
Why the Era of Big Government Isn't Over

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AMERICANS ARE today the richest, freest people the world has ever known. They enjoy unprecedented levels of personal health, mobility, safety, education, and amenity. Their worst foreign enemies have been vanquished, and for the time being the prospect of war appears 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. Pollsters report levels of social contentment never seen before.

Freedom and fortune in the United States are also very widely shared, making us the most egalitarian of any advanced, prosperous society. True, the distribution of income has become somewhat less equal, but income is an incomplete measure of real-life circumstances in a society where the average income is so high and where so many things that were once luxuries—good food and clothing, cars, homes, advanced communications, art, entertainment, foreign travel—have become mass-market commodities. The down-to-earth measures of material welfare like consumption, health, and longevity show a marked increase in real equality.

Many of today's most talked-about political problems—reducing pollution, relieving traffic congestion, providing better medical care to people of mod-

est income—are hardly problems of resources at all; we possess ample means to address them. 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.

More important now are problems that are, in many ways, the *result* of our freedom and prosperity: the characteristic problems of a mass-upper-middle-class society. One of these is the problem of extending the knowledge, habits, and institutions of productive freedom to those who continue to live in circumstances of genuine poverty and hardship. Another is the problem of employing our good fortune properly within the wider society—learning to live in a world where wealth, freedom, and technology have amplified man's capacities for vice along with his capacities for virtue.

These two problems are now at the center of national political debate, and both 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. Refreshingly, political discussion of these problems has become increasingly bipartisan. If conservatives were largely absent or ignored during the debates over civil rights and urban poverty in the 1960's, beginning with the publication of Charles Murray's *Losing Ground* in 1984, they have taken the lead in articulating and applying new approaches to the problem of poverty, especially in the areas of welfare and

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school reform. And if the debates over culture, marriage, and family sometimes seem to be mounted not so much by as within the Right—that is, between social conservatives and libertarians—the Left has been strongly engaged as well.

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 on the part either of liberals or of most conservatives, even in this presidential season of lively intraconservative debate. It is the oldest of political problems, the problem of limited government.

II

MODERN GOVERNMENT has turned out differently from what was anticipated by libertarian thinkers like Friedrich Hayek. In his great polemic *The Road to Serfdom*, published in 1944, Hayek warned that the welfare state could metastasize into full-fledged socialism under the pressures of class envy and economic resentment and the prestige of “rational central planning.” This was Hayek’s road to servile citizens, stagnant economies, inert societies. But his fears now have an antique ring. Hardly anyone today admires government planning, and, at least in America, class and economic animosities have not grown but abated. The free market has triumphed in practical result and popular opinion; 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 complete peacetime 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 that is not captured by these statistics, government has grown more than 50-percent faster than the economy as a whole, and now claims more than one-third of America’s economic resources. The federal government owns one-third of the American land mass, 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. Even as government has been growing overall, we have reformed or repealed many policies and programs, including the regulation of transportation, energy, and finance; farm subsidies; overcontrol of pharmaceutical marketing; populist-style antitrust enforcement; and innumerable trade restrictions—all to excellent

effect. Equally important, we have abstained from many harmful ventures common to other democracies, like nationalized medical care and restrictions on industrial restructuring and “downsizing.” American government is still small as compared with other Western economies, and the others are less prosperous and dynamic than ours.

Nevertheless, 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 followed 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 judgment.

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 this 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 regulation of automobile insurance raises rates and leaves more unsafe drivers on the road; and that rules issued by the Environmental Protection Agency (EPA) or the Occupational Safety and Health Administration (OSHA) often require enormous expenditures for little or no environmental or safety benefit.

Moreover, the gap between public policy and private behavior is widening. Social Security is the most conspicuous example. When the program was established in the 1930’s, many Americans of modest means had few if any effective opportunities for personal saving and investment. Today, most Americans are shareholders, and the price of a ticket to a professional basketball game 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.

III

THERE IS a standard account of why government programs survive long after they have become obsolete or been intellectually discredited. That is the theory of interest groups: well-organized groups with large stakes in a policy, like an

industry or an occupational or recreational group receiving a subsidy, constantly outmaneuver diffuse groups with small individual stakes, such as taxpayers who contribute pennies apiece to finance the subsidy. It is a powerful theory with a distinguished academic pedigree, and it lately received renewed impetus in the spirited presidential campaign of Senator John McCain. But the critical question is this: as the growth of private markets, affluence, and technology erode the formal reasons for many government programs, might they not also erode the practical political forces that maintain those same programs?

There are several reasons for thinking this might be the case. 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 of Utah—who wants to tax sales on the Internet—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 1970's, and although it may lasso an individual firm like Microsoft, it has no hope of corraling the entire industry as it did trucking and railroads in an earlier age.* The sheer growth of market opportunities increases the gap in performance between government and the private sector. This appears to have been an important factor in the erosion of political support for regulation of energy and the airlines, and seems to be at work today in the movement for Social-Security reform.

There is, however, another side to the coin. 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; "side-agreements" on environmental and labor standards that accompany trade compacts like NAFTA; proposed U.S. legislation to empower the states to tax Internet sales—all these are examples of governments forming policy cartels to maintain their power.

Consider also the political implications of specialization (which, as Adam Smith taught in the first chapter of *The Wealth of Nations*, is both the cause and the consequence of economic advance). In a society as advanced and complex as ours, most of us, however well-informed about one special niche of the big wide world, are poorly informed about the rest of it. We may know a great deal about bankruptcy law or automobile repair or interior design, but little about bioengineered foods, global

warming, or the administration of health insurance. And this means, as compared with times past, that we judge a larger number of political questions not according to our own practical knowledge of the world but according to abstract, second-hand accounts, many of them from self-interested parties and political entrepreneurs. Those accounts, being addressed to a public that knows few of the facts at hand, tend to be simple dramatizations focusing exclusively on a wrong that needs righting, without mentioning the inevitable costs and trade-offs that would be obvious to anyone with direct knowledge.

Most importantly, better technology and more efficient markets are things that government, and those who seek its favors, can make use of themselves. The communications revolution has made it possible to mount litigation, legislation, and publicity campaigns with a degree of thoroughness and coordination never before possible. Arresting research by the economists Gary Becker and Casey Mulligan suggests that a key factor in the postwar growth of government has been the increased efficiency of taxation, which permits the redistribution of higher benefits to particular beneficiaries at lower cost to taxpayers. Just as in private markets, when the cost of something falls, the amount demanded and consumed increases.

IV

INDEED, THERE is good cause to worry that government is mastering the techniques of efficiency and growth inherent in the "new economy." This 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 built-in inefficiencies like bicameralism and decision-making by committee and voting. The age of superaffluence and high technology may, paradoxically, be one in which the traditional architecture of limited government is newly at risk.

Here are a few vignettes from what might be called the new executive state:

- As long ago as the early 1980's it was shown (by R. Shep Melnick) that the Clean Air Act, one of our most complex federal statutes, had essentially been written by the EPA, the courts, and environmental groups. The role of Congress had been reduced to ratifying the sit-

* See, on this point, Peter W. Huber's "monopoly.com" on page 36 of this issue—E.D.

uation on the ground every few years and adding a few statutory tweaks when administrative developments departed too far from legislative sentiments.

In the intervening years, the dynamic has progressed much further. Today, the EPA has gathered the authority to write and enforce rules costing many billions of dollars simply on a showing that some, even relatively trivial, health benefit will result. Its new ozone standard, currently on appeal, would cost on the order of \$100 billion a year if fully implemented. In return, it would provide public health benefits of about zero.

- 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. One well-developed technique is to establish a standard that is generally infeasible (like the EPA's ozone rule, which would obviously never be enforced as written), thereby compelling 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 will not 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 is nothing but a silly rumor and they just want to be helpful partners with the nation's athletics directors. Similarly, business executives needing the approval of the Federal Communications Commission (FCC) 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 little or no relevance to the economic merits of the transaction but which they must accept as "voluntary" conditions of approval.

- The executive branch is learning unilateral taxing and spending, thereby loosening the linchpin 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 telephone service; these revenues are spent on computers for schools and libraries and other projects. The commission itself sets the tax rate (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 could 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, financed by hiring private lawyers who work for a percentage of the proceeds, 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 Rhode Island's suit against manufacturers of lead-based paint are the advanced prow of this development.

As a legal matter, these cases are travesties. The government already collects more in tobacco taxes than it pays in smoking-related medical expenses; Secretary of Housing and Urban Development Andrew Cuomo, in threatening the gun suit, made it clear that his real interest was not legal vindication but rather that the manufacturers agree to contribute to the \$1-billion annual expenses of housing-project security and to change the design and marketing of firearms. The cases' circumvention of democratic process has been condemned by both the conservative Robert Bork and the liberal Robert Reich. Nevertheless, the state tobacco suits, which were entirely bipartisan, have been a huge financial success, raising \$240 billion. That guarantees continued probing and legal innovation in successive categories of government expenditure and non-statutory regulatory schemes.

- The growth of international law and organizations is opening still more and broader avenues for unencumbered executive lawmaking. Last fall, following the Senate's rejection of the Comprehensive Test Ban Treaty, administration officials said the United States would abide by the treaty anyway (that is, continue to

abstain from testing nuclear weapons). That is the President's prerogative as commander-in-chief. But officials went beyond this, suggesting that we were *legally obliged* to adhere to the treaty despite the Senate's action.

The source of this alleged obligation is 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! 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 law journals and at the United Nations, according to which governments and citizens have the legal duty to follow prevailing international practices regardless of what their own political institutions have decided.

- A separate problem is presented by the Kyoto Protocol, the agreement placing sharp restrictions on greenhouse gas emissions that the Clinton 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.

V

IN THEORY, Congress could revise or reverse any or all of the developments I have described, either by statute or by exercising its power of the purse. Executive agencies always operate under the terms of some more-or-less relevant statute, and Congress is continuously engaged in oversight and statutory adjustment. Most of the policies in question are also subject to judicial review. The important point, however, is that the dynamic of executive growth undercuts the constitutional checks and balances, and even enlists Congress and the courts in the cause.

First, Congress has accommodated political

pressures for new spending and regulation by delegating some of its law-making power to the executive, which has essentially unlimited ability to take on additional projects.

Second, these delegated legislative functions include, in practice, 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," just as the Education Department says; their relations may not be chummy—often they are antagonistic—but they are long-term and "codependent." Everyone involved has strong incentives to work things out, keep quarrels out of court, and present a united front to Congress when statutory ratification is in order.

Third, executive programs are not subject to the same pressures for compromise and moderation that they would face in the legislature, such as competition for appropriations. Each agency is able to pursue its goals constrained only by the divergence of interests within its 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, what 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.

This dynamic is different from the customary political competition between Congress and the President, where the advantage seesaws between the one (as during the Watergate era) and the other (as during Ronald Reagan's first term). The growth of administrative government diminishes the political prerogatives—and therefore the democratic-representational functions—of both the President *and* Congress. Both are progressively more constrained by the actions of individual agencies working in concert with the private members of their coalitions, with recourse as needed to courts (and especially juries) to provide legal legitimacy while diffusing political accountability.

Still, it is on the legislature that the effects I have described are the greater by far. 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, given the sharp partisan division between Congress and President Clinton, the incentives for its use were particularly strong. 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 chamber.

We all know that our constitutional structure needs some play in the joints in order to stand and endure; but that is precisely what is under threat by the form our government is taking. One set of potentially serious consequences, even in a nation as rich as ours, is economic. Unchecked administrative government tends to produce quiet accommodations and abuses whose cumulative 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 1980's, just as it was, *mutatis mutandis*, of the Asian financial collapse of 1998. In the meantime, the economy becomes poorer and less dynamic, and politics becomes more regimented and less democratic.

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 a very bad thing when public policy and private practice diverge as much as they do in the United States today. Americans have not become Hayek's 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 expanding government by tiny meliorative increments; he learned it from the world he inhabits. The government invented it itself.

VI

WHAT, THEN, is to be done? One important remedy can be found in the principle of competition. At every point on the political spectrum, Americans are individualistic, prochoice, and antimonopoly: 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 already the building blocks for school and welfare reform, grounded in the demonopolization of government services and the reinvigoration of diverse community institutions. Competition is also powerfully at work in the battles over cultural standards and institutions, battles that are resulting in a profusion of new magazines, museums, think tanks, and academic, artistic, and professional societies.

Competition should also be the animating principle of those who would devote themselves to the task of relimiting government. Political competition was Madison's "auxiliary precaution," standing behind the Constitution's "parchment barriers" to the growth of government. The forms of competition Madison 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.

One thing that has already constrained or reformed many domestic policies is the growth of interstate and international markets—just ask the Food and Drug Administration 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 research by the economist Jagdish Bhagwati and his 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 like NAFTA and the WTO. For example, recent actions to dismantle trade and investment barriers in Chile and elsewhere in Latin America, in South Korea and elsewhere in Asia, and even in China have been taken on the basis 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 just to empower states—which are already the source of some of our most egregious poli-

cies—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, as Roberta Romano of the Yale Law School has demonstrated, is in large part 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. Thus, Washington state would be free to tax all the sales of Amazon.com as well as those of local bookstores—but Amazon would be free to relocate to another state with a lower tax.

Competition also holds great promise for reforming liability law. Sellers of automobiles, medical care, hot coffee, and other things involving consumer risk could be permitted to contract out of liability for the big-ticket items of tort law—pain-and-suffering and punitive damages—provided only that they remained liable for the tangible costs of accidents, like medical expenses and lost wages. That way, we would see head-to-head competition among 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 here. By all means make HMO's 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.

VII

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 he put it) as well as a bigger economy. Such was the success of Reagan’s strategy that it acquired an almost mythical prestige, and has continued to be employed by Republicans in today’s 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 re-

quire that our presidents be much more constitutionally assertive. The President is, among other things, one of the three coequal 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 like those I have described often go unchallenged on constitutional or other legal grounds; and, when they are challenged, executive-agency lawyers reflexively defend them with all the resources 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 regarded as unconstitutional, and not to interpret vague or ambiguous statutes (like those on which the FCC’s tax program and the EPA’s air-quality standards are based) in ways that encroach on congressional responsibilities.

Such steps would be highly controversial among many academic and practicing lawyers, among executive-branch officials who are always keen to keep Congress out of their hair, and in Congress itself. The controversies, if chosen with care and advanced in a principled way, would be invigorating and productive.

VIII

IHAVE noted that, despite the growth of government, Americans have not become Hayek’s serfs. 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, as Tocqueville put it, 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 is not quite right, either. Americans are a pleasure-loving people, to be sure, and with abundant sources of gratification. But we are also skeptical, self-reliant and at times fiercely individualistic, 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 and enduring attributes of the American character, which are the ultimate sources of the freedom and prosperity we are enjoying today, are needed more than ever if we are to confront and transcend the steady encroachments of the new executive state.