



Gridlock: From Liberty's Shield to Sword for the Status Quo

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On the list of complaints Americans have today about their federal government, gridlock sits near the top. Despite the campaign promises, election after election, little in Washington seems to get done. Immigration, entitlements, the federal debt and more – all cry out for attention. Is there a better, more basic example than Congress's failure, year after year, to meet its October 1 deadline to fund the massive programs it authorizes? To keep Leviathan afloat over the past 23 years, our legislators have passed 119 continuing resolutions, kicking the proverbial can down the road each time.

Yet we tend to forget that gridlock, to put it in modern parlance, isn't a bug in our system of government. It's a feature. It's built into the Constitution, and for good reason. Let's remember, the generation that wrote and ratified our basic law had just fought a long war to overthrow oppressive government. They weren't about to saddle themselves with one of their own making. The document is thus replete with checks on power, limits on the reach and character of government that have long served us well by requiring numerous hurdles to be overcome before government could act, thereby preserving our liberty.

But that cautious approach to governing rests on a common understanding about the proper, limited role of government in a free society, which the Framers wanted to preserve. Implied is the idea that if some among us want to change that understanding and that arrangement, they'd have to overcome the Constitution's inherent gridlock. There are two ways to mount such a change, however: within the Constitution, or extra-constitutionally. We took the former course after the Civil War; the latter, in fits and starts, over the past century, especially after the New Deal Supreme Court was pressured to read many of the Constitution's checks out of the document. With that, government grew until today, vast areas of life are under governmental oversight and control, decided not individually but collectively. And because we've thus politicized so many matters, we're now deeply divided about how to resolve the problems that have followed, as many long ago predicted would happen.

But here's the kicker: Whereas the gridlock that resulted from the Constitution's checks on power once kept government out of most such matters, the gridlock that results today from the checks that remain cuts the other way, keeping government in businesses it was never authorized to be in in the first place. The Congressional Budget Office tells us, for example, that Social Security, for which there is no constitutional authority, will soon be insolvent, but because the Constitution is still sufficiently skewed against change, gridlock results in preserving an untenable status quo. In short, those constitutional checks that remain that once were part of a set

of shields designed to preserve limited government are now swords against restoring the original design and the individual liberty and responsibility it secured.

Just to be clear, however, the problem is not with the Constitution. It's with our having abandoned the Constitution, which was written to avoid this situation by making it hard for government to act. By implication, we were not expected to rely on government for our well-being, as so many do today. Rather, we wanted to be free because only so could we be responsible for our own well-being, living our lives as we wished. Let's see that in a bit more detail.

Under Limited Government

We begin, as the Founders did, not with the Constitution but with the Declaration of Independence, where we find, in essence, America's moral, political, and legal vision. Appealing to the natural rights strain of natural law, grounded in universal reason, the Founders set forth first the pre-existing moral order: Each of us is born with equal natural rights to life, liberty, and the pursuit of happiness. Only then did they turn to the political and legal order that follows: We create government to secure those rights, its just powers derived from the consent of the governed. Thus, government is twice limited: by its ends, to secure our rights; and by its means, which require our consent. Thus, too, government doesn't give us our rights, as so many think today. We already have rights, including rights to create and empower government. It's rights first, government second, dedicated to securing our liberty. There's nothing extraordinary in that vision, except the long human struggle to secure it. It's what the abolitionists, the suffragists, and the civil rights movement appealed to when the positive, written law went the other way.

But of course, it would take positive law to secure the vision – the Constitution – where we find the many checks that enable gridlock, making change difficult by design. Start with the Preamble: All power rests originally with “We the People” who “do ordain and establish this Constitution.” Thus, government has no “inherent” powers, only those granted by the people, who must first have them. And notice the purposes for which powers were granted: “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” Even the general welfare – the welfare of all – is properly read as securing our rights, consistent with the Declaration.

Beyond the Preamble, however, are numerous express and implicit restraints on power. Start with the first sentence of Article I: All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. “All,” not some: That's the non-delegation doctrine; Congress can't delegate its powers to other branches of government – a core element in the separation of powers. And implicit in “herein granted” is doubtless the most important limit on Congress, made explicit in the Tenth Amendment: the doctrine of enumerated powers. Article I, section 8 enumerates Congress's 18 legislative powers, all aimed at securing liberty. You'll find no power there over retirement, health care, education, housing, the arts, and so many other schemes that Congress today creates, subsidizes, and regulates.

To go on, the bicameral legislature just mentioned, each chamber constituted differently, plus presentment to a president with veto power make it difficult to legislate, as does the supermajority needed to override a veto. Judicial review is yet another and a crucial check, as are

periodic elections. The Bill of Rights puts further limits on both the ends and the means of government. And federalism, leaving most power with the states, when coupled with Congress's limited powers meant that most of life was meant to be lived under state common and statutory law, not under vast federal programs as today. Federalism also enabled us to vote with our feet, which many do. True, the Civil War Amendments expanded federal power, the constitutionally proper way, but only to check states from violating the rights of their own citizens. Given the Constitution's original compromise over slavery, those were crucial steps toward securing liberty.

Thus, quite apart from how any of those many checks on power were executed – practice has always been less than perfect – there can be no question about whether the Constitution, especially as amended following the Civil War, was designed to limit the powers it authorized, all to secure individual liberty and responsibility. Erring on the side of caution, the Framers accepted gridlock as inevitable – and usually salutary in securing the Constitution's ends.

The Progressive Response

For 150 years, the original design held, for the most part, and the nation thrived. As late as 1887, for example, 100 years after the Constitution was written, we could find President Grover Cleveland vetoing a bill appropriating \$10,000 for seeds for Texas farmers suffering from a drought, his veto message saying, "I can find no warrant for such an appropriation in the Constitution." But with the rise of progressivism late in the century, that would change.

Hailing from elite Northeastern universities, progressives were social engineers enamored of the new social sciences. They wanted "experts" to reorder society, mainly through state statutes at first, but increasingly through federal policies. Contemptuous of constitutional restraints, President Woodrow Wilson saw the document as a "straitjacket" that kept him from expanding the role of the federal government. Although progressive political activism achieved several changes over the early decades of the 20th century – the 16th and 17th Amendments were striking examples, providing for a federal income tax and the direct election of senators, respectively – the courts often stood athwart those efforts in the name of the Constitution.

That would change with the New Deal, but not before the Supreme Court rejected several of President Franklin D. Roosevelt's programs toward the end of his first term. Following his landslide reelection in 1936, he unveiled his infamous plan to pack the Court with six new members. The plan failed, politically, but the Court changed course nonetheless. In three main steps, it effectively opened the door to the modern welfare state.

In two 1937 decisions the Court eviscerated the doctrine of enumerated powers. It read Congress taxing power, which enabled Congress, pursuant to its enumerated ends, to tax to provide for the "general Welfare of the United States," as authorizing Congress instead to tax for anything that, in its judgment, served "the general welfare," apart from enumerated ends. Thus arose our modern redistributive state. And it read Congress's power to regulate interstate commerce, which was meant to ensure free interstate trade in light of earlier state interference, as authorizing Congress to regulate anything that affected interstate commerce, which of course is virtually everything. Thus the modern regulatory state.

Then in 1938 the Court bifurcated both the Bill of Rights and judicial review. If a law implicated "fundamental" rights like speech and voting, it would get "strict" judicial scrutiny and doubtless

be found unconstitutional. By contrast, if “nonfundamental” rights like those concerning property and economic liberty were implicated, the law would be upheld provided one could conceive of a reason for it. With such judicial deference, one more check on power fell.

The third step came in 1943 when the Court jettisoned the non-delegation doctrine, allowing Congress to delegate ever more of its legislative powers to the executive branch agencies it had been creating. With some 400 and more such agencies today, that’s where most of our laws are made, as regulations, rules, and the like. Thus the modern executive state – Leviathan. Rule by bureaucratic experts, progressivism triumphant.

Gridlock’s Virtues and Vices

Clearly, what’s come to be known as the 1937 constitutional revolution turned the document on its head. We’ve gone from limited to largely unlimited government. And the evidence bears that out in both the redistributive and the regulatory domains. Notice too that this was done not through constitutional amendment – the constitutionally correct path the Civil War generation followed – but through judicial legerdemain, albeit under political pressure from President Franklin Roosevelt.

But notice especially the checks that were eviscerated, starting with the core doctrine of enumerated powers. Reading the taxing and commerce powers as the New Deal Court did turns them from shields against power into swords of power. That was no accident. How else could a path be cleared for expanding the federal government than by reading Congress’s powers far more broadly than they’d ever been read before? Rexford Tugwell, one of the principal architects of the New Deal, put the point plainly: “To the extent that these [New Deal policies] developed, they were tortured interpretations of a document intended to prevent them.”

Look too at the bifurcation of rights and judicial review. If the powers unleashed in 1937 were to prevail, the Court needed to remove the check afforded by property rights and economic liberty, reducing them to the status of “poor relations” in the Bill of Rights, as Chief Justice Rehnquist once put it, critically. And with the non-delegation doctrine eliminated, Congress could write broad statutes and leave it to unelected non-responsible executive branch bureaucrats – experts – to make all the policy judgments that once were the responsibility of a Congress subject to periodic elections.

Note finally that it was judicial deference all the way down. The Court would no longer hold Congress to its enumerated powers or ends, would police only “fundamental” rights, would look the other way as Congress delegated away its legislative powers – and would soon do the same with agency decisions brought before the Court, developing a series of deference doctrines that allowed agencies free rein. As the judicial check waned in case after case, the line between judicial deference and judicial abdication grew vanishingly thin.

With the demise of those checks on federal power, the welfare state expanded, of course, in all of its variations, from regulatory redistribution to corporate welfare, aid to states, healthcare subsidies, and far more. The predictable and predicted result has been ever-increasing dependence on government programs, a Hobbesian war of all against all, and a nation deeply divided over the proper role of government – many wanting ever-more “free” goods and services, others wanting a restoration of individual liberty and responsibility, with little common ground between those two alternatives.

So long as we remain divided fairly evenly on that basic question, we will likely stay gridlocked, because the constitutional checks on power that have remained in place will ensure it. It's doubtful, for example, that reform of unsustainable entitlements can pass both congressional chambers and survive presidential presentment, especially given the intense political pressures that move would generate. Thus, the gridlock that once kept government in check now keeps us from getting government back in check. What once was a shield for liberty is now a sword for the status quo.

In recent years the Supreme Court has begun revisiting its past errors – reviving the doctrine of enumerated powers, better securing property rights and economic liberty, and reconsidering its deference doctrines – albeit only at the margins, so far. To avoid the insolvency toward which we're headed, however, and overcome the perverse incentives the modern welfare state has put in play, many more of us than presently do must recognize that the Founders got it right while in the last century we got it wrong, very wrong. Only so will gridlock be surmounted.

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