

# THE HERITAGE LECTURES

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The Constitution:  
200 Years Later  
Three Lectures

*By The Honorable William E. Simon  
The Honorable Donald P. Hodel  
The Honorable Philip M. Crane*



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**The Heritage Foundation**  
214 Massachusetts Avenue, N.E.  
Washington, D.C. 20002  
U.S.A.  
202/546-4400

# **THE CONSTITUTION: 200 YEARS LATER**

Three Lectures by

**The Honorable William E. Simon**  
Chairman, WSGP International, Inc.  
Trustee of The Heritage Foundation

**The Honorable Donald P. Hodel**  
U.S. Secretary of the Interior

**The Honorable Philip M. Crane**  
Member of Congress, Illinois

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## KEYNOTE ADDRESS

# WHY THE CONSTITUTION FOSTERS FREE ENTERPRISE AND ECONOMIC EFFICIENCY

by **The Honorable William E. Simon**

I appreciate the opportunity to participate with you and your distinguished guests in this most important anniversary for America by speaking on the Constitution and our free enterprise system.

In truth, I come before you with no particular pretense to scholarship or expertise in constitutional law. But I do bring one or two noteworthy qualifications.

The business of my life has been the production of wealth, wealth not just for Bill and Carol Simon's family, although I have been modestly successful at that, but wealth for the benefit of society as a whole. And I have stored up a wealth of experience, helping to shape the economic policy of our government and, through it, to influence economic conditions of the world.

During those years on Wall Street and at the Treasury, I gained a deep appreciation for the genius of the Constitution of the United States and for the men who crafted it in a time of turmoil, uncertainty, and national peril.

Think back two hundred years or so. How did the world look? The English philosopher Hobbes put it briskly and sharply: human beings could look forward to a life that was "solitary, poor, nasty, brutish and short."

Now that may sound like the title of a Washington, D.C., law firm, but it really describes the future as seen by one of the great intellects of that day.

**Revolutionary Entrepreneurs.** Then something extraordinary happened--something called America: enlightened entrepreneurs declaring revolution against the crown; a revolution giving birth to a nation founded on faith in God; a nation setting forth a philosophy limiting government and empowering people; a people uniting for the principle that we are born to be free, with equal opportunity to build and live a good and worthy life, and to leave a better life for our children.

Bill Bennett once said that the American revolution is the only revolution that did not disappoint its sons and daughters. And there is a good reason why that is true.

Jefferson and his compatriots were men of great vision; they could see to the farthest frontiers of freedom. But perhaps their greatest gift was the ability to translate a radical vision into a practical plan for government.

Their revolutionary idea was that governments exist to protect liberty. Governments do not bestow rights on their citizens. Human beings have certain rights, because they are human beings, because they are children of God. And governments exist to protect those rights--inalienable rights to life and liberty and the pursuit of happiness.

**Powerful Ideas.** Those astonishing words penned by Thomas Jefferson, perhaps even more than the muskets at Lexington and Concord, fired "the shot heard 'round the world."

The power of Jefferson's pen was reinforced by another revolutionary idea that stirred the soul of this young nation. While Jefferson was declaring that men are not created for tyranny, Adam Smith, in his remarkable *Wealth of Nations*, declared that men are not created for poverty.

Smith challenged the old idea that the wealth of nations is destined to decline or, at best, remain fixed forever. Wealth could be created, the standard of living could be raised--raised beyond even our wildest dreams--but this would require two fundamental changes in the way that we lived.

First, it would require unleashing human creativity; and second, it would require getting the state out of the way of the marketplace.

**Creative Capital.** When we speak of creativity, it is important to remember that Adam Smith was not an economist--no mean-spirited, squinty-eyed numbers cruncher was he. Smith was a moral philosopher and his definition of capital was broader than just money and natural resources. Smith understood that the most important capital is the capital that resides in the creativity and imaginations of human beings.

Resources plus imagination and creativity create wealth, according to Adam Smith. And that strikes me as a profoundly moral, even spiritual conviction.

God's command to Adam and Eve, that we be stewards of creation, did not mean just tilling the existing garden; it meant venturing out and creating new gardens. Human creativity is a spark struck from the fiery creativity of God himself.

**A Sacred Right.** But creativity cannot flourish in conditions of captivity. Smith's second point, getting the state out of the way of the marketplace, was eagerly embraced by the planters, the merchants, the entrepreneurs of that day--men like Washington, Adams, Jefferson, Hancock, and Dickinson--men who hungered to break free from England's grip of taxation without representation, rigid restrictions on trade, and prohibition of western land settlements.

What is more, Smith openly sided with the colonists. "To prohibit a great people from making all they can," he said, "or from employing their stock and industry in the way that they judge most advantageous is a violation against the most sacred right of mankind.

No wonder that John Hancock, under 500 indictments for smuggling, would sign his name on the Declaration in letters so large, even King George could read it without his spectacles.

And so they affirmed and fought for the universal principle that freedom, including the freedom to own property, is not just a right--not just a sacred right--but the indispensable starting point for public progress.

**Political and Economic Freedom Linked.** They understood that there is an inextricable link between political and economic freedom, that, in fact, they are indivisible, for if we permit our economic freedoms to disappear, our personal and political freedoms will also disappear.

But the triumph of independence ushered in a new crisis that threatened to overwhelm our young nation. The founding fathers soon learned that there is another, even faster way to eliminate freedom--and that is by debasing the currency, because inflation is such an insidious process, not one man in a million sees it while it is going on, but the consequences are devastating to all.

The idea that any country could fragment itself into 13 sovereign states, that it would hand over to each the power to mint its own currency, and to erect its own trade barriers, yet still remain one, united and free nation was a fantasy.

Looking out over the stormy sea of corrupted currencies and deepening debt, James Madison would write, "The loss which America has sustained since the peace from the pestilent effects of paper money on the necessary confidence between man and man, on the necessary confidence on the public councils, on the industry and morals of the people, and on the character of republican government, constitutes an enormous debt against the states."

Jefferson would say simply, "I place debt as the greatest of dangers to be feared."

**Blueprint for Freedom.** Madison, in his brilliance, grasped that the only hope for saving liberty, for saving America, was to create a republic that would be anchored in commerce--a republic that could, at once, unleash human creativity, while providing sufficient central authority to ensure the nation's economic and political security.

And so a Constitution was drafted and approved by the people--not some cockamamie scheme hatched by theorists and philosophers, but a blueprint for a future of freedom holding out the hope of happiness and real prosperity for all.

John Chamberlain, in his seminal book *The Roots of Capitalism*, noted three specific ways in which the Constitution and Bill of Rights support a free enterprise economy:

The states were forbidden to place obstacles in the way of interstate commerce. The national government was given responsibility for creating a uniform national currency. And, in the Fifth Amendment, the framers affirmed the vital importance of private property ownership when they declared that "no 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."

To those major provisions we may add the uniformity of duties throughout the nation; the uniformity of bankruptcy laws; the protection of patents and copyrights; the prohibition of state interference with the obligation of contracts; and the guarantee to each state of a republican form of government.

**Vivid Contrast.** What a magnificent creation; magnificent in 1787, and just as magnificent in 1987, when our Constitution is compared to those Soviet bloc and Third World documents, whose declarations of high-sounding ideals contrast so vividly with the privation and hopelessness of their people.

What is the proof? Jack Paar put it flippantly, but accurately, "Immigration is the sincerest form of flattery."

Yet, today, so many intellectuals who thrive on envy, who resent that others have influence and can make choices about their lives, and who go to great lengths to undermine freedom, cannot answer themselves the most basic, core questions which define America:

What was it in the Constitution that, from our earliest days, persuaded people in distant lands--soon, by the millions--to uproot their families and to risk their lives to reach these shores?

What was it that enabled this system to clothe, to house and to feed our people more effectively, and more abundantly, than any other system in the world?

What was it that made America a glorious success story?

Some say it was our land or resources, but the Soviet Union has more land and greater resources than we do, yet that system depends upon us to provide the food and products it needs.

Others say it was the quality of our people, but blessed as we are with one of the largest, most talented populations on earth, the Chinese are five times more numerous, their civilization was developed far in advance of ours, but their standard of living lags light years behind.

No, ladies and gentlemen, it was freedom--our national commitment to liberty and individual dignity.

**Formula for Success.** "Without the Constitution and the Union," Abraham Lincoln said, "we could not have attained the result; but even these are not the primary cause of our great prosperity. There is something back of these, entwining itself more closely about the human heart. That something is the principle of 'Liberty to All'--the principle that clears the path for all--and by consequence, enterprise and industry to all."

The formula for success has not changed nor will it: it is freedom and incentives for people to work hard, save and create.



To the individual family, this means new opportunity and a higher standard of living. To the business firm it means larger markets and higher profits. To our government, it means increased effectiveness and public support.

But permit me to make a point here that perhaps could be stressed more often by men and women such as myself, who have lived by--and profited from--the free enterprise system.

**Freedom Means Responsibility.** True freedom is not mere absence of restraint; true freedom is not a license to do as we please. The success of the Constitution, the success of America and of the American dream, hinge directly on our willingness to couple freedom with a sense of moral responsibility--responsibility to our family; responsibility to our community; responsibility to our country; and ultimately and inescapably, responsibility to our God who rules us all.

Nourish freedom with personal responsibility and we will strengthen the virtues of our citizens. We will build the character of our country. We will expand and replenish the moral capital of our society. We will succeed in our endeavors.

**Living Up to a Splendid Vision.** But if we fail the test of moral responsibility, we will begin a long slide toward oblivion. We will consume our moral capital until that day comes--just as surely as it came to the great civilizations of Greece and Rome--when, unable to distinguish the principled from the degenerate, the fit from the unfit, the leader from the loser, our society will collapse.

We can avoid that judgment, we can live up to that splendid vision of Washington, Jefferson, Madison, and Lincoln, if we replenish our moral capital both in our daily lives, and where it is needed most desperately--in the highest councils of leadership in Washington, D.C.

For, ladies and gentlemen, if our goal is to build a new generation of computers to compete with Japan, then should we not resolve that we are not going to lose a new generation of Americans to alcohol, abortion, AIDS, and cocaine?

If our goal is state-of-the-art technology in every classroom, then shouldn't we make sure that America's students can read the instruction manuals, and, yes, appreciate the principles of the free, democratic country that produces it, because they have studied the Constitution, the Declaration of Independence, and the Ten Commandments?

If our goal is more Americans becoming risk-takers and entrepreneurs, then shouldn't we decide that we're not going to permit crime to stalk city streets, or white collar corruption to trample the ethics of competition on Wall Street?

And finally, if we expect America to remain strong, united, and free, then isn't it time that we heed Thomas Jefferson's warning that "to preserve our independence, we must not let our rulers load us with perpetual debt: we must make our selection between economy and liberty, or profusion and servitude"?

**Growth of Government Control.** I cannot conceive of any time, in my lifetime at least, when this nation had more need of principled leadership. We are, in our public affairs, accepting with ever less reluctance and embarrassment, actions and practices which are plainly inconsistent with the principles of responsible freedom and public virtue which we inherited from generations of Americans that preceded us.

Unfortunately, there is no convenient scapegoat. As modern governments have, year-by-year, usurped the power to control our daily lives, they have done so believing that they are reflecting popular will, that they are the proper authority to determine and implement the ideals of society.

It is we, through our institutions--and business is a prime offender--who have gradually surrendered to the narcotic of government spending, subsidy, and supervision; it is we, ourselves, who have created the false environment where equality of status is mistaken for equality of opportunity, and where security, albeit a false sense of well being, is exchanged for personal freedom.

Let me repeat--the framers of our constitution believed in property rights and these are spelled out. Yet, while many today speak of a whole litany of phony rights--the right to free welfare, the right to free health care, the right to protection from free competition--they would ignore the real economic rights that the Constitution clearly provides.

**Cassandra's Warning.** It has been just over ten years since I left Washington. I warned in 1976 that the accelerating trend toward big government, fueled by the simplistic notion that Washington could spend ever-increasing amounts of borrowed money, would inevitably lead to tragic problems for America.

I was called a Cassandra. But even I would not have believed in 1977 what has been done to this economy. I feel only sadness in having to say that Ronald Reagan has missed an historic opportunity.

If the President deserves credit--as he surely does--for cutting tax rates and reducing some of the burden of regulation, he must also acknowledge his share of responsibility for the other side of the equation--the United States fiscal picture has dramatically worsened during his administration.

**Where is the Statesmanship?** The President, at least, has tried to uphold principle for the greater good of the American people. The same cannot be said of Congress. Forgive my words, ladies and gentlemen, but with a few notable exceptions, the entire Congress is nothing but a bunch of despicable whores who long ago sold out to special interests in return for their re-election.

Where is the statesmanship in a record that has seen 29 unbalanced budgets in the last 30 years?

Where is the statesmanship in a record that has seen federal spending more than double in the last decade?

Where is the statesmanship in a record that has seen the national debt more than double in the last six years?

In my last year as Secretary of the Treasury, the federal government ran a deficit of \$66 billion. This was a shocking figure, and it is still a source of pain to me that an administration of which I was a part had to accept responsibility for such a dubious achievement.

Today, the achievement of "only" a \$66 billion deficit would be the subject of testimonial dinners and a national celebration. Today, the single most shocking and shameful statistic is that the fastest growing expenditure in the federal budget is the payment of interest on our national debt.

**A Riotous Binge.** We are taking what we inherited from our forefathers and, instead of earning it over again for ourselves, we are indulging in an unparalleled act of moral squalor. There is no denying that this riotous binge is more than an economically irresponsible act, it is a morally irresponsible act. It would be difficult to imagine any other act that threatens to consume our inherited stock of moral capital.

But ladies and gentlemen, even as we are putting our children in hock for a lifetime, we are putting America in hock to the rest of the world. As a nation, we consume more than we produce; to maintain spending in excess of production, we have been selling assets and borrowing abroad at an astonishing rate.

Since 1981, the United States has gone from owning net foreign assets of nearly \$140 billion, to owing net foreign debts of more than \$200 billion. By 1990, we could owe foreigners nearly \$1 trillion. Think of it: in just a few years, we have wiped out the net accumulation of several generations.

**No Free Lunch.** The accumulation of these economic distortions must be squarely faced. The longer we delay the hard adjustments, the more difficult and costly the needed solutions will become. There is no free lunch.

If Congress persists in its crude and reckless attempts to cut back on imports with a swagger stick of protectionism, then the risks of retaliation and an eventual trade war will sharply increase. Protectionism is not patriotism.

If the administration attempts again, as it has already, to deal with the dilemmas of trade and budget deficits by the depreciation of our monetary standard of value--by devaluing the dollar--then the outlook for inflation will continue to darken.

The recent decline the the bond market, the sharp increase in the price of gold, the run-up in inflation and interest rates are clear and vivid warnings. They are declarations of no confidence in this nation's policies, and we ignore them at our peril.

**Blind Folly.** Already, in less than a year, we have gone from a much heralded victory of zero inflation, to a renewed inflation rate of five percent and

rising. Of course, Washington would tell us to be thankful that inflation is still only five percent. This means every dollar we earn and save will only shrink to 95 cents in purchasing power by the end of the year.

Nowhere is it written in stone that the United States economy can withstand indefinitely the shocks and willful abuse which have been pummeling it for over two decades. History is littered with the wreckage of governments that refused to turn away from blind folly.

In his book, *In Search of History*, Theodore White described the collapse of the Chinese economy under the Kuomintang government after World War II. He attributed that collapse largely to the effects of runaway inflation on people's habits and morals.

"Inflation," he wrote, "is a haunting pestilence of the middle class. It is the hidden threat that disorganized governments always hold over those who try to plan, to save, to invest, to be prudent. To be honest in day-to-day dealings in runaway inflation does not make sense. To pay debts on time is foolish; to borrow and spend as fast as possible is prudence."

And when Mao Tse-tung seized power, the Chinese were no longer burdened by inflation--or by freedom.

**Honesty and Courage Needed.** What we need in Washington is the honesty to admit the mess we are in and the courage to work ourselves out. We need leadership: leadership by people who understand the vital link between freedom and responsibility; leadership by people who will put aside short-term personal gain for the long-term good of the republic, leadership by patriots of the kind who came together in those fateful days in Philadelphia, first to declare a revolution, then to create our Constitution.

Loath as I have been to tamper with a Constitution whose principles are sound, I am convinced that we no longer have the luxury of delay. The time has come to do what must be done. We must shackle this mad rush to national bankruptcy, by putting into the Constitution some rigorous prohibition against runaway deficit spending.

**Time for an Amendment.** As you know, Congress did pass, in 1982, a balanced budget Constitution amendment by a majority vote, but not by the two-thirds needed in each house to submit the amendment to the people. It is time for another try.

I confess I am skeptical about an amendment which postulates some kind of advance statement of revenues and expenditures, and which requires super-majorities in each house to adopt a prospective budget which is out of balance. This has all the earmarks of an elaborate budgetary charade.

Better that we attack the problem of mounting national debt at the point where the debt grows: the rolling over of existing debt and the issuance of new debt. I note that Senators Armstrong and Boren have introduced an amendment

which would constitutionally restrict the issuance of new debt and I think they have found the right place to launch the attack.

The fundamental choice comes down to the consideration: how much personal freedom, if any, are we willing to give up in seeking collectivist security? It is certainly not easy to live with the uncertainties that exist in a free society, but the real benefits are far superior to any other system.

If our Constitution is to continue underpinning a dynamic, free economy, if it is to protect liberty, thrift, enterprise and remain the standard for a nation powerful in purpose and moral worth--then let us resolve, in this bicentennial year, that we will renew our faith in its core principles at the heart of America's strength and prosperity.

Ignore those sound principles, reverse the meaning and intent of its framers, and we face not only economic decline, but the loss of our most precious freedoms. Revive and maintain its sound principles, honor their wisdom, give them new life and power, and we the people will go forward into our third century united in freedom, with liberty and justice--and prosperity--for all.





# THE CONSTITUTION AND ECONOMIC LIBERTIES

by the Honorable Donald Hodel

This is the year in which we celebrate the 200th anniversary of what some call the "living Constitution." That phrase has been used all too often by others to justify departure from the principles, ideals, and values of our Founders. Some think they can invoke the phrase "living Constitution" as justification for federal government controls over the daily lives of people that were not contemplated in 1787--all in the name of "keeping up with the times." I use the expression "our living Constitution" in an entirely different sense: its principles are just as relevant and sound today as they were 200 years ago. The ideas expressed in the Constitution about limited government, about checks and balances, and about the integral role of states in the federal system are--or certainly should be--just as alive today as when they were laid down by Madison, Franklin, and 53 others in Philadelphia so many years ago.

Central to our understanding of our constitutional system are its basic premises. One of these is that the power of the federal government is conferred on it by the people. The Constitution is intended to restrain government, not restrain its citizens. Forrest McDonald has said, "It is a body of law designed to govern not the people, but government itself." There is a corollary: our liberties, which are "guaranteed" by the Constitution, do not come from the state. They come from God. Thomas Jefferson is quoted on the wall of the Jefferson Memorial as saying, "God who gave us life gave us liberty. Can the liberties of a nation be secure when we have removed a conviction that these liberties are the gift of God?"

What types of rights and liberties are guaranteed or protected by the Constitution? The Founders made no distinction between the Constitution's protection of our political rights and our property rights. The due process clause of the Fifth Amendment proscribes depriving people of life, liberty, or property without due process of law. The just compensation clause of the Fifth Amendment provides, "Nor shall private property be taken for public use without just compensation." It appears to be an obvious attempt to protect private property against the government. It was adopted contemporaneously with the First Amendment's protection of speech and religion and the Sixth Amendment's protection of the right to a speedy trial.

**Economic Rights Protected.** In his brilliant essay entitled *Property*, written in 1792, Madison points out that a person's land and money are property, but that is only a narrow definition of the word. "In its larger and juster meaning," Madison said, property "embraces every thing to which a man may attach a value and have a right." Madison then lists as being part of the broader definition of property a person's opinions, "a property of peculiar value in his religious opinions," and "a property very dear to him in the safety and liberty of his person." From this he concludes that "as man is said to have a right to his property, he may be equally said to have property in his rights." Then Madison warns, "If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property and the property in rights."

Clearly there was an intention to afford constitutional protection for both economic and political rights. Doing so, in my judgment, was essential, for these rights are inextricably interwoven.

Obviously, without political rights such as voting, petitioning government, and suing those who invade your property rights, it is pretty hard to protect your property rights unless you resort to physical force. It is just as true that, without property rights, or even with what some might call "only an erosion" of property rights, there can be a loss of political rights. Save by force of arms, which also costs money, there is no way to fight government attempts to take away political rights unless you have the economic wherewithal to lobby, to go to court, to arouse public opinion. That was true 200 years ago, but it is much truer today with the growth of government.

Historically, going all the way back to the Magna Carta, it was people who had a real stake in the economy of the country who were leaders in the effort to secure personal liberties. It was the barons, not the tenant farmers, who met with King John at Runnymede. In all events, a government that is powerful enough and arrogant enough to snuff out economic liberties can be powerful enough and arrogant enough to try to tamper with political liberties. There already is erosion in some political liberties in the United States as a direct consequence of the diminishing commitment to protect economic liberties. I think we see a current example of that in the federal campaign expenditure limitation laws. They are the government saying you may not do something which otherwise is lawful in the political arena by limiting what you can do with your property.

If we look back briefly over 200 years of the Constitution, we see that, for nearly 150 years, our courts relied on the Constitution to protect our economic liberties. Economic freedom was protected by, among other things, the concept of substantive due process. In 1829, Justice Story said, "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of the legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." The idea was that, to be constitutionally valid, a statute must have a direct relationship as a means to an end, and the end itself must be appropriate and legitimate.

**Down a Slippery Slope.** What determined legitimacy of the legislative objective under the Constitution? Except for the Fifth Amendment's just compensation clause, the Constitution is not specific on that subject. Courts had to look to historic notions of the content of the right to private property and economic liberty. That certainly included freedom of contract. Clearly a legislative objective to redistribute wealth was not constitutionally permissible. For example, in 1934 Justice McReynolds said, "The legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if for the moment this may seem advantageous to the public." Unfortunately for those of us who believe in the protection of property rights, Justice McReynolds wrote those words in the dissenting opinion in that case.



That was the beginning of a very slippery slope. With few exceptions, it has been downhill all the way since. By 1937, the Supreme Court formally abandoned the idea that economic legislation could be tested by a concept of substantive due process.

**Judicial Abandonment.** It appears there is a virtual abdication by the courts of any real sense of constitutional responsibility to protect our economic liberties. Incredible deference is given to the legislative and executive branches of the government in the economic area. The judiciary's substantial abandonment of constitutional protection for economic rights is articulated probably as clearly as any place, maybe as alarmingly, in a decision of the Warren Court in *Berman v. Parker* in 1954: "The definition [of the reach of the police power] is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs served by social legislation."

You may have noticed the qualifier buried in that statement: "subject to specific constitutional limitations...." Let us not be deluded. As I have said, in reality it is very hard to find them in the Constitution. For example, in the 1984 decision in *Hawaii Housing Authority v. Midkiff*, the Supreme Court upheld the state's right to condemn private land so that tenants who occupied it then could purchase it. This is a sanctioning of a state's exercising its eminent domain power for private benefit. It seems to be in direct conflict with the historical constitutional understanding that takings under that power must be for public purposes.

As Richard Epstein explained in an article so aptly entitled "Asleep at a Constitutional Switch," in practice, almost every statute regulating economic activity seems to meet constitutional standards, no matter how powerful the arguments against it.

Let us understand clearly what this means. First, except in unfortunately rare instances, we can forget the idea that the courts will interpose the Constitution between government and our economic liberties. Second, the political institutions that have inherited the power to define the extent of our economic liberties are ill suited to do so. So do not be surprised if things get worse.

**Special Interest Pressure.** Legislative and executive branches are especially vulnerable to the pressures of organized special interests, many of which have no interest in preserving the rights of private property. I need not tell The Heritage Foundation about the abundance of those who are prepared to trample on private enterprises for any number of reasons, such as redistribution of wealth or because they appear to believe that free people supposedly lack the adequate social conscience or intellectual stamina necessary to make the right decisions.

Third, what this means is that, even if the Reagan Administration succeeds in getting more conservative judges appointed to the federal courts, it does not

necessarily follow that we will have a quick return to the days when attacks on our economic liberties will have to survive the standard of substantive due process. Conservative judges rightly are very reluctant to be judicial activists. Justice Antonin Scalia has cautioned us that we conservatives believe in judicial restraint. So, what can we do as we head into the Constitution's third century?

**"Hallelujah, I Lost."** First of all, I do not think we should give up hope, at least not entirely, that the courts once again will allow some protection, perhaps a growing protection, of economic liberties by the Constitution rather than by the whims of the legislature. Perhaps, with the appointment of conservative judges, we will see some things going our way again. There is a glimmer of hope from a recent case, entitled *Hodel v. Irving*, which was decided last month. In that case, I was a formal party on the wrong side and lost, hallelujah. The Supreme Court said there was a "taking" requiring just compensation under the Fifth Amendment of the Constitution, when Congress passed a law that provided the rights of a deceased Indian would escheat to the tribe, if the deceased owner's undivided interest in the land was 2 percent or less of the acreage and earned less than \$100 in the year before his death. Congress's idea was that it was just not a big enough interest to deserve protection. I did think, how would you feel if your savings and loan called you up in early January and said, "You know, your savings balance was below \$1,000 this last year, and you earned less than \$100, so we delivered it to somebody else." We justifiably would be outraged.

I want to emphasize that I was on the wrong side of the case because the Justice Department keeps telling us that it must defend the constitutionality of federal statutes even if we do not agree with them. I did not approve that particular statute. It is an important case, because individual economic rights were sustained even though Congress has nearly plenary power over Indians and their reservation lands.

There is a further glimmer of hope in this month's decision in *First English Evangelical Lutheran Church v. Los Angeles County*. The Supreme Court ruled that temporary takings of property by land-use regulations that deprive the owner of all use of property must be compensated under the Fifth Amendment.

**Conservatives Must Do More.** I believe we as conservatives can and must do more than just hope. We can be leaders in creating institutional and public respect for the importance of economic liberties. For some of us, our first focus must be on both political and career employees of government. I think we have to teach that, in determining whether to support a proposal for a legislative or administrative action, we cannot permit the focus alone, as many suggest, on the question of what is "constitutional." Given today's standards, if we ask only that question, we are almost guaranteed to end up with a bad answer. We always must insist on addressing the further question of what is right, in light of the genius of limited government and the benefits of decisions in a free marketplace.

Let me give you a quick example of an issue that currently concerns the Department of the Interior. The California Coastal Commission is a creation of the State of California, which has phenomenal power over almost anything dealing with the coast of California. Among other things, it concluded that if, for example, your

beach house has fallen into disrepair and you wish to tear it down and rebuild it, you cannot get the necessary permit unless you meet certain requirements of the California Coastal Commission, such as granting an easement to the public over your property so others can use it.<sup>1</sup>

**"Right" vs. "Constitutional."** There is another example of where we have to ask the question "what is right," and not just "what is constitutional?" In 1971, Congress enacted the Alaska Native Claims Settlement Act. Under that Act, the Alaska natives gave up their individual and group claims to Alaskan lands, much of which are rich in energy and mineral resources, and in exchange, they received stock in the corporations that owned the land. The statute said the stock was not saleable until 1991.

We are approaching 1991. The leaders of those native corporations are very concerned that some shareholders may sell their stock in 1991 and that others may gain control of the corporations. Now there are some in Congress who are proposing legislation that will take away the right of Alaska natives to sell their stock to non-natives. This, of course, will continue native ownership in the corporations.

There is a serious constitutional question about such a proposal; but the point is that, even if it is constitutional, if we have any respect for economic freedom of individuals, an individual's rights to one's property should not be wholly subservient to the Congress's perception of the common good of the group. That bill has no place in our society. It is not enough to ask, "Is it constitutional?" We must ask, "Is it right?" I am glad to say that so far the Administration has taken a strong stand against that bill and sent a strong veto signal.

**Return to Principles.** In the long term, we have to focus our attention on the people of America, especially our young people. Remember that legislatures and government administrators, whether they like it or not, periodically are held accountable by the electorate. That is why it is so essential that the people of America, our fellow citizens, understand both the words and the historic principles of our Constitution. In the final analysis, it is the people who can elect leaders who will return to the principles of economic liberties the Founders thought they were assuring some 200 years ago.

There is much talk today about addressing the problems of American education. Let me give you a current example of a real problem. In February, a nationwide poll indicated how ill-informed many Americans are about our Constitution. I was shocked and grieved to learn that nearly half of those who were polled believed that the Constitution of the United States of America contains the declaration that is central to Marxist theology, "from each according to his ability, to each according to his needs." Is it any wonder that the constitutional protection of our economic liberties has all but vanished? Obviously, we as leaders,

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1. On June 26, 1987, three days after Secretary Hodel delivered these remarks, the United States Supreme Court ruled that the action of the California Coastal Commission, requiring private landowners to grant an easement to the public, was a "taking" requiring just compensation under the Fifth Amendment.

as parents, and as educators, have not done the job that we could and should have done. But we still have a chance.

We can use this occasion of the bicentennial of our Constitution not merely to celebrate its longevity. It can impel us to take the time and to make the effort to see to it that the words and the underlying principles of our Constitution, including the principle of economic liberty, come alive in the hearts and minds of all Americans young and old. In that sense, I once again emphasize that it is a "living Constitution."

We can seize the opportunity to explain to our fellow countrymen and women how truly blessed we are, and why, that we live in a country which, as James Madison said, "has a constitution crafted by the finger of the All Mighty hand."



## THE STATE OF THE CONSTITUTION

by The Honorable Philip M. Crane

While I am not one for the support of agencies and bureaus whose missions center in Washington, I confess to having introduced the bill to create the Commission on the Bicentennial of the Constitution. Then I did something even worse in the eyes of some--I amended my original bill to extend the life of the Commission until 1991. And the reason for that was to include the bicentennial of the ratification of the Bill of Rights. I do not think you can look at the Constitution without incorporating an examination of the Bill of Rights because there was a clear understanding coming out of Philadelphia in 1787 and also from the ratifying conventions of at least Massachusetts and Virginia that there had been a concession made that a Bill of Rights would be appended very rapidly to the original document.

Hamilton did not think it was necessary, but Jefferson and Madison felt very strongly that we had to incorporate this set of "Thou Shalt Not's" because they did not want any misunderstandings as to the role of government. They took George Washington's view that government can be a benign servant or the fearful master. And all history had taught them that the latter was the natural course of affairs.

Something to keep in mind in reviewing this period is that we will have an opportunity this year to focus on the Constitution itself, but next year we are going to put the spotlight on the legislative branch, as the first Congress was elected in 1788. Then in 1989 we will focus on the executive branch and Washington's inaugural. In 1789, the Judiciary Act was passed, creating the Supreme Court, so in 1990 we will focus on the judicial branch of government, and in 1991, on the Bill of Rights.

In short, this is a magnificent opportunity that I hope will be supported by all of you in every conceivable way to generate the attention, interest, and especially studies on the part of our young people of this precious document that has made our system unique in the history of government. The Founding Fathers held some very strong views that had, in part, evolved out of the colonial experience, but they also were great students of history. Every one of them had read in depth political theory and constitutional theory, and that in turn was translated into the works that finally were revealed to the people on September 17, 1787, which we will memorialize in Philadelphia this coming September 17.

**Liberty Defined.** In graduate school, I remember pausing while studying the Constitution over the use of the word "freedom," which was so widespread at that time and still is, in contrast to the word "liberty." But if you go back in the documents of the time, you will find many more references to liberty than to freedom. What is the difference between the two words? And I looked them up in *Webster*, and at the end of the freedom definitions it said, "See liberty," and at the end of liberty it said, "See freedom." I thought perhaps our penchant for efficiency had caused us to abandon the word liberty, because it has three syllables and freedom only two. But contained in the definition of freedom is the phrase, "an absence of restraint." The Founding Fathers did not believe in an absence of

restraint--an absence of arbitrary externally imposed restraints to be sure, but they certainly did not believe in an absence of restraint. And by contrast, the best definition of the word liberty as they used it in the phrase that ends the Preamble to our Constitution is found in 2nd Corinthians. And there it states "where the spirit of the Lord is, there is liberty." Well, where the spirit of the Lord is is not a condition where there is an absence of restraint. It is the exercise of restraint upon ourselves within the parameters of the Old and New Testament laws. We must recognize the rights of our fellow men and our inalienable rights to our life, liberty, and our property. These are fundamentals that are contained within the understanding of where the spirit of the Lord is, along with a commitment to righteousness and justice.

The Founding Fathers, as I say, were all motivated very powerfully by traditional Judeo-Christian thought. That was built into their understanding of what they were attempting to create. It is something new in the history of civilization--something untried before. It was an opportunity here in this New World with the chance virtually unlimited to come the closest to creating a world under God's law that man had ever experienced.

**Restraining Absolute Power.** Now going back in the Old Testament, you remember the pharaohs professed to be God and if man was created to serve his God, in effect, what the ancient pharaohs insisted was man was created to serve the pharaoh. Then the Hebrew prophets were the ones who began to exercise the first check against that claim--that arrogant claim of absolute and unlimited power--and they reminded the pharaohs that there was One mightier than they and they would be held accountable to His law come Judgment Day. They did not have the mechanisms for throwing the rascals out of office in those times, but there was still a clear understanding that there was a higher law and that the pharaoh had to exercise his power in accord with that higher law. The fact of the matter is, it was the first real restraint on that plain and effective exercise of absolute and unlimited power, even though it was flawed.

Yet for all of these efforts by the Hebrew prophets, when James I assumed the throne in Great Britain, he claimed to rule by divine right and to exercise absolute and unlimited power. And in effect what he said was that God had searched the British Isles after the death of Queen Elizabeth and the Tudors and He administered blood tests and the Stuarts had bluer blood than most people and so He patted James on the head and said he was the ruler. This was the arrogant claim made by James I, who was nevertheless a very enlightened man. He had the equivalent of a Ph.D. education and certainly was a deeply religious man. For all of that, he was a frail mortal and as guilty of making mistakes as we all are. When the Parliament challenged his claim, it led to the most turbulent century in British history. His brother lost his head trying to advance the same pretension in 1649. There was a brief flirtation with dictatorship. In 1660 the monarchy was restored, and Charles II attempted to regain some of the powers lost in that confrontation with Parliament and the flirtation with the Cromwellian dictatorship. That led again to another confrontation, which culminated in 1688 with the Glorious Revolution.

**Flawed to This Day.** That was a milestone in the evolution of the British system of government and it was also something that our forebears hearkened to in the system that they finally adopted here. What happened in 1688, of course, was that the power transferred from the hands of the one into the hands of the few, because Parliament was an aristocratic body made up of permanent landholders at that time, but by starting the change from power exercised by one absolute monarch to power exercised by an aristocracy, it ultimately gravitated into the hands of the many in the House of Commons. Yet the system was still flawed and still is to this day because in 1766, on the very day that Parliament repealed the Stamp Act, it passed what was called the Declaratory Act, which stated that Parliament had the right to regulate the lives of British citizens "in all cases whatsoever." So the British system of government is one that still claims the power to regulate the lives of the British people in all cases whatsoever. No exceptions and by simple, democratic, majority vote. For example, coming out of World War II after Winston Churchill's government had piloted Great Britain through its darkest hour, the British people opted for a change. They elected the Labor Socialists, who promptly nationalized the major industries. And they did it by a simple democratic vote, which they are empowered to do.

This system was something that our Founding Fathers rejected and, in fact, you can find the premises of our system spelled out in Jefferson's Declaration of Independence where he proclaims the existence of God and of man created in His image and as such endowed with those inalienable rights--life, liberty, and the pursuit of happiness. And in turn, government here was to be created as a servant of man--subservient to man--and its expressed purpose in that Declaration is to make us more secure in the possession of our divine inheritance. In short, God alone is the sovereign. We use the phrase "state's rights," which is a misnomer. Under our system, states never have rights. Only individuals have rights, and states exist to make us more secure in the possession of those rights.

**"We the People."** Now as I said, that sounds like a self-evident truth, and yet it was unique in the history of government down to that point. All previous governments starting with the pharaohs either professed to be God or put themselves on a parallel with God or immediately subordinate to God, but the order was God, government, man rather than God, man, government. They had a debate over the beginning of the Preamble: Should it be "We the faithful" or "We the people?" And they said, "Well, of course, it has to be we the people." We the people of the United States. We are the ones who enjoy those God given and inalienable rights and we, in turn, are creating a pragmatic institution to serve the limited ends that government is expected to perform, because as Thomas Paine said, "Government is the badge of lost innocence."

That brings up to a second assumption of the Founding Fathers--again one directly out of our Judeo-Christian tradition--that man is a flawed creature. He is not capable of perfection. James Madison said at one time during the debates, "There is nothing inherently wrong with monarchy provided you get an angel for a king." But the Founding Fathers were sufficiently aware of history to know that they had never witnessed any angels for kings. They knew that, because man's nature was flawed, a system had to be structured that on the one hand would acknowledge man's frailty, but on the other hand would borrow from the known

governmental systems of the past to create something that would maintain a sufficient check and restraint on the excesses of government that we might still be able to enjoy the maximum degree of freedom.

So they looked at the various systems of government: government in the hands of one; government in the hands of the few; or government in the hands of the many. They were all abusive. In fact, if anything in the debates in Philadelphia, they were more worried about the excesses of democracy than they were of aristocracy. But they knew that aristocracies had been abusive in their treatment of the colonies. They knew that monarchs had, but they harkened back also to the experience of enlightened Athens where a democratic society had condemned its wisest man to die by taking hemlock. The only sin he had committed was asking embarrassing questions.

**Fusion of Three Systems.** So the Founding Fathers were not persuaded that there was any single system that was pure enough to be tolerated in its own right and they struck upon something that evolved in part out of their own colonial experience and that fused the three. In the executive branch, in effect, they borrowed from the system of monarchy; in the House of Representatives, from democracy; and in the United States Senate, the aristocracy. That provision for absolute equality of state representation in the Senate guarantees that tiny little Delaware, which has fewer people than my congressional district, will still always have the same muscle as giant California. That provision is not subject to amendment except at the consent of the states. Of course, there is no way that underpopulated states like Wyoming or Delaware will relinquish their equal representation in the United States Senate. But what could be more undemocratic than to guarantee that six or seven hundred thousand people in Delaware will have the same voice and representation as 25 million people in California? But it was intended thus.

Then in the House, they incorporated the principle of democracy where the representation is based upon population. They gave to the people through that body closest to them the most important power, which was the power to levy taxes. The House was constitutionally mandated to do this, but it is also the body--this is based on precedent rather than defined in the Constitution--that has always originated all of the general appropriations bills. One of the points I have made until I have a sore throat is that if you have taxation on the one hand and spending on the other, you have the ball game. I would happily let Gary Hart occupy the White House tomorrow if I could have Jim Wright's margin of control of the House filled with Connie Macks because whoever is in the White House is going to march to the beat dictated by House control of spending and taxation. Those are the ultimate powers.

**State of Tension.** Now to be sure the system forces compromise. To get anything through, the House has to make an accommodation to the aristocratic branch of our government in the Senate and the President with his veto authority. The Founding Fathers debated whether that special majority to override a veto should be three-fourths. Washington thought it should and frankly I do too. But they finally compromised on the two-thirds vote to override a veto. And as I say, the system provides for some accommodation like that. But the fact is they



distrusted all three systems and felt that they could put them in a state of tension where each one was contesting for its own prerogatives and maybe trying to usurp some of the other bodies' prerogatives, but this was best calculated to produce something that would be more directly accountable to the people and more apt to guarantee us maximum personal liberty.

If you look at some of the aberrations of the 20th century, stop and consider, for example, the premises behind the Soviet system of government. First, they reject the idea of a transcendent moral order or a belief in God and as a result, the government is empowered to be God in direct violation of the premises that establish our system. Second, there is the implicit assumption, if you analyze Karl Marx's writings where he talks about the creation of the class conscious proletariat, that it will rise up in proletarian fury and overthrow the owners of the means of production and distribution and usher in the dictatorship of the proletariat. But that is just a way station on the road to the final stage of Marxism, and that is utopia. Classes will disappear, governments will disappear, and we will all retire to the green pastures and live happily ever after. So the system is predicated on the notion of man's nature evolving to the level of angels. But it will never be realized. They will never evolve out of the dictatorship of the proletariat because they have falsely defined the nature of man. And it is not just falsely defined in Judeo-Christian terms; it is falsely defined in historical terms. It is a misreading of history. The irony is Karl Marx wallowing around in the bowels of the library there in London published *Das Kapital* in 1859 with the maxim "From each according to his ability, to each according to his need." All he had to do was study the Plymouth Experiment.

**Colonial Stupidity.** You remember those Christian pilgrims came over and established a communist settlement. They were all to go out and cultivate the fields and harvest the crops and put them into a common granary, where they would be redistributed on the basis of need. After three years, the colony was dying. They could not raise enough food. Governor Bradford, in desperation, finally carved up the land and said, "Here, each one of you is going to own your own farm and each one of you must be responsible to provide for yourselves." In one season, they were producing food surpluses.

Based upon just three years of stupidity in our early colonial practices in trying to defy the laws of nature and the laws of God, it is easy to predict what would happen to any nation that wanted to emulate them. In creating our system of government, the Founding Fathers had the expectation and the hope that, while no system is perfect, this one would come closer to guaranteeing a maximization of personal liberty. Simultaneously, they acknowledged that, while we have good intentions, we commit trespasses and therefore we must have some form of government.

But there was another ingredient, too, and it was certainly recognized by the Founding Fathers. It was a universal belief at the time of the creation of the Republic and it is one that I think also cannot be stressed enough in our day and age. Ben Franklin said to his colleagues on the last day of the Convention that he did not have total confidence in their handiwork, but it was the best he thought that the collective genius of their age could produce. Then he went on to say, "But

this government, like all government before it, will generate into a despotism because the people need a despotism."

**Morality and Righteousness Essential.** So regardless of the form, you need virtuous people. The preachers in the pulpit in those days, as well as the politicians, kept emphasizing that point: that the system could only survive if you had righteous, moral people. When the Founding Fathers separated from the mother country, there were some faint-hearts who feared a loss of material benefits from their trade relationships with Great Britain. They said, "You know that is our line of credit. That is our market. You know, if we separate from Great Britain, we are going to be hurting." But again hearkening to the pulpit, they embraced and accepted the faith of their fathers. In the Sermon on the Mount, Jesus at one point said, "Therefore, take no thought about what you shall eat, what you shall drink or wherewithall you shall be clothed. For your Heavenly Father knoweth that ye have need of all these things. But seek ye first the Kingdom of God and His righteousness. And all these things shall be added unto you."

In other words, try and organize yourselves in a righteous society and the material blessings are by-products, and God knows that you have need of all these things. That point, as I say, was stressed repeatedly: the essentiality of morality and righteousness--the world under God's law. But it took a great act of faith to make that leap into the dark in those days. The Founding Fathers did not know exactly what the outcome would be. And the sad fact is most people who have engaged in revolutions have simply replaced one form of tyranny with another. Anybody can engage in a revolution, but to successfully take a revolution and create something of enduring value as the Founding Fathers did was, again, one of the really remarkable accomplishments of that period in our national experience two centuries ago. That is why celebrating September 17 may be even more important than celebrating July 4--it shows what we did with our revolution.

But when de Tocqueville traveled here, you remember, he said he was searching for the source of America's greatness. He said he looked on the farms and the hamlets and he looked in the cities and the factories and could not figure out the source of America's greatness and then he said he went into the churches and "the church pulpits," he said, "were aflame with righteousness." He said he then understood the source of our greatness--personal opportunity and personal liberty. All of us are the beneficiaries of this because we are still a Godly people and we will continue to be great as long we continue down this course. But we have to acknowledge the magnitude of concentration of power in Washington which would have appalled the Founding Fathers.

**Back to Basics.** I would hope that in the course of our examinations of these important events in their bicentennial years we could decide that we no longer can afford business as usual. And if we are going to preserve the dream of the Founding Fathers, we have to start systematically what Reagan committed himself to the 1980 campaign--the New Federalism. That is what it was all about.

I am confident that as we come out of our history lesson we will start asking fundamental questions with a view to revitalizing the system by going back to basics. And if we do, then those historians who are writing two centuries from now, when

we are celebrating the quadracentennial, might look back and say, "You know, we flirted in those first two centuries with throwing the whole thing away. Then something happened to activate the interest of the American people in keeping the dream alive and they took the requisite steps and in the process they secured unto themselves and their prosperity the blessings of liberty."

