

2017

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Recommended Citation

Lloyd, Gordon, "The Constitutional Case of the American Commercial Republic" (2017). Pepperdine University, *School of Public Policy Working Papers*. Paper 67.

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The Constitutional Case of the American Commercial Republic

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Introduction

What joins commerce or trade on the one side with the republic and the rule of law on the other side is the centrality of contracts and consent. People have been exchanging goods and services for centuries, but only when money replaces barter does money making, personal profit, and private property become defensible and commerce emerges as a way of life. Similarly, while the word “republic” has been around for centuries, only when placed in contrast to monarchy does the meaning become clear. By the 17th century, republicanism was seen as the alternative to monarchy or absolute rule by one person for his or her own private interest.

Plato observed that a commercial regime is a city fit for pigs in contrast to the best regime run by philosophers. Aristotle proclaims that the management of the household (*oikos-nomos*) is an inferior activity to the governing of the *polis* and that making money off of money is an unnatural act, whereas farming with an eye to self-sufficiency is praiseworthy. Working our way through Aquinas and beyond we can discuss such concepts as the just price, the just wage, as well as the deadly sins that emerge from devoting too much attention to the secular world. Such a study would reveal an important point: at some point the case had to be made in favor of a commercial republic.

The John Locke and Adam Smith Foundations

We begin our coverage with the late 17th century work of John Locke. Locke’s dominant theme is that improvement in the material condition of mankind is both possible and desirable. With the help of modern science, Locke presented a view of human progress and the transformation of nature that was unknown to the ancients.

He argued that this improvement could best be achieved by challenging the existing economic system of mercantilism and feudalism along with the notion that monarchs had that divine right to rule. Locke envisioned the essential unit of analysis to be the autonomous individual located in a state of nature free from social restraints and governmental regulations. For Locke, this fundamental natural position was one of abject poverty. Nevertheless, since God gave the world to man to enjoy and improve rather than to suffer and starve, those who are rational and industrious in taking care of themselves by plowing the land and investing in the useful arts and sciences are to be held in the highest esteem. Through the privatization of this common property, the general well-being is advanced. Accordingly, the acquisition of private property is natural rather than suspect as the ancients would claim or theft as Rousseau and Marx would assert. These are the roots of modern commerce.

Locke seriously undermined not only primogeniture in the economic world but also the divine right of kings in the political world. Legitimate government comes into existence by the consent of autonomous individuals who willingly surrender the right to adjudicate disputes and relinquish the power necessary and proper to make laws for the well-being of the community. Locke includes no idea that the rights of the people come from the government; rather, he sees the powers of the government as a conditional grant by the people. All the better, then, to separate the powers of government and limit the reach of government to specified objects. The people retain control over the vast areas of their life. And thus the modern republic is born.

Adam Smith also focused on improving the human condition by increasing the wealth of the nation. Poverty was to be solved by increasing production, which in turn depended on the productivity of labor, which was strongly influenced by the division or specialization of labor that depended, finally, on the extent of the market. Smith assumes that competition produces a fair outcome. But, according to Smith, human beings not only have a Lockean natural inclination to self-preservation; the butcher, the baker, and the brewer also have a natural inclination to “truck, barter, and exchange” beef, bread, and beer with other human beings. No “human wisdom” or governmental planning was needed to create this situation. In seeking the cooperation of others, we do not appeal to their generosity, “but to their self-love, and never talk to them of our own necessities but of their advantages. Nobody but a beggar chooses to depend chiefly upon the benevolence of his fellow-citizens.”

Locke and Smith wrote that the practical arts and sciences actually lead to the improvement of society and that there is a natural progress from a primitive agricultural community to a “civilized and thriving country.” In such a society, the government is not extensively involved in the day-to-day operations of production and the granting of special privileges to a few companies. This defense of an active market rather than an active government was called the system of *laissez faire* by John Stuart Mill in 1848 and the system of free enterprise by von Hayek in the 20th century. The presumption through the centuries is that individuals know what is best for themselves and that the market system works favorably. The defense through the centuries is that a concern with self-interest is not the same as personal greed or self-indulgence. A commercial society requires its inhabitants to learn the values of hard work, thrift, and moderation. On the other hand, there is a strong presumption from the Mercantilists through the Progressives that selfless administrators can be educated in how to determine the level and kind of production necessary for an efficiently run economy.

The Federalist and Our Commercial Republic

The authors of The Federalist Papers adapted Locke’s defense of private property and Smith’s model of the extended market to their vision of a commercial republic. The Federalists argued that the well-being of the nation depended on the presence of economic, political, and religious liberty. These

liberties, in turn, required the encouragement of a variety of opinions, passions, and interests, and *these*, in turn, depended on the encouragement of a commercial society across an extended territory. At the heart of Madison's defense of commerce are the benefits that come from genuine competition. It is through the competition of firms and industries for the consumer that economic liberty is secured. Similarly, the competition of the separate branches of government and different levels of a government, augmented by frequent and fair elections helps secure political freedom or "republican liberty." And linked to this is the notion that religious liberty is secured by the competition between a vast number and variety of religious sects. Competition, of course, is encouraged by the extent of the market.

The "oracle" Montesquieu, however, had argued that republics could only thrive in small and homogeneous communities where people knew each other and cared directly for the public things. To be sure, Montesquieu had supported federalism and the separation of powers, but he saw these republican institutions as auxiliaries to the success of a small and homogeneous society. The Federalist "corrected" Montesquieu by arguing that republican institutions will only be helpful over an extended territory with a variety of competing interests.

Madison put it this way in Federalist 51: "If all men were angels, no government would be necessary." Yet there is no temptation in Madison to transform men into angels or to eliminate the causes of faction. The rule of law is better than the rule of man. That is the key to the modern case for republicanism and thus involves commerce as a solution. One might add that the rule of markets—the rule of law of demand and supply—is better than the rule of men in the economic realm. Modern republicanism does not stress the pre-existence of a common good. Nor is it willing to rely simply on the voice of the people as the expression of a common good. Our commercial republicanism appeals to a Constitution.

Federalist 51 provides the institutional or constitutional framework for the operation of Federalist 10. The Federalists reject three previous modes of politics: absolute monarchy, direct democracy, and small scaled republicanism. Instead they defend the deliberate sense of the community. That is what Madison means by the rule of law rather than the rule of men. The latter was seen as the very essence of tyranny.

For the Progressives, however, this institutional framework was a mere façade for the rule of the upper over the lower class. The objective was to win the battle for democracy. Interestingly, one might have expected that Jefferson would have loomed large in the heroic figures of the Progressives. Yet, while Jefferson might have been a democrat, Progressives saw his understanding of democracy as underdeveloped. Namely, he put his emphasis on individual freedom and not social justice. Instead the Progressives looked to Hamilton, seeking to cure his views of an attachment to the upper class while retaining his loose interpretation of national powers.

Federalist 10 argues that the most common and durable source of faction is the property question. And that is what makes a conversation between the Founding and the Progressives possible. For Locke and Smith, private property is a legitimate reward for personal effort. It also leads to the improvement of the human condition. For Rousseau and Marx, private property is theft and the symbol of human alienation. Linked to the property question is what is the proper role of government? For Marx, all politics and government are about power and power ultimately is economic power, which, in turn, is about the few who own and the many who don't own property.

How Does the Constitution Ordain and Establish Our Commercial Republic?

According to the Framers, a republican form of government is one where a) a scheme of representation takes place in contrast to both a monarchy and a (pure) democracy; b) there is a separation of powers between the legislative and executive branches; c) the judicial branch is independent of the political branches; and d) the legislative branch is bicameral rather than unicameral. There is also e) a provision for frequent elections by the people with room for debate about the mode of election, the length of term of office, should the terms be staggered, and who can vote and who can run for office.

Article One, Section Six indicates that, "Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States." This underscores the commercial nature of the republic. The idea of paying someone to serve the public was certainly untraditional. But that is what the Framers proposed. Now that did not mean that the electorate and the elected were to be motivated simply by money; rather it meant that it is appropriate to pay someone for services rendered, and we can always refuse to hire them again. Besides, paying an elected official for their service certainly broadens the pool of who can be elected.

We pay the elected representatives of the three branches of government while providing safeguards against the corruption that goes along with money. (See Article II, Section 1; Article III, Section 1; and Amendment XXVII.) Article 1, Section 7 states that "all bills for raising revenue shall originate in the House of Representatives." And there are specific restrictions on Congress and the States with respect to granting "titles of nobility." There is no provision for primogeniture in the distribution of property and the divine right of kings in politics is replaced by the consent of the governed. We are a commercial republic.

Among the 18 clauses in Article One, Section 8 outlining the powers of Congress, the first eight and the 18th deal directly with a commercial society. The remaining powers focus on the common defense. Even here, the mores of a commercial society enter through the back door: no appropriation to raise and support armies "shall be for a longer term than two years."

There was close to unanimous agreement at the Constitutional Convention that Congressional action under the Articles of Confederation was impeded by the

unavailability of a regular source of funding and borrowing. Thus the delegates agreed to grant the power to tax and borrow to Congress under the new Constitution (see Article I, Section 8, clauses 1 and 2).

But what if Congress abuses this power? One answer is that the power is limited to support public policy that supports the general welfare and common defense. But what if these two clauses are used as invitations to expand the role of government rather than to limit the role of government? What policy can't be justified in the name of the general welfare or common defense? The Framers' answer is that ultimately the people themselves - initially through regular elections and ultimately through the amendment process - must express their "deliberate sense" on the issue. Whether one interprets these clauses loosely or strictly has had a huge impact on the kind of commercial society and republican government that has unfolded in the United States. For example, the New Deal and Great Society programs in the 20th century and Obamacare in the 21st century owe much to a broad constitutional interpretation of these clauses.

The most famous is Article 1, Section 8, clause three - known popularly as the interstate commerce clause. The clause granting Congress the power to "regulate commerce...among the several states" is vital to the creation and preservation of an interstate commercial republic over an extended territory. But what exactly does this clause mean and has its meaning changed over time? Is it possible to draw a clear line between intrastate and interstate commerce as the Supreme Court in the New Deal era attempted to do? What exactly constitutes commerce? Does Chief Justice John Marshall's decision in *McCulloch v Maryland* settle the issue for good? Again, the New Deal, the Great Society, and Obamacare programs relied on a very expansive rather than restrictive interpretation of the meaning of this clause.

Six of the eight restraints on Congress in Article 1, Section 9, and six of the sixteen restraints on the state governments in Article 1, Section 10 are directly or indirectly related to a commercial republic operating within a federal framework. For example, Congress is forbidden from laying "a tax or duty...on articles exported from any state," and Congress shall give no preference "by any regulation of commerce or revenue to the ports of one state over those of another." And the states are forbidden from coining money, emitting "bills of credit," or "impairing the obligation of contracts."

Constitutional Amendments and the Progressive Challenge

There are 27 amendments to the Constitution, 20 of which are the result of decisions made during the three main "eras" in American public policy: ten from the founding, three from the civil war era, and seven from the Progressive-New Deal era of the 20th century. Half of the founding amendments, 1/3 of the civil war amendments, and 4 out of 7 from the 20th century deal directly or indirectly with a commercial republic.

The important question is this: Do these 10 out of 27 Amendments reinforce the original design of a commercial republic or fundamentally change the commercial nature of the republic?

The most important founding-era amendment is the 5th Amendment, which states that no person shall “be deprived of life, liberty, and property, without due process of law; nor shall private property be taken for public use, without just compensation.” There are all sorts of questions that have emerged. What is private property? Do the rules of due process change over time? Who determines “just compensation?” And what burden of proof must the government meet to warrant the takings of private property “for public use.” Do the different claims of private property and public use actually put commerce and republicanism on a potential collision course? The important point is that this Amendment reinforces the attachment of the republic to a commercial society where a strong argument has to be made to take away private property and that such seizure must be done according to the rule of law.

One of the most controversial aspects of a commercial republic is the possibility that there may be no limits on what people can own and then trade. For example, is it consistent with the principles of a commercial republic that people can own other people and then buy and sell them on the open market? A strong argument can be made that free labor and slave labor are inconsistent with each other and one or the other mode must ultimately prevail; a commercial society and a feudal/slave society cannot subsist together. Suffice it to note that the 13th Amendment removes the tension by eliminating slavery from the United States.

The 44 words in Section One of the 18th Amendment are intended to introduce a remarkable change in our commercial republic. In popular terminology, this section prohibited and criminalized the purchase and consumption of alcoholic beverages. But there is a bit more nuance and ambiguity to this section.

We can collect the 44 words into five separate but related categories. 1) After one year from the ratification of this article 2) the manufacture, sale, or transportation of intoxicating liquors 3) within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof 4) for beverage purposes 5) is hereby prohibited.

Americans, for most of their history, accepted that the Constitution limited the reach of the federal government to few and defined objects leaving the rest of public policy to state and local governments or to the private commercial sector. An important feature in Section One of the 18th Amendment, therefore, is that it introduces the proposition that we as individual Americans are not free to engage in the commerce and the consumption etc., of certain beverages. Not having a drink is made the moral equivalent of not owning a person. And it is done in the name of republican and public virtue over against commercial and personal vice. And all done constitutionally. A politically decentralized and commercial nation overwhelmingly accepted the argument that drinking was a moral issue beyond the scope of the market and vital for the well-being of the republic.

But what was not anticipated was the endurance of entrepreneurial politics in American life. Section One does not even mention the words, “purchase,” “consumption,” and “alcohol.” What is there is the phrase “intoxicating liquors.” This leaves open to Congressional debate, the definition of “intoxicating liquors.” What about “sacramental wine,” and “medicinal alcohol?” Nor is anything said about prohibiting drinking when eating! This ambiguous language is not accidental; it reflects the persistence of entrepreneurial politics in America. The 21st Amendment that overturned the 18th Amendment confirmed that we are indeed a commercial (federal) republic.

The Progressives in the late 19th and early 20th century relied on the clauses of Article I, Section 8 to regulate the relationship between capital and labor and to support the development of labor union activity. The Progressives also provided a significant challenge to the traditional understanding of the role of government in a commercial republic. They introduced three new cabinet departments that were directly responsible for regulating the three sectors of the economy: the Agriculture Department, the Labor Department, and the Commerce Department. The roles of these departments have expanded over the last hundred years in an effort to control rather than to encourage the operation of a commercially based republic. And they succeeded in securing the passage of the 16th Amendment, which gave Congress the power “to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”

With the Progressives, equality replaces liberty as the central concern of both economics and politics. The role of the federal government is to regulate interstate commerce, thus the ICC and the emergence of the three new cabinet departments.

So the Progressives are against both the improved science of politics AND the extended commercial republic. They would rather have a parliamentary system governed by a centralized administration and a society that holds to the values of social justice or communal freedom than individual liberty that seems to reinforce the selfish side of human nature. Competition implies market failure whereas government intervention suggests government solution. And there is no sense saying that local government is better, because according to the Progressives, these social problems do not recognize state boundaries. Thus, in addition to the separation of powers and checks and balances, the Progressives have no affinity for federalism.

Coordination rather than competition leads to good outcomes and leadership is linked to the notion of knowledge. There is a Progressive inclination toward a body of knowledge that can be certified by an advanced degree somehow independent from special or personal interests. These public servants will seek the common good and since commerce and the common good do not go together, it is the job of government to reign in the self interested few who would shaft us unsuspecting and innocent many.