REVISITING THE IDEAS OF THE FOUNDING

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When the ideas of the founding period of the American republic have been studied by legal scholars, they have tended to approach that inquiry from a particular perspective. They have begun by positing a set of ideas as central to the interpretation of the United States Constitution over the course of its history, and have then proceeded to examine the status of those ideas in the founding period against the backdrop of their subsequent development over more than two centuries. This posture toward the ideas of the founding, I will be arguing, has produced two distorting effects on their recovery. The first effect has been to overstate the significance of some constitutional ideas with which later generations of Americans have been preoccupied; the second has been to understate the special importance attached to other ideas by the founders.

The ideas posited as central to American constitutionalism by scholars adopting the above posture have made up a comparatively small set. They include liberty in various forms, ranging from freedom of speech and religion to certain "liberties" extracted from the Due Process Clauses of the Fifth or Fourteenth Amendments, such as some economic liberties subsumed in the doctrine of "liberty of contract" (for example, the liberty to buy or sell the term of employment in the labor market), or some liberties connected with intimate sexual and reproductive choices.

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1. I am defining that period as encompassing the years between 1774, when the First Continental Congress was called into session, and 1791, when the Constitution and its first ten amendments (the "Bill of Rights") was ratified. One could argue that it began earlier, and extended further, but it is the ideas that took shape and evolved in those years that I will be focusing upon.

2. Examples of this tendency abound. For two visible illustrations, see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005) and AKHIL REED AMAR, THE BILL OF RIGHTS (1998). In a discussion of his methodology in the latter book, Amar says, in commenting on founding-era studies by historians, "in most standard...stories, the historian-authors and the readers are exhausted...by the end of the summer of 1787. There is little room left in these narratives for the ensuing process.... Even if an adventurous historian takes the constitutional story up through the Bill of Rights or the entire Washington Administration, the curtain then typically comes down. What happened later is 'not my period,' the historian tells himself." AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY, supra, at 468. "But what happened later," Amar suggests, "is the reason many people today look to the Founding with reverence rather than revulsion." Id. Amar obviously believes that the ideas of the founding period need to be understood in connection with the subsequent evolution of those ideas.
They include equality, which has primarily manifested itself in constitutional prohibitions against official policies that treat people unequally on the basis of their race, nationality, gender, sexual preference, or age. They include solicitude for private property and its protection from confiscation or undue regulation by the state. They include the principles of popular sovereignty and representation in a republican form of government, where sovereignty is located in the citizenry at large ("the people"), but governmental decisions are made by the people's elected representatives or by persons appointed to offices by those representatives. They include the principles of federalism and separation of powers in the American constitutional republic, under which power is shared, and allocated, between two tiers of governmental entities, the federal government and the states, and under which the powers of those entities are further allocated between legislative, executive, and judicial branches of a government. Finally, they include the idea of judicial review. That idea bears a logical connection to that of separation of powers, but because of the way it has evolved over time, with the Supreme Court functioning as not merely one interpreter of the Constitution, but the supreme interpreter, judicial review has conventionally been treated as a contribution in its own right.

In almost any compilation of the "great" constitutional cases of American history, one will find that the cases included in that compilation are described as attempts to apply one or more of those ideas to particular controversies.\(^3\) It is thus not surprising that when the founding era of the American constitutional republic is studied in law schools or written about by legal scholars, the ideas listed above receive paramount emphasis. But when one turns to the narratives of the founding period supplied by eighteenth and early-nineteenth century American historians, one finds a disconnect between the supposed centrality of the ideas and the narratives. The narratives suggest that some of the ideas typically assigned a central place in the history of the American founding period did not play a significant role in that history, and were not prominent in the thoughts and actions of those who participated in it. This essay explores that disconnect.

I

When standard historical treatments of the founding period by historians are examined, it is immediately apparent that the interpretive

\(^3\) Any constitutional casebook directed at American law students could be cited as illustrating that treatment of "central" ideas of American constitutionalism. See, e.g., G. Stone et al, CONSTITUTIONAL LAW (6th ed. 2009).
context in which they place events and ideas from that period is strikingly different from the context in which legal scholars have typically placed them. Mainstream historical narratives of American independence and the framing of the Constitution describe the American Revolution as being primarily fueled by sovereignty issues, and the period between the outbreak of the Revolutionary War and the 1787 Philadelphia Convention that produced the Constitution as also being dominated by debates about the nature and locus of sovereignty in America. The remainder of this section presents a synthesis of those narratives, illustrating their emphasis on the central role played by sovereignty debates throughout the framing period.

The narratives begin in the 1760s, where they trace a mounting series of grievances against the British government that culminated in the 1776 decision of the American Continental Congress to dissolve the connections between the British colonies in America and Great Britain. The grievances ranged from Parliament's 1763 decision to forbid further westward migration past a "Proclamation Line" drawn at the foothills of the Appalachian mountain range to a series of parliamentary acts from the mid-1760s through the mid-1770s imposing duties on products imported to America in order to raise revenue to pay for war debts. In resisting those measures, American colonials offered a series of justifications for their actions. They asserted, first, that they could not be taxed by Parliament because they were not represented in it; next, that their only duty to a British sovereign was to the king as residents of his "plantations" in the British Empire; and finally, by the 1770s, that the king had repudiated them as his subjects by backing Parliament's attempts to tax them and by helping declare war on them. By the time the American Congress had issued the Declaration of Independence in 1776, it was claiming that the only sovereign Americans recognized was themselves, in the form of the people assembled in the former British colonies.

Mainstream historical accounts continue to emphasize sovereignty issues in their narratives of the events between the outbreak of the

7. MIDDLEKAUFF, supra note 4, at 318-34; RAKOVE, supra note 6, at 79-100.
Revolutionary war and the Philadelphia Convention of 1787. In that period, the accounts suggest, the critical issues facing Americans involved the formation of effective government within the framework of republican political theory, with its apparent repudiation of a strong central government and its theoretical grounding of sovereignty in the people.

The first unit of American central government that replaced Parliament and the Crown after independence was the Continental Congress, convened in 1774 to develop and coordinate resistance to the British government’s taxation measures. When it became apparent that Parliament was not going to cease its efforts to impose taxation on the colonies, and skirmishes between British troops and colonists broke out around Boston in 1775, the Second Continental Congress, which came into being in the spring of 1775, began to make plans to create and finance a continental army to defend an anticipated British invasion of America. The Continental Congress had initially been thought of not as an institution that exercised any sovereign power itself, but merely functioned to facilitate communication among the colonial assemblies. Its members were delegates from those assemblies or local committees in the states; they took instruction from the bodies who appointed them and were not seen as having any formal governing authority. But after the British responded to Congress’s issuance of the Declaration of Independence by launching an invasion of New York in the summer of 1776, Congress took over the financing and management of the war, including creating a Continental Army, commanded by George Washington, staffing that army, and entering into diplomatic relations with other nations (including the critical alliance with France) throughout its duration.

Even though Congress authorized troop increases, hired paymasters and quartermasters for the army, and printed money to pay for wartime expenses, it technically had no official governmental status at all until 1781, when the Articles of Confederation, a document declaring that the newly independent American states had formed a confederated government for limited purposes, was finally ratified by all of those states. Despite Congress’s pivotal role in the direction and financing of the war, the powers granted to it by the Articles of Confederation were sufficiently limited that throughout the war, and for most of the 1780s, it was dependent on the states in almost all respects, even in areas, such as

9. The next several paragraphs draw upon RAKOVE, supra note 6, at 111–207.
the exercise of foreign policy, where its primacy had been tacitly or explicitly acknowledged. A telling example came in Congress's efforts to raise revenue to pay for the war or to pay off war-related debts after its conclusion. It had not been granted the power to enact duties or taxes in the Articles of Confederation, and when, on two occasions in the 1780s, it tried to secure the approval of the states for a 5% "impost" of imported goods to be applied to the war debt, it failed to get the unanimous support of the states required by the Articles.11

An early draft of the Articles of Confederation had given Congress the power to make decisions about peace, war, and the conduct of foreign relations; to administer the army and navy; to emit bills of credit and borrow money; and to devise an apportionment of common wartime expenses among the states.12 None of those powers were treated as controversial. But another set of provisions gave Congress the authority to determine contested state boundaries, to purchase land from Amerindian tribes, and to create a national territory out of trans-Appalachian lands deemed to be outside the borders of states.13 Those powers were opposed by some states, and were eventually deleted from the Articles.

Two provisions in the Article of Confederation captured the assumptions those who drafted and ratified it made about the relationship between state and federal power in the early American republic. One stated that the states should "abide by the determinations of the United States in Congress...on all questions which by this Confederation are submitted to them."14 The other stated that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not...expressly delegated to the United States."15 The form of government created by the Articles was thus one of dual sovereignty, composed of two types of governmental entities whose powers rarely overlapped. Moreover, neither Congress nor the states were governments with clearly separated departments. Congress was a unicameral legislature, as was the state of Pennsylvania, and none of the new American states had clearly demarcated executive, legislative, and judicial branches.

Late in 1781, after the Articles of Confederation had been ratified, the
Revolutionary War suddenly ended, as a large British force commanded by Lord Charles Cornwallis was trapped in Yorktown, Virginia by part of George Washington's continental army, some French reinforcements, and a portion of the French fleet off the coast. Cornwallis's surrender convinced the British government that fighting a North American campaign against both the Americans and the French was hopeless, and peace negotiations, which were concluded in 1783, began. The result was that Americans had won their independence, and, at least temporarily, preserved their republican form of government. For the next four years, however, the weaknesses of the central government created in the Articles of Confederation would cause difficulties, keeping issues of sovereignty in the forefront of American politics. Three areas were particularly troublesome: public finance, western lands, and foreign relations.

Because Congress had no power to regulate commerce or to raise taxes, it was dependent on the states to raise revenue, which it needed to pay the Revolutionary War soldiers, many of whom had not been paid at the end of the war, and civilians who had provided supplies to the war effort and been given vouchers that could be redeemed in federal paper currency. The value of federal currency was based on the ability of Congress to back it up by taxation or other ways it could create obligations, but the only way in which Congress could raise revenue was through collection of taxes earmarked for the war by states, and through loans from foreign governments. By the mid-1780s it had become apparent that the value of federal currency was depreciating, and Congress was unable to repay loans. Its proposed solution of imposts on imported goods was rejected by the states. Its future fiscal solvency appeared to be in serious question.

The controversies among states over western lands boundaries remained in place even after Maryland's ratification of the Articles. It was not until 1784 that Virginia and New York agreed to cede claimed lands in the Ohio River valley, which came to be known as the Northwest Territory, and it was not until 1787 that Congress was able to enact an ordinance in which it assumed control of the disposition of land in that territory, appointed local officials to govern it, and initiated the process where some sections of the territory could apply for statehood. Meanwhile the British remained established in forts in the trans-Appalachian region, citing provisions in the Treaty of Paris that called for the expedient collection of debts owed to British creditors in

16. RAKOVE, supra note 6, at 205–12.
the new American states. Instead of honoring those provisions, some states passed legislation designed to prevent British creditors from enforcing their debts, and the British government used the situation as a reason for not withdrawing its presence from the forts.\(^{19}\)

In retrospect, Congress's financial difficulties and its struggles with the western lands issue were both symptomatic of its general relationship to the new American states and ominous for America's future on the world stage. Even though there was no dispute that Congress needed to be the instrument conducting foreign policy and engaging in diplomatic relations with other nations, it was apparent that the dependence of Congress on the states posed a severe threat to its effectiveness in those areas. In two instances in the 1780s, Congress was unable to respond effectively to commercial disputes: one with Britain over restrictions it imposed on West Indian markets and the other with Spain, over its closure of the lower Mississippi to American navigation. In both situations northern and southern states were differently affected by the foreign power's actions, and the resultant stalemate in Congress defeated proposals to allow that body power to regulate commerce in the Atlantic, and prevented a commercial agreement about the lower Mississippi between Spain and John Jay, representing Congress, from being ratified.\(^{20}\)

The realization that Congress not only possessed limited powers, but also was dependent on the states in exercising those powers it held—among other embarrassments, it did not appear capable of raising sufficient revenue to meet its foreign debts or of securing ratification for treaties it made—eventually prompted calls for a revision of congressional powers that, over the course of 1786 and 1787, would lead to the Philadelphia Constitutional Convention. The last set of events commonly introduced in historical narratives of the founding period centers on that convention and its aftermath, emphasizing the debates and decisions that occupied those drafting and ratifying the Constitution from 1787 to 1791. The more recent of those narratives portray the "constitutional moment" in American politics as less of an attempt to revise the powers of Congress than as an effort to seize an opportunity to address some of the vices of republican government as it had been practiced in the states between independence and the late-1780s.\(^{21}\)

A majority of the delegates to the Philadelphia Convention had come to believe, through their experiences with the Articles of Confederation

\(^{19}\) RAKOVE, supra note 6, at 342–45.

\(^{20}\) See id. at 345–52.

form of government, that self-interested factionalism in the states could paralyze a central government even in the exercise of powers obviously suited for it, and that the same tendency of humans to group themselves into factions could render state governments ineffective as well. They thus designed, in the Constitution, a new federal government embodying the principles of separation of powers and federalism, principles that would not just impose checks on the activities of the federal Union, but on those of the state governments as well. Viewed in that fashion, the Philadelphia Convention, framing, and ratification of the Constitution were the last stage in a transformed understanding of the nature of American republican government that had begun with the denial of the sovereign authority of the Crown and Parliament over the British colonies in America. Even the appearance and ratification of a federal Bill of Rights was connected to the theme of sovereignty, because the Bill of Rights was inserted into the Constitution in the form of a set of amendments after concerns had been raised about the potential of the newly created federal government to trample on the individual liberties of citizens unless explicitly restrained.22

II

When one matches up the themes afforded significance in the historical narratives described above with the legal ideas conventionally associated with American constitutionalism, it becomes apparent that only some of those ideas were in the forefront of American political discourse between 1774 and 1791. Such a comparison makes possible a more refined typology of the state of the central ideas of American constitutionalism in the founding period. The typology divides those ideas into three categories. In one category are ideas that were explicitly regarded as of central importance in the dissolution of the American colonies from the British empire, in the formation of government in America, and in the revision of that form of government in the Constitution. In another category are ideas that were generally treated as implicitly important throughout the entire founding period, but came to be given explicit importance in the Constitution because events which took place at the time of the framing and ratification of that document served to emphasize their significance. A last category of ideas are those to which the founding generation did not afford importance, and did not have their significance enhanced by events at the time. Those ideas have only assumed great importance to later generations, and taken on

22. For that view of the Bill of Rights, see WOOD, supra note 21, at 536–43.
constitutional significance, because of the flow of subsequent events.

A.

Of the central legal ideas of American constitutionalism listed above, only one—the locus of sovereignty in a republic—figured prominently in the entire founding period. The nature and locus of sovereignty in colonial and Revolutionary America was a source of controversy from the 1760s on. As Americans successively repudiated Parliament, and then the king, as holding sovereign authority over them, they erected another sovereign in their place: "the people," as assembled in provincial legislatures.\(^{23}\) Theoretically, the installation of the people as sovereign meant that America, at independence, was a republican form of government, one based on representative sovereignty rather than direct popular sovereignty. But beyond their commitment to republicanism, and their association of a strong central government with both monarchy and imperial tyranny, Americans did not have fully formed views about the structure of government.

All the newly formed states wrote constitutions in the 1770s. Some of those constitutions created legislatures with upper and lower houses, and some retained all governing powers in a unicameral legislature.\(^ {24}\) Some anticipated a judicial branch which was independent of the legislature; others retained the colonial conception of "high" courts, which were collections of legislative and judicial members.\(^ {25}\) None retained the colonial governors, who were theoretically superior to colonial legislatures and could dissolve them, but some had executives, appointed by and subservient to the legislature.\(^ {26}\) In some states the informal bodies of citizens who elected or appointed representatives to legislative assemblies sought to retain power over them, giving them instructions and limiting their terms.\(^ {27}\) The only common feature of American republicanism, as practiced in the 1770s and 1780s, was the absence of any unifying central sovereign. As noted, the members of the Continental Congress were delegates from states, whose terms were limited and who were given periodic instructions by the state assemblies or conventions who had appointed them, and the Articles of Confederation provided that almost all of the actions of Congress

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23. See id. at 344–89.
24. RAKOVE, supra note 6, at 121–23.
25. WOOD, supra note 21, at 446–50.
26. Id. at 206–14.
27. Pennsylvania was the most conspicuous example. See id. at 226–37.
required ratification by nine of thirteen states to take effect.\textsuperscript{28}

The absence of an effectual central unit of government in America testified to the fact that the American experiment in politics was premised on republican theory. The revulsion of Americans against imperial and monarchical forms of government explained why Congress, even after the Articles of Confederation had been ratified, had so few powers. In the view of republican theorists, the idea of a central government regulating international commerce, imposing taxes on imported goods, and controlling the disposition of contested western lands—powers that made little sense for individual states to exercise and might have provided beneficial revenues to the confederated government—smacked too much of the imperial authority of Parliament to be palatable. The only successful exercise of central authority, apart from the war, in which Congress engaged in the 1770s and 1780s was the Northwest Ordinance.\textsuperscript{29}

It was precisely because the nature and locus of sovereignty in a republic was so vital and pressing an issue to Americans of the founding period that a groundswell to revise the Articles of Confederation began in the mid-1780s. By then it had become apparent that sovereignty really did rest in the “people assembled” in state legislatures, and that was not necessarily a good thing, particularly for the stature of America as a new nation on the international stage. Congress could not enter into treaties without the consent of nine states,\textsuperscript{30} and state legislatures had different views on how their residents might fare under treaties. Congress could not pay the soldiers in the continental army or pay back the loans it had received from foreign governments during the war without the states helping it to collect revenues, and the interest of some states dictated that they concentrate on filling their own coffers. The dependency of Congress on the particular and often conflicting interests of the states had become something of an international embarrassment.\textsuperscript{31}

Thus concerns about the nature and locus of sovereignty in a republic begat the experiments with separation of powers and federalism that surfaced from the deliberations and drafting of the federal Constitution. Some sort of significant control on unchecked factionalism in the states was on the minds of many of the delegates to the Philadelphia Convention. What emerged, in the Constitution’s text, was not the initial

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\item 28. Jensen, supra note 10, at 269–70 (quoting Articles of Confederation art. X, para. 1 (U.S. 1781)).
\item 29. Middlekauff, supra note 4, at 609–11.
\item 30. See Jensen, supra note 10, at 269 (quoting Articles of Confederation art. IX, para. 6 (U.S. 1781)).
\item 31. Rakove, supra note 6, at 276–84.
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concept of a congressional negative on state laws, but a Constitution with a Supremacy Clause and a federal Supreme Court given jurisdiction to enforce that clause. The Constitution did not merely create a far more robust federal government than the form created by the Articles of Confederation. It defined the powers of that government in some provisions, limited those of the states in others, and gave the Supreme Court jurisdiction to decide cases and controversies testing the scope and limits of those powers. The idea of federalism was thus something that emerged during the founding period, rather than being present at its origins, and it was a response to some of the difficulties engendered by state-centered republicanism.

Separation of powers was also a late emerging, rather than an original, idea of the founding period. The British “constitution” had established separate governmental powers in its monarchy, checked by Parliament, and in its upper house, representing the nobility, and lower house, representing the common people. In rejecting the Crown and Parliament as sovereigns, Americans had rejected the British conception of separation of powers. They did not replace it, initially, with any analogous conception. All colonial officials identified with the Crown or Parliament lost their legitimacy in the new state governments. Although some state legislatures retained separate “upper” and “lower” houses, those bodies were not tied directly to classes or interests. The judiciary in England was identified with the Crown or with the Church; in America courts had been identified, indirectly, with the Crown and the Privy Council. After independence the status of state judges was unclear.

It was only when Americans began to reflect upon factionalism in state legislatures, and to consider how to avoid the evils of that phenomenon in a revised federal government, that more robust conceptions of separate branches and powers in a single governmental unit began to emerge. There had been no federal executive with designated powers, or even any state executives, before the drafting of the Constitution. No mechanism providing for joint decision-making by separate branches of government, such as the federal executive’s treaty-making power, and the Senate’s complimentary treaty ratification power, had been devised. Contrary to the conventional political wisdom of the eighteenth century, the presence of more than one “sovereign” branch of government might not necessarily result in one head of an empire being within another (“imperium in imperio”), which theorists of the time deplored; instead the separation of a governmental entity into

33. See id. at 88.
branches, and the creation of ways in which the branches could check each other's power, might enable a republican government to control a large amount of territory, another purported impossibility. By expanding the sphere of a federal government's jurisdiction, some framers of the Constitution reasoned, the citizenry that government affected would be more diverse and more scattered, and factionalism reduced.

Perhaps the best way to understand the impulses that lead delegates to the 1787 Philadelphia Convention to create the form of government they designed in the Constitution, then, is to see that project as an effort to correct abuses that had emerged with state-centered republicanism. For every feature identified with American state government in the 1770s and 1780s—the absence of an executive branch with significant powers, the absence of a sharp division between the upper and lower houses of legislatures, the uncertain status of state courts, the resistance to the exercise of any significant powers by a central governing authority—the Constitution, through the separation of powers principle, supplied a remedy at the federal level. In addition, through the idea of enumerated federal powers, reserved state powers, and the Supremacy Clause, the drafters of the Constitution said, in effect, to state legislatures: we will offer you a model of a government designed to function, and, by the way, if it passes laws that conflict with your laws, you will have to obey them. One can understand how some opponents of the Constitution believed it was the first step in a consolidated government designed to obliterate the states.

The idea of separation of powers thus stands in the same position to the idea of republican sovereignty as that of federalism. It was not an original central idea of the founding era; in declaring independence Americans were rejecting the model of a government with separate branches with which they had been associated, and not putting any in its place. It was only when their experiments with state-centered republicanism posed difficulties for the future of their nation in the international arena that they began to consider ways to check some of the tendencies they had noted in the first decade of American government.

B.

We turn now to ideas that were implicitly important in colonial and revolutionary America, and came to assume a status of explicit importance in American constitutionalism because of events in the 1780s. The first of those ideas is protection for private property.

One of the dangerous side effects of unconstrained republican
government, some delegates to the Philadelphia Convention believed, was the unfortunate way that factionalism and demagoguery could mix, resulting in uneducated members of the citizenry being persuaded that their "interests" would be furthered by actions that threatened the stability of the social order. An apparent example of this volatile mix had come in 1786, when the Massachusetts legislature, which throughout the decade had imposed large poll and land taxes in order to repay the state's war debt, adjourned without printing paper currency in which taxes might be paid. Farmers in the western part of the state, affected by depressed agricultural conditions, exposed to the taxes, and fearing that their homes might be foreclosed, advanced in a mass on an arsenal in Springfield, demanding the right to pay their taxes in corn or wheat, or to postpone payment. After a skirmish with state militia forces, in which some farmers were killed, the legislature, the following year, modified its tax policies. "Shays's Rebellion," as the incident was called in recognition of Daniel Shays, the leader of the farmers, highlighted the conflicting interests of merchant creditors and farmers in the state legislature, and demonstrated, in the minds of some observers, how factionalism could readily spill over into violence.

Some of the reaction to the 1786 Massachusetts rebellion found its way into the deliberations of the Philadelphia Convention. Those concerned about its implications were not only fearful that factions might resort to violence when thwarted in legislatures, but that legislators themselves might cater to mobs, thereby endangering the stability of private property. Eventually the Constitution prohibited states from coining money, emitting bills of credit, making any currency except gold and silver legal tender for the payment of debts, passing bills of attainder or ex post facto laws, and passing laws impairing the obligation of contracts. Taken together, those provisions addressed the very situation the Massachusetts rebellion had produced: they were designed to prevent state legislatures, acting in response to agitation from debtors, from changing the currency in which debts could be paid or the obligations between debtors and creditors.

Although protection for property was only mentioned once explicitly in the Constitution and its first ten Amendments—the Due Process Clause of the Fifth Amendment provided that no one could be deprived of property without due process of law—the idea of protection for the

34. WOOD, supra note 21, at 409–13.
35. TINDALL & SHI, supra note 4, at 306–08.
36. See the discussion in WOOD, supra note 21, at 412–25.
38. U.S. CONST., amend. V.
property rights of individuals can be said to have been implicitly understood by Americans as part of their heritage as British subjects. Among the "liberties" of the king's subjects, which colonists repeatedly referred to in protesting against Parliament's tax measures in the 1760s and 1770s, was that of being free from arbitrary restraints on one's property by government. The principle of taxation without representation, which colonists invoked in resisting the measures, presupposed that governmental decisions taking property from persons whose interests were not considered in those decisions—the colonies had no representatives in the House of Commons, which enacted the measures—violated the British constitution. As resistance to British policy toward the colonies widened in the 1770s, Americans began to assert that because they were not represented in Parliament and that body had no authority over them at all. In the evolution of this argument, protection for the property rights of individuals became a way of concretizing the theory that government existed to secure the "natural" rights of citizens, and when it transgressed on those rights it lost its legitimacy.

The idea of protection for property rights was thus embedded in American political thought even before the colonists resolved to sever their connections with the British monarchy and Parliament. The actions of state legislatures in the 1780s, however, seemed to lend urgency to the threat governments, even those modeled on republican political theory, could pose to property rights. Part of the rationale for protecting private property from undue governmental interference was that the protection allowed individuals to profit from the fruits of their possessions and labor, eventually reaching a state of financial independence where they had the resources and leisure to pursue civic activities, such as participation in state legislatures. If state governments, responding to the grievances of mobs and debtors, adversely affected the capacity of individuals to amass property and profit from their holdings by depreciating currency, engaging in excessive taxation, or changing the terms of debtor-creditor relations, property-holders might need to devote all their attention to preserving their fortunes, and eschew participation in public life. As the Philadelphia convention assembled, those concerns were on many of the delegates' minds, and thus protection for property emerged as one of the explicit goals of the Constitution.

If the idea of protection for property had a largely inchoate status for much of the framing period, only taking on a specific content in the late 1780s, the idea of "liberty" was comparably abstract. It seems fair to say, in fact, that although the idea that British subjecthood served to
ratify the possession by its holders of a set of natural rights or liberties was widely acknowledged, and repeatedly invoked—the Declaration of Independence stated that among the "unalienable rights" of humans was that of "liberty"—specific examples of those rights were not commonly mentioned. Although Jefferson's draft of the Declaration, in the course of listing grievances the Americans had with the king, was implicitly suggesting that some of those grievances were connected to the violation of particular liberties, specifications of the basic liberties of Americans were not included in either the Articles of Confederation or the 1789 version of the Constitution. Codification of the particular liberties of American citizens that were to receive constitutional protection only came with the 1791 Amendments, the Bill of Rights.

Several of the grievances against King George set forth in the Declaration can be understood as presupposing an underlying liberty that had been violated. The charge that the king "has kept among us, in time of peace, standing armies... without the consent of our legislatures" presupposed a right in civilians not to be subjected to military control unless they chose. "[Q]uartering large bodies of armed troops among us" was in the same vein, indicating that Americans could refuse the entry of military troops into their homes. "[I]mposing taxes on us without our consent" invoked the liberty of not being forced to pay tributes to governments in which one was not represented. Finally, "depriving us in many cases of the benefits of trial by jury" suggested that the right to be tried by one's peers was a natural liberty of British citizens.

Many of those liberties would resurface in the Bill of Rights. But in the interval, neither the Articles of Confederation nor the 1787 Constitution chose to mention any of them. The absence of provisions detailing the liberties of Americans in the Articles can be explained by the fact that the document presupposed that the confederated government it created would only be exercising a set of limited powers, and the scope and content of the rights of individual citizens would be addressed in state constitutions. The absence of such provisions in the Constitution requires more extended attention.

It is sometimes thought that the 1787 version of the Constitution did

39. The text of Jefferson's draft of the Declaration of Independence, with the editorial changes made by the "Committee of Five" appointed by the Continental Congress to review the draft, is in MAIER, supra note 8, at 236–41.
40. See id. at 238.
41. Id.
42. Id.
43. Id.
not enumerate any constitutionally protected rights, and that this omission was one of the bases on which those who opposed the Constitution objected to it.\footnote{E.g., ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776–1791, at 120–51.}\footnote{U.S. CONST., art. I, § 9, cl. 2.} That conclusion is not quite accurate. There were two provisions of the 1787 Constitution that specifically conferred "rights" on individuals, and a third that can be read as presupposing the existence of a right. Article I, Section Nine, Clause Two provided that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."\footnote{See Paul D. Halliday & G. Edward White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 VA. L. REV. 575 (2008).} That presupposed the existence of a "privilege" which would enable persons in confinement to challenge the sufficiency of their detentions in court by filing a habeas corpus petition. English law, in both common law and statutory form, had included the habeas privilege since at least the seventeenth century, and its suspension by Parliament had been comparatively rare. Habeas writs had been brought in the colonies as well.\footnote{U.S. CONST., art. I, § 9, cl. 3.} The framers of the Constitution apparently thought it important to make clear that incarcerated persons would continue to be able to challenge their confinement.

Bills of attainder and ex post facto laws—the former singling out individual persons for subsequent condemnation or punishment, and the latter penalizing actions that were not punishable when committed—were also prohibited in Article I, Section Nine, Clause Three.\footnote{U.S. CONST., art. I, § 10.} To make it clear that those prohibitions applied against the states as well, Article I, Section Ten, Clause One spelled that out.\footnote{U.S. CONST., art. II, § 2, cl. 3.} Finally, Article III, Section Two, Clause Three provided that "[t]he trial of all crimes, except in cases of Impeachment, shall be by jury ...." Adding all those provisions up, one could say that Americans had been given four constitutional "rights": they could, except in instances of "invasion or rebellion," require officials to justify their detentions in court; they were protected from legislation singling them out as individuals for punishment or making unforeseeable enlargements of criminal provisions; and they were granted the right of jury trials in criminal cases. All of those safeguards seemed so basic to the idea that government could not make use of the criminal process to impose arbitrary restraints on its citizens that their inclusion in the Constitution's text was hardly controversial.
There were numerous other “rights” thought to be of equal importance to the citizenry of a republic that were not included in the text of the 1787 Constitution. Their omission raised concerns, especially among those who feared that the newly created federal government might usurp the prerogatives of the states, about the potential of that government to infringe the liberties of the people. The initial response of supporters of the Constitution to calls for a federal bill of rights was twofold. They first emphasized that the new federal government was one of limited powers, and thus powers not expressly granted to it would be reserved to the states, and the state constitutions had enumerated individual liberties such as freedom of speech and freedom to worship. They also suggested that if certain rights were spelled out for protection in the Constitution, their enumeration might be understood as indicating that rights which had not been mentioned could be infringed. Over time, as supporters of the Constitution began to have qualms about its ratification, they allowed themselves to be persuaded to agree to a series of initial amendments that would amount to a bill of rights to be applied against the federal government.

Thus by 1791 Americans had been granted a set of “liberties”: freedom of speech, the press, and religion;\(^50\) the power to keep soldiers from being quartered in their houses in peacetime;\(^51\) freedom from unreasonable searches and seizures;\(^52\) protection against search warrants unless probable cause could be shown; the requirement that those charged with capital crimes be indicted by grand juries;\(^53\) protection against being tried twice for the same offense;\(^54\) the right of persons charged with crimes not to incriminate themselves;\(^55\) the right, in criminal trials, to be confronted with hostile witness, have the opportunity to present favorable witnesses, have the assistance of counsel, and have a speedy trial;\(^56\) protection from “excessive bail” and “excessive fines,” and from “cruel and unusual punishments;”\(^57\) the right not to have one’s private property taken for public use without “just compensation;”\(^58\) and, most sweeping of all, the right not to be “deprived of life, liberty, or property, without due process of law . . . .”\(^59\)

\(^50\) U.S. CONST., amend. I.
\(^51\) U.S. CONST., amend. II.
\(^52\) U.S. CONST., amend. IV.
\(^53\) U.S. CONST., amend. IV.
\(^54\) U.S. CONST., amend. V.
\(^55\) U.S. CONST., amend. V.
\(^56\) U.S. CONST., amend. VI.
\(^57\) U.S. CONST., amend. VIII.
\(^58\) U.S. CONST., amend. V.
\(^59\) U.S. CONST., amend. V.
The sequence by which those "liberties" found their way into the Constitution seems particularly striking when one notes that even though they collectively serve to define the essence of what citizenship in a republic meant at the time, their insertion in the Constitution came as an afterthought, and in part as a political maneuver. This suggests that the central concerns of those who had convened at Philadelphia and drafted the Constitution, and those who had reservations about it, were not with what modern commentators would call the "civil liberties" of Americans. It was not that those liberties were unimportant, but they were not primarily on the delegates' and ratifiers' minds. They were concerned, fundamentally, with the allocation of sovereign powers between the states and a central government in America.

Thus, if one searches in the founding era for evidence of an abiding interest in the protection of civil rights or civil liberties, that search is likely to be anachronistic. As heirs to a tradition of eighteenth-century republican thought, the framers were highly sensitive to the threats to the liberty of citizens that could come from corruption, or excessive factionalism, or a gravitation toward tyranny in government. But their remedies were directed toward changing the structure of American governmental institutions rather than increasing community vigilance toward assaults on individual liberties. They thought that if a central government in America had more powers, and clearly enumerated powers, and well defined branches with separated functions, and supremacy over the states within its spheres of influence, that in itself would help prevent corruption and check tyranny. Liberties would be more secure if a newly modeled federal government could help curb the excesses of the states. The idea of liberty in the founding period thus appears as derivative of other more prominent ideas, and most of the provisions in the Constitution giving substantive content to that idea were not included in the original document and were added for reasons that had little to do with their content.

C.

As for the ideas of equality and judicial review, their presence is considerably muted in the founding era. Only one provision in the Constitution, including the Bill of Rights, uses the term "equal," that providing that in the event two candidates in a presidential election had a majority of votes in the Electoral College, and "have an equal number of votes," the House of Representatives would choose one to be
The only conspicuous endorsement of equality as a central idea in the founding period comes in the preamble to the Declaration of Independence, with its assertion that it is a "self-evident ... truth" that "all men are created equal." What that phrase actually meant, however, is more clearly revealed in the text of one of the grievances against the King of England that Jefferson included in his original draft of the Declaration, and the members of the Continental Congress deleted. The grievance announced that the king had "waged cruel war against human nature itself" by "violating its most sacred rights of life and liberty in the persons of a distant people, ... captivating and carrying them into slavery in another hemisphere," and, being "determined to keep open a market where men should be bought & sold," had "suppress[ed] every legislative attempt to prohibit or to restrain this execrable commerce." In that passage Jefferson argued that the practice of African slavery ran counter to human nature as well as contradicting the proposition that all men were created equal. Some members of the Congress, uncomfortable with the implications of that argument for the slave trade, flourishing at the time, insisted on its deletion. In the notes he kept of Congress's deliberations on the language of the Declaration, Jefferson identified those who opposed his passage as members from "South Carolina & Georgia," along with "Northern brethren" who had been "pretty considerable carriers of [slaves] to others."

The episode underscores the fact that despite the Declaration's preamble, most Americans of the founding period did not believe that all humans were created equal. On the contrary, ideas of social, racial, and gender inequality, and deference to persons occupying the upper positions in a social hierarchy from those occupying the lower positions, were predominant in late-eighteenth century America. Only male freeholders were permitted to vote. In most agricultural households, the predominant unit of social and economic organization, all the members of the household were dependent on the male proprietor. Many households included indentured servants or slaves. Clothes, education, and manners sharply distinguished "gentry" from "yeomen," laborers, and servants. Equality was, essentially, a constitutional idea for another

60. U.S. CONST., art. II, § 1, cl. 3. That happened in the 1800 election, when Thomas Jefferson and Aaron Burr each received 73 votes for president, and the House of Representatives eventually elected Jefferson. The clause also provides that once the president has been chosen, "the Person having the greatest Number of Votes of the Electors shall be Vice President," and if "there should remain two or more who have equal Votes," the Senate should choose among them for Vice President.

61. MAIER, supra note 8, at 236.

62. See id. at 239.

Finally, there is no mention of judicial review in any of the authoritative documents of the founding period. Historians have found evidence that some members of the generation anticipated that the judiciary could exercise some oversight of the activities of other branches, and state constitutions assumed the existence of courts. The Constitution established a Supreme Court, and anticipated that Congress might establish lower federal courts. But what one does not find is any discussion of the question whether the judiciary was expected to be the sole interpreter of the Constitution, or just one along with other branches, or if interpretations differed, which branch’s should prevail. It does not appear that the idea that the meaning of constitutional provisions, as applied to legal disputes, should authoritatively be supplied by the judiciary was contemplated, or not contemplated, by those who drafted and ratified the Constitution. Their minds were on other matters.

III

When the central ideas associated with American constitutionalism in its founding period are subjected to historical analysis, two conclusions seem inescapable. First, it is not possible to understand the ideas with which those who drafted and ratified the Constitution were most concerned without attention to the history of America as a British colony, and an independent nation, between the mid-1770s and the late-1780s. Much of what had transpired in the decade before delegates assembled in Philadelphia in 1787 would shape their concerns, making questions of sovereignty, federalism, and separation of powers vital to them, and making protection of property and liberty derivative of those questions. To understand the form that the 1787 Constitution took, it is necessary to understand the experience with government that Americans had had since the 1770s.

Second, a number of constitutional issues, many of them concerned with the meaning and scope of civil rights and civil liberties and with the scope and limits of the principle of equality, have become central to American constitutionalism, but were not abiding concerns of the founding period. Even the Bill of Rights, whose presence in the Constitution has spawned many of those issues, was primarily thought of as an issue of federalism when it was ratified. If one searches the founding period for illuminating evidence about what the framers

64. CHRISTOPHER CLARK, SOCIAL CHANGE IN AMERICA 3–8, 110–14 (2006).
thought about the sorts of free speech, freedom of religion, equal protection, and Establishment Clause issues that have helped to define modern American constitutional jurisprudence, one largely searches in vain. The most important step in recovering the ideas of the founding era is to determine what its contemporaries, as opposed to subsequent generations, were primarily concerned about; and when one probes that question, one finds that they were primarily concerned about the structure and allocation of sovereign power in American government. All the other central ideas of American constitutionalism were either derivative of that concern, the product of specific events in the 1780s, or creations of later periods in American history.

It is, of course, appropriate for scholars and others to consider the founding period against the backdrop of all that has occurred since. One might argue that it is particularly appropriate to consider the constitutional ideas of that period from a "holistic" perspective, since the Constitution was designed to be a document capable of enduring over time, and being adapted to "the various crises of human affairs." But it is one thing to consider the interesting and sometimes distressing contrasts between the conceptions of liberty, or equality, or eligibility to participate in civic affairs, held by the framers and those of our own; and quite another to transpose our contemporary assumptions about sovereignty, or liberty, or property, or equality, onto a recreation of the ideas of the framers about those subjects, so that we "discover" the founding generation as being strange, or benighted, or discordant. Whatever one may think of such a transposition as a normative exercise, it is anachronistic history. The paradox of undertaking historical recreations of the central ideas of the founding period is that the more we remember about what has come after the time in which those ideas were in ascendancy, the harder it becomes to understand them.

65. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY, supra note 2, at 469.