Divergence or Destiny?:

Comparing the Modern Conception of Positive Rights to the Founders' Conception of Individual Rights

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Abstract

This paper compares the American Founders' theory of individual highlights and the current American fascination with enshrining positive rights into law. I begin my examination by analyzing the inspirations for both the Founding Theory of Rights and the Modern Theory of Rights, specifically the political theory of Locke and the Founders, the English tradition that the Founders embraced, and the structural details of the Constitution. After examining the roots of both theories of rights, I look at whether the two camps of thought can co-exist or are in conflict with each other. I conclude that while there may be a surface-level textual support for positive rights, when read in the proper context, the Founding Theory of Rights cannot be reconciled with the Modern Theory of Rights.

Keywords: *John Locke, English Heritage, American Founding, Founding Fathers, Individual Rights, Positive Rights, Negative Rights*

Introduction

On July 4, 1776, the Founding Fathers convened in Philadelphia and published the United States' Declaration of Independence from the British crown. With the backing of fifty-six fellow American Founders, Thomas Jefferson argued that the purpose of government was to protect three unalienable rights of the American people: life, liberty, and the pursuit of happiness.[1] Taking inspiration from English empiricist John Locke, among other thinkers, our Founders shaped a vision of individual rights where the government's role was to defend said rights, instead of producing rights for the people.[2] In this regard, the founding interpretation of individual rights was negative. Today, however, our country is steadily moving away from this paradigm and towards the view that the government ought to take a positive view on individual rights. In other words, there is a rising camp of thought that our government's role in the realm of individual rights is to produce whatever rights the people demand, in the name of pursuing happiness. The "rights" of abortion, welfare, and healthcare mark just several privileges that a growing faction of our nation demands the government fulfill. Yet, is this framework of rights one that the Founders envisioned and endorsed?

In this paper, I seek to compare the founders' view of individual rights with the modern conception of positive rights. To accomplish this objective, I examine the integral sources of inspirations for both camps of thought. For the Founding Theory, I first analyze the English tradition inherited and embraced by the Founders and how this foundation shaped the outlook that the Founders had on rights. Further, I also look to the foundations of natural law to understand the underpinnings of the Founding Theory of rights. On the Modern Theory side, I textually analyze several passages in various Founding era documents that lend to the conception of positive rights. In addition, I point out details in the Constitution's structure which can be interpreted to allow for a positive rights paradigm. I conclude this paper by arguing that the Modern Theory of rights cannot be reconciled with its founding counterpart.

Definitions

I define the "Founding Theory of Rights" as the belief that individual rights are negative. A negative right is that which requires one's neighbor *not* to act towards the individual. The right to life, for example, is a cornerstone negative right. Your right to life is upheld when your neighbor does not attempt to take your life. Your neighbor does not need to take a positive action for your right to life to be upheld; negative rights are honored when one person fulfills his "negative" duty on all others — the duty not to interfere with a person's activities in a certain area.[3] By extension, under the Founding Theory, government is only responsible for protecting the negative rights of its citizens.

On the other hand, I define the "Modern Theory of Rights" as the idea that individual rights are a combination of positive and negative rights, and that governments are obligated to

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[1] Thomas Jefferson, "Declaration of Independence: A Transcription," National Archives (The U.S. National Archives and Records Administration, July 4, 1776), https://www.archives.gov/founding-docs/declaration-transcript.

[2] Bruce Morton, "John Locke, Robert Bork, Natural Rights, and the Interpretation of the Constitution," *Seton Hall Law Review* 22, no. 3 (1992): 1, https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2992&context=shlr.

[3] Manuel Velasquez et al., "Rights," Markkula Center for Applied Ethics at Santa Clara University, 2018, https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/rights/.

fulfill both types of rights for their people. A positive rights paradigm requires someone *to* take action for another individual's positive right to be upheld. Manuel Velasquez clarifies that positive rights afford the beneficiary "the positive assistance of others in fulfilling basic constituents of human well-being like health and education."[4] Whereas negative rights focus on others' inaction, positive rights focus on others' actions. A positive right is fulfilled when the holder receives benefit from an outside source, specifically the government. For example, the positive right of universal healthcare can only be fulfilled with action not taken by the right's holder but by the government subsidizing his healthcare. The modern interpretation of individual rights contends that the government has a responsibility to fulfill both positive and negative rights of the people.

The Comparison

The Founding Theory of Rights

The founding interpretation holds that as long as the government protects our negative rights, it has fulfilled its purpose. This idea can be seen in the early phrases of our country's Declaration of Independence, that man is "endowed by their Creator with…unalienable rights…[of] life, liberty, and the pursuit of happiness…That to secure these rights, Governments are instituted among [m]en." It is noteworthy that Jefferson places this clause about man's unalienable rights before highlighting the various grievances committed by King George III. If Jefferson were to highlight King George's faults before talking about the purpose of government, then those alleged "faults" would have no reference point and support. Jefferson had to first establish what the government is required to do. Only then were King George's actions able to be normatively judged as grievous abuses of power. For Jefferson and his colleagues, protecting negative rights was both the necessary and sufficient condition for the government to fulfill in order to uphold its legitimacy. When the government becomes destructive of these ends, meaning the protection of life, liberty, and the pursuit of happiness, our declaration goes so far as to justify the people if they sought to "alter and abolish" the current government.[5]

It is reasonable to assume that the Founders did not have a problem *per se* with the government taking positive action to produce benefits for its citizens; they simply believed it was not the duty of the *federal* government to do so. Thomas West writes in his book *The Political Theory of The American Founding* that the Founders, composed of statesmen across the thirteen colonies, supported local and state laws that provided welfare for the poor.[6] Further, West holds that in the founding era, it was expected that families would step up to support their loved ones who fell into unemployment or old age. In Massachusetts, all kindred of poor persons in the Commonwealth, assuming sufficient ability, were required to care for the impoverished family member.[7] Yet, there is no enshrined right in our Constitution, nor any clause, that stipulates senior citizens must receive familial assistance from the federal government. Even if there was a constitutionally recognized positive right that the federal government must fulfill, such as the

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4 *Ibid.*

5 Jefferson, "Declaration of Independence: A Transcription."

6 Thomas G. West, *The Political Theory of the American Founding : Natural Rights, Public Policy, and the Moral Conditions of Freedom* (Cambridge, United Kingdom: Cambridge University Press, 2017), 394.

7 *Ibid.*

right to welfare, legal scholars are generally in consensus that such a right would be not constitutionally valid or enforceable.[8] Helen Hershkoff believes that a federal positive right would not be upheld by the Supreme Court because the Founders sought to promote the concept of federalism when formulating the Constitution.[9]

Federalism is the idea that powers and responsibilities ought to be divided among the federal and state level governments. In the founding era, there was a slight preponderance towards the states over the federal government, evidenced most prominently by the 10th Amendment. Federalism helped the Founders ensure that federal influence would be checked and mitigated in order to foster the liberty of the states. The First Amendment of our Constitution does not guarantee a freedom of speech that permeates all levels of authority and environments of life; it simply holds that "Congress shall make no law…abridging the freedom of speech."[10] The founders approached the free speech issue not from the lens that the people necessarily have the right to speak as they wish but from the perspective and goal of limiting federal influence.

The federalism framework significantly clashes with the modern conception of rights. Today, citizens focus not on how much control the federal government should have on their lives but on what rights they should be afforded by the federal government. Subscribers of the founding conception of individual rights, however, viewed rights as negative and God-given, not government-granted. Due to time constraints, I simply analyze two influences for the Founding Theory of Rights: the English tradition and natural law.

Inspiration for the Founding Theory of Rights

The English Tradition

The Founders found their basis for the unalienable rights of life, liberty, and property from the English tradition they inherited. Contrary to the popular belief that the pilgrims fully denounced everything British upon settling in North America, the Founders once thought highly of the British crown. In 1768, Rhode Island lawyer Silas Downer began his Discourse at the Dedication of the Tree of Liberty by holding that "[o]n this occasion we cheerfully recognize our allegiance to our sovereign Lord, George the third, King of Great-Britain, and supreme Lord of these dominions."[11] Of course, this devotion would dissipate in the coming years as King George accumulated a list of accusations of grievances. Yet, leading up to the Declaration, American colonials were dismissive of the British parliament but not necessarily the British crown. In that same introduction, Downer follows his declaration of allegiance to the crown by also stating that he "utterly den[ies] any other dependence on the inhabitants of that [Great Britain] island," implying the parliament. Additionally, Jefferson affirms that the principles of the United States are "a composition of the freest principles of the English constitution, with others derived from natural right and natural reason."[12]

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8 Helen Hershkoff, "Positive Rights and State Constitutions: The Limits of Federal Rationality Review," *Harvard Law Review* 112, no. 6 (April 1999), https://doi.org/10.2307/1342383.

9 *Ibid.*

10 The United States Bill of Rights, Amendment I.

11 Silas Downer, "A Discourse at the Dedication of the Tree of Liberty," in Bruce Frohnen, ed., *The American Republic: Primary Sources* (Liberty Fund, 2002), 140.

12 West, 43.

The rights of the English tradition can be linked back to the *Magna Charta*, a charter of rights signed by English King John in 1215. A result of the battle at Runnemede, the charter argued that King John had violated certain rights held by the English barons. While the charter contained sixty-three articles elucidating the rights of the people, the document most importantly established the idea that there is no divine right of kings; King John and all subsequent kings must abide by natural and divine law.[13] With this principle established, *Magna Charta*'s articles then focused on preserving the negative rights of life, liberty, and property of the common Englishmen. From ensuring the Church of England's freedom of conduct to rejecting eminent domain by affirming one's protection against having his property seized without his consent, the *Magna Charta* viewed individual rights as negative and the king's role as a protector, not a producer, of rights.[14]

Four centuries later, in 1628, English King Charles I found himself in the middle of a dispute with Parliament. Charles sought increased tax revenue, but the Parliament repudiated his request. The King retaliated by compelling wealthy individuals to lend the government funds, forcing his troops into citizens' homes, and punishing dissenters of his policies with unjust arrest. Parliament, thus, published the *Petition of Right*, which reiterated the people's rights to protection against arbitrary imprisonment and the forced quartering of troops.[15] The American colonials, a century and a half later, would directly pull from the *Petition of Right* by establishing the Third Amendment: protection against the quartering of troops.

Magna Charta and *Petition of Right* set a reasoned foundation for *The English Bill of Rights*, a declaration of rights passed in 1689. Before the document makes clear the rights held by the English people, it indicts King James II of twelve grievances, including violating the freedom of elections, imposing excessive fines, and inflicting cruel and illegal punishments.[16] Like the *Petition of Right*, the *English Bill of Rights* was a source of inspiration for the American Bill of Rights as the wording of the Eighth Amendment identically parallels the "excessive fines have been imposed; and illegal and cruel punishments inflicted" clause in *The English Bill of Rights*.[17]

The final English document I would like to analyze is Englishman Thomas Paine's *Common Sense*, a pamphlet published just six months before the United States' separation from Great Britain. A native of Great Britain, Paine moved to America in 1774. After two years, he penned *Common Sense* as a response to Edmund Burke's *Reflections on the French Revolution*. Paine wrote his famous pamphlet as a self-proclaimed cosmopolitan and a radical advocate for democracy, repudiating monarchical and aristocratic structures.[18] He writes, "[s]ociety is produced by our wants and government by our wickedness; the former promotes our happiness *positively* by uniting our affections, the latter *negatively* by restraining our vices."[19] For Paine,

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13 Md. Kamruzzaman and Shashi Kanto Das, "The Evaluation of Human Rights: An Overview in Historical Perspective," *American Journal of Service Science and Management* 3, no. 2 (2016): 8, https://www.academia.edu/download/48552596/7100190.pdf.

14 *Magna Charta*, in *The American Republic*, 93–94.

15 *Petition of Right*, in *The American Republic*, 98.

16 The English Bill of Rights, in *The American Republic*, 106.

17 *Ibid.*

18 Thomas Paine, *Common Sense* (1776), in *The American Republic*, 179.

19 *Ibid.*

the government's job is not to promote citizens' pursuit of happiness by positive action; that role belongs to society at large. He, however, saw the government as once again, a protector of our God-given rights. By instituting negative laws to curb man's vices, Paine believed this was the best option to not only preserve the general welfare but also fulfill the government's duty to its people.

A reason why the Founders did not focus the Constitution on specifying rights for the people is because they saw the issue of rights as a foregone conclusion. They had the luxury of working off of the aforementioned English documents, which argued what the Founders thought self-evident: every man has negative rights that no earthly authority can undermine. Thus, in *Federalist 84,* Hamilton critiques the Anti-Federalists' entreaty for a bill of rights, stating that the Constitution already includes a list of provisions that are meant to keep the federal government from overreaching and violating the people's rights.[20] Hamilton did not see the need to be redundant and explicitly state in the Constitution what was already elucidated by the English declarative documents. All that he believed the Founders needed to do in the Constitution was focus on preventing the national government from becoming too strong and undercutting the unalienable and negative rights of the people.

For instance, there is no technical right to privacy in our Constitution, even though there is a strong argument that this right is negative. The government fulfills a citizen's right to privacy when it does not conduct a warrantless search into one's house window; the government does not need to take action to protect the right to privacy. The closest provision to a right of privacy in our Constitution is the Fourth Amendment in the Bill of Rights, which prevents law enforcement from unreasonable searches and seizures of our persons, houses, paper, and effects. Yet, this amendment does not guarantee that we have a right to secrecy at all times. In *Katz v. United States,* the cornerstone case of Fourth Amendment jurisprudence, Justice Stewart writes, "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.[21] Even though the right to privacy is a negative one, the Founders decided against explicitly conferring this right in the Constitution. Once again, we see an example of the Founders' conviction that their primary goal in writing the Constitution was to clearly lay out what the federal government could and could not do. If the guidelines are established, then the whole issue of individual rights will sort itself out. The Founders did not design the Constitution to address all negative rights known to man, as that was done by the English intellectual tradition and natural, much less did the Founders intend to enshrine positive rights in the Constitution. The Founders relied on their English heritage to determine what "negative rights" encompassed. They would turn to natural law when examining why every man has rights in the first place.

Natural Law

The Founders recognized the ultimate foundation for rights was not any tradition but natural law. While traditions like the English heritage may be a solid benchmark for what the

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[20] Insight regarding Hamilton's *Federalist 84* argument against the Bill of Rights was from Dr. Jesse Merriam's American Political Institutions lecture on January 24, 2023.

[21] *Katz v. United States,* 389 U.S. 347 (1967).

governing authorities may or may not do, it is natural law that primarily dictates what the people have a right to, and by extension, what the government's limits are. Further, it is natural law that inspired the English documents, which proceeded to inspire our Founders. In *Common Sense*, Paine argues, "[f]or were the impulses of conscience clear, uniform and irresistibly obeyed, man would need no other law-giver," implying that superseding statutory laws is a law-giver whose laws are the ultimate governing force of man.[22] In our Declaration of Independence, prior to the all-popular "we hold these truths to be self-evident" line, the Founders inquired on what "the Laws of Nature and of Nature's God entitle [men]."[23] By asking this question prior to any discussion on the unalienable rights, the Founders show their willingness to adhere by natural law and let it guide their beliefs on individual rights.

To understand the natural law regarding individual rights, we ought to turn to the State of Nature theory expounded upon by Locke. While Hobbes and Rousseau also gave accounts of their opinion on the State of Nature, I choose to focus on Locke's account considering that his ideas on the social contract and government most closely aligns with the US constitutional order. For Locke, all men are born free and equal in the state of nature. Left to their own devices, there is paradoxically both peace and insecurity that permeates the land, according to Locke.[24] Specifically, he argues that the insecurity is aimed at man's enjoyment of his property, a negative and unalienable right each man holds. If there is no government instituting laws and punishments for theft, then each man's property rights are vulnerable to exploitation. It is for this reason that Locke believed that a social contract between the government and its citizens is necessary. By ceding some of their power and autonomy, citizens empower the government and legitimize the institution in return for their rights being protected by the government.

The social contract and governmental structures enable the tacit, rationalist natural law to be illuminated in the text of the empirical statutory law. Jefferson held that the natural law can be discerned by "the head and heart of every rational and honest man. It is there nature has written her moral laws, and where every man may read them for himself."[25] While it is true that the line of good and evil runs through every man's heart, as Solzhenitsyn aptly stated, man is definitely able to sear his conscience. Thus, it is paramount that the law of nature, primarily dictating that every man has a right to his own property, is reflected in the formal laws of the United States. The Founders understood this important principle and as a result, framed the Constitution to protect one's property not only from others citizens but also from the government.

The amalgam of natural law and the English tradition allowed our Founders to craft a robust foundation for our constitutional republic. By operating off an intellectual inheritage that held a negative view of rights, the Founders were able to direct more focus towards promoting federalism and constructing a constitution which would best protect the people from excessive federal influence. To summarize the Founding Theory of Rights, government is required to

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22 Paine, in *The American Republic*, 179.

23 The Declaration of Independence, in *The American Republic*, 189.

24 Locke's argument on man's insecurity in the enjoyment of his property is found in Essay 2, Chapter 9. For more, see John Locke, The Two Treatises of Civil Government (Hollis ed.). London: A. Millar et al., 1689.

25 Jefferson's statement comes from his letter to James Madison, written on August 28, 1789. The statement was cited in Chester Antieau's article on natural rights. For more, see Chester James Antieau, "Natural Rights and the Founding Fathers-the Virginians," *Washington and Lee Law Review* 17, no. 1 (1960), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3506&context=wlulr.

protect the negative rights of the people that already exist, not produce positive rights into legal existence.

The Modern Theory of Rights

The modern interpretation of individual rights, however, holds not only that government must fulfill citizens' positive rights but also that it is the *federal government's* duty to produce and protect these positive rights. Yet, this view of rights does not ignore negative rights. In fact, it is built off the first principle that government must first acknowledge the three basic Lockean negative rights. In this way, the modern interpretation of rights is an extension of the founding conception of rights. When the two types of rights are in conflict, however, the modern interpretation favors the positive right. One has his right to unemployment benefits fulfilled when another is forced to increase his tax payment, thus undermining his property rights. A baby's right to life, under a pro-choice paradigm, will be subjected to the will of the mother by way of her positive right to abortion. The modern interpretation of rights not only acknowledges the legitimacy of negative rights, but it also embraces the Founders' viewpoint on government's purpose.

Inspiration for the Modern Theory of Rights

The Founders' Perspective on the End of Government

In the second paragraph of our Declaration, our Founders held that man has a right to life, liberty, and the pursuit of happiness. To this argument, they rely on the laws of nature, having just invoked this source of authority in the first paragraph of the Declaration. They also ground their argument for unalienable rights in the premise that all men are created equal. This, of course, was a core first principle propagated by Locke and his fellow social contract thinkers. In the state of nature, Locke held, men exist as independent and equal to each other, as required by the laws of nature and reason.[26] Due to the equal status of all men, no one may deprive another of "life, health, liberty, or possessions."[27] It is worth mentioning that the Founders, while relying on Locke, made a critical revision when penning the Declaration. As opposed to duplicating Locke's life, liberty, and property amalgam, the Founders chose to substitute the last right with the pursuit of happiness in the Declaration.

The consequences of this substitution must not be understated. Under Locke's paradigm of rights, there is little to no room for an interpretation that a government must fulfill positive rights for its citizens. To protect the life of its citizens, a government must institute laws preventing murder and assault. To preserve liberty, a government has to respect citizens' rights to assemble and freely speak. To promote property rights, a government needs to implement laws that criminalize theft and trespass. By substituting property with the pursuit of happiness, however, the Founders opened the door for this modern idea of positive rights to flourish. The essential question to answer is whether the Founders intended to open this door that unbeknownst to them, would spark much controversy and disagreement in the twentieth and twenty-first century.

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[26] John Locke, The Two Treatises of Civil Government (Hollis ed.), 198. London: A. Millar et al., 1689.

[27] *Ibid.*

Just three weeks prior to the signing of the Declaration, George Mason led the charge in publishing Virginia's Bill of Rights. In the preface to the list of rights, Mason contends that the rights that pertain to him and his posterity are "the basis and foundation of government."[28] This argument would be reused in our country's Declaration, as Jefferson would write that "to secure these rights [life, liberty, and the pursuit of Happiness], Governments are instituted among Men." Mason begins his commonwealth's bill of rights with the Lockean conception of man's equality. Further, he argues that when man exits the state of nature and enters into society, they cannot be deprived of "the enjoyment of life and liberty with the means of acquiring and possessing property."[29] While, at first glance, this argument looks identical to the Lockean negative rights, Mason's use of "acquiring and possessing" lends credence to the argument that governments should produce and fulfill positive rights. If man cannot be deprived of his enjoyment of life and liberty, and if such enjoyment is contingent upon the ability to acquire and possess property, then logically, man cannot be deprived of the ability to acquire and possess property. Thus, in the case of impoverished citizens unable to purchase property with their own resources, is the federal government required to fulfill a positive right to public housing for them?

At the end of Article I, Section I, Mason similarly argues that man cannot be deprived of the ability to pursue and obtain happiness and safety. Had the argument been for just the pursuit of happiness, one has quite an simple route at arguing exclusively for negative rights. All the government must do to avoid depriving one's ability to pursue happiness is to avoid enacting laws hampering the people's pleasure and enjoyment of life. Yet, Mason extends his argument by claiming that man must be able to not only pursue but also obtain his own happiness. From this extension, one can legitimately argue that the government is obliged not only to promote the liberty of men but also ensure their success and happiness. If man cannot be deprived of obtaining happiness, does that not, when synthesized, simply argue that man has a right to happiness? It is here that the modern theory of rights starts to pick up steam. The commonly invoked "rights" of social welfare and unemployment benefits are prime examples of privileges that, if fulfilled by the government, would add to the happiness of its citizens. Further, if a government recognizes the international right to sustainable housing, then citizens would be greatly assisted in "acquiring and possessing property."

Yet, Mason is not done opening the door for the positive rights paradigm to develop. In Section III, he opens by holding that governments are instituted to promote the common benefit and security of the people. Specifically, he argues that we ought to form a government that is most capable "of producing the greatest degree of happiness and safety."[30] The use of "producing" is critical as the verb connotes the idea of an actor taking literal action to arrive at a given product. The use of "producing," coupled with happiness being the end goal of government, allows the Modern Theory of Rights to be something that the Founders plausibly allowed or even endorsed in their writing.

Mason was not the only Founder who at the very least, allowed for the argument that governments are obliged to promote positive rights. John Adams writes in his *Thoughts on*

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28 Virginia Bill of Rights, in *The American Republic,* 157.

29 *Ibid.*

30 *Ibid.*

Government that "the happiness of society is the end of government."[31] He finishes his paragraph addressing government's duty by contending that "the form of government which communicates . . . happiness, to the greatest number of persons, and [to] the greatest degree, is the best." This statement, like Mason's argument in the Virginia Bill of Rights, empowers the idea of positive rights. Adams not only discusses governments and their duty to promote happiness but specifically the *degree* of happiness that they promote. Under a framework of negative rights, the degree of happiness obtained by citizens has no relation to the government. All the government must do in a negative rights paradigm is protect the people's liberty; how much happiness they gain from their actions is subject to the people's individual choices. Yet, if the quality of government is judged by the degree of the people's happiness, then this would require the government to play a positive role in promoting the welfare of its citizens. No longer can it just protect negative rights. Now, if it is to be the best government, it must do whatever it takes to promote the highest degree of happiness possible. In the same pamphlet, Adams emphasizes the importance of liberal education, for it is only with an educated citizenry that our republic thrives. He writes, ""[l]aws for liberal education…are so extremely wise and useful, that…no expense for this purpose would be thought extravagant."[32] Would Adams have supported a right to free college, as is commonly requested for in the twenty-first century?

Many assume that the Founders strictly advocated for a negative theory of individual rights. I am not contending that they do not, but from the passages and thoughts just analyzed, there is room for a positive rights paradigm under the Founders' thoughts. Their decision to slightly diverge from Locke's list of life, liberty, and property, choosing instead the pursuit of happiness, is a critical in-road for the argument that the Founders allowed for positive rights when writing the Declaration.

Constitutional Structure

The Modern Theory of Rights is not just influenced by the writings of the Founders; part of the justification for the Modern Theory comes from the structure of the Constitution itself. The Founders acknowledged that the Constitution, while acting as a guardrail for our nation, must be amendable: able to be reformed when needed. Seeking to construct a republican government, the founders promoted popular sovereignty while still guarding it from becoming too influential. To accomplish this, they instituted Article V into the Constitution, which outlines the rigorous but fair procedure for constitutional amendments.

In 1791, just fifteen years after the institution of the Constitution, the Bill of Rights was ratified. These ten amendments largely addressed what the federal government could not do, such as restrict the freedom of speech and assembly, quarter troops in citizens' homes, or usurp power that is neither explicitly delegated to the national government nor the states. Even the few amendments mandating the government to take positive action for the people are anything but analogous to the modern entitlements Americans request from the federal government. Only the sixth and seventh amendments technically mandate the government to fulfill a "positive" right, which is a criminal's right to a speedy trial that consists of a jury. These are positive rights to procedural justice, which significantly differ from the positive rights being demanded today,

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31 John Adams, *Thoughts on Government* (1776), in *The American Republic*, 196.

32 Adams, *Thoughts on Government*, in *The American Republic*, 199.

mainly privileges that promote one's autonomy and equality. While there were few positive rights validated in the Bill of Rights, and no positive rights in the autonomy and equality camp, the nature of Article V makes it difficult to halt contemporary appeals for positive rights on the basis of constitutional permissibility. Moreover, Article V takes away from the seemingly once-reliable argument of originalism to dismiss modern appeals for positive rights.

Originalism is typically understood as a legal camp of interpreting the Constitution that holds that the Constitution should be read in the original meaning that the Founders intended in 1787.[33] In recent years, Originalism has been treated as a litmus test to determine whether a judge is judicially conservative or liberal. As such, Originalism has been a prominent topic that one uses to evaluate sitting judges and nominees for the Supreme Court. Conservatives who appreciate judges that adhere to the Founders' beliefs about the Constitution assail liberal judges for believing the Constitution to be a fluid, living document that adapts to the times. Inversely, liberals that appreciate judges who consider contemporary details in their judicial analysis will attack conservative judges who they believe are static and stubborn in their constitutional outlook. On its face, Originalism looks like a legitimate litmus test to evaluate judges' ideology due to its binary nature: it is either you view the Constitution through the original lens of the Founders or you do not. Yet, what if originalism and living constitutionalism share some common ground?

Jack Balkin argues that the two seemingly contradictory camps of thought actually overlap. He makes this argument by introducing his theory of Framework Originalism, which holds that the Constitution should be seen as a starting point and framework for republican governance.[34] He openly admits that this theory assumes the Constitution was not a finalized product in 1787. Instead, it was a foundation for governments that provided "an initial allocation of powers, rights, and responsibilities that would be built up through collective action."[35] Under this paradigm, it is the job of the people to fill in the substantive blanks in the Constitution that the Founders intentionally left in 1787. Balkan sees the Constitution as a skeletal framework system that can and should be adapted to contemporary issues of governance.[36] To see our founding document as a framework instead of a binding and fixed set of rules, Balkan believes that "we must consider not only original meaning and judicial precedents, but also a wide variety of other state-building constructions."[37] Because he sees these state-building constructions as compliant with Originalism, he finds it "far better to see…the administrative and welfare state and the civil rights revolution, not as pragmatic exceptions to originalism but as perfectly consistent with it."[38]

Article V strengthens Balkan's theory of Framework Originalism. If the Constitution did not include an amendment process, it would be all too easy to debunk Balkin's theory that the Constitution can continue to be added and built on by the people. There would be no textual

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33 Lawrence B. Solum, "Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate," *Northwestern University Law Review* 113, no. 6 (2019): 1250, https://doi.org/10.2139/ssrn.3324264.

34 Jack M. Balkin, *Living Originalism* (Cambridge, Mass.: The Belknap Press Of Harvard University Press, 2014), 3.

35 *Ibid*, 33.

36 *Ibid.*

37 *Ibid*, 6.

38 *Ibid.*

permissibility for treating the Constitution as a starting point if the document did not include Article V. While Balkin sees the substantive portion of the Constitution as able to be expanded, he also believes in fidelity to "the original meaning…and the rules, standards, and principles stated by the Constitution's text.[39] Without Article V, Framework Originalists like Balkin will struggle at adding substance to the Constitution, let alone enshrine positive rights into our founding document. The clear guiding framework to interpret the Constitution would become the Fixation Theory, which holds that "the meaning of the constitutional text is fixed when each provision is framed and ratified."[40] Further, the movement for positive rights would lose all ground as there is simply no provision in the Constitution providing for internet access, universal healthcare, student loan forgiveness, unemployment benefits, and other highly sought-after positive rights.

Due to Article V, however, we must account for the will of the people when examining constitutional questions. As such, it is a foregone conclusion that we can make positive rights constitutional, insofar as it can be properly ratified into the Constitution as a result of the lengthy amendment process. Likewise, it is certainly plausible that we *can* examine the Constitution under Balkin's Framework Originalism. Yet, the question of "can we?" is not the core question I am seeking to examine; it is the question of "should we?" that I seek to examine. Ultimately, would Framework Originalism and the conception of positive rights be compatible with the Founding Theory of rights?

Clarifications

At first glance, the Founding and Modern theories of rights look contradictory to each other. The Founders' reliance on natural law and their English heritage points toward the argument that the government fulfills its purpose when it protects the inherent negative rights carried by man from the state of nature. Yet, their continual focus on happiness, and the pursuit thereof, allows for the Modern Theory to be plausibly compatible with its founding counterpart. To thoroughly examine the two theories, it is essential to clarify what happiness means. Only when we properly address this all-too-familiar term in our founding documents will our examination of the two camps of thought become much clearer.

What is Happiness?

Happiness is in high demand, and it has always been a highly sought after state of mind. Even the American Founders viewed happiness in high regard; eight state constitutions, as well as constitutional amendment proposals from two other states, elaborate on the importance of happiness.[41] If one is granted a wish by a stranger or friend, chances are he will think about happiness and long to be happy. If not happiness as a concept, he will seek an instrumental good that he believes will help him ascend to happiness, whether it be wealth, fame, or company. The modern conception of happiness is this idea of man being in a state of pleasure; it can be tied

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39 *Ibid*, 3.

40 Lawrence B. Solum, "The Fixation Thesis: The Role of Historical Fact in Original Meaning," *Notre Dame Law Review* 91, no. 1 (2015), https://doi.org/10.2139/ssrn.2559701.

41 West, 33.

back to the philosophical camp of Prudential Hedonism.[42] Classical hedonism often has a sensual and negative connotation, which is why Daniel Michael Weijers seeks to clarify that hedonism is much more than the mindset that man should do what he can to satisfy his carnal desires. Weijers defines Prudential Hedonism in his doctoral dissertation as a philosophy which holds that "happiness—usually defined as a preponderance of pleasure over pain, and where both pleasure and pain are defined broadly—is all of what ultimately makes our lives go well for us.."[43]

Prudential Hedonism makes sense at face value; who does not want to have pleasure in life? Every action we take, to a certain degree, is done with the purpose of advancing our pursuit of happiness. We work to earn enough money in the hopes of purchasing goods that bring us pleasure. We gather with friends and family to obtain pleasure from their humor and company. Even acts of service, which are externally selfless, may give us an inward pleasure of satisfaction knowing that we are doing good in the world. However, is pleasure synonymous with the traditional definition of happiness that the Founders were familiar with?

This question is of paramount importance to analyze. If the answer is yes, then there is room for the Modern and Founding theories to co-exist. Since Founders such as Adams and Mason emphasized that government has a duty to maximize the happiness of its citizens, then it would be proper and perhaps necessary for the government to produce and fulfill the positive entitlements that increase man's pleasure. Yet, if pleasure is neither a necessary nor sufficient component in the traditional definition of happiness, then the conception of positive rights cannot be reconciled with the Founding interpretation of man's rights.

I argue for the latter scenario: that the modern conception of happiness significantly differs from the traditional view of happiness that the Founders knew. Like all visionaries, the Founders had predecessors whose thoughts they relied on. Their defense of life, liberty, and the pursuit of happiness can be traced back to the three types of natural goods expounded by St. Thomas Aquinas, which are the goods of the individual, the family, and the State.[44] He held that life, or self-preservation, is the good of the individual, liberty the good of the family, and happiness to be the good of the State. When speaking on the "good," Aquinas invoked a metaphysical foundation for what the concept entailed. To have a metaphysical foundation means that what is good is more than merely what is pleasurable and beneficial to us as individuals, but that the good consists of that which is transcendent, mainly moral and intellectual virtues. It is on this foundation of virtue that Aquinas formulates his theory on happiness. Whereas the modern conception of happiness is based on pleasure, the ancient conception of happiness that Aquinas and Aristotle constructed is built on virtue and its attainment.

In his *Treatise on Happiness*, Aquinas holds that, "Happiness means the attainment of the perfect good."[45] Considering the key word "attainment," the Thomistic view of happiness

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[42] Daniel Michael Weijers, "Hedonism and Happiness in Theory and Practice" (Doctoral Thesis, 2012), https://core.ac.uk/download/pdf/41337673.pdf.

[43] *Ibid.*

[44] Edward J. Furton, "Richard Hooker as Source of the Founding Principles of American Natural Law," in *The Failure of Modernism: The Cartesian Legacy and Contemporary Pluralism*, ed. Brendan Sweetman (American Maritain Association, 1999), 105.

[45] St. Thomas Aquinas, *Treatise on Happiness*, trans. John A. Oesterle (University of Notre Dame Press, 1983), 54.

revolves around action. Aquinas, when answering whether happiness is an activity, argues that, "Man's happiness, inasmuch as it is something created that exists in him, must be an activity, for happiness is man's ultimate perfection. He later refers to Aristotle's claim that "happiness is the reward of virtue."[46] His conception of happiness relies less on the idea of man feeling worldly pleasure and more on the premise of man ascending towards virtue and fulfilling his purpose of living. The Aristotelian and Thomistic conception of happiness would be coined into the Greek term *eudaimonia*, which most closely translates to the concept of "flourishing" and is held as the highest good by the philosophers. Specifically, this term relates to "rational activity in accordance with virtue."[47] The key distinction between the modern and ancient conceptions of happiness is that the Thomistic, *eudaimonia* conception of happiness is inextricably tied with virtue. Whereas the modern conception of happiness purely consists of pleasure, the ancient understanding of happiness is that we are only happy when we live a life of virtue.

Virtue is not something that can be simply given to someone; it is a process where man cultivates his character to ascend towards a morally upright life. Thus, despite repeated references of happiness, the Founders did not believe that government should "give" happiness to its people using positive entitlements. Under the Thomistic view of happiness, it is impossible for one to "give" happiness as the state of mind necessitates virtuous behavior. West writes that the Founders "thought the best way to promote public happiness was to 'secure' these rights'. . . to limit 'the design and end of government.'"[48] For the Founders, government was designed to be a protector of rights, not a producer of them. Yet, they did not just agree with Aquinas and Aristotle on what happiness entails but also what virtue encompasses.

The Founders and Virtue

Prior to the United States Constitution, the constitutions of the individual states were replete with references to moral virtue and the importance of government promoting it. Thomas West examines what Vermont, New Hampshire, Massachusetts, Pennsylvania, and Virginia held about virtue. He chooses these five states to examine as they were the most populated states prior to the 1787 Constitution, and these states represented the North, Middle, and Southern regions of the thirteen colonies.[49] Among the five states, the virtues of justice, moderation, temperance, frugality, and industry were repeatedly mentioned as core components for government's success.[50] These constitutions all note that "no free government, or the blessings of liberty, can be preserved" without these virtues at the forefront.[51] The five characteristics were often referred to as the "social virtues." While this list sounds similar to the cardinal virtues, there is an important addition to consider: industry. West defines this virtue as "the habit of appropriately hard work," going on to say that "people must be willing to work for a living and not expect to be supported by the labor of others." Not only does West argue that industry is a key social

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46 *Ibid*, 55.

47 Gary Cox, "What is Happiness?," *Philosophy Now*, iss. 47 (December 2021/January 2022), in Supantha Bhattacharyya, "Eudaimonia to Hakuna Matata - the Evolution of Happiness Studies," *Cenacle* 1, no. 12 (2022), https://cenacle.in/wp-content/uploads/2022/03/CENACLE_Vol1No12_Jan-Dec-2022.pdf#page=25.

48 West, 34. He cites Paine's *Common Sense* regarding the excerpt of "the design and end of government."

49 *Ibid*, 272.

50 *Ibid.*

51 Quoted passage was from the Virginia Declaration of Rights. The excerpt is found in West, 272.

virtue, he finds it to be a necessary republican virtue. Without a strong work ethic embedded in the psyche of a nation, "no consent-based government can subsist."[52]

When the time came to publish the 1776 Declaration and 1787 Constitution, the individual states had an established consensus on the importance of virtue for the republic. Thus, the Founders did not see much need to articulate on virtue in the national documents as the topic had been exhausted at the state-level constitutions. The importance of virtue was an unspoken first principle that undergirded the Declaration and Constitution; governments exist to protect the people's life, liberty, and pursuit of happiness, so that they may be aided in their ascent towards virtue.

The Purpose of Rights

Edward Furton writes that while the current understanding of liberty is a freedom from association, the traditional view of liberty, held by Locke and the Founders, was that its purpose is to help the holder attain moral and intellectual virtues.[53] Furton grounds his article on the premise that the Lockean natural rights of life, liberty, and property have an inherently teleological nature, meaning that these rights serve a specific purpose or end. He consults the Aristotelian conception of "right," that it is "a good or end of human action whose attainment fulfills some intrinsic part of human nature."[54] More importantly, Furton distinguishes this conception of rights from the modern conception, that a right is "a claim of justice which a member of a community has *against* other members of the community."[55]

Furton argues that the key figure connecting Locke and the Founders with Aquinas and Aristotle was the renowned English theologian Richard Hooker. The sixteenth century Anglican theologian is best known for his *Lawes of Ecclesiastical Polity*, which summarized several key points of Aquinas's *Summa Theologiae*, chief of which was Aquinas's view of natural rights.[56] Through Hooker's work in bringing Thomistic thought to the forefront of Locke's political inquiries, Ellis Sandoz argues that the Founders were able to operate on the same theoretical foundation of natural rights as Aquinas: that there is a teleological purpose to the rights mankind holds.[57]

Conclusion

To conclude our inquiry on the compatibility of the Founding and Modern Theories of rights, it was necessary to examine what the Founders and their inspirations believed about the definitions of happiness and the purpose of rights. The works of Aristotle, Aquinas, Hooker, and Locke, to name several, inspired the Founders to affirm that unalienable rights exist for the purpose of assisting its holder in living a virtuous life. Only when man lives virtuously will he find happiness as was defined in the Greek *eudaimonia* sense. Additionally, the intellectual

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52 West, 274.

53 Furton, 105.

54 *Ibid*, 104.

55 *Ibid*, 103. Furton cites this definition of "right" from Fred D. Miller Jr.'s work on Aristotle politics. The full citation is *Fred D. Miller, Nature, Justice, and Rights in Aristotle's Politics (Oxford: Clarendon Press ; New York, 1997)* (italics added).

56 *Ibid*, 105.

57 Ellis Sandoz, *Republicanism, Religion, and the Soul of America* (University of Missouri Press, 2013), 11.

inspirations for the Founders led them to affirm that the happiness articulated in the Declaration, as well as John Adams and George Mason's works cited earlier, must be seen through the primary lens of virtue, not pleasure.

With that established, the modern conception that the federal government must produce positive rights and entitlements for the people cannot be reconciled with the founding vision for individual rights. Entitlements naturally erode the work ethic of a people, and by extension, the republican virtue of industry. There may have been some textual support in our founding documents for the Modern Theory of rights with various Founders emphasizing happiness. Yet, when we consider the teleological nature of rights and the traditional conception of happiness understood by the Founders, the idea of positive rights, primarily consisting of entitlements today, cannot fit in the founding paradigm of rights

Of course, it is not my contention that the federal government must be prohibited from producing entitlements. If the federal government seeks to enshrine into the Constitution a right to a certain Paid Time Off (PTO) policy for all private sector employees, or a right to internet access, there is nothing stopping them from using Article V's amendment process. I argue simply that the federal government is not obliged to abide by the positive rights paradigm that has permeated American political discourse as the framework is incompatible with how the Founders understood rights and government's duty.

To answer the question in this paper's title, there is definitely a divergence from the trajectory established by the Founders on how we ought to understand individual rights. Moreover, that is not the only point of divergence. We have split from our predecessors in how we define happiness, rights, and the purpose and duty of government. Whether we continue on this path of divergence or turn back to the traditional conceptions of these metaphysical issues remains an all-important question that will be unpacked with each succeeding American political era.

Bibliography

Antieau, Chester James. “Natural Rights and the Founding Fathers-the Virginians.” *Washington and Lee Law Review* 17, no. 1 (1960). https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3506&context=wlulr.

Aquinas, St. Thomas. *Treatise on Happiness*. Translated by John A. Oesterle. University of Notre Dame Press, 1983.

Balkin, Jack M. *Living Originalism*. Cambridge, Mass.: The Belknap Press Of Harvard University Press, 2014.

Bhattacharyya, Supantha. “Eudaimonia to Hakuna Matata - the Evolution of Happiness Studies.” *Cenacle* 1, no. 12 (2022). https://cenacle.in/wp-content/uploads/2022/03/CENACLE_Vol1No12_Jan-Dec-2022.pdf#page=25.

Downer, Silas. “A Discourse at the Dedication of the Tree of Liberty.” 1768.

Frohnen, Bruce, ed. *The American Republic: Primary Sources*. Liberty Fund, 2002.

Furton, Edward J. “Richard Hooker as Source of the Founding Principles of American Natural Law.” In *The Failure of Modernism: The Cartesian Legacy and Contemporary Pluralism*, edited by Brendan Sweetman. American Maritain Association, 1999.

Hershkoff, Helen. “Positive Rights and State Constitutions: The Limits of Federal Rationality Review.” *Harvard Law Review* 112, no. 6 (April 1999). https://doi.org/10.2307/1342383.

Jefferson, Thomas. “Declaration of Independence: A Transcription.” National Archives. The U.S. National Archives and Records Administration, July 4, 1776. https://www.archives.gov/founding-docs/declaration-transcript.

Kamruzzaman, Md., and Shashi Kanto Das. “The Evaluation of Human Rights: An Overview in Historical Perspective.” *American Journal of Service Science and Management* 3, no. 2 (2016): 8. https://www.academia.edu/download/48552596/7100190.pdf.

Miller, Fred D. *Nature, Justice, and Rights in Aristotle’s Politics*. Oxford: Clarendon Press ; New York, 1997.

Morton, Bruce. “John Locke, Robert Bork, Natural Rights and the Interpretation of the Constitution.” *Seton Hall Law Review* 22, no. 3 (1992): 1. https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2992&context=shlr.

Paine, Thomas. *Common Sense.* 1776.

Sandoz, Ellis. *Republicanism, Religion, and the Soul of America*. University of Missouri Press, 2013.

Solum, Lawrence B. "Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate." *Northwestern University Law Review* 113, no. 6 (2019): 1250. https://doi.org/10.2139/ssrn.3324264.

———. "The Fixation Thesis: The Role of Historical Fact in Original Meaning." *Notre Dame Law Review* 91, no. 1 (2015). https://doi.org/10.2139/ssrn.2559701.

Velasquez, Manuel, Claire Andre, Thomas Shanks, S.J., and Michael J. Meyer. "Rights." Markkula Center for Applied Ethics at Santa Clara University, 2018. https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/rights/.

Weijers, Daniel Michael. "Hedonism and Happiness in Theory and Practice." Doctoral Thesis, 2012. https://core.ac.uk/download/pdf/41337673.pdf.

West, Thomas G. *The Political Theory of the American Founding : Natural Rights, Public Policy, and the Moral Conditions of Freedom*. Cambridge, United Kingdom: Cambridge University Press, 2017.