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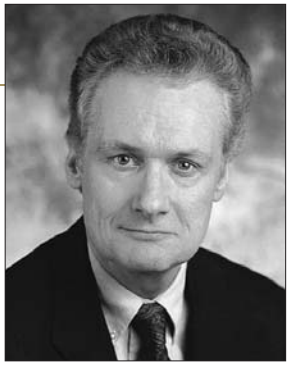
A QUARTERLY MESSAGE ON LIBERTY

From Limited Government to Leviathan

Roger Pilon

When Thomas Jefferson wrote that the natural progress of things is for liberty to yield and government to gain ground, he doubtless had in mind his rival, Alexander Hamilton, for hardly had the new government begun when Hamilton proposed a national industrial policy in his 1791 Report on Manufactures. To Hamilton's argument that Congress had the power to pronounce upon the objects that concern the general welfare and that those objects extended to "the general interests of learning, of agriculture, of manufacturing, and of commerce," both Jefferson and James Madison, the principal architect of the Constitution, responded sharply. Said Madison: "The federal Government has been hitherto limited to the specified powers, by the Greatest Champions for Latitude in expounding those powers. If not only the means, but the objects are unlimited, the parchment had better be thrown into the fire at once." Congress shelved Hamilton's Report. He lost that battle, but over time he won the war.

Thus, the doctrine of enumerated powers, meant to be the



Roger Pilon is vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies. This is an excerpt of Senate testimony he gave on October 25 on the constitutional limits on federal power and programs, available at http://www.cato.org/testimony/ct-rp102005.html.

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principal restraint on overweening government, faced political pressure from the start, and increasing pressure as time went on. In fact, the pattern we see through our first 150 years under the Constitution can be summarized as follows: In the early years, measures to expand government's powers beyond those enumerated in the Constitution rarely got out of Congress because they were stopped by objections in that branch; members of Congress actually debated whether they had constitutional authority.

Court began rewriting the Constitution without benefit of constitutional amendment. It did so in two steps. In 1937 the Court eviscerated the doctrine of enumerated powers, opening the floodgates for the modern redistributive and regulatory state to pour through. Then a year later it bifurcated the Bill of Rights, creating a bifurcated theory of judicial review in the process. Thereafter, if a law implicated "fundamental" rights like speech, voting, or, later, certain "personal" rights, the Court

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Later, however, as constitutionally dubious bills did get out of Congress, presidents vetoed them—on constitutional grounds. And finally, when that brake failed, the Supreme Court stepped in, for the most part. In sum, the system of checks and balances worked because the Constitution was taken seriously by sufficient numbers of those who had sworn to uphold it.

But the Progressive Era called all of that into question. Marked by a fundamental shift in the climate of ideas, it paved the way for the New Deal, which institutionalized those ideas. Following Franklin Roosevelt's notorious threat to pack the Supreme Court with six new members, a chastened

would give it "strict scrutiny" and probably find it unconstitutional. By contrast, if a law implicated "nonfundamental" rights like property or contract—"economic" rights—the Court would defer to the political branches and essentially look the other way. Thus was the modern welfare state "constitutionalized," the Constitution politicized, and the door opened to political management of the economy.

Search the Constitution as you will, you will find no authority for Congress to appropriate and spend federal funds on education, agriculture, disaster relief, retirement programs, housing, health care, day care, the arts, public broadcasting—the list

is endless. Most of what the federal government does today is unconstitutional because done without constitutional authority. Reducing that point to its essence, the Constitution says, in effect, that everything that is not authorized—to the government, by the people, through the Constitution—is forbidden. Progressives turned that on its head: Everything that is not forbidden is authorized.

But don't take my word for it. Take the word of those who engineered the constitutional revolution. Here is Roosevelt, writing to the chairman of the House Ways and Means Committee in 1935: "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation." And here is Rexford Tugwell, one of the principal architects of the New Deal, reflecting on his handiwork some thirty years later: "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." They knew exactly what they were doing—turning the Constitution on its head. That is the legacy we live with today.

That legacy has many implications. Here are five. First, and perhaps most important, is the loss of legitimacy—moral, political, and legal. Today, we tend to think mainly of political legitimacy, failing to see how the several grounds of legitimacy go together. We imagine that the people, by their periodic votes, tell the government what they want; and to the extent that it responds to that expression of political will, consistent with certain state immunities and individual rights that might check it, the government and its actions are legitimate. Whatever moral legitimacy flows from that view is a function of the moral right of self-government, we believe, but that right is largely open-ended regarding the arrangements it might produce. It could produce limited government. But it could as easily produce unlimited government. And without a keen sense of the role and place of moral legitimacy, we are indifferent as to which it is.

That is not how legitimacy operates in our constitutional republic. Rather, as shown by the Declaration of Independence, the main principles of which shaped the Constitution, we find our roots in Lockean state-of-nature theory and its underlying theory of natural rights. Legitimacy is first defined by the moral order, by the rights and obligations we have with respect to each other. Only then do we turn to political and legal legitimacy, through the social contract—the Constitution—that facilitates and reflects it. The federal government gets its powers by delegation from the people through ratification—reflecting mainly the

(natural) powers the people have to give it—not through subsequent elections, which are designed primarily to fill elective offices. To be sure, many of the powers thus delegated leave room for discretion by those elected. That is why elections matter: different candidates may have different views on the exercise of that discretion—the discretion to declare war, to take a clear example. But through elections the people can no more give government a power it does not have than they can take from individuals a right they do have. In a constitutional republic like ours, it is the Constitution that sets the powers, not the people through periodic elections.

But when powers or rights are expanded or contracted not through ratification but through elections and the subsequent actions of elected officials, and the courts fail to check that, the Constitution is undermined and the powers thus created are illegitimate. That happened when the New Deal Court bowed to the political pressure brought on by Roosevelt's Court-packing threat. And that paved the way for powers that have never been constitutionally authorized by the people—for illegitimate powers, that is—and for the accompanying loss of rights.

Some would argue that we could correct that problem of illegitimacy simply by putting our present arrangements to a vote through the super-majoritarian amendment and ratification procedures provided for in Article V. Were that vote successful, that would indeed produce political and legal legitimacy. But because the Constitution as it stands today reflects fairly closely the moral order that alone can be justified—in other words, the Framers and those who subsequently amended the document got it right, for the most part—I would object to amending the Constitution simply to lend political and legal legitimacy to the modern welfare state. Better, I believe, to be able to point not simply to that state's moral illegitimacy but to its political and legal illegitimacy as well.

The second untoward implication of our departure from the Constitution is the chaos that follows for law more generally. The judicial methodology the Constitution contemplates for most constitutional questions is really quite simple. Assuming a court has jurisdiction in a case challenging a given federal statute, the first question is whether Congress had authority to enact the statute. If not, that ends the matter. If yes, the next question is whether and how the act may implicate rights, enumerated or unenumerated.

Those questions are not always easy to answer and often involve close calls. But the difficulties are multiplied exponentially when the floodgates are opened and federal, state, and local legislation pours through, producing often inconsistent and incoherent "law"

from every direction. Add to that the tendentious and politicized judicial methodology that flowed from the New Deal—today we have three and sometimes four levels of judicial review, each with its own standards, and multifactored "balancing" tests—and it soon becomes clear that we are far removed from a Constitution that was written to be understood at least by the educated layman. The Constitution was meant to bring order. If under it "anything goes," order goes too, and chaos follows.

Closely related to those two implications is a third. If Congress can redistribute and regulate virtually at will, unrestrained by the limits the Constitution imposes, the rule of law is at risk. By definition, unauthorized powers intrude on rights retained by the people; but a cavalier attitude toward powers can lead more directly to the same attitude toward rights: if powers can be expanded with impunity, so too can rights be contracted. In fact, a "living constitution," interpreted to maximize political discretion, can be worse than no constitution at all, because it preserves the patina of constitutional legitimacy while unleashing the political forces that a constitution is meant to restrain. And how long can "anything goes" for officials go unnoticed by the citizenry? A general decline in respect for law must follow.

Fourth, when constitutional integrity declines, we lose the discipline a constitution is designed to impose on government. A constitution makes it harder for government to act, which is one of the main reasons for having one. This implication speaks to one of the basic functions of a constitution, which is not only to empower but to limit the government that is created through it. When we created and ratified the Constitution, we agreed to limit the government's power as an act of self-discipline. We could have set no limits on the government's power, of course; but that would have left us to a future determined by the political winds, and experience had taught us the perils of that course. Thus, we struck what we thought was a careful balance, giving the government enough power to do what we thought it should do, but reserving to ourselves the liberty appropriate to a free people. With that balance struck, the Constitution would serve to discipline us and future generations who might be tempted, given the circumstances, to grant the government more power than, in our considered judgment, we thought prudent.

Future generations could adjust that balance, of course, by amending the Constitution, provided sufficient numbers among them wanted to do so. In fact, that is just what happened following the Civil War. Troubled as the Framers were about the institution of slavery—which they recognized only obliquely in the Constitution, to ensure union—they left its regulation to the states. After the Civil War, however, a new generation not only abolished slavery but, through the Fourteenth Amendment, fundamentally changed the balance between the federal government and the states. With the ratification of that amendment we finally had federal remedies against state violations of our rights. Thus, although the amendment is properly read as having expanded federal power, it was done to discipline state power. A new balance was struck, to be sure, but because it was done through the constitutional process it did not amount to abandoning the discipline a constitution imposes, which is what happens when we stray from the document's principles. In fact, the contrast between the different ways in which the Civil War and the New Deal generations changed the rules is stark and instructive. The Civil War generation did it the right way—through the ratification process.

The New Deal generation, faced with a choice between amending the Constitution and changing it by judicial legerdemain, chose the latter.

But the larger picture regarding discipline should not be lost. For just as the Constitution disciplines the government, so too it disciplines the people in their daily lives. Speaking in the House in 1832, South Carolina's Warren R. Davis captured the point nicely:

> This system of transferring property by legislation . . . will degrade the States by inducing them to look for bounties, to the Federal Government; will degrade and demoralize the people, by making them dependent on the Government; will emasculate the free spirit of the country.

Vast numbers of Americans today look to Washington for a rich array of "entitlements" that speak of nothing so much as the illusion of something for nothing. And politicians nurture that illusion, propelling us all in the downward spiral that Thomas Hobbes aptly called a war of all against all. Stated otherwise, as contributors to public largesse become fewer and recipients more numerous, the downward spiral becomes a death spiral. And we are headed in that direction as discipline continues to erode.

Finally, and closely related, let me little more than mention the economic implications of effectively unlimited government. By this point in human history, and especially after the collapse of the socialist experiments of the 20th century, we have a fairly clear understanding of the connection between liberty and prosperity—a connection that Adam Smith articulated so well in 1776 and economists like Mises, Hayek, and Friedman, among many others, have refined and extended in our own time. What that understanding points to, once again, is the prescience of the Framers in drafting a constitution dedicated to securing our liberty and hence our extraordinary prosperity.

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But neither liberty nor prosperity is guaranteed by a mere parchment, especially by one that is ignored. The American economy has proven resilient enough to withstand the blows imposed by the galloping government of the 20th century—although we will never know how much more prosperous we might have been had that government been better reined. In future, however, to the extent we ignore the lessons of economics we invite the consequences that have befallen so many other nations that have chosen economic planning over economic liberty. And the basic lesson of economics is that liberty, property, and contract are the fundamental preconditions of prosperity.

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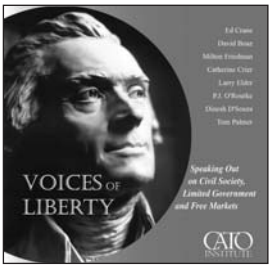

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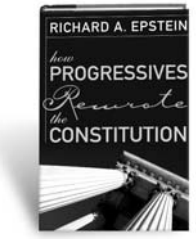

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