



Politics, Constitutional Decline and Government Overreach

By Roger Pilon
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"What's the Constitution among friends?" asked Ohio's John F. Follett in the House in 1884. Still in the offing, constitutional decline was only stirring. In fact, three years later, 100 years after the Constitution was written, President Grover Cleveland would veto a bill appropriating the paltry sum of \$10,000 for seeds for Texas farmers suffering from a drought. "I can find no warrant for such an appropriation in the Constitution," his veto message said.

Cleveland was simply echoing a long settled understanding that ours is a Constitution that authorizes only limited government. Not that calls for more government had not been heard from the start. In 1791, for example, Treasury Secretary Alexander Hamilton unveiled his Report on Manufactures—an early industrial policy scheme. Congress promptly shelved it. And in 1794, the Constitution's principal author, James Madison, finding before him a bill for the relief of French refugees fleeing to Baltimore and Philadelphia from an insurrection in San Domingo, rose on the floor of the House to declare, unremarkably, that he could not "undertake to lay his finger on that article of the Federal Constitution which granted a right to Congress of expending on objects of benevolence the money of their constituents."

How quaint. Is there anything today that is not fit for government's attention? Large sodas and restaurant menus have lately garnered notice. Retirement, health care, day care, wages, rents, prices, charity, even public radio and television—all that and so much more is the regular business of modern American government because, as President Obama has so often put it, "We're all in this together." Indeed, "we sometimes forget," he told Ohio State graduates last spring, "the larger bonds we share, as one American family." The family vacation of old springs to mind: Do we go to the mountains or the beach? If we're all in this together, we can't go our separate ways.

So how did a nation conceived in and dedicated to individual liberty take on the trappings of the collective mind such that so much of life today is lived through the state, as in the Obama campaign's much parodied "Life of Julia" cartoon? How did we go from limited government to Leviathan, from the dominance of the private to that of the public sphere? Elements of both have been with us from the beginning, of course, but the presumption at the outset and long thereafter

was for private, not public, initiative. That's no longer true. Got a problem? Washington has a solution. Politics today is ubiquitous.

The Original Design

The tale of that transition to massive government overreach is worth telling because if we don't understand its roots and how to respond, the implications are stark. We could afford to delude ourselves about the solvency of our collective retirement undertaking when the ratio of Social Security contributors to recipients was 16 to 1. When it's 3 to 1, as now, and the demographic handwriting is on the wall, those delusions are too dear to endure. Our children are already paying the price, as economists are now documenting. And Social Security is hardly the least solvent of our modern social welfare schemes. Obamacare was sold in part as the answer for our looming Medicare and Medicaid indebtedness, yet its numbers, clearer by the day, are making those programs look positively sound. What can't go on perforce will not.

Not surprisingly, those who designed our political arrangements understood this, and understood it systematically. Unlike so many other nations, we were blessed at the outset not to have a single or dominant religion but several, which meant that if peace were to reign, religion had to be a free private affair. To be sure, religious establishments were found at the state level—the last in Massachusetts until 1836—and religious strife was not unknown even after the Constitution was ratified. But the principle—that religion and government needed to be separated for the benefit of both—was understood and, more important, understood to be perfectly generalizable to most of life, including especially economic life, our main daily business. More than once Madison said that the purpose of government was to secure property—defined broadly by John Locke as lives, liberties, and estates—for which we toil most of our waking hours. With the protection of property and contract as its main domestic function, government was to intrude little further into the market—or into other affairs, for that matter—leaving individuals otherwise free to assess and pursue their own interests, their own happiness.

The results would never be perfect, of course, but they'd be better by far, the Founders believed, than the alternative—better than public management of the market and more. Nor would this preference for individual liberty amount to saying "You're on your own," as President Obama has claimed. To the contrary, we're perfectly free to join with others for religious, economic, charitable, artistic, or many other endeavors—provided only that it's voluntary, not forced, not through force of law. In that sense, that proper sense, we are indeed "all in this together."

Progressive Social Engineering

But that wasn't good enough for late 19th and early 20th century Progressives. They were in a hurry. What's more, they believed they knew better than the rest of us what our true interests were. Schooled in the elite universities of the Northeast, imbued with British utilitarianism—which had supplanted the natural rights principles of the Founders—and German ideas about good government—Bismarck's welfare state—Progressives were enamored with social engineering. "No person who is interested in social progress can long be content to raise here and there an individual," wrote Frank Dekker Watson in 1922, then director of the Pennsylvania School for Social Service. Indeed, he commended the ongoing "crowding out" of private by

public charity, conducted by "professionals," for only so would "public funds ever be wholly adequate for the legitimate demands made upon them."

Progressive social engineering took many forms, but its efforts to change the world focused mainly on the political branches. Its aim was to replace judge-made common law, which established the legal framework within which individuals and organizations pursued their interests, with statutory law, enacted by legislatures and, in time, by the administrative agencies in the executive branch. Unlike common law, grounded in reason and custom, legislation of the kind Progressives championed reflected the policy preferences of the majority or, more realistically, of those best situated to influence the political system. Thus the shift from law grounded in principle to law as policy, from reason to will, and to the politicization of law—precisely what the Constitution sought to avoid. When all is politics, nothing is law.

In the early decades of the 20th century the Progressive zeal for change through political action unfolded in ever-wider areas of life. Much of it focused on economic affairs, of course. Yet for all their efforts in the name of the "little guy," what Progressives accomplished in the end was "the substitution of state-monopolies and cartels for competitive markets," as legal theorist Richard Epstein has ably demonstrated, because they "thought they could tell a good monopoly from a bad one." And why not? After all, they undertook their mission through the largest monopoly of all, government. Whereas the founding generation and many that followed saw government, in the classical liberal tradition, as a "necessary evil," Progressives saw it as an engine of good, an institution able and even authorized to solve all manner of social and economic problems.

At times that hubris reached disturbing lengths. One appalling example, inspired by the modern "science" of eugenics, was a push to improve our genetic pool by sterilizing those thought to be of insufficient intelligence—promoted by such luminaries of the day as the presidents of Planned Parenthood and Stanford University. Ruling for Virginia in a 1927 "sweetheart suit" brought against the state statute that authorized the practice, the sainted Justice Oliver Wendell Holmes concluded (in)famously that "Three generations of imbeciles are enough." There followed across America some 70,000 sterilizations.

None of this should have been possible, of course, under the Constitution as written and later amended. The original Constitution limited Congress's authority to only 18 enumerated powers or ends. The Bill of Rights, added two years later, further limited how the federal government might exercise those powers. And the Civil War Amendments extended those further limits and more against the states. With the rise of Progressivism, however, often manipulating the era's populism, the shift in the climate of ideas started to take a toll on our understanding of the Constitution. Whereas bills reflecting government overreach had most often never gotten out of Congress, or if they did presidents vetoed them or, ultimately, courts blocked them, those checks started to fail as Progressivism took hold. Such is the power of the *Zeitgeist*.

Politicizing the Court—and the Constitution

The ensuing constitutional decline didn't happen all at once. In fact, during those early decades the courts, the last check in that process, resisted the decline to a substantial degree. With the

arrival of the New Deal, however, things started coming to a head as Progressives shifted their political activism from the states to the federal government. Seizing the opportunity afforded by the Depression, the administration of Franklin Roosevelt pushed massive expansions of federal power through a pliant Congress. But when those programs reached the Supreme Court, the nine old men, as they came to be called, stood athwart them. Shortly thereafter the crisis came when Roosevelt, following the landslide election of 1936, unveiled his notorious Court-packing scheme, his plan to pack the Court with six new members. Responding to the national uproar over the scheme, Congress refused to go along. But the Court got the message. What followed was the famous "switch in time that saved nine."

The switch began with two 1937 decisions. Without benefit of constitutional amendment, the Court eviscerated the main structural restraint on Congress's power, the doctrine of enumerated powers, thus enabling Congress to bring into being the modern redistributive and regulatory state. To complement those rulings, in 1938 the Court effectively bifurcated the Bill of Rights, crafting in the process a bifurcated theory of judicial review that reduced property rights and economic liberties to a kind of second-class status. And finally, in 1943 the Court upheld the growing practice in Congress of delegating ever more of its legislative power to the many administrative agencies it was creating—well over 300 such agencies today—thus sanctioning the modern executive state where most "law making" now takes place—the regulations, rules, guidance, and such of modern "administrative law."

"Government overreach" thus stands for more than government reaching into areas in which it is incompetent—something we see in spades today. More important, it stands for government reaching into areas in which it has no authority—no authority under a natural reading of the text, structure, original understanding, and history of the Constitution. Thus, it's not simply a matter of policy but of principle—constitutional principle. Our governments, unlike those in many parts of the world, can claim no "inherent" power. Whatever powers they have have been delegated to them by the people—not through periodic elections, which are meant to fill offices, but through their constitutions.

Constitutions have two main functions: to authorize, institute, and empower the governments the people create through them; and then to limit that power. In the Federalist Papers we see how the Framers struck that balance. In particular, in Federalists 41, 42, and 44 Madison explains how the General Welfare, Commerce, and Necessary and Proper Clauses, respectively, were meant to be read—the very clauses the New Deal Court turned on their heads. And in Federalist 45 Madison draws it all together when he writes that the powers of the new government were "few and defined." Contrast that with today's federal government. And it isn't as if the New Dealers weren't aware of what they were doing. As legal historian William Leuchtenburg has shown, they debated whether to amend the Constitution or to simply pack the Court. The latter faction won out. Perhaps Rexford Tugwell, one of the New Deal's principal architects, put it best: "To the extent that these new social virtues [i.e., New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them."

Reversing Course

Thus, today we live with that legacy of constitutional decline—and without the discipline the document was meant to impose on politics. The result was predictable and predicted. As noted above, we are spending as fast as we can borrow while regulating our liberties away. And that will not change until we come to grips with the nature and gravity of the problem. In a nutshell, except for a court decision here or there, the only restraint on government overreach today, short of no longer being able to borrow, is politics—because the New Deal decisions, to put it plainly, stripped the Constitution of most of its structural and substantive restraints on government. That's what they were meant to do, to clear the way for the New Deal programs.

By itself, therefore, the Court cannot reverse this process. At this late date, when so many have grown dependent on countless government programs, the Court can only chip away at the edges of Leviathan or, more important, say "No further," as it did in several parts of its Obamacare decision. The heavy lifting will have to be done by the political branches—the very branches that propelled us into this situation. That speaks volumes about how difficult it will be to check this spiral, as we see when we look around the country at states, cities, and counties caught up in it, staring bankruptcy in the teeth. But the political branches, of course, are us. In the end, therefore, we have no one to look to but ourselves. Politics gave us the constitutional decline that enabled the government overreach we labor under today. Politics is what we have left to extract ourselves from that course.

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