**New Model Federalist No. 4 – On Bureaucracy**

That Congress ought not to delegate legislative power to executive agencies – That excessive regulation infringes liberty and impedes federalism – That federal legislation ought to be concise, but local legislation may be nuanced – That sunset clauses ought to be added to laws which grant wide discretion to the executive – That Congress and the executive ought to discard outdated laws and regulations – That the size of the Cabinet ought to be reduced – That the States ought to be given discretion in how they attain federal standards – That the capacity of the judicial branch ought to be increased – That complex federal laws and regulation are necessary for some objects

*It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulged, or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow.* ***—James Madison, Federalist No. 62, February 27th, 1788.***

In our previous essay, we upheld the necessity of representative government in a large republic, and examined the consequences that occur when elected representatives cede legislative authority back to the people. Here, we explore the consequences that occur when representatives instead abdicate that authority to an unelected bureaucracy. It is the unfortunate condition of our Republic today that its laws resemble those deplored by Mr. Madison; and by being in such a state they have upended the separation of powers that, after much toil and sacrifice against the consolidated power of the British Crown, was enshrined in the Constitution of the United States.

These United States have arrived at such a state of affairs because Congress has in past decades wantonly delegated power to regulatory agencies by means of poorly-crafted laws, such that the executive branch has now come to wield immense legislative authority. A President may, by issuing an executive order or announcing an emergency, effect sweeping changes in policy or transfer billions of dollars in public funds – powers that the Founders of our Republic bestowed on Congress.[1] Even in the absence of Presidential direction, bureaucratic agencies continuously promulge regulations that, though not called laws, are legally binding upon citizens. Laws meant for the people's well-being thus instead pull lawmaking farther from the people; they constrain state and local governments; and they multiply rules that suffocate enterprise and governance, thereby sapping our Union's vigor. It is our view that new laws ought to be designed so as to limit the federal bureaucracy; that bad laws and unnecessary regulation be discarded; and that regulation which remains necessary, with some exceptions, give wider discretion to the States.

Our argument is founded upon the principle of non-delegation, that the elected legislature has no right to give its lawmaking function to any other person or body. This principle derives from the fundamental premise on which our Republic is founded, that all legitimate government derives from the consent of the governed – that is, from the people. The people, being unable to exercise direct democracy over a vast country, vest legislative power in a representative body of their choosing.[2] In these United States, the people, having ratified the Constitution, bestowed this

[1] "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." *U.S. Constitution*, Art. 1, Sec. 1; "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law;" Art. 1, Sec. 9.

[2] "The constitution of the legislative is the first and fundamental act of society, whereby provision is made for the continuance of their union, under the direction of persons, and bonds of laws, made by persons authorized thereunto,

power on Congress. As Congress is the sole body in the federal government fully representative of the people, it may not cede its authority to make laws to any other institution; for laws created in such a way would not derive from the consent of the people, and would thus be illegitimate.[3]

In recent decades, Congress has grown desirous of crafting exhaustive laws which would govern every matter that society may encounter. Yet it is beyond the ability of legislators to accomplish in detail the task they set for themselves: they have other legislation to attend to, and cannot devote their full time to the comprehensive law they seek. To close the gap between ambition and reality, they include provisions which empower a regulatory agency to extrapolate the meaning of the law to particular instances, and thereupon to publish detailed rules that carry the law's force. The law's practical effect on citizens is manifested in such particulars, and so the law comes to be defined by those regulations created by executive agencies, which are not representative of the people. By venturing to leave no aspect of life unlegislated, Congress has thus fallen into the habit of delegating legislative power, depriving the people of consent.

It must also be noted that voluminous and incoherent laws cede authority not only from the people to the bureaucracy, but from the people to lawyers and to those wealthy enough to employ lawyers. If only those who have devoted years to the study of law can understand the laws, it will be only they and those who can most readily access their services who will benefit from the law itself; whereas ordinary citizens will be perplexed, and thus left helpless before the executive, whose arbitrary interpretations of the law they do not know how to challenge.[4] This, we venture to proclaim, is very much the condition of our Republic today.

Furthermore, complex federal laws and a multitude of regulations impede the functioning of a federal republic by constraining the laws of the States. Each new federal law or regulation on a given matter restricts the ability of state legislatures to design their own laws affecting that matter, thereby restricting the partial sovereignty that the States under the Constitution are meant to enjoy. This principle applies also to the effect of state laws and regulation upon municipalities.

From these general principles three particular ones may be derived, which serve as a guide to responsible legislation. First, laws ought not to be made at all unless they are necessary and proper to the ends defined by the federal or state constitutions, and in all other instances it is best to leave decisions to individuals, organizations, and lower governments. This preference rests on the reasoning that the benefit of new laws to society must outweigh the cost of adding to

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by the consent and appointment of the people, without which no one man, or number of men, amongst them, can have authority of making laws that shall be binding to the rest." John Locke, *Second Treatise of Government*, Ch. 19, Para. 212.

[3] "When any one, or more, shall take upon them to make laws, whom the people have not appointed to do so, they make laws without authority, which the people are not therefore bound to obey… when other laws are set up, and other rules pretended, and inforced, then what the legislative, constituted by the society, have enacted, it is plain that the legislative is changed. Whoever introduces new laws, not being thereunto authorized by the fundamental appointment of the society, or subverts the old, disowns and overturns the power by which they were made, and so sets up a new [and illegitimate] legislative." Locke, *Second Treatise of Government*, Ch. 19, Para. 212 and 214.

[4] "Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising and the moneyed few, over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest reared not by themselves but by the toils and cares of the great body of their fellow citizens. This is a state of things in which it may be said with some truth that laws are made for the few not for the many." James Madison, *Federalist No. 62*.

the body of laws.[5] That cost is both monetary, in that fewer laws require fewer resources to be spent on enforcement, and political, in that the absence of a law governing a particular aspect of life allows individual citizens to enjoy personal choice, the maximization of which is one of the principal aims of enlightened government.

Second, laws ought to be simple and well-defined, so as to limit the regulator's scope for extrapolation. This preference addresses the non-delegation principle. If the laws that Congress passes are concise and clear, they shall require fewer regulations to supplement them; and those regulations which must be made can more easily be scrutinized to ensure that they are strictly pursuant to the law from which they arise, and do not exceed it. Moreover, the people themselves will be able to evaluate the laws passed in their name, and to weigh their findings in their choice of legislators, thus ensuring that their original authority to give assent is not removed from them.

Third, the preceding two principles apply proportionally less strictly at lower levels of government. This preference addresses the fact that sometimes, in order to maintain liberty, complex laws are indeed necessary, so as to accommodate the great variety of circumstances that affect the lives of citizens.[6] Yet such complexities are best crafted and enacted at the local level. Local laws often function more effectively than sweeping federal laws, as they are adapted to local circumstance, and better safeguard liberty, as the people have more direct input in their design. For this reason, the power of making ordinary criminal laws, which have the greatest effect on personal liberty, is reserved to the States.[7] It follows that federal laws, in most cases, are improved if they allow refinement at lower levels. There are certain exceptions, particularly for laws governing commerce that extends across state boundaries; we shall return to these later.

There are also practical reasons to curtail the federal bureaucracy. The complexity of laws yields a multiplicity of regulations pursuant to them; a multiplicity of regulations produces a multiplicity of agencies to promulge and enforce them; and a multiplicity of agencies produces a multiplicity of budgets to carry out their operations. This tangled web of rules paralyzes our government's capacity for action, while this multitude of costs adds to the burden of taxation and debt. Not only are time, money, and effort buried in this way, but the very impulse for action is stifled, and an inert mindset develops. This malaise first affects government, but if not checked spreads to private enterprise; if it is not reversed, society and the economy become stagnant, and then decline.[8] This effect was evident in France, where excessive labor laws paralyzed industry and suppressed employment; the French today are laboring to reform those rules. It ought not to

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[5] "Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society." Executive Order 12291, issued by President Ronald Reagan, Feb. 1981.

[6] "If you examine the formalities of justice in relation to the difficulties a citizen endures to have his goods returned to him or to obtain satisfaction for some insult, you will doubtless find the formalities too many; if you consider them in relation to the liberty and security of the citizens, you will often find them too few, and you will see that the penalties, expenses, delays, and even the dangers of justice are the price each citizen pays for his liberty." Montesquieu, *Spirit of the Laws*, Bk. 6, Ch. 1-2

[7] Article 1, Section 8 grants Congress explicit power to define as crimes only "Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." It also grants power to punish counterfeiting. Article 3 adds power to punish treason, and restricts to seven categories those cases which may be tried by the federal courts.

[8] "Centralization succeeds without difficulty in impressing a regular style on current affairs; in skillfully regimenting the details of social orderliness; in repressing slight disorders and small offenses; in maintaining society in a status quo that is properly neither decadence nor progress; in keeping in the social body a sort of administrative somnolence that administrators are accustomed to calling good order and public tranquility. It excels, in a word, at preventing, not doing." Tocqueville, *Democracy in America*, Vol. 1, Part 1, Ch. 5.

be forgotten that the ideas of enlightened government and the free market developed hand in hand: each reinforces the other, and together they enable civilization to thrive.

Perhaps, some will say, though a huge mass of regulation may be an evil, it is nonetheless a necessary evil for administering a large country. Yet the experience of the British shows that a vast bureaucracy is as unnecessary as it is harmful: the British Empire, at its height, governed one-quarter of the world with fewer than fifty thousand civil servants.[9] They did it by limiting their central government and instead entrusting authority to the governments of their territories and dominions. These United States may rival that feat, in governing its own large territory and populace, by limiting its federal bureaucracy and entrusting authority to the several States; and it may do so more effectively than the British did, because the state governments, unlike those of Britain's former imperial territories, are accountable to their people. To do so, however, reform and restructuring must be had, for which we shall now offer some particular proposals.

First, the volume of federal laws and regulations ought to be reduced, and kept thereafter at the lowest level necessary to meet public needs. Certain steps may be taken immediately – some have already been initiated – to achieve this aim gradually and without harm to the public interest. Congress ought to include "sunset clauses" in laws that delegate regulatory power to the executive branch, thereby requiring that those laws, and regulations issued pursuant to them, be reviewed periodically by Congress itself; though the period between reviews ought to be long enough that firms and citizens affected by the law are not forced constantly to adjust to changes which may be made upon review. Additionally, a commission ought to be established to review antiquated laws and recommend them to Congress for repeal; and the executive branch ought continually to review and eliminate outdated regulations, and uphold policies that require old regulations to be removed prior the introduction of new ones.[10] These measures ought also to be taken by those States whose bureaucracies have become detrimental to the common good.

Second, the size of the federal executive ought gradually to be reduced commensurate to the limited scope of its powers and responsibilities envisioned by the Constitution. This process must begin at the highest level of administration: the Cabinet of the United States, which had four officers during the presidency of Washington, and which today has been bloated to fifteen.[11] Such a wide cabinet does not only propagate bureaucracy; it muddles its own ability to advise the President, and that of the President to decide, for a meeting of fifteen rarely yields clear advice. Furthermore, it takes immense time and attention for a President to direct fifteen Cabinet Secretaries; this burden prompts the creation of an extensive White House staff; and the enlarged staff, being comprised of individuals with their own preferences and priorities, takes on a life of its own and wrests the creation of policy from the Cabinet, rendering the Cabinet redundant. Our Union once governed itself with State, Defense, Treasury, Interior, and Justice as its primary departments; it ought to do so again by consolidating other departments within their fold.[12]

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[9] "UK Government – Did we rule the Empire with 4,000 civil servants?" UK National Archives Blog, Aug 1, 2012. The author debunks the claim that the Empire was administered by only 4,000 civil servants, but notes that most of the imperial administration was done in a decentralized manner. His high-end estimate of 40,000 civil servants in Britain pales in comparison to the two million employed by the federal government of the United States in 2015. See "Sizing Up the Executive Branch: Fiscal Year 2015," U.S. Office of Personnel Management, published June 2016.

[10] The "make one, scrap two" rule introduced by the present administration deserves credit here.

[11] Excluding the Vice President.

[12] For instance, the Department of Transportation could be accountable to the Department of the Interior.

Third, discretion in the details of implementing federal laws, whenever possible, ought to be given to the States, and likewise for state laws to local governments. That is to say, in areas such as commerce and health, where it may be necessary and proper that the federal government set standards for the entire Union, it is nonetheless often beneficial that the States decide how best to attain those standards, rather than having their methods prescribed to them by Congress. Doing so would reduce the volume of regulation: for each matter that a subordinate government may decide, the higher government does not need to make a rule. Moreover, local discretion may improve a law's effectiveness by adapting its implementation to local conditions; it also gives ordinary citizens greater ability to influence the process of implementation as conditions change, so as to accomplish the ends of the federal legislation in a way that does the least harm to other objects of public interest.

Moreover, this approach is less likely to violate the non-delegation principle. Whereas Congress must be wary of granting too much discretion to unelected bureaucracies, as doing so may separate lawmaking from the consent of the governed, it may, without reservation, grant discretion in particular matters to the States.[13] State legislatures, like Congress, are representative of the people; legislative authority may be delegated to them without losing the people's consent.

Fourth, as the inevitable effect of reducing the volume of regulations will be to increase the number of controversies brought before the courts, the capacity of the judicial branch ought to be increased, so that courts can resolve disputes in a timely and economical manner. We thus call for the federal and state governments to invest in judicial infrastructure, not only in material necessities, such as courtrooms, but in human capital as well. Although our Republic is bestowed with an abundance of lawyers, it has too few judges; legislatures at each level of government ought to pass acts providing for governors and the President to appoint a number of new judges each term, over a period of several terms of office, so as to permanently increase the country's stock of justices without the courts being 'packed' by a single executive. In addition, some new courts ought to be dedicated to specific matters formerly guided by regulation, so to ensure wise resolution of cases requiring specialized knowledge.[14] An increase in capacity may also have the salutary effect, by making trial more accessible, of removing lawyers from the backroom and returning them to the courtroom, where they must argue their cases before the public.

Here, however, a word of warning is necessary: legislatures, having ceased to delegate their law-making responsibility to unelected bureaucracies, must not instead yield that duty to unelected judges. The courts exist to arbitrate disputes under the law, not to promulgate the law itself.[15] The sort of judicial activism, common in this era, in which the people look to the courts to issue proclamations that establish, in effect, their preferences into law, must be curtailed. Legislatures, in whose sole hands the legitimate power of crafting laws resides, ought jealously to guard their prerogative from infringement on any side; so too ought the people.[16]

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[13] So long as Congress does not abdicate a general power enumerated to the federal government by the Constitution.

[14] We refer here to true judicial courts, empowered under Article 3 of the Constitution, rather than expanding the quasi-judicial "Article 2" courts which adjudicate regulation under the aegis of the executive branch.

[15] "[The judiciary] may truly be said to have neither Force nor Will, but merely judgment… The courts must declare the sense of the law; and if they should be disposed to exercise Will instead of Judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body." Alexander Hamilton, *Federalist No. 78*.

[16] "If the judge had been able to attack laws in a theoretical and general manner, if he had been able to take the initiative and censure the legislator, he would have entered onto the political stage with a bang; having become the

Lastly, as with every great principle, there are practical limitations to the general need for a reduction of the regulatory state. For instance, the safety of food and drugs is clearly a matter of interstate commerce, directly impacts the general welfare, and cannot be specified sufficiently in a concise federal law; the Food and Drug Administration thus ought to retain some regulatory authority. The patron of that agency, Theodore Roosevelt, one of this Republic's most illustrious Presidents and a staunch believer in both free enterprise and the welfare of citizens, was adept in recognizing such circumstances;[17] we regard him as having struck the best balance yet attained between legislative and executive prerogative. Of specific concern to him were competition and conservation, in that the former is necessary to preserve the market by which our Union prospers, and the latter to fulfill our moral obligations as civilized men and women; crucially, neither can be accomplished fully by the States alone. We shall elaborate on these topics in later essays.

A note is warranted on laws regarding general commerce, given that the commerce clause of the Constitution has been much abused to widen the scope of federal legislation, from whence, by the means described above, power usually ends up in the hands of the federal executive.[18] We assert that, to justify a federal law under that clause, the law ought to affect commerce as its main purpose; it ought to regulate activity that is commercial in character, not cite some side-effect it might have on commerce as a pretext to regulate an activity of an entirely different character.[19] If a bill passes that test, Congress ought to make the resulting law clear and predictable, and give sufficient forewarning. For when commercial regulation must occur, it is to the benefit of both business and the public that firms affected understand what to expect, and have time to prepare.

It is no simple task to establish principles on the length and complexity of laws at several levels of government, and to recommend how to realize them, within the few pages this format demands. Some intricacies are necessarily omitted. Yet it amounts to this: that, fellow citizens, intrusions of government into your lives and businesses ought to occur as little as possible, and those that must occur ought to be malleable at the level where you may most directly and easily shape them; and that they ought not to be dictated to you from on high, by unelected agencies to whom your representatives surrendered their solemn law-making power. Know, too, that these principles of separation of powers and limited government are not novel concepts, but intended by the Founders of this Union, and by so drawing our Republic back to its origins we can thrive.

—U.S. Citizen

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champion or adversary of one party, he would have appealed to all the passions that divide the country to take part in the conflict." Tocqueville, *Democracy in America*, Vol. 1, Part 1, Ch. 6. His description sounds prophetic.

[17] "I recommend that a law be enacted to regulate interstate commerce in misbranded and adulterated foods, drinks, and drugs. Such law would protect legitimate manufacture and commerce, and would tend to secure the health and welfare of the consuming public." Theodore Roosevelt, *Fifth Message to Congress*, Dec. 5, 1905.

[18] The text of the clause is as follows: "The Congress shall have Power… To regulate commerce with foreign Nations, and among the several States and with the Indian Tribes;" *U.S. Constitution*, Art. 1, Sec. 8.

[19] As court precedent held before 1942. Before, peoples and goods in commerce, instrumentalities of commerce, and channels of commerce could be regulated. Later, particularly after the *Wickard v. Filburn* case in 1942, the standard expanded to peoples and things having a substantial effect on commerce, which opened the door to excess.