

## Constitutional Corner – America’s Fundamental Principles: Economic Freedom.

Our last entry in the fundamental principle “sweepstakes” is the principle of economic freedom. Economic freedom encompasses several sub-principles: the freedom to acquire and use property; the freedom to engage in economic activity, i.e. buying and selling; freedom of contract, and others.

Economic Freedom was very much a part of the overall call for liberty in the colonies; for more than a hundred years Parliament had been passing laws which made life more difficult for America’s merchants and indeed for most citizens, as certain goods become the subject of protective tariffs (protective of British merchants in England and the West Indies mostly) and thus more expensive.

Beginning with the Navigation Acts of 1630 and ending with the nefarious Townsend duties on glass, lead, paints, paper and tea in 1767, the colonies had become England’s “cash cow” and the colonists didn’t appreciate the status one bit. Duties, imposts and taxes all served to deprive the colonists of a portion of their property, and this without true representation in Parliament.

“Pennsylvania Farmer” John Dickinson put it this way: “[W]e cannot be free, without being secure in our property ... we cannot be secure in our property, if, without our consent, others may, as by right, take it away ...”<sup>1</sup>

Supreme Court Justice William Paterson expressed a similar view in 1795. “No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry.”

The *Declaration of Rights and Grievances* of the Stamp Act Congress (October 19, 1765) complained of Parliament’s incessant imposition of duties and proclaimed that it was “unreasonable and inconsistent with the principles and spirit of the British constitution, for the people of Great Britain to grant to his majesty the property of the colonists.”

The *Declaration and Resolves* of the First Continental Congress (October 14, 1774) had stated the colonists were entitled to “life, liberty and property: and they have never ceded to any foreign power whatever, a right to dispose of either without their consent.”<sup>2</sup>

The *Declaration of the Causes of Taking-up Arms* of the Second Continental Congress stated the colonists had taken up arms for: “the protection of our property, acquired solely by the honest industry of our fore-fathers and ourselves, against violence actually offered.”

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<sup>1</sup> “A Warning to the Colonies,” in *The Political Writings of John Dickinson, Esq.* 1804.

<sup>2</sup> Notice the labeling of Parliament as a “foreign power.”

To top it off, several of the complaints Jefferson made in the Declaration of Independence sprang from economic arguments the colonists had been making for years.

A war of independence ensued -- hazarding their "lives, fortunes and sacred honor" -- all to protect economic and other freedoms.

### **The Freedom To Acquire And Use Property.**

The private ownership of property was seen by the Founders as fundamental to the concept of ordered liberty and was among the rights most consistently stated by the Founders. It is perhaps best elucidated in the Virginia Declaration of Rights, which comprises Article 1 of the Virginia Constitution: "*That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*" Other state Constitutions contained similar provisions.<sup>3</sup>

Yet the Founders recognized that this view was not a permanent fixture of society; in his [\*Defence of the Constitutions of Government of the United States\*](#), John Adams stated: "The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If 'Thou shalt not covet' and 'Thou shalt not steal' were not commandments of heaven, they must be made inviolable precepts in every society before it can be civilized or made free."

Adams' reference to the "commandments of heaven" reveals the source of this foundational truth: the Bible. If "Thou shalt not steal" does not equate to a right to own property, it has no meaning at all.

"The Bible offers 500 verses on prayer, less than 500 verses on faith, but more than 2,000 verses on money and possessions."<sup>4</sup> Until the last century there was a traditional connection between economics and Christian thought, most notably found in the *Summa Theologica* of Thomas Aquinas and John Calvin's *Institutes of the Christian Religion*, both of which contain whole sections devoted to economic questions.

Because man is created in the image of God, we are rational beings capable of choosing in a marketplace of competing products and services, including competing ideas. Because we are

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<sup>3</sup> Pennsylvania, 1776, Art. 1; Vermont, 1777, Art. 1; Massachusetts, 1780, Art. 1; New Hampshire, 1784, Art. 2; Delaware, 1792, Preamble. found in *The Federal and State Constitutions*, ed. Francis Newton Thorpe (Washington: U.S. Government Printing Office, 1909).

<sup>4</sup> <http://www.preachingtoday.com/illustrations/1996/december/410.html>.

commanded to have dominion over the earth we can lay claim to property as a means of exerting that dominion.

Conversely, the Bible's clear description of man's sinful nature warns us, and government, to be on guard for selfishness, greed, and particularly, economic exploitation; thus we need to be wary of the concentration of power, whether in government or in private industry (i.e., monopoly).

From the Declaration, we know that the purpose of government is to secure our inalienable rights, so how does government go about doing so? How does government secure my right to acquire and possess property without infringing on the right of others to equally do so? And once I have acquired this property to what extent can government legitimately interfere with my right to enjoy it? To what extent can the government take my property for legitimate public purposes? The Founders and Framers wrestled with these questions, and more.

Take this simple test. Do I have the individual power to order my neighbor to not build a fence beyond a certain height? No, clearly I have no such power. So if government, including local government, obtains all its "just powers" from the "consent of the governed," how in the world does my county government obtain the right to tell my neighbor or myself what height we can or cannot build a fence? How can I delegate to government a power I do not possess? Government's power to control the use of property is often illegitimate.

Nevertheless, we find several legitimate protections of property in the Constitution:

First and foremost, the concept of a government limited to certain enumerated powers erects some protection, or did initially, over government illegitimately taking property through unjust means (this "wall" has taken some hits over the years).

Article 1, Section 8, Clause 8 granted Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This clause not only promoted "the progress of science," it secured the intellectual property of the creator, at least for a specified timeframe. Notice that such protection was intended for "limited times;" some argue that today's granting of copyright protection for "a term lasting for the author's life plus an additional 70 years"<sup>5</sup> establishes, in effect, a monopoly.

Elsewhere in Section 8 we find the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Clause 3); enact "uniform Laws on the subject of Bankruptcies" (Clause 4), to regulate the Value [of money], and ... fix the Standard of

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<sup>5</sup> For anonymous works the term is "95 years from first publication or 120 years from creation."

Weights and Measures (Clause 5), punish counterfeiting (Clause 6), and punish “Piracies” (Clause 10); all these clauses provide Congress other opportunities to protect private property.

Taxes were to be uniform so as not to jeopardize anyone’s property unfairly: "A just security to property is not afforded by that government, under which unequal taxes oppress one species of property and reward another species."<sup>6</sup>

Property was also protected (in the original Constitution, at least) through non-interference with contracts: “No State shall ... pass any ... Law impairing the Obligation of Contracts.”<sup>7</sup>

Conversely, we also have the ominous 5<sup>th</sup> Amendment, which gives the federal government the right to take private property for “public use,” with “just compensation.”<sup>8</sup>

The Founders were not laissez-faire capitalists. First, because “capitalism” had only recently been introduced (though not by that name, that came later) through publication of Adam Smith’s *Wealth of Nations*,<sup>9</sup> but also because the Founders were still in the midst of abandoning the principles of British mercantilism, which Smith had argued should be replaced. *Wealth of Nations* was published in 1776, so by 1787 its arguments were still being absorbed.<sup>10</sup>

The Framers and Ratifiers saw a definite role for government in promoting trade and supporting the success of business, thus protecting the property of those businesses. Tariffs, imposts and excises were judiciously used in the years after the Constitution went into effect.

In “[Founders: Property Rights, Free Markets, and Sound Money](#),” a well-written and comprehensive essay, Thomas G. West argues that while the Founders often had disagreements over the extent to which the government should influence the economy, they didn’t waver in their agreement on these three main points concerning private property: “the legal right to own and use property in land and other goods; the right to sell or give property to others on terms of one’s own choosing (market freedom); and government support of sound money.” Let’s examine West’s last point.

### **“Government Support of Sound Money.”**

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<sup>6</sup> James Madison, *Essay on Property*, 1792.

<sup>7</sup> Article 1, Section 10, Clause 1. This protection is no longer in effect; in 1934, the Supreme Court upheld a Minnesota law that temporarily restricted the ability of mortgage holders to foreclose on their mortgages. The Court found the law to be a valid exercise of the state's Police Power. It explained that the temporary nature of the contract modification and the emergency caused by the Great Depression, justified the law.

<sup>8</sup> The 2005 case of *Kelo v. City of New London* so broadened the meaning of “public use” as to render it essentially meaningless.

<sup>9</sup> Long title: *An Inquiry into the Nature and Causes of the Wealth of Nations*.

<sup>10</sup> In 1790, Jefferson wrote in a letter to Thomas Mann Randolph stating: "... in political economy I think Smith's *wealth of nations* the best book extant ..."

Thanks to inflation caused by the Federal Reserve's money policy, a dollar today buys less than 5% of what a dollar did 100 years ago. Our money system works today only because most Americans are too ignorant to understand how they are being manipulated by the "money changers."

The Founders' experience with money demonstrates that there were times when principle gave way to pragmatism. Specie money (i.e. coin) was often scarce due to a perpetual imbalance in trade -- colonists imported far more than they sold overseas, not unlike our current situation.

According to the eminent historian Forrest McDonald, the bulk of the Founders' reading was in histories. During the Constitutional Convention, the delegates made nearly 400 references to history to justify their positions.<sup>11</sup> This reliance on history provided them abundant examples of both good and bad money policy. They knew of the Roman practice of devaluing their coins by reducing their alloy and the Founders themselves had seen the pernicious effects of "clipping." They knew that the Chinese originated paper currency in the eleventh century, with disastrous results. Yet like a moth to the flame, from 1690 onward, the colonists resorted to the issuance of paper money to satisfy the insatiable demand for currency.

One of the few wise acts of the British Parliament in the pre-revolutionary period was the 1751 passage of The Currency Act, which prohibited the New England colonies from printing paper money. During the Revolutionary War, however, the Confederation Congress, unable to raise necessary funds through voluntary state requisitions, had no recourse but to print fiat currency, leading to the phrase: *"Not worth a Continental,"* and Washington's 1779 lament: *"A wagon of money will not buy a wagon of goods."*

Despite this lesson, with their post-war economies in shambles, Massachusetts and other states (including Virginia) succumbed to the demands of their citizens and printed their own paper money, with the predictable effect on its value.

In January 1787, as he pondered whether to accept Virginia's invitation to become part of its delegation at Philadelphia that May, George Washington summed up his view of fiat money in a letter to Jabez Bowen: *"Paper money will invariably operate in the body of politics as spirit liquors on the human body. They prey on the vitals and ultimately destroy them. Paper money has had the effect in your state that it will ever have, to ruin commerce, oppress the honest, and open the door to every species of fraud and injustice."*<sup>12</sup>

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<sup>11</sup> Forrest McDonald, *A Founding Father's Library*.

<sup>12</sup> Letter to Jabez Bowen, January 9, 1787.

Jefferson owned: *"That paper money has some advantages, is admitted. But that its abuses also are inevitable, and, by breaking up the measure of value, makes a lottery of all private property, cannot be denied. Shall we ever be able to put a constitutional veto on it?"*<sup>13</sup>

Does the Constitution permit paper currency? Some claim that the phrase to "coin money" in the Constitution's Article 1, Section 8, prohibits Congress from ordering the printing of paper money at all. Others (and I share this view) believe the phrase should be (and was) interpreted as in "coining" a phrase. The Founders were certainly aware of this usage, as Webster's Dictionary confirms, but during the Grand Convention they actually disapproved resolutions that would have given them the power to print money. Other resolutions, however, that would have overtly prohibited the power to print money were equally voted down. They denied the states the power to emit Bills of Credit and to declare anything but silver and gold to be legal tender. Robert Natelson sums the situation up by stating: "Congressional power to 'coin money' and to 'regulate...foreign Coin' included money forged in any medium, not merely metallic coin – a point repeatedly affirmed during the ratification debates."<sup>14</sup>

Let's consider one final feature of economic freedom:

### **Free Markets.**

"The Constitution created the largest contiguous area of free trade in the world."<sup>15</sup> Until the first Congress met, we might add.

While the Founders knew the value of economic liberty, they had differing views as to the role of government in achieving it. The contrasting views were no better exemplified than in Thomas Jefferson and Alexander Hamilton. Jefferson as Washington's Secretary of State, and Hamilton, as Secretary of the Treasury, found themselves on opposite sides of the issue of whether the government should interfere in the economy.

"A wise and frugal Government," said Jefferson, "which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement."<sup>16</sup>

Hamilton argued that: "True liberty, by protecting the exertions of talent and industry, tends more powerfully than any other cause to augment the mass of national wealth,"<sup>17</sup> but the

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<sup>13</sup> Letter to Dr. Josephus B. Stuart, May 10, 1817.

<sup>14</sup> Robert Natelson, *The Original Constitution, What It Actually Said and Meant*, 3<sup>rd</sup> Edition, 2014, p. 112.

<sup>15</sup> Forrest McDonald, *The Founding Fathers and the Economic Order*, found at:

<http://oll.libertyfund.org/pages/forrest-mcdonald-the-founding-fathers-and-the-economic-order>

<sup>16</sup> Thomas Jefferson, First Inaugural Address, 1801.

<sup>17</sup> Defense of the Funding System," July 1795.

means to that liberty, in Hamilton's mind, was a strong central government acting in the interests of commerce and industry.

Hamilton won.

After independence, while under the Articles of Confederation, states had often imposed tariffs on each other's goods, disrupting the already fragile wartime economy further and eventually causing creation of the Constitution's Commerce Clause. "Regulating Commerce" gave Congress considerable power, and they used it right off the block. "The federal government would exercise functions the colonists had conceded to London. The states would retain those functions the founders had claimed for the colonial assemblies."<sup>18</sup> "Duties, Imposts and Excises" were soon imposed, while being careful to observe the Constitution's requirement that they be "uniform throughout the United States."<sup>19</sup>

The Tariff Act of 1789 imposed rates on different goods ranging from 5% to 50%. This "temporary" tax did what it was intended to do. The United States collected 80 to 95% of its revenue from foreign imports. Few complained.

While the United States has never enjoyed a completely free market, the economy was markedly less regulated during the Founding Period than today. Today, while we tout our economy as based on free-market capitalism, the truth reveals a highly regulated economy with few differences from those of European socialist countries. (By the way, the entrance of Socialist Senator Bernie Sanders into the 2016 presidential race has brought a much-needed conversation on socialism to the forefront.)

Richard Williams, writing in the *The Fiscal Times*,<sup>20</sup> argues we have neither capitalism nor socialism in the United States today but rather "regulism." "Regulism is characterized not by the state owning firms but rather by the state making all of the key decisions for firms. The most obvious example includes firms that have been designated by regulators as "too big to fail." "In an economy that is based primarily on capitalism, when firms close, it's because they aren't efficient, they don't keep costs under control or they fail to meet the needs of customers. But in an economy characterized by regulism, with the government making the key decisions, it's just as likely caused by government decisions as by poor business practices... In socialism, when firms fail, everyone knows it's the government's fault because they run the business. In an economy run by regulators, no one ever knows if it's the government's fault. As

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<sup>18</sup> Natelson, p. 112.

<sup>19</sup> Article 1, Section 8, Clause 1.

<sup>20</sup> Found at: <http://www.thefiscaltimes.com/2015/10/15/Capitalism-vs-Socialism-Why-Both-Clinton-and-Sanders-Are-Wrong>

long as government regulators escape scrutiny for their bad performance, they can continue to drive the economy into the ground with no one being the wiser.”

In “[Over-regulated America - The home of laissez-faire is being suffocated by excessive and badly written regulation](#),” Forbes staff writers argue that “America needs a smarter approach to regulation.”<sup>21</sup> Over the last eight years, the U.S. has fallen from the 6th freest economy in the world to 11th place.<sup>22</sup> Forbes writer Bill Frezza estimates the annual cost of regulation in the U.S. to be about \$1.8 Trillion. “Any regulation that is expected to cost over \$100 million is supposed to get a cost-benefit analysis. Obama added \$20 billion in new regulatory costs just last year. Every year there are over 3,500 new rules that come out of the federal government. ... [H]ow many rules got a cost-benefit analysis last year? Fourteen!”<sup>23</sup>

How did we reach this over-regulated state? I lay the blame at the feet of Congress, exacerbated by the Supreme Court’s sanction of Congress’ delegation of legislative power.<sup>24</sup>

For our first 100+ years Americans enjoyed the greatest amount of economic freedom of any nation on earth. It was never truly a free market, but the closest thing to it. Abundant resources, the avoidance of crippling wars, and a people intent on using the talents God had given them, lead us to rise to the pinnacle of world power and prestige. Today, however, the federal government smothers business large and small in needless and costly regulations, takes a large portion of our economic property in taxes to re-distribute to others, imposes onerous environmental regulations on our property, saddles succeeding generations with unimaginable debt, and wastes [\\$25 Billion](#) annually on frivolous projects (see: [Solyndra](#)). Unless we recapture the spirit of economic freedom in this country, and address our other defects, I fear America is headed for a fall of Biblical proportions.

We will be discussing this topic on “We the People, The Constitution Matters” on WFYL radio Friday morning, 26 February, 7-8am. You can “Listen Live” at [www.1180wfyl.com](http://www.1180wfyl.com), or, if you are fortunate enough to live in the station’s broadcast area, on the radio as you drive to work that morning.

You can later download the podcast of the show and listen at your leisure, or you can listen to one of the rebroadcasts during the weekend. I would love to hear your ideas on this topic. Hope you’ll join us.

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<sup>21</sup> <http://www.economist.com/node/21547789>

<sup>22</sup> <http://www.cnsnews.com/commentary/anthony-b-kim/us-falls-sixth-freest-economy-world-eleventh-obama-took-office>

<sup>23</sup> <http://www.forbes.com/sites/billfrezza/2014/05/02/how-to-ease-the-crushing-costs-of-federal-regulations/#4eea68744d75>

<sup>24</sup> *Mistretta v. United States* :: 488 U.S. 361 (1989)

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