

WHY WORRY NOW?

The Long-Term Risks to Freedom:

A Survey, an Assessment, a Request for Your Comments



By **Jay B Gaskill**

ONCE UPON A TIME, A NEW NATION APPEARED ON THE STAGE OF HISTORY.

It was a nation-state uniquely founded as an oasis for individual freedom. It was a brave experiment in nation-making, a rebellious sovereign born from a radically universal principle - that all individual humans are endowed with certain inalienable rights, among them the right to life, liberty and the *pursuit* of happiness. These rights were not created by or allowed or permitted by government fiat. Rights such as these can never legitimately be abrogated by any government without the due processes of law.

One thing was unmistakably clear from the founding context of the American republic: The inalienable rights enjoyed by citizens are *individual* in character, rather than *collective*. The founders lived in the context of the post-tribal Enlightenment philosophy of 18th century Europe, particularly the English branch thereof. In this philosophical universe, individual people have rights, not collectives. Governments have no rights at all, just *powers*, the legitimate exercise of which is contingent on how these powers are to be used. Rights are as unlimited as individuals are unique; and they as legitimate as individuals choose to exercise them with due deference to the rights of others. But the powers of government are only provisionally legitimate – to be exercised only as they are necessary to serve and protect the workings of a free society.

In the immediate aftermath of the Allied victory in WW II (an epochal event that could not have ended as well as it did without the intervention by massive US forces), the American experiment was working well enough to fuel a decades-long surge of optimism. But flash forward to the early 21st century USA: You detect the stench of pessimism, defeatism and anxiety; it is floating over the American intelligentsia like the dense smog hovering over Beijing.

Most of us spend far too much time being overstimulated by the massively invasive info-blizzard – carried like some medieval plague by a host of vectors - phones, tablets, pads, posts, screens. Bit-fragments of our attention are intensely sought-after as *commodities*. We have become fragmented as a result. As we are dragged from tweet to text, from micro-moment to moment, we are being distracted from a set of looming threats to our freedoms - even to our very survival as a semi-free people. This is why we need to pause for this assessment. At the end of this exercise, you are invited to add your comments, insights and new risks to the Threat List. I will be posting the results over the course of 2014

FREEDOM'S GROWING THREAT LIST

1. Politicization of the US judicial system -ongoing

The US constitution is a magnificent statement of principles captured in somewhat malleable words. The essential protections of the constitution crucially depend on an independent judiciary that is trained in, fully understands, and is actually committed to its core principles. For reasons that will be evident, only a judiciary that remains dedicated to the intelligent and courageous preservation of constitutional principles can preserve our remaining freedoms. Retail politics always generates pressures favoring result-oriented jurisprudence. Paraphrasing Ben Franklin, it's a constitution "if we can keep it". Eternal vigilance will always be needed. There is no trivial or throwaway federal judicial appointment.

2. Critical mass of new politically-controlled government- dependent classes – in play

You already know this, but know, also, the postmodern rationale of the enemy. The term, "postmodern", is code for "post-Enlightenment". The entire political/social system of "victim" classes, based loosely on race, gender, disability or other presumptively disadvantaged categories, is a retreat from the ideal of *individuated* justice. Without paying sufficient attention, we have entered the brave new world of "collective justice" or "social justice". These terms are code for neo-tribalism. Politically dependent "classes" can be nurtured and exploited through government appropriations or by regulatory favors. In either instance, a favor-granted, political payback loop is established that becomes very difficult to break. There is much work to do to stem this tide, starting with tough, intelligent discourse.

3. Power consolidation by entrenched, ungovernable regulatory agencies – well in play

We are dangerously close to a tipping point here. Scores of federal agencies have now been created and empowered by the Congress and the Presidency to act with virtual autonomy within the loose scope of their respective charters. These agencies are very, very powerful, having in the bargain acquired the authority to proclaim new regulations with the force of law (without getting the consent of Congress or the President), to enforce these new regulations with penalties and sanctions often as severe as criminal punishments, and even to adjudicate violations outside the regular judicial system, denying, for example, the right to confront one's accusers and a trial by jury¹. We face a major, dangerous power shift, one that started decades ago when an overburdened Congress and a complicit executive offloaded a body of "technical" regulatory work to "experts" embedded in the new bureaucracies. At present, the Congress lacks the time, energy, expertise and political will to restrain the new "regulatory branch" of government, even when - to pick an interesting recent example – one agency declared that the very gas we exhale and our plants inhale is now an official pollutant. We stop this soon or we lose the capacity to change course.

4. Fatal erosion of US sovereignty via the international system – just beginning in earnest

The USA is under increasing pressure to conform its practices to "international standards" which means in effect to subject its citizens to rules and adjudication procedures that violate protective provisions of the constitution. The recent international

gun control treaty was just one of a dozen or more challenges that were more dangerous to the constitution's delicate bulwark against erosion of freedom than most members of the political class realized. In former times, national sovereignty was lost only by defeat in war. Now, it is to be voluntarily surrendered piecemeal, for "the greater good." This can happen to us, because the treaty clause of our constitution provides a potential legal loophole that can override the bill of rights. Here is the language: "[All] Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding". (U. S. Constitution Article Six).

There are internationalists who want to bypass the US Bill of Rights "obstacle" in service of "the greater good". They will rely on a clever textual (mis)interpretation. Here is their argument: If the original text of the Treaty Clause had said "the Constitution(s) or Laws of any State", a reviewing court would likely conclude that a treaty and enabling legislation could only override the various state constitutions. But the Article Six refers to "the Constitution" (in the singular), meaning (under the internationalist interpretation) that a ratified treaty really is the supreme law of the land.

Article Six contains a dangerous ambiguity, and the US Supreme court has yet not touched the issue. Have no doubt that some future Supreme Court (one in which one or two of the current conservatives are replaced with more internationalist ones) could easily resolve the ambiguity in favor of an expansive reading of the treaty power. As constitutional scholars remind us, *the US Constitution is what the Supreme Court says it is*. Such a "progressive" court could hold that conflicting provisions in the U. S. Constitution must give way to effectuate a given ratified treaty's implementation. So... just how Many Votes would it take to override part of the Bill of Rights? The answer: "Only 73, consisting in the "vote" of the president, that of 67 senators and 5 Supreme Court members. This is because a treaty is ratified by the US Senate by a two third's majority. So the number is 72 (67 plus 5) and one for POTUS. Is eternal vigilance warranted? Nothing less than fierce eternal vigilance will do where the US Supreme Court is concerned. This is why the politicization of the US judicial system poses an extreme risk to the future of all our freedoms.

5. Aftermath of losing a war, or partially surrendering to avoid one – a growing possibility

History warns the heedless, weak and naively isolationists who live in the illusion of a cost-free, under-defended state of peace and freedom that reality bites. A truly robust and credible military and national defense policy is an absolutely necessary bulwark against the loss of all *domestic* freedoms. Either the USA remains a proactive force for freedom in the world, by example at home, and by prudent, intelligent and firm action abroad, or the reverse happens: the world's pathetic freedom record gradually resets ours. This is a recipe for tyranny administered in small doses.

6. Aftermath of a large scale US economic collapse – a pending possibility

This is hardly a novel idea. Consider: The German Weimar Republic; the South American banana republics of the last century; post WWI Russia; the damage done in the great depression of the 1930's.

Authoritarian ideologies and their human hosts are like opportunistic pathogens waiting for the breakdown of the social immune system. Because of the prevalent postmodern moral confusion in the culture, we are more vulnerable than ever to a wholesale surrender to one of the virulent ideologies should the US economy get into a truly scary tailspin.

7. Rise of dangerous ideologies with a strong domestic following - metastasizing

Militant Islam will probably never get sufficient traction in the current USA culture to constitute a domestic threat. Political liberalism (as distinguished from old fashioned liberalism) has acquired the style of religion, mostly benign, but all too often resistant to reasonable dialogue with conservatives. Yet it is not a true ideology.

But within the precincts and closed doors of political liberalism a darker variant has gestated. It is a form of hard-progressivism, a blend of Marxism Lite with a vaguely anti-human environmentalist model (the kind that equates “speciesism” with racism). The radical progressive agenda includes (and is defined by) a persistent attempt to improve (read remake) *human nature* itself. In combination with emerging drugs, neuro-technologies and the classic techniques of social manipulation, the temptation to make a more compliant human being presents a genuine threat to freedom. Creativity and compliance are arch enemies. The friends of freedom need to be on the side of creativity in this struggle.

The hard-progressive acolytes know each other, but remain loosely organized. They blend in well with the regular liberals. But this version of progressivism has acquired an entrenched position within the American intelligentsia and represents an authentic threat.

Doubtless there are other unnamed and unidentified ideologies waiting in the wings. The problem for any formal ideological movement in the USA is that mere penetration of the intellectual elites is never quite enough. A populist link is needed.

When an economic crisis is deep enough and scary enough, a small cadre of leaders will cobble together a coalition of the moment in order to achieve power. If unchecked, they will consolidate power and the game is virtually over.

Make no mistake: No refuge for liberty will remain safe if the USA ever fails to be the historic exemplar and beacon of freedom in the world. If the friends and allies of liberty must ever actually go the barricades, even their victory cannot guarantee the return of the constitution as we know it.

8. Loss of constitutional checks and balances through the neglect of core values - pending

Values matter. Ideas matter. Principles matter. The constitution matters. Yes, this is a cultural struggle, already partly lost, one in which friends and adversaries both need to be apprised of the stakes, and patiently – but urgently educated.

When Ben Franklin famously said that “It is a republic if you can keep it” he meant that a wide spectrum of opinion, differing in many policies and particulars, needs to come together, over and over again, to sustain this unique constitutional republic against an ever new set of threats and challenges. Franklin had the advantage of living in a culture in which the core values themselves were secure. We do not.

Any list of the serious long-term risks to our freedoms is necessarily incomplete. If any part of this essay has struck home or sparked a thought, please take the time to amplify, comment, add and expand on the topic. Send an email to the author at law@jaygaskill.com. Your comments will be acknowledged, credited and most of them will be added – with attribution, unless you wish otherwise.

Why worry now?

As that First Century sage, Hillel the Elder, counseled, “If I am not for myself, then who will be for me? And if I am only for myself, then what am I? And if not now, when?”

If it is not your freedom at risk or the freedom of someone you care about, then whose is it?

It is our freedom, if we can keep it.

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Jay B Gaskill, a California lawyer, served as the 7th Public Defender for the county of Alameda, CA. Many of his articles are available on the Policy Think Site (www.jaygaskill.com). His latest book, the political thriller, *Gabriel’s Stand*,ⁱⁱ is to be released by Central Avenue Publishing of British Columbia in May, 2014.

Endnotes

ⁱ There is a creeping administrative control network that extends over American commerce and daily life. It represents the collective handiwork of several mega-agencies of the federal government, overlapping control regimes, like the EPA, the EEOC, the FDA, the FCC, the ICC, the OSHA, the HHS and others too numerous to list. The pattern, well documented by the attorney/commentator Mark Levin, in his book, *Liberty and Tyranny* (Simon & Schuster 2009), is the same for each of these regulation-generating behemoths. Congress has given away the store and ignored (for the most part) the consequences. Each of these and many other agencies have been granted the power to make laws (called regulations), to enforce them by imposing sanctions (law enforcement is supposed to be an executive function), and to adjudicate cases outside the court system (a judicial function). The congress, the sole entity body that is empowered to make new laws, did not make CO2, the naturally gas released by animals and absorbed by plants, into a pollutant; the EPA did that. Under the radar, the web of regulations, some well-intended, others misguided, many never actually authorized, cumulatively are suffocating new business startups, weighing down struggling businesses and impairing economic growth. But that is merely the preamble to the trouble ahead. There are international bureaucracies seeking regulatory authority wherever on the globe an individual sovereign is willing to cede it to them. This closely related risk is addressed in the next session, immediately below and is dramatized in a soon-to-be release book by Jay Gaskill – see the next endnote for details.

ⁱⁱ Jay B Gaskill’s latest, book, GABRIEL’S STAND is a novel in the tradition of Orwell and Huxley, in which the dark prospect of a tyranny is balanced by an American sense of heroic optimism. It is also a father-daughter story, a saga of family, friendship, loyalty and betrayal. It will be available in both paper and electronic editions throughout the USA via Amazon, Barnes and Noble and other vendors. The story unfolds in a plausible, near-future USA where

the old polity has been fractured by a series of ecological calamities. Anxiety has stoked popular panic. Technology is alternately embraced and feared, loved and hated. In this turbulent setting, an opportunistic, malevolent ideology has gained traction. Its followers present themselves as well-meaning “greens,” but beneath their public veneer a toxic mindset has metastasized. These are true eco-fanatics, cultists to the core, who harbor the chilling vision that the earth (Gaia) is a living organism, on which humanity is a plague, an ecophage. Their agenda (ruthlessly concealed), is that the Gaia’s final cure will require human extermination. The political path to the agenda’s implementation is *a loophole in the US Constitution through which a ratified treaty can create a super-agency with power to control “dangerous” technologies*. Gaia must be cured of the ecophage. “Disarm the humanity’s medical defenses and the plagues will do Gaia’s work.” It is to be the final holocaust.
