

2. Limited Government and the Rule of Law

Congress should

- live up to its constitutional obligations and cease the practice of delegating legislative powers to administrative agencies—legislation should be passed by Congress, not by unelected administration officials;
- before voting on any proposed act, ask whether that exercise of power is authorized by the Constitution, which enumerates the powers of Congress; and
- exercise its constitutional authority to approve only those appointees to federal judgeships who will take seriously the constitutional limitations on the powers of both the states and the federal government.

Limited government is one of the greatest accomplishments of humanity. It is imperfectly enjoyed by only a portion of the human race; and where it *is* enjoyed, its tenure is ever precarious. The experience of the past century has made clear the insecurity of constitutional government and the need for courage in achieving it and vigilance in maintaining it.

Advocates of limited government are not anti-government, per se, as some people charge. Rather, they are hostile to concentrations of coercive power and to the arbitrary use of power against right. With a deep appreciation for the lessons of history and the dangers of unconstrained government, they advocate for constitutionally limited government, with the delegated authority and means to protect our rights, but not so powerful as to destroy or negate them.

The American system was established to provide limited government. The independent existence of the United States was based on certain truths:

that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and

the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

On that foundation, the American Founders established a system of government based on delegated, enumerated, and thus limited powers.

The American Founders did not pluck those truths out of thin air, nor did they simply invent the principles of American government. They drew on their knowledge of thousands of years of human history, during which many peoples struggled for liberty and limited government. There were both defeats and victories along the way. The results were distilled in the founding documents of the American experiment in limited government: the Declaration of Independence, the Articles of Confederation, the state constitutions, and the Constitution of the United States.

The American Founders were careful students of history. Thomas Jefferson, in his influential *A Summary View of the Rights of British America*, prepared in 1774, noted that “history has informed us that bodies of men as well as individuals are susceptible of the spirit of tyranny.” Patrick Henry summed up the importance of history thus: “I have but one lamp by which my feet are guided, and that is the lamp of experience. I know of no way of judging the future but by the past.” History—the lamp of experience—is indispensable to understanding and defending the liberty of the individual under constitutionally limited, representative government.

Through the study of history, the Founders learned about the division of power among judicial, legislative, and executive branches; about federalism; about checks and balances among divided powers; about redress and representation; and about the right of resistance, made effective by the legal right to bear arms, an ancient right of free persons. Liberty and limited government were not invented in 1776; they were reaffirmed and strengthened. The American Revolution set the stage for extending the benefits of liberty and limited government to all. As John Figgis, professor of modern history at Cambridge University, noted at the beginning of the 20th century:

The sonorous phrases of the Declaration of Independence . . . are not an original discovery, they are the heirs of all the ages, the depository of the emotions and the thoughts of seventy generations of culture.

The roots of limited government stretch far back, to the establishment of the principle of the higher law by the ancient Hebrews and by the Greek philosophers. The story of the golden calf in the Book of Exodus and the investigations of nature by Aristotle both established—in very different ways—the principle of the higher law. Law is not merely an expression of will or power; it is based on transcendent principles. The legislator is as bound by law as is the subject or citizen; no one is above the law.

Many strands have been entwined to form the fabric of liberty:

- **The struggle between church and state**, which was put into high gear in the Latin West by Pope Gregory VII in the 11th century under the motto, “freedom of the church.” That movement provided the foundation for such important institutions as the rule of law and legal accountability, federalism, and the independent and self-governing associations that make up civil society.
- **The growth of civil society** in the self-governing chartered towns of Europe, in which the guiding principle was “city air makes one free.” The independent cities of Europe were the seedbeds of modern civil society—of the market economy, of personal liberty, and of the security of person and property.
- **The fixing of limits on the powers** of monarchs and executives through written constitutions. To inheritors of the Anglo-Saxon political tradition, the Magna Carta of 1215 and its iterations are the most memorable of those documents. The Magna Carta included the requirement that taxes not be imposed without the consent of the “general council of the realm.” That concept laid the groundwork for the English parliament, as well as other very specific limitations on the king’s power, including the stipulations that no one be imprisoned or outlawed or exiled or his estate seized “except by the lawful judgment of his peers or the law of the land” and that “merchants shall have safe conduct in and out of England.” That language was the precursor of the Petition of Right of 1628, the Bill of Rights of 1689, the American Declaration of Independence, and the American Constitution and Bill of Rights.

Those various movements reinforced each other in a multitude of ways. The assertion of the freedom of the church and even of its supremacy over the secular powers was bound up with the idea of the higher law, by which all are judged—emperor, pope, and peasant alike. As legal scholar

Henry Bracton, a judge during the reign of Henry III, noted of the royal authority, “The law makes him king. Let the king therefore give to the law what the law gives to him, dominion and power; for there is no king where will, and not law, bears rule.” Were the king to consider himself above the law, it was the job of the king’s council—the precursor of parliament—to rein him in: “if the king were without a bridle, that is, the law, they ought to put a bridle upon him.” Not only was the nascent parliament above the king, the law was above the parliament. As Sir Edward Coke noted in the 17th century, “when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.”

The supremacy of the law over the exercise of power is a hallmark of the Western legal tradition. The rule of law is not satisfied by merely formal or ceremonial exercises, such as the publication of edicts in barely understandable form, whether in the archaic “Law French” of the king’s courts or the pages of the *Federal Register*. The laws must be understandable and actually capable of being followed.

Recognition of the principle of reciprocity between the holders of power and the general populace was also widespread. Rights were enumerated in constitutions and charters. Those rights were not gifts from the powerful, which could be taken away on a whim, but something on which one could take a stand. Tied up in the notion of a chartered right was the ancillary power to defend that right, even to the point of resistance with force of arms. The higher law, reciprocity and mutuality of obligations, written charters of rights, the right to be consulted on policy and to grant or refuse one’s consent, and the right of resistance in defense of those rights are the foundations of constitutionally limited government. They were won over many centuries at great sacrifice.

Just how precious that heritage is can be gleaned from comparing it with the history of Russia, where throughout its history there has been very little reciprocity between rulers and ruled and no independent power able to challenge the rulers. The principality of Muscovy and its successors were highly despotic, with no charters of liberty, no power higher than the tsar (or his successors, the Communist Party leaders and now Vladimir Putin), no limits on power—in effect, no law. As Harvard University historian Richard Pipes noted in his book *Russia under the Old Regime*, “There is no evidence in medieval Russia of mutual obligations binding prince and his servitor, and, therefore, also nothing resembling legal and

moral ‘rights’ of subjects, and little need for law and courts.” The country’s immense difficulties in establishing the rule of law, a system of well-defined and legally secure property, and a market economy are testimony to the great and vital importance of building on a tradition of stable, constitutionally limited government. They also remind us how important it is for us to maintain our heritage of limited government and the rule of law.

The struggle for limited government was a struggle of liberty against power. The demands for religious liberty and the protection of property were fused in the heroic resistance of the Netherlands to the Empire of Spain in their great revolt. The Dutch inspired the English to rise up against the Stuart kings, who sought to fasten upon the English the absolutism that had made such headway on the Continent. The American Revolution was one link in a long chain of revolutions for liberty. The historian John Lothrop Motley opened his magisterial history, *The Rise of the Dutch Republic*, by connecting the Dutch Republic with the United States of America:

The rise of the Dutch Republic must ever be regarded as one of the leading events of modern times. . . . The maintenance of the right by the little provinces of Holland and Zeeland in the sixteenth, by Holland and England united in the seventeenth, and by the United States of America in the eighteenth centuries, forms but a single chapter in the great volume of human fate; for the so-called revolutions of Holland, England, and America, are all links of one chain.

Motley continued,

For America the spectacle is one of still deeper import. The Dutch Republic originated in the opposition of the rational elements of human nature to sacerdotal dogmatism and persecution—in the courageous resistance of historical and chartered liberty to foreign despotism.

The Dutch, like the British and the Americans after them, became a shining example of what was possible when people were free: prosperity was possible without the guiding hand of the king and his bureaucrats; social harmony was possible without enforced religious conformity; and law and government were possible without an unlimited and absolute sovereign.

The story of the attempts to institute absolutism in the Netherlands and in England was well known by the American Founders, who were, after all, British colonists. One cannot understand the American attempt

to institute limited, representative government without understanding the history of England. What they were struggling against was the principle that the powers of the state are “plenary,” that they fill up the whole space of power. In 1598, King James I of England (then King James VI of Scotland) wrote that “the King is above the law, as both the author and giver of strength thereto.” In 1610, James made *A Speech to the Lords and Commons of the Parliament at White-Hall* in which he railed against the notions of popular consent and the rule of law and stated that “as to dispute what God may do is blasphemy . . . so it is sedition in subjects to dispute what a king may do in the height of his power.”

In other words, there are no limits to power. Distinct echoes of that view are still heard today. For example, in 1995 under President Bill Clinton, the solicitor general of the United States, Drew Days, argued the case of *United States v. Lopez* before the Supreme Court; he was unable to identify a single act of Congress, other than those expressly prohibited by the Constitution, that would be impermissible under the administration’s expansive view of the commerce clause. Days contended that the powers of Congress are plenary, that is, unlimited, unless, perhaps, specifically prohibited. That all-too-common view turns the notion of limited government on its head. Limited government means that government is limited both in the exercise of its delegated powers and in the means it can employ, which must be both “necessary and proper.” The English Revolution of 1640, the Glorious Revolution of 1688, and the American Revolution of 1776 were fought precisely to combat unlimited government. What Americans need is not unlimited government, as Days proposed, but limited government under law, exercising delegated and enumerated powers. That is how the equal liberties of citizens are protected. As the philosopher John Locke, himself an active participant in the struggles for limited government in Britain and the primary inspiration of the American revolutionaries, argued in his *Second Treatise on Government*:

The end of Law is not to abolish or restrain, but to preserve and enlarge Freedom: For in all the states of created beings capable of Laws, where *there is no Law, there is no Freedom*. For *Liberty* is to be free from restraint and violence from others, which cannot be, where there is no Law: But Freedom is not, as we are told, *A Liberty for every Man to do what he lists*: (For who could be free, when every other Man’s Humour might domineer over him?) But a *Liberty* to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.

The American experiment in limited government generated a degree of liberty and prosperity that was virtually unimaginable only a few centuries before. That experiment revealed flaws, of course, none of which was more striking and repugnant than the toleration of slavery, or “manstealing,” as it was called by its libertarian opponents, for it deprived an individual of his property in his own person. That particular evil was eliminated by the Thirteenth Amendment to the Constitution, showing the self-correcting nature and basic resilience of the American constitutional system, which could survive such a cataclysm as the Civil War.

Other flaws, however, have been revealed or have surfaced since. Among them are the following:

- **An erosion of the basic principles of federalism**, as the federal government has consistently encroached on the authority of the states. Federal criminalization of acts that are already criminalized by the states, for example, usurps state authority (as well as circumventing—opinions of the Supreme Court notwithstanding—the prohibition against double jeopardy in the Fifth Amendment to the Constitution: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”). An even more striking contemporary example of the overreach of federal law is the continued exercise of federal controls over marijuana use in states that have legalized the medical or recreational use of that drug. The Tenth Amendment is quite explicit on this point: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
- **Violation of the separation of powers** between the various branches of government. In Article I, Section 8, for example, the Constitution explicitly reserves the power to declare war to Congress, a power that Congress has allowed to be usurped by the executive branch and which it should retake to itself. (See Chapter 27.)
- **Failure of the legislative branch to fulfill its responsibilities** when it delegates its legislative powers to administrative agencies of the executive branch, such as the Department of Labor, the Federal Trade Commission, and the Consumer Financial Protection Bureau. In addition to violating the Constitution, that failure has led to the erosion of the rule of law, as administrative agencies have burdened us with an unimaginably complex welter of edicts. The *Federal Register* ran 97,000 pages in 2016, reflecting a degree of minute regulation that is unreasonable and burdensome. It virtually guarantees that any

citizen involved in a commercial transaction, for example, will run afoul of some part of it, no matter how well intentioned or scrupulous he or she may be. This situation is an invitation to the arbitrary exercise of power, rather than the application of law. Such extensive delegation of powers is an abdication of the representative function described in the *Federalist Papers* and elsewhere by the Founders. Members of Congress are thereby converted from representatives of their constituents into “fixers,” who offer to intercede on behalf of constituents with the agencies that are illegally exercising the authority of the legislative branch. Thus, members of Congress can avoid responsibility for onerous laws but can take credit for gaining special treatment for their constituents. That system may be thoroughly congenial to the interests of the existing officeholders of both the executive and the legislative branches, but it is directly contrary to the doctrine of the separation of powers and to the very concept of representative government. (See Chapter 3.)

- **Inattention to the important role of the federal judiciary** as a check on arbitrary and unauthorized exercises of power. Especially since the Court-packing “constitutional revolution of 1937,” the federal judiciary—and Congress, in ratifying judicial nominees—have focused too little attention on fulfilling the role of the courts in enforcing constitutional restraints on both the federal and the state governments, as set out in Article III, Section 2, of the Constitution. Sections of the Constitution that have suffered from relative neglect include Article I, Section 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”); Article I, Section 8 (enumerating and thus limiting the powers of Congress); Article I, Section 10 (“No state shall . . . pass any . . . Law impairing the Obligation of Contracts”); the Fifth Amendment (“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation”); the Ninth Amendment (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people”); the Tenth Amendment (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”); and the Fourteenth Amendment (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”). Although the First and Four-

teenth Amendments have indeed been the source of significant judicial activity, the Court has not consistently applied the prohibitions of the First Amendment to either commercial speech or political speech (the latter in the context of campaign finance). Nor has the Court rectified the novel (and specious) distinction between personal liberties and economic liberties drawn by Justice Harlan F. Stone in *United States v. Carolene Products Co.* (See Chapter 15.)

Those flaws can, however, be corrected. What is needed is the courage to place the health of the constitutional order and the future of the American system above short-term political gain. The original American Founders were willing “to mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.” Nothing even remotely approaching that would be necessary for today’s members of Congress to renew and restore the American system of constitutionally limited government.

In defending the separation of powers established by the Constitution, James Madison clearly tied the arrangement to the goal of limiting government power:

It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next instance oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

For limited government to survive, we need a renewal of both of the forces described by Madison as controls on government: dependence on the people, in the form of an informed citizenry jealous of its rights and ever vigilant against unconstitutional or otherwise unwarranted exercises of power, and officeholders who take seriously their oaths of office and accept the responsibilities they entail.

Suggested Readings

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