

Yes, Eighteenth Century Constitutionalism for the Twenty First Century*

George Thomas
Williams College

The sentiment that the Constitution needs to be radically altered to keep up with the times is by now a fairly old one. It originated in the early years of the twentieth century where progressives insisted that the Constitution must be viewed in Darwinian terms so that we could “adapt” it to the “opinion of the age.”¹ This notion of adaptation or evolution rejected the idea of a fixed constitution. Whether it was our inherited understanding of liberty, or constitutional forms such as the separation of powers, we would have to adapt these to meet the needs of “political development.”² While progressive arguments combined pragmatic and evolutionary justifications, both strands of thought tended to reject the notion of permanent constitutional foundations. Thus progressives were often dismissive of fixed constitutional rights and limits as a relic of eighteenth-century thought that must be reconstructed to bring our government into accord with the flow of History.³ In Woodrow Wilson’s words, a “living” constitution “must be Darwinian in structure and practice [as] no living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon

* Particularly as the main competitors seem to be Rousseau’s eighteenth century democracy, Kant’s eighteenth century cosmopolitanism, and Hegel’s (nearly) eighteenth century History. Let me add that I think both Levinson and Scheppele are, more or less, within the contours of eighteenth century constitutionalism.

¹ Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 172.

² Herbert Croly, *Progressive Democracy* (New Brunswick: Transaction Publishers, 1998), 1.

³ As Herbert Croly said, “the insertion of the bill of rights in the Constitution contributed more than any other feature to convert it into a monarchy of the Law superior in right to the monarchy of the people.” *Progressive Democracy*, 55. See also, James W. Ceaser, *Nature and History in American Political Development* (Cambridge: Harvard University Press, 2006).

their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose.”⁴

Subsequent calls for constitutional reform have often born a heavy debt to the progressives—and Wilson in particular. Consider the APSA report on “responsible party government,” James McGregor Burns’ call for a parliamentary government, Robert Dahl’s insistence on “polyarchy,” and the Committee on the Constitution’s desire to bring cabinet government into the fold of our constitutional system. All follow in Wilson’s footsteps, seeking to alter or overcome elements of America’s written Constitution—particularly its embrace of the separation of powers and checks and balances—to bring it in line with modern governance.⁵ Professor Levinson’s *Our Undemocratic Constitution* is partly in this vein—but only partly.⁶ I take him seriously when he insists on being a kindred spirit with the Founders who themselves insisted on “learning from experience,” creating a Constitution to suit their needs.⁷ This insistence runs throughout *The Federalist*. Moreover, in defending the Constitution, *The Federalist* speaks of “aptitude and tendency,” or in the language of modern political science, probability, not certainty, as it recognizes the Constitution is an imperfect experiment. This recognition led James Madison, in fact, to be much less sanguine about maintaining constitutional government than Wilson, whose *Constitutional Government* reads as an

⁴ Wilson, *Constitutional Government*, 57, 56.

⁵ APSA report, “Responsible Two Party Government”; Burns, *Democracy’s Deadlock*, Dahl, *A Preface to Democratic Theory* and *How Democratic is the American Constitution?*; and Lloyd Cutler, ____ . Much recent scholarship, however, has criticized the Wilsonian view of the separation of powers. See Jessica Korn, *The Myth of the Legislative Veto* (Princeton: Princeton University Press, 1996), Joseph Bessette, *The Mild Voice of Reason* (Chicago: University of Chicago Press, 2004), and Daniel Stid, *The President as Statesman* (Lawrence: University Press of Kansas, 1996).

⁶ Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (New York: Oxford University Press, 2006).

⁷ *Ibid.*, 15.

extended quarrel with Madison.⁸ While Wilson would insist that government “is not a body of blind forces; it is a body of men,” this was, *pace* Wilson, precisely what underpinned Madison’s constitutionalism.⁹ It was based, that is, on the lessons of history and experience, not the ingenious musings of a theorist planning a constitution from the closet of his imagination.

The history and experience of American constitutionalism makes it difficult to think of our Constitution as an eighteenth century constitution. Yet, if I found myself at Levinson’s constitutional convention, I would caution against a progressive view of History or “constitutional development.” Indeed, against such views, I would insist on elements of eighteenth century constitutionalism that our Constitution embraces and, so I would argue, should be foundational to any new form of government we created in the twenty first century. I briefly take up these issues in turn.

An Eighteenth Century Constitution?

Because the Constitution does not speak for itself, if not properly contrived, as argued in *The Federalist*, No. 48, the Constitution might become a “mere demarcation on parchment.”¹⁰ Yet to vest authority to “speak” for the fundamental law in any one body is effectively to make that body sovereign. Thus the purposeful division of power within the Constitution is based on a refusal to vest sovereign authority in any single body—including in “the people themselves,” even if the Constitution implicitly recognizes their

⁸ Alexander Hamilton, *The Federalist Papers*, No. 85. Even Brutus, arguing against the Constitution, said we cannot strive for perfection as even those urging ratification of this Constitution admit it is imperfect. Brutus I, Herbert Storing, *The Anti-Federalist* (Chicago: University of Chicago Press, 1985).

⁹ Woodrow Wilson, *Constitutional Government in the United States*, 56.

¹⁰ *The Federalist Papers*, 281.

revolutionary right to “alter or abolish” this particular constitution.¹¹ The very diffusion of sovereign authority—what Aristotle called the distribution of offices—speaks to the fundamental nature of the polity: it is neither “democratic” nor “undemocratic.”¹² Rather, the Constitution is a “complex and skillfully contrived” blend of liberalism and democracy that is characterized by tension.¹³ This is evident insofar as natural rights and popular sovereignty both provide the foundation of our Constitution. In this way, American constitutionalism is ordered around agonistic institutions and principles.

The ineluctable result of this move, so much at the heart of eighteenth century constitutionalism, is to make the Constitution “resistant as a whole to any sustained settlement of the kind that either a demagogue or a sovereign authoritative point of view might try to impose.”¹⁴ But this has also meant that the Constitution rarely finds coherent expression as a whole. Rather, attempts to construct and reconstruct constitutional

¹¹ Madison would have put this as a “preface” to the Constitution along with the Bill of Rights woven throughout the text, making this sentiment textually explicit. Though even here, the people, arguably, would be bound by natural rights and reason and thus not sovereign in a Rousseauian sense. Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourses* (New Haven: Yale University Press, 2002), 170.

¹² See Louis Fisher and Neal Devins, *Our Democratic Constitution* (New York: Oxford University Press, 2004) and Sanford Levinson, *Our Undemocratic Constitution*.

¹³ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, . See also James W. Ceaser, *Liberal Democracy and Political Science* (Baltimore: Johns Hopkins University Press, 1990) and Walter F. Murphy, “Constitutions, Constitutionalism, and Democracy” in Douglas Greenberg, Stanley Katz, et al., eds., *Constitutionalism and Democracy* (New York: Oxford University Press, 1993) discussing liberal democracy or constitutional democracy as a compound form of government.

¹⁴ Bryan Garsten, *Saving Persuasion: A Defense of Rhetoric and Judgment* (Cambridge: Harvard University Press, 2006), 208. See also Wayne Moore, *Constitutional Rights and Powers of the People* (Princeton: Princeton University Press, 1996), arguing that multiple perspectives may exist outside of “official” constitutional channels. A point vividly brought home by Madison in a letter to Jefferson, when he insisted that these political devices for maintaining the Constitution might fail: these mechanisms “are neither the sole nor the chief palladium of constitutional liberty. The people, who are the authors of this blessing, must also be its guardians.” Quoted in Lance Banning, *Jefferson and Madison: Three Conversations From the Founding* (Madison: Madison House, 1995), 21.

authority and meaning have been the norm.¹⁵ We might characterize these attempts as an interaction between America's small "c" constitution, which has aptly been described as America's constitutional soul, and our large "C" formal constitution.¹⁶ To be sure, debates about constitutional ideas are historically rooted in struggles to justify particular policies and political projects. But they also illuminate what it has meant to bring the Constitution to life. These ideas, moreover, have shaped how we think and speak about the Constitution, even while the Constitution shapes the horizon in which such political struggles take place.

As a polity, if we have a sort of constitutional faith, we have disagreed profoundly about constitutional meaning and authority, engaging in conflicted struggles over the proper ordering of constitutional values. Many of these constitutional reconstructions depart significantly from our eighteenth century constitution, as in the near erasure of the ninth amendment,¹⁷ or in how we elect presidents. Others, such as political parties, may go against original visions but are consistent with original ends. Yet attempts to construct or reconstruct constitutional meaning and authority are frequently arguments over precisely what constitutional ends require. Even those statesmen who have been thought to radically alter the Founders' Constitution often insisted that they were simply adapting constitutional meaning and authority to the Founders ends. In this spirit, FDR frequently cast himself as adhering to the substantive ends of the Constitution, even while viewing constitutional forms as instrumental and, therefore, adaptable in the pursuit of

¹⁵ Walter F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Baltimore: Johns Hopkins University Press, 2007), 10.

¹⁶ Harvey C. Mansfield, *America's Constitutional Soul* (Baltimore: Johns Hopkins University Press, 1990).

¹⁷ Randy Barnett, *Restoring the Lost Constitution* (Princeton: Princeton University Press, 2004).

foundational ends.¹⁸ Erstwhile New Dealers like Robert Jackson and Felix Frankfurter often insisted that the New Deal flowed from the Founder’s constitutional commitments in this manner, which would make the New Deal a constitutional “restoration” rather than a constitutional “revolution.”¹⁹ Such an understanding might even plausibly be manifest in Justice Cardozo’s attempt to capture the spirit of the Founders: “It is not in my judgment inconsistent with what they [the Founders] would say today nor with what they would believe, if they were called upon to interpret ‘in light of our whole experience’ the constitution that they framed for the needs of an expanding future.” This is quite different from a “living” constitution that rejects foundations in favor of historical evolution.

Yet FDR also drew deeply on historical adaptation—perhaps even rejecting foundational ends. This sentiment is characterized by Frankfurter’s insistence, nurturing three decades of progressive thought, the “Constitution of the United States is most significantly not a document but a stream of history.”²⁰ Or Cardozo’s insistence “that the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute.”²¹ This was surely true of the progressive insistence on “pure democracy,” which would require a profound reconstruction of constitutional liberty as well as an alteration, if not abandonment, of our formal constitutional structures, in favor not just of history, but History. As Wilson put it in *Constitutional Government in the United States*, “Governments are living things and operate as organic

¹⁸ For such a view, see Sotirios Barber, *Welfare and the Constitution* (Princeton: Princeton University Press, 2003), 92-93. Wilson, in portions of *Constitutional Government*, might even be seen in this light.

¹⁹ See Tulis, “The Two Constitutional Presidencies.” See also Barry Cushman, “Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s” 50 *Buffalo Law Review* 7 (2002), 73-74. For the New Deal as a legitimate “revolution” see, Ackerman, *We the People*, 306.

²⁰ Felix Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite* (Chapel Hill: University of North Carolina Press, 1937), 2.

²¹ Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 102.

wholes. Moreover, governments have their natural evolution and are one thing in one age, another in another.”²² In the *New Freedom* Wilson would explain this as a necessarily progressive venture: “Progress, development—those are modern words. The modern idea is to leave the past and press onward to something new.”²³ For Wilson our understanding of liberty and constitutional structure meant to protect it must evolve—or develop—with large-scale historical change.

There is perhaps an understandable temptation to dispense with constitutional forms in favor of grander and nobler constitutional ends—particularly given changing historical circumstances. We might read the preamble to the Constitution for inspiration, as it calls us to “establish justice” and “secure the Blessings of Liberty to ourselves and our Posterity.” We would be hard pressed to find such inspiration in the mundane technicality of Article I. Or, even for those swept away by the Court as great defender of individual liberty, Article III, Section 2: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” Demands for justice and efficiency, articulated to some degree in the Constitution’s preamble, are often behind the insistence on dramatic constitutional change, bringing the Constitution up to date by making it more “democratic” or more effective. But we should notice that James Madison viewed complex constitutional forms as a means of achieving justice. Recall that in his most famous discussion of the separation of powers in *Federalist 51*, Madison concludes his exposition on the virtues of the separation of powers by attaching it to the sentiment

²² Wilson, *Constitutional Government in the United States*, 54.

²³ Wilson, *The New Freedom*,

that “Justice is the end of government.”²⁴ This is brought more vividly to light in a subsequent sentence, “It [justice] ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”²⁵ The point is that justice might be best achieved by preventing quick or authoritative action under the Constitution, particularly authoritative or quick action that is done in the name of justice. The separation of powers can be both means and ends: a means in preventing “usurpations,” an end in “promoting sober deliberation”²⁶ about the ends the Constitution aspires toward. Perhaps the Constitution is no longer fostering and sustaining its substantive commitments. Perhaps those commitments are relics of the eighteenth century. But we should be wary of constitutional change as an imperative of History.²⁷ As Ken Kersch describes it, this Whiggish narrative of development involves “erasures” that gloss over the agonistic and conflicted struggle between “liberties and liberties” and “rights and rights” that were central to forging the institutions of the “New American State.” Thus rights and liberties, long protected within the terms of traditional American constitutionalism, were, in accord with the progressive imperative of state building as History, said to be no longer rights, embracing Oscar Wilde’s quip that “the only duty we owe history is to rewrite it.”²⁸

And yet I am open to the possibility that constitutional meaning is forged in the historical interaction between general constitutional principles and particular political and historical circumstances. This is not to say that whatever comes out of our historical debates is constitutional meaning—that is the Constitution as history. Nor, though, is it to

²⁴ Federalist 51, 292.

²⁵ Ibid.

²⁶ Barber, *On What the Constitution Means*, 178.

²⁷ This tendency is not manifest in Levinson’s or Scheppelle’s work.

²⁸ Ken Kersch, *Constructing Civil Liberties* (New York: Cambridge University Press, 2004).

say that whatever meaning comes out of these great debates reveals to us the true nature of our Constitution—that is the Constitution as History. Rather, it is to offer a more tentative suggestion that confronted with particular historical circumstances, we are forced to wrestle with constitutional identity at its most foundational level. In looking at the question of constitutional continuity and change, Edmund Burke thought “before its final settlement [a constitution] may be obliged to pass, as one of our poets says, ‘through great varieties of untried being,’ and in all its transmigrations to be purified by fire and blood.”²⁹ Here I think there are lessons from the eighteenth century that remain relevant.

The Lessons of Eighteenth Century Constitutionalism

At the root of modern constitutionalism, embraced by our Constitution, is the insistence on substantive limits to governmental power. While limits came to be identified with individual rights, they were also rooted in an understanding of the limits of politics. Thus even in a revolutionary act where the people alter or abolish a constitution and create a new form of government they were limited in the reach of their power. Recall that the Declaration itself, that great act of a revolutionary people, spoke of our Constitution in these terms. If popular sovereignty is one facet of the American amalgam, unlike Rousseau’s version, which “is nothing but the exercise of the general will,” it has bounds. The revolution was justified not simply because American sovereignty was being denied—“altering fundamentally the Forms of our Governments”—but because “whenever any Form of Government” becomes destructive of its ends, the people have a right to alter or abolish it. This revolutionary right is rooted in the natural rights of human beings—and to “secure these Rights, Governments are

²⁹ Edmund Burke, *Reflections on the Revolution in France* (New Haven: Yale University Press, 2003), 210.

instituted among Men.” There is, then, a limit to what consent, by way of popular sovereignty, can legitimately achieve.³⁰ This is evident in the thought of James Wilson, Thomas Jefferson, and James Madison—three of the Founders most frequently turned to in order to justify popular sovereignty as trumping, in various ways, constitutional provisions.³¹ Interestingly, however, these thinkers often insisted that even outside of the Constitution, in revolutionary rather than constitutional terms, the people are bound.

In his first lecture on jurisprudence, James Wilson insisted that the “revolutionary principle” ought to be taught “as a principle for the constitution of the United States,” and, during the ratifying conventions, he insisted that, “the truth is, that the supreme absolute and uncontrollable authority, *remains* with the people.” Yet Wilson insisted on this point as legitimizing the act of creating a *new* constitution based on the popular authority of the people and not the states. Indeed, at the end of his speech he insisted that the Declaration of Independence illustrated this unalienable right of the people.³² He then proceeded to quote the second paragraph, where consent legitimizes power because it obligates government to recognize unalienable rights—that is, unalienable individual rights, which are the basis of the right of self-government.

In a similar manner, Jefferson insisted, again and again, that “the earth belongs to the living” and, thus, that each generation has “a right to chose for itself the form of

³⁰ Murphy, *Constitutional Democracy*, 516.

³¹ Akhil Reed Amar, “Popular Sovereignty and Constitutional Amendment” in Levinson, ed., *Responding to Imperfection*. See especially Bruce Ackerman, *We The People*, Vol. 1 and 2.

³² James Wilson, Pennsylvania Ratifying Convention 4 Dec. 1787 in Kurland and Lerner, eds., *The Founders’ Constitution*, Vol. I (Indianapolis: Liberty Fund, 1987), 62. For a discussion of Wilson suggesting his endorsement of unqualified popular sovereignty, see Akhil Reed Amar, *America’s Constitution: A Biography* (New York: Random House, 2005), 297.

government it believes most promotive of its own happiness.”³³ Jefferson, though, also spoke of natural right as limiting what any generation acting as popular sovereign can do. And even when Madison insisted the people are the best protectors of their rights, he denied the “majority is the standard of right and wrong.” Madison also spoke of rights prior to and binding upon civil society.³⁴ I do not wish to labor over the intricacies of these thinkers, so much as suggest that even in *creating* a constitutional order, they tended to draw on a combination of popular sovereignty and natural rights, with the latter, at the very least, tempering and limiting the reach of the former. Thus popular sovereignty, even outside the Constitution, existed within a foundation and was distinct from popular will.

The notion of substantive limits is in contrast to the insistence that rights can be structured in purely pragmatic and procedural terms, or based on “authentic” acts of popular constitutionalism. As Cass Sunstein argues, because rights are secured by government—the result of legal rules—they can be reconstructed by the government to meet the needs of history and democracy.³⁵ To say that rights are “constructed” would hardly come as a surprise to the natural rights thinking of the Founders who insisted on precisely this point. But they were constructed to comport with the fundamental nature of human beings and government, then, was legitimately constituted to protect such rights. Thus the legal realist insistence was novel, not in insisting that rights were constructs, but in insisting that because they were constructs we could construct them to the needs of

³³ Thomas Jefferson to James Madison, 6 Sept. 1789 in Kurland and Lerner, eds., *The Founders’ Constitution*, Vol. I, 68.

³⁴ James Madison, “The Law of Nature and Majority Rule” and “A Memorial and Remonstrance Against Religious Assessments” in Ralph Ketcham, ed., *Selected Writings of James Madison* (Indianapolis: Hackett Publishing, 2006), 28, 21.

³⁵ Cass Sunstein, *The Second Bill of Rights* (New York: Basic Books, 2001), 26-27.

modern society. A similar sentiment finds expression in the popular constitutionalism of Bruce Ackerman.³⁶ Here popular sovereignty, when authentically expressed, cannot be limited. In Rousseau's words: "If, then, the people simply promises to obey, it dissolves itself by that act and loses its character as a people; the moment there is a master, there is no longer a sovereign, and forthwith the body politic is destroyed."³⁷ Yet how do we know an "authentic" act of popular will when we see it? Such vexing questions are at the root of *formalizing* politics in a written Constitution precisely so that foundational questions do not turn on scrutinizing popular will.

Montesquieu's eighteenth century constitutionalism may yet have something to teach us. Professor Scheppele's discussion of the sweeping claims of executive power, rooted in international law and the "global war on terror," are interesting in this light. Perhaps the imperatives of the twenty-first century require a virtually unchecked executive to protect and preserve our nation, which requires a radical reconstruction of liberty. If we take the claims of History seriously, this may be what twenty-first century constitutional development requires.³⁸ It was, after all, Wilson who insisted on expansive executive power as a means of overcoming constitutional checks in administering the will of the people. In drawing out the popular potential of the presidency, Wilson insisted "Let him once win the admiration and confidence of the county, and no other single force can

³⁶ Ackerman's "dualist democracy" is rooted in unbound popular sovereignty. *We the People: Foundations* (Cambridge: Harvard University Press, 1991), 3-33. In Volume II, *We the People: Transformations* (Cambridge: Cambridge University Press, 1998), Ackerman even calls the peoples' voice "the prophetic voice," 3. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1998) also seems to suggest that the people can alter constitutional forms based on the thin constitution. Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004) occupies a less clear position. His insistence that the people play a role in enforcing constitutional meaning is unproblematic. His insistence, at times, that the people's understanding becomes the understanding of the Constitution is more troublesome.

³⁷ *Ibid*, 170.

³⁸ See Gordon Silverstein's review of John Yoo, *The Powers of War and Peace* in this light,

withstand him . . . he is irresistible.”³⁹ And it was progressives like Herbert Croly who rejected the notion of separated power, insisting that, “a thoroughly representative government is essentially government by men rather than by Law.”⁴⁰

This sentiment, too, found expression in Rousseau: if sovereignty cannot be bound, neither can it be divided, as he took aim at “separations” in politics altogether: “But our politicians, being unable to divide sovereignty in its principle, divide it in its object. They divide it into force and will, into legislative power and executive power; into rights of taxation, or justice, and of war; into internal administration and foreign relations—sometimes conflating all these branches into a fantastic being, formed of disparate parts; it is as if they created a man from several different bodies, one with eyes, another with arms, another with feet, and nothing else.”⁴¹ Yet maintaining some form of the separations at heart of constitutional democracy may be more prudent than ever. As Montesquieu insisted in sketching the notion of a separation of powers at the origins of modern constitutionalism, the most important separation was not between the executive and the legislature, but between both of these and the judiciary. And this was of a judiciary that spoke to legal issues and not necessarily constitutional questions. Furthermore, even in parliamentary systems there is the separation between the majority and minority in parliament, as well as the separation between government and society, public and private, and church and state for example. All of these separations are at the

³⁹ Ibid., 68. Of course Wilson was resisted by Henry Cabot Lodge and the Senate.

⁴⁰ Herbert Croly, *Progressive Democracy*, 274.

⁴¹ Rousseau, *The Social Contract*, 171.

heart of constitutional democracy even if they may take different forms in different polities. History has not rendered them irrelevant.⁴²

Casting a glance at some of the most pressing political issues in the early years of the twenty-first century might firm up our commitments to such constitutional separations. The division between the legislature and executive may remain the most effective means of utilizing and containing executive power. A merger of legislative and executive powers may well increase the power of the executive. This could also be true of a more “democratic” president insisting on popular will as the proper foundation of power. Or take gay marriage. Returning to a more robust view of federalism, against the centralizing tendencies of twentieth-century state building, may well be the best way to deal with such fraught political issues in an increasingly pluralistic society. This increasingly pluralistic society might also need a secular constitutional creed more than ever as a means of providing us with some foundational unity. Against such notions of a “national creed” we also find the latest manifestation of progressive History, as we are encouraged to adapt our parochial Constitution to accord with the more cosmopolitan imperatives of “global constitutionalism.” This fits, in part, with the universal aspirations of eighteenth century constitutionalism as is evident in Professor Scheppele’s discussion of modern rights conventions such as the Universal Declaration of Human Rights. Yes, the language of “natural rights” is absent, or obscured, but such universal rights are difficult to think of in other terms.⁴³ Here we might look at what is permanent about

⁴² Levinson urges us to embrace many of these separations even while insisting on a more direct and nationalist view of democracy. See also, Pierre Manent, *A World Beyond Politics?* (Princeton: Princeton University Press, 2005).

⁴³ This does not mean that the US should engage in a crusade for such rights. Quincy Adams and Lincoln.

constitutionalism—and the “permeability of constitutional borders.”⁴⁴ And yet it may be, as theorists of eighteenth-century constitutionalism like Montesquieu and Madison argued, that a constitution of our own remains the best method of protecting and fostering such rights and values.

⁴⁴ Gary Jeffrey Jacobsohn, “The Permeability of Constitutional Borders” *Texas Law Review* 2004.