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America 250: Hope, Division, and Promise

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America's 250th Anniversary: Triumphs, yet Troubles Ahead

by ROGER PILON

Two hundred fifty years ago, America was born. Our birth certificate, the Declaration of Independence, proclaimed a new order of the ages, *novus ordo seclorum*. Fifty years on, Thomas Jefferson, the Declaration's main author, would capture metaphorically the principle animating that seminal moment: "the mass of mankind," he wrote, "has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God." Yet have we, over the ensuing 200 years, not saddled ourselves with booted and spurred government riding us as the Founders would never have countenanced, at a price in liberties lost that they had pledged their lives, their fortunes, and their sacred honor to secure?

That is the troubling question before us as we celebrate our nation's 250th birthday. To be sure, we enjoy liberties today only hoped for at our founding. Slavery is long gone, at a terrible price, as are laws separating one race from another. The franchise has greatly expanded. And rights of speech, association, criminal procedure, and more are secure well beyond what they once were. But the limited government the Founders envisioned and the Framers instituted in our Constitution is today little to be found. Our governments reach nearly every corner of our lives, politicizing everything, leaving us at war over government's proper functions.

We hear often, for example, that our political leaders should come together to solve our problems, everything from health care to retirement, childcare, education, housing, jobs, drugs, student debt, and more—problems that in truth are simply the personal problems of life. That faith in government is profoundly misplaced. Earlier Americans had little like it. They were concerned mainly about what government could do *to* them—see the Bill of Rights—not what it should do *for* them. They yearned to be free, not to be dependent on government. That is why so many came to America. Perhaps by recovering that basic understanding of the proper role of government we can reduce our divisions and reclaim our birthright, freedom.

In this celebratory year, therefore, we will have a much-needed opportunity to revisit and revive America's first principles, which today are too little taught, mistaught, and misunderstood by too many Americans. That was evident in a recent NPR interview when a political activist contended that "what Congress and the president need to do is raise wages and lower prices." The constitutional—to say nothing of economic—confusion that comment reflects is breathtaking, yet it is all too common. With "affordability" the political concern *du jour*, it hardly surprises.

To address this problem, there's no better place to start than with our founding documents. Accordingly, I'll begin with the moral, political, and legal vision implicit in the Declaration's sparse language, then briefly show how that vision was largely instituted in our Constitution as corrected by the Civil War Amendments. I'll then show, again briefly, how the Progressive Era's vision, instituted through the New Deal's constitutional revolution, fundamentally undermined the Founders' plan for liberty under limited government, giving us the modern redistributive and regulatory state that today politicizes so much of life.

The Declaration of Independence

Addressing "a candid World," the Founders' immediate aim in the Declaration was to justify their decision to declare independence. Toward that end, they set forth a theory of legitimate government and then demonstrated how far British rule had strayed from that ideal. But their argument served not simply

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to discredit British rule; in addition, it set the course for future American government. Ever since, the Declaration's ringing phrases have inspired countless millions around the world, prompting many to leave their homelands to begin life anew in America.

Appealing to all mankind, the Declaration's seminal passage opens on a crucial point: "We hold these Truths to be self-evident." Grounded in reason, "self-evident" truths invoke the long tradition of natural law, which holds that there is a "higher law" of right and wrong from which to derive human law and against which to criticize that law at any time. Moral reasoning, accessible to all, not political will, is the foundation of our Nation.

But if the Founders' vision is derived through reasoned argument, liberty is its aim. Thus, the cardinal moral truths are these: "that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed."

We are all equal in the fundamental sense that no one has natural rights superior to those of others. We are born with those rights; we do not get them from government—indeed, government gets its powers from us. And our rights to life, liberty, and the pursuit of happiness imply the right to live our lives as we wish, provided only that we respect the equal rights of others to do the same. Drawing on the common law tradition of liberty, property, and contract—its principles grounded in "right reason"—the Founders thus outlined the moral foundations of a free society.

We institute government, the Declaration says, to secure our rights—our natural rights and the rights we create as we live our lives. But the powers government needs for that must be derived from our consent if they're to be legitimate. Government is thus twice limited: by its end, to secure our rights; and by its means, which require our consent.

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There is a practical problem here, however, for the consent the Declaration requires for government's powers can never be more than imperfect. Invariably, we get majorities, and minorities who haven't consented. How, then, can the majority justify imposing its will over the minority? It cannot. Indeed, minorities well understand the tyranny of the majority.

There's a silver lining here, however. Because government entails manifold forced associations, especially as it expands over our lives, we arrive at an inescapable moral presumption *against* doing things through government, where force is inevitable, and a clear presumption *for* individual liberty, with the burden on those who would do things through government to show why they must be done there rather than left to the private sector where they can be done freely and hence in violation of the rights of no one. Government, in short, should be a *last* resort.

There, in a nutshell, is the moral and political argument for *limited* government, which Thomas Paine stated succinctly: "Government, even in its best state, is but a necessary evil; in its worst state, an intolerable one." And Churchill: "Democracy is the worst form of government, except for all the others." Democracy is not an end, only a means. Liberty is its end. To ensure that, a constitution is required.

The Constitution

Having recently overthrown oppressive British rule, the Constitution's Framers were not about to impose oppression on themselves. Guided by the Declaration's limited government principles, they crafted a federal government strong enough to secure our rights against domestic and foreign oppression yet not so powerful or extensive as to be

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The U.S. Capitol Building in Washington, DC.

oppressive itself. Toward that end, their document authorized governmental powers, then checked and balanced those powers. Thus, it divided powers between the federal and state governments, leaving most power with the states: federalism. And it separated powers among the three branches of the federal government, pitting power against power.

The Preamble establishes the basic political principle: "We the People," for the purposes listed, "do ordain and establish this Constitution." Thus, all power comes from us. And in the first sentence of Article I we see that all legislative Powers "*herein granted* shall be vested in a Congress." By implication, not all such powers were granted. In fact, in Article I, section 8, we find that Congress has only 18 such powers or ends. Finally, that doctrine of enumerated powers is reiterated explicitly, as if for emphasis, in the Tenth Amendment, the final member of the Bill of Rights: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." And the Ninth Amendment, an obverse of the Tenth, reads: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." In sum, the Constitution creates a government of delegated, enumerated, and thus limited powers.

Thus, the basic picture that emerges is no different than the one that emerged from the Declaration. We all have rights to pursue happiness as we plan and live our lives, with government there to secure those rights and do the few other things we've authorized it to do.

The Constitution was not perfect, of course, nor have we ever conducted ourselves perfectly under it. Thus, the Framers knew that its oblique recognition of slavery, made necessary if there were to be union, was inconsistent with the Declaration's principles. Most hoped that the "peculiar institution" would wither away over time. It did not. It took a brutal civil war and the ratification of the Civil War Amendments to end slavery and incorporate at last the great principles of the Declaration, thus bringing the states under the Bill of Rights, which could not have happened originally.

But as Reconstruction petered out and new ideas came to the fore, America's constitutional ethos began slowly to decline. Indeed, by 1900 we could find the editors of *The Nation,* before it became an instrument of the modern left, lamenting the demise of classical liberalism. In an editorial entitled "The Eclipse of Liberalism," they surveyed the European scene, then wrote that in America, too, "recent events show how much ground has been lost. The Declaration of Independence no longer arouses enthusiasm; it is an embarrassing instrument which requires to be explained away. The Constitution is said to be 'outgrown.'"

Progressivism

Progressives were social engineers hailing from the elite universities of the Northeast. They were animated by

ideas from abroad: British utilitarianism, which had supplanted natural rights thinking; German theories about good government, like Bismarck's social security experiment; and homegrown theories about democracy and pragmatism. Undergirded by the new social sciences, they constituted a heady brew urging government planning to address all manner of perceived social and economic problems.

During the early decades of the 20th century, progressives operated mostly at the state level where courts often rejected their efforts as inconsistent with the Constitution. During Franklin Roosevelt's first term, however, things came to a head, especially after the Supreme Court rejected several of his New Deal schemes, prompting him, shortly after his 1936 landslide reelection, to unveil his infamous scheme to pack the Court with six new members. Uproar followed throughout the nation. Nevertheless, the Court got the message. There followed "the switch in time that saved nine" as the Court began effectively rewriting the Constitution—without the benefit of a constitutional amendment.

It did that in three main steps. In 1937, it eviscerated the doctrine of enumerated powers, thus opening the floodgates to the modern redistributive and regulatory state: so much for the Constitution's authorization of only *limited* government. In 1938, from whole cloth, it bifurcated rights as either fundamental or nonfundamental, then created a bifurcated theory of judicial review, leaving economic liberties largely unprotected from legislative and administrative mischief. Finally, in 1943, it authorized Congress to delegate ever more of its legislative powers to unelected bureaucrats in the Executive branch where today most of our law and regulations are created: so much for democratic control of government. It was a triple-play, guaranteed to give us massive government, the politicization of virtually everything, and a war of all against all for the spoils.

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What Is to Be Done?

Those outcomes were predictable and predicted. In fact, they were not unknown to the Founders, as the *Federalist* will show. Drawing on the Declaration's moral vision, the Constitution was written to discipline not only the officials we elect but we the people. When we fail to understand or appreciate that, ineluctable consequences follow. Increasingly, we have demanded ever more goods and services from government, nowhere authorized by the Constitution. Worse still, we have refused to pay for them through current taxation, so we borrow. Today, service on the federal debt exceeds defense costs while entitlement programs continue to increase our out-of-control debt, which stands at this writing at over $38 trillion. This cannot end well.

We are well down this undisciplined, irresponsible road. In recent years, the Supreme Court, our most disciplined branch, has taken important steps toward disciplining the political branches and the administrative state, but thus far it has only chipped away at the problem. As the weakest branch, "with neither purse nor sword," as Alexander Hamilton wrote, the Court can do little more without causing chaos. In truth, it falls to Congress to address the larger problem. But for that to happen, it falls to us, the people, to grasp the nettle, recognize the problem, and act. What better time to start that than in this year when we will be celebrating America's birth and the freedom that enables us to do so.

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