

## Competition and the Constitution

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IS THERE TOO MUCH OR TOO LITTLE COMPETITION in American life? Does competition promote growth and progress, or selfishness and inequality? Is it fair and efficient, or does it merely let the strong prey on the weak? And what is the alternative? Can competition be tamed and improved by government and union power, or is that a recipe for lethargy and self-dealing?

These questions lie at the heart of today's policy debates over reviving the economy, restructuring the financial system, regulating energy production, and reforming health care, education, and pensions. Each debate is cast in terms of the desirability of some particular government intervention intended to pursue broad goals like economic growth, financial stability, retirement security, or access to medical care or schooling. In each case, though, an essential and prominent feature of the proposed intervention is the suppression of competition.

It is fitting that the question of competition should underlie so many of our policy debates, because the principle of competition underlies our political order. In America, political leaders are held accountable, and their power is limited, through competitive elections. For the same purposes, our government is organized through institutional competition among the three federal branches and among the federal and state governments. The First Amendment decrees a system of intellectual *laissez faire* in which ideas compete for influence and acceptance. And the whole structure supports and regulates an economy premised on open competition.

But our constitutional order is becoming markedly less competitive—making government less responsive and leaving critical sectors of our society less dynamic and free. Monopoly in the public sector

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fosters monopoly in the private sector, and vice versa. The decline of competition, and the resulting rise of monopoly power, is thus coming to define our public life.

To understand the sources of this trend and its importance, we need first to understand the nature, advantages, and challenges of competition itself.

#### UNDERSTANDING COMPETITION

Competition is an elemental fact of life. In nature, it is the driving force of evolution by natural selection. In society, it is equally powerful and inescapable. Within every nation of every culture and political system, there is competition for basic needs like food, shelter, and sexual mates as well as competition for distinctively human goods such as honor, friendship, and power. Among nations (and among tribes before there were nations), there has always been competition for dominion and security.

Competition is ubiquitous because the condition that gives rise to it is ubiquitous: the scarcity of resources relative to the needs and desires of living beings. But, as the process of biological evolution suggests, competition is more than a result of scarcity—it is also a means of successfully adapting to that condition. In society, competition is largely peaceful when properly structured by public laws and private norms. And its advantages go well beyond the “survival of the fittest” of natural selection.

The most obvious advantage is discipline. Those working in rivalry with others tend to work longer and harder and to be more focused on production than on consumption—out of hope of gain, fear of failure, or sheer love of the game.

At the same time, competition promotes sociability, self-restraint, and service. It harnesses individual self-interest to the interests of others. Business firms vying for customers are eager for feedback about the appeal of their products; this helps them to think objectively about the value of what they have to offer, because offerings with less appeal lose out to those with more. The same is true of doctors competing for patients, professors for students, and politicians for voters.

And competition promotes adaptability of another kind: resilience and durability over time. We know from evolutionary biology, and from the performance of competitive as opposed to controlled economies, that competition tends to produce forms that are well adapted to their

environments, that resist threats to their well-being, and that improve continuously in response to changing circumstances.

Well-structured competition also moderates social conflict. The judgments of the marketplace, and of other competitive procedures such as political elections, are impersonal in the sense that they constitute the aggregation of large numbers of small, essentially anonymous individual decisions. It is a great boon to society to have some important decisions made in this manner rather than by identifiable individuals and groups, whose motivations, sincerity, and legitimacy can always be questioned by those who oppose their decisions.

Above all, competition generates useful information and true knowledge. As Justice Oliver Wendell Holmes wrote in a celebrated dissent in the 1919 First Amendment case *Abrams v. United States*, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” In economic markets, competition elicits dispersed information about supply, demand, costs, and preferences and transmits it in the form of prices to producers and consumers. In the “marketplace of ideas” — from politics to religion, science to philosophy — competition entails publicizing ideas and testing them against the experiences and observations of others. In some areas, this process produces a consensus of popular or professional opinion. Such consensus invariably changes over time, but in many important fields (such as engineering and the health sciences) it is demonstrably progressive — cumulating and improving rather than oscillating.

But competition is often unpopular. It is, for one thing, frequently regarded as a vestige of our brutish past. In the modern West, scarcity has been replaced by abundance when it comes to most basic necessities. This profusion has led many people to believe that our higher civilization should progress away from competition in all realms, and toward more elevated, cooperative arrangements.

But though some things have become abundant, others remain incorrigibly scarce. We have become rich in food and shelter, but there can never be enough information and knowledge, reputation and status, or love and beauty to go around. Indeed, competition is the driving force of the most advanced spheres of human endeavor. The worlds of art, literature, science, and music are relentlessly competitive, and competition in those fields is often deliberately augmented by mechanisms such as prizes — Nobel, Pulitzer, MacArthur, and many others. The

fruits of these arrangements are among the highest accomplishments of our civilization.

But competition can also be unpopular for a simpler reason: It keeps us from getting what we want. Although competition is frequently associated with individualism and egoism, its primary advantages are collective rather than individual. The individual person, firm, or group may gain or lose in competition with others, while society gains from the process one way or the other. Therefore, especially in personal life, competition often presents itself as a constraint on our aspirations and sometimes delivers bitter disappointments—when we don't get the girl or boy, or the job, or the desired college-admission letter. These experiences may blind us to the advantages of competition. And they are particularly rankling to the modern mind, which is averse to constraint and regards personal autonomy and self-realization as the essence of progress.

The cause of our disappointments, though, is not competition *per se* but rather scarcity. Competition is, as noted above, not the cause of scarcity but rather its messenger. The question is not whether we like competition as a means of accommodating scarcity in things we desire but rather whether we would prefer an alternative procedure. For example, marriages could be arranged by parents as in days of yore; jobs could be assigned by a government agency; and college admissions could be determined in the manner of primary- and high-school admissions, with everyone guaranteed a spot but restricted to the college nearest to home. As these examples suggest, the alternatives to competition generally involve greater coercion; they do not lessen constraint but rather transfer its operation to a decision-maker who is removed from those whose interests in a decision are most immediate and personal.

We therefore do not really face a choice between cooperation and competition. Cooperation is an ultimate good, competition an instrumental good. How to induce self-interested individuals to cooperate with one another for the good of all is a large, perhaps the largest, social question. But invoking the desirability of cooperation without specifying how it is to be achieved does not get us anywhere.

The only alternatives to competition are coercion by third parties, as illustrated above, and altruism. Within families, friendships, and small communities, we cooperate altruistically—which is to say, out of our love or concern for others or out of a deep sense of common purpose. But altruism becomes progressively weaker as relations among

individuals grow more distant and our ability to monitor the reciprocal altruism of others decreases. In the economic marketplace, altruism is wholly ineffective—it simply invites free riding, which is the opposite of cooperation. Meanwhile, large-scale economic coercion—socialism—is now generally out of favor, although coercive government regulations play a role in most market economies. That means coercion and competition are, in many circumstances, the only plausible means of advancing common aims, which is why the question of coercion versus competition is the essential issue in so many of our policy debates.

Political arrangements, like commercial arrangements, involve relations among large numbers of strangers with common interests. This suggests that competitive organization could be beneficial in political life—and the benefits could be unusually large, because of the great power of government for good and for ill. At the same time, however, popular discontent with competition, and vague but deeply felt desires for greater cooperation, are likely to be exceptionally influential in the world of politics, which is ultimately the world of popular opinion. Competition in government is therefore both unusually powerful and unusually problematic.

#### COMPETITION AND THE CONSTITUTION

Competition is nowhere mentioned in the Constitution or the Declaration of Independence. It is not among the national aspirations set forth in those documents: equality, liberty, and the pursuit of happiness, protected and promoted by a republican union. But competition is a foundation of our constitutional order and a critical means of achieving our aspirations. In particular, it shapes our common life through elections, the separation of powers, federalism, free speech and religion, and competitive enterprise.

In the United States and other representative democracies, top government officials are chosen in regular elections. Those who aspire to office must compete for public approval. There is, of course, competition for power in every political system: In a monarchy or dictatorship, one competes for the allegiance of rulers and elites. But democracy is more than a procedure for channeling the competition for power in one direction rather than in others. Our Constitution provides for elections that are public, periodic, held at dates fixed in advance, and regulated by settled procedures. These features transform the competition for

power, enlarging the field of political candidates while moderating the power of the victors. Incumbents—especially our term-limited presidents—have only a temporary hold on power, and their ability to influence the struggle for succession is weak. Their influence in office is a function of popular approval. This public competition for power eliminates any pretense that leaders hold office through intrinsic right or privilege. In these respects, our democracy employs competition to promote the most valuable but most elusive attributes of government: honesty, diligence, and responsiveness.

Competitive democracy has also made our government more adaptable in the face of changing circumstances, and therefore more stable and durable. Authoritarian regimes such as China's are sometimes envied *sotto voce* for their decisiveness and their freedom from democratic muddle. Over time, however, such governments tend to become not only corrupt but insular and sclerotic. Their suppression of political competition makes them progressively weaker. America's constitutional regime has endured for more than two centuries, outlasting a long parade of rivals that looked stronger for a time but came to ignominious ends.

Of course, the Constitution's reliance on competition does not end with elections. The great difficulty of government, James Madison wrote in Federalist No. 51, is that one "must first enable the government to control the governed, and in the next place oblige it to control itself." The framers' answer to this difficulty was competition within government, in the form of the separation of powers. "Ambition must be made to counteract ambition," wrote Madison, continuing with a direct analogy to economic markets and similar systems: "This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public."

The Constitution supplies that rivalry at the national level by dividing the government into the legislature, executive, and judiciary and further dividing the legislature into two houses. The two political branches follow a formal division of labor: Congress writes the laws, the president executes them. But the Constitution complicates matters by making each political branch partially dependent on the other: The president can veto laws, but Congress can impeach the president; the president conducts foreign policy, but Congress holds the purse strings. The branches are not simply stages of policy production, like a manufacturer and a distributor; they are partners in each other's business. The

system requires continuous cooperation in both the design and execution of policy — cooperation that can be given or withheld according to each partner's interests and ambitions.

The separation of powers has been an effective tool of limited government for much of our history. Major legislation usually requires a deep consensus — two separate majorities of the Congress, the approval of the president, and, if the law is challenged, the assent of the judiciary. Years, sometimes decades, must be devoted to publicizing proposals and gathering information through hearings and other means, mobilizing support and forging coalitions, responding to criticism, and winning over or compromising with opponents. For that reason, those who favor bigger, more decisive, more authoritative government suggest making our system more streamlined and efficient. The most common proposals involve moving to a parliamentary system in which the executive branch is a handmaiden to the legislative majority, to make the Congress unicameral, and to make all elective offices co-terminous.

In one sense, the complaint of the critics is understandable. In economic markets, the well-known consequence of competition is to *increase* output and efficiency, so why should competition *limit* output in the political sphere? Doesn't such "gridlock" mean that our system is broken? But this misses the point of the separation of powers, which is easier to see when we understand our system in terms of policy and political competition. In a democracy, greater and more efficient "output" does not necessarily mean more taxation, regulation, or spending. Rather, it means more of the kind of government citizens prefer. And our history makes it quite clear that Americans often prefer a government that does less over a government that does more. In our system, the branches not only check but balance one another: The two political branches compete not so much in order to frustrate each other as to win the approval of the electorate.

Sometimes that rivalry moves the government toward a more liberal, expansionist course — as in the Democrats' capture of the House and Senate in 2006. Sometimes it produces a more conservative course — as in the Republicans' capture of the House and Senate in 1994 and the House in 2010. Each of these elections replaced single-party government with divided government two years after a presidential election had consolidated the congressional majorities of the president's party. That is one piece of evidence among many indicating that Americans like their

government competitive. Between elections, the electorate counts on rivalry for public favor between the branches and parties to keep government relatively honest and balanced. The party that sees its agenda frustrated may well yearn for greater “efficiency”—just as the losing competitor in any system may resent the competition. But the competitive system serves the larger interest, which in this case is the will of the public and the good of the country.

At the same time, when dispatch is called for—as in response to a crisis or foreign threat—our system has proved as energetic and decisive as any parliamentary model. A particular weakness of parliamentary systems is that crises can prompt legislative defections that cause the government to fall at the worst possible moment. Our independent presidency is insurance against that event—another example of the balancing effect of separation-of-powers competition.

Our system also benefits from competition among the different levels of government. The American states are not administrative subdivisions of the central government but rather sovereign entities that possess a degree of political autonomy. This arrangement is not a matter of deliberate design, like the separation of powers: The states pre-existed the Constitution and simply insisted on it. The result was an additional dimension of competition in the supply of government.

First and foremost, the states engage in policy competition to attract and hold citizens and employers. State policies are only one among many factors affecting decisions about where to live and work, but the American public is highly mobile and state policies concern many things that people care deeply about—schools, transportation, crime, family law, public amenities, and of course taxes. The 2010 census showed that, during the past decade, states with relatively low taxes, efficient government, and business-friendly laws prospered and attracted new residents and jobs at the expense of states with less attractive policies. For example, over the past decade, Texas and some of the Rocky Mountain states grew more than twice as fast as California, whose natural advantages have been increasingly undermined by high taxes and cumbersome regulations.

States also compete with the federal government. The Supreme Court regularly adjudicates cases in which states challenge federal laws for usurping their jurisdiction or violating the rights of their citizens. We see this today in the state challenges to the constitutionality of the

“individual mandate” and other aspects of the Patient Protection and Affordable Care Act of 2010 (Obamacare). Conversely, the federal government occasionally challenges state policies on constitutional grounds, as in the Justice Department’s ongoing effort to prevent Arizona from enforcing federal immigration laws.

Competitive federalism, like the separation of powers in Washington, provides balance as well as checks. States are “laboratories of democracy” where innovative policies can generate information, change opinions, forge coalitions, and be tested before adoption at the national level. For instance, welfare-reform initiatives in Wisconsin and other states led to national welfare-reform legislation in 1996. Today’s numerous charter-school and school-voucher programs—still controversial at the national level but popular in many states—may eventually lead to national legislation as well. States can provide negative examples, too: The fiscal crises suffered by several states have figured prominently in the debates over the consequences of the national debt.

Moreover, states are parallel political universes with their own opportunities for leadership. As a result, our national politics is much more open and competitive than it would be otherwise. States provide the national electorate with a candidate pool that is more variegated and seasoned than in nations with unitary, non-federalist governments. Governors are experienced public executives. They are relatively independent of the Washington political establishment—even, in some cases, of their own parties—and are more likely to mount fundamental challenges to the status quo. These effects are particularly prominent in presidential politics, which usually includes several candidates with executive experience gained outside of Washington (in unitary governments, the candidates are almost always incumbent national legislators). Many more of our presidents have come from the state houses than from Congress.

Beyond the design of our institutions, an understanding of the value of competition is also apparent in the way the First Amendment protects the freedom of religion, speech, the press, and political association from undue government interference. These limits on government action are usually described in legal and political terms—as guarantees of individual rights and protections of minorities. But they can also be understood in economic terms—ensuring that political doctrines, religious faiths, news, and information of all kinds are competitively supplied with no official barriers to entry. The unbridled marketplace of

ideas yields immense social benefits and is deeply engrained in our culture. The ideas-based sectors of American society—higher education, science and engineering, entertainment, the media—are among our most successful and dynamic. Free competition among religious faiths, and the absence of a government church, have proven to be pro-growth policies even in our secular age, contributing to an unusual variety and vibrancy of religious practice and belief.

Competition in ideas is also vital to the quality of our politics and government. It complements democratic elections, the separation of powers, and federalism with a robust supply of policy criticism, policy ideas, and organized opposition. It also ensures a free flow of information, which is essential to effective government. When the first cases of severe acute respiratory syndrome (known as SARS) appeared in the Guangdong province of China in 2002, several months passed before the government notified World Health Organization officials, by which time the pandemic had already killed many in China and was spreading to other nations. In America, SARS would have been national news immediately, and no bureaucratic cover-up could have succeeded. In February 2003, when the U.S. space shuttle *Columbia* disintegrated on re-entry, the disaster was known instantly and its cause (shedding rocket insulation on launch) was revealed within hours. NASA officials nevertheless continued to insist for months that the cause was unknown, which suggests how they would have behaved absent a free press. News competition keeps political leaders not only honest but well informed and less beholden to self-protective government bureaucracies. The advantages are summed up in Amartya Sen's aperçu that no nation with a relatively free press has ever experienced a serious famine.

Finally, there is our constitutional system's affinity for competitive enterprise. The Constitution contains no self-denying ordinances, similarly general and explicit as those of the First Amendment, regarding broader economic activity. Indeed, the framers assumed that the new government would actively regulate commerce. But they also assumed that they were writing a Constitution for a "commercial republic" in which the government's role was to protect private property and promote free enterprise. The Federalist Papers contain many references to commerce and its benefits, such as Federalist No. 11's deep bow to the "unequaled spirit of enterprise, which signalizes the genius of the American merchants and navigators, and which is in itself an inexhaustible mine of

national wealth.” And the Constitution contains several provisions that make sense only in the context of an economy based on ownership and competition: The patent and copyright clause was intended to protect the property rights of creators, the contract clause and the bankruptcy clause were intended to prevent the states from favoring influential economic interests, and the takings clause was meant to protect private property from direct government confiscation.

Indeed, a central purpose of the Constitutional Convention was to halt state policies that discriminated against firms and individuals in other states, such as tariffs on out-of-state goods and regulatory preferences for local interests. The Constitution addressed the problem by giving Congress the power “to regulate commerce . . . among the several states.” The provision has proved ineffective for this purpose, because the composition of the Senate—with every state equally represented in a small body in which courtesy is king—has guaranteed that Congress will rarely override the protectionist policies of any state. Instead, Congress has marshaled the commerce clause to regulate innumerable matters that have little or nothing to do with interstate commerce. In this congressional vacuum, the task of policing against discriminatory state laws has fallen to the judiciary, under the “dormant commerce clause” doctrine—which reasons that, because the clause empowers *Congress* to regulate interstate commerce, the states may not do so. Thus, state attempts to manipulate the interstate flow of goods and services to their advantage may be held unconstitutional by the courts in the absence of congressional action.

Although the constitutional scheme has failed to work as planned in this regard, the Constitution clearly intended the federal government to promote free interstate competition by countering state parochialism. And to the extent that the courts take the dormant commerce clause seriously, the constitutional scheme is not, ultimately, a failure at all. Rather, we have yet another example of the balancing effect of separation-of-powers competition, with one branch stepping into the breach when another is passive.

Competition was more than an end of the constitutional order—more than a source of liberty, equality, and prosperity. It was also a means of securing the constitutional order itself. That is one implication of the most famous of the Federalist Papers, Federalist No. 10. The essay was concerned with the problem of factions—what today we call special-interest groups—which it considered the gravest threat to

democratic government. According to the essay, factions introduce “instability, injustice, and confusion . . . into the public councils,” which are “the mortal diseases under which popular governments have everywhere perished.” In a free society, factions are inescapable — because individuals have differing opinions, faculties, resources, and circumstances, and therefore differing and often conflicting interests. Government can hardly ignore them — “the regulation of these various and interfering interests forms the principal task of modern legislation.” Yet if government succumbs to them, by passing laws that enrich particular groups at the expense of others, it will become not only unjust but unstable — forfeiting the allegiance of the people who formed it and authorized it to wield power on their behalf.

Federalist No. 10’s answer to this dilemma was not any specific constitutional provision. Rather, it was the work as a whole — the “extended republic” of representative, federated, competitive government. If each elected official represented a sufficient diversity of interests, and if the nation was large enough that its legislature encompassed a sufficient further diversity, then the number of factions would be so great, and the conflicts among them so intertwined, that each would be relatively harmless. As a result of this competition, “the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest,” would give legislators the space — the opportunity — to engage in disinterested deliberation.

The force of these arguments has been the subject of great debate down the centuries; one can see in Washington today that they were hardly a complete or durable solution to the problem of special interests. The important point, however, is that the framers understood that a sufficient variety of competing private interests was essential to the Constitution’s success. That insight was no doubt correct. Just as competition in government protects the integrity of private society, so competition in private society protects the integrity of government. In the American system, political and economic competition are co-dependent.

#### CONSTITUTIONAL COMPETITION TODAY

Contemporary America is in many respects a highly competitive place. Our economy is predominantly competitive, and in some sectors — computer and communications technology, new and old media — the “gale of creative destruction” is blowing mightily. The huge numbers of

Americans who follow or participate in sports and games also suggests that appreciation for competition runs deep in our culture.

Yet our constitutional institutions are becoming significantly less competitive. One result is that public policies are increasingly uncoupled from democratic procedures and popular consent. Another is that government is increasingly poaching on the private economy and making it less competitive. If private and public competitiveness are indeed co-dependent, then greater monopoly in the private sector may in turn prompt government policies to become more partial, and so on in a reinforcing spiral.

The federal government is attempting with increasing boldness to restrict competition in the realm of ideas, particularly political ideas. The most conspicuous example is the succession of statutes controlling campaign organization, finance, and speech, such as the McCain-Feingold Act of 2002. The courts have struck down some of these restrictions as unconstitutional but have upheld others, and there is no doubt that Congress will keep pushing the boundaries. Campaign restrictions are popular with members of Congress because they reduce the vigor of competitive challenges, and so protect incumbents.

A much narrower but equally odious example is the Department of Justice's prosecution of pharmaceutical firms—criminal prosecutions seeking to imprison company executives—for disseminating accurate, valuable research findings on the “off-label” uses of their products. (“Off-label” refers to the use of a drug approved by the Food and Drug Administration but in a way, or for a purpose, not specifically approved by the agency—for instance, when a drug approved for use in preventing seizures is found to help fight depression and is prescribed for that purpose without FDA approval.) The DOJ prosecution enforces an expansion of the FDA's power to regulate statements made by pharmaceutical companies about their products, justified under a court-recognized distinction between commercial and political speech. But it can also be seen as an attempt by the FDA to preserve its regulatory monopoly on medical discovery and communication. Were these activities to be more widely permitted in the private sector, the results would surely benefit public health—and improve FDA regulation as well.

The most notable developments, however, are the collapse of competitive federalism and the separation of powers. State policy competition

is increasingly being supplanted by “cooperative federalism” directed from Washington. Federal spending and regulatory policies, from Medicaid to highway funding to the No Child Left Behind Act, are producing national uniformity in key functions of state government that are especially in need of diversity and innovation. The Supreme Court is dramatically narrowing the dormant commerce clause doctrine and giving the states increasing leeway to regulate matters, such as automobile emissions and fuel economy, that the federal government is already regulating. These legal trends are permitting states to routinely export taxes and regulatory burdens to citizens of other states—the purest form of unaccountable government and interest-group favoritism. And the federal government is increasingly inclined to suppress state policy competition directly when it doesn’t like the results, as in the Obama administration’s effort to prevent Boeing from opening a new plant in right-to-work South Carolina rather than in union-friendly Washington State.

At the federal level, the separation of powers is being supplanted by unilateral executive government, with only intermittent, and usually inconsequential, oversight by Congress and the judiciary. The roots of this development go back to the emergence of regulatory agencies in the Progressive Era and their proliferation during the New Deal and the 1970s. Regulatory agencies are executive-legislative hybrids that write and enforce administrative rules—de facto laws that often have enormous economic consequences—under broad delegations of authority from Congress. They include the Securities and Exchange Commission, the Environmental Protection Agency, and scores of agencies within the cabinet departments. Congressional committees hold oversight hearings in which the people’s representatives roundly condemn or lavishly praise the regulatory agencies’ decisions, and Congress usually amends their enabling statutes every decade or so. But the effect of all this activity is marginal; rarely does it fundamentally alter the agencies’ work or mandates.

The executive agencies now exercise most of the domestic discretionary authority of the federal government. This isn’t obvious in the government’s budget numbers, however, because regulatory agencies “tax and spend” through the rules they apply to private firms. The costs of installing pollution-control devices, or of maintaining and disclosing financial accounts in a certain manner, or of designing health-insurance

policies to cover certain services while excluding others, are borne entirely in the private sector. In these and innumerable other cases, the power of the purse is held by executive branch rule-writers, unconstrained by congressional appropriations or the political limits of taxing and borrowing.

The financial crisis of 2008 dramatized the arrival of executive government and accelerated its progress. Almost entirely on their own, the Federal Reserve Board and the Treasury Department made financial commitments of more than \$2 trillion, used regulatory powers aggressively to arrange and compel mergers of private banks, and bailed out and acquired substantial control of scores of major financial institutions and two automobile companies. When Congress did get into the action, with a \$700 billion authorization for a “Troubled Asset Relief Program,” the Treasury promptly announced that TARP funds would be used not for purchasing troubled assets at all, but instead for other purposes (eventually including the General Motors and Chrysler bailouts) that many members of Congress thought they had voted against. Congress erupted in bipartisan outrage, but soon acquiesced through legislation supporting the Treasury’s about-face.

Since then, Congress has passed two laws — Obamacare and the Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) — that reach new heights of legislative delegation. Although both statutes are very long, they decide very little. Instead, they launch hundreds of new rule-making proceedings under extraordinarily vague standards that leave the serious choices to the agencies. For this reason, many of the statutes’ policies are still largely unknown to the public and even to Congress.

Two things, however, are certain. First, both the financial and health-care sectors will become much less competitive. Under Dodd-Frank, regulatory officials are to designate a few large financial firms as “systemically important” and thus subject to special government requirements and protections. The protections (especially the implicit guarantee against default on their debts) will lower the firms’ borrowing costs. That break will give the protected firms substantial competitive advantages over ordinary banks, which will in turn leave them beholden to the government when political favors are needed. The arrangements are similar to those of the “government-sponsored enterprises” Fannie Mae and Freddie Mac before they collapsed into federal conservatorship

in 2008. The entire financial sector will now be dominated by similarly favored and politicized GSEs.

Obamacare regulations will also produce many fewer and much larger service providers, from hospitals to medical practices to insurance firms; federal supervision will replace competition throughout the health-care sector and move it toward a “single payer” system as originally envisioned by the law’s sponsors. The statute also contains open-ended authorization for price regulation. Price controls in competitive markets are counterproductive and dangerous: What begins as consumer protection usually ends up as producer cartels that raise prices. Under both statutes, we will observe — we are already observing — the co-dependence of political and economic competition. When power is concentrated in government, it becomes concentrated in the private sector as well. When we hear public agencies and their private wards attacking each other, they are not competing but rather bargaining over the quids and quos of their mutually sustaining alliances.

The second certain thing is that the course of policy in the financial and health-care sectors will be relatively undemocratic. The 2010 elections changed the party leadership of the House, signaling a shift in public opinion about the direction of government policy. The shift produced prompt, significant changes in tax policy, spending, and borrowing. But it has not touched Dodd-Frank, Obamacare, or other major statutes that delegate the power to make policy to the executive agencies.

To be sure, the agencies have since postponed many rule-making proceedings and issued numerous (by now more than a thousand) temporary waivers of Obamacare requirements. These actions, however, appear to be efforts to postpone particularly onerous and contentious steps until after the 2012 elections, or to favor particular firms or constituencies, or both. So they illustrate the superior capacity of executive government to calibrate legal requirements for political purposes. Congress, too, makes decisions by the electoral calendar and grants exemptions, but with vastly less precision and subtlety; indeed, many of the executive waivers and postponements have been issued unilaterally, without any basis in the statutes.

The controversies over the implementation of Obamacare and Dodd-Frank have a strong partisan cast, but the emergence of executive government is thoroughly bipartisan. Dodd-Frank is a natural extension of the 2008 financial-rescue efforts. Many other Bush-era regulatory

initiatives—such as the Sarbanes-Oxley Act of 2002, the EPA’s effort to regulate greenhouse gases under the Clean Air Act, and the rules (under the Energy Security and Independence Act of 2007) that will effectively abolish the incandescent light bulb—have become highly controversial, but are barreling ahead on their own momentum.

A final and especially worrisome move toward unilateral executive government is also bipartisan. This is congressional delegation of the power to tax—a responsibility the Constitution specifically assigns to Congress. In recent decades, Congress has authorized two regulatory agencies—the Federal Communications Commission (in 1993 and ’96) and the Public Company Accounting Oversight Board (in 2002)—to fund some or all of their operations by setting and imposing broad-based fees of their own. And the Dodd-Frank bill established the new Consumer Financial Protection Bureau, which is to be funded entirely from the profits of the Federal Reserve Banks. These are a new species of public power: special-purpose governments of independent means, able to tax and to spend without ever facing voters.

Why has Congress acquiesced in these profound diminutions of its authority? One important reason is surely the executive’s inherent advantage in high-volume lawmaking. The executive branch is organized by hierarchies, the Congress is organized by committees, and hierarchies can make decisions with much greater dispatch than committees can. Moreover, the Constitution defines the structure of Congress in detail, often with the purpose of rendering decision-making even more cumbersome; meanwhile, it leaves the executive branch largely undefined and therefore freer to innovate. In this environment, both Congress and the president have discovered that they can respond to the growing profusion of political demands through the expedient of delegation—and that doing so is advantageous for each branch, so long as the other cooperates. Congress takes political credit for standing up for affordable health care, cheap-but-stable finance, clean air, and safe products. The executive makes the decisions that allocate the costs and benefits of these high-minded goals across the economy. The latter are of course the hard decisions—the real lawmaking—but they provide abundant political opportunities of their own, especially when dispensed with freewheeling executive discretion.

REVIVING COMPETITION

Every competitive system contains within it strong pressures to escape—to make cooperative adjustments that will lessen its rigors, profit its participants, and reduce the benefits it provides to others. The tendency is well known in industry, where the cooperative approach is called a cartel, and in labor markets, where it is called a union. It is equally present in our constitutional institutions, where politicians have always looked for ways to loosen the strictures of competition.

Their growing success has many causes. The circumstances of modern life are placing more demands on government than traditional legislation could possibly cope with. Advances in technology and communications are increasing the executive's organizational advantages over Congress. The courts are increasingly inclined to defer to the political branches, especially when they act collaboratively.

But certainly one of the most important reasons that all of this can go on is a decline in the public's appreciation for the virtues of competition, amounting in many cases to a vain desire to be released from its obligations. Many people today associate progress with freedom from constraint and view cooperation as more advanced and civilized than competition. These sentiments give a special lift to efforts at political cooperation, because politics is aspirational, always seeking to point the way to a better world. And if the terms of political cooperation include the disparagement of private commercial competition and the promise to make it, too, more cooperative—well, so much the better.

Such attitudes misperceive the nature of competition. Competition, properly structured, is the most effective and least coercive means yet discovered for allocating that which is scarce and inducing social cooperation for the benefit of all. In its desuetude, we are building autonomous political monopolies in the public sector that control dependent economic monopolies in the private sector, with much less in the way of democratic accountability than we have grown accustomed to. This does not feel like progress. It should stimulate us to reconsider the functions of competition in our constitutional order, and to find ways of re-introducing them—no doubt in new forms—into contemporary political institutions.