

Political Science 37
The American Founding
Spring 2011
Professor Arkes

Opening: On the Union and the Founders

Abraham Lincoln, Message to Congress, July 4, 1861

Harry Jaffa, "What Were the 'Original Intentions' of the Framers of the Constitution?," in Jaffa, *Original Intent and the Framers*, pp. 13-54
[Recommended,

- Aristotle, *The Politics*, Bk. I, A (1252a-1253a); Bk. III, C, ch. 9 (ca. 1280a-1281a)
[Principles of Oligarchy and Democracy, and the Nature of Distributive Justice]
- Arkes, *First Things*, Chs. I-II, pp. 3-30 (On Reserve)]

The Structure of Politics at the Revolution—and the Argument over Natural Rights

Bernard Donoghue, *British Politics and the American Revolution*,
pp. 1-20

John Galvin, *Three Men of Boston*, pp. 1-3, 89-128. [On the Stamp Act and the reaction; the British opposition forcing a change in the laws, and the critical shifts in the American argument, moving to a rejection of the authority of Parliament]

[Recommended, Galvin, pp. 260-80 ("Tea" and "The Port Bill")
Electronic Reserve]

Samuel Johnson, "Taxation No Tyranny," in *Dr. Johnson's Works*
(Oxford, 1825 ed.), pp. 224-63

Alexander Hamilton, "The Farmer Refuted" (1775) in *The Papers of Alexander Hamilton*, Vol. 1, pp. 81-131, 159-165

[The packet contains the entire pamphlet, but I make these recommendations in editing this reading—H.A.]

[Note also that Hamilton is making this argument before the Declaration of Independence; and of course the case for natural rights precedes the framing of a Constitution]

Recommended

-Jerrilyn Greene Marston, "The King's Authority," in *King and Congress: The Transfer of Political Legitimacy, 1774-1776*, pp. 13-34 [Electronic Reserve]

The Movement to the Declaration of Independence

Jerrilyn Greene Marston, "The Abdication of George III," in *King and Congress*, pp. 35-63

Winston Solberg (ed.), *The Federal Convention and the Formation of the Union*, [purchase] pp. 5-32, including the "Declaration of the Causes and Necessity of Taking Up Arms," (July 1775), and other resolves)

The Anthropology --and Epistemology-- of a Republican Regime

- Daniel Robinson, Lectures on the American Founding
 - Moral Science at the Founding: Ruling Passions (Lecture at Amherst, October 31, 2003)
 - “Theories of Human Nature at the Founding” (Amherst, November 11, 2003)
 - “On the Evident and the Self-Evident,” Lecture at the Madison Center, Princeton (October 2001)

- James Wilson, "Of Man as an Individual," in *The Works of James Wilson* (ed. McCloskey, 1967), Vol. I, pp. 197-226; and in the same volume:
 - "Of Man, As a Member of Society," pp. 227-46
 - "The Philosophy of Evidence," pp. 370-98

- How Important was John Locke?
 - John Locke, *Second Treatise on Civil Government*, chs. I-IV (paragraphs 1-51)

[Recommended: Steven Dworetz, “Locke, Liberalism and the American Revolution,” in Paul Sigmund (ed.), *The Selected Political Writings of John Locke*, pp. 388-98](LR)

Aftermath of the Declaration: A People and Army Acting in a New Character

- Jerrilyn Marston, *King and Congress*, pp. 131-69 [“Congress and Protection”--
And the character of a republican army]
- David Hackett Fischer, *Washington’s Crossing*, pp. 324-379

- Thomas West, “Slavery,” in *Vindicating the Founders*, pp. 1-36

The Movement to a New Constitution

- Articles of Confederation and the Annapolis Convention
 - Winston Solberg (ed.), *The Federal Convention and the Formation of the Union*, pp. 41-64 [purchase]
- Jerrilyn Marston, *King and Congress*, pp. 298-309 (“A National Executive or a National Legislature”) [Recommended: “Congress Grants Authority for Government,” 251-96 (Electronic Reserve)]
- Albert Beveridge, *The Life of John Marshall*, Vol. I, Ch. VIII, (“Antagonism to Government”), pp. 288-318

The Constitutional Convention: From Madison’s Notes

[Readings drawn from Solberg]

- a. The Virginia Plan v. the New Jersey and the Hamilton Plans – pp. 71-155
- b. Settling on the reach of the new government, 155-277

- c. Navigation Acts and Slavery, 278-86
- d. The Presidency and the Completion of the Constitution , pp. 287-34
- e. The final text of the Constitution, pp. 347-60

Prudence and Statecraft in the Founding: The Teaching of Madison

Gary Rosen, *American Compact: James Madison and the Problem of Founding*, pp. 89-125 [Electronic Reserve]

[Recommended: Keith Whittington, “The Authority of Originalism and The Nature of the Written Constitution,” *Constitutional Interpretation*, pp. 47-76] (LR)

The Arguments over Ratification

Solberg, 360-74

The Federalist and the Antifederalists

- The Common Defense and a Nation of States
 - The Federalist Papers*, #1-10 [Purchase]
 - Herbert Storing, *What the Antifederalists Were For*, pp. 3-14

Martin Diamond, “The Federalists’ View of Federalism,” in *Essays in Federalism*, ed. George C.S. Benson (Claremont, 1961), pp. 21-64

On the Judiciary

- The Federalist #78-83
- “The Essays of Brutus” [New York, October 1787-April 1788]. XI-XVI, in Storing (ed.), *The Complete Antifederalist* (University of Chicago Press), Vol. 2, pp. 417-46

[Recommended: Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788*, especially the chapters on Pennsylvania, Massachusetts, Virginia and New York, chs 4, 6-13] (LR)

Meditation on the Founding

Harry V. Jaffa, *A New Birth of Freedom*, pp. 73-152, 203-36, 357-402 [purchase]
[Recommended: pp. 1-72]

Original Argument over the Bill of Rights: Natural Rights and Positive Rights

Arkes, “On the Dangers of a Bill of Rights: Restating the Federalist Argument,” in *Beyond the Constitution*, ch. 4
James Wilson, “On the Natural Rights of Individuals,” Vol. II, pp. 585-610 [Electronic Reserve]

Recommended:

Which Designs Protect More Freedom?: The Founders and Modern Liberalism

Thomas West, "Free Speech in the American Founding and in Modern Liberalism," *Social Philosophy and Policy* (Summer 2004), pp. 310-84 [Electronic Reserve]

The Bill of Rights and the Right to Bear Arms

- Stephen Halbrook, "The Original Understanding of the Second Amendment," in Eugene Hickock (ed.), *The Bill of Rights*, pp. 117-29
- District of Columbia v. Heller (2008) On the Second Amendment, especially Justice Scalia's opinion for the majority [Was Scalia drawing his conclusion from the text of the Constitution, or from a source outside the text?] (Electronic Reserve)

[Recommended:

- Nelson Lund, "Taking the Second Amendment Seriously," in *The Weekly Standard* (July 24, 2000), pp. 21-26
- Joyce Malcolm, *The Right to Bear Arms* (LR)
- McDonald v. Chicago* (2010) –The Supreme Court extends the Second Amendment to the States as well as D.C.] (Elec. Res.)

The Founders and the Family

- West, "Women and the Right to Vote," and "Women and the Family," in *Vindicating the Founders*, pp. 71-109
- [Recommended: David Hackett Fischer, *Albion's Seed*, on the "ways" of family, marriage, gender, sex, pp. 68-93 (Puritans in Massachusetts), 274-306 (Virginia)]

The Mind of James Wilson: A Law that Begins with "Man"

- Wilson's opinion in *Chisholm v. Georgia*, 2 Dallas 419 (1793), pp. 453-69
- Wilson, Lectures on Law, Introductory Lecture, in *The Works of James Wilson*, pp. 3-40
- "The Law of Nature," 126-47

[Recommended:

- Jean-Jacques Burlamaqui, *The Principles of Natural Law* [5th ed., 1807; originally published in 1740's] Vol. I, pp. 1-23, 37-47] (LR)

Religion and the Founding

- Michael Novak, On the Hebrew Metaphysic of the American

- Founding, and A Religious Theory of Rights, *On Two Wings*, pp. 5-24, 27-47, 77-95 [Recommended: 99-124] [purchase]
- John Noonan, "JM's Original Insight," [On James Madison] in *The Lustre of Our Country*, pp. 59-91
 - "The Foremost of our Political Institutions," pp. 95-115
 - Madison, "Memorial and Remonstrance against Religious Assessments" (1785), in Philip Kurland and Ralph Lerner, *The Founders' Constitution*, Vol. 5, pp. 82-84
 - Mark DeWolfe Howe, *The Garden and the Wilderness*, pp. 1-60
 - On the Establishment of Religion: Provisions in the Constitutions of the States, and other essays
 - Philip Kurland and Ralph Lerner (eds.), *The Founders' Constitution*, Vol. 5, pp. 70-94
 - Philip Hamburger, Separation of Church and State, pp. 1-17
 - On Electronic Reserve: 65-189 [Recommended: 21-64—and the rest of the book]
- [Recommended:
- Michael McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," *Harvard Law Review* (May 1990), pp. 1410-151
 - George Washington, Speeches and Messages to Churches and Congregations, in Allen (ed.), pp. 531-35, 545-49] (LR)

The Mind of Alexander Hamilton

- Federalist #1, 6
 - On the axioms of government:
 - #31-33, 80, 81
 - #78, 84
- Hamilton's memo to Washington on the National Bank (Feb. 1791) in Kurland and Lerner. Vol. 3, pp. 247-50
- Hamilton and Madison in the Pacificus and Helvedius Papers
 - Hamilton, The Pacificus Papers, Nos. I-VII, *Papers of Alexander Hamilton*, Vol. XV, pp. 33-43, 55-63, 65-69, 82-86, 90-95, 100-106, 130-35 [Electronic Reserve]
- Hamilton, Memorandum to Washington on confronting the British and the Spanish (September 15, 1790), in *Papers of Alexander Hamilton*, Vol. VII, 36-57 [For a discussion of this memorandum as part of Hamilton's "realism" –and yet a realism that was not Machiavellian, see Arkes, "Machiavelli in America," in Angelo Codevilla, trans. and ed., The Prince (Yale, 1997), pp. 124-51

[Recommended:

- Hamilton on the Jay Treaty

“Remarks” prepared by Hamilton for George Washington, on the Jay Treaty, Papers of Alexander Hamilton, Vol. XVIII, pp. 404-54; Vol. XX, pp 13-34 [“Camillus”] (Electronic Reserve)

- Karl-Friedrich Walling, *Alexander Hamilton on War and Free Government*. On the questions of war and national security, see chs. 3, 7, 9 and 10, pp. 42-70, 154-72, 209-77] (LR)

The Mind and Jurisprudence of John Marshall

- Marshall on the Alien and Sedition Acts, in Morton Frisch and Richard Stevens (eds.) *The Political Thought of American Statesmen*, pp. 99-116
- On Natural Rights, the Reach of the National Government, and the Reach of the Courts
 - Marbury v. Madison*, 1 Cranch 137 (1803)
 - Fletcher v. Peck*, 6 Cranch 87, 127-48 (1810)
 - Dartmouth College v. Woodward*, 4 Wheaton 518 (1819), 519-51 [background of the case], 624-54 [Marshall’s argument for the Court]
[Recommended:
 - Daniel Webster’s argument for Dartmouth College, 551-600] (Electronic Reserve)
 - Ogden v. Saunders, 12 Wheaton 213 (1827), 213-14, 254-71 (Bushrod Washington’s argument), 271-92 (Johnson), 332-58 (Marshall), 359-69 (setting forth the judgment), and Webster’s argument before the Court, which anticipated Marshall’s argument on the foundation of “contract” in natural rights]
 - Osborn v. U.S. Bank*, 9 Wheaton 738 (1824), 738-44, 816-71 [The finessing of the Eleventh Amendment?] (Electronic Reserve)
[Recommended: Arkes, “The Laws of Reason and the Surprise of the Natural Law,” *Journal of Social and Political Philosophy*]
 - Cherokee Nation v. Georgia*, 5 Peters 1 (1831), 15-20
 - Worcester v. Georgia*, 6 Peters 515 (1832), 536-96
 - Martin v. Hunter’s Lessee*, 1 Wheaton 304 (1816)
[On the Judiciary Act of 1789, See *Annals of Congress*, 1: 796-830; Kurland and Lerner, 4: 145-61]
 - Barron v. Baltimore*, 7 Peters 243 (1833), 243-51
 - McCulloch v. Maryland*, 4 Wheaton 316 (1819), 401-37
 - Gibbons v. Ogden*, 9 Wheaton 1 (1824), 1-3, 186-222
 - Cohens v. Virginia*, 6 Wheaton 264 (1821), 375-447

[Recommended: Arkes, *The Return of George Sutherland*, Ch. 5 (“The Puzzle of the Commerce Clause”)] (LR)

The Antelope, 10 Wheaton 66 (1825), 114-33

Justice Story carries on:

La Jeune Eugenie, 2 Mason 409 (1822), 833-51 [Elec. Reserve]
Prigg v. Pennsylvania, 16 Peters 539 (1842), 608-26
(Story’s opinion for the Court), 626-36 (Taney’s concurring opinion)

The Political Economy of the Constitution

- From Madison’s notes on the Convention, in Kurland and Lerner, Vol. 3:393
- Charles Pinckney, Remarks at the Ratifying Convention in South Carolina, in Kurland and Lerner, Vol. 3: 395-96
- Alexander Hamilton, Report on Public Credit (1790), in *The Papers of Alexander Hamilton*, Vol. VI, pp. 65-78
- Joseph Story, Constitutional Commentaries, Vol. III (1833), pp. 4-15
- Debate on aid to the City of Savannah, 1796, in *Annals*, Vol. 6: 1712, 1717-26; and in Kurland and Lerner, Vol. 2: 447-52
[Recommended: Compare U.S. v. Butler, 297 U.S. 1 (1936)]
- Oliver Ellsworth in the Connecticut Ratifying Convention, in Kurland and Lerner (eds), The Founders’ Constitution, Vol. 2, pp. 429-31
- From the Ratifying Convention in Virginia: Madison, Randolph, Henry, and others, in Kurland and Lerner, Vol. 2, pp. 433-40
- Pollock v. Farmers Loan & Trust, 157 U.S. 429 (1895), 430-42
(Statement of the case), 532-53 (Joseph Choate’s argument for the appellants—i.e., against the federal income tax) 553-86 (Chief Justice Fuller’s opinion for the Court) 586-608 (Stephen Field’s concurring opinion) [Recommended: dissenting opinions by White and Harlan, 608-54]
- Thomas West, *Vindicating the Founders*, pp. 37-70, 111-30 (“Property Rights,” “The Property Requirement for Voting”)
[Recommended: West, “Poverty and Welfare,” pp. 131-45]

Final Meditation: The Crisis over the Refounding—and the Continuing Crisis

Jaffa, *A New Birth of Freedom*, pp. 237-471