The First American Founder

James W. Ceaser

America reveres its founders. They are portrayed on monuments large and small, celebrated on national holidays and invoked in everyday conversation, and commemorated by the names of countless cities, schools, and streets—none more iconic than Madison Avenue.

This focus on founding, however, is more the exception than the rule in the world today. There was, of course, a founder of the communist Soviet Union (Lenin), fascist Italy (Mussolini), and national-socialist Germany (Hitler), but these regimes are no more. Atatürk, once hailed as the great founder of modern Turkey, has largely been erased by Erdogan, and Mao Tse-tung just barely hangs on in China. Among democracies, there is still a place for Gandhi in India, Mandela in South Africa, and perhaps Havel in the Czech Republic and de Gaulle in France. But other European nations, like Britain or the Netherlands, have grown into their current condition without a founder.

America, by contrast, has made the founding a central theme of its political science. And yet Americans are remarkably imprecise when it comes to assigning the label of founder. To whom should it apply? For most, a founder probably refers to an “important political figure back then” who helped the nation get started. At an Independence Day celebration on July 4, between eating grilled hot dogs and viewing fireworks, Thomas Jefferson may well be mentioned, but no one would take exception if George Washington, James Madison or Alexander Hamilton were as well. These men and others are variously ascribed the title of founder for having contributed in some way to launching a new political order.

Let us try, however, for a little more precision. “The founding” may refer to three distinct moments in the establishment of the nation: the

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Revolution, the writing and ratification of the Constitution, and the launching of the government and passage of the Bill of Rights. The founding period thus runs from the battle of Lexington in 1775 through the end of Washington’s first term in 1793. Those meriting the appellation of founder include our revolutionary leaders (Franklin, Adams, Jefferson, and Washington), the principal figures who prepared and defended the Constitution (Madison, Washington, and Hamilton), and the political actors who helped shape the new federal government in its first few years (also Washington, Hamilton, and Madison).

If someone demanded to know which of these three moments should be designated as the founding, most historians would probably give the prize to the constitutional period of 1787-1788. At the center of this event was James Madison, the person subsequently labeled “the father of the Constitution.” Madison was essential in forming the new government and in defining the terms of debate at the Philadelphia Convention. Along with Hamilton, Madison was also a main author of the Federalist Papers, which explained and defended the Constitution during the ratification contest. Feeling he was duty-bound by an implicit agreement reached in many states during the ratification debate, he was also the chief force behind the passage of the Bill of Rights through Congress in 1789.

This is all well-covered ground; less well known, and more fundamental, is Madison’s role in introducing the concept of founding, or lawgiving, itself. Before there could be a founding, there had to be an idea of founding. It had to become part of our way of thinking, and it was Madison who supplied this intellectual breakthrough. He, more than anyone, served as the founder of the American idea of founding.

This piece of our political history goes almost wholly unrecognized today, as no one imagines that the idea of founding ever needed to be established. The concept is taken for granted and regarded as perfectly natural. We speak of the founding and the founders for the obvious reason (we believe) that we had a founding and founders. But was this connection regularly made in 1787? Did Americans associate what was being done with the momentous feats of lawmaking achieved by Moses in the desert at Sinai, Lycurgus in ancient Sparta, or Solon in Athens? Did the language of founding and lawmaking fit so readily as we suppose today?

The truth is that this terminology was rarely employed in America at the time. Almost no one, for example, used the language of founders
or lawmakers to refer to those who wrote America’s first national constitution, the Articles of Confederation. Was John Dickinson, the James Madison of the Articles, ever honored as a founder? John Adams certainly saw himself in this light when he wrote the Massachusetts constitution, but the idea of a founding, far from being self-evident to all, had to be revived and promoted in 1787-1788.

The credit for reintroducing this language belongs to the authors of the Federalist Papers, and above all to Madison. It was Madison who explicitly took up the theme of the lawgiver and began comparing America’s Constitution writers to the seminal lawgivers of antiquity. His purpose was to have Americans view the events unfolding before them through the lens of the idea of lawmaking, with its connotations of extraordinary action and bold remaking. Madison refined the idea of founding and suggested, audaciously, that our founding might rival, and even replace, the great foundings of the ancient world. Without this step, those we call our founders today might not be known as founders at all.

The Concept of Founding

Founding or lawmaking was once a fundamental theme of political science. In classical times, lawmaking was understood as the effort of an individual to bring into being good government, or at any rate the best government possible under an existing set of circumstances. Two elements were involved in the act of founding. First, there was the acquisition of knowledge of what promoted good government. In the case of the founding of Sparta, described by the great Greek historian Plutarch, Lycurgus made an extensive voyage around parts of the Aegean and perhaps even farther afield, examining different forms of rule and considering which one might best suit his native land. While in Crete, he consulted the philosopher Thales, who had begun to elaborate a science of politics that considered the best regime, and how good regimes could be established. One who discovers this kind of knowledge — Aristotle is another example — is a teacher of lawgivers, or a proto- or invisible founder, who gives advice to an actual founder.

Second, there was the act of founding — the task of the founder properly understood. Perhaps this person had availed himself of a body of knowledge, as Lycurgus had done, or perhaps he acted without it, proceeding by his own wits. In any case, a founding could be only partly mapped out in advance by theoretical knowledge. At best, prior
knowledge serves as a partial guide for action, given the importance of particular circumstances in actual situations. Facts on the ground demand different strategies. A prospective founder must also take into account what can be achieved by way of promoting the good, and at what risks and costs.

Depending on the situation they face, some lawgivers decide to settle for much less than they might have wished for. According to Madison, the Athenian founder Solon confessed that he had “not given to his countrymen the government best suited to their happiness, but most tolerable to their prejudices.” On the other hand, Lycurgus remained “more true to his object,” which led him to take chances and use “violence with the authority of superstition” to accomplish his objectives. Lycurgus founded Sparta by resorting to extraordinary measures that differed from the principles on which he based the political system.

Niccolò Machiavelli reformulated the classic account of founding, giving the subject his own special points of emphasis. He brought the self-interest of the founder into the equation, asking how the task of founding might benefit a founder himself. No longer did he assume that a founder naturally acted in service of his compatriots without regard for his own glory and renown. The founder’s goals had to be squared with promoting the public good.

In line with the ancients, Machiavelli set out two general dimensions of founding. First, founding should be aided by theoretical knowledge that he called the rules for the “government of princes.” Machiavelli offered his own political science as the best source of instruction, maintaining that it was superior to the classics’ because it was more realistic. It looked to how people live rather than how they should live. The one who possesses this knowledge, though he does not literally act, is again the proto- or invisible founder—in this case, Machiavelli himself.

Second, someone must pursue the actual work of founding. Machiavelli describes this individual in The Prince as one who makes his way by the use of his “own arms and ability.” The greatest are “Moses, Cyrus, Romulus, Theseus, and the like,” figures who took the “lead in the introduction of a new order of things.” In the Discourses on Livy, Machiavelli refers to such leaders as founders (fondatori), and specifies some of their characteristics.

One defining feature is that a founder almost always acts by himself. Founding is an individual activity, not the work of a committee. This
consideration led Machiavelli to excuse the actions of Romulus, who famously murdered his brother Remus. “[W]e must assume,” he wrote, “that it never or rarely happens that a republic or monarchy is well constituted, or its old institutions entirely reformed, unless it is done by only one individual; it is even necessary that he whose mind has conceived such a constitution should be alone in carrying it into effect.”

Founding a new mode and order is an enormously difficult task requiring an extraordinary degree of authority. Yet a founder often begins without holding an office of any kind. His authority derives from taking advantage of an “opportunity,” a situation in which people face dire circumstances already in place or else created by the founder. Today, an opportunity might be called a “crisis”—a terrible thing to waste. Under such conditions, people are disposed to follow a strong leader. But this spontaneous inclination only lasts so long. Sooner or later, people will grow discontented and wish to be rid of the founder, as when Moses faced rebellions in the desert from those who had willingly followed him out of Egypt. At some point, Machiavelli observes, a founder will need to ensure his authority by compelling obedience. “[T]hings must be ordered in such a mode that when [the people] no longer believe, one can make them believe by force.” Force consists of physical arms or psychological controls, most often by using religion to instill fear.

For Machiavelli, founding takes place on different levels. It can refer to changing the frame of government within an existing state; creating an altogether new unit or nation; or, beyond politics in the literal sense, transforming an entire culture or civilization from, say, the pagan era to the Christian era, or the Christian era to the Enlightenment. Founding in the last case is a project beyond what any single person can ever accomplish in a lifetime. Only an invisible founder, a thinker endowed with religious authority or theoretical persuasiveness, can launch the enterprise. The thinker induces others, long after the introduction of his idea and often without their direct knowledge, to carry out parts of the project. The invisible founder becomes, as it were, the real founder, exercising his control across generations or centuries. The greatest examples would include Jesus (or perhaps Paul) and Machiavelli himself.

René Descartes, the thinker who helped to inaugurate the Enlightenment project within the realm of philosophy, offered an account of the lawgiver that extended Machiavelli’s analysis. Early in the *Discourse on Method*, Descartes describes his ideal city planner, which is
his stand-in for a founder: “[T]here is not so much perfection in works created ... by the hands of various masters as there is in those which one person has worked on alone. Thus we see that the buildings which a single architect has undertaken and completed are usually more beautiful and better ordered than those which several people have tried to refurbish by making use of old walls built for other purposes.” Descartes then goes on to propose building a city in “regular places which an engineer has designed freely on level ground.”

Descartes’s lawmaker is again a single person who seeks to tear everything down and begin de novo. Relying on a science likened to engineering, which supplies exact answers, the founder acts, unconstrained by custom or ancient structure. The scenes of violence in which Machiavelli delighted are omitted. The founder builds the city if possible from scratch. Descartes’s model is the technocrat’s dream of founding with complete rational control, unimpeded by the wishes and views of the many.

Finally, there is Jean-Jacques Rousseau, who depicts the lawgiver in the most fantastic terms. Rousseau imagines the founder as acting on his own and seeing farther than all others. Founders establish in advance an entire system, far surpassing the accomplishments of statesmen who only put into effect and maintain what the founder has created. Few persons possess the genius to perform this function, which entails figuring out how “to change human nature, so to speak — to transform each individual, who on his own is a complete and solitary whole, into part of a greater whole from which he in a way receives his life and his being.”

Rousseau emphasizes that a plan of founding must be fitted carefully to meet the needs of each place, which vary greatly. A general science can only help so much compared to a kind of artistic talent. The task of founding requires unusual authority that exceeds what reasoned argument alone could ever persuade a people to do. It must be viewed as having divine sanction.

BRITISH THOUGHT AND THE DENIAL OF FOUNDING

British political thought in the 17th and 18th centuries, in the form of its two dominant schools — contract theory and organic development — eliminated the founder. It may be that these schools of thought deliberately dismissed the idea of the lawgiver in order to discourage
would-be Machiavellian leaders from unsettling the political world. Or perhaps they held that the whole concept was a kind of artifice or fiction, especially in modern times. Whatever the case, each school presented a new type of political science that did not include the figure of the lawgiver. Americans, as we shall see, relied greatly on British political thinking, but decidedly not in the case of founding.

Contract theory, deriving largely from John Locke, held that governments are formed when individuals voluntarily come together on the basis of reasonable calculations about how best to secure their primary rights—above all the rights to life or personal safety and to the preservation of their property. The creation of a sound political order is assisted by a science of politics that, becoming known in simple form to the public, helps in the actualization of this process. The science explains how people living in a state of nature, without government, would logically transition to civil governance. This model should eventually be adopted everywhere. Setting up such a society can be done without a great founder endowed with extraordinary authority; the origination of society is accomplished through the reasonable and semi-automatic process of creating a social compact.

Contract theory is a replacement for the model of founding. Resting on the logic of reason and interest ascribed to all, it eliminates reliance on chance. Waiting for a great and heroic lawgiver, a singular person of astonishing political ability, is no longer necessary. If certain minimal conditions obtain—chiefly the elimination of priestly control and religious superstition—the establishment of a sound civil order should follow.

Organic theory (or Whig jurisprudential history), the other major form of political science in Britain, taught that the English constitution had formed gradually, a product of accident and piecemeal adjustment. England by this account never had a single moment of origin. It had no founding or founders. It began somewhere back when, whether in the famed “forests of Germany” among the Gothic tribes, or at some other “time immemorial” prior to the advent of known records. England’s magnificent constitution grew by trial and error. Human intelligence allowed for what Edmund Burke called “reform” along the way, which introduced partial correction, but there was no wholesale transformation or beginning anew.

Organic theory further argued that a science of politics is unequal to the task of founding. The process is far too complex, beyond what any
human being, regardless of intelligence, could manage. In any case, the
tremendous authority needed to carry out the task of founding inevi-
tably undermines liberty. Founding destroys restraints and centralizes
power. It is usually achieved by force or fraud. The example of this kind
of beginning will live on and help sanction later attempts to destroy
free government.

Proponents of organic theory presented their account of English
constitutional development as actual history. This assertion may reflect
their best understanding, but it may also represent a deliberate narrative
designed to conceal and help people forget the enormity and radical
quality of the Glorious Revolution. In the guise of history, the organic
school seems to have been less concerned with perfect accuracy than
with presenting the teachings of its political philosophy.

Organic theory sought to dampen the enthusiasm Machiavelli had
encouraged regarding clean slates and new beginnings. Moderation
was the watchword. To that end, organic theory eliminated the idea
of founding. Burke explained that the British constitution (indeed all
“the states of the Christian world”) had not been formed “upon a reg-
ular plan or with any unity of design,” but instead grew “in a great
length of time, and by a great variety of accidents.” As if in opposition
to Descartes, he seemed partial to the crooked and narrow streets of old,
preferring them to either the homogeneity of engineered plans or to
the egotistical genius of modern architects. As for celebrating founders,
Burke noted: “The very idea of the fabrication of a new government is
enough to fill us with disgust and horror.”

THE AMERICAN IDEA OF FOUNDING

American political thought in the 18th century broke with both British
schools of thought and returned the theme of founding to political
science. For all that Americans had borrowed from the English, this
difference divided — and divides — the two countries. Americans accept
the concept of founding; the British do not.

The Federalist Papers oppose the claim of organic theory that politi-
cal constitutions must be the result of unplanned growth and accident.
The opening paragraph of Federalist No. 1 announces that the outcome
to the debate over ratification would decide “whether societies of men
are capable or not of establishing good government from reflection and
choice, or whether they are forever destined to depend for their political
constitutions on accident and force.” The authors wagered on reflection and choice, positing that intentional founding is clearly possible.

America’s major founders at the time were not wild-eyed idealists eager to reject what was old or customary just because it was old and customary. At the same time, they were not loath to follow a new course when necessary. The Constitution would mark the next achievement, creating a pivot point in world history. In Federalist No. 14, Madison recalled what had been set in motion: “Happily for America, happily we trust for the whole human race, they pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe.”

The Federalist Papers’ divergence from contract theory is more complicated. American thinkers at the time regularly turned to John Locke to discuss the origin of government, and they often fit the Revolution into the framework of his social-compact theory. The establishment of a new government, though, went beyond what Locke had emphasized. Without the deliberate exertions of a small number of men, the new Constitution would never have been presented. Their effort was the task of lawmakers.

The Federalist Papers’ embrace of founding returned greatness to the center of political life and restored a claim of rank and hierarchy between founders and people. There were now great men performing great deeds at a critical moment. The Federalist Papers present with delicacy the case for a new kind of political actor who combines knowledge of the science of politics, judgment in determining where theoretical knowledge applies to existing circumstances, and persistence and boldness in pursuing the nation’s interest.

The theme of founding culminates in James Madison’s explicit introduction of the lawgiver in Federalist No. 38. Madison supplied a list of 13 ancient “reformers” or “lawgivers,” examining cases “in which government has been established with deliberation and consent.” The list includes Theseus, Lycurgus, Solon, and Romulus. Madison then proceeded to compare America’s founders to these renowned figures, lifting what was taking place to the select circle of great events. If the Constitution was ratified, the American founders might become not just the worthy rivals of these ancients, but, in light of “the improvement made by Americans on the ancient mode of preparing and establishing
regular plans of government,” their potential superiors. They would replace the renowned figures of antiquity.

The argument in favor of American preeminence is seen in how the task of founding was carried out. Beginning with the issue of the number of founders, Madison recalled that for the ancients the “task of framing” had always been “performed by some individual citizen of preeminent wisdom and approved integrity,” never by an “assembly of men.” Americans instead used a select body of citizens at the convention, though with only a few playing a leading role. If relying on a group of people risked creating “discord and disunion” (as in fact occurred so often at the convention), it also offered the possibility of greater wisdom as well as safety in the outcome.

When it came to how a plan was to be adopted, ancient practices ranged from those who tried to figure out in advance what the people would agree to, which limited what they could propose, to those who abandoned regular procedure and turned to compulsion, seeking greater perfection. Madison seemed to admire those in the latter group, but their approach was impossible in America. America’s founders lacked the force to compel. Their challenge was to generate sufficient support through persuasion to allow for consent to what was overall a wise plan. They also had to function without the public assuming that a supernatural force was working in their favor (apart from having George Washington on their side, a fact many viewed as providential).

The regular procedure the founders followed in the ratification process brought an additional benefit. No gap existed between the process of founding and the subsequent method of rule under the new Constitution. Both were republican. Ratification became a legal means to creating a social contract, setting a precedent for other modern republics. This approach contrasts with the method followed by the European Union, where the citizens of member states have been excluded from participation and ignored in revisions of the project.

Madison’s study of ancient examples confirmed what he had learned at the convention. Founding, even under the most favorable circumstances, made clear “the hazards and difficulties incident to such experiments, and… the great imprudence of unnecessarily multiplying them.” This conclusion prepared Madison to take a decisive step, acting on his own like a classic founder. In Federalist No. 49, Madison offered a new meaning for a written constitution. To avoid repeating
the difficulties of founding, he introduced the idea that the Constitution should be looked at with “veneration” and “reverence,” and not easily or frequently altered. With the deepening support that comes with age, it would “have the prejudices of the community on its side.”

The instrument of a written constitution, superior to statutory law and changeable only by a process separate from ordinary lawmaking, was an American innovation that developed in the states in the period after the Revolution. It seemed to enhance the standing of constitutions. Yet this fact never extended to the idea that the federal Constitution should be thought of as an enduring symbol that would connect future generations to the founding period. Even today, a written constitution is not automatically revered; few state constitutions are viewed in this way. In some states, they can be easily amended, and many have been rewritten. It would take a person of peculiar temperament, and perhaps questionable sanity, to venerate the constitution of California.

Madison’s idea of making the Constitution an object of veneration seems to have crystallized in early 1788, in response to the planned circulation of Thomas Jefferson’s *Notes on the State of Virginia*. Jefferson proposed a very low threshold for revision of written constitutions and in his correspondence argued that constitutions should be redone every generation. Jefferson regarded written constitutions more as ordinary law—supreme in their legal status, yes, but ordinary in the sense that, like statutory law, they should be constantly updated and improved. A heightened regard for founders, he held, imprisons the public mind and favors a disposition to accept authority and superstition. Jefferson later famously mocked this kind of subservience: “Some men look at Constitutions with sanctimonious reverence, [and] deem them, like the ark of the covenant, too sacred to be touched. [T]hey ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.”

Jefferson believed that the present is likely to possess greater political wisdom than the past, and the future greater wisdom than the present: “[L]aws and institutions must go hand in hand with the progress of the human mind.” (Many progressive thinkers at the turn of the 20th century adopted Jefferson’s sentiments and borrowed his language.) He believed that any bias in favor of founderism should be firmly rejected. If there was a predominant view of written constitutions in 1787, it may well have been this one.
James Madison defended a different view. No blind worshiper of ancestors—we have seen how he supported certain new experiments—he nevertheless saw no reason to defy prudence and invite constant constitutional revisions. “The reason of man,” he wrote, “like man himself, is timid and cautious when left alone, and acquires firmness and confidence in proportion to the number with which it is associated. When the examples which fortify opinion are ancient as well as numerous, they are known to have a double effect...[T]he most rational government will not find it a superfluous advantage to have the prejudices of the community on its side.” Better to respect the achievements that were made, shield them from undue pressures, and protect them from the future actions of persons likely to possess far less political intelligence and prudence. Even more important, reverence for the Constitution by Madison’s account affects how people think of the political world. It encourages them to look to and value the past—in this case, to a past that gave near as much as one could hope for. Without this disposition, it is hard to imagine that we could have founders at all.