

ENLIGHTENMENT ECONOMICS AND THE FRAMING OF THE U.S. CONSTITUTION

RENÉE LETTOW LERNER*

Did the Framers have an economic theory in mind when they wrote and ratified the U.S. Constitution? Some say the principal Framers did not have a common, cohesive set of views on economics.¹ Others consider the question to be irrelevant. Society and constitutional interpretation have moved on, these commentators argue, so what the Framers thought or whether they embedded economic views in the Constitution has about as much relevance today as a typewriter. Another possible position is that the Framers might have had common understandings about economics but largely left them out of the Constitution, except in odd bits like the Contracts Clause or the Takings Clause.

The principal Framers did, in fact, share a basic set of economic views, though they did not agree on all economic questions. These economic views permeate the Constitution and are not manifest only in odd clauses. Many structural features of the Constitution are designed to further desirable economic ends, as the Framers envisioned them.

I. ECONOMIC PRINCIPLES OF THE ENLIGHTENMENT

What was the content of the Framers' economic beliefs, and where did those beliefs come from? These economic beliefs were shared throughout Europe in the late eighteenth century, although events in America helped to reinforce them.

Historians and students of philosophy have long explored the political thought of the Enlightenment: the contractual theories of Locke, the checks and balances of Montesquieu, and

* Associate Professor of Law, The George Washington University Law School. Bradford Clark, Craig Lerner, and Arthur Wilmarth gave helpful comments and suggestions.

1. *See, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 189–216 (1913) (describing the differing economic views of the Framers).

so forth. This political thought, however, went hand in hand with Enlightenment economic thought.

To understand the Enlightenment economic thought that the Framers shared with many in Europe, it is necessary to understand the workings of the old regime. Guilds, monopolies, and mercantilism characterized that regime. The guilds formed an elaborate regulatory apparatus. To have a dress made in France, for example, one had to buy cloth from a draper, get accessories or ornaments from the mercer, and bring it all to a tailor, who then set to work according to the rules established by his guild for cutting cloth.² The tailor was forbidden to stock or sell cloth.³ If these practices resemble union work rules today, that is not an accident. Governments sold monopolies, or patents as they were known, on the manufacture, exportation, or importation of coal, soap, starch, iron, leather, books, wine, and fruit—in short, on almost everything imaginable—to raise revenue.⁴ Colonial Americans resented English mercantilism in the form of the Navigation Acts, which required colonists to export certain goods only to England or its colonies and to conduct their trade entirely on English or colonial vessels.⁵

These old-regime economic ideas dominated thought and policy throughout Europe in the first half of the eighteenth century. Commerce was viewed as a “kind of warfare”;⁶ mercantilism was widespread. Gradually, in the second half of the eighteenth century, different economic ideas took hold. Thinkers praised free trade as leading to economic growth for all participants; trade was seen less and less as a zero-sum game. Rent-seeking (the transfer of wealth from producers to non-producers through political power) and monopolies came under increasing attack. Most prominent among Enlightenment economists was Adam Smith at the University of Edinburgh. Smith’s arguments in fa-

2. PHILIPPE PERROT, *FASHIONING THE BOURGEOISIE: A HISTORY OF CLOTHING IN THE NINETEENTH CENTURY* 36 (Richard Bienvenu trans., Princeton Univ. Press 1994) (1981) (describing ancient régime practices for the making and selling of clothing in the eighteenth century).

3. *Id.*

4. See P.J. Federico, *Origin and Early History of Patents*, 11 J. PAT. OFF. SOC’Y 292, 292–95 (1929).

5. See Second Navigation Act, 12 Car. 2, c. 18 (1663) (Eng.).

6. JOEL MOKYR, *THE ENLIGHTENED ECONOMY: AN ECONOMIC HISTORY OF BRITAIN 1700–1850*, at 64 (2009) (quoting Josiah Child, seventeenth-century mercantilist and economist).

vor of free trade are well-known. In *The Wealth of Nations*, published in 1776, he called monopolies the “great enemy of good management.”⁷ Other thinkers also praised free trade and condemned monopolies, even before publication of *The Wealth of Nations*. Montesquieu, in the first edition of *The Spirit of the Laws*, published in 1748, discussed how trade brought prosperity to all participants and declared: “The natural effect of commerce is to lead to peace.”⁸

In Britain, these ideas had political consequences. The old economic regime was passing away, despite the restrictions on the colonies. As historian Joel Mokyr puts it, Britain by the mid-eighteenth century had “free internal trade, weak guilds, a relatively effective fiscal system, and a state that was firmly committed to protection of property.”⁹ This relative economic freedom encouraged the gradual improvements in technology that drove the industrial revolution. In continental countries, the old economic regime lasted longer. France struggled free from it in a bloody revolution and aftermath from which it took decades to recover. Eventually, however, the countries of Western Europe instituted Enlightenment economic principles to one degree or another and experienced their own industrial and agricultural revolutions accordingly.

II. ENLIGHTENMENT ECONOMICS AND THE U.S. CONSTITUTION

Fortunately for the new Republic, two of the most important Founders least affected by Adam Smith’s thought were not at the convention in Philadelphia. John Adams was a Malthusian pessimist,¹⁰ Thomas Jefferson an idealistic agrarian,¹¹ and both were busy in Europe during the summer of 1787. Benjamin Franklin, another agrarian, was at Philadelphia but in his dotage. At center stage in the Constitutional Convention were those who had studied *The Wealth of Nations* carefully and had

7. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 149 (Kathryn Sutherland ed., Oxford Univ. Press reissue 2008) (1776).

8. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 338 (Ann M. Cohler et al. eds., Cambridge Univ. Press 1989) (1748).

9. MOKYR, *supra* note 6, at 65.

10. See FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 99 (1985).

11. *Id.* at 106–108 (arguing that agrarian French physiocrats, including François Quesnay, significantly influenced both Jefferson and Franklin).

absorbed its principles. These delegates included James Madison and Alexander Hamilton.¹²

If the most important Framers in Philadelphia largely shared the economic views of prominent Enlightenment thinkers such as Adam Smith and Montesquieu, why do we see so few direct traces in the Constitution? To be sure, there are the Contracts Clause¹³ and the Takings Clause,¹⁴ evidence of the importance to the Framers of upholding contracts and protecting private property from government interference. Many of the broad principles of Enlightenment economics, however, such as promoting free trade and preventing monopolies and rent-seeking, would have been difficult to enact directly. One could imagine a variety of exceptions under different circumstances that would make it hard to draft a general rule. In the area of patents for intellectual property, the Framers actually sanctioned monopolies in the Constitution itself,¹⁵ though not without controversy. We therefore, for the most part, should not expect to find direct enactment of these ideas.

Nonetheless, the Framers crafted numerous parts of the Constitution to further these principles indirectly. I will discuss four of them here: (1) the Commerce Clause;¹⁶ (2) the interstate and alien diversity clauses;¹⁷ (3) the elaborate procedures of bicameralism and presentment for enacting bills (and the provision allowing the Senate to amend financial bills);¹⁸ and (4) the enumerated limitations on legislative power.¹⁹

The clause giving Congress the power to regulate interstate and foreign commerce was intended to prevent the States from restricting trade. This purpose can be difficult to remember in our post-New Deal era, when the clause is used to justify congressional regulation of almost every conceivable action, including the growing of marijuana for one's own consump-

12. *See id.* at 128; RON CHERNOW, *ALEXANDER HAMILTON* 347, 376–77 (2004); ROBERT ALLEN RUTLAND, *JAMES MADISON: THE FOUNDING FATHER* 54 (1987).

13. U.S. CONST. art. I, § 10, cl. 1.

14. U.S. CONST. amend. V.

15. U.S. CONST. art. I, § 8, cl. 8.

16. U.S. CONST. art. I, § 8, cl. 3.

17. U.S. CONST. art. III, § 2.

18. U.S. CONST. art. I, § 7.

19. *See* U.S. CONST. art. I, §§ 8–9.

tion.²⁰ Concern that the States would restrict trade was not merely hypothetical. The States were imposing tolls and tariffs on each other and attempting to do the same with foreign commerce, as well as creating monopolies that restricted trade.²¹

The case of *Gibbons v. Ogden*²² perfectly illustrates how the Commerce Clause was intended to operate. The state of New York, in unenlightened old-regime fashion, granted a monopoly on steamship travel in New York waters to two investors.²³ Congress had enacted its own, non-monopoly licensing scheme governing ships. The Supreme Court invalidated New York's monopoly, citing Congress's power under the Commerce Clause.²⁴ In one blow, the Court, applying the Commerce Clause, simultaneously struck down one of the most despised features of the old economic regime—the monopoly—and furthered one of the Enlightenment economists' chief goals: free trade.

The interstate and alien diversity clauses concerning federal jurisdiction in Article III also were based on a desire to increase trade. The Framers realized that trade could not flourish if out-of-state and foreign merchants suffered from bias against them in state courts. During the Virginia ratifying convention, in June 1788, James Madison argued in favor of federal diversity jurisdiction for this reason: "We well know, Sir, that foreigners cannot get justice done them in these [state] Courts, and this has prevented many wealthy Gentlemen from trading or residing among us."²⁵ The same difficulty applied to out-of-state merchants. To this day, a number of businesses fear bias in state courts, and make litigation and commercial decisions ac-

20. See *Gonzales v. Raich*, 545 U.S. 1, 28 (2005) (holding that under the Commerce Clause, Congress may regulate the growing of marijuana for the grower's consumption).

21. See MCDONALD, *supra* note 10, 102–106.

22. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

23. *Id.* at 2.

24. *Id.* at 186.

25. Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 38–39 n.187 (2009) (quoting 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1469 (John P. Kaminski & Gaspare J. Saladino eds., 1993)); see also Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1348 n.507 (1996) (noting Madison's support for diversity jurisdiction).

cordingly.²⁶ The continuing perception of bias in state courts suggests problems with many limitations on diversity jurisdiction, including the requirement of complete diversity.²⁷

The Framers also designed the legislative process to further commerce and to prevent rent-seeking indirectly. They viewed faction as one of the greatest dangers to a republic. Madison defined a faction in *Federalist* No. 10 as a “number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”²⁸ One form of faction is the modern, rent-seeking interest group. In *Federalist* No. 10, Madison confidently declared that factions would not easily be able to attain their ends under the Constitution because of the diversity of interests in a large republic.²⁹ He referred to the difficulty of a faction getting its program through “the national council.”³⁰ He and his fellow Framers had carefully designed the federal legislative process as a system of checks and balances to thwart faction. Through bicameralism and presentment, each chamber could check the other, and the President could check both.³¹ The Framers believed that this elaborate process would help to weed out faction-inspired measures that were rent-seeking.

26. See Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 104 (1980) (“Both survey groups have acknowledged that fear of local bias enters the calculus of decision in selecting a judicial forum.”); see also Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 408–409 (1992) (“The bases of client-related bias that defense counsel reported to be the most common were out-of-state status (50.7%) and business/corporation status (44.8%).”).

27. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); see also Tammy A. Sarver, *Resolution of Bias: Tort Diversity Cases in the United States Courts of Appeals*, 28 JUST. SYS. J. 183, 194 (2007) (“The finding that federal court judges do not tend to favor non-diverse (in-state) litigants over the diverse party suggests that the prerogative of invoking diversity jurisdiction goes a considerable way to eliminate the potential for state court bias, real or perceived.”).

28. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

29. See *id.* at 83–84; see also THE FEDERALIST NO. 51, *supra* note 28, at 323 (James Madison).

30. THE FEDERALIST NO. 16, *supra* note 28, at 115 (Alexander Hamilton).

31. See Michael Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 742 n.16 (1993) (citing 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 86 (1937) and JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 385–86 (1987 edition) (original year)).

The Framers also were alert to the dangers of “tacking.” Tacking is a procedure in which an unrelated measure is “tacked” to, for example, an appropriations bill to encourage legislators who would not otherwise vote for either measure to do so. Tacking can be a form of logrolling. The members of the Philadelphia convention discussed the problem of legislative tacking in detail at several different points.³² The convention concluded that the President’s veto and each chamber’s power to amend the other’s bills to strip out extraneous provisions were sufficient safeguards against tacking. This is why Article I, Section 7, which sets out the House’s power to originate bills for raising revenue, carefully preserves the Senate’s power to amend those bills.³³ This analysis has interesting implications for reconciliation procedure, earmarks, and other notable features of the legislative process today.

Finally, the Framers intended the enumerated powers of Congress to limit the subjects the national legislature could address. This limitation served not only to preserve powers in the States, but also to control the possibilities for national rent-seeking and congressional interference in the economy. An exchange between Nancy Pelosi and a CNSNews.com reporter in October 2009 illustrates the modern fate of the idea of enumerated powers in Congress:

CNSNews.com: “Madam Speaker, where specifically does the Constitution grant Congress the authority to enact an individual health insurance mandate?”

Mrs. Pelosi: “Are you serious? Are you serious?”

CNSNews.com: “Yes, yes I am.”³⁴

Mrs. Pelosi then shook her head before taking a question from another reporter.³⁵ Her press spokesman later clarified the Speaker’s meaning: “You can put this on the record. That is not

32. *Id.* at 746 n.33–34 (citing 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 233, 263, 273, 275–76, 545–46 (1966)).

33. U.S. CONST. art I, § 7. “[B]ut the Senate may propose or concur with Amendments as on other Bills.” *Id.*

34. Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi Says: “Are You Serious?”*, CNSNEWS.COM (Oct. 22, 2009), <http://www.cnsnews.com/node/55971>.

35. *Id.*

a serious question. That is not a serious question.”³⁶ There is a stylistic similarity between Mrs. Pelosi and her spokesman. Alas, terse repetitions do not substitute for reasoned debate about constitutionality of the sort that used to go on regularly in both chambers of Congress and that fill up pages of the old *Congressional Record*.³⁷

Legislators are not the only officials with a lax sense of their constitutional responsibilities. Recent presidents have failed to exercise their veto power as earlier ones did, instead contenting themselves with issuing signing statements that object to the constitutionality of particular provisions. Past presidents vetoed bills containing provisions they deemed unconstitutional, including, occasionally, bills they otherwise thought good policy. President Washington explained that his first veto was based on constitutional grounds³⁸ and his successors through Andrew Jackson similarly explained the vast majority of their vetoes.³⁹ In vetoing the Internal Improvements Bill in 1817, President Madison delivered a message that included the following:

I am not unaware of the great importance of roads and canals and the improved navigation of water courses, and that a power in the National Legislature to provide for them might be exercised with signal advantage to the general prosperity. But seeing that such a power is not expressly given by the Constitution, and believing that it can not be deduced from any part of it without an inadmissible latitude of construction and a reliance on insufficient precedents; believing also that the permanent success of the Constitution

36. *Id.*

37. On November 14, 2011, the U.S. Supreme Court granted certiorari to consider several questions relating to the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 109 (2010). See *Florida ex rel. Atty. Gen. v. HHS*, 648 F.3d 1235, 1241 (11th Cir. 2011) *cert. granted*, 11-393, 2011 WL 5515162 (U.S. Nov. 14, 2011) and *cert. granted*, 11-398, 2011 WL 5515164 (U.S. Nov. 14, 2011) and *cert. granted in part*, 11-400, 2011 WL 5515165 (U.S. Nov. 14, 2011). The Eleventh Circuit held that the Act’s individual mandate to buy health insurance was unconstitutional; the Sixth Circuit and the D.C. Circuit held that it was within Congress’s power under the Commerce Clause. See *id.*; see also *Seven-Sky v. Holder*, No. 11-5047, 2011 WL 5378319 (D.C. Cir. Nov. 8, 2011); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 534 (6th Cir. 2011).

38. See ROBERT SPITZER, *THE PRESIDENTIAL VETO* 27–28 (1988).

39. See EDWARD CAMPBELL MASON, *THE VETO POWER: ITS ORIGIN, DEVELOPMENT AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES* 129 (Albert Bushnell Hart ed., 1890).

depends on a definite partition of powers between the General and the State Governments, and that no adequate landmarks would be left by the constructive extension of the powers of Congress as proposed in the bill, I have no option but to withhold my signature from it.⁴⁰

There are recent glimmers that some citizens and officials are paying more attention to the enumerated powers set out in the Constitution. In each Congress since the 104th (January 1995 to January 1997), a bill known as the Enumerated Powers Act has been introduced in the House of Representatives. The bill would require that every bill specify the constitutional provision giving Congress the power to enact it.⁴¹ At the beginning of the 112th Congress, in January 2011, the House adopted a new part of a House Rule requiring the sponsor of a bill or resolution to submit a statement “citing as specifically as practicable the power or powers under the Constitution authorizing the enactment of that bill or joint resolution.”⁴² The new House leadership organized briefings for House staff and circulated a memo to members on how to comply with the new requirement.⁴³

If the enumerated powers set out in the Constitution are thought to be too restrictive, the proper solution is to amend the Constitution, not to distort certain provisions beyond recognition. Although amendments to the Constitution have become very rare, in earlier times—when judges and other officials and citizens took the language of the Constitution more seriously—amendments were more frequent.⁴⁴ They might be-

40. James Madison, Veto Message on the Internal Improvements Bill (Mar. 3, 1817) (transcript available at <http://millercenter.org/scripps/archives/speeches/detail/3630>).

41. See John Shadegg, *Enumerated Powers Act*, JOHN SHADEGG CONGRESS, <http://www.johnshadegg.com/issues/enumerated.aspx> (last visited Nov. 1, 2011). The Tea Party movement has been calling attention to this proposal. See, e.g., *HR 450 Enumerated Powers Act*, TEA PARTY NEWS WATCH (Nov. 8, 2009), <http://teapartynewswatch.com/hr-450-enumerated-powers-act/>. See The Enumerated Powers Act of 2011, H.R. 125, 112th Cong. (2011); see also 157 CONG. REC. 1, H37 (daily ed. Jan. 5, 2011). In January 2011, the House Judiciary Committee referred the most recent version of the Enumerated Powers Act to the Subcommittee on the Constitution. *H.R. 125: Enumerated Powers Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h112-125> (last visited Nov. 1, 2011).

42. H.R. Res. 5, 112th Cong. (2011) (enacted).

43. See Richard E. Cohen, *House GOP: Bills Will Have to Cite Constitution*, POLITICO (Dec. 20, 2010, 10:01 AM), <http://politico.com/news/stories/1210/46565.html>.

44. See Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 *PUBLICUS* 153, 162–68 (1987).

come so again. There is nothing radical about the idea of a constitutional amendment to give Congress the power to regulate environmental pollution, for example. Such an amendment might well garner the necessary political support to be ratified.

If constitutional language is not taken seriously and regularly amended, a dangerous vision of the Constitution arises: the constitutional text as a fossil, an outdated relic that must have life breathed into it by “creative” interpretations. This is the current notion of a “living Constitution.” This vision invites much mischief. Among other things, Congress sinks into sloppy practices leading to economic favoritism and massive intrusions into the economy, the President becomes a party to these practices and fails to protect the common good of the entire nation, and judges—particularly Supreme Court justices—alternately ignore their proper constitutional responsibilities and award enormous political power to themselves to act like unelected and unreviewable legislators. Of course the Constitution should be “living,” in the sense of having meaning relevant to current activities. Few would want an irrelevant Constitution. The question is “living” by what means?

The Framers designed the Constitution to further certain core principles of Enlightenment economic thought: protecting private property, enforcing contracts, preventing monopolies, and encouraging free trade among states and nations. In some clauses these principles are explicit.⁴⁵ In others, the Framers allocated powers and arranged procedures to further these principles indirectly. Interpreting these clauses according to their animating economic principles enriches our understanding of constitutional meaning and guards against judges’ fancies or political fads. Such interpretation might well be more practicable than some think and might have the added benefit of salutary economic effects. Just as deviation from this animating understanding occurred in different branches of government and the electorate over time, a return to this understanding might require broad encouragement. Support and, indeed, virtue among legislators, government officers, judges, and ultimately, voters are important to maintain the economic principles the Founders sought to encourage through the framing of the Constitution.

45. *E.g.*, U.S. CONST. amend. V (Takings Clause).