

FIRST PRINCIPLES

FOUNDATIONAL CONCEPTS TO GUIDE POLITICS AND POLICY

NO. 68 | MAY 29, 2018

The Founders and Free Trade: The Foreign Commerce Power and America's National Interest

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Abstract

The American Founders believed that the authority to regulate trade was a necessary tool of foreign policy. They saw that free trade among nations is to be desired, but they also thought that it could only be established if the government had a power to counteract the restrictive policies of foreign nations, thus opening their markets to American goods. They appreciated the value of commercial connections to other countries, but they also thought that America should be independent as regards the goods that are truly necessary to the nation's security. They granted the federal government a power to regulate foreign trade, yet they saw the dangers in such a power and took steps to ameliorate them.

Americans pay a great deal of attention to the political thought of the American Founders—and with good reason. Americans understand their country as having a distinctive political identity originating in the Founding. Accordingly, the preservation and transmission of that identity requires knowledge of the mind of the Founding generation. This is not to say that Americans turn to the Founders for a solution to every political question. It is to say that we try to conduct our political debates in relation to the Founding, understanding what the Founders held, and giving it due consideration, even when we find that we may need to depart from it.

On this view, knowledge of the political thought of the Founders is a key aspect of American civic education. Thus, we find contemporary Americans studying the principles of the American Revolution—especially the doctrine of natural rights and the belief that a government's first duty is to secure those rights. Thus, we find our fellow citizens examining with care the Founders' understanding of the Constitution—debating the original meaning and the contemporary application of such principles as separation of powers, federalism, and the protections for individual liberty found in the Bill of Rights.

In the midst of all this public discussion of the Founders, however, comparatively little attention has been paid to their understanding of the government's power to regulate foreign trade. This is a material omission because of the seriousness with which the Founders treated this power. They placed it prominently in the Constitution: It is one of the first powers of Congress in the enumeration found in Article I, Section 8. And they dedicated as much

This paper, in its entirety, can be found at <http://report.heritage.org/fp68>

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thought to it as to many other questions that we more commonly examine today.

The Founders were keenly aware of the considerable benefits of free trade among nations. They understood the advantages of free economic activity, and they saw that America could gain from exchange with other countries. Writing in *The Federalist*, Alexander Hamilton emphasized that the “prosperity of commerce” is the “most useful as well as the most productive source of national wealth.”¹ James Madison, often referred to as the father of the Constitution, expressed his wish for a “system” of “perfect freedom” of trade among nations.²

The Founders included in the Constitution a power to regulate foreign trade because they believed such a power was a necessary tool of statecraft in foreign policy.

At the same time, the Founders included in the Constitution a power to regulate foreign trade because they believed such a power was a necessary tool of statecraft in foreign policy. For them, trade not only fostered an efficient international economic system, it also had serious implications for the power of nations—in particular for their ability to defend themselves and to secure their independence. The Founders were thus willing to countenance that the government might need to regulate international trade with a view to the great national aims of American security and independence when the conduct of other nations rendered such regulation necessary.³

In studying the Founders, we must beware the danger of distorting their thought by imposing on them categories that are familiar from contemporary

debates. In particular, living in an age in which scholarly support for free trade is widespread, we might view the Founders’ defense of the power to regulate foreign commerce in the national interest as a species of protectionism. This would be an error. The Founders did not include the power to regulate foreign commerce in the Constitution so that it could be wielded merely with a view to safeguarding the profits of established businesses or preserving the jobs in existing industries from foreign competition. Indeed, they did not understand the power as existing for the sake of any such partial or local interest. They rather thought it was to be employed on those occasions when it was truly necessary to secure the prosperity, power, and security of the nation itself.

More generally, it would be a mistake to turn to the Founding in order to find *any* specific trade policy for the present. In writing and defending the Constitution, the Founders established and explained the purposes of certain governmental powers. They did not presume to dictate to future generations the particular policies that should be enacted utilizing those powers. They appreciated the complexity of the nation’s economy and were aware that it was likely to increase exponentially with the growth of the country. Accordingly, they did not try to leave us a recipe or a set of rules for regulating foreign trade, but rather an understanding of the basic principles that ought to inform our thinking about how to regulate foreign trade.⁴

Pre-Founding Philosophic Sources

Before turning to the Founders themselves, it is useful to examine the philosophical background to their political thought. In relation to the question at hand, the most relevant figures are John Locke, author of the famed *Two Treatises of Government* (1689), and the Baron de Montesquieu, the French author of the no less celebrated *Spirit of the Laws* (1748). Locke is most widely known today for the

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1. Alexander Hamilton, James Madison, and John Jay, *The Federalist*, Jacob Cooke, ed. (Middletown, CT: Wesleyan University Press, 1961), p. 74.
 2. Philip B. Kurland and Ralph Lerner, eds., *The Founders’ Constitution*, Vol. 2 (Indianapolis: Liberty Fund, 1987), p. 481.
 3. This should not be read to suggest, however, that governmental invocations of national security as a justification for trade restrictions should be accepted at face value and go unchallenged. Indeed, such justifications may prove without merit upon close examination.
 4. For a good overview of The Heritage Foundation’s current policy recommendations regarding free trade, the reader should consult Terry Miller, Anthony B. Kim, and James M. Roberts, *2018 Index of Economic Freedom* (Washington, DC: The Heritage Foundation, 2018) <http://www.heritage.org/index/download>; Anthony B. Kim and Terry Miller, “Advancing Economic Freedom Is the Right Way to Move Forward with Trade,” *Heritage Foundation Issue Brief* No. 4820, February 23, 2018, <https://www.heritage.org/trade/report/advancing-economic-freedom-the-right-way-move-forward-trade>; and Terry Miller, Brian Riley, and Tori Whiting, “Free Trade Agreements that Benefit Americans: Eight Guidelines for Policymakers,” *Heritage Foundation Issue Brief* No. 4695, April 28, 2017, <https://www.heritage.org/trade/report/free-trade-agreements-benefit-americans-eight-guidelines-policymakers>.
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influence of his teaching on natural rights and limited government. Montesquieu is commonly understood as having influenced the Founders on questions of institutional design, pointing the way to such arrangements as separation of powers and federalism. Both of these thinkers also recognized the government's power to regulate international trade. And, given how widely read and highly regarded their works were, their arguments on this issue could not help but influence the thinking of the Founders.⁵

Locke and the Federative Power. The proponents of economic freedom justly regard Locke as a friend. Locke's teaching provides a solid philosophical and moral foundation for economic liberty, and it also holds that the protection of such liberty is one of the leading tasks of properly constituted government. According to Locke, all human beings possess natural rights to life, liberty, and property. All human beings are equal and independent, since none has a natural authority over another. Because each man owns himself, he acquires a property right in anything on which he exercises his labor. Human beings are not, however, absolutely free by nature to do just anything they wish. They live under a law of nature that forbids them from violating each other's rights and that commands them to do what they can to preserve themselves and others.

All of this surely implies a natural freedom of individuals to exchange the goods that they have made their property when they find it advantageous to do so. Such activity, after all, violates no one's rights and can only aid in their mutual preservation, which they are obliged to seek by the law of nature. In the state of nature, according to Locke, a man may "do whatsoever he thinks fit for the preservation of himself, and others within the permission of the *law of nature*."⁶ Here a man may do whatever work he likes, make whatever he likes, and trade with whomever he

likes, so long as he does not violate the rights of others. This freedom of exchange, moreover, extends to all of one's fellow human beings, even those of other nations. Locke suggests as much when he notes that by the law of nature, a man "and all the rest of mankind are one community" and "make up one society, distinct from all other" nonhuman "creatures."⁷

Human nature being what it is, however, not everyone in the state of nature confines himself to innocent activities within the law of nature. Men are prone to injustice, to rapine, and to the violation of each other's rights. As a result, rights are insecure in the state of nature, and men form societies and establish governments as the remedy. Government is created in order to protect the rights of human beings by means of known laws backed by reliable sanctions.

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The creation of government, though done for the sake of securing individual rights, nevertheless entails a partial surrender of man's natural freedom. According to Locke, upon entering into civil society, a man "gives up" his natural freedom—that liberty to do whatever he thinks fit to preserve himself, within the limits of the law of nature—to be "regulated" by such "laws made by the society" as are necessary to securing "the preservation of himself" as well as "the rest of that society." These civil laws, Locke notes, will "in many things confine the liberty" man "had by the law of nature."⁸

5. During the Founding period, Montesquieu was cited in American political writings more than any other single secular author. See Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *American Political Science Review*, Vol. 78, No.1 (March 1984), pp. 189-197. The French philosopher's public standing is indicated by *The Federalist Papers*, in which both James Madison and Alexander Hamilton (in numbers 47 and 78, respectively) refer to "the celebrated Montesquieu." See Hamilton, Madison, and Jay, *The Federalist*, pp. 324 and 523. Locke's influence on the American mind of the Founding period is suggested by Thomas Jefferson, who wrote that "as to the general principles of liberty and the rights of man, in nature and in society, the doctrines of Locke, in his 'Essay concerning the true original, extent, and end of civil government,' and of Sidney in his 'Discourses on government,' may be considered as those most generally approved by our fellow citizens" of both Virginia "and the United States." Thomas Jefferson, *Jefferson: Writings*, Merrill D. Peterson, ed. (New York: Library of America, 1984), p. 479.

6. John Locke, *Two Treatises of Government*, Peter Laslett, ed. (New York: Cambridge University Press, 1988), § 128 (emphasis in original).

7. *Ibid.*

8. *Ibid.*, § 129.

Moreover, in giving up his unfettered natural liberty upon entering into civil society, man also gives up an unfettered control over his property. To be sure, for Locke, civil society is instituted in order to protect private property. He therefore insists that government has no power to take the property of subjects “without their own consent.” Without this guarantee, there could be no right to property. Nevertheless, Locke believed that a secure right to property can coexist with laws governing the conditions under which property is held, used, and exchanged. Accordingly, Locke acknowledged that within civil society, public authorities have a legitimate “power to make laws, for the regulating of property between the subjects one amongst another.”⁹

Locke’s teaching thus implies a legitimate power of government to regulate the trade of members of a civil society with those outside it. After all, if government may regulate property relations among its own subjects, it would surely have a right to do so between subjects and foreigners. Locke makes this clear in his account of what he calls the “federative” power, or the authority that government possesses to manage a civil society’s foreign relations.

According to Locke, once men enter into a civil society, that society becomes “one body” still in the state of nature in relation to “the rest of mankind,” or “all other states or persons out of its community.”¹⁰ Therefore, the civil power—or the federative aspect of that power—has the “management” of all “controversies,” and indeed all the “transactions,” that occur “with all persons and communities” outside the “society.” Thus the federative power comprehends “the management of the security and interest of the public without, with all those that it may receive benefit or damage from.”¹¹

Ultimately, under appropriate conditions, a country’s commerce can be viewed as a matter of national security since a country’s wealth bears directly on its ability to protect itself and its own citizens from

foreign threats. Again, according to Locke, human beings enter into civil society because the state of nature is too dangerous. The institution of civil society, however, does not completely remove the dangers of the state of nature, because every civil society remains in the state of nature in relation to all other civil societies. That is, each country must navigate an international realm in which the rules of justice, though generally acknowledged, are not reliably respected, and in which there is no supreme power that can protect rights and remedy injustices. Under these circumstances, each country can rely only on its own power for its own protection—and therefore must be mindful of whether its commercial relations with other countries increase or diminish that power.¹²

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Montesquieu and the Objects of Commerce.

Like Locke, Montesquieu is justly regarded as one of the great modern philosophers of liberty and was also a strong proponent of free trade among nations. Montesquieu presents commerce as an engine of economic and intellectual development. The “effect of commerce,” he notes, “is wealth”; that of wealth is “luxury”; and that of luxury “the perfection of the arts.”¹³ This chain of consequences will doubtless appear familiar to most American readers, who have themselves witnessed the remarkable ability of free markets to generate high levels of economic well-being and an accompanying expansion of both

9. *Ibid.*, § 139.

10. *Ibid.*, §145.

11. *Ibid.*, §§ 146–147.

12. In our day, of course, the United States has entered into a variety of international agreements governing trade, which provide remedies for harmful practices by other countries, and joined international organizations like the World Trade Organization, whose primary purpose is to defend nations from rapacious behavior by others. Still, there can be no doubt that each country must ultimately rely on its own power for its own protection, and, as we will see, the Founders duly granted this power to the new government in Article I, Section 8 of the Constitution.

13. Baron de Montesquieu and Charles de Secondat, *The Spirit of the Laws*, Anne Cohler, Basia Miller, and Harold Stone, eds. (New York: Cambridge University Press, 1989), p. 357.

practical and scientific knowledge. The modern world has pursued international commerce to a great extent. No one can deny that, at the end of many generations of such commerce, modern nations are far richer, and possess far more scientific insight and technical skill, than they did before.

Montesquieu also presented commerce as the source of a kind of moral improvement. He observed that the “history of commerce” is the history of “communication among peoples.”¹⁴ As a result, commerce has “spread knowledge of the mores,” or the culture and way of life, “of all nations everywhere.” The spread of such knowledge has in turn permitted nations to compare themselves to each other, “and good things have resulted from this.” Mutual knowledge tends to dispel the often exaggerated view that nations have of each other’s differences, thus removing a potential cause of hostility and conflict. We “should not be surprised,” Montesquieu says, “if our mores are less fierce than they were formerly.” Commerce “cures destructive prejudices, and it is an almost general rule that everywhere there are gentle mores, there is commerce, and that everywhere there is commerce, there are gentle mores.” Commerce also renders men less warlike by binding them together through mutual self-interest. “The natural effect of commerce is to lead to peace. Two nations that trade with each other become reciprocally dependent; if one has an interest in buying, the other has an interest in selling, and all unions are founded on mutual needs.”¹⁵

For Montesquieu, commerce brings peace, prosperity, and progress—alluring goods of the body and the mind. He therefore generally favored robust and free international trade. “The true maxim,” he says, “is to exclude no nation from one’s commerce without great reasons.” For it “is competition that puts a just price on goods and establishes the true relations between them.”¹⁶

Montesquieu also assumed (like Locke before him) that governments had the authority to regulate

their international trade on those occasions when it was necessary to secure their own nation’s interest. Here, as in his more famous account of separation of powers, Montesquieu holds up England as the example to be imitated by other nations. He claims that the English are “the people in the world who have best known how to take advantage of each of these three great things at the same time: religion, commerce, and liberty.”¹⁷ Montesquieu believed, though, that a nation cannot properly “take advantage” of commerce while leaving it utterly unregulated. Thus, Montesquieu observes with approval that “England prohibits the export of its wool; it wants coal brought to the capital by sea; it does not permit the export of horses unless they are gelded; the ships from its colonies that trade in Europe are to anchor in England.”¹⁸

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Admittedly, this sounds very far indeed from what contemporary proponents of free trade have in mind. Nevertheless, Montesquieu presents such policies as consistent with “liberty of commerce,” properly understood. “Liberty of commerce,” he contends, “is not a faculty granted to traders to do what they want.”¹⁹ For Montesquieu, then, liberty of commerce depends not on the utter absence of regulation, but on the avoidance of burdensome and arbitrary regulation. Thus, he praises England for imposing customs directly and not farming them out to private collectors. “The farming of customs,” he argues, “destroys commerce by its injustices and harassments and by the excesses of what it imposes.”²⁰ Prosperous commerce requires a stable legal environment, one in which traders can know

14. *Ibid.*, p. 357.

15. *Ibid.*, p. 338.

16. *Ibid.*, pp. 343–344.

17. *Ibid.*, p. 343.

18. *Ibid.*, p. 345.

19. *Ibid.*

20. *Ibid.*, p. 346.

in advance the costs of their business. Accordingly, commerce is well served by a system of taxes collected by disinterested agents of the government rather than by private contractors trying to make a living by collecting as much as they can. This same thinking informs Montesquieu's observation that "it is in countries of liberty that the trader finds innumerable obstacles; the laws never thwart him less than in countries of servitude."²¹ Commerce can flourish even with regulations, so long as they are written in the law and known in advance—but it will be destroyed where there are no legal regulations and it is instead governed by the arbitrary and transient will of the ruler.

Trade and the Struggle for American Liberty

Turning to the American Founders, we find Locke and Montesquieu's understanding of trade and the government's authority to regulate it reflected in the arguments made during the struggle to secure American liberty from British domination. In the first place, these arguments reveal the Founders' awareness of the desirability of trade between nations. In its list of complaints about British conduct toward America, the Declaration of Independence condemns the king and Parliament for enacting "pretended legislation" for the purpose of "cutting off our trade with all parts of the world."²²

The Declaration's primary author, Thomas Jefferson, had argued in a similar spirit at an earlier stage of the controversy. In his *Summary View of the Rights of British America* (1774), Jefferson bitterly denounced the system of commercial regulations that Parliament had imposed on the colonies. These regulations operated, he contended, to the advantage of Great Britain and at the expense of American interests. British regulations prohibited access to certain markets to the Americans, and thus diminished the prices they could command for their own goods and elevated the prices they had to pay for what they purchased. In all this, Jefferson detected "the spirit of tyranny."²³

Such complaints about British regulations of commerce, however, did not mean that the Americans of the Revolutionary period utterly rejected the notion that government should have power to regulate trade. On the contrary, the dominant opinion of the time openly acknowledged the legitimacy of such a power. This consensus view is reflected in the "Declaration and Resolves" of the Continental Congress of 1774. The Congress sternly condemned all the recent "arbitrary proceedings" of the British government, such as the closing down of the port of Boston (in retaliation for the Boston Tea Party), the transportation of Americans to Britain for trial, and the dissolution of colonial legislatures. It also asserted that "the foundation of English liberty, and of all free government, is a right of the people to participate in their own legislative council," and that since the Americans were not and could not properly be represented in the Parliament, they had a right to be governed by their own "provincial legislatures" in "all cases of taxation and internal polity."

At the same time, however, the Congress "cheerfully" gave its "consent to the operation of such acts of the British Parliament, as are bona fide, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members."²⁴

Indeed, in the struggle for American independence the Founders themselves used the regulation of foreign trade as a policy tool by which they sought to attain desirable political ends. In the aforementioned "Declaration and Resolves," the Continental Congress of 1774 adopted "a non-importation, non-consumption, and non-exportation agreement or association" among the colonies as a way of pressuring Britain into retreating from its oppressive measures against the colonists.²⁵ The Congress also created committees of inspection to see to it that these restrictions on trade were observed in all of the colonies.

The history of the struggle for American liberty shows not only that the Founders accepted the

21. *Ibid.*, p. 345.

22. Jack P. Greene, ed., *Colonies to Nation: 1763–1789: A Documentary History of the American Revolution* (New York: W.W. Norton & Company, 1975), p. 299.

23. Jefferson, *Thomas Jefferson: Writings*, p. 108.

24. Kurland and Lerner, *The Founders' Constitution*, Vol. 1, p. 2.

25. *Ibid.*, p. 3.

legitimacy of a governmental power to regulate foreign commerce; it also sheds light on their understanding of the purposes of that power. In particular, the non-importation and non-exportation policy of the Continental Congress reminds us that the power to regulate international commerce is a key instrument of statecraft in foreign policy. The successful conduct of foreign policy requires the government to have the tools necessary to modify the behavior of foreign states when their conduct is contrary to important American interests.

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Governments often seek to achieve their foreign policy goals through diplomacy, that is, through argument and admonition. In extreme cases, when the interests at stake are weighty enough, they threaten military action or go to war. In cases where persuasion fails, but war seems inappropriate, governments often resort to economic pressure brought to bear by regulation of trade. Such exercises of this power have been a tool of foreign policy from the Founding to the present.

Foreign Trade and the Constitution

Like the writings of Locke, Montesquieu, and the Founders during the Revolutionary period, the Constitution of 1787 affirms the importance of economic freedom, while at the same time recognizing the authority of governments to regulate international trade in appropriate circumstances. On the one hand, the Constitution takes care to protect the foundation of a free economy for the United States.²⁶ It protects private property not only by ensuring that taxes can only be imposed by a legislature representing the people of the United States, but also by providing, in the Fifth Amendment, that “no person”

can be “deprived” of “property” without “due process of law,” and that “private property” may not be taken for “public use” without “just compensation.” It protects the sanctity of contracts—so important to a free economy—by forbidding the states from enacting any law “impairing the obligation of contracts.” And it goes far toward establishing a free trade zone within the country by vesting in the Congress (and not the states) the power to regulate interstate commerce by forbidding the Congress to enact any “regulation of commerce or revenue” that give “preference” to the “ports of one state over those of another, and by strictly limiting the power of states to tax imports and exports.”

On the other hand, the Constitution also confers a governmental authority to regulate the nation’s commerce. That such a power is included at all is, of course, clear evidence that the Founders regarded it as a legitimate and important power. Moreover, the full scope of this power—including its coercive aspect—appears when it is considered in relation to the taxing power. Article 1, Section 8 of the Constitution—the main list of the powers of Congress—begins by conferring on Congress a “power to lay and collect taxes, duties, imposts, and excises.” Then, after granting a power to “borrow money on the credit of the United States,” it proceeds to delegate a power to “regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”

Everyone among the Founders knew, just as every politically informed person today knows, that duties—taxes on imported goods, also known as tariffs—can be used, and have been used, as a means of regulating foreign trade. In general, taxes impose a monetary cost on an activity, and they can thus be made high enough to discourage that activity. High duties on foreign imports will thus tend to discourage the importation of foreign goods, which can raise costs for domestic consumers.

Knowing all this, the Founders evidently included the commerce power as a power distinct from the power to impose duties precisely because they believed that the power to impose duties was not in itself adequate as a means of regulating trade. They apparently could envision some circumstances in which it would not be enough to encourage or

26. For a good overview of the Founders’ teaching on political economy, see Thomas G. West, “The Economic Principles of America’s Founders: Property Rights, Free Markets, and Sound Money,” Heritage Foundations *First Principles Series* No. 32, August 30, 2010, <http://www.heritage.org/political-process/report/the-economic-principles-americas-founders-property-rights-free-markets-and>.

discourage some forms of trade through taxation but would be necessary to require or forbid them through regulation. Such exigencies will inevitably arise in the long life of nations. At one time a government may forbid the exportation of things essential to national defense, such as the material necessary to make a nuclear weapon. At another time it may prohibit the import of a product that it believes poses a threat to public safety, such as produce from a country with a record of exporting unwholesome food.

The importance of the commerce power—the understanding of it as a necessary tool of any fully functional government—is further revealed in the remarks of those of the Founding period who studied the Constitution with care or who had a hand in drafting it. In the former category—impressive students of the Constitution—we would place Joseph Story, John Marshall’s celebrated colleague on the Supreme Court and the author of a massive set of *Commentaries on the Constitution of the United States* (1833). On Story’s telling, the inclusion of a power to regulate commerce was not even a matter of much controversy at the Constitutional Convention. “The want of this power,” he claimed, “was one of the leading defects of the confederation, and probably, as much as any cause, conduced to the establishment of the Constitution.” It was not necessary to dwell upon it, he continued, because the necessity of such a power was so well understood. “In the convention there does not appear to have been any considerable (if, indeed, there was any) opposition to the grant of power.”²⁷

Why was this power so obviously necessary as to raise no controversy, so clearly called for that Story could say that without it “the government would scarcely deserve the name of a national government, and would soon sink into discredit and imbecility”? Story suggested that “commerce” is essential to “the prosperity of nations.” He also suggested—paradoxically, but not unreasonably—that a power to regulate commerce can be necessary to the extension of commerce. Prior to the adoption of the Constitution, he said, commerce “was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by a want of combination.”²⁸ In

other words, unduly restrictive trade practices of foreign governments might call for an American response, with a view to opening foreign markets to American goods—and such a response could be made effective only by a national power, and not by the individual authorities of the states.

One might respond that this is a partisan view, the view of a Federalist, a proponent of an energetic national power. The evidence does not bear out this suspicion, however. We find, for example, James Madison—the celebrated “Father of the Constitution,” and later a leading Jeffersonian defender of strict limits on the national power—speaking of the authority over commerce in much the same terms as those used by Justice Story. In the preface to his notes on the debates at the Constitutional Convention, Madison observed that the “want” of authority in Congress “to regulate commerce had produced in foreign nations,” and “particularly” in Great Britain, “a monopolizing policy injurious to the trade of the U.S.” The solution, his comments suggested, was some “countervailing policy on the part of the U. States [sic],” a step that was, however, prevented prior to the ratification of the Constitution by the absence in the Articles of Confederation of a power to regulate trade.²⁹

Similarly, in 1785, two years before the Constitutional Convention convened, Madison wrote to James Monroe that it appeared “not to admit of a doubt” that some “power of regulating trade, to a certain degree at least, ought to be vested in Congress.” Again, such a power was necessary, Madison indicated, in order to counteract the restrictive policies of other nations, policies that sought to limit America’s access to foreign markets. Madison desired a system of free trade among nations, but nevertheless believed the establishment of such conditions required some power of regulation that could be used with a view to inducing other countries to open themselves to American goods. Thus, Madison told Monroe that he “wished” that no regulations were necessary. “A perfect freedom is the system which would be my choice.” Nevertheless, he added, for such a system to be “attainable, all other nations must concur in it.”

27. Joseph Story, *Commentaries on the Constitution of the United States*, Vol. 2 (Boston: Little and Brown, 1851), pp. 2–3.

28. *Ibid.*

29. *Ibid.*, p. 483.

Yet since it is impossible to expect that all nations will conform to this standard, Madison thought it necessary for the United States to “retort the distinction[s]” imposed by foreign regulations of trade, in order to get those distinctions removed. Madison spoke of this question as if it were not a difficult one, as if the requirements of national interest and national self-respect pointed clearly to the solution: “What is to be done? Must we remain the passive victims of foreign politics; or shall we exert the lawful means which our independence has put into our hands, of extorting redress? The very question would be an affront to every citizen who loves his country.”³⁰

This is not to say that there were no reservations about the commerce power expressed at the Constitutional Convention. Such reservations, however, arose not from an objection to the power in principle, but instead from concerns that it might be exercised in ways not compatible with the interests of some of the states. Thus, for example, Charles Pinckney of South Carolina proposed not that the power to regulate commerce be withheld, but rather that it be exercised only with a two-thirds vote of each house of the legislature. This precaution was necessary, he contended, because of the diversity of commercial interests of states, which could “be a source of oppressive regulations if no check to a bare majority” exercising the power “should be provided.” He further noted that the “power of regulating commerce was a pure concession on the part of” the southern states, since they “did not need” the commercial “protection” that the northern states were thought to require. Also emphasizing the role of community interest in the question, George Clymer of Pennsylvania contended that the “northern and middle states” would be “ruined” without some power “to defend themselves against foreign regulations.”³¹

Because the delegates regarded this question primarily as one of interest and not principle, it was susceptible of compromise. The spirit in which the Convention proceeded, and which permitted it to adopt the commerce power with no restrictions on

it, is nicely illustrated by the remarks of the other famous Pinckney of South Carolina, Charles Cotesworth Pinckney, who had risen to the rank of general in the Revolutionary army. Pinckney, like his kinsman, held that “it was in the true interest” of the southern states “to have no regulation of commerce.” Nevertheless, he added, in view of the commercial losses the “Eastern states” had suffered in the Revolution, their “liberal conduct toward the view of South Carolina,” and the interest that “the weak” southern states had in “being united with the strong eastern states, he thought it proper that no fetters should be imposed on the power of making commercial regulations.”³² And so it was decided.

***The Federalist* on Trade and International Politics**

If we wish to fully understand the Founders’ view of any of the powers granted to Congress, we must, of course, ultimately turn to *The Federalist*, the most celebrated commentary on the Constitution. *The Federalist* strongly affirms the importance of international trade to American economic well-being and national power. “The prosperity of commerce,” Alexander Hamilton explains in *Federalist* 12, is “perceived and acknowledged, by all enlightened statesmen, to be the most useful as well as the most productive source of national wealth.” Commerce, he claims, invigorates industry and makes agriculture more prosperous by providing markets for American goods. Commerce is thus “the faithful handmaid of labor and industry in every shape.”³³

At the same time, however, *The Federalist* also acknowledges the power to regulate trade as a necessary, and indeed a not particularly controversial, authority of the government. Writing in *Federalist* 22, Alexander Hamilton explains that the “want of a power to regulate commerce” was “allowed” by “all parties” to be one of the defects of the Articles of Confederation. Because of “the universal conviction entertained upon the subject, little” needed to be said about it.³⁴ Similarly, in *Federalist* 45, James Madison notes that while the “regulation of

30. *Ibid.*, p. 481.

31. *Ibid.*, p. 484.

32. *Ibid.*

33. Hamilton, Madison, and Jay, *The Federalist*, p. 74.

34. *Ibid.*, p. 136.

commerce” is an addition and not just a modification of the powers of the federal government, it seems to be one “which few oppose, and from which no apprehensions are entertained.”³⁵

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Moreover, *The Federalist* agrees with John Locke’s *Second Treatise* in presenting commerce with foreign nations as a matter of foreign policy, falling under the federative power of the commonwealth to regulate all transactions with those outside the political community. In *Federalist* 42, Madison turns to the “class of powers lodged in the general government” that concerns “intercourse with foreign nations.” This category includes the powers “to make treaties; to send and receive ambassadors, other public ministers and consuls; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations” and the power “to regulate foreign commerce.”³⁶

Similarly, in *Federalist* 11, Hamilton was careful to refer to trade with foreign nations not as a right but as a “privilege.” American power, and America’s potential usefulness as an ally, he writes, would “enable us to bargain with great advantage for commercial privileges.”³⁷ Moreover, in *Federalist* 7, Hamilton indicates that foreign trade regulations, even ones that we might find disadvantageous to ourselves, are not “injuries” but merely “justifiable acts of independent sovereignties consulting a distinct interest.”³⁸ Trade with other nations, then, is not something to which any nation is entitled, but rather

a benefit to be obtained by the intelligent application of the nation’s power and influence.

The Federalist, however, does not simply recapitulate the understanding of the politics of trade expressed by Locke and Montesquieu, by the leaders of the American Revolution, and by the Framers of the Constitution. It also goes further than any of those sources in explaining the understanding of human nature, and of the nature of international politics, that informed the Founders’ decision to include in the Constitution a power to regulate trade with foreign nations. According to this understanding, nations are admittedly capable of a mutually advantageous commercial intercourse. At the same time, however, they are also capable of a spirit of rivalry and competition that can lead them to use their power to limit or suppress each other’s commerce. The latter spirit, indeed, is all too commonplace. Thus, John Jay observes in *Federalist* 4, the American states were “rivals” with Britain and “most other European nations” in “navigation and the carrying trade,” and that we would “deceive ourselves” if we were to think that any of these other countries would “rejoice” to see our trade “flourish.” On the contrary, as our “carrying trade” could not increase “without in some degree diminishing theirs, it is more their interest, and will be more their policy, to restrain, than to promote it.” America’s commercial prosperity, Jay explains, was likely to cause “jealousies and uneasiness” to “slide into the minds and cabinets of other nations.”³⁹ In *Federalist* 11, Alexander Hamilton made similar observations.⁴⁰

According to *The Federalist*, the problem here identified is not merely rooted in the unreasonable and shortsighted competitiveness of the great powers of the late eighteenth century. It is rather a problem rooted in human nature itself. Writing in *Federalist* 6, Hamilton explains that the “causes of hostility among nations are innumerable.” Some

35. *Ibid.*, p. 314.

36. *Ibid.*, p. 279.

37. *Ibid.*, p. 68.

38. *Ibid.*, pp. 39–40.

39. *Ibid.*, p. 20.

40. “There are,” Hamilton noted, “appearances to authorize a supposition, that the adventurous spirit which distinguishes the commercial character of America, has already excited uneasy sensations in several of the maritime powers of Europe. They seem to be apprehensive of our too great interference in that carrying trade, which is the support of their navigation and the foundation of their naval strength. Those of them, which have colonies in America, look forward, to what this country is capable of becoming, with painful solicitude.” *Ibid.*, p. 66.

“have a general and almost constant operation upon the collective bodies of society.” Among these are “the love of power or the desire of preeminence and dominion,” as well as “the jealousy of power, or the desire of equality and safety.” Moreover, these general causes of conflict show themselves in a more specific way in nations like the United States and the European powers of Hamilton’s day. Thus, he also includes in his list of causes of conflict the “rivalships and competitions of commerce between commercial nations.”⁴¹

We might observe that nations, including our own, can behave in a foolish and self-injuring manner when they try to limit the trade of other countries—from which they might have benefitted in the end. Hamilton does not deny this. He reminds us, however, that it is common, given the aforementioned insurmountable imperfections in human nature, for nations to act in such short-sighted ways. It is indeed best for all nations, including commercial nations, to be “governed by mutual interest” and to “cultivate a spirit of mutual amity and concord.” Nevertheless, we have “invariably” seen “that momentary passions and immediate interests have a more active and imperious control over human conduct than general or remote considerations of policy, utility, or justice.”⁴² *The Federalist* thus concludes that foreign policies hostile to American commercial interests, being rooted in human nature, were not apt to disappear, and that it was accordingly wise of the Constitution to include a power by which the government of the United States could “counteract” such policies.⁴³

The arguments of *The Federalist*, as well as those made by other commentators on the Constitution, point to the Founders’ understanding of the purposes and uses of the commerce power. Story, Madison, and Hamilton all emphasize the benefits to the United States of engaging in free trade with other nations. All three, however, also note that America’s opportunities for such trade are limited by the restrictive practices of other nations. All three also present the commerce power as a tool of retaliation, the exercise of which was intended to open up foreign markets to American products. American commercial regulation should “counteract”—to use the word chosen

by Story and Hamilton—foreign commercial policies hostile to American interests, or should be used as a means of “retort” against such policies—to use Madison’s language.

On the Founders’ view, then, the exercise of the commerce power involves no question of economic isolationism. The purpose of the commerce power, and the “counteracting” policies that it makes possible, is not to cut America off from nations that pursue self-serving trade policies. It is rather to induce those nations to drop those policies against the United States so that it might trade with them on mutually advantageous terms.

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According to *The Federalist*, the considerable benefits of trading with other nations do not just come about spontaneously. Free trade is ordinarily thwarted by powerful forces in human nature, and therefore has to be secured through a prudent application of the nation’s authority to regulate its own foreign commerce. It may seem strange to hold that the freedom to trade depends on the power of the government to regulate trade. For the Founders, however, this claim, though seemingly paradoxical, is not self-contradictory. It rather manifests the familiar logic of political life, according to which some goods can only be secured by a government power that, if misused, can also harm those goods. It is no more self-contradictory to give the government power to regulate trade for the sake of securing freedom of trade than it is to vest the government with

41. Ibid., p. 29.

42. Ibid., p. 31.

43. Ibid., p. 67.

a power to wage war because we want to see peace established and preserved.

Above all, *The Federalist* teaches that the power to regulate foreign commerce is preeminently a political power that is to be exercised with a view to protecting and advancing the country's political interests, and particularly its concern with its own security, power, and honor. In securing freedom for America's foreign trade, the Union would be doing more than just promoting America's economic prosperity. It would also be establishing America's status as a nation capable of standing on the world stage with dignity, able to choose its own path free from foreign interference or domination.

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In *Federalist* 11, Hamilton praised the "adventurous spirit which distinguishes the commercial character of America," the "unequaled spirit of enterprise" of "American merchants and navigators," which promised to be "an inexhaustible mine of national wealth."⁴⁴ This energetic commercial spirit, Hamilton foresaw, promised to raise America to the rank of a first-rate power. The European nations foresaw this same possibility and sought to prevent it. Hence their efforts to devise restrictive commercial regulations, designed with a view to "clipping the wings" by which America "might soar to a dangerous greatness."⁴⁵ These European policies, in the absence of an American power of retaliation, would not only rob America of the wealth it could win through an

extensive commerce, but would also reduce America to a weak and subordinate position in the world. Thus would "poverty and disgrace overspread a country, which with wisdom might make herself the admiration and envy of the world," and a nation that could have been independent and powerful would find foreign governments in a position to "prescribe" the "conditions of" its "political existence."⁴⁶

This dire outcome could be averted, however, if the American states would wisely choose union under a government with the power to regulate foreign commerce in defense of American interests when doing so proved necessary. Indeed, by choosing this path, Americans would do more than avoid dishonor and subjection. It would, Hamilton suggested, open up a field for American commerce that would render the country both wealthy and powerful, and therefore "superior to the control of all trans-Atlantic force or influence," and able itself "to dictate the terms of the connection between the old and the new world."⁴⁷

Alexander Hamilton's *Report on Manufactures*

No account of the Founders' understanding of international trade would be complete without some discussion of Alexander Hamilton, who wrote at greater length about this question than any other leading member of the Founding generation. Hamilton is often mistakenly thought to be a protectionist, perhaps because his most famous state paper as Secretary of the Treasury—the *Report on Manufactures* (1791)—makes a forceful case for using the power of the government to subsidize the development of America's manufacturing sector. Hamilton, did not, however, think that the government should, as a matter of routine policy, protect all American industries from all foreign competition. Rather, his thinking about trade fell within the Founding consensus that admitted the benefits of free trade, even seeing its necessity for our nation's prosperity and power, but also saw the need for a governmental authority to regulate trade in order to protect America's national interest.

44. *Ibid.*, pp. 66 and 69.

45. *Ibid.*, p. 66.

46. *Ibid.*, p. 69.

47. *Ibid.*, p. 73.

Hamilton had studied Adam Smith's path-breaking work *The Wealth of Nations* (1776).⁴⁸ He therefore understood that a generally *laissez-faire* approach to trade policy would lead to economic development. In his *Report* he acknowledges the view that the "quick-sighted guidance of private interest" would, "if left to itself, infallibly find its own way to the most profitable employment," and that this employment would also in the end turn out to be the one most favorable to "public prosperity." On this view, it is, most of the time, "the soundest as well as the simplest policy" to "leave industry to itself."⁴⁹ Do this, and surely American manufacturing would "grow up as soon and as fast as the natural state of things and the community may require," without any governmental interference in the economy.⁵⁰

Hamilton freely admitted the general "solidity of this hypothesis." Nevertheless, he thought it would not turn out to be true in all circumstances, and particularly in the circumstances that America faced in Hamilton's own day. At that time, he believed, America faced a number of obstacles to its development of a manufacturing economy, especially the policies of other developed nations, which took steps to artificially protect their own manufacturers. These nations, he explained, gave "bounties"—or what we today would call subsidies—to their own manufacturers "on the exportation of certain commodities" in order to allow these manufacturers to "under-sell and supplant all competitors in the countries to which those commodities are sent." Thus, while we could expect the "industry" and "private interest" of a people to find their way to the best employment under "equal terms," we could not expect such a result when a people's industry and private interest faced the "adventitious barriers" created by the "positive regulations" and "artificial policy" of foreign governments.⁵¹ Such policies, Hamilton thought, called for some plan of counteraction on the part of America's government, if America was to develop its own thriving manufacturing economy.

It would be a mistake to seize upon these arguments as grounds for calling Hamilton a protectionist. Protectionism implies a settled policy of protecting American enterprises, simply because they are American, from all foreign competition. Hamilton did not advocate such a policy. On the contrary, he warned against government interference on behalf of industries that were incapable of flourishing on the basis of their own productivity. Support for "manufactures long established," he observed, "must always be of questionable policy," because "a presumption would arise" in such cases "that there were natural and inherent impediments to success."⁵² Similarly, elsewhere in his *Report*, Hamilton criticized those nations that, "urged by a spirit of monopoly," promoted their own industries at the expense of those of other nations, and thus surrendered "the interests of a mutually beneficial intercourse to the vain project of *selling everything* and *buying nothing*."⁵³

Although not a protectionist, Hamilton called for government support for American manufacturing in his own day because he believed that a flourishing American manufacturing economy was necessary to American national security and independence. In view of the aforementioned obstacles that foreign governments placed in the way of American manufacturers, Hamilton believed some government intervention was necessary if American industry was to develop as quickly as possible. This development, however, was not, for Hamilton, so much a luxury as it was a necessity for our young nation. War, he believed, was an ever-present possibility. The ambitious nations of Europe were unlikely to give up their pretensions to power in the western hemisphere.

American independence, won at such great cost in the Revolution, could only be maintained if America possessed within itself the materials it needed to make war successfully. National "independence and security," he contended, were the "great objects" of

48. See Ron Chernow, *Alexander Hamilton* (New York: The Penguin Press, 2004), pp. 347 and 376. For a more detailed account of Hamilton's relationship to Smith, see Peter McNamara, *Political Economy and Statesmanship: Smith, Hamilton, and the Foundation of the Commercial Republic* (DeKalb: Northern Illinois University Press, 1997).

49. Joanne B. Freeman, ed., *Alexander Hamilton: Writings* (New York: Library of America, 2001), p. 648.

50. *Ibid.*, p. 670.

51. *Ibid.*, p. 672.

52. *Ibid.*, p. 701.

53. *Ibid.*, pp. 664–665 (emphasis in original).

all governments, and they required each nation to “possess within itself all the essentials of national supply,” including “the means of *subsistence, habitation, clothing, and defense*.” Such goods were necessary to wage war, and a nation at war could not safely rely on other nations to provide them. When war came, a threatened trading partner might refuse to provide them, or their shipment might be interdicted by an enemy. The internal “possession of these goods,” Hamilton thus concluded, “is necessary to the perfection of the body politic, to the safety as well as the welfare of the society.”⁵⁴

In making such arguments, Hamilton was by no means stepping beyond the Founding consensus on these questions. On the contrary, the *Report on Manufactures* was written by Hamilton as Secretary of the Treasury in response to a request of the House of Representatives, which had sought the Secretary’s advice on “the subject of manufactures,” and especially on “the means of promoting such” as would “tend to render” the United States “independent” of “foreign nations for military and other essential supplies.”⁵⁵ And here the House was following the lead of President George Washington, whose January 8, 1790, speech to Congress had observed that the best way to preserve peace was to prepare for war, and that such preparation called for the promotion of such “manufactories” as would make the country “independent” of other nations for “essential” and “particularly for military supplies.”⁵⁶

The Dangers of Regulating Trade

Economists have rightly warned about the dangers involved in giving the government an authority to regulate foreign trade. These dangers include cronyism and rent-seeking—the attempt on the part of special interests to enrich themselves at the expense of the public. Seeing the existence of such an authority, some groups will organize with a view to getting it exercised for their own narrow benefit. They may seek protection for their own industry, for example, simply because the protection excludes or impedes

foreign competition and thus keeps them in business, charging the prices they want to charge for the goods they want to provide.

The Founders were aware of these dangers and sought means to counteract them. In the first place, Alexander Hamilton insisted in his *Report on Manufactures* that any regulations of trade must be examined on the basis of a “national view”—and not merely in relation to any regional or partial considerations.⁵⁷ This meant, on the one hand, that the power should not be exercised except when it was truly in the nation’s interest to do so, that is, when it promoted American security and independence. It also meant, on the other hand, that Americans should not complain, or condemn as mere rent-seeking, policies that promoted American commerce just because they benefitted some Americans more directly than they benefitted others.

It is an unavoidable fact of life that all governmental policies, even those most necessary to the common good, benefit some more directly than others. Thus Hamilton admonished his fellow Americans not to consider these questions in terms of “solicitudes and apprehensions which result in local discriminations,” but instead to weigh such policies in light of “the intimate connection of interest which subsists between all the parts of a society united under the same government.” “It is a truth as important as it is agreeable,” he contended, “that everything tending to establish substantial and permanent order in the affairs of a country, to increase the total mass of industry and opulence, is ultimately beneficial to every part of it.”⁵⁸

Hamilton’s admonition to think nationally, however, could not of itself solve the problem. After all, nothing is more common than for human beings to invoke the national interest, and even national security, as a spurious justification for policies that they really seek only for their own private benefit. The Founders knew this, and they sought to ameliorate the problem, if not to solve it outright, by designing the kind of government and the kind of republic that

54. *Ibid.*, p. 692 (emphasis in original).

55. *Ibid.*, p. 647.

56. Quoted in Carson Holloway, *Hamilton Versus Jefferson in the Washington Administration: Completing the Founding or Betraying the Founding* (New York: Cambridge University Press, 2015), p. 113.

57. Freeman, *Alexander Hamilton: Writings*, p. 688.

58. *Ibid.*, p. 694.

would be less likely to fall victim to such narrowly self-serving policies. They believed that institutions like separation of powers, as well as the creation of an extended republic with a multiplicity of interests, would make it much more difficult to assemble political majorities that would devise national policies for the sake of advancing mere factional interests.

As we noted before, some at the Constitutional Convention feared that the power to regulate commerce would be used to benefit some states at the expense of others. In response, James Madison held that the institutional arrangements established by the Constitution made this unlikely. He contended that “abuse” of the commerce power “was rendered improbable by the provision of two branches—by the independence of the Senate, by the negative of the Executive.”⁵⁹ In other words, the creation of a legislature divided into two houses makes it less likely that a majority can seize control of both chambers and impose legislation made only with a view to benefitting some particular interest. This outcome is made even less likely, moreover, by the Senate’s greater independence of momentary majorities, made possible by the longer terms held by Senators. And the veto power of the President provides an additional check.

In addition, the Founders believed that the very size of the country, made possible by the principle of representation, would impede the emergence of any majority capable of wielding the powers of the government for narrow and self-interested purposes. This argument was made at the Constitutional Convention as a direct response to fears about abuses of the commerce power. When some worried that the commerce power might operate against the well-being of some states, since the various states had different commercial interests, Roger Sherman of Connecticut remarked that “the diversity” of commercial interests “was of itself a security” against the abuse of the power.⁶⁰ This argument was also pressed by James Madison. He contended that abuse of the commerce power was made “improbable” not only by separation of powers, but also by the fact that the Union included both “agricultural” and

“commercial” states, and that even the commercial states had significant “interior interest[s]” that were “agricultural” in character.⁶¹

As is well known, Madison also developed this argument for the public at large in his celebrated tenth *Federalist* essay. There, Madison observed that the problem of clashing interests trying to shape public policy for their own particular purposes is inseparable from republican self-government. This danger shows itself in relation to all matters of national policy, including trade. The country will confront the questions whether “domestic manufactures” should be “encouraged, and in what degree, by restrictions on foreign manufactures.” Such questions, Madison observed, “would be differently decided by the landed and manufacturing classes,” and “probably by neither, with a sole regard to justice and the public good.”

The solution to this problem, Madison argued, is not to withhold the power to regulate commerce, which, as we have seen, he and the other Founders thought necessary to a competent national government. It is instead to “extend the sphere” of the society so as to “take in a greater variety of parties and interests,” and hence to “make it less probable that a majority of the whole will have a common motive” to enact policies not in the public interest.⁶²

Conclusion

The American Founders considered the question of international trade in a pragmatic spirit. Their thinking about it was informed by theory, but they approached it as practical statesmen trying to balance a variety of considerations. They understood the considerable benefits of voluntary economic exchange, but they also believed that the authority to regulate trade was a necessary tool of foreign policy. They saw that free trade among nations is to be desired, but they also thought that it could only be established if the government had a power to counteract the restrictive policies of foreign nations, thus opening their markets to American goods. They appreciated the value of commercial connections to other countries, but they also thought that America

59. Kurland and Lerner, *The Founders’ Constitution*, Vol. 2, p. 485.

60. *Ibid.*, p. 484.

61. *Ibid.*, p. 485.

62. Hamilton, Madison, and Jay, *The Federalist*, p. 64.

should be independent as regards the goods that are truly necessary to the nation's security. They granted the government a power to regulate foreign trade, yet they saw the dangers in such a power and took steps to ameliorate them.

Their understanding is perhaps best captured in summary form in George Washington's famous Farewell Address as President. "Harmony" and "liberal intercourse with all nations," Washington contended, "are recommended by policy, humanity, and interest." Accordingly, America's government should seek trade with all nations on "equal and impartial" terms, "diffusing and diversifying by gentle means the streams of commerce." The establishment of such trade, however, would depend on agreements reached by nations acting on their own interests. Accordingly, statesmen responsible for negotiating

the "conventional rules" of commercial "intercourse" would have to keep "constantly" in mind that it is "folly in one nation to look for disinterested favors from another."⁶³

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63. William B. Allen, ed., *George Washington: A Collection* (Indianapolis: Liberty Fund, 1988), pp. 525–526.