

**The US Constitution and debates on the expansion of federal power, 1932-2013**

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## Chapter 1 - Introduction

*“Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?”*

- James Madison, *Federalist 14* (2003: 63)

The prizes for any politician who successfully stakes a claim to the character of a country and to its enduring attributes, and places themselves as the inheritors of that mantle, can be significant indeed. A politician who projects his or her own version of what a country is and has been, and so by extension, should be, can use this as an important tool to appeal to voters. This feature of politics is certainly not unique to any one country; after all, the presence of some kind of national symbols, history and ideas about what and who constitutes a country are important to the very idea of the nation-state. These sorts of symbols and images form part of a national identity, but they may also seep into political rhetoric, with politicians marking out battle lines over shared national history and seeking to apply these histories and ideas to contemporary political issues. But while debate over such symbols and documents feature prominently in the politics of many states, the contemporary politics of the United States is remarkably infused with such discourse and it is *de rigueur* for politicians to deploy the past for their own ends.

The intensity of this relationship with the history of the founding period and the Constitution and Declaration of Independence is made plain by a comparison with Britain’s weak relationship with some of the foundational documents of constitutional monarchy - Magna Carta or the 1689 Bill of Rights, for instance - and by a comparison of Americans’ enduring regard for figures such as Jefferson and Madison and France’s distant relationship with its great revolutionary pamphleteer Sieyès. This remarkable level of reverence shown towards the Constitution, elevating it and the history of the founding period to the status of national mythology, is a phenomenon which many have identified. As Brooks has noted (2013: 85):

“It has often been said that the Constitution, which we may think of as including the principles expressed in the Declaration of Independence and also the Federalist Papers, is a civic Ark of the Covenant in America ... In no other western democracy is the constitution ... as venerated”.

Examining the politics of the United States in the twentieth and early twenty-first centuries, we can see that invocations of the Constitution and the memory of the ‘founding fathers’ are not simply a matter of legal custom or of patriotic tributes. The references to national history made by politicians and political movements often concern foundational questions about the organisation of the American state which have consequences for specific policy debates. In particular, these documents are often used to promote a certain viewpoint on how various political and civic relationships should operate: the relationship between the federal government and its states and citizens, between citizens and other citizens and between other entities, in particular businesses, and national government. In short, it is often a debate about the role of the federal government in American life.

This debate is not new, nor is the tension between the powers of the federal, national government and the powers of state governments. In common with other states operating federal political systems there has been a longstanding friction in America, which we can see evidenced even prior to 1787 under the Articles of Confederation regime. This same federal-state tension can be seen clearly in many periods since, including in the era of Roosevelt’s New Deal, Johnson’s Great Society and the backlash against them with Reagan’s ‘New Federalism’ and the Gingrich Congresses. In recent years the role of the spirit and values of the Constitution in political debate has been thrown into sharp relief again by the rise of the ‘patriot’ militia movement and the invocation of the authority of the Constitution and the men who created it by the Tea Party movement in their campaign against Obama administration initiatives such as the Patient Protection and Affordable Care Act (‘Obamacare’).

This dissertation aims to answer the question: how has the American founding shaped American policy debates since the New Deal, and what are the implications of this? For reasons of space, the focus here will be on federal economic and regulatory power, as opposed to, for instance, security and surveillance powers. The discussion will concentrate on four periods each spaced around 20 years apart - the New Deal, Great Society, Reagan's New Federalism and the Tea Party and Obama - as each shows us a flashpoint in American politics where the tensions created by debates over the Constitution flare up.

Through examining the debates over the legacy of the Constitution and America's founding in these periods, what we can see is that all parties have been guilty of misrepresenting history to suit contemporary agendas and policy debates. This dissertation highlights that while American politics is not exceptional in having a prominent role for national mythology in policy debates, the degree to which images of the 'founding fathers' figure in debates about the role of the federal government in American life is unusual and quite remarkable. In doing this the dissertation builds upon other work concerning the role of history in contemporary American politics, by those such as Jill Lepore (2011a) and Darren Mulloy (2004). It also aims to evaluate the competing claims that politicians have made in the federalism debate as to their alleged faith to the Constitution and the founders, and the supposed lack of faith shown by their opponents.

But, ultimately, this dissertation questions whether it is even desirable to stake a claim to be the true interpreter of the wishes of a small group of men who designed a system of government three centuries ago. Returning to Madison's claim that the glory of eighteenth century Americans was that they refused to approach received wisdom with blind veneration, can the same be said of America today? If not, what are the consequences?

## Chapter 2 - The American political tradition

As Wolin (1989: 3) writes, the US Constitution “is probably the richest source of American values, myths, ideologies, and theories” which inform debate over what constitutes the American political tradition. Commenting on the 1989 bicentennial of the ratification of the Constitution, he wrote that such events are “rituals organised to promote a mythic history. They appear to be celebrating the past, but their most important function is to fix the collective identity in the present ... in order to legitimate a particular present”. The Constitution is used as one medium through which competition for legitimacy is waged over the question of federal power (Foley, 2007:7). This is of course an issue which is as old as the United States itself, and even predates 1787.

The question of how far federal, national power should extend was one of the principal issues which moved twelve of the thirteen colonies to appoint delegates to a convention in Philadelphia in May 1787 to debate revisions to the Articles of Confederation. Adopted in 1781, the Articles had created a unicameral national legislature for what it termed a “United States of America”, but without the power to levy taxes, enforce its laws and treaties in the states, regulate disputes and commercial activity between states or the means to raise and fund an army (Zimmerman, 1992:17). The inadequacies of the Confederate Congress, combined with a fear of violent rebellion in the states, the power of state legislatures and concerns about the ability of the new nation to defend itself and engage in trade, convinced a variety of figures, not least the authors of *The Federalist*, that an overhaul was needed. The convention oversaw the discarding of the “perpetual union” created under the Articles, and in its place a new constitution with a significantly altered relationship between the state and the federal; indeed, it created a national *government*, rather than simply a legislature, for the first time.

But this relationship was far from settled. In the process of ratifying the document a bitter contest ensued between those who favoured stronger central government and those who saw such a creation as tantamount to a return to rule by Britain. The question was never resolved completely, and instead various compromises were attempted. As Chubb writes (1992:285):

“At the Constitutional Convention in 1787 the framers struggled mightily with an issue that was to occupy American politics for two centuries: the proper balance between national and state power. The compromise written into the Constitution only temporarily resolved the issue of balance”.

In some ways then, the convention of 1787 bequeathed this issue of the proper role of the federal government to future generations as an enduring tension in American politics, much as it left the issue of slavery unresolved. This has done little to stop those who seek to promote the idea of ‘limited’ or ‘small’ government constituting ‘the American way’ from arguing that they have inherited this political tradition from the Constitution. But, equally, neither has it prevented those seeking an expanded role for federal power from arguing that there are other aspects of the American political tradition which would support their view.

Much is often made of the words of James Madison (2003:227) that “The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Government are numerous and indefinite”. Indeed, a number of similar phrases, emphasising the limited character of the national government proposed under the new Constitution, can be found throughout *The Federalist*. But, it is slightly problematic to quote ‘the father of the Constitution’ in this way without paying attention to the context of his words. These were protestations against those critics who alleged that the new constitution was a counter-revolutionary document, its object being to recreate the tyranny of Parliament and King now in a Congress and a President. Indeed, if we look more carefully through *The Federalist* we can find from Madison a defence of the ‘elastic clause’, where he argues (2003:220) that to have “prohibited the exercise of any power not *expressly* delegated” to it (as under the Articles) would have served to “disarm” the federal government

of any real authority. Even still, there can be little doubt that most founders, and delegates at ratifying conventions, did imagine a far more equal balance between state power and federal power than there has been over the last two hundred years. Indeed, just such an express “disarming” of federal power came from Madison’s own hand with the 10th amendment to the Constitution in 1791, attesting to his growing scepticism towards federal power in his later years.

Madison’s initial opposition to such a restriction illuminates another issue in attempting to apply the thought of the founders to contemporary policy debates: there were major fault lines and disagreements among the Constitution’s drafters and the new charter faced significant opposition to its ratification. When one invokes the ‘founding fathers’, which one is homage being paid to? As Bookman (2008:29) writes: “[D]oes one call upon all fifty-five Framers who attended the Convention however briefly? Just the thirty-nine who signed? ... the delegates to the state ratifying conventions? The electorate that chose the delegates to the state ratifying conventions?”. There were significant divisions between, and indeed within in the case of New York (Hamilton’s fellow deputies abandoning the process early on), a number of the state delegations. When it came to ratification, especially in New York (where the Constitution passed with just three votes to spare), Virginia and Massachusetts, there was further disagreement. Indeed Ellis (1987:297) has argued that “it is undeniable that the Constitution was not very popular when it was first adopted”. Even between those in the federalist camp, serious divisions had to be breached through compromise.

Indeed, Hamilton was known to have been bitterly disappointed by what he saw as the lack of power given to the new national government to shape the United States into a commercial power. One of the first examples of this unresolved state-federal tension coming into focus was when, acting as Treasury Secretary under Washington in 1790, Hamilton pushed for the federal assumption of state debt, meeting opposition from states such as Virginia which had already paid their dues. Hamilton reasoned that the Constitution gave the executive authority

to pursue fiscal policies to further the wellbeing of the United States, against those who thought that his interpretation was a step too far, arguing it would over-centralise financial power. While a compromise (or rather, a *quid pro quo*) was reached allowing Hamilton to have his way, Jefferson (cited 1900:61) was later to comment that the measure “was unjust, in itself oppressive to the states, and was acquiesced in merely from a fear of disunion, while our government was still in its most infant state”.

The clash between federal and state authority in the first decades of the American republic came to a head in the Civil War. In its ‘declaration of causes’ justifying its secession from the Union, the Mississippi State Convention (1861:87) argued that the federal government, in its efforts to curtail the spread of slavery, had “utterly broken the compact which our fathers pledged their faith to maintain” in the Constitution which had guaranteed “the right of property in slaves”. But in his 1860 Cooper Union Address, Lincoln rejected the idea of a Constitutional right to hold and transport slaves in federal territories. “That instrument is literally silent about any such right”, he said (Lincoln, 1989:126).

Yet strikingly in his efforts to find historical justification for his arguments, Lincoln increasingly turned to the Declaration of Independence, prioritising this above the Constitution as the source of America’s real political values and traditions. Most famously of all, in his Gettysburg Address Lincoln emphasised that America’s supreme political value was in fact “the proposition that all men are created equal” (cited Sweet, 2012:83), making the Declaration rather than the Constitution the principle which was at stake in the Civil War. Despite the Union’s military victory in the Civil War, this could not resolve the federal-state relationship once and for all in favour of federal power, as evidenced by the numerous failures of Reconstruction, and the subsequent institutionalisation of racial segregation under so-called ‘Jim Crow laws’ passed by southern legislatures.

### **Chapter 3 - The New Deal era: “A reappraisal of values”**

In his first inaugural address, Franklin Roosevelt's plan for the expanding role of federal power was left vague. But what was clear was that in the context of the catastrophic consequences of the Great Depression he saw the need for a reevaluation of the role of the federal executive in American life. More than this, Roosevelt promoted a new spirit of solidarity among the American people. At the same time as paying tribute to the Constitution and its authors, Roosevelt (1999:170-171) sought to emphasise that it was an evolving document which is open to “changes in emphasis and arrangement” as the times dictate. With his declaration that unprecedented dangers and changes can provide a basis for “temporary departure from that normal balance of public procedure” between the executive and legislature, he appeared to be demonstrating a rejection of a rigid doctrine of original intent.

But it is Roosevelt's 1932 Commonwealth Club Address which shows us more clearly his views on the changing role of the federal government in light of America's political tradition. Instead of starting with a tribute to America's founding, Roosevelt began his speech by tracing the development of the nation-state in Europe. The very first founders of governments “did strive steadily toward something that society needed and very much wanted, a strong central state” (Roosevelt, 1932), power which was then fought back and tempered with limits on arbitrary state power. But after this battle had been won, a new antagonism had emerged in society, the product of the industrial revolution and the rise of finance: “Just as in older times the central government was first a haven of refuge, and then a threat, so now in a closer economic system the central and ambitious financial unit is no longer a servant of national desire, but a danger”, Roosevelt told his audience. The time had come for “a reappraisal of values”. While this was no reason to abandon the corporation, it was reason for national government to step in to “apply restraint” where an “unethical competitor” threatens the public welfare and to encourage the development of “an economic declaration

of rights". At the same time as reasserting his continued belief in American "faith in our tradition of personal responsibility", Roosevelt argued (1932) that for the crisis to be overcome "we must all shoulder our common load".

Roosevelt was to return to this account of how the eighteenth century struggle for protection from central government had been replaced by one against the errant practices of corporations. Political tyranny had turned into economic tyranny, this time at the hand of "economic royalists" who had carved "new dynasties" under which "men could no longer follow the pursuit of happiness", he would later say (Roosevelt, 1936). In this way, Roosevelt sought to present his critique of the tensions present under the contemporary state of economic relations in similar terms to the antagonisms at play in the American Revolution.

This rhetoric earned Roosevelt critics on all sides. Both at the time of his presidency and in subsequent evaluations, there were those on the Left who rejected Roosevelt's plans for national renewal under the New Deal as a sop to capitalism and "chided him for offering a "profoundly conservative" response to a situation that had the potential for revolutionary change" (Leuchtenburg, 1995a:3). As Farber (2010:18) writes, "Roosevelt was, in his own heart and in the eyes of his followers, hardly a radical. He saw no need to change, let alone overthrow, Americans' constitutional principles or the capitalist system". But even in pursuing his more tentative critique of laissez-faire capitalism and the 'night-watchman state', Roosevelt's plan still elicited strident criticism from those who alleged that the New Deal was a repudiation of the American political tradition.

As he came to power in 1933 and began implementing his response to the Great Depression in Congress, landmark laws such as the Federal Securities and Social Security Acts, and the creation of the Civilian Conservation Corps and National Recovery Administration, were met with derision from Roosevelt's opponents. Representing a number of conservatives hostile to the New Deal, Robert Taft made it clear that his opposition was motivated by his belief that

the New Deal programmes, instead of simply being unsound policy, were attacks on the American political tradition and Constitution. Farber (2010:16) notes that Taft's view of the Constitution's aims, much the same as Beard's (1913), was that the Constitution was designed as a means to protect the interests of property against the 'levelling spirit' of the masses. "More and more the [Roosevelt] Administration has become enamoured of a policy of planned economy", Taft charged. "For that purpose they were prepared to cast aside every constitutional principle which the Anglo-Saxon race had established in centuries of struggle. They have scant regard for individual rights to life, liberty, and property established by the Constitution" (cited Farber, 2010:16).

Further examples of allegations over the New Deal's 'anti-American' character are plentiful: according to the Republican Party platform of 1936, America was "in peril" after three years in which the "New Deal Administration has dishonoured American traditions" (cited Sutton, 2002:203). The American Liberty League, launched in 1934 by a group of conservative Democrats, counted more than 125,000 Americans among its members and deployed \$1,200,000 in its six-year battle against the New Deal (Farber, 2010:22). Figures such as Al Smith and business leaders such as Alfred P. Sloan (then head of General Motors), mulled the creation of an 'Association Asserting the Rights of Property' to oppose what they saw as Roosevelt's efforts to undermine a cornerstone of life in the United States (Farber, 2010:22).

The Supreme Court's decision to begin striking down a number of integral pieces of New Deal legislation with *Schechter v. United States* (1935) triggered a heightening of the rhetoric in the debate over Roosevelt and his alleged lack of Constitutional faith. With the launch of a number of anti-New Deal legal groups, such as the 'National Committee to Uphold Constitutional Government', a series of challenges were brought to the Court over the constitutionality of a range of Roosevelt's measures. In his exasperation at the undermining of key planks of his programme, in February 1937 Roosevelt quite shamelessly pursued a

plan to pack the court with New Deal sympathisers through a reform which would have allowed a President to appoint extra judges to sit whenever a justice reached 70.

The accusations came thick and fast. Leuchtenburg (1995b:159) describes how one man, claiming to have started the first 'Roosevelt for President Club', now said he thought "that the President has not only destroyed the Democratic Party but has betrayed his oath to uphold the Constitution". In their report on Roosevelt's Judicial Procedures Reform Bill, the Senate Judiciary Committee rejected the bill as a "direct violation of the spirit of the American Constitution" (reproduced Sutton, 2001:211). "No amount of sophistry can cover up this fact", it declared, rejecting Roosevelt's argument that his reforms were in line with the founders' intentions. The founders had not, Roosevelt said, intended life tenure "to create a static judiciary" (Sutton, 2001:209). Roosevelt's supporters returned fire, charging that the Constitution was "not an idol to be worshipped" through "evoking nostalgia for a mythical past" (cited Leuchtenburg, 1969:81 & 87). Roosevelt's bill quickly became engulfed in rhetorical fire and failed to pass through Congress. And yet, according to Leuchtenburg, 1937 is still widely perceived as a constitutional revolution. The bitter fight resulted in the resignation of a string of older, mostly conservative justices, allowing Roosevelt to appoint eight justices in total before leaving office, and caused Justice Roberts to switch his position on the constitutionality of the New Deal. The damage done to Roosevelt's image by the battle, in Leuchtenburg's words (1995b:161), "should not obscure the President's one huge success in the court fight - the legitimation of a vast expansion of the power of government in American life".

Despite the painful skirmishes which Roosevelt faced in proclaiming his new philosophy of federal power, more so than most presidents his twelve years in office left a lasting imprint upon the American political tradition. As shall be seen in subsequent chapters, its legacy continued to attract both admirers and detractors. Rather than abandon the idea of such a "reappraisal of values" in American government, Roosevelt's successor was to go on to

launch his (ultimately doomed) 'Fair Deal' and the 'New Deal' was also to inspire Lyndon Johnson in his 'Great Society', as well as prepare the ground for further centralisation of federal power in the White House under Nixon.

Brooks (2013:88) writes that while "it would be too much to say that the spirit of Locke and limited government was extinguished at this point in American history", this spirit was "overshadowed by a rival ethos that partook of the spirit of positive government that was ascendant throughout the western democratic world at that moment". This presents Roosevelt's views on the proper role of government as a major departure from preceding traditions, but perhaps they do not have to be seen in this light. Rohr has argued (1989:93) that the battles of the New Deal era were "in some sense a reenactment of the founding of the Republic", rather than a rejection: "The Brownlow Committee<sup>1</sup> joins Publius in defending powerful government as instrument for higher ends". Just such an argument had been employed by Roosevelt's proponents at the time of the New Deal. Writing less than a year after the start of the administration, the journalist and friend of the Roosevelts' Ernest Lindley (1934:10) sought to defend what he termed the "Roosevelt Revolution" on the grounds that it was actually "thoroughly saturated with cherished American ideals. Its objectives were security, happiness, self-respect, a decent standard of living for the ordinary man, the idea of generally distributed well-being expressed in the Declaration of Independence". What was different, however, was that when it came to paying tribute to the 'founding fathers' Roosevelt "has not quoted them as the authors of doctrine to be observed reverently for all time to come. He has the habit, rather, of extolling them for the boldness and intelligence in handling the practical situations with which they were confronted" (1934: 10), in much the same way Roosevelt saw himself faced with the spectre of the Great Depression.

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<sup>1</sup> Roosevelt's committee on expanding the executive branch

In this way Roosevelt began a new tradition in constitutional rhetoric which saw the Constitution as a flexible document, one which could bend with the times (in particular, times of crisis). While the idea of the 'living Constitution' may not have originated with Roosevelt, his 'New Deal approach' to it did a great deal to promote the rise of such non-originalist interpretations to the mainstream.

## Chapter 4 - Civil rights, the Great Society and Lyndon Johnson's federalism

It is often said that Lyndon Johnson, having been a New Dealer in his youth as the head of the Texas National Youth Administration, saw himself as "fulfilling FDR's mission" (cited Dallek, 2005:157). Perhaps appropriately then, many of the same federal-state tensions and debates over the meaning of America's political tradition which Roosevelt engaged with came to the fore once again during the Johnson administration.

On no issue was this clearer than the federal action taken during Johnson's period in office to promote civil rights, outlaw segregation and expand voting rights to previously disenfranchised African Americans. While previous presidents had also shown a willingness to use federal power to enforce segregation - such as Truman's executive order integrating the armed forces and Eisenhower's use of federal troops for the integration of Little Rock High School - in many ways the climax of the Civil Rights Movement's political influence in Washington came in the 1960s, setting the stage for confrontations over the federal government's role in promoting civil rights.

In addition to questions of morality and justice, this debate over civil rights legislation was often informed by battles over the proper role of federal government in enforcing the provisions of the Constitution at state level, and the struggle over Johnson's 1964 Civil Rights Act typifies this. In his 1964 *My Hope For America*, an election manifesto of sorts, Johnson wrote (1964:30-31) that prejudice "cannot continue. Our Constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it ...", appearing to skirt over the fact that slavery was very conspicuously left unresolved by the Constitution. In his 'we shall overcome' speech Johnson (1965) compared the struggle of civil rights protestors in Selma, Alabama to 'patriots' in the battles of Lexington and Concord, and in his address on the signing of the Civil Rights Act (1964) he quoted extensively from the preamble to the Declaration of Independence. Similarly, in Martin Luther King's speech at the 1963 March on

Washington for Jobs and Freedom, he opened not with his famous “I have a dream” refrain but with a direct reference to America’s founding documents, rhetorically situating the Civil Rights Movement in a long crusade towards the fulfilment of the country’s founding principles (cited Mulloy, 2004:79):

“When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes black men as well as white men, would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness.”

But at the same time, the debate over the 1964 Civil Rights Bill in the House of Representatives saw Southern Democrats invoke the country’s political heritage in opposition to the legislation, many linking the law to what they saw as an unconstitutional encroachment on state matters by federal government. Armistead Selden of Alabama argued that the bill “contained the seeds of an American totalitarianism” (cited Andrew, 1988:25), while Republican John Tower charged that the law represented “an unwarranted extension of federal power” (27), violating the constitutional “prerogatives of all Americans to live their own private lives and to conduct their own private businesses in accordance with their own individual wishes and desires”. The fight over the bill in the Senate was even more drawn out. Famed anti-civil rights advocate Strom Thurmond cried that the bill was “the most unconstitutional legislation that has ever been considered by the Congress. This legislation will make a Czar of the President...” (cited Andrew, 1988:28). As we saw with Roosevelt’s Supreme Court battles, the invocation of the founding documents in the debate over civil rights legislation had the effect of situating the discussions not only in the merits of the law itself, but in a battle over the very nature of American identity and tradition. Typical of a number of the bill’s opponents, Republican Jacob Javits (cited Andrew, 1988:27) insisted that the congressional fight represented a “struggle for the soul of the nation”. Overcoming the longest filibuster the Senate had ever seen, the bill was eventually passed with a handsome majority, 73 to 27 votes (Caro, 2012: 568).

Johnson's civil rights legislation formed one part of his broader agenda for social transformation, in the 'Great Society', the highlights of which were the creation of Medicare and Medicaid, the initiation of federal aid to education, the 'War on Poverty's' Office of Economic Opportunity and Job Corps. This vast, ambitious project to expand federal power and intervention in American life was underpinned by the same attitude to government, and to America's political tradition, that Johnson invoked in his justifications of civil rights legislation. As Dallek writes (2005:235), Johnson was sure of the conviction, born of his involvement with Roosevelt's New Deal, that "consolidation of control in the executive assured greater economy and efficiency" and this was a guiding principle for much of the Great Society.

Against the view that the American Constitution mandated laissez-faire, limited government, Johnson's belief was that America's founding documents instead compelled government action in order to fulfil their promises. Johnson advisor and speechwriter Richard Goodwin (cited Campbell, 1981:4) said the Great Society "sought to ensure our people the environment, the capacities and the social structures which will give them a meaningful chance to pursue their individual happiness", in a reference to the Declaration of Independence's assertion that the "the pursuit of happiness" is one of the rights which legitimate "governments are instituted" to ensure. But while Johnson and his advisers may have sought to attempt this historical justification of the Great Society in public, it should probably come as no surprise that at other times Johnson saw this invocation of America's founding documents as simply a means to an end. Robert Johnson notes (2009:208) that when preparing his first speech of the 1964 presidential campaign President Johnson wished to dispense with such invocations quickly, instructing aides to begin the speech with "that Declaration of Independence, Bill of Rights, Constitution thing, wrapped up in one paragraph".

Much of Johnson's project for federal action was met with fierce opposition from his opponent in the 1964 election, Barry Goldwater, on the grounds that it went against the American tradition. In his *Conscience of a Conservative*, Goldwater (2013 [original 1960]:15) railed against the extension of federal power into areas such as school integration and lamented the Democratic party's wholesale "abandonment of States' Rights" since the party's capture by "Socialist ideologues". In stark contrast to Johnson's activist philosophy of government, Goldwater wrote that the founders knew that "government has proved to be the chief instrument for thwarting man's liberty" (9-10) and interestingly, against the refrain popular in the rhetoric of American leaders that the framers had unleashed a 'great experiment in democracy', Goldwater does not flinch from declaring that the Constitution was "hardly" (11) democratic, arguing indeed that this was one of its qualities.

When voters had their democratic way in November 1964 they rejected Goldwater, returning Johnson to power with a still unparalleled share of the vote. But the election, as many observers have commented, represented a moment of transition in American politics. Johnson's presidency marked the high-point in the expansion of federal economic and regulatory power in the twentieth century; as his closest advisor Joseph Califano has said (cited Nagourney, 2014), Johnson "was the ultimate liberal president — he believed government was there to help" and in the decades after the 1960s, "the Republicans so beat us up on that score, and no one was there to answer." Despite Goldwater's gargantuan defeat, the in-roads made by Republicans in the Deep South were a sign of future political shifts which were to alter the electoral map. In similar fashion, Goldwater's attempts to reassert the importance of the Constitution and America's founding principles in political debate were to prepare the ground for the 'Reagan Revolution', the growth in right-wing militia movements and ultimately the Tea Party.

## Chapter 5 - Reagan's 'New Federalism' revolution

In Jimmy Carter's first presidential nomination acceptance, delivered eleven years after Lyndon Johnson left office, his words still conveyed a sense of optimism about the power of federal government to deliver social justice, seeking to ground his ambitions for politics in the wishes of the founders (cited Filler, 1990:246): "I see a future of justice—the justice of good jobs, decent health care, quality education, a full opportunity for all people regardless of color ... I want us to be what the Founders of our Nation meant us to become". By contrast, in Ronald Reagan's first inaugural address, replete with a multitude of references to the lives of individual founding fathers, he called for a return to America's historic scepticism of federal power, heralding a new period of decentralisation (Reagan, 1990:213): "In this present crisis, government is not the solution to our problem; government is the problem ... All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government."

Reagan railed against the growth of federal grants-in-aid, Keynesian counter-cyclical spending and what he later termed "50 years of taking power away from the hands of the people in their States and local communities" (1982), proposing a 'New Federalism' in American politics to reduce federal power and return the country to the kind of state-federal balance imagined by the founders. In this way, Reagan presented his conservative plan for a reduced government role in welfare, regulation of business and taxation in terms of a fulfilment of America's founding creed and as the realisation of American exceptionalism. Writing after his death, the former president's son, Michael Reagan, alleged (2011:185) that "the welfare state would have appalled the Founding Fathers and the framers of the Constitution. It certainly appalled Ronald Reagan". As Lees writes (1988:183), "behind the Reagan proposals lay a perception of the federal system rather different from the one which dominated thinking and political action since the 1930s" and Reagan made it his mission to remind Americans that scepticism towards government was part of the America political tradition.

Despite the enterprising zeal Reagan displayed for cutting back federal power, his efforts to reform welfare, abolish the Environmental Protection Agency and the Department of Education were thwarted by Democrats and moderate Republicans in Congress (Dallek, 1999: viii). This did not mean the death of Reagan's call to return to 'hands-off' government. Reagan's demands for a return to what he saw as the American way reverberated through American politics, with the consequence that, in Brooks' words (2013:89), the "political conversation was changing such that the New Deal philosophy that had dominated American politics for two generations was increasingly on the defensive". His nomination of four conservative, originalist Supreme Court justices assured such a legacy for Reagan's philosophy; with the nominations of O'Connor, Kennedy and in particular Scalia and Rehnquist "originalism never looked back", in Lepore's words (2011b), with the doctrine having had a foothold in the Court, albeit of varying strength, ever since. Joined by George H. W. Bush's conservative appointee Clarence Thomas, Reagan's justices succeeded in striking down a law on the grounds that it exceeded Congress's powers under the commerce clause in *United States v. Lopez* (1995), the first time the Supreme Court had done so since the New Deal. This prompted left-leaning figures in the political and legal establishment to express fears that the resurgence of the doctrine of original intent would allow conservatives to use the Constitution and the founding fathers as props to promote their own policy preferences. For instance, as Nagel writes (2001:33), outgoing Supreme Court justice William Brennan "charged that federalism would then serve as a 'cover' for blocking national policies with which conservatives disagreed" under the 1986-2005 Rehnquist Court.

In Capitol Hill politics, Reagan's 'New Federalism' agenda continued to exert a clear influence well into the 1990s. In the 1994 Congressional election campaign the issue of federal power was high on the agenda, with Reagan's philosophy serving as the inspiration for the Republican Party's 'Contract with America'. The manifesto authored by Newt Gingrich, then the rising star of the House, proclaimed "the end of government that is too big, too intrusive. It can be the beginning of a Congress that respects the values and shares the faith

of the American family” (cited Brauer, 2006: 36). But for some libertarian figures, even Gingrich’s ‘Contract’ was out of touch with the founders’ intentions, failing, in Ron Paul’s words (2009:3), to raise “fundamental questions” about America’s political direction.

Outside of Washington, Darren Mulloy has argued (2004:10) that the ‘Reagan Revolution’ in favour of a return to the federalism of the founders served as a spark for the growth of the right-wing militia movement:

“During the 1980s Ronald Reagan famously promised to get government “off the backs” of the American people, and his campaign was taken up again by the Republican Party in the 1990s under the congressional leadership of Newt Gingrich ... For many observers it was hardly surprising that groups like the militias were forming in such a political climate.”

Members of the movement, infamously brought into public view with the 1995 bombing of a federal building in Oklahoma City, “want to receive the sanctification of the nation’s Founding Fathers”, Mulloy argues (2004:175), identifying their cause with the American Revolution and America’s founding documents.

We see then that Reagan’s efforts, following Goldwater, to reassert an understanding of the American founding and Constitution as based on principles of limited government and economic liberalism provided part of the impetus for the development of a new move in American politics towards decentralisation and the erosion of federal power which had been growing since Roosevelt. Such a climate was to provide fertile ground for a new movement, focused on the Constitution and America’s past, campaigning for a transformation of federal power.

## **Chapter 6 - Obama, the Tea Party and the 'essence of America'**

With the advent of the 2008 financial crisis, the election of Barack Obama to the presidency and the rise of the 'Tea Party', the political battles over America's constitution and history (or rather popular memory) have been renewed with great fervour. Most accounts tell us the Tea Party movement was sparked by the comments of CNBC reporter Rick Santelli (cited Foley, 2012:15), attacking Obama's pledge to deploy \$275 billion to stave off home foreclosures: "If you read our founding fathers, people like Benjamin Franklin and Jefferson, what we're doing in this country now is making them roll over in their graves." But as we have seen, the Tea Party movement, and its use of national history to present its philosophy of federal government, is in many ways not a new phenomenon and forms part of a long chain of right-wing politicians and movements which have sought the blessing of the past for their ideas.

The Tea Party movement emerged out of the debates over the proper role of government, and federal debt, in responding to the 'Great Recession', reflecting this ongoing debate over the size and power of the federal government. While outgoing president George W. Bush had already embarked upon a number of significant federal measures to address the crisis (e.g. the Troubled Asset Relief Program), it was Obama's inauguration in January 2009 which provided the catalyst for the movement's rise. His Keynesian-inspired American Recovery and Reinvestment Act of 2009 ('the stimulus package') containing measures totalling \$831 billion to deal with the recession inflamed anti-government elements in the Republican Party and was the focus of the Tea Party's first major protests on 15 April 2009, tax filing day (Spiker, 2012:1). The 2010 mid-term elections saw a number of Tea Party-aligned Republicans take office and for the first time House members recited the Constitution line by line before starting business (Brooks, 2013:93).

In addition to adopting a name that immediately echoes the history of the American Revolution and the dumping of tea in Boston harbour in 1773, the Tea Party's rhetoric has

been dominated by a focus on the history of the revolution and the founding, as well as the suggestion that Democratic politicians, and in particular Obama, represent a kind of 'un-American' other. This has been both literally, in the case of the seemingly endless 'birther' controversy, and symbolically, in the charges made by Tea Party supporters that Obama's administration has refused to follow the founding fathers' wishes and instead pursues, in Rick Perry's words, "un-American" (2010:176) policies, leading to "the socialist abyss" (85). As Judis writes (2011), Republicans have "described Obama and the Democrats' proposals as alien to the Constitution". Typical of much of this rhetoric, Newt Gingrich has declared that "the big problem is that President Obama refuses to behave like an American president" (cited Real Clear Politics, 2013), while Michelle Bachmann, a leading light in the Tea Party, has attacked Obama with the following: "You're not a king, you're not a dictator ... President Obama ... has rewritten the Constitution for himself as a part of his effort to fundamentally transform the United States of America" (cited Isquith, 2013).

Foley, a supporter of the movement, writes (2012:231) that the Tea Party creed is summed up by "a unique blend of fidelity to limited government, constitutional originalism, and defence of sovereignty, blended with a laissez-faire attitude toward markets and morals". She claims that this faith "is not just the essence of the Tea Party; it's the essence of America". This belief that the Tea Party represents America's true values gives the movement its character, and demonstrates again the singular importance of the Constitution and national mythology in American politics. A fierce critic of the movement, Jill Lepore (2010), has put forward a useful thought: the Tea Party's historicised arguments can be seen as an effort to apply legal originalism to the realm of politics. "Set loose in the culture, it looks like history but it's not", she writes of originalism, arguing that it "is to history what astrology is to astronomy, what alchemy is to chemistry, what creationism is to evolution", ultimately a "fiction". Indeed, the Tea Party's insistence that America's founding values are limited central government and 'economic freedom' (especially low taxation) seems peculiar alongside the story of the 1787

Constitutional Convention, where the founders created a national government with wide-ranging powers to lay taxes.

By contrast, in Obama's first term as President he was generally more vague in his appeals to America's political tradition. But in his 2006 *Audacity of Hope* Obama made clear his scepticism when it comes to "the myth of the founding" (92). The view he expresses here, pitting him directly against the originalism of the Tea Party and swathes of the Republican and legal establishment, is that the Constitution "is not a static but rather a living document, and must be read in the context of an ever-changing world" (90). He writes that the founders ("brilliant, flawed men") would have rejected the sacralisation of the Constitution, arguing that they shared (93) "a rejection of all forms of absolute authority".

Obama's first term saw a number of policy initiatives which had the result of expanding federal power and, since 2010, the Patient Protection and Affordable Care Act (ACA) has become the Tea Party's *cause célèbre*, throwing a political spotlight on the Constitution and the originalism debate once again. In its submissions to the Supreme Court in defence of the act, the administration set out a number of counts on which it believed the law to be constitutional, arguing that the crux of the law "is squarely within Congress's power to regulate interstate commerce, to lay and collect taxes and to enact legislation that is necessary and proper to effectuate its enumerated powers" (Verilli *et al*, 2011a:15). Obama's solicitor general also cited the support of the Constitution's general welfare clause in the administration's arguments (Verilli *et al*, 2011b:13). The opposing submissions alleging the act's unconstitutionality were generally more willing to appeal to the history of the founding in broad terms, in addition to citing specific concerns around the use of the commerce clause. 'Obamacare', the submission argued, was one example of the "ever increasing power of Congress—a power that is undermining our Nation's founding commitment to a limited federal government" (Muisse *et al*, 2011:1).

Ultimately the court endorsed much of what the act did to expand federal economic power. Both the majority and minority opinions of the court were filled with references to the views of the founders. In his judgement for the majority, Justice Roberts (2012:59) wrote: “The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today”. In his opinion Roberts declared the core of ACA, the individual mandate, to be valid under Congress’s power to lay taxes, rather than the commerce clause. While seeing the mandate ‘penalty’ as a tax was not the most “natural” reading of the act, Roberts asserted (32) that “granting the Act the full measure of deference owed to federal statutes, it can be so read” as the court has “a duty to construe a statute to save it” from being struck down “if fairly possible” (44). Roberts also referred (6) to the Court’s tendency in the past to take a “permissive reading” of federal powers under the Constitution, explaining that this has been prompted by a “reticence to invalidate the acts of the Nation’s elected leaders”.

Following the judgement, the criticism from both the Tea Party and the Republican establishment continued. Bachmann described the judgement as "truly a turning point in American history. We'll never be the same way again" (cited Mears & Cohen, 2012). This enduring opposition to ACA culminated in another significant event which highlights again the role of history in American political debate: the October 2013 federal government shutdown. The effort, spearheaded by Republicans such as Ted Cruz in the House, to defund aspects of the ACA by holding the federal appropriations budget hostage saw both sides of the debate look to the Constitution for support of their actions. The “founding fathers liked shutdowns”, Gingrich (2013) wrote, while Obama (2013a) returned fire by declaring “that's not what the founders of this nation envisioned when they gave us the gift of self-government”, and proposed a defence of the role of the federal government. Judis (2013) has compared the “anti-federal tactics” employed by Republicans during the shutdown to the efforts of the 1930s conservative coalition to thwart New Deal legislation, writing that both “cited the United

States Constitution as their authority for attempting to defy or dismantle the federal government”.

Obama’s invocation of the founders’ views in the debate over the shutdown is representative of the greater willingness he has shown during his second term to apply the founding documents to policy debates, asserting their blessing for a more activist role for government in implementing the rights and ‘promises’ he claims as part of the American tradition. This has led some Democratic commentators to declare that Obama is seeking to ‘take back’ the Constitution from Republicans, countering conservative claims to be the true heirs of the ‘founding fathers’. According to Simon Lazarus of the left-wing Constitutional Accountability Center, “Obama is wrapping himself in the Constitution. Finally.” Lazarus argues that in his second inaugural address, Obama’s “first goal was to knock down the claim endlessly reiterated by Ryan and his allies, that the 1789 Constitution mandated “small government”, pointing to Obama’s charge (2013b) that “the patriots of 1776 did not fight to replace the tyranny of a king with the privileges of a few”. The fact that Lazarus points to Obama’s citing of 1776, a reference to the Declaration, in order to make an argument about how he has seized the Constitution once again goes to show how the two documents have been conflated in political debate.

What has emerged during Obama’s second term is that he, like Lincoln, has been eager to make particular rhetorical use of the Declaration of Independence much more than the Constitution. For instance, in a reference to the opening lines of the document promising “life, liberty and the pursuit of happiness”, Obama has declared (2013b) that “while these truths may be self-evident, they’ve never been self-executing” instead requiring “collective action” to fulfil the nation’s “founding principles”, words which unsurprisingly sent some conservatives howling. There were further examples of Obama’s efforts to link this narrative of communitarianism to America’s founding in order to defend federal power during the 2012 presidential campaign. During their respective convention nomination acceptance speeches,

Romney (2012) highlighted “freedom” as the paramount value of America’s political tradition (“... freedom to build a business. With their own hands. This is the essence of the American experience”), while Obama (2012) instead pointed to “citizenship, a word at the very heart of our founding, at the very essence of our democracy” and the mutual obligations citizenship entails. Obama continued: “freedom without a commitment to others ... is unworthy of our founding ideals”.

As we have seen throughout this chapter the political battle over America’s “essence”, the word used repeatedly in this debate, and what this means for federal power has been brought to the fore once again, in large part thanks to the Tea Party. Politicians and movements, of both right and left, have continued to apply the past to contemporary political questions. On the Tea Party-Republican side the tendency has been to draw upon the federalism of the Constitution, in addition to an appeal to what might be called the Lockean liberal view of America’s founding. By contrast, Obama has more commonly sought to root his defences of federal power in an appeal to the rights and ideals expressed in America’s Declaration of Independence, arguing that the need to implement these foundational ‘promises’ provides a basis for government activism. This use of national history has shaped the debate over ‘Obamacare’ and a range of other Obama initiatives into a battle not merely over policy preferences, but over American political identity, tradition and what, or who, counts as ‘un-American’.

## Chapter 7 - Conclusion

In American politics, the US Constitution is much more than a document providing a framework for government. As we have seen, debate over its meaning and spirit, the views and ideals of its authors, the history of the founding period in general and what they mean for American identity, is to be found almost everywhere in American politics. While the invocation of founding documents by the right is a well-known phenomenon, this dissertation has demonstrated the proclivity of politicians of the American left to do the same; history is put to political purposes by a variety of different political actors, to an extent rarely seen elsewhere. This issue is most clear when it comes to discussions on the expansion of federal power. By their nature this is the case because the debates concern the distribution of power outlined in the Constitution. But more than this, debates over federal power tend to elicit arguments that go far beyond the text of the document, seeking justification in an appeal to a perceived American 'essence' and claims to be the inheritor of the founders' mantle. American politicians and movements of all kinds have sought to project their own understanding of America's past, to contextualise their views historically, marshalling history in order to provide legitimation for their vision of government.

This discourse is not a phenomenon particular to the Tea Party, but an enduring part of American politics, on both the mainstream and the fringe. While history plays an important role in political debate in virtually all states, the frequency with which the Constitution and the supposed views of its authors are invoked, and the level of reverence shown towards them, is quite unusual. To an extent, the history of America's founding has been exploited as a propaganda device. As has been highlighted at points throughout this dissertation, a number of the claims that politicians have made as to what constitutes the 'essence' of America are questionable: whether it is figures on the right who exaggerate the extent to which the founding fathers were anti-tax and anti-government, or those broadly on the left who have sought to use the language of the Declaration of Independence in order to justify activist federal government.

On this point of distinguishing between the Declaration of Independence and the Constitution, this dissertation has highlighted how Lincoln, Roosevelt, Obama and to some extent Johnson

have tended to prioritise the Declaration in their rhetoric, citing its aspirations towards equality and “unalienable rights” as justification for their expansion of federal governmental power. In contrast, and perhaps unsurprisingly, those whose aim has been to constrain federal power, such as Reagan, southern segregationists and to some extent the Tea Party, have been more likely to seize upon the Constitution and its delineation of powers in arguing that the American political tradition demands a smaller, weaker national government.

The effect of this is that debate over the expansion of federal power has been shaped in a way that makes arguments over left-right policy preferences also battles over national identity and the political character of the nation. Such debates take on an almost teleological quality, as politicians make competing claims as to the country’s destiny. This is a potentially unsettling feature of American politics. The consequence is that instead of justifying political viewpoints on the basis of an appeal to experience, data, prudence or the invocation of moral principles, such viewpoints can sometimes be justified simply by appearing to make them fit with an eighteenth century design for government. The problem with this is that American constitutionalism in particular is not presented as an ideology to be contested when it is invoked by politicians, but rather as some kind of static, revealed truth. Consequently, there is stasis; it is difficult to change the Constitution fundamentally because it would be seen as going against the ‘essence’ of America. Or, as Judis writes (2011), Americans are presented with a false, almost existential, dichotomy between liberty and tyranny in America, which makes compromise difficult to achieve. This focus on the politics of the Constitution and the history of the founding has sometimes allowed pertinent political issues to be glossed over as ‘constitutional matters’. For instance, in the heated debate over the constitutionality or ‘un-Americaness’ of ‘Obamacare’, discussions about the policy’s distributional impacts and weaknesses receded and received less of an airing than they might have otherwise.

Ultimately, we have to question whether it is even desirable for a politician to ‘win’ the debate over who can best channel the views of founders. Such attempts to lay claim to the founders’ wishes are suspect in the first place. As Lepore writes (2011a:16):

“To say that we are there [in the past], or the Founding Fathers are here, or that we have forsaken them and they’re rolling over in their graves because of the latest,

breaking political development ... is to subscribe to a set of assumptions about the relationship between the past and present stricter, even, than the strictest form of constitutional originalism, a set of assumptions that ... amounts to a variety of fundamentalism.”

Such claims to be the inheritors of the founders’ mantle are also stymied by the fact that in reality there is no singular founding political heritage which can be appealed to, but instead a series of unresolved contradictions. The Constitution was a document which was fiercely fought over - not universally applauded - after it was drafted by the delegates to the 1787 Constitutional Convention, a design for government which was a compromise that failed to please many of the framers, setting up a number of political tensions and contradictions which have flared up at various times: federal and state, urban and rural, slave and free, community and individual, democratic-republicanism (promoting equality) and propertied republicanism. The end of the Civil War and the apparent victory of federal power failed to soothe these frictions and they have come to the fore again in different guises during the New Deal, Great Society, Reagan Revolution and Obama-Tea Party periods.

Far from being uncontested and above politics, or merely something to be appealed to superficially in patriotic tributes, ideas about the founding are at the heart of conflicts in American politics. It is potentially dangerous to see the Constitution as out of reach of politics, as Foley seems to suggest when she writes (2012:ix) that “what matters is preserving the Constitution ... all else is petty politics”, because its role becomes unquestioned and it becomes easier for politicians disingenuously to cite it to support their position, perhaps fooling a public who may not be terribly familiar with the actual text of the document. As impressive as the Constitution’s design for government might have been, the approach taken towards the document today should be a more open and critical one, acknowledging the weaknesses of the original, the changes in society and politics over more than 200 years and the way in which America has already drifted from some of the arguably anti-democratic intentions of the founders (see Dahl, 2001; Levinson, 2008; Lazare, 1996, 2001).

But these unresolved contradictions at the heart of America’s political heritage have not stopped a variety of politicians turning to the founding documents and the men who wrote

them. Indeed, as highlighted above, it appears that some presidents and political movements have been picking and choosing one document over the other, and downplaying unpalatable aspects of both, in order to claim historical inspiration for their contemporary policy preferences. For those who have sought to invoke America's political heritage, the actual contents and contexts of the documents often seem to matter less than what they perceive to be the general spirit of the Constitution, Declaration of Independence and American Revolution - the three prongs of American national mythology and, in some senses, an origin myth. It is this discussion over the United States's true character and authentic founding principles which plays such a significant role in political rhetoric, focusing certain policy debates on questions of history and constitutional interpretation. This is an important, and peculiarly pronounced, part of American politics which politicians and movements of all stripes have sought to exploit in justifying their vision of federal power.

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