

THE POLITICAL ECONOMY OF THE ORIGINAL CONSTITUTION

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INTRODUCTION

There seems to be little dispute that the original Constitution of the United States—and by “original Constitution” I mean the document drafted in 1787 and ratified, along with its first Ten Amendments, in 1789 and 1791¹—was an economic document. It was a document containing provisions that addressed economic issues and reflected economic attitudes. But the original Constitution was by no means solely an economic document. This Article will argue that if one emphasizes the Constitution’s economic dimensions, one should approach it as a document reflecting attitudes toward *political* economy, that is, the relationship between political theory and economic activity.

This approach is distinct from another line of scholarship that has been concerned with “economic interpretations” of the Constitution. The other line of work, first made visible by Charles Beard’s *An Economic Interpretation of the Constitution*² and perpetuated by Beard’s critics,³ sought to identify the economic “interests” of the men who drafted the Constitution and to suggest

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1. The first ten amendments can fairly be considered part of the “original Constitution” because the addition of a “Bill of Rights,” identifying rights that individual citizens held against the newly created federal government, was proposed while the 1787 draft of the Constitution was sent to the states for ratification and was understood as part of the basis by which prospective opponents of the 1787 draft were persuaded to support it. See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 65–72 (2009).

2. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 16–18 (1913).

3. See, e.g., ROBERT E. BROWN, *CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF “AN ECONOMIC INTERPRETATION OF THE CONSTITUTION”* 3–6 (1956); FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 5–7 (1958).

that those individuals—Beard identified them as including shippers, manufacturers, and bankers—wanted a strong central government to further their interests.⁴ Beard's critics, by looking more closely at the backgrounds of the Framers, concluded that some of his characterizations were faulty. For example, although Beard claimed that groups whose economic interests centered on "personalty" favored the Constitution, in opposition to those whose interests centered on "realty," some of Beard's critics demonstrated that a majority of the Framers derived most of their income from real property holdings.⁵

The difficulties with economic interpretations of the Constitution are twofold. First, the approach, which rests on an "interest group" analysis of politics and economics fashionable for a time among twentieth-century historians, is anachronistic because it projects later conceptions of the organization of American political and economic life back on to the framing period. Most wealthy Americans of the framing era derived their incomes from a form of agricultural householding, which could involve extractive agriculture, land speculation, and domestic and international commerce.⁶ Agricultural households operated both as subsistence farming operations and as commercial enterprises, blurring the line between "personal" and "real" property ownership.⁷ Second, the approach tends to oversimplify. The mere fact that a supporter of the Constitution could be described as having a particular economic interest hardly proves that he supported the Constitution *because* of that interest. There are numerous reasons why late-eighteenth-century Americans might have supported or opposed a measure intended to transform the structure of American government. Economic interpretations of the Constitution, in the hands of some historians, become another way of demonstrating those historians' preference for ascribing weighty causal significance to economic motivations in historical actors.

4. See BEARD, *supra* note 2, at 101–102.

5. See, e.g., McDONALD, *supra* note 3, at 121–22.

6. For more detail on the ubiquity of agricultural housing in the framing era, see G. EDWARD WHITE, 1 LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 63–80 (forthcoming 2012).

7. For an illustration, see ROBERT D. MITCHELL, COMMERCIALISM AND FRONTIER: PERSPECTIVES ON THE EARLY SHENANDOAH VALLEY 8–9 (1977).

Thus, the central question is not whether the Constitution is susceptible of an economic interpretation. Rather, if one assumes that the original Constitution was in some respects an economic document, one must ask what sort of economic document it was. In other words, on what assumptions about economic activity was the Constitution based? And, what was the relation of those assumptions to broader assumptions about human behavior, human governance, and the course of human events that the Framers held? In short, how might one describe the political economy of the original Constitution?

I. THE “ECONOMIC” PROVISIONS OF THE ORIGINAL CONSTITUTION

A. *The Central Concerns of the Constitution’s Supporters*

The movement to alter the form of national government in the United States arose out of two sets of concerns that surfaced among creole elites⁸ between the mid-1770s and the mid-1780s as Americans fought the Revolutionary War and gained experience with state governments and the federal government of the Articles of Confederation.⁹ One set of concerns centered on the Articles of Confederation government’s dependence on the States.¹⁰ Although the Continental Congress directed and financed the Revolutionary War effort, it had been largely dependent on the States in doing so because the Articles government needed the support of nine states to exercise any of its

8. “Creole elites” refers to members of colonial British American families who had lived in America for two or three generations and who were educated and relatively affluent. See ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE* 642 (2005). Members of those families were the founders of the Continental Congress, the institution formed before independence as a clearing house for intercolonial grievances against British colonial administration. *Id.* The Continental Congress emerged as the source of the Declaration of Independence and the body that organized and financed the war effort. *Id.* As a unicameral legislature staffed by representatives from the States, it was the principal form of national government created by the Articles of Confederation. *Id.* It would also emerge, in the 1780s, as the locus of demands for reforming the Articles government that eventually produced the Philadelphia convention of 1787 at which the Constitution was drafted. *Id.*

9. See *id.* at 614.

10. JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 337–42 (1979).

principal powers.¹¹ Consequently, the Articles government never found an effective way to raise money throughout the War. It issued currency, but the currency rapidly depreciated.¹² It imposed war-related taxes on the States but had difficulty collecting.¹³ It relied on state militias to staff the Continental Army but had trouble keeping and paying its soldiers.¹⁴ It never was able fully to resolve the principal disputes regarding claims to western lands that had delayed ratification of the Articles until 1781, the year that the Revolutionary War ended.¹⁵ It was, in short, a weak body, which threatened to fragment further as America emerged as an independent nation.

The other set of concerns animating creole elites, who led the movement to reconsider the Articles form of government, arose out of the actions of state legislatures. The newly formed state governments quickly established state constitutions along the lines of republican theory, with most of their lawmaking power centered in legislatures rather than state executives or judges.¹⁶ The executive branch was associated with colonial governments and discredited monarchism, and the drafters of most state constitutions did not have a robust conception of judicial power.¹⁷ The newly composed state governments were premised on the theory of governance that members of state legislatures would be representatives of the people at large and be directly accountable to them.¹⁸ Some legislatures, most conspicuously Pennsylvania's, had no upper houses.¹⁹

From the point of view of those involved in the movement that led to the Philadelphia convention, what happened in state governments in the 1780s was predictable once one attended to some "truths" about human behavior. Factions, representing

11. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 6; see RAKOVE, *supra* note 10, at 337–42; MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1744–1781, at 179–80 (1940).

12. MIDDLEKAUFF, *supra* note 8, at 606.

13. *Id.* at 614.

14. *Id.* at 615.

15. *Id.* at 607–11, 624.

16. See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 449–50 (2d ed. 1998).

17. *Id.* at 445–50.

18. See RAKOVE, *supra* note 10, at 121–23.

19. See, e.g., PA. CONST. of 1776, § 2.

groups with particular political or economic interests, formed and sought to pass laws supporting their various agendas.²⁰ Demagogues emerged from state legislatures and the general population and sought to rouse masses of uneducated citizens in support of causes they advanced.²¹ Shays's Rebellion, in which a group of farmers in western Massachusetts physically closed the courts to prevent the execution of judgments for debts in late 1786 and early 1787, was seen by proponents of the Philadelphia convention as illustrating both factionalism and demagoguery.²² The farmers had become enraged by measures the Massachusetts legislature passed that—following the factional interests of eastern bankers and merchants—raised taxes and refused to make paper money legal tender for the payment of debts.²³ Demagogues in the western part of the state, where the measures were generally unpopular, stirred up farmers to prevent, through extra-legal means, the enforcement of laws perceived as adverse to their interests.²⁴ As James Madison suggested to Edmund Randolph and George Washington, while delegates to the Philadelphia convention prepared to convene in the spring of 1787, episodes such as Shays's Rebellion illustrated that much of state legislation was "vicious," consisting of "base and selfish measures, masked by pretexts of public good and apparent expediency," and promulgated by persons from motives of "ambition" and "personal interest."²⁵ Finally, Madison believed, the presence of factions within legislatures tended to produce measures that favored narrow self-interest of members of those factions rather than the interests of the public at large, and this undermined "the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights."²⁶

20. Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1763 (1996); see also *THE FEDERALIST NO. 10* (James Madison).

21. See WOOD, *supra* note 16, at 324–28.

22. See MIDDLEKAUFF, *supra* note 8, at 621.

23. *Id.*

24. *Id.*; WOOD, *supra* note 16, at 325.

25. The Madison quotes are from letters he wrote to Edmund Randolph on April 8, 1787 and to George Washington on April 16, 1787. See RAKOVE, *supra* note 10, at 392–93.

26. *Id.* at 393.

In addition, Madison told the delegates that state governments repeatedly supported their parochial interests in the years since independence at the expense of the Articles government.²⁷ He singled out the states' failure to respond to wartime requisitions made by the Continental Congress, their violations of treaties Congress had made with foreign governments, their interference with interstate commerce, their sometimes antagonistic posture to the commercial interests of one another, and the apparent lack of concern among some state legislatures for established rights of property and contract.²⁸

When Madison communicated those sentiments, members of the Philadelphia convention were ostensibly assembling only to consider strengthening the powers of the Articles government. But as the implications of Madison's comments became clear to other delegates in Philadelphia, it was apparent that he was not confining his list of the "Vices of the Political System of the United States" to the encroachment of the States on federal powers or the States' failure to support the Articles government.²⁹ Madison also was directing his fellow delegates' attention to some of the evils illustrated by Shays's Rebellion that were apparently inherent in unicameral republican governments.³⁰ Because the Articles government had a unicameral legislature,³¹ merely strengthening its powers would not address those evils: a more extensive restructuring of republican government in America was in order. When the delegates began to see the evils inherent in unicameral republican governments, they recognized that separating the powers of governmental institutions—a reform initially associated with unicameral state legislatures—could be applied to the Articles government as well.³² As it turned out, the Constitution of the United States was mainly about applying such reforms.

27. *See id.* at 392.

28. *Id.* at 391–94.

29. *Id.* at 392.

30. *See* WOOD, *supra* note 16, at 214–18.

31. ARTICLES OF CONFEDERATION of 1781, art. V.

32. A delegate from South Carolina, Pierce Butler, stated on May 30, 1787 that "he had opposed the grant of powers to Congress heretofore, because the whole power was vested in one body," but "[t]he proposed distribution of the powers with different bodies changed the case," a change that "would induce him to go great lengths." JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 73–74 (E. H. Scott ed., Chicago, Albert Scott & Co. 1893).

B. *The Reformist Provisions of the Constitution*

If one thinks of the Philadelphia delegates as being centrally occupied with two tasks—redesigning a federal government with separated powers whose branches would check one another, and strengthening the relationship of that government to the states—one can identify three sets of constitutional provisions that signaled the delegates’ attention to those tasks. Of those sets, two were economic in orientation, and this Article is centrally concerned with them.³³ The third set, however, might have served to most clearly define the Constitution of the United States as a novel, revolutionary document. It may be termed the “structural” set of provisions of the original Constitution: those in which a separation of powers model, with checks and balances, was imposed on the newly created federal government.

1. *Structural Provisions*

Among the structural provisions were: (1) the separation of Congress into two houses; (2) the apportioning of only one house on the basis of population; (3) the creation of a federal executive, to be popularly elected every four years and certified by designated electors; (4) the popular election of members of the House of Representatives, but the election of members of the Senate by state legislatures; and (5) the allocation of certain powers (such as being commander in chief of the armed forces; making treaties; and appointing ambassadors, Supreme Court justices, and other federal officials) to the President, but the allocation of other powers inextricably related to those executive powers (such as declaring war; funding military operations; ratifying treaties; and confirming the appointments of ambassadors, justices, and other officials) to other branches. Finally, another check on the activities of Congress, the Executive, and the States was introduced with the creation of a Supreme Court, with lifetime appointments, and the inclusion within that Court’s jurisdiction of a designated class of cases, including controversies between a state and citizens of another state, controversies between citizens of different states, and “all Cases, in Law and Equity, arising under this Constitution.”³⁴

33. See *infra* Part I.B.2.

34. U.S. CONST. art. III, § 2, cl. 1.

Collectively, the structural provisions made the American federal republic a unique political entity in the late eighteenth century and may be said to capture most vividly the Framers' belief that the only way to preserve an idealized form of republicanism—one in which the representatives of the people were guardians not only of private rights but also of the public good—was to impose structural checks on the conduct of the representatives. Limited terms of office, periodic accountability to the public officeholders represented, oversight of legislative or executive decisions by other branches, and the subjection of all governmental actors to the requirements of the federal Constitution were the Framers' remedies against factionalism, corruption, and tyranny.

2. "Economic" Provisions

The structural checks of the Constitution are its most famous, particularly when judicial review is superimposed upon them. But Madison's critique of the American political system at the Philadelphia convention was not limited to the abuses of unicameralism. He also suggested that States had not cooperated with the federal government or with one another and that on occasion their decisions had posed threats to rights of property or contract.³⁵ Madison intimated that those "vices" were endemic to humans charged with governance if their tendencies toward factionalism, parochialism, self-interest, and demagoguery were not checked.³⁶

a. "Private Rights" Provisions

The economic sets of provisions in the Constitution can be viewed with Madison's critique in mind. The first set of those provisions were the "private rights" provisions that sought to restrain the States, and, in some instances, the federal government, from unduly interfering with rights of property or contract. The private rights provisions were mostly placed in Arti-

35. See RAKOVE, *supra* note 10, at 392.

36. For a fuller discussion of Madison's assumptions about human nature and political economy, see DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 136–42 (1980). See also DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 172–73 (1989).

cle I, Section 10, which was concerned with imposing constitutional restraints on state activity. Article I, Section 10 includes both the Contracts Clause, prohibiting states from “impairing the Obligation of Contracts,” and a provision forbidding enactment of an “ex post facto Law.”³⁷ The latter might seem to apply only to criminal legislation, and the Supreme Court declared as much in a 1798 opinion.³⁸ But at the time of the Framing “ex post facto” legislation was understood as any retroactive undoing of previously created rights or obligations,³⁹ and its prohibition was intimately related to the rule that Joseph Story later would characterize as a “great and fundamental principle of a republican government,” that a legislature could not take property from *A* and give it to *B*.⁴⁰

The next private rights provisions appeared in Article I, Section 2 and Article I, Section 9. They both pertained to the right to hold persons in a permanent condition of servitude or slavery. Article I, Section 2 merely acknowledged that the condition existed, listing, in the categories of persons in a state’s population that should be counted (or excluded) in determining that state’s tax requirements and congressional representation, “free Persons,” “those bound to Service for a Term of Years,” “Indians not taxed,” and “three fifths of all other Persons.”⁴¹ The only other “persons” then present in the American population were slaves. Article I, Section 9 continued this euphemistic description of slavery, preventing Congress from prohibiting “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit” before 1808.⁴² The clear message of those sections was that property rights in slaves were acknowledged, Congress had no power to abolish slavery, and trade in slaves to the United States would be protected through 1807.

37. U.S. CONST. art. I, § 10, cl. 1.

38. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 394 (1798). For a fuller discussion of the ambiguous understanding of ex post facto laws in the framing period, see WILLIS P. WHICHARD, JUSTICE JAMES IREDELL 131–33 (2000).

39. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 485–86, 496–97 (Cambridge, Brown, Shattuck, & Co. 1833) (suggesting that “[t]he terms, *ex post facto* laws” encompasses civil as well as criminal legislation).

40. *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657–58 (1829). A prohibition on ex post facto laws was also imposed on the federal government in U.S. CONST. art. I, § 9, cl. 3.

41. U.S. CONST. art. I, § 2, cl. 3.

42. U.S. CONST. art. I, § 9, cl. 1.

The remaining private rights provisions came in the Fifth Amendment, which stated that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”⁴³ Although the Court would later interpret “liberty” and “property” in the Due Process Clauses as imposing significant restraints on the power of legislatures to regulate economic activity or redistribute economic benefits,⁴⁴ the Fifth Amendment’s Due Process Clause was not drafted against a tradition of substantial federal government economic regulation.⁴⁵ Several states included clauses in their constitutions affirming the fundamental status of a right to acquire and possess property, and five state constitutions provided that “no person could be ‘deprived of his life, liberty, or property but by the law of the land.’”⁴⁶ The Framers of the Fifth Amendment, however, may have thought of its Due Process Clause in a more specific context. Its placement in an amendment whose other provisions created procedural safeguards for persons accused of crimes suggests that its Framers might have been primarily concerned with the federal government’s arbitrary seizure of the property of such persons.

The Fifth Amendment’s Compensation Clause was probably the outgrowth of a different set of expectations. The experience of eighteenth-century Americans with government seizure of property for “public uses” had been relatively extensive. Colonial towns initially treated land as communally owned, and many took unimproved land for public roadways without compensating the owners.⁴⁷ By the Revolution, a consciousness of the importance of private property had emerged, and in the late 1770s and early 1780s many states adopted provisions requiring the payment of compensation when the state appropriated property through eminent domain powers.⁴⁸ During the

43. U.S. CONST. amend. V.

44. See generally Glen O. Robinson, *Evolving Conceptions of ‘Property’ and ‘Liberty’ in Due Process Jurisprudence*, in LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL 63 (Ellen Frankel Paul & Howard Dickinson eds., 1989).

45. See *id.* at 72–73.

46. JAMES W. ELY JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 30 (3d ed., 2008).

47. *Id.* at 11–12, 24.

48. *Id.* at 23–24.

Revolutionary War, however, the federal government regularly destroyed or seized private property, citing military necessity, and state courts did not require compensation.⁴⁹ In addition, several states confiscated the property of loyalists by designating them traitors or through escheat legislation directed at enemy aliens.⁵⁰ The wartime experience might have contributed to the insertion of a “just compensation” requirement in the Fifth Amendment.

The economic provisions of the Constitution dealing with private rights against the state suggest that insecurity about the sanctity of private property in the face of unicameral legislatures with redistributive tendencies was one of the important factors contributing to the Philadelphia convention.⁵¹ Accompanying that insecurity was a concern that the parochial self-interestedness of states would pose a threat to the effectiveness of any federal government.⁵² That concern is reflected in another set of economic provisions inserted in the original Constitution, namely those directed at restraining the potential influence of the States on fiscal policy and commerce crossing state or national lines. I refer to those provisions as the “federalism” provisions.

b. “Federalism” Provisions

The economic provisions of the original Constitution concerned with federalism can be extracted by considering Article I, Section 8, which lists the affirmative powers of Congress, alongside Article 1, Section 10, which identifies the powers that States are prohibited from exercising. Taken together, the provisions in those two Sections reflect the Framers’ unhappy experience with public finance during the Revolutionary War and its aftermath when the Continental Congress found itself frustrated by the States’ disinclination to participate in fiscal policies that they did not perceive to be in their interest.⁵³

First on the list of Congress’s enumerated economic powers in Article I, Section 8 were the powers “To lay and collect

49. See, e.g., *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 362–63 (1788).

50. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 991 (1997).

51. See ELY, *supra* note 46, at 41–58.

52. See RAKOVE, *supra* note 10, at 392–93.

53. *Id.* at 337–42.

Taxes, Duties, Imposts and Excises” and to “pay the Debts and provide for the common Defence and general Welfare of the United States”⁵⁴ The Continental Congress’s efforts to raise revenue by taxing imported or exported goods or otherwise securing revenue from the States that could be applied to the war effort and the repayment of foreign debts had been consistently rebuffed by states during the war and beyond.⁵⁵ Under the Articles government, establishing impost duties on foreign goods required consent by a high percentage of the states, which left Congress at the mercy of the states.⁵⁶ Congress’s position was weakened by having to ask the states to be the principal collectors of impost duties and by having to agree to have duties imposed on exports so as to provide Congress with security to attract foreign loans.⁵⁷ Article I, Section 8 made it clear that Congress no longer required the consent of the states to impose taxes, duties, impost, and excises, and that it would be the collection agency for those revenues. To make doubly sure, Article I, Section 10 prohibited the States, absent the consent of Congress, from laying any impost or duties on imports or exports, except “what may be absolutely necessary for executing . . . inspection laws,” and in that instance “the net Produce of all Duties and Imposts, laid by any State . . . shall be for the Use of the Treasury of the United States”⁵⁸

The next set of congressional powers listed in Article I, Section 8 had to do with coining money, issuing bills of credit, and establishing standards for legal tender. Here again the Continental Congress had had trouble with the States during the period of the Articles government. Under the Articles of Confederation, Congress had no power to levy taxes without the States’ consent, so it chose to finance the Revolutionary War by issuing federal bills of credit.⁵⁹ Those deteriorated in value throughout the war until finally Congress asked the States to levy war taxes of their own and remit the income to the federal

54. U.S. CONST. art. I, § 8, cl. 1.

55. See RAKOVE, *supra* note 10, at 340–42.

56. See *id.* at 337–42.

57. See *id.* at 283, 340–42; WOOD, *supra* note 1, at 15–20.

58. U.S. CONST. art. I, § 10, cl. 2.

59. See Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL’Y 1017, 1048–50 (2008).

treasury.⁶⁰ Congress even attempted to get the States to impose price regulations.⁶¹ Even though the States made some efforts to levy and collect taxes and eventually paid the salaries of military officers, federal currency deteriorated to the point where Congress had to stop issuing it.⁶² No systematic program in which the states helped raise revenue for Congress was initiated during the years of the Articles government.⁶³

The Framers of the Constitution were determined not to have any future federal government so dependent on the States for its public finance. Accordingly, Article I, Section 10 prohibited the States from coining money and issuing bills of credit. The States could not “make any Thing but gold and silver Coin a Tender in Payment of Debts”⁶⁴ Meanwhile Congress was given power, in Article I, Section 8, “[t]o borrow Money on the credit of the United States,” and to coin money and “regulate the Value thereof”⁶⁵ The Framers apparently hoped to create an economic culture in which the States would not compete with the federal government on currency issues.

The last of the original Constitution’s federalism economic provisions involved commerce.⁶⁶ Here again, the States had thwarted the goals of the Continental Congress. In 1783, Britain sought to gain a commercial advantage in the trans-Atlantic trade by limiting American products to Caribbean markets it controlled while continuing to make British products widely available to American markets, where a pent-up demand for British luxury goods had been released after the end of the war.⁶⁷ Congress hoped to retaliate against the British by limiting or imposing high duties on British imports, but it had no power to regulate interstate or foreign commerce.⁶⁸ In 1784, Congress drafted two resolutions authorizing it to regulate the importation of goods in ships of foreign nations that had not concluded commercial treaties with the United States, which

60. See RAKOVE, *supra* note 10, at 282–83.

61. See Natelson, *supra* note 59, at 1049.

62. RAKOVE, *supra* note 10, at 275.

63. For more detail on the Continental Congress’s difficulties in raising revenue during and after the conclusion of the Revolutionary War, see *id.* at 295–96.

64. U.S. CONST. art. I, § 10, cl. 1.

65. U.S. CONST. art. I, § 10, cl. 1.

66. See U.S. Const. art. I, § 8, cl. 3.

67. RAKOVE, *supra* note 10, at 345–46.

68. *Id.*

included Britain and France, and to prevent foreign subjects engaged in commercial trade with the United States from importing goods other than from their own countries.⁶⁹ The resolutions did not affect American commerce; they were designed to give the United States better leverage in negotiating commercial treaties with European nations.⁷⁰

The resolutions were not formally submitted to the States in 1784, and, encouraged by American merchants eager to import British goods, sentiment mounted in Congress for an extensive reconsideration of foreign commerce, which was increasingly perceived as dominated by British merchants. A committee was formed in Congress that eventually produced a report, made available in 1785, recommending that the Articles of Confederation be amended to allow Congress to regulate foreign and interstate commerce.⁷¹

The recommendation never reached the States. It met objections within the Continental Congress on two grounds.⁷² First, representatives of southern states believed that federal regulation of foreign commerce would work to the advantage of northern merchants, who controlled most of the trans-Atlantic shipping trade. They feared that the majority of northern states in Congress would work to obtain lower prices for southern exports to facilitate trade and would be indifferent to the prospect of higher prices for European imports to the south, which had become heavily dependent on them.⁷³ Second, some members of Congress, from both northern and southern states, believed that congressional power to regulate commerce would be a step toward aggrandizing the general powers of the federal government under the Articles, which was undesirable.⁷⁴ The episode illustrated that members of the Continental Congress saw themselves primarily as representatives of their states.

69. See 26 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 317-22 (Gaillard Hunt ed., 1928) [hereinafter 26 JOURNALS].

70. See RAKOVE, *supra* note 10, at 345-46. See also 26 JOURNALS, *supra* note 69, at 319-21.

71. See 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 201-05 (John C. Fitzpatrick ed., 1933).

72. See generally RAKOVE, *supra* note 10, at 346-47 (relying on correspondence in 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 182-83, 218-21 (Edmund C. Burnett ed., 1936)).

73. See *id.*

74. See *id.*

In addition to the apparent threats to private property posed by faction-ridden unicameral state legislatures, delegates to the Philadelphia convention expressed concern that the inability of the Articles government to regulate foreign commerce had put it at a considerable disadvantage in foreign policy. Even though Great Britain had been defeated in the Revolutionary War, the British maintained frontier posts west of the Appalachians, and Spain, which owned the Louisiana Territory, had closed the lower Mississippi River to American navigation in 1785.⁷⁵ The United States seemed at a considerable disadvantage in the negotiation of treaties with foreign nations because of the ability of states to affect the treaty making process. Some delegates argued that the United States would never secure the respect of the international community nor be able to defend its territory from prospective European invaders if it could not negotiate treaties with one voice.⁷⁶

Thus, Article I, Section 8 of the Constitution gave the newly created federal government the power to “regulate Commerce with foreign nations” It added that Congress would have the power to regulate commerce “among the several States”⁷⁷ In contrast to the treatment of taxation and currency issues, Article I, Section 10 contained no complementary provisions limiting the States’ domestic commerce powers, although it did prevent States from entering into “any Agreement or Compact . . . with a foreign Power” without the consent of Congress.⁷⁸ The Framers were fully aware that the States consistently regulated domestic commerce within their borders and would doubtless continue to do so, although the Framers might not have anticipated that intrastate and interstate commerce would become swiftly entangled in the late-eighteenth- and early-nineteenth-century American economy.

75. *See id.*

76. *See generally id.*, at 342–44; FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 3–12, 49–51 (1973).

77. U.S. CONST. art. I, § 8, cl. 3.

78. U.S. CONST. art. I, § 10, cl. 3.

II. THE POLITICAL ECONOMY OF THE ORIGINAL CONSTITUTION

A. *The Framers' Starting Assumptions About Human Economic Activity*

Identifying the economic provisions of the original Constitution has given us an opportunity to explore their political context. This Article now moves to another level of abstraction, the set of starting assumptions about human economic activity that helped form that political context. A sense of those starting assumptions can be gleaned from some of the “long train of abuses and usurpations” associated with “[t]he history of the present king of Great Britain” in the Declaration of Independence.⁷⁹ The King’s “repeated injuries,” the authors of the Declaration wrote, had “a design to reduce [the American colonies] under absolute Despotism,” and the “direct object” of “the establishment of an absolute Tyranny” over them.⁸⁰ Included in the injuries and usurpations were some economic grievances.

1. *The Economic Grievances of the Declaration of Independence*

a. *Vassalage to Great Britain*

The King had “endeavored to prevent the population”⁸¹ of the American colonies. The colonies relied on immigrants from Europe, who were vital to the labor force that colonial residents regarded as necessary to the profitable cultivation and development of “new . . . Lands”⁸² the authors considered unsettled.⁸³ He also had “obstruct[ed] the laws for Naturalization of Foreigners,” had “refus[ed] to pass others to encourage their

79. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

80. *Id.*

81. *Id.* at para. 9.

82. *Id.*

83. By “unsettled land,” those who supported independence meant land once occupied but vacated by Amerindian tribes or land that was not being used by tribal populations in ways consistent with European conceptions of ownership of real property. See FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 58–60 (combined and unabridged Volumes I and II, 1995), summarizing the prevailing late eighteenth-century attitudes of Americans of European descent toward Amerindian land use and ownership.

migrations hither,” and had “rais[ed] the conditions of new Appropriations of Lands.”⁸⁴ Those policies seemed designed to maintain the American colonies in a state of vassalage to Great Britain by depriving them of an adequate supply of labor.

b. Corrupting the Judiciary

The King had “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”⁸⁵ That grievance was a reaction to Parliament’s 1773 decision to pay the salaries of judges in Massachusetts not from appropriations by the legislature but from customs revenues.⁸⁶ In the colonies, judges served at the king’s pleasure; receiving their salaries from a source other than the people entirely removed them from the people’s control.⁸⁷ The authors of the Declaration interpreted that action as a conscious effort to make the colonial judiciary agents of the Crown and Parliament, to whom judges would now owe their salaries as well as their offices. This sort of judicial patronage could be expected to result in officials of the empire influencing the decisions of colonial judges, which would foster “Despotism” and “Tyranny” over the colonies.⁸⁸

c. Establishing Corrupt Colonial Officials

The King had “erected a multitude of New Offices and sent swarms of Officers to harrass our people, and eat out their substance.”⁸⁹ This grievance had an overt political dimension: It expressed the resentment at the presence of additional colonial bureaucrats who might “harrass” Americans in the conduct of their lives. But the conjunction of “harrass our people” with “eat out their substance” suggested a more specific, if less overt, concern. “[E]at out their substance” referred to the tendency of government officials to seek to line their pockets, in this instance by imposing revenue-raising regulations such as taxes and customs duties on economic activity. It was a common practice in the late

84. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

85. *Id.* at para. 11.

86. See HERBERT FRIEDENWALD, *THE DECLARATION OF INDEPENDENCE: AN INTERPRETATION AND AN ANALYSIS* 233–37 (1904).

87. *Id.*

88. THE DECLARATION OF INDEPENDENCE para. 2. (U.S. 1776).

89. *Id.* at para. 12.

eighteenth century for collectors of duties or customs to be paid a percentage of the amounts they collected. When Parliament passed the Stamp Act of 1765, which was highly unpopular and generally resisted in the colonies, the first step in the administration of the act was to hire stamp tax collectors.⁹⁰

d. Undermining American Trade and Taxation Without Representation

In addition, the King formulated two specific economic policies that offended the Declaration's authors: "giving his Assent to [Parliament's] Acts of pretended Legislation," for "cutting off our Trade with all parts of the world,"⁹¹ and for "imposing Taxes on us without our Consent."⁹² Those policies struck directly at the economic interests of Americans, the first by depriving them of markets on which a significant percentage of the American population was dependent; and the second by cutting into the profits Americans might make from their businesses by requiring them to pay taxes to which they had not consented. Once again despotism and tyranny could be associated with the policies. Forbidding American traders from competing with their English counterparts was a form of economic despotism, and government without the consent of the governed was a favorite practice of tyrants.

2. Economic Grievances as Evidence of Despotism and Tyranny

The authors of the Declaration of Independence evidently assumed that by listing the various actions with which they had identified the "present king of Great Britain," they would make self-evident his ambition to reduce the American colonies to an "absolute Despotism" characterized by "the establishment of an absolute Tyranny."⁹³ Their belief that their contemporaries would see the goals of despotism and tyranny behind the King's actions rested on connections they made among economic activity, human nature, and the tendencies of officeholders.

90. Cf. PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 41 (Edmund S. Morgan ed., 1959) (setting out Stamp Act provision for implementation of Act).

91. THE DECLARATION OF INDEPENDENCE para. 15, cl. 2 (U.S. 1776).

92. *Id.* at para. 15, cl. 3.

93. *Id.* at para. 2.

The policies affecting emigration of Europeans to the American colonies, the naturalization of foreigners in America, the “conditions of new Appropriations” of American lands, and the cutting off of American trade with the rest of the world were reactions one would expect from a government that recognized its colonies as potential economic competitors. It was natural to assume that governments, like individuals, would pursue their economic self-interest. If the British government believed that it was in its interest to have its colonies economically dependent on it rather than competitive with it, its policies toward the colonies would reflect that belief. The policies were despotic: Americans were being taxed and having their trade restricted to increase the revenue base and market share of Great Britain. Economic despotism, however, was what one expected self-interested officeholders to favor. Thus, the British policies not only *were* despotic (“let Facts be submitted to a candid world,” the Declaration’s authors wrote),⁹⁴ they *could be expected to be* despotic, because the natural tendency of unchecked officeholders was toward despotism.

The Framers also expected their contemporaries to draw predictable inferences from the policies that made judges dependent on the will and purse of the Crown and imposed taxes on the colonies even though they were not represented in Parliament. When one officeholder had the power to appoint another and was responsible for setting and paying that other’s salary, the latter officeholder would be dependent on the former, and, human nature being what it was, that dependence would yield subservience and, if unchecked, tyranny. And when a government could impose rules on its citizens without those citizens being consulted, let alone consenting, that government was acting in a tyrannical fashion. The contemporaries of the Declaration’s authors understood the tyrants to be holding and wielding power in a culture of dependence: Their actions could not be checked by persons affected by them. The absence of checks on governing officials led to tyranny because the inherent tendencies of humans wielding unchecked power were toward arbitrariness and self-aggrandizement.

At this point, it is clear how a generation of Americans who started with the “facts” of economic policies they resented, and

94. *Id.*

made certain assumptions about the behavior of the officials formulating and implementing those policies, could believe that their only remedy was to disengage themselves from the British empire and the monarchical parliamentary system of government it represented. Once they became convinced that the imperial interests of Great Britain would come into conflict with the interests of the American colonies, it was a short step to conclude that the colonial policies of the king and Parliament were designed to achieve despotic rule over Americans, who would eventually be subjected to tyrannical rule. Because it was in the nature of human officeholders to promote their ideological and pecuniary self-interest, officeholders unchecked by the citizenry would tend inevitably toward corruption (the improper mixing of pecuniary self-interest with policymaking), luxury (devotion to private gain and the privileges that came with it), and tyranny (arbitrary, self-interested decisionmaking). Given that the interests of imperial Britain and its American colonies could be in conflict, and that the citizens of the colonies were not even represented in the British government, what was there to check this tendency toward despotism in the imperial government of America?

B. Starting Assumptions and Remedies

1. Republican Government

The only remedy was disengagement from the empire, accompanied by the abandonment of a monarchical government in America. At this point some of the economic “facts” the Declaration’s authors submitted to a candid world had been translated, through the filter of the behavioral assumptions described above, into a theory of political economy. The Framers planned to create a government in America whose founding principles and institutional organization would be designed to prevent the abuses that had surfaced in the British imperial government. It would be a government erected on the same assumptions about the behavior of human officeholders that fueled the prediction that imperial governance of the American colonies would eventually take the form of despotism and tyranny. The government would be designed to prevent those developments from occurring in America.

The American government would be republican, not monarchical. Sovereignty would rest in the people, not in kings. The

hierarchies of royal patronage that fostered dependence, which allowed tyranny to surface, would be eliminated. When the American colonies became states, all vestiges of royal authority—governors, vice-Admiralty courts, and the oversight of colonial legislatures by the king’s Privy Council—would be eliminated. The American states would be governed by state legislatures whose delegates represented the people at large. The powers of the Articles of Confederation government would be strictly limited to prevent that government from exercising despotic power.

The original conception of republican government in America thus assumed that the political solution to the evils that had surfaced in the British imperial government was to eliminate monarchy, locate sovereignty in the people, and assure that the people were represented in the bodies that governed them. By eradicating royal authority and patronage, and by ensuring that those who made policies were accountable to the citizenry at large, republican theorists believed that the culture of dependence and unchecked office-holding, in which despotism and tyranny could so easily flourish, could be stifled in America.

2. *Separation of Powers as a Check on Factionalism and Demagoguery*

One decade after independence, delegates to the Philadelphia convention had come to believe that the initial version of American republican government had not fully addressed two of the endemic problems of governance. They reasoned as follows: By eliminating not only monarchy but also its trappings in the form of executive officials, and by gathering all governing powers in the legislature, the first generation of republican theorists took too sanguine a view of the relationship between the people and their legislative representatives. The theorists failed to consider that a legislative body might develop its own version of patronage, where factions within a legislature, united by their common agendas, grouped together to advance policies that favored their pecuniary interests and those of constituents with influence. And the theorists failed to consider the capacity of legislators to act as demagogues, who threatened the sanctity of private property by making appeals to the passions of members of the public who sometimes lacked the ability to separate reason from emotion. Both the events in the Massachusetts legislature that precipitated Shays’s Rebellion

and the rebellion itself had illustrated the risks of factionalism and demagoguery in a republican political order.

3. *Fostering Virtue*

As the Framers of the Constitution moved in the direction of imposing separation of powers limitations on republican forms of government and federal limitations on the power of the States in the American union, they were motivated by one additional assumption relating to the political economy of governance in a republic. This assumption was the necessity of fostering “virtue” as an antidote to self-interestedness and the evils that flowed from it. Virtue, as the founding generation understood the concept, meant a combination of civic responsibility and disinterestedness.⁹⁵ It was the antithesis of seeking office for private gain or power. Virtuous behavior amounted to a code of conduct in which one signaled that his public activities were motivated by fidelity to the principles of republican government rather than self-aggrandizement. George Washington’s decision to retire from the presidency after two terms, even though there was no constitutional limitation on his term of office, is an example of this ideal. It was deemed a repudiation of partisan politics and of any attempt to equate the tenure of the President of the United States with that of a king.⁹⁶

The goal of instilling virtue in a class of republican political officeholders was advanced by the checks on officeholders established in the original Constitution. In addition to the periodic accountability of members of Congress to the public, the ability of each branch of the federal government to check one another and the limited number of enumerated federal powers, there were the specific limitations imposed on the States—in the form of the Contract and Compensation Clauses—to prevent potential threats to private property that might be the result of demagoguery. Those limitations on the ability of officeholders to pursue their self-interest might—when combined

95. The classic formulation of the American framers’ conception of virtue appears in J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 579 (1975). See also G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE 1815–1835*, at 48–49 & nn. 95–96 (abridged 1991).

96. See, e.g. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 516–18 (1993) (discussing the contemporary reaction to Washington’s retirement).

with adherence to a code of virtuous behavior—result in public officeholders who are genuinely interested in furthering the public good rather than private self-interest.

Although tying the concept of virtue to the central behavioral assumptions driving republican political economy is not difficult, the precise relationship of virtue to the pursuit of economic activity in the founding generation is less easily described. On one hand, the ideal of virtue was intended as a counterweight to self-interestedness and the accompanying tendencies to pursue private gain and luxury. On the other hand, the founding generation recognized that it was easier for Americans to enter public life and remain indifferent to its self-aggrandizing dimensions if they were financially independent.⁹⁷ In an age in which social standing was equated with wealth as well as with family honor and reputation, republicans hoped that wealthy elites would enter public life in part because the elites might be freer of its corrupting tendencies. Thus, the concept of virtue could presuppose the economic independence from which its codes of disinterestedness could more easily emanate. For most of the creole elites who participated in the revolution and the framing of the Constitution, that economic independence was achieved through an individual's or a family member's vigorous pursuit of economic gain, which made the ideal of virtue the culmination of successful economic activity.⁹⁸

III. CONCLUSIONS AND CONSEQUENCES

In sum, the economic provisions of the original Constitution need to be folded into the dominant theories of political economy that undergirded American constitutional republicanism of the founding generation. All of the provisions discussed in this Article can be seen as the product of attitudes toward the behavior of human officeholders and their constituents regarding economic issues. The political economy of the Constitution was designed to limit what were perceived as the inherent ten-

97. WOOD, *supra* note 1, at 230–34.

98. The tension between the ideal of virtue and the pursuit of economic activity can be seen in the attitudes of Alexander Hamilton, James Madison, and Thomas Jefferson toward issues of governance and partisanship during the presidency of John Adams. For a succinct overview, see *id.* at 232–234.

dencies of human actors holding power toward economic self-aggrandizement, partisanship, factionalism, and, if unchecked, corruption, luxury, despotism, and tyranny. It was designed not only to place checks on the conduct of those actors, but also to encourage the pursuit of virtue among those who entered public life.

Nothing in the above analysis, however, suggests that the Framers of the original Constitution had any guiding definition of the relationship between government and market forces in the arena of economic activity. The attitudes described above are attitudes about the relationship of economic activity to the behavior of humans holding positions of public power, not attitudes toward the *form* economic activity might take. Occasionally, there are normative glimpses in individual provisions of the original Constitution: of the specter of state legislatures abrogating private contracts; of the federal government's or states' seizing of property without compensation; of the fact that numerous Americans had property in slaves. But it would be anachronistic to think of the original Constitution as embodying a "free market" approach to the regulation of economic activity. If anything, the document assumes—in its provisions protecting property rights from usurpation by state legislatures or Congress—a promotional or regulatory relationship between the state and markets. Such an assumption would be entirely consistent with the usual model of economic activity in late eighteenth century America, in which towns, colonies, and states distributed land grants, exercised eminent domain powers, granted exclusive franchises to promote the building of turnpikes and bridges, and created opportunities for public officeholders to attach private emoluments to their offices.⁹⁹

It would be misleading for us to project later models of economic regulation, the products of vastly expanded market activity and the extensive growth of a regulatory public sector, onto the framing period. The appropriate questions to ask about the role of economic activity in the original Constitution center on its

99. ELY, *supra* note 46, at 52–68, describes how the promotional or regulatory relationship between states and private entrepreneurs played out in the late eighteenth and early nineteenth centuries. See also Alfred S. Konefsky, *Simon Greenleaf, Boston Elites, and the Social Meaning and Construction of the Charles River Bridge Case*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ 165, 169–71 (Daniel W. Hamilton & Alfred L. Brophy eds., 2011).

connection to the theories of political economy on which the Constitution was founded. When those questions are explored, the economic dimensions of the original Constitution turn out to be centered on a set of late-eighteenth-century notions about the behavior of office-holders, extracted by the framing generation from their experiences with imperial rule and the initial American experiments in republican government. They turn out not to be precise guidelines about the relationship between free markets and their regulation, nor are they precise blueprints for twenty-first century constitutional interpreters. The original Constitution was an economic document in a distinctive, late-eighteenth-century sense of political economy.