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Progressives are wrong about the essence of the Constitution

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In a 2006 interview, Supreme Court Justice Stephen Breyer said the Constitution is "basically about" one word — "democracy" — that appears in neither that document nor the Declaration of Independence. Democracy is America's way of allocating political power. The Constitution, however, was adopted to confine that power in order to "secure the blessings of" that which simultaneously justifies and limits democratic government — natural liberty.

The fundamental division in U.S. politics is between those who take their bearings from the individual's right to a capacious, indeed indefinite, realm of freedom, and those whose fundamental value is the right of the majority to have its way in making rules about which specified liberties shall be respected.

Now the nation no longer lacks what it has long needed, a slender book that lucidly explains the intensity of conservatism's disagreements with progressivism. For the many Americans who are puzzled and dismayed by the heatedness of political argument today, the message of Timothy Sandefur's "The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty" is this: The temperature of today's politics is commensurate to the stakes of today's argument.

The argument is between conservatives who say U.S. politics is basically about a condition, liberty, and progressives who say it is about a process, democracy. Progressives, who consider democracy the *source* of liberty, reverse the Founders' premise, which was: Liberty preexists governments, which, the Declaration says, are legitimate when "instituted" to "secure" natural rights.

Progressives consider, for example, the rights to property and free speech as, in Sandefur's formulation, "spaces of privacy" that government chooses "to carve out and protect" to the extent that these rights serve democracy. Conservatives believe that liberty, understood as a general absence of interference, and individual rights, which cannot be exhaustively listed, are natural and that governmental restrictions on them must be as few as possible and rigorously justified. Merely invoking the right of a majority to have its way is an insufficient justification.

With the Declaration, Americans ceased claiming the rights of aggrieved Englishmen and began asserting rights that are universal because they are natural, meaning necessary for the flourishing of human nature. “In Europe,” wrote James Madison, “charters of liberty have been granted by power,” but America has “charters of power granted by liberty.”

Sandefur, principal attorney at the Pacific Legal Foundation, notes that since the 1864 admission of Nevada to statehood, every state’s admission has been conditioned on adoption of a constitution consistent with the U.S. Constitution *and the Declaration* . The Constitution is the nation’s fundamental law but is not the first law. The Declaration is, appearing on Page 1 of Volume 1 of the U.S. Statutes at Large, and the Congress has placed it at the head of the United States Code, under the caption, “The Organic Laws of the United States of America.” Hence the Declaration “sets the framework” for reading the Constitution not as “basically about” democratic government — majorities — granting rights but about natural rights defining the limits of even democratic government.

The perennial conflict in American politics, Sandefur says, concerns “which takes precedence: the individual’s right to freedom, or the power of the majority to govern.” The purpose of the post-Civil War’s 14th Amendment protection of Americans’ “privileges or immunities” — protections vitiated by an absurdly narrow Supreme Court reading of that clause in 1873 — was to assert, on behalf of emancipated blacks, national rights of citizens. National citizenship grounded on natural rights would thwart Southern states then asserting their power to acknowledge only such rights as they chose to dispense.

Government, the framers said, is instituted to improve upon the state of nature, in which the individual is at the mercy of the strong. But when democracy, meaning the process of majority rule, is the supreme value — when it is elevated to the status of what the Constitution is “basically about” — the individual is again at the mercy of the strong, the strength of mere numbers.

Sandefur says progressivism “inverts America’s constitutional foundations” by holding that the Constitution is “about” democracy, which rejects the framers’ premise that majority rule is legitimate “only within the boundaries” of the individual’s natural rights. These include — indeed, are mostly — unenumerated rights whose existence and importance are affirmed by the Ninth Amendment.

Many conservatives should be discomfited by Sandefur’s analysis, which entails this conclusion: Their indiscriminate denunciations of “judicial activism” inadvertently serve progressivism. The protection of rights, those constitutionally enumerated and others, requires a judiciary actively engaged in enforcing what the Constitution is “basically about,” which is making majority power respect individuals’ rights.