving this dual commitment problem explains much of nineteenth-century regulatory history. Governments tried a variety of methods to get around these problems. At the beginning of the century, when incorporation was by special act, legislatures placed restrictions on the terms of a firm's service into its corporate charter. Government control over these charters was limited by the doctrine that charters were contracts and thus could not be changed after the fact by either side. Any restrictions had to be put in place when the charter was created.[5] Regulating through charters proved overly rigid, as it forced decisions to be made once and for all. In reaction, states began to develop a variety of systems that retained flexibility while giving investors some assurance that their investments would be safe.[6] The result was the development of a set of governance structures, such as commissions and agencies,

5. Of course, these restrictions could be general, as when the state reserved the right to change the terms of service later.

that did not fit neatly into the traditional constitutional categories.[7] These new structures necessitated the development of new doctrines, to preserve the rights of investors and citizens while avoiding the problems of earlier methods.

Our nineteenth-century ancestors worried about the abuse of power for good reasons. Their own experience showed them how much harm government misbehavior could cause. For them, as for Kruman's Founders, the delicate balance between liberty and authority, between good government and tyranny, was a practical challenge, not merely a theoretical concern. It should come as little surprise that they were not always as deferential to government as Novak claims.

Was the "Well-Ordered Society" the Madisonian Nightmare?

Throughout the book, Novak only glances at national politics. He ignores traditional landmarks of constitutional history such as *Marbury* and *Dred Scott*. He proceeds as if the system he is studying had nothing to do with national issues such as slavery. Nothing could be farther from the truth. In the system Novak describes, state and local governments were exempt from the federal Bill of Rights, so the only federal restrictions on their behavior arose from the interstate commerce and contract clauses of the U.S. Constitution. This system of extreme federalism was part of a web of protective institutions designed to allay Southern fears that a powerful national government could be used to destroy their peculiar institution. And once slavery was destroyed, those protective institutions collapsed. Thus, it is no coincidence that Novak's system ended with the Civil War.

The institutions protecting slavery were both visible and invisible. Some of the visible ones, such as the three-fifths rule, which counted slaves as three-fifths of a person for the purpose of apportioning seats in the House of Representatives, were explicitly embodied in the Constitution. Others, such as the so-called balance rule, were developed later. A crucial part of the Missouri Compromise of 1820, the balance rule required that new states be admitted in pairs, one free and one slave. But some of the most important protective mechanisms were invisible; like the dog that did not bark in the Sherlock Holmes story, they were important because of what they did not do. For example, Madison came to the constitutional convention convinced that the greatest threats to American liberty lay in state legislatures (for details, see Rakove 1996). To rein them in, he proposed creating a Council of Revision, a national body to review all state statutes. His plan was rejected at the convention, largely because

6. Many such problems crop up in private relations as well. For an informative discussion of the similarities between the governance of private and public contracts, see Goldberg 1976.

7. Werner Troesken (1997) uses a large data set to show that the form of regulation was consistently related to the credibility of local-government commitments: in states where local governments could change the terms of service, regulation was much more often carried out by state bodies, which were, one presumes, less subject to local political control.

Southerners feared that such a power would allow the federal government to interfere with slavery. Another, less obvious example was land policy. Until the Civil War, Southern states succeeded in keeping the price of land high. By slowing westward expansion, this policy kept down the number of free states, thus helping to keep pressure off the balance rule.

In the foregoing perspective, it is easy to understand why the Civil War led to the destruction of the constitutional regime Novak sketches. The abolition of slavery completely changed the politics of rights. Now that Southerners no longer had to worry about Northern interference with slavery, they were not as hostile to federal protection against state governments. In this light, the Fourteenth Amendment does not seem quite as innovative as often portrayed. Rather than a power grab by a national government emboldened by its military victory, it can be seen as what Jack Rakove (1996) calls "the most Madisonian element of the American Constitution" (337–38). With slavery off the national agenda, Americans could revisit the constitutional bargain. When they did, they found Madison's plan to use the federal government to protect rights against state governments no longer taboo.

Forcing the federal courts to hear due-process cases forced them to consider what it meant to get due process. When they did so, they were traveling into what was for them virgin territory. The first cases involving the Fourteenth Amendment were literally unprecedented: because of the original constitutional deal, no federal law of due process existed before 1868. However, the federal courts had plenty of precedent: the rich body of law in the state courts. Of course, as we have seen, that precedent was by no means dispositive—active controversies raged over such basics as the meaning of due process, the exact boundaries between police power and tyranny, and which was the most dangerous branch of government. Naturally, the debates in the state courts carried over to the federal courts.

We can gauge the extent to which federal courts borrowed from state courts by examining the opinion in one of the most famous of the early Fourteenth Amendment cases, *Munn v. Illinois* (94 U.S. 113 [1876]). This case involved an Illinois statute giving Chicago the power to regulate rates charged by grain elevators. The court upheld the statute on the grounds that the elevators were a business affected with the public interest and therefore subject to regulation. Most historians agree that the doctrine of "affectation with the public interest" was widely used before *Munn* (Scheiber 1971). However, this was not the only borrowed doctrine. For instance, in the majority opinion, Chief Justice Waite noted that although the power to regulate "is a power which may be abused…this is no argument against its existence. For protection against abuses by legislatures people must resort to the polls, not to the courts" (134). This idea is often presented as a dangerous innovation, but it was not. It simply restated dogma well known in state courts, where it had appeared at least as early as 1825. In a dissent filed in that year, Justice Gibson of the Pennsylvania Supreme Court argued that "it rests with the people…to correct abuses in legislation, by instructing their

representatives to repeal the obnoxious act" (*Eakin v. Raub*, 12 Serg. & Rawle 330, 355).

The war over the economic role of due process in the Constitution continued to rage in both federal and state courts over the next century, fought on the grounds I have discussed. The issues cropped up in some of the most famous (and infamous) decisions of this century. For example, in *Lochner v. New York* (198 U.S. 45 [1905]) the Supreme Court struck down a law limiting the hours of bakers on the grounds that making a small group such as bakers better off did not serve the public interest. Twenty-one years later, the court turned to the idea that Novak touts, that of the well-ordered society, to uphold zoning in the case of *Ambler v. Euclid* (272 U.S. 365 [1926]). In this case the court established once and for all the constitutionality of zoning. The decision, written by Justice George Sutherland, one of the most conservative justices of the twentieth century, used exactly the reasoning that Novak attributes to judges following the vision of the well-ordered society.

Constitutions, Context, and Equilibrium in the Web of Institutions

After this brief tour of the constitutional history of early America, where do we stand? What can attentive and careful readers learn from these books?

Most obviously, they will learn that we have a far richer and more complex constitutional heritage than most of us realize. As Kruman points out, that heritage did not appear *de novo* in 1787. Instead, it stretched back to the debates over the Imperial Constitution that led to the Declaration of Independence. Moreover, thinking on these issues continued to evolve during the next century and, as Novak shows, was not as simple as a reading of Locke or *The Federalist* would suggest. Instead, early Americans developed a complex body of law to ensure that government had authority and the people had liberty. When government was carrying out its traditional tasks, jurists supported government for exactly the reasons that Novak discusses. But because they still worried about the issues Kruman stresses, they required government to meet certain formal requirements when carrying out those tasks. When government strayed from well-trod paths, the courts were less friendly, often rejecting these same arguments. To complicate matters, the boundaries of these areas were never settled; judges often disagreed about what was and was not allowed. With the transformation of the economy and polity, these boundaries became even blurrier, as both government and private parties began to take actions for which no obvious precedents existed.

Another, less obvious lesson neither author faces openly. One of our most cherished myths is that of the Golden Age, a time when we shared a single vision of what constitutes America. The evidence I have discussed suggests that such a time never was. Instead, what Alexander Hamilton called "the great national discussion" (quoted by Kramnick 1990, 270) might better be thought of as having taken place at the

Tower of Babel. No matter how often our ancestors talked, they remained divided. And often they divided along lines contested since the Founding.

To make sense of this heritage, we need a better theory of constitutional politics than we now have. That theory, unlike those of James Buchanan and Gordon Tullock or John Rawls, must begin with the realization that a constitution is not created behind a veil of ignorance, nor is it automatically enforced. Instead, a constitution is chosen by people who know a lot about how they and others will be affected by their choices. Moreover, a constitution is not enforced by neutral third parties standing outside of society, but by members of society, whose behavior with respect to the constitution must be consistent with their behavior in the rest of their lives. Thus, any successful constitution must be self-enforcing—it must provide those who are to monitor compliance and punish offenders with an incentive to do their job.

This way of thinking about the constitution, in which it must be an equilibrium of the games that people play in their daily lives, is not new. This is exactly how the Founding generation, from Madison to Calhoun, thought and talked about the constitution. Indeed both Madison ([1788] 1987, 314) and Calhoun ([1850] 1992, 601) explicitly discussed the need for a constitutional "equilibrium." For them, it was obvious that constitutional politics are just ordinary politics by other means. Their insight has recently been rediscovered by political economists of various stripes. (For examples applied to law, see Posner 1995 and Weingast 1995, 1997.) These new equilibrium constitutionalists argue that we must build our theory of constitutional politics on the links between constitutional and ordinary politics. Only then will we be able to make sense of the sort of twists and turns we find in histories such as those of Kruman and Novak.

References

Calhoun, John. [1850] 1992. Speech on the Admission of California—And the General State of the Union. In *Union and Liberty: The Political Philosophy of John C. Calhoun*. Edited by Ross M. Lence. Indianapolis: Liberty Fund.

Ely, James. 1992. *The Guardian of Every Other Right: A Constitutional History of Property Rights*. New York: Oxford University Press.

Gilman, Howard. 1993. *The Constitution Besieged: The Rise and Fall of Lochner Era Police Powers Jurisprudence*. Durham, N.C.: Duke University Press.

Goldberg, Victor. 1976. Regulation and Administered Contracts. *Bell Journal of Economics* 7 Autumn: 426–48.

Grandy, Christopher. 1989. Can Government Be Trusted to Keep Its Part of the Social Contract? New Jersey and the Railroads, 1825–1888. *Journal of Law, Economics, and Organization* 5 (June): 249–69.

Greene, Jack. 1994. *Negotiated Authorities: Essays in Colonial Political and Constitutional History*. Charlottesville: University of Virginia Press.

Hughes, Jonathan R. T. 1989. *The Governmental Habit Redux: Economic Controls from Colonial Times to the Present*. Princeton, N.J.: Princeton University Press.

Hunt, Robert. 1958. *Law and Locomotives: The Impact of the Railroad on Wisconsin Law in the 19th Century*. Madison: University of Wisconsin Press.

Kramnick, Isaac. 1990. "The Great National Discussion": The Discourse of Politics in 1787. In *Republicanism and Bourgeois Radicalism: Political Ideology in Late 18th Century England and America*. Ithaca: Cornell University Press.

Kruman, Marc. 1997. *Between Authority and Liberty: State Constitution Making in Revolutionary America*. Chapel Hill: University of North Carolina Press.

Locke, John. [1690] 1980. *The Second Treatise of Government*. Edited by C. B. McPherson. Indianapolis: Hackett.

Madison, James, Alexander Hamilton, and John Jay. [1788] 1987. *The Federalist Papers*. Edited by I. Kramnick. Reprint, London: Penguin Books.

Mendelson, Wallace. 1956. A Missing Link in the Evolution of Due Process. *Vanderbilt Law Review* 10 (December): 125–37.

Novak, William. 1996. *The People's Welfare: Law and Regulation in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press.

Posner, Richard. 1995. *Overcoming Law*. Cambridge, Mass.: Harvard University Press.

Potter, Janice. 1983. *The Liberty We Seek: Loyalist Ideology in Colonial New York and Massachusetts*. Cambridge, Mass.: Harvard University Press.

Rakove, Jack. 1996. *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: Alfred Knopf.

Reid, John Phillip. 1995. *Constitutional History of the American Revolution*. Abridged edition. Madison: University of Wisconsin Press.

Scheiber, Harry. 1971. The Road to *Munn:* Eminent Domain and the Law of Public Purpose in the State Courts. *Perspectives in American History* 5:329–402.

Troesken, Werner. 1996. *Why Regulate Utilities? The New Institutional Economics and the Chicago Gas Industry, 1849–1924*. Ann Arbor: University of Michigan Press.

———. 1997. The Sources of Public Ownership: Historical Evidence from the Gas Industry. *Journal of Law, Economics, and Organization* 13 (March): 10–25.

Weingast, Barry. 1995. The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development. *Journal of Law, Economics, and Organization* 11 (April):1–31.

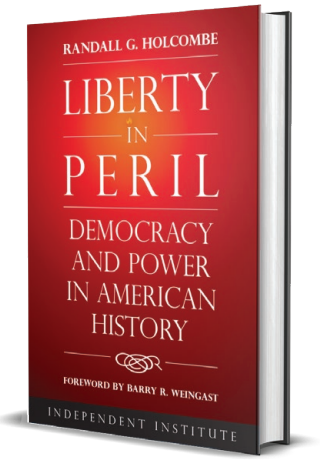
———. 1997. The Political Foundations of Democracy and the Rule Law. *American Political Science Review* 91 (June):245–63.

SUBSCRIBE NOW AND RECEIVE A FREE BOOK!

"***The Independent Review*** does not accept pronouncements of government officials nor the conventional wisdom at face value."
—**JOHN R. MACARTHUR**, Publisher, *Harper's*

"***The Independent Review*** is excellent."
—**GARY BECKER**, Nobel Laureate in Economic Sciences

Subscribe to ***The Independent Review*** and receive a free book of your choice such as ***Liberty in Peril: Democracy and Power in American History***, by Randall G. Holcombe.



Thought-provoking and educational, ***The Independent Review*** is blazing the way toward informed debate. This quarterly journal offers leading-edge insights on today's most critical issues in economics, healthcare, education, the environment, energy, defense, law, history, political science, philosophy, and sociology.

Student? Educator? Journalist? Business or civic leader? Engaged citizen? This journal is for YOU!

Order today for more *FREE* book options

SUBSCRIBE

The Independent Review is now available digitally on mobile devices and tablets via the Apple/Android App Stores and Magzter. Subscriptions and single issues start at $2.99. **Learn More.**

Download on the App Store | GET IT ON Google Play | Available on MAGZTER

INDEPENDENT INSTITUTE, 100 SWAN WAY, OAKLAND, CA 94621 • 1 (800) 927-8733 • ORDERS@INDEPENDENT.ORG