Osgoode Hall Law Library, Toronto, Canada, Dan Cronin photo, 30 May 2010, flickr.

Taking Back the Constitution - Part 8 – What is natural law?

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23 November 2013

Why consider amendments

We have now reached the 8th column of this series and considered six amendments to our Constitution. These have:

2. Replaced the Constitutional Convention method of proposing amendments,
3. Updated the experience requirements for federal elective office,
4. Provided specific terms for Supreme Court justices and other federal judges,
5. Term limited members of Congress,
6. Limited longevity of members of the "permanent government," and
7. Replaced the income tax, repealing the 16th Amendment.

The basic purpose of these amendments is to narrow the gulf that has grown between citizens and their government. In spite of what some members of the bureaucracy believe, they are not indispensable agents ordained by fortune to rule us lesser humans. Our founders strongly believed in rotation in government office. They felt that a short stay in government gave less

time to develop corrupt and overbearing behavior. Knowing you would soon return to the status of "ordinary citizen" might impose a certain humility on your actions while in government.

I hope that as you audited these suggestions you actively searched for better ways to attain these objectives. We need every concerned citizen to engage in vigorous informed debate of each potential amendment to our Constitution. A ruling by five out of nine black-robed justices does not begin to tap the genius of our nation.

These suggested amendments are intended for those citizens who are aware that the writing of our Constitution was a major intellectual advance. It more clearly identifies those things the central government should do (and more importantly should not do).

The reasons for each provision of our Constitution must be carefully studied. Proposed alterations should then closely adhere to the Constitution's checks and balances. The original intent of our founders' merits careful comparison to current interpretations. When it appears those interpretations have gone astray, we should correct them with suitable amendments.

Supreme Court interpretations to correct poor interpretations have been shown to be possible, but a lengthy and uncertain process. It also fails to involve the citizen and take advantage of the huge talent pool available. We have had a century of significant amendment by interpretation, and the results, in my opinion, pervert the intent of our Constitution. I expect, if they had been undertaken using the full formal amendment process, we would have a better result. Of course the idea's of 20th century's socialist/fascist/"liberal"/progressive era might well have contaminated popular thinking. They certainly contaminated the thinking(?) of the judicial elite.

The amendments above also represent very modest changes to our federal structure. Some of the amendments I will deal with in future columns make suggestions that delve into more fundamental issues.

Our founders concepts

In this one column we describe concepts fundamental to our founder's thinking. It is apparent when studying their many writings, as well as the discussions leading to the Constitution, that providing as many protections for the individual citizen and his property as possible were paramount. They accepted that some government was necessary, but tried to provide checks and balances on that government so that it did not become a repressive factor in citizens' lives. The federal government was not to interfere with honest, non-threatening individuals who cared for themselves, their families, and friends. Neither were they to assume responsibility for those activities beyond providing for the safety of the country.

The founders fully understood that government was a dangerous device, so they restricted the federal government primarily to foreign affairs, possible conflicts between the states and those functions that necessarily transcended state borders.

In my opinion their carefully drafted Constitutional structures proved to be insufficient when the accompanying intellectual legacy weakened over the first century. The normal human drive

toward acquiring more power was no longer staunchly opposed by those who fully understood the consequences of extensive government. In government, unlike private ventures, unprofitability is not a program-killing restraint.

Our founders found inspiration in John Locke's (1632-1704) writings on the nature of man, and his inherent (or natural) rights that are independent of government or rulers.[i] Natural law is generally understood to be a body of unchanging moral principles that are the basis for all human conduct. As such it is not the result of legislation, but is discovered and refined through reason and experience. However, natural law may be codified in legislation as an enforcement convenience.

The Declaration of Independence starts with the paragraph:

> WHEN in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.[ii]

It is very clear that our founders based their argument for independence on natural law. In legislating a separation from Britain they were not claiming to have invented new law, but appealing to preexisting laws which were not dependent on man or his legislative institutions.

Certainly, the concept of natural law existed long before Locke's formulation in the writings of the great Roman jurists who felt their task to be the *discovery* (not legislation or invention) of those principles that best guide the interactions of humans. Those jurists, such as Cato and many others[iii] writing over the centuries, carefully refined the understanding of natural law.

More recent writing on natural law

The English language tradition carried on the process of legal discovery by jurists. Called the *common law*,[iv] many centuries of court decisions provided examples of what rules best fit the nature of man. These rules helped provide a relatively stable society in which all men are free and equal before the law. These court decisions still form the basis for law in English speaking countries.

The idea of the common law has been described many times, but I am most charmed by Richard Maybury's brief formulation:

- Do all you have agreed to do,
- Do not encroach on other persons or their property.[v]

His first tenant is the basis for contract law; and the second for criminal and tort law.

Writing in the 1960's the very prominent Italian legal economist, Bruno Leoni[vi] strongly contrasts:

- legislative law based on the whims of temporary legislators, and

• the common/natural law based on the discovery by generations of jurists.

He asserts that when legislators create too many laws, or attempt to violate natural law, they damage or destroy otherwise successful societies.

Why consider natural law?

As we become overloaded with legislative enactments, the space for voluntary organizations and individual initiatives becomes less. It is now easier to see the importance of natural law than it was in the 1780's. As Leoni would say, legislative departures from the natural law increase conflict, decrease toleration, and destroy economic progress. The closer our federal legislation follows and gives specificity to natural law, the more readily it will be accepted and enforced.

Unfortunately political power is such a seductive force that every generation must be wary of its poisoned fruits. Be skeptical of its promises, and roll back its legislation.

Our founders tried to give subsequent generations the tools to cope, including the right to modify the document which tried to hold government in check. It remains to be seen if a generation will arise that understands the stakes, rises to the task, and returns government to its carefully delimited useful tasks.

In the next column we return to our specific suggestions for amending the Constitution.

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[i] John Locke (1632-1704) wrote *Two Treatises of Government*, *Letter on Toleration*, *Second Letter on Toleration*, and *Third Letter on Toleration*. Lock defended the idea that by nature all men are free and equal and that as part of a social contract they transfer some of their rights to government in order to ensure the stable enjoyment of their lives, liberty and property. Natural law is distinct from conventional law and Divine law by applying to all people and being capable of discovery by reason alone.

[ii] First paragraph of the *Declaration of Independence*, drafted by Thomas Jefferson, revised by Franklin, Adams, and Jefferson, and revised again when it was placed before the Second Continental Congress in Philadelphia. It was adopted by "The Unanimous Declaration of the 13 united States of America" (Notice the lack of capitalization of "united").

[iii] Our great contemporary legal economist, Jesús Huerta de Soto writing in *Money, Bank Credit, and Economic Cycles* (English edition 2006) about the gradual refinement of natural economic law in the classical Roman period (before Christ) credits Marcus Porcius Cato, Cato Licianus, Mucius Scaevola, Ouintus Mucius Scaevola, Servius Surpicius Rufus, Alfenus Varas, Gaius, Pomponius, Africanus, Marcellus, Papinian, Paul, Ulpian, and Modestinus with this gradual discovery and refinement over 3 centuries.

[iv] The Roman natural law and the English common law differ slightly in that the common law emphasizes precedent to a greater degree. The Roman natural law tradition focused strongly on superior logic and reasoning. This point seems minor but played a part in the earlier perversion of English banking to permit the use of demand deposits for the banker's purposes rather than the depositors. This led to legalization of fractional reserve banking with its' boom and bust effects. A thorough description of the ultimately dangerous effect of this confusion about demand deposits is contained the book cited in the previous footnote.

[v] Richard J. Maybury & Jane A. Williams, *Whatever Happened to Justice? (An Uncle Eric Book.), 2004;*

[vi] Leoni, Bruno (1913-1967) *Freedom and Law* [1961]. Available online from the libertyfund.org who say, "The greatest obstacle to rule of law in our time, contends the author of this thought-provoking work, is the problem of overlegislation. In modern democratic societies, legislative bodies are increasingly usurping functions that were and should be exercised by individuals or groups rather than government. The result is an unwieldy surfeit of laws and regulations that by their sheer volume stifle individual freedom."