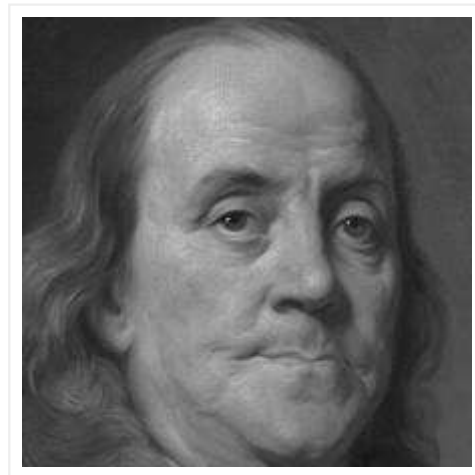


Hang Together

"We must indeed all hang together, or most assuredly we shall all hang separately." Benjamin Franklin

An Irrational Lack Of Fear

Posted on **January 29, 2013** by **Daniel Kelly**



— So you think you can keep a republic, do you?

It's remarkable, really, what Western political philosophy has accomplished. Some might even say it has brought about the end of history – in the sense that we have achieved the highest and best form of government consistent with the broadest possible personal freedoms. So now it's time to relax. Our liberties have become immune from any meaningful, systematic challenge. Turns out Jefferson was just being a humbug when he groused that "eternal vigilance is the price of liberty."

For the fifth consecutive year, the United States has slipped in the Index of Economic Freedom. By this measure we currently rank only tenth in the world, two slots behind Mauritius. You know Mauritius, don't you? That collection of little islands to the east of that larger island of Madagascar, over near the east coast of Africa? Yeah, that Mauritius. It's best known for, well, the demise of the Dodo bird and being two places ahead of the United States in the index.

Before we skip lightly over this because it's just measuring "economic" matters, we probably ought to consider the relationship between our basic liberties and economic freedom. Our place in the index is an aggregation of scores on a range of topics that extend beyond what we normally consider to be mere economics. The analysts considered factors such as the rule of law (property rights, freedom from corruption), limited government (government spending, fiscal freedom), regulatory efficiency (business freedom, labor freedom, monetary freedom), and open markets (trade freedom, investment freedom, financial freedom).

Yes, a loss of freedom in any of these categories will eventually have an economic effect, but it first manifests as a restriction on the choices you may make for yourself. Those who give over their economic liberty to the state so that they may concentrate on enjoying their political freedoms pretty quickly discover that they have neither. As Friedrich Hayek understood, there is ultimately little meaningful distinction between "economic" freedom and "political" freedom.

If a direct assault on political freedom is more your thing, here is Louis Michael Seidman, who in the New York Times a few weeks ago forcefully argued we ought to abandon the Constitution as a binding instrument. Our system of government is broken, he says, "but almost no one blames the culprit: our insistence on obedience to the Constitution" Now, if Mr. Seidman was a construction worker making an off-hand comment at a block party this would be no big deal. But he isn't. He's the so-called professor of constitutional law at Georgetown, one of our nation's elite law schools. Or maybe he's a professor of so-called constitutional law. Given his rejection of what he is supposed to teach it's hard to know where to put the "so-called." I wonder if this is part of fundamentally changing America?

There is a good deal of cultural support for Prof. Seidman's views. In fact, there is an entire organization devoted to reimagining the Constitution as a "living document." That theory, if you're not acquainted with it, reduces the Constitution to a ventriloquist's dummy. It says whatever the judiciary makes it say – it has no independent meaning of its own. The purpose of the philosophy is to free the government to make law without having to bother with the politically-accountable legislative process or the even more difficult procedure for amending the Constitution. The organization calls itself, oddly enough, the American Constitution Society. They describe themselves as a collection of "progressive" lawyers, judges, policy experts, legislators and academics with a rapidly growing nationwide network of like-minded people. In other words, they are already extensively embedded in our government.

As a nation we seem to be drifting along in the wake of the ACS and Professor Seidman. It was only a few years ago that our government decided it has the authority to tell us what products we must buy. That is the irreducible and necessary basis for the Patient Protection and Affordable Care Act (Obamacare), which mandates that you purchase health care insurance upon pain of financial penalty. The Democrats arguably lost control of Congress because of this legislation. But we just returned to office the one after whom the Act was named, and the Democrats regained some of the Congressional numbers they lost in 2010. Turns out that losing some of the liberty over how to spend our money doesn't really bother us too much.

This is all of a piece with Thomas Friedman's infamous infatuation with China's one-party autocratic government: "That one party," he gushes, "can just impose the politically difficult but critically important policies needed to move a society forward in the 21st century." Yes, Mr. Friedman, it has that power. But the price is a world in which the powerful few can "just impose" on everyone else.

Friedman and Seidman have either been hanging out at the same Starbucks, or there is something about the government being able to impose itself on others that is central to their political philosophy. Prof. Seidman's rejection of constitutionalism (and the rule of law) came with the coy observation that "[t]here is even something to be said for an elite body like the Supreme Court with the power to impose its views of political morality on the country."

Is any of this ringing any bells? The ability to "just impose" policies has been the heart's cry of tyrants throughout history. Tyrants are not defined by how they obtain office, but by what they do with them once they are theirs. To the extent governments do as Friedman and Seidman wish, they unwind 800 years of Western political philosophy.

Our story, the story of the West, is of the centuries-long struggle to establish that political authority comes from the consent of the governed, and that a stable government capable of protecting our freedoms requires a tight circumscription on what government officers may and may not do. We adopt constitutions to institutionalize the fact that governments have no authority, no power, of their own – they have only what "we the people" lend them. A constitution is the primary safeguard against the government forgetting that, between it and the people, the people are sovereign.

All of this evidences a growing sensibility amongst those in government – and near to it – that refuses to recognize the proper order of precedence. And so many of us seem unconcerned by this. We don't fear the possibility of a lawless government, perhaps because we don't believe it is possible in the United States. After all, we're nowhere near, say, Bahrain in the Index of Economic Freedom. Oh wait, we kinda are. They're only two places behind us and rising. In the meantime, we're well behind Hong Kong (1) and Singapore (2). But that ranking need not cause concern, right?

Benjamin Franklin, when asked whether the constitutional convention had produced a republic or a monarchy, said "A republic, if you can keep it." Friedman, Seidman, and the ACS don't want to keep it. They are telling us, if we would pay attention, that they want to go back to when we believed governmental authority was something bootstrapped into existence by the government itself, rather than delegated by the consent of the governed. And they can't do that without dismantling our constitution (whether explicitly *a la* Seidman, or implicitly in the manner of the ACS). If a phobia is an irrational fear, what's an irrational lack of fear? Whatever it's called, it would accurately describe our equanimity in the face of repeated, public, and notorious promises to diminish our freedoms, whether economic or political.

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Greg Forster

on **January 30, 2013 at 1:09 pm** said:

Let's admit that the rule of law can be hard to pin down. The law as such cannot act; only people can. Therefore insofar as ruling is a human act, there is always a sense in which men rule. The key question is, what (if anything) do those who rule in this sense think themselves obligated to follow when they rule? That (whatever it is) is what really "rules." The rule of law is thus ultimately a set of social norms that prevail among the human rulers. The heart of the problem here is that the sense of an obligation to obey something extrinsic to the human rulers is being eviscerated.



Michael Hintze

on **January 30, 2013 at 5:28 pm** said:

Dan has identified one of the core problems of our society today, if not THE core problem. As a society, more and more people seem unconcerned about their growing loss of personal liberty. In most cases, they fail to recognize that it is happening. Why?

I submit the answer can be found in this country's accelerating trend to becoming a nanny-state. People are unconcerned with their loss of personal freedom because they are happy to trade away those freedoms for the "right" to be taken care of, cradle to grave, by the state.

Think of all the areas of life into which the state now intrudes:

1. Reproduction (free contraceptives for all)
2. Marriage (gay marriage, no-fault divorce, 2nd and 3rd generation welfare mothers)
3. Education (ever lower standards of academic performance, and an emphasis on politically correct topics that have nothing at all to do with becoming a productive and self-sufficient member of society)
4. Employment (long-term unemployment benefits, minimum wage laws, union favorable labor laws, affirmative action)
5. Healthcare (Medicare, Medicaid, PPACA, "must treat" laws and regulations)

6. Retirement (Social Security, ERISA)

7. "Too big to fail" corporate bailouts

That is far from an exhaustive list. But, it is an instructive one. Looked at with the unblinking eye of logic, why would anyone choose to work when the government will pay him not to work? Why would any farmer plant a crop when the government will pay him not to? Human nature being what it is, we are asking too much of most people when we ask them not to take advantage of these programs.

And, we ask too much of them to expect they will rush to vote for those who would cut off or reduce their chance to live off the government, and more to the point perhaps, off those who pay the government's bills.

Politicians, also being human, like getting re-elected. How best to do so? Increase the number of people who are dependent upon government for their day-to-day existence, let them know that as "their" politician you are all that stands between them and the end of their gravy train, and it is not hard to imagine what will flow from such a state of affairs.

I have heard the Constitution referred to as the law that controls the laws. It is also the law that circumscribes our government, or perhaps more euphoniously, the law that governs the governors. In our system of government, it is, by design, the people who govern the Constitution.

If the people will not restrain themselves, then no Constitution can do so.