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P o l i t i c s a n d G o v e r n m e n t
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I

To the friends of human freedom and progress, it is difficult to imagine a time more pleasing and full of promise than our own. Americans are today the richest, freest people the world has ever known. We enjoy unprecedented levels of personal health, mobility, safety, education, and amenity. Our worst foreign enemies have been vanquished and for the time being the threat of war is remote. The same may be said of civil discord, as many old and often violent animosities of race, class, and economic interest are melting away. The best of our popular and high culture is wonderfully good. We may not be in a Great Awakening, but religious belief and observance are widespread, and many secular varieties of ethical and spiritual inquiry and self-improvement are booming. We may not have abolished the business cycle, but it has moderated enormously in the post-war period (coinciding exactly with the American Enterprise Institute's presence on the scene). Pollsters report levels of social contentment never seen before.

Our freedom and fortune are also very widely shared, making us the most egalitarian of any advanced, prosperous society. It is true that the distribution of income has become somewhat less equal, but income is an incomplete measure of real life circumstances in a society where average income is so high, where the necessities have become practically universal, and where so many one-time luxuries – good food, clothing, cars, and homes; advanced communications; art and entertainment; foreign travel – have become mass-market commodities. The down-to-earth measures of material welfare, such as consumption, health status, and longevity, show a marked increase in real equality.

Indeed one of the most valuable commodities of modern life is time itself, and time is being redistributed down the income spectrum as Americans are increasingly substituting personal pursuits for additional earnings. Popular culture has come to acknowledge, and to a striking degree celebrate, the social contributions of the entrepreneur and the economic risk-taker. But we should also acknowledge the claims of those of modest economic aspiration. An old libertarian saw holds that true freedom must include the freedom to be one's potty little self. To which many an overweight corporate lawyer would add: and also the freedom to be one's hard-bodied self! New uses of time that our social wealth makes possible—early retirement, part-time telecommuting, second careers in the nonprofit sector, Doctors Without Borders, working-class sabbaticals—make the income distribution statistics worse but real life better. The statisticians and editorialists will catch up. Meanwhile, that so many of us can even contemplate life as a style is one of the greatest blessings of living in such a free, abundant, and beautiful nation.

I I

America does face some serious problems. But to a remarkable degree our problems are no longer those of obtaining and securing freedom and prosperity. Those problems, which were humankind's central concerns from the dawn through the twentieth century, have now in all essentials been solved. They have been solved by science and technology and improvements in social, legal, and economic institutions— which is to say by intellectual endeavor, trial and error, and the passage of time. We could lose the solutions through war or catastrophe, but they are now existent knowledge, part of the evolved genome of human practice. That is the real millennium story. Many of today's most talked-about problems—such as reducing pollution, relieving traffic congestion, providing better medical care to people of modest means, conserving more open space, raising police salaries— are

hardly resource problems at all. We possess the means to improve them to about any degree we want: we would need to give up a share of other good things to get them, but the trade-offs would not involve serious sacrifice. The constraints on their solution are not material but political – the capacity of our political system to mediate our inevitable differences of interest and opinion.

Today's most serious problems are institutional and moral. They are in important respects the *result* of our prosperity – the characteristic problems of a super-affluent, mass-upper-middle-class society. I will begin with two that have recently emerged at the center of political debate, joining and to a degree displacing traditional economic issues such as taxing and spending and the state of the economy. They may be described as the problems of *extending* our wealth and freedom and of *employing* our wealth and freedom properly.

The problem of extension has an obvious global dimension; within the United States it consists of extending the knowledge, habits, and institutions of productive freedom to those who continue to live in circumstances of genuine poverty and hardship. James Q. Wilson has described this as the challenge of joining America's two nations into one.

The problem of proper employment consists of maintaining the knowledge, habits, and institutions of productive freedom in the wider society. It encompasses a variety of phenomena: the profusion of obscene and violent entertainment, the breakdown of the family, the spread of drugs and drug culture, incidents of Littleton-style mass violence and Oklahoma City-style political terrorism, and popular anxiety over the social consequences of new genetic and information technologies. All derive from the tremendous power and freedom of action that wealth and technology have placed at the disposal of every individual. The challenge they present is learning to live in a world where wealth and freedom have amplified man's capacities for vice along with his capacities for virtue. From time immemorial the good, the bad, and the ugly have coexisted and competed for human allegiance; but now the

tasks of containment and rollback of vice and ugliness have become more daunting. The culture wars are in these respects like the cold war.

Our new problems raise issues that go well beyond public policy as traditionally conceived – issues of personal conduct, social norms, civic and cultural institutions, and particularly the state of the family, child-rearing, and sexual practices. Political activists of the Left often and deliberately conflate the poverty problem with issues of economic distribution among the non-poor. And there is some overlap – for example, the availability of medical care to people with low incomes. But in general no one believes that today’s poverty problems can be much improved by redistribution. The problem of proper employment of wealth and freedom involves some clear government responsibilities, such as policing threats of civil violence and adapting family law to a world of sexual equality. But many of the policy proposals in this area – pro-family tax deductions, mandatory screening attachments for computers and television sets, federally prescribed school uniforms, sex-ed for pre-teens – are an unsettling combination of government overreach and government impotence. One of the most important social consequences of great wealth and freedom is simply boredom, especially among adolescents and the elderly, and no one has yet designed a tax deduction to deal with this.

Political debate over these problems is increasingly nonpartisan. Conservatives were largely absent or ignored during the debates over civil rights and urban poverty in the 1960s; but beginning with the publication of Charles Murray’s *Losing Ground* in 1984, conservatives have taken the lead in articulating and applying new approaches to the poverty problem. Today, following passage of the Welfare Reform Act of 1996, the great issues are the improvement of schooling in poor city neighborhoods; the socialization of poor, fatherless young men; and the protection of poor, unmarried young mothers and their children. The Right continues to be vigorously in the forefront, with efforts ranging from Governor Bush’s forceful championing of faith-based approaches to resurrecting poor neighborhoods to the

enormous sums of money that conservative foundations and financial tycoons are pouring into school choice and charter school projects. At the national level, Democrats remain hobbled by their party's dependence on the teachers' unions – dramatized by Vice President Gore's absurd proposal to extend universal government schooling down to pre-kindergarten child care. But at the local level, Democrats and liberals such as Floyd Flake in New York City and numerous leaders in Milwaukee and other front-line cities are arm-in-arm with conservatives and Republicans on the side of school choice, competition, and curriculum reform.

The debates over popular culture, marriage, and family have been mounted not so much by as within the Right—that is, between social conservatives and libertarians. But the Left has been strongly engaged as well; the social conservatives include William Galston, John DiIulio, Joseph Lieberman, Eugene Genovese, and many others.

A fine pragmatic tradition is at work here. When new problems arise in American politics, they often roil old partisan and philosophical alliances, stirring up exasperated argument and bitter reproach. Then, if the problems are lasting and serious enough, intellectual leaders inch away from received doctrines in an effort to craft a new synthesis, and political leaders inch away from received constituencies in an effort to define and occupy a new political center. Those are the auguries of practical progress in our system.

III

There is, however, another problem that our generally happy state has made more urgent, but that so far is receiving less attention and generating no new approaches. It is the oldest of political problems, the problem of limited government.

Modern government has turned out differently than libertarian thinkers

such as Friedrich Hayek anticipated. Hayek, in his great polemic *The Road to Serfdom*, published in 1944, warned that the welfare state could metastasize into full-force socialism under the pressures of class envy and economic resentment and the popular prestige of “rational central planning” – that was his road to servile citizens, stagnant economies, inert societies. Those fears have an antique ring today: hardly anyone admires government planning anymore and, at least in America, class resentments have abated, not grown. The free market has triumphed in practical result and popular prestige; Hayek has won the Nobel Prize; billionaires can be folk heroes and even run for President.

Yet the state has grown prodigiously. In 1947, the first peacetime, demobilized year after Hayek wrote, government outlays (federal, state, and local) were 21 percent of Gross Domestic Product; in 1999 they were 31 percent. Taking into account the growth of regulation not captured by these statistics (because regulatory expenditures are made largely within the private sector), government has grown more than 50 percent faster than the economy as a whole and now claims substantially more than one-third of America’s economic resources. The federal government owns one-third of the American landmass, pays for 40 percent of medical care, manages nearly 50 percent of personal retirement savings, and regulates many major industries. State governments heavily regulate the distribution and sale of automobiles, alcoholic beverages, insurance, and other important goods and services.

That is not the whole story, of course. While government has grown on the whole, we have reformed or repealed many programs – such as transportation, energy, and financial regulation; farm subsidies; over-control of the introduction of new pharmaceuticals; populist antitrust enforcement; and innumerable trade restrictions – all to excellent effect. Equally important, we have abstained from many harmful ventures common to other democracies, such as nationalized medical care and restrictions on industrial restructuring and “downsizing.” American government is big by historical

standards but small compared with those of the other Western economies, and the others are less prosperous and dynamic than ours.

Still, we find ourselves with an activist government that plays a larger and more immediate role in our lives than ever before. Every American who is a taxpayer, property owner, or employee of an institution of any size is now in continuous contact with one or more agencies of government whose rules must be obeyed under sanction of the police power. Business executives, plant managers, personnel managers, real estate agents, doctors, accountants, and university administrators now routinely do things under the influence of government rules or court doctrines that they would not do according to their own professional judgement. The rules and doctrines are supposed to further some larger purpose, such as consumer protection or environmental quality. But those on the front lines often regard that claim with scorn, and they are often right. We know, for example, that doctors in states with more expansive tort liability practice “defensive medicine” that increases costs without improving quality of care; that citizens of states with stricter controls on automobile insurance pay higher insurance rates and are more frequently killed or injured in highway accidents (because of the effect of regulation in suppressing rate differentials that encourage safe driving); and that EPA and OSHA rules often require enormous expenditures for little or no environmental or safety benefit.

Moreover the gap between public policy and private practice is widening. Social Security is the most conspicuous example. When the program was established in the 1930s, many Americans of modest means had no very effective opportunities for personal saving and investment. Today most Americans are shareholders, and the price of a pro basketball ticket will get you into a superlatively managed mutual fund; yet Social Security continues to garnish a large share of our earnings and to promise relatively miserable returns to most current workers. The examples here are endless

and often downright silly. My sister in rural Iowa does not need the Rural Electrification Administration to get power or the Public Utility Commission to get telephone service. The Internet has made a hash of the SEC's corporate-disclosure and stock-exchange rules.

There is a standard account of why government programs survive long after they have become obsolete or been discredited by an AEI policy study. That is the theory of interest groups: well-organized groups with large stakes in a policy, such as an industry or occupational or recreational group receiving a subsidy, constantly outmaneuver diffuse groups with small individual stakes, such as the taxpayers paying pennies apiece to finance the subsidy. It's a powerful theory with a distinguished academic pedigree including the likes of Mancur Olson and George Stigler. It has been elaborated recently in fine books by Robert Samuelson and Jonathan Rauch and has reached prime time due to the spirited presidential campaign of Senator McCain.

But the critical question is this: As the growth of private markets, affluence, and technology erode the formal reasons for many government programs, do they also erode the practical political forces that maintain those same programs? Scholars have pointed to several reasons for thinking so. Globalization – the increased mobility of capital, goods, and services across political boundaries – has weakened the effective power of individual governments to tax and regulate; that is what the labor unions, the Seattle rioters, and Governor Mike Leavitt are worried about. The increased pace of technological change can leave lumbering government in the dust; the federal government has been trying in vain to regulate the computer industry since the 1970s, and although it may lasso an individual firm such as Microsoft it has no hope of corralling the entire industry as it did trucking and railroads in an earlier age. The sheer growth of market opportunities increases the performance gap between government provision and private provision; this appears to have been an important factor in the erosion of political support

for energy and airline regulation, and seems to be at work today in the movement for Social Security reform.

There is, however, another side to the coin. More wealth and leisure time means that greater resources may be devoted to lobbying government. Governments may react to globalization not by becoming leaner and more focused but by joining forces. The European Union's efforts to harmonize taxing and spending among European nations, trade "side-agreements" on environmental and labor standards, and the proposed U.S. legislation to empower the states to tax Internet sales are all examples of governments forming policy cartels to maintain their power.

Consider also the political implications of specialization. As Adam Smith taught in the first chapter of *The Wealth of Nations*, increased division of labor is the essential cause and consequence of economic advance. But it also means that, in a society as advanced and complex as ours has become, most of us are well informed about one special niche of the big wide world but poorly informed about the rest of it. Each of us knows a great deal about one thing, such as bankruptcy law or automobile repair or interior design, but little about many other things, such as bioengineered foods, global warming, or the administration of health insurance. Compared with times past, we judge a larger number of political questions not according to our own concrete, practical knowledge but according to abstract, second-hand accounts, many of them coming from self-interested parties and political entrepreneurs. And those accounts, being addressed to a public that knows few of the facts of the issue at hand, tend to be simple dramatizations—focusing exclusively on a wrong needing righting, without mentioning the inevitable costs and trade-offs of righting the wrong which would be obvious to anyone with direct practical knowledge. Our highly extended division of labor helps explain the paradox of sentimental popular opinion in a highly educated society.

Most importantly, better technology and more efficient markets are

things that government itself can make use of, and couple to its unique powers of coercion. The communications revolution has made it possible to mount litigation, legislative, and publicity campaigns (increasingly, all three in tandem) with a reticulation never before possible. Arresting new research by Gary Becker and Casey Mulligan of the University of Chicago suggests that increased efficiency of taxation has been a key factor in the postwar growth of government. The general form of the Becker–Mulligan hypothesis is this: more efficient government means bigger government, because efficiency permits redistribution of higher benefits to beneficiaries at lower cost to taxpayers. Just as in private markets, when the cost of something falls the amount demanded and supplied increases.

I believe there is good cause for worry that government is mastering the techniques of efficiency and growth as well as the private sector, and that the super-affluent society is one where the architecture of limited government is at risk. The problem has, moreover, assumed constitutional dimensions, because the Executive Branch, which the Constitution leaves largely undefined, is much more free to innovate than the Legislative Branch, with its many designed-in inefficiencies such as bicameralism and decision-making by committee and voting. Herewith a few vignettes from the New Executive State:

- In the early 1980s, R. Shep Melnick, then of the Brookings Institution, showed that one of our most complex federal statutes, the Clean Air Act, had essentially been written by EPA, the courts, and environmental groups; Congress was reduced to ratifying the situation on the ground every few years, adding a few statutory tweaks when administrative developments departed too far from legislative sentiments. The dynamic described by Melnick has progressed much further in the years since his study. Today EPA has gathered authority to write and enforce rules costing many billions of dollars, simply on a showing that some, even relatively trivial, health benefit would

result. Its new ozone standard, currently on appeal, would cost on the order of \$100 billion per year if fully implemented. In return it would provide public health benefits of about zero, and as likely to be slightly *negative* as slightly positive. (These estimates are by AEI's Randall Lutter using EPA data.)

- Agencies increasingly govern by informal guidance and one-on-one negotiations with grantees and regulatees – a practice that received rare publicity when OSHA recently attempted to apply its workplace regulations to telecommuters' homes by informal guidance. One well-developed technique is to establish a standard that is generally infeasible – such as the ozone rule, which of course would never be enforced to the tune of \$100 billion – thereby forcing firms and localities to seek waivers to which strings may be attached. Through these and other means, “virtual regulation” – rules of uncertain provenance, known only to those immediately affected – is becoming as important as formal, on-the-record regulation. College athletics directors know that they must aim for equal expenditures and participation in men's and women's sports, and if necessary abolish some men's sports to do so; but you won't find this policy in Title IX of the Education Amendments Act of 1972 or in the Department of Education's regulations under the Act, and if you ask the Department's officials whether such a policy in fact exists, they will tell you it's nothing but a silly rumor and that they just want to be helpful partners with the nation's athletics directors. Business executives needing the approval of the Federal Communications Commission or the Surface Transportation Board for a merger or other major transaction know that they will be presented with an expensive to-do list, having nothing to do with the economic merits of the transaction, which they must accept as “voluntary” conditions of approval.

- The Executive Branch is learning unilateral taxing and spending,

thereby loosening the lynchpin of legislative power. The FCC's universal service program, which it established by regulation a few years ago, now produces annual revenues of more than \$5 billion from a tax on long-distance service, which is spent on computers for schools and libraries and other projects. The Commission sets the tax rate itself (currently 5.9 percent – twice the statutory tax on the same service) and adjusts it as often as quarterly to keep revenue in line with its spending plans. That is a breathtaking degree of financing power, one that neither the Ways and Means Committee nor Goldman Sachs can match. When the telephone companies announced plans to itemize the tax on their long-distance bills, the FCC chairman told them it would be better if they didn't.

- The latest innovation in Executive taxation, pioneered by the states, is “recoupment litigation,” wherein the government selects a group of citizens who are to pay a portion of government expenditures under threat of liability suit. The suits are themselves financed unilaterally rather than through legislative appropriation – by hiring private lawyers who work for a percentage of the proceeds – and they seek not only payments for government programs but changes in private business practices (more “informal regulation”). The state litigation against cigarette and gun manufacturers, the federal government's tobacco suit and planned gun suit, and now Rhode Island's suit against manufacturers of lead-based paint, are the advanced prow of this important development. As a legal matter the cases are travesties. The government already collects more in tobacco taxes than it pays in smoking-related medical expenses; Secretary Cuomo, in threatening the gun suit, made it clear that his real interest was not legal vindication but just that the manufacturers stop by and agree to contribute to the \$1 billion annual expenses of housing project security and to change the design and marketing of firearms. And the

cases' circumvention of democratic process has been condemned by both Robert Bork and Robert Reich – the first time those two have agreed on anything since Reich was answering Bork's exam questions at the Yale Law School. Nevertheless, the state tobacco suits (which by the way were entirely bipartisan) were a huge success, raising \$240 billion. That guarantees continued probing and legal innovation over successive categories of government expenditures and non-statutory regulatory schemes.

- The growth of international law and organizations is opening vast new avenues for legislative diminishment. Last fall, following the Senate's rejection of the Comprehensive Test Ban Treaty, administration officials said the United States would abide by the treaty (that is, continue to abstain from testing nuclear weapons) anyway. That of course is the President's prerogative as commander-in-chief. But the officials went beyond this, suggesting that we were *legally obliged* to adhere to the treaty despite the Senate's action. The source of the asserted obligation was another treaty, the Vienna Convention, governing interim compliance with treaties that have been negotiated but not ratified – a convention that many nations ratified but the United States did not, precisely because it would have compromised the Senate's treaty powers! The administration's casuistic reasoning – using an unratified treaty as legal grounds for complying with a rejected treaty – was a subtle step forward for the new theory of “customary international law,” now a-building in the law journals and United Nations salons, which holds that governments and citizens have legal duties to follow prevailing international practices regardless of what their own political institutions have decided. It was a nice touch to raise it in the context of an unambiguous foreign policy issue, but “customary international law” is largely concerned with domestic issues such as criminal justice and labor policies.

- A separate problem is presented by the Kyoto Protocol, the agreement placing sharp restrictions on greenhouse gas emissions that the administration negotiated but has said it will not submit to the Senate in its current form. The administration's efforts to begin enforcing the Protocol by regulation, and Congress's efforts to prevent enforcement pending Senate action, have obscured a more fundamental difficulty. If the Protocol, or anything like it, *were* ratified, it would commit the United States to costly environmental efforts under the continuing supervision of one or more international bodies. Compliance would presumably be subject to our domestic legislative and regulatory procedures – that is, to our constitutional form – but, once again, the Executive would have the upper hand in developing policy and presenting the Congress with political *faits accomplis*. It is important to notice in this respect that the crafting of international agreements involves the participation of “non-governmental organizations” (“NGOs” – the international euphemism for private interest groups) on more formal, quasi-official terms than in domestic rule-making under our administrative procedure laws.

Now Congress could in theory revise or reverse all of the developments I have described, by statute or power of the purse. It is complicit in all of them already, in that the executive agencies are always operating under the terms of some more-or-less relevant statute, and Congress is continuously engaged in oversight and statutory adjustment. And most of the policies in question are subject to judicial review or adjudication. The important point, however, is that the dynamic of Executive growth undercuts the constitutional checks and balances, and even enlists the Congress and courts in the cause:

First, Congress accommodates political pressures for new spending and regulation by delegating some of its law-making power to the Executive, with

its essentially unlimited ability to take on additional projects and design administrative structures appropriate to each.

Second, in practice the delegated legislative functions include not just the formal one of decision-making but also the political ones of representation, deliberation, and coalition-building. The agencies and those they fund and supervise are indeed “partners” as the Education Department says; their relations may not be chummy – often they are antagonistic – but they are long-term and “co-dependent.” Everyone involved has strong incentives to work things out, keep quarrels out of court, and present Congress with a united front when statutory ratification is in order.

Third, Executive programs are not, however, subject to the same pressures for compromise and moderation that they would face in the legislature, such as logrolling and competition for appropriations – especially where the agencies are able to command private resources on their own by regulation or ad hoc taxing. Each agency is to this degree able to pursue its goals constrained only by the divergence of interests within its program coalition, and not by the larger and far more divergent interests of those on the outside. In this manner, the mechanisms of government come to promote, rather than discipline, the popular fallacy that Thomas Sowell calls “the quest for cosmic justice” – the idea that every conceivable social improvement ought to be pursued regardless of cost. And that maintains political pressure for yet more programs and agencies.

It is important to understand that this dynamic is different from the customary political competition between the President and Congress, where the advantage seesaws between the Congress (as during the Watergate era) and the President (as during Ronald Reagan’s first term). The growth of administrative government diminishes the political prerogatives – and therefore the democratic-representational functions – of both President and Congress. Both are progressively more constrained by the actions of individual program agencies working in concert with the private members of

their program coalitions, with recourse to courts (and especially juries) as needed to provide legal legitimacy while diffusing political accountability. Anyone who has worked in the Executive Branch knows that it is a far-flung confederation of semi-autonomous baronies, not a hierarchy like a large corporation. Confirming this, a recent AEI study finds that the agencies have largely ignored the requirements of President Clinton's Executive Order on regulatory policy. But the effects on legislative representation and deliberation are much greater, for the reasons I have described. In 1996, in an effort to reassert its authority over administrative law-making, Congress passed the Congressional Review Act, providing special procedures for statutory disapproval of specific agency actions. The Act was considered a triumph on Capitol Hill, and the incentives for its use were particularly strong given the sharp partisan division between the Congress and President. But it has been a nullity. In the years since the Act's passage, the Executive Branch has issued over 15,000 regulations. A total of eight resolutions of disapproval have been introduced; none has passed either House.

We all know that our constitutional structure needs some play in the joints in order to stand and endure. But we revere and protect the essential structure; we do so not for its own sake but for its beneficial consequences, and the form our government is taking threatens the consequences. The economic consequences could be serious even in a nation as rich as ours. Unitary administrative government tends to produce a succession of quiet accommodations and abuses whose cumulative economic costs are revealed only when an external shock brings the whole game to a disastrous end. That was the lesson of the U.S. savings and loan debacle in the 1980s and the Asian financial collapse of 1998. In the meantime – until such a coalition-shattering crisis occurs – the economy becomes poorer and less dynamic and politics becomes more regimented and less democratic. At an AEI conference last year, a Japanese business executive spoke about the financial collapse of the previous year and the subsequent, halfhearted efforts to reform Japan's ossified political system. Asked if he thought the Japanese economy was now

on the rebound, he replied, “Yes – unfortunately.”

The more immediate consequence is popular disillusionment with government and politics. We all expect and even enjoy a certain amount of bombast from our politicians, but it is not a good thing that public policy and private practice should diverge as much as they do in the United States today. Americans have not become serfs: although we must propitiate many bureaucratic fiefdoms, and are generally compliant, we are the opposite of servile. Our regard for government – never very high – has fallen to its lowest level in polling memory.

The American era of big government began with Theodore Roosevelt and Woodrow Wilson, each with his own forthright, popularly compelling vision of active government hitched to a common national purpose. It continued with Franklin Roosevelt, who had a big problem on his hands and popular support to try almost anything to fix it. But much of government today has no theme or theory, just momentum. It is government sprawl, strip-mall socialism – ubiquitous, undistinguished, strictly utilitarian in the service of innumerable small middle-class wants and gripes. Bill Clinton did not invent the technique of government accretion by tiny meliorative increment; he learned it from the world he inhabits; the government invented it itself.

IV

Poverty amidst plenty, decadence amidst plenty, and the accretion of political power have brought down great nations in the past, but they are unlikely to bring down America. Our wealth and freedom may be generating new problems but they are, after all, tremendous assets, not liabilities! They ought to help us cope with moral and institutional problems as well as material problems.

I want to suggest that an important principle for harnessing our wealth

and freedom is the principle of competition. Americans across the political spectrum are individualistic, pro-choice, and anti-monopoly: they favor a wide scope for individual preference and know that competition, even tough and unruly competition, promotes not only choice on the demand side but quality, discipline, and integrity on the supply side. Those hardy sentiments are building blocks for many practical reforms. Competition is already the first principle of contemporary school and welfare reform, grounded as they are in demonopolization of government services and reinvigoration of diverse community institutions. It should also be a central principle of those who wish to maintain a healthy, productive culture.

That may seem like an odd suggestion, as powerful new forms of competition appear to many to be the essence of the problem—Hollywood competing with the family, careers and romance competing with parenthood, MTV competing with reading and conversation, liposuction competing with diet and exercise. But there is no going back: in the rich, egalitarian, racially and ethnically diverse society that America has become, fifties-style cultural orthodoxy is as lost a cause as the public school monopoly. In any event, as David Frum shows in his fine new book, the fifties were the exception: our cultural history has mainly been one of bumptious innovation and distrust of authority. Religion has always been far more robust in America than in Europe, which suggests that the advantages of competition over monopoly can extend to culture as well as material things. If raising a child, preserving a marriage, or marketing a good movie, poem, or political doctrine is more demanding than it used to be, then the tougher demands may lead to stronger efforts and better supply. Better supply could compensate for the weakening of social norms and sanctions, and in time generate new ones. It may be objected that religion remains under siege in the larger American culture; my reply is that the unpopular minority has the most to gain from open, depoliticized competition. Many of today's most aggressive cultural threats come from government monopolies—victim feminism and fuzzy math in the

public schools, the FCC's hostility toward religious broadcasting. The times call not for more regimentation but the opposite: a gale of constructive competition from new schools, textbooks, magazines, museums, orphanages, academic and literary societies, bar associations, and think tanks.

Competition has numerous applications to the task of re-limiting government. Political competition was Madison's "auxiliary precaution," standing behind the Constitution's "parchment barriers" to the growth of government. The forms of competition he envisioned have become less effective—his "extended republic" of divergent regional interests is no more—but other forms have grown, and can be similarly employed once the essential strategy is grasped. The growth of interstate and international markets has already constrained or reformed many domestic policies—just ask the FDA officials who are trying to prevent Americans from using the Internet to learn about foreign pharmaceuticals. Globalization must be permitted to continue its work, unfettered by diplomatic schemes to "rationalize" divergent national policies. Trade liberalization programs themselves need to be treated with a new skepticism, presenting as they now do the potential for hitching economic interests not to free commerce but to unfree policy. Forthcoming AEI research by Jagdish Bhagwati and colleagues suggests that the growth of global markets is producing effective political coalitions for freer trade within nations, thereby reducing the need for tit-for-tat trade liberalization treaties such as NAFTA and the WTO. For example, recent actions to dismantle trade and investment barriers in Chile and other Latin American nations, South Korea and other Asian nations, and even in India and China, have been taken out of unilateral national interest, not as part of international agreements. All the more reason to resist new agreements that would condition the opening of trade on the closing of democratic choice in individual nations.

Within the United States, the resurrection of federalist doctrines in the courts could open the way for a Madisonian revival. The trick here is to

understand that the purpose of modern federalism is not to empower states—which are already the source of some of our most egregious policies—but to see that public policy is provided under circumstances of greater competition. The single most productive body of U.S. regulatory law is corporation law, and this is in large part, as Roberta Romano of the Yale Law School has demonstrated, because corporations are free to choose their state of incorporation. The Romano principle is rich in possibility. If, for example, it proves impossible to keep Internet sales tax-free, then state sales taxes should apply to sellers rather than customers. So Washington State would be free to tax all of the sales of Amazon.com as well as those of local bookstores—but Amazon would be free to locate in another state with a lower tax, and would be much more mobile than either retail stores or customers.

Competition also holds great promise for reforming liability law. Courts should permit sellers of automobiles, medical care, hot coffee, and other things involving consumer risk, to contract out of liability for the big-casino elements of tort law—pain-and-suffering and punitive damages—provided only that they remain liable for the tangible costs of accidents such as medical expenses and lost wages. That way we would see head-to-head competition between sellers with more and less extensive liability, and find out if the lawyers are right that the current tort system is well worth its costs to consumers. The current debate over removing the liability exemption of Health Maintenance Organizations provides an excellent opportunity. By all means make HMOs subject to liability in the event of medical accidents or “bad outcomes”—so long as they are also free to specify the extent of that liability in their insurance contracts, along with numerous other provisions affecting the quality and cost of competing health care plans.

Reforms such as these will require innovations in political rhetoric and leadership, especially at the presidential level. Rhetoric can be a powerful tool for limited government, as Ronald Reagan demonstrated with his skillful

use of tax-reduction to promote a smaller government (to “reduce the government’s allowance”) as well as a bigger economy. In 1975, one of President Gerald Ford’s top economic advisers, Paul MacAvoy, was briefing him on a legislative proposal to deregulate the trucking industry. MacAvoy said, “Mr. President, I must tell you that if you go forward with this, not only the Teamsters but the owners will fight you every step of the way.” Ford replied, “Well, then it must be a pretty good bill. Let’s go with it.” Eight years later, in 1983, I found myself briefing President Reagan on an initiative to abolish some of the remaining vestiges of trucking regulation. I said, “Mr. President, I must tell you that if you go forward with this, not only the Teamsters but the owners will fight you every step of the way – they actually like being regulated.” Reagan replied, “Well, then it serves them right. Let’s do something else.” Reagan was of course as fervent a deregulator as Ford, but he was working on a larger strategy and would not be distracted. Such was the success of Reagan’s strategy that it acquired an almost mythical prestige and has continued to be employed in a much more prosperous age when it has outlived its political utility. The times call for new rhetorical strategies and more particular and gritty approaches to government reform.

Markets, choice, and competitive federalism can provide some of the tools. But the problem of unbounded administrative government will also require that our presidents be much more constitutionally assertive. The President is, among other things, one of the three co-equal branches of the federal government. He is as entitled as the Supreme Court to take positions on what is and is not constitutional, and to direct his subordinates to act, and to abstain from acting, in accordance with those positions. Today, Executive Branch innovations such as those I have described often go unchallenged on constitutional or other legal grounds – and, when they are challenged, agency lawyers reflexively defend the practices with all the techniques of litigation and case-by-case compromise at their disposal. The President could begin to reverse this process by ordering executive officials not to enforce statutes he

regards as unconstitutional, not to interpret vague or ambiguous statutes (such as those on which the FCC's taxing program and the EPA's air quality standards are based) in ways that encroach on congressional responsibilities, not to undertake litigation financed by contingency-fee arrangements with private lawyers, and to defer scrupulously to the Senate's treaty power. Steps such as these would be highly controversial among many academic and practicing lawyers (who believe the courts should have a monopoly on interpreting the Constitution), among executive branch officials (who are always keen to keep Congress out of their hair), and in the Congress itself (which often prefers to fob off contentious issues). The controversies, if chosen with care and advanced in a principled way, would be invigorating and productive. The dynamics of Executive growth I described earlier invite such a constitutional remedy; indeed, they admit of no other.

I have noted that Americans have not become Hayek's serfs despite the growth of government. But some social critics believe we have become something almost as bad — the people portrayed in a famous gloomy passage in Tocqueville's *Democracy in America* and, at a high-tech level, in Aldous Huxley's *Brave New World*. These are people who have become childlike, self-absorbed, and politically anesthetized by "petty and banal pleasures" under the ministrations of a government that "gladly works for their happiness but wants to be the sole agent and judge of it." But that isn't us either. We are a pleasure-loving people to be sure, and with abundant sources of gratification. But we are also skeptical, self-reliant, ethically serious and at times highly moralistic, and possessed of a strong patriotism attached to a "way of life" rather than to government. These singular attributes of the American character are undimmed by post-modernity and jostle to cope with its problems. It was not love of luxury that created our nation, held it together, and raised it up to its current preeminence; it was our fierce independence and love of liberty. Having in this manner achieved prosperity, we will not succumb to it.

Why the Era of Big Government Isn't Over – Letters and Response

Commentary
July-August 2000

[Letters concerning an abbreviated version of Mr. DeMuth's Boyer Lecture published in the April issue of Commentary, and Mr. DeMuth's response.]

JOHN ENGELMAN, Walnut Creek, California:

Christopher C. DeMuth ["Why the Era of Big Government Isn't Over," April] passes lightly over the main reason the era of big government continues: most Americans want the government to help them get through life. Mr. DeMuth seems to believe that most Americans are as well off as he is. His article glitters with exaggerations – describing America, for example, as "a mass-upper-middle-class society" – and bizarre untruths, like his claim that the United States is "the most egalitarian of any advanced, prosperous society." The reality is that economic inequality is more pronounced in the United States than in any other industrial democracy. Moreover, since the recession of 1973, real income for the poorest two-thirds of Americans has declined an average of 1 percent a year.

If the income gap continues to grow, and I believe it will, there will be a popular demand for income equality. Then the era of big government will truly begin.

DONALD FELDSTEIN, Teaneck, New Jersey:

Everyone supposedly knows that big government is bad and smaller government is better – more efficient and effective, closer to the people, ultimately more democratic. Relying on this truism, Christopher C. DeMuth makes a persuasive case that big government is still with us, and may even be growing. The only problem is that the truism is not true.

Social Security is one of the biggest government programs. A few years ago, magazines were filled with dire warnings that the aging baby boomers would soon bankrupt the Social Security system. Now that we debate how best to spend a trillion-dollar surplus in the next decade, the issue has faded.

With his genius for sensing public opinion, President Clinton has made saving Social Security one of his top priorities. For all its size, in other words, Social Security is also popular. Nothing destroyed the Gingrich revolution more than the perception that the Republicans would gut or cut Social Security. Maybe the American people know something Mr. DeMuth does not.

The more important debate is between proponents of means-tested programs (based on income) and supporters of universal programs (for broad categories of people). The old adage still holds: programs just for the poor become poor programs. Thus, if I am a working person in the lower middle class, just barely ineligible for welfare, Medicaid, food stamps, and housing subsidies, and I see my neighbor, much like me but barely eligible for all these benefits, I am likely to become embittered, the stereotypical hard-hat bigot. By contrast, I treasure my benefits under a universal program like Social Security. We need some unity in America, and only such universal programs can provide it.

MICHAEL W. SCHWARTZ, New York City:

In his extraordinarily important article, Christopher C. DeMuth contends that an increase in executive-branch initiatives is what best explains the persistence of "big government." Although highly informative and powerfully reasoned, his argument gives too little weight to the role of the judicial branch in producing the erosion of democratic values he describes. Three examples will illustrate the point.

One of the major devices by which the judiciary has enhanced its power is the class-action suit, which enables lawyers to shape public policy by exposing private defendants to litigation that is prohibitively dangerous to fight, or by suing public bodies and entering into stipulated "settlements" (e.g., for the governance of prisons or the administration of welfare systems) that are indistinguishable from legislation. The federal rule of civil procedure that allows class actions dates only to 1967, and like all such rules is subject to plenary control by Congress, which could quickly curb class-action excesses by amendment. "Law" that is now made in class actions, far beneath the radar of public debate, would then have to be made either in Congress or not at all.

The failure to regulate awards of punitive damages and attorney fees

in the federal courts is another shocking omission on the part of Congress. Punitive damages are an inherently lawless, unjustifiable exaction, which the Supreme Court has tried, and failed, to control. Congress could step in to prevent this unconscionable enrichment of the private bar.

Finally, I have never understood why the judiciary committees of Congress do not conduct oversight hearings into the behavior of federal judges as other committees routinely do in the case of executive officers. Given the enormous discretion judges enjoy to make law, often relying on a judicial determination that Congress has authorized such "public litigation," there can be no credible objection to such hearings on grounds of "judicial independence." The result would be a greater degree of that political accountability whose decline Mr. DeMuth chronicles.

The failure of Congress to address even one of these issues in nearly six years of Republican control of both houses is a grave indictment of the GOP's leadership.

FREDERIC WILE, New York City:

Congress itself is complicit in the creation of the "unbounded administrative government" that Christopher C. DeMuth describes. Not wishing to touch issues that engender conflicting opinions in their constituencies, our representatives have, by nonfeasance and through the creation of vague legislation, left voids that appointed activists in the executive and judicial branches have been only too eager to fill. An egregious example of this has been the distorted enforcement of the 1964 Civil Rights Act, which has led to affirmative-action mandates that are in direct conflict with the act itself.

The solution for the problems adduced by Mr. DeMuth lies in Congress's exercising the legislative powers clearly set forth in Article One of the Constitution. That Congress does not so act is a function not of its laziness but of its constant preoccupation with fund-raising and reelection.

JOSEPH C. DOHERTY, Chestertown, Maryland:

Christopher C. DeMuth sets forth some of the realities of a U.S. government that is growing not only in size but also in complexity. In the long run, the latter phenomenon may be even more destructive of democratic values and effective management of the public business than the former. The more complex government becomes, the less the average citizen can understand it, and the more indifferent he becomes toward the entire process.

As a result of the evolving conditions Mr. DeMuth describes, we see experts, technicians, systems analysts, bureaucrats, and special pleaders of all kinds taking over the mechanics of the governmental process. Meanwhile, our elected officials stand by, truculent and assertive as usual but completely uncertain how to conduct public affairs. To make matters worse, the media simply ignore government issues they do not understand or find boring.

CHRISTOPHER C. DEMUTH replies:

My article's account of American egalitarianism was summary, but it was not exaggerated or untrue, as John Engelman complains. After calling my account "bizarre," he says that "since the recession of 1973 [not a recession year, by the way], real income for the poorest two-thirds of Americans has declined an average of 1 percent a year." That is to say that the incomes of a large majority of Americans have fallen by nearly one-quarter since 1973. Does he really believe this?

Mr. Engelman is repeating a factoid-myth that has been in circulation for many years. Its exact provenance remains a mystery, but it is probably a misinterpretation of one of the government's wage surveys. The likeliest source is a Labor Department survey of "weekly and hourly earnings of production and nonsupervisory workers," which covers about two-thirds of the workforce (not "of Americans") and which shows annual declines in the 1-percent range for some stretches (though not for the 1973-2000 period).

That survey has been collected in such a way, however, as to include progressively more lower-wage workers over time: it does not track changes in individuals' earnings over time. Moreover, the survey, like most official wage surveys, does not include employee bonuses, profit-sharing, or benefits (the fastest growing form of compensation), or in-kind government transfers

(Medicaid, WIC, food stamps) or the Earned Income Tax Credit (which can be substantial for lower-wage workers). Finally, this survey, like most others, uses the Consumer Price Index (CPI) to adjust for inflation, and all competent economists agree that the CPI has seriously overstated inflation, and thereby seriously understated wage increases, over the past several decades. The Boskin Commission's 1.1-percent CPI correction would itself reverse a 1-percent annual decline in inflation-adjusted wages.

Although Mr. Engelman fell for a statistical whopper, he could easily find good data showing increasing inequality in annual incomes (properly measured and adjusted) in recent decades. But the important point is that annual income is itself a highly misleading measure of the distribution of personal welfare in a society as rich as ours – where we are so wealthy that "annual income" has become, to a significant degree, discretionary. In the early 20th century, most Americans went to work immediately after secondary school or earlier and kept working until shortly before they died; today young adults are spending much more time in school (and engaging in other non-earning pursuits), and older people are spending well over a decade on average in retirement. Consider that a man and a woman about to graduate from medical school will typically appear toward the bottom of the income distribution. When they begin work, their incomes are above average, and when they marry, their "household income" doubles. Thirty years later, in their peak earning years, they will probably be in the top 5 percent of the income distribution. Today the bottom and top of the income distribution in any given year include many people such as these; the word for this form of income inequality is "progress."

An important reflection of these trends can be seen in the work of Daniel Slesnick of the University of Texas, who finds that the distribution of annual consumption has remained essentially unchanged since 1973, even as the distribution of annual income has become less equal. (This includes Mr. Engelman's "poorest two-thirds," whose consumption expenditures have been increasing at about the same rate as the top one-third.) And Slesnick's data do not capture the most important new form of consumption – consumption of leisure (non-earning) time, which is particularly striking among the "poorest two-thirds" and among those who are in the workforce. New research by MIT economist Dora Costa shows that, in 1950, Americans in the top 10 percent for wage income were working 46

hours a week on average while those in the bottom 10 percent were working 52 hours—and that by 1998 the two groups had traded places, the top 10 percent laboring 52 hours a week while the bottom 10 percent were down to 45 hours. That is a redistribution from the top to the bottom of the wage scale of nearly one day of free time every week, or a month-and-a-half every year! These changes in the allocation of time have important consequences for income distribution. Robert Haveman of the University of Wisconsin has shown that most of the recent increase in income inequality among male wage earners (at least 63 percent of increased inequality for the period 1973-1988) has been due to voluntary personal choice, not lack of opportunity.

Mr. Engelman is right that economic inequality, beyond a certain point, generates popular demand for some equalization. So he should ask himself why, if inequality has really been growing as much as he supposes in recent decades, redistribution has faded from U.S. politics during this period. The last big redistributive initiative was President Clinton's 1993 proposal to provide health insurance to the dozens of millions of Americans who lack it: the proposal was a spectacular flop, and health care reformers have despaired ever since over the public's indifference to the issue. Now the levelers have turned to the "digital divide," where social justice is to be had through government subsidies for Palm Pilots and Internet connections. Such is the equality politics of a super-rich, super-egalitarian society.

Every important statement in Donald Feldstein's letter is wrong. Magazines were not filled with warnings that Social Security would be bankrupt soon, but rather that it would be bankrupt in 30 or 40 years; the current surpluses in the government's general account have not altered those projections; Social Security has not faded but is one of the central issues in this year's presidential campaign. President Clinton has not made saving Social Security a top priority; he offered one reform proposal with some interesting features, and submitted budgets that claimed to "protect" Social Security through entirely meaningless, indeed ridiculous, slights of accounting, but his eight years in office have produced little of substance in the area despite the pleas of prominent Democratic legislators like Daniel P. Moynihan and Bob Kerrey. (The one important Social Security reform of his term, the recent elimination of the earnings limit for people over 65, was a longtime Republican proposal.) The Gingrich revolution was not "destroyed" — its 1994 majority of the House of Representatives remains intact, although diminished

in size – and Speaker Gingrich's setbacks at the hands of President Clinton, such as during the government shutdown in the fall of 1995, had nothing whatever to do with Social Security.

I am sorry that Mr. Feldstein imagines himself, as a low-income worker, becoming an "embittered bigot" because poorer neighbors are receiving means-tested welfare benefits. And I am sorry that he thinks the only way to achieve unity in America is through universal government programs. If he were to look closely at Social Security, he would see that it has many features that are disuniting and embittering and distributively perverse to boot – such as its treatment of working women and widows in many circumstances – features that would be cured if the program were means-tested or, better yet, privatized and vested.

I agree with Michael W. Schwartz and Frederic Wile that the courts and Congress are responsible for much bad policy and willy-nilly government growth. Both writers offer several choice examples and emphasize congressional pusillanimity – which, I think they would agree, is an institutional problem rather than one of party or persons. That, in my view, is why the executive agencies should be regarded as the "most dangerous branch," and why the President is the only likely source of constitutional reinvigoration. The specialized executive agencies, with the "experts, technicians, systems analysts, bureaucrats, and special pleaders of all kinds" that Joseph C. Doherty describes, are the activist forces of modern government. The Congress is essentially two large unwieldy committees, subdivided into hundreds of smaller overlapping committees and rent by innumerable factions of interest and ideology; the judiciary is constrained by self-denying doctrines of precedent and jurisdiction and, above all, by the inability to set its own agenda.

In contrast, the executive agencies are purposive, protean, persistent: able to seize and promote with alacrity every opportunity created by vague legislation and judicial innovation (the Civil Rights Act mentioned by Mr. Wile, and the rules concerning class actions, punitive damages, and attorneys' fees mentioned by Mr. Schwartz, being conspicuous examples). But the parchment still says the agencies work for the President. The situation will improve when – I think only when – a President reverses course, and obliges his hundreds of thousands of energetic, well-organized subordinates to follow.