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Some Reflections on "Liberty Reclaimed"

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I wish to share some reactions to Jim Lewis' *Liberty Reclaimed* but I shall restrict the scope of my thoughts to Mr Lewis' observations about the American Founding Fathers. Certainly much of what Lewis says cannot be taken exception to, and he is to be applauded vigorously for pointing out the lack of support amongst the Founders for egalitarianism and plebiscitary democracy, despite disingenuous readings by later leftist scholars.

Nevertheless, Lewis must be faulted for his unsubstantiated revisionism in regard to several aspects of the American Republic's foundational period. In dealing with the ninth and tenth Amendments to the U.S. Constitution, for example, Lewis is too glib. The ninth and tenth Amendments were, of course, as his narrative suggests, designed to overcome the fears of men like Hamilton and others that enumerating specific rights would suggest that these were the only rights people enjoyed, and that specifying rights against powers not delegated to the Federal Government would undermine strict constructionism i.e. forbidding the Federal Government to abridge freedom of speech and press when no powers at all over speech and press were specified in the document would, in the absence of the tenth Amendment, imply that such a power had been implicit in the original, unamended constitution.

The use of the passage from Bennett Patterson's *The Forgotten Ninth Amendment* falsely suggests that the ninth Amendment was binding on the States (p.13). The key passage is the final sentence of the Patterson quotation: "The language of Madison, who was the father of the Ninth Amendment, shows conclusively in the original draft that he did not intend this narrow limitation upon his proposal." i.e. the ninth Amendment should bind only the Federal and not the States governments. Now Madison's original draft does make that very clear, but that is why Madison's original draft was altered. Madison and a few supporters wished the whole Bill of Rights to apply to the States as well as to the National Government, but Congress refused. The "original intent" is that of the framing and satisfying body as expressed in the enactment, not the intention of the original draftsmen whose draft was, in any case, changed.

The Rights of Individual States

Madison's ideas on separation of Church and State were seriously altered in the final version of the First Amendment. As it was put out to the States and ratified, the First Amendment not only pledged that the Central Government would not establish a National Church (as the Anglican Church was established in England), but also pledged the Congress not to disestablish the established State churches, the last of which was abolished by the Massachusetts Legislature in 1838.

I do not mean to suggest that the framers of the Constitution - Jefferson, of course, was not one - were indifferent to the actions of the States in regard to the rights of their citizens, but they left those rights, in general, to be guarded by the State constitutions and the political apparati of the States. Some very limited rights were guaranteed to persons against the States by the Constitution in that the States as well as the Federal Government were denied the power to pass *ex post facto* laws, Bills of attainder, or create titles of nobility. In addition, States were forbidden to impair the obligation of contract or to make anything other than gold and silver legal tender. Furthermore, the Federal Government was charged with guaranteeing to the States a Republican form of Government, which meant (at the very minimum) that States could not establish monarchies.

In Baron v. Baltimore the Supreme Court under Chief Justice Marshall reiterated the obvious fact that the Bill of Rights did not apply to the States, and even in the 20th Century, when the Supreme Court has begun to apply restrictions to the States (beginning with Gitiow v. New York [1924]), it has done so under the theory of incorporation or adoption, whereby it held that "due process"

clause of the "liberties and immunities" clause of the post-Civil War 14th Amendment made the Bill of Rights applicable to the States.

States' Laws not Libertarian

As to the laws that existed in the States at that time, and which were allowed to stand by the silence of the Constitution, they could not often be characterised as "libertarian" in the modern usage of that term. Sabbatical laws, anti-sodomy laws, anti-adultery and anti-fornication statutes, anti-drunkenness laws, anti-gambling laws, anti-prostitution enactments, anti-pornography laws, and the whole anti-libertarian tradition of the English Common Laws' criminal offences were the inheritance of every state. Jefferson, in his model code for Virginia proposed rhinomactation (nose-chopping) for adulteresses - presumably on the utilitarian consideration that it would make them less attractive to potential male partners (although the same revulsion might have been produced in their husbands thereby).

As to Lewis's claim that the Founding Fathers were in favour of *laissez-faire* capitalism, that is undoubtedly true if one uses the term in the perspective of the Roosevelt statist revolution. If one uses it in the pure libertarian sense, one would be hard pressed to demonstrate it. Madison transported in a time machine would undoubtedly be horrified to see the jungle of laws and regulations with which his political descendants have restricted their economic freedoms. Nevertheless, Lewis's statement "...the Founding Fathers said little about government control of the economy" (p.18) is deceptive and/or inadequate. The Federal Government was forbidden to (1) tax exports, (2) interfere with the slave trade before 1808, (3) require goods to be channelled through specific harbours, (4) lay direct taxes upon states except in direct proportion to their populations, (5) vary tariffs geographically, or (6) take property for public use except by due process of law with just compensation. States were forbidden to: (1) impair obligation of contract, (2) make anything other than gold or silver money, (3) impose tariffs and duties on goods in interstate or international trade, and (4) refuse to return runaway slaves and indentured servants. The Federal Government was given general taxing authority with the right to impose tariffs specified, control of bankruptcy jurisdiction (with its implicit right to impair obligation of contract), control of the coinage and currency with no stated obligation to limit this to gold and silver, the right to borrow money on the credit of the United States, control of such territory (as property and as political territory) as was to be ceded by the States from their western claims(substantial). In addition, the Federal Government was given the right to regulate commerce with the Indian tribes, foreign nations, and between States.

States or State Regulation?

Interpretations of this latter clause are the constitutional justifications of much of the economic regulation by the Federal Government. The full explication of the meaning of interstate commerce would require a dissertation, and then would be inconclusive. Fortunately, there is a logical trap for the libertarian revisionist which will permit us to avoid defining inter-state commerce: whatever trade is within the purview of inter-state commerce clause fails within the legitimate sphere of Federal regulation. Whatever trade is outside the purview of that clause is within the sphere of the domestic regulations of the States, except as to those slight aforementioned restraints by the Constitution and whatever restrictions their own constitutions place upon their governments. The logic is inescapable - expand the sphere of interstate commerce and you expand potential federal regulation; contract that sphere and you expand the range for potential State regulation. (Furthermore, it is not clear that Federal regulation of interstate commerce was meant to exclude totally state regulation. The ordinary police powers of states have generally been upheld as they have been applied to interstate commerce unless federal legislation under the inter-state commerce clause had pre-empted them. Thus, New York State may ban fireworks entirely, including those from other states and nations, but not exclusively those of other states and nations [giving New York fireworks manufacturers a monopoly] and the Federal Government may pass enactments to provide

reasonable transit through the state of fireworks from, say, Pennsylvania to Vermont.)

Finally, let us close by questioning some of the pop history Mr Lewis dishes out about the Federalists, Jeffersonians and the courts. The idea that the Jeffersonian Republicans were the party of liberty and the grim Federalists the party of limitless repression needs some reworking. I cannot help mentioning that the quotation of Chief Justice Earl Warren (p.32) is historically inaccurate in saying that the Sedition Act was repealed upon the election of Jefferson in 1800. It was a temporary measure stated by its own provisions to lapse at that time, which it did - it was not repealed.

Every State by virtue of the English Common Law and many by the additional mechanism of defining or expanding statutes had the criminal offence of seditious libel (as well as blasphemous libel and ordinary libel and slander). The Sedition Act was more liberal than those States acts (and the English Common Law) because it provided for truth as a defence against libel. The maxim of the laws of the States (from the English Common Law) was "the greater the truth, the greater the libel." I shall remain silent on the constitutionality of the Sedition Law, but it is instructive to note that Jefferson's objections were not on libertarian grounds of freedom of speech but on the States' rights grounds that this sphere was the legislative domain of the States. When Jefferson was President, he set his followers to begin prosecutions of Federalists and other detractors in state courts. In New York, this led to *Crossley v. the People* where Alexander Hamilton defended the editor Crossley from a Jeffersonian prosecution, but his defence by truth was not allowed. The New York State Legislature was so impressed with Hamilton's closing speech however, that they allowed in future cases truth as a defence.

"Jefferson the Libertarian" scarcely fits the historical personage of the Sage of Monticello, and I shall refrain from bringing up his slave-holding or the provisions for the recognition and protection of slavery in the U.S. Constitution.