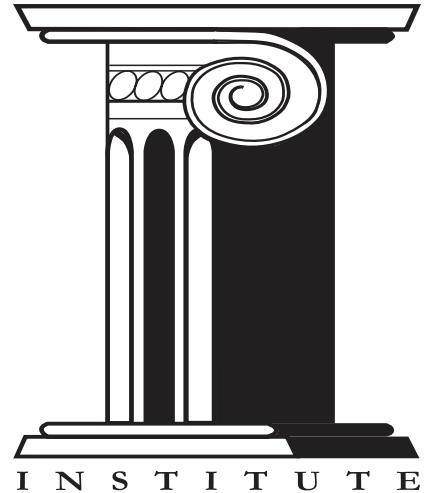


LIMITS



On Power and the Use of Coercion

Election 2008: A Crossroads?

by John Hendrickson

The Initiative & Referendum Institute based at the University of Southern California reported that voters in thirty-six states voted on 153 state ballot questions on November 4, 2008.¹ As mentioned in "Election Day 2008: A Cultural Crossroads," which appeared in the September 2008 issue of *LIMITS*, the major ballot issues dealt with cultural issues, most notably marriage and abortion. At the time of this article, the Initiative & Referendum Institute reports that 63% of the 153 ballot questions have been approved by voters.² The Institute also argues that the results of the election demonstrate local voting reaction to "local conditions, and not giving any indication of a prevailing national mood."³

In regard to cultural issues, it appears that voters continued to show strong support for upholding and constitutionally protecting traditional marriage, defined as between one man and one woman. Arizona (56%), California (52%), and Florida (62%) all passed bans on same-sex marriage.⁴ The state of Arkansas also "approved a measure that prohibits unmarried couples — both same-sex and opposite-sex — from adopting or becoming foster parents."⁵ This trend continues to demonstrate that a majority of Americans oppose same-sex marriage and support constitutional protection of traditional marriage.

Although voters supported traditional marriage, voters rejected efforts to ban abortions. California, South Dakota, and Colorado all had ballot questions dealing with abortion and all three failed. California rejected a parental notification and waiting

period requirement in regard to minors; South Dakota rejected a ban on abortions except in the case of rape or health of the mother; and Colorado's measure defined a person as "beginning at the moment of fertilization."⁶ Both abortion and marriage still remain front and center in the cultural war and both will most likely remain front and center in 2009.

In addition to cultural issues, voters also faced tax and bond questions on their respective ballots. The economy became the fundamental issue of the election. The Initiative & Referendum Institute reported that "seventeen tax measures were on ballots nationwide."⁷ "Montana voters authorized higher property taxes to support state universities, while Florida voters rejected a proposal for higher property taxes for community colleges,

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Does Regulation Cost Money?

by John Hendrickson

The issue over government regulation is just as important as taxation. The regulatory state has always been a factor in American government, but since the Progressive era of the early twentieth century, the regulatory state has grown tremendously. As government grows, so do taxation and regulation, and all three can be devastating to a free economy. Although regulation is necessary to uphold the rule of law, too much regulation can stifle business and cost taxpayers, both individuals and business owners, countless hard-earned dollars.

The Competitive Enterprise Institute's annual report on regulation, *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, provides citizens with a sound idea of how much federal regulation costs taxpayers. In fact "federal regulations cost Americans almost as much as the income tax and more than 40 percent of all federal spending."¹ In recent years the federal budget has hit the trillion mark, \$2 trillion in 2002 and a \$3 trillion budget proposed for fiscal year 2009.²

Clyde Crews Jr., the author of the report, noted that the "government's reach extends well beyond taxes that Washington collects and the deficit spending at which it excels."³ "Federal environmental, safety and health,

and economic regulations cost hundreds of billions of dollars every year over and above the costs of official federal outlays," noted Crews.⁴

Some alarming aspects of the report include:

- "The Weidenbaum Center at Washington University in St. Louis and the Mercatus Center at George Mason University in Virginia jointly estimate that agencies spent \$42 billion to administer and police the 2007 regulatory enterprise. Adding the \$1.157 trillion in off-budget compliance costs brings the total regulatory burden to \$1.201 trillion."
- "Regulatory costs of \$1.16 trillion absorb 8.5 percent of U.S. GDP, which was \$13.67 trillion in 2006."
- "Regulations dwarf the \$150 billion 'economic stimulus package' passed in early 2008.."
- "Given that 2007 government spending stood at \$2.73 trillion, the hidden tax of regulation now approaches half the level of federal spending itself."⁵

Ten Thousand Commandments provides a shocking overview on the overreach of government by bureaucracy and the regulations that empower the plethora of agencies that oversee almost every aspect of American life. As Congressman Ron Paul recently wrote, "Too many people trust government regulators so completely that they abdicate

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Is the Bailout Constitutional?

by Robert A. Levy

In the current crisis, bank runs and other forms of financial panic could lead to the collapse of the country's or even the world's economic edifice. Extraordinary measures might be in order. In extremis, it may seem quixotic to question the constitutionality of the federal bailout, but it's essential nonetheless.

Realists might say, "Save your ivory-tower doubts for the law journals." Supreme Court Justice Robert Jackson famously wrote, "The Constitution is not a suicide pact." Douse the flames first; then repair the bad wiring.

But a declaration of unconstitutionality, if justified, serves three vital purposes today. It imposes a heavy burden on proponents of the bailout to explain why the Constitution can be violated with impunity. It reinforces the case for abandoning the program once any true emergency has passed. And it helps establish a presumption against adopting similar measures that might be proposed to resolve future "emergencies."

Bad Precedents

Even now some experts, including my colleagues at the Cato Institute, believe that alter-

native proposals (perhaps even constitutional proposals) could achieve the desired ends without socializing the financial sector and without establishing statist precedents that could haunt us for decades or longer.

Opponents of the bailout are unconvinced when media pundits and presidential candidates carp about the failure of deregulation, the need for immediate government intervention, and the final days of capitalism. According to bailout skeptics, government created this crisis -- with everything from artificially low interest rates to political pressures for "affordable" housing, quick loans for bad credit risks, and the subsidization of agencies such as Fannie Mae and Freddie Mac. The predictable result of those perverse incentives: greater leverage and more risk. Heads, the private sector wins; tails, the taxpayer loses. Critics ask why a solution to the problem should now be entrusted to the bureaucrats who got us into this mess.

On that question, I concede insufficient expertise. More important, events on the ground seem to have superseded the policy debate. The bailout moves ahead, never mind that many economists and public finance specialists insist it is more invasive than required and unlikely to address root causes. We embark on this adventure notwithstanding the controversy

regarding its necessity and effectiveness.

I turn, therefore, to the threshold question that should have, but has not been, adequately examined: Is the bailout constitutional?

No Authority

It is not. The federal government has no constitutional authority to spend taxpayers' money to buy distressed assets, much less to take an ownership position in private financial institutions. And Congress has no constitutional authority to delegate nearly plenary legislative power to the Treasury secretary, an executive branch official.

Congress can proceed only from legitimate authority, not from good intentions alone. That means we must find a constitutional pedigree for each proposed law.

One possible rationale for the bailout is the all-encompassing commerce clause. As the country grew and some people came to believe that most of its problems required national regulatory solutions, Congress sought to find a specific constitutional power that would justify an ambitious federal agenda. The commerce clause became the vehicle of choice.

Yet that is not why the clause was written into the Constitu-

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and Florida, Louisiana, and Oklahoma approved various property tax exemptions.”⁸

Minnesota approved a constitutional amendment that would increase the sales tax by 3/8 of one percent for purposes of funding clean water, natural areas, parks, and the arts.⁹

The National Conference of State Legislatures reported that three significant tax cuts appeared on the ballot. In Massachusetts voters rejected a measure to eliminate personal income tax; in North Dakota voters rejected a measure to “cut personal income tax rates by 50% and corporate rates by 15%,” and Oregon voted down a measure that “removes the cap of \$5,600 on the amount of federal income taxes paid that may be deducted on state income taxes.”¹⁰ Voters in Arizona passed a measure that “prohibits any new property sale or transfer tax,” and voters in Maine approved a repeal of “a new tax on beverages and health insurance claims.”¹¹

Taxpayers suffered a serious defeat in Arizona when Proposition 105 fell in defeat. Proposition 105 “requires any initiative measure containing a tax or spending increase

be passed by a majority of registered voters, rather than a majority of those voting on the measure.”¹² Oregon did pass Measure 56, which would “eliminate voter turnout requirements for local property tax votes.”¹³ The Initiative & Referendum Institute reported that voters approved at least \$13 billion in bonding-related measures.¹⁴

Some additional ballot questions included the issue of affirmative action. Colorado rejected an anti-affirmative action proposal, while voters in Nebraska approved a measure “that prohibits government from discriminating or giving preferential treatment on the basis of race, sex, color, ethnicity, or national origin.”¹⁵ Sportsmen in Oklahoma achieved a significant victory when voters overwhelmingly approved a constitutional amendment that establishes a right to hunt and fish.¹⁶ Iowa overwhelmingly approved one ballot measure that revised Article II, Section 5 of the State Constitution, and Section 5 will now read: “A person adjudged mentally incompetent to vote or a person convicted of any infamous crime shall not be entitled to the privilege of an elector.”¹⁷

The state and national election results paint an uncertain future for both limited government and protecting marriage and life. Taxpayers certainly suffered several defeats this election on the national and state levels, but perhaps with

many state budgets in crisis, including Iowa’s budget, and the fiscal health of the nation in jeopardy, Americans will realize that economic solutions do not rest in tax increases or government-run solutions, but allowing constitutional government and the free enterprise system to work. Whether the issue is limited government, tax reform, protecting marriage, or defending the unborn, or to put it simply, Ronald Reagan’s coalition, we must not give up in fighting this cultural war against liberals and progressives.

Endnotes

¹Ballotwatch: Election 2008, A First Look at Results, Initiative & Referendum Institute, November 5, 2008, <<http://www.iandrinstitute.org>> (November 7, 2008).

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³Ibid.

⁴Percentages obtained from the National Conference of State Legislators.

⁵“2008 Ballot Measures Results,” National Conference of State Legislatures, November 6, 2008, <http://www.ncsl.org/programs/legismgt/statevote/2008_Ballot_Results.htm> (November 8, 2008).

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⁷Ballotwatch: Election 2008.

⁸Ibid.

⁹Ibid.

¹⁰“2008 Ballot Measure Results.”

¹¹Ibid.

¹²Ibid.

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¹⁴Ballotwatch: Election 2008.

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¹⁷“Iowa Election Profile,” National Conference of State Legislatures and State of Iowa, General Assembly, House Joint Resolution 3, 2006.

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**Is the Bailout
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tion. Under the Articles of Confederation, the national government lacked the power to regulate interstate commerce. Each state was free to advance local interests and to create barriers to trade without regard to possible prejudice to out-of-state interests. That process devolved into what Justice William Johnson, concurring in *Gibbons v. Ogden* (1824), characterized as a “conflict of commercial regulations, destructive to the harmony of the States.”

The solution: a constitutional convention at which, according to Johnson, “If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.”

Instead of serving as that shield against interference by the states, the commerce power has become a sword wielded by the federal government in pursuit of a boundless array of regulatory programs. That financial markets are interstate does not authorize the federal government to do anything and everything to manage those markets. The commerce power is to “regulate,” but commerce is not regulated by eliminating private risk and

substituting tax-funded handouts to favored economic actors. The Framers who crafted the commerce clause could not have intended to empower Congress to give an executive official virtual carte blanche over all financial institutions.

Moreover, it is not a commerce clause argument to say that Congress created the mess and, therefore, Congress can do whatever it wants to fix the mess. Legislators’ misdeeds do not ipso facto justify the socialization of private banks, brokers, mortgage companies, and insurance companies -- and who knows where it stops.

Even if Congress could defend the bailout as a means of preventing interstate impediments to commerce, that would not legitimize any and all means.

No Intelligible Principle

To legitimately invoke the commerce power, Congress must show not only that a federal program is necessary, but also that it is proper -- that is, the program does not violate other foundational principles, such as federalism, separation of powers, and limited government. Congress has not made that showing.

Indeed, the bailout quite clearly violates the Constitution’s separation-of-powers principle -- in particular, what has become known as the non-delegation doctrine, which states that Congress may not delegate its legislative power to any other entity, including the Cabinet

departments of the executive branch. Article I, section 1 of the Constitution states, “All legislative Powers ... shall be vested in a Congress.” A plain reading of that text shows that lawmaking is for the legislative branch, which does not include the Treasury Department. Yet when Congress authorized the bailout package, it gave Secretary Henry Paulson Jr. unprecedented power to act as a super-legislature.

True enough, the Supreme Court, in a series of cases beginning in 1928, condoned some forms of delegation. Legislators may delegate their authority, said the Court in *J.W. Hampton Jr. & Co. v. United States* (1928), so long as Congress “shall lay down ... an intelligible principle to which the person or body authorized ... is directed to conform.”

What, then, is the intelligible principle to which Henry Paulson must conform? No one knows -- least of all the taxpayers, who will bear the cost. “Make things better” is not an intelligible principle.

These days delegation has become a formula for irresponsibility. Congress gets to claim credit for the supposed benefits of the bailout, yet dodge culpability for the associated costs.

But Congress itself, not an executive official, must be accountable for the consequences of laws that Congress puts in place. That tenet has been a cornerstone of our Constitution for

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more than two centuries. John Locke got it right in his *Second Treatise of Civil Government* (1690): The separation-of-powers principle means that “the legislative [branch] cannot transfer the power of making laws to any other hands.” The legislative power, wrote Locke, is “to make laws, and not to make legislators.”

Despite that sound advice, the Treasury Secretary is now the one calling the shots as he partially nationalizes a significant sector of our economy.

Honest Choices

Maybe the bailout is necessary. Maybe it will even work. But necessary or not, temporarily effective or not, the bailout is unconstitutional. And constitutionality is not restored merely by the invocation of “emergency” by the administration and Congress.

Conservatives should have learned that lesson when the Great Depression drove the New Deal expansion of government. Liberals should have learned it more recently when civil liberties were compromised in pursuit of real and imagined terrorists.

To preserve the rule of law, we must condemn all legislation that offends the Constitution -- no matter how unlikely the prospect that courts will invalidate

the offending acts; no matter how unwise, from a policy perspective, court intervention might be.

When policy is allowed to trump constitutionality, three choices are available to honest citizens. We can abandon the proposal and try to accomplish the desired ends using alternative but constitutional means. We can change the Constitution so that the proposal is no longer unlawful. Or, at a minimum, we can acknowledge the truth -- that we are violating the Constitution in pursuit of demonstrably necessary ends, which could not be otherwise attained.

But we have chosen none of the above. Instead, we have proceeded with the bailout despite few, if any, cautionary words about its unconstitutionality. That’s a recipe for lawlessness, not to mention a precedent that will rear its ugly head every time there’s serious trouble that the federal government thinks it can fix.

Robert A. Levy is chairman of the Cato Institute. This article appeared in Legal Times on October 20, 2008, and was added to cato.org on October 20, 2008, and is reprinted with permission from the Cato Institute.

Regulation

by John Hendrickson
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their own common sense to government bureaucrats.”⁶ The Founding Fathers understood human nature and government and today we should be asking ourselves whether or not we are being good stewards by upholding the constitutional government that they created?

Endnotes

¹Wayne Crews and Ryan Young, “Government’s 10,000 Commandments Cost Americans More than \$1 Trillion,” Budget & Tax News, The Heartland Institute, October 2008, <<http://www.heartland.org/Publications/budget%20tax/article.html?articleid=23879>> (November 8, 2008).

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⁶Congressman Ron Paul, “The Moral Hazard of Regulation,” *Texas Straight Talk*, November 3, 2008, <http://www.house.gov/apps/blog/tx14_paul> (November 8, 2008).

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Happy New Year
from all of us at
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in 2008 and
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2009.

Taxation's Perfect Storm

by E. Ralph Hostetter

A perfect storm occurs when the major elements of weather -- humidity, temperature and, in the case of hurricanes, barometric pressure -- reach critical levels and come into alignment in a given location. Its powers can be awesome. Hurricane Katrina in 2005 was nearly the perfect storm.

Figuratively speaking, the perfect-storm theory might be applied to politics. For example, when the three most powerful elected officials in the United States, who share the same ideology and political philosophy, are placed in such an alignment, there is the potential for the creation of awesome political power.

Election Day, did just that. It brought about the alignment of the three individuals who will hold these powerful positions. The positions are the President of the United States; the Speaker of the House of Representatives, and the Majority Leader of the United States Senate.

As Speaker of the House, Nancy Pelosi, D-Calif., has the authority to schedule all bills for members of the House to vote on. She has what is the same as absolute authority in this role. House Rules prescribe complicated procedures to bypass the Speaker. No Member has dared so far to attempt to bypass or challenge her, probably for fear of "political payback."

The Constitution provides

that "all bills for raising Revenue shall originate in the House of Representatives." This includes all tax law. Thus, all legislation to create, increase, revise or reduce taxation must have the Speaker's approval. With a strong party majority now in the House, tremendous power is conferred upon its Speaker.

President Bush's legislation to cut taxes passed in 2003 contains the provision that his tax reductions are to expire in ten years from the effective date of the statute. This tax legislation can be repealed at any time. There are calls from the congressional left to do exactly that. Of note is the fact that only tax-reduction laws provide an automatic expiration date. No tax-increase law has been enacted in recent times with an expiration date.

Speaker Pelosi apparently favors increasing federal taxes, and she can exercise the power to do so. Increased taxes evidently would begin with families jointly making \$42,000 or more annually.

Next in line in the new alignment of power is Senator Harry Reid, D-Nev. As Senate Majority Leader with a large majority of fifty-seven (and possibly more in the near future), he will exercise considerable power, if not as much as the House Speaker. All tax legislation, after originating in the House, must go to the Senate to be enacted into law. Like the House Speaker, the

Majority Leader is in charge of the Senate's legislative schedule. The two of them currently have party majorities, share political philosophy, and are in alignment as to tax policy.

The most powerful of the three, of course, will be President Barack Obama come Inauguration Day, January 20, 2009. He, too, shares the leftist political philosophy of the leaders of Congress. As an important part of the Constitutional checks-and-balances system, all legislation must be presented to the President for his signature (approval) before it can become law.

The President also has the power of veto. He can, thereby kill enactment of legislation unless his veto is overridden by a two-thirds vote of each house of congress. Considering the President's alignment with the Speaker and Senate Majority Leader, very few vetoes, if any at all, would be expected in the Obama administration during the incoming 111th Congress given its new and more liberal political composition.

Sen. Obama announced his position on taxes in alignment with Congressional leaders in a statement he made during a door-to-door interview with the now-celebrated Holland, Ohio, resident "Joe the Plumber." In answer to a question, the Senator told Joe of his belief in

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**Taxation's Perfect Storm
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"spreading the wealth around." Whatever was intended by that statement, people familiar with it recognize that the concept is fundamental in Marxist and socialist dogma. Neither the House Speaker nor the Senate Majority Leader to date has rejected the "spread the wealth around" statement.

The elements for taxation's perfect storm will be in place January 20 of next year. The electorate has chosen and now must prepare for the cloudburst of new tax law which will rain down on them in the future. There will be no shelter.

E. Ralph Hostetter, a prominent businessman and publisher, also is an award-winning columnist and Vice Chairman of the Free Congress Foundation Board of Directors.

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LIMITS

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