

THE CONSTITUTION AND ECONOMIC LIBERTY

JAMES W. ELY JR.*

Does the Constitution simply establish a framework for the resolution of political disputes? Is the Constitution neutral with respect to political economy? Justice Oliver Wendell Holmes famously suggested as much in his *Lochner* dissent. “[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*,” he declared. “It is made for people of fundamentally differing views”¹ Filled with quotable quips, the Holmes dissent frequently is invoked by scholars as though it contained Delphic wisdom.² Nonetheless, the dissent has its flaws, and, like the answers of the legendary oracle at Delphi, the opinion is maddeningly ambiguous.

The central premise—that the Constitution does not endorse any particular economic theory—seems clear and warrants exploration. In common with other remarks in the *Lochner* dissent, this point is more asserted than demonstrated.³ There is a

* Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, Vanderbilt University. Professor Ely would like to thank Mark Brandon, Robert K. Faulkner, and Brian Fitzpatrick for their helpful comments.

1. *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting); see also DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 36 (2011) (explaining that, in *Lochner*, “Holmes put forth the idea that the Constitution is, and was meant to be, neutral between individualist and collectivist economic and social systems”).

2. See DAVID N. MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* 4 (2011) (“Justice Holmes’s dissent has been accepted unquestioningly by historians and constitutional scholars.”).

3. For example, Holmes’s cavalier suggestion that the majority opinion in *Lochner* was grounded in the concept of Social Darwinism has come under withering criticism. See, e.g., HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937*, 99 (1991) (“But the influence of Social Darwinism was much less than we have been led to believe. There is painfully little evidence that any members of the Supreme Court were Social Darwinists or for that matter even Darwinian.”); see also David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 *GEO. L.J.* 1, 7–9 (2003) (noting a lack of evidence that Social Darwinism had a meaningful impact on legal discourse).

threshold question: Is Holmes referring to the U.S. Constitution or to a theory of what constitutions should contain? Constitutions can serve different purposes.⁴ Moreover, Holmes curiously framed the debate by setting up polar opposites,⁵ which arguably is a false dichotomy. In fact, the United States never has pursued a strict laissez-faire policy; even when Holmes wrote, lawmakers were enacting a host of economic regulations.⁶ The vast majority of these regulatory measures either passed judicial muster or were never challenged.⁷ The reference to “paternalism and the organic relation of the citizen to the State,”⁸ although somewhat opaque, likely points toward the attacks on individualism and claims of economic rights that characterized the Progressive era.⁹ Of course, Holmes could be partly correct and partly wrong. That the Constitution affirms neither paternalism nor laissez faire does not establish the broader proposition that the Constitution has no relevance for economic policy.

Holmes was strongly committed to a majoritarian philosophy that entailed deference to legislative decisions.¹⁰ In 1900, he insisted, “But wise or not, the proximate test of a good government is that the dominant power has its way.”¹¹ It follows that Holmes was dubious about claims of constitutional rights.¹² In 1910, he revealingly observed, “I am so sceptical as to our knowledge about the goodness or badness of laws that I have no practical criticism except what the crowd

4. See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 216 (2004) (contrasting preservative and transformative functions served by constitutions).

5. See *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).

6. MAYER, *supra* note 2, at 115 (dismissing as a myth the notion that the Supreme Court adhered to a laissez-faire philosophy and pointing out that the Court upheld many economic regulations during the *Lochner* era).

7. *Id.*

8. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

9. See generally James W. Ely Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. & POL’Y (forthcoming 2012).

10. See G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 343 (1993) (“Since [Holmes] did not believe that law had much independent meaning apart from majoritarian social attitudes, he did not think it operated as a restraint on those attitudes. The idea of there existing constitutional obligations that restrained members of society across time was thus foreign to him.”).

11. OLIVER WENDELL HOLMES, *Montesquieu*, in *COLLECTED LEGAL PAPERS* 258 (1920).

12. See, e.g., ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 26–27 (2000); WHITE, *supra* note 10, at 328.

wants.”¹³ In *Lochner*, therefore, Holmes may well have been projecting his personal disbelief in constitutional constraints onto the Founders. Moreover, Holmes offered no factual evidence to support his pronouncements, which he apparently regarded as self-evident.¹⁴

Can we seriously believe that the Framers had no economic program in mind? It is hard to square Holmes’s agnostic position either with the expressed views of leading Framers or with provisions of the Constitution and the Bill of Rights. Indeed, the movement to establish a new government in 1787 was fueled in large part by the desire for a central authority capable of protecting private property, encouraging trade, restoring public credit, and defending American interests abroad.¹⁵ According to one scholar, Alexander Hamilton and James Madison “agreed on the Constitution as necessary to provide the essential framework for commercial development through the creation of a national market, public credit, uniform currency, and the protection of contract.”¹⁶ In the words of two prominent historians, “Federalists proposed . . . to place the new land in the mainstream of acquisitive capitalism.”¹⁷

A brief review of the historical record may shed light on the intended relationship between the Constitution and economic policy at the formation of the new republic. The tenets of constitutional thought in the late eighteenth century should be considered first. John Locke and the Whig emphasis on the rights of property owners profoundly influenced the founding

13. Letter from Oliver Wendell Holmes to Frederick Pollock (Apr. 23, 1910), in *HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932*, at 163 (Mark DeWolfe Howe ed., 1941).

14. Cf. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 19 (1995) (noting Holmes’s “disdain for facts (he made a point of never reading newspapers), his contempt for views divergent from his own, his indifference to citing legal precedent, his reliance on quips, and his allegiance to elite attitudes”).

15. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 463–66 (1969).

16. ISAAC KRAMNICK, *REPUBLICANISM AND BOURGEOIS RADICALISM: POLITICAL IDEOLOGY IN LATE EIGHTEENTH-CENTURY ENGLAND AND AMERICA* 287 (1998).

17. KERMIT L. HALL & PETER KARSTEN, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 72 (2d ed. 2009).

generation.¹⁸ “In the eighteenth-century pantheon of British liberty,” John Phillip Reid observed, “there was no right more changeless and timeless than the right to property.”¹⁹ This sentiment was reflected in a number of the early state constitutions, which employed Lockean language and explicitly linked individual liberty with the right to private property.²⁰ The 1776 Virginia Declaration of Rights, for example, proclaimed: “[A]ll men are by nature equally free and independent, and have certain inherent rights . . . namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”²¹ Delegates to the 1787 convention repeatedly echoed the Lockean principle that the security of property was a primary goal of society.²² As Stuart Bruchey argued, “[p]erhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights.”²³ Given the pervasive influence of Locke upon the founding generation, it seems fair to conclude that the Framers envisioned a constitutional order grounded in protection of private property and individual rights.²⁴

One may doubt that the Framers were solely guided by constitutional theory. They were, after all, practical men seasoned

18. See PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 87 (1997) (“By the late eighteenth century, ‘Lockean’ ideas on government and revolution were accepted everywhere in America; they seemed, in fact, a statement of principles built into English constitutional tradition.”); see also Edward J. Erler, *The Great Fence to Liberty: The Right to Property in the American Founding*, in *LIBERTY, PROPERTY AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION* 50–57 (Ellen Frankel Paul & Howard Dickman eds., 1989) (discussing the significance of Locke in the founding period).

19. JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 27 (1986).

20. See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 191–92 (Rita Kimber & Robert Kimber trans., expanded ed. 2001) (“The first state constitutions . . . clearly emphasized the individual’s claim to legal protection of his property.”).

21. Virginia Declaration of Rights § 1 (1776).

22. JAMES W. ELY JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 42–43 (3d ed. 2008).

23. Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 *WIS. L. REV.* 1135, 1136 (1980).

24. See Ellen Frankel Paul, *Freedom of Contract and the “Political Economy” of Lochner v. New York*, 1 *N.Y.U. J.L. & LIBERTY* 515, 529–38 (2005) (“The founding, it would be fair to say, was a ‘Lockean moment.’”).

by political and military experience. Economic developments in the late colonial period undermined the older system of mercantilism, with its focus on price controls, public markets, and regulations on the export of staple crops.²⁵ Instead, the colonists gravitated toward a free market economy based on private contracting.²⁶ Willard Hurst explained, “[f]rom the country’s national beginnings and well into the twentieth century the market captured people’s imagination, energy, and ambition to an extent and with a sustained hold unmatched by any other institution.”²⁷ Likewise, William E. Nelson asserted that, as early as the 1640s, in Virginia “the hallmark doctrine of market capitalism, that individuals should be free to enter into contracts which courts would then enforce, was firmly in place.”²⁸ In this regard it is significant that land and inheritance laws were revamped to promote freedom of alienation.²⁹ By the late eighteenth century, land was increasingly seen as a market commodity, and interest in land speculation was widespread.³⁰ Leading members of the Constitutional Convention, such as George Washington and James Wilson, were actively involved in speculative land ventures.³¹ The Framers were familiar with these steps toward a market economy and almost certainly approved of them. In fact, protection of property ownership and contractual stability were seen as the keys to economic prosper-

25. See James W. Ely Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 673, 674–87 (2008).

26. See *id.* at 678–79; see also JOHN LAURITZ LARSON, *THE MARKET REVOLUTION IN AMERICA: LIBERTY, AMBITION, AND THE ECLIPSE OF THE COMMON GOOD* 5 (2010) (“Long before Adam Smith codified the principles of liberal political economy in *The Wealth of Nations* (1776), many Americans—not just merchants but also urban shopkeepers, market farmers, small backcountry planters, and certain skilled artisans—had begun to experience aspects of modern ‘liberalism.’”).

27. JAMES WILLARD HURST, *LAW AND MARKETS IN UNITED STATES HISTORY: DIFFERENT MODES OF BARGAINING AMONG INTERESTS* 10 (1982).

28. William E. Nelson, *Authority and the Rule of Law in Early Virginia*, 29 OHIO N.U. L. REV. 305, 360 (2003).

29. See Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 387 (2006) (“Americans from the founding era forward . . . viewed the greater circulation of land in America as the basis of a new political ideal—republicanism—that offered more opportunity for political participation than existed in European society.”).

30. See Ely, *supra* note 25, at 688–92.

31. See *id.* at 692.

ity.³² This utilitarian embrace of market principles reinforced the philosophical commitment that private property was the basis for self-government and liberty. As Hurst observed, “those who framed and adopted the Constitution accepted the private market as a central institution in the social order—so central that, without substantial controversy, they wove provisions affecting its care into the structure of government.”³³

Not surprisingly, many provisions of the Constitution and Bill of Rights pertain to property interests and economic activity. Alarmed about the debt relief measures states enacted during the post-Revolutionary era, the Constitution contained a number of provisions to restrict state autonomy. Foremost among these were the ban on making anything but gold and silver coin legal tender and the clause forbidding the States from impairing the obligation of contracts.³⁴ It bears emphasis that the Framers saw contractual rights as sufficiently vital to warrant a specific ban on state impairment.³⁵ The Bill of Rights, of course, added guarantees of individual rights, including due process protection for liberty and property, as well as a requirement that compensation be paid when private property was taken for public use.³⁶ It is hard to quarrel with the conclusions of Charles A. Beard, once the enfant terrible of the historical profession, who observed in 1913:

The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities.

32. See CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 74–75 (1996) (noting that Marshall was convinced “that strong constitutional protection for property and investment capital would promote national prosperity”).

33. HURST, *supra* note 27, at 12.

34. See U.S. CONST. art. I, § 10; see also Paul, *supra* note 24, at 535 (describing “prohibitions on certain state actions” in the Constitution).

35. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 537 (1989) (“This was the Federalist effort to link the eighteenth century’s affirmation of individual liberty with the rhetoric of contract and private property. Thus, the Federalists valued market ‘freedom’ so highly that they forbade the states from ‘impairing the obligation of Contract’ in the original 1787 Constitution, at a time when they believed an elaborate Bill of Rights unnecessary.”).

36. See U.S. CONST. amend. V.

The major portion of the members of the Convention are on record as recognizing the claim of property to a special and defensive position in the Constitution.³⁷

Even a cursory glance at the Constitution drafting process lends support to Beard and leaves one to ponder what Holmes was thinking. Clearly, the Founders intended the Constitution to secure property and contractual rights, and to that extent embodied an economic policy that government was not free to abridge.

Even if Holmes badly overstated the neutrality of the Constitution with respect to economic matters, his assertion that the Constitution embraces neither paternalism nor laissez faire remains to be considered. Holmes is correct that the Constitution neither mandates a policy of paternalism nor endorses the modern welfare state. To be sure, some scholars have labored to find communitarian values implicit in the Constitution at the time of the Founding.³⁸ This explains the voguish interest in the problematic theory of civic republicanism. It has become an article of faith in some quarters that the doctrine of civic republicanism, with its emphasis on the subordination of private rights to public good, was influential to the founding generation.³⁹ This theory is not compelling. Critics charge that stu-

37. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 325 (new ed. 1998).

38. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 46–47 (1985); see also Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1540 (1988) (“One of the largest accomplishments of modern historical scholarship has been the illumination of the role of republican thought in the period before, during, and after the ratification of the American Constitution. It is no longer possible to see a Lockean consensus in the founding period . . .”); Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 *HARV. J.L. & PUB. POL’Y* 37, 37 (1990) (drawing upon the Thirteenth Amendment to argue that “a minimal entitlement to property is so important, so constitutive, and so essential for both individual and collective self-governance that to provide each citizen with that minimal amount of property, the government may legitimately redistribute property from other citizens who have far more than their minimal share”).

39. See, e.g., GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970*, at 29 (1997) (“The core of American republican thought during the eighteenth century was the idea that private ‘interests’ could and should be subordinated to the common welfare of the polity.”); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 506–52 (1975) (disputing the role of Locke in fashioning American values).

dents of civic republicanism are guilty of distorting history⁴⁰ and of fashioning a past that is serviceable for the statist goals of contemporary liberalism.⁴¹ Not only does the republicanism thesis contradict the emphasis on individualism that permeated the constitution-drafting process, but a redistributionist program would undermine the very economic rights that the Framers sought to safeguard.⁴²

The relationship between the Constitution and *laissez faire* is more difficult to unpack. Leading members of the founding generation were aware of the work of Adam Smith, notably his 1776 work *The Wealth of Nations*.⁴³ James Madison, Alexander Hamilton, and James Wilson were familiar with and influenced by Smith's views.⁴⁴ Yet Smith was not cited at the Constitutional Convention and was rarely mentioned during the ratification debates.⁴⁵ Although this does not rule out Smith's possible indirect influence at the Convention, such influence would be hard to chart. In addition, *The Wealth of Nations* covered many topics, and one cannot assume it was read primarily for its *laissez-faire* outlook.⁴⁶

As we have seen, free market principles were gaining ground in the late eighteenth century. There were, however, remnants of the older mercantilist scheme still in place, and some price regu-

40. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 567–79 (1995); see also Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 31–38 (1992) (probing notions of republicanism, finding that the concept has been applied for many diverse purposes and become distended, and concluding that it rests upon malleable and contested terms).

41. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 160 (1996) (“[L]iberal law professors marketed republicanism as a theory that could solve the counter-majoritarian difficulty, revive Warren Court liberalism, provide progressives with even more than they had received from the Warren Court, and had the Founders’ imprimatur.”).

42. See LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 117–122 (2003) (discussing the conflict between redistributive transfers of property through taxation and welfare payments and the protective functions associated with individual property rights).

43. See JAMES L. HUSTON, *SECURING THE FRUITS OF LABOR: THE AMERICAN CONCEPT OF WEALTH DISTRIBUTION, 1775–1900*, at 69–75 (1990) (discussing the “common analysis” between Smith and revolutionary leaders in America).

44. See Samuel Fleischacker, *Adam Smith’s Reception Among the American Founders, 1776–1790*, 59 WM. & MARY Q., 3D, 897, 901 (2002).

45. See Iain McLean & Scot M. Peterson, *Adam Smith at the Constitutional Convention*, 56 LOY. L. REV. 95, 96 (2010).

46. See Fleischacker, *supra* note 44, at 915.

lations persisted. Because the Constitution left significant authority to control public health and safety with the States, it seems unlikely that the Framers envisioned an entirely unregulated economy. Moreover, key Framers favored a legislative program to promote economic growth. Alexander Hamilton, described by a recent biographer as the “chief agent of a market economy,”⁴⁷ urged an ambitious plan of improved credit, protective tariffs, subsidies, and a national bank.⁴⁸ It is true that Hamilton believed “human enterprize ought, doubtless, to be left free in the main, not fettered by too much regulation”⁴⁹ But he was no champion of a hands-off economic policy.⁵⁰ Not everyone shared Hamilton’s views, but from the outset of the new republic both Congress and the States sought to foster enterprise. The record does not establish that the Framers necessarily expected the Constitution to institute a *laissez-faire* regime.

In short, the Holmes dissent in *Lochner* offers a misleading account of the relationship between the Constitution and the political economy. Even if the Constitution does not endorse particular economic theories, it assigns a high value to property and contractual rights.⁵¹ The Framers anticipated a substantially free market resting on private property. As Jennifer Nedelsky pointed out, “the idea that property and contract could define the legitimate scope of governmental power was a basic component of constitutionalism from 1787 to 1937.”⁵² Holmes lost track of this insight. In *Lochner* he better predicted future constitutional developments than interpreted the original Constitution. Although Holmes anticipated the advent of New Deal jurisprudence,⁵³ he did not accurately present the views of the Framers.

47. RON CHERNOW, *ALEXANDER HAMILTON* 345 (2004).

48. See PETER MCNAMARA, *POLITICAL ECONOMY AND STATESMANSHIP: SMITH, HAMILTON, AND THE FOUNDATION OF THE COMMERCIAL REPUBLIC* 128–39 (1998).

49. Alexander Hamilton, *The Examination No. 3* (Dec. 24, 1801), in 25 *THE PAPERS OF ALEXANDER HAMILTON* 467 (Harold C. Syrett ed., 1977).

50. See JOYCE APPLEBY, *THE RELENTLESS REVOLUTION: A HISTORY OF CAPITALISM* 174 (2010) (“Alexander Hamilton thought Adam Smith’s idea that an economy could regulate itself crazy.”).

51. See generally Paul, *supra* note 24, at 529–38.

52. JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 228 (1990).

53. The agnostic view of Holmes found clear expression in post-New Deal jurisprudence. See *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) (Black, J.) (“Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.”).