THE CATO HANDBOOK FOR CONGRESS

104th Congress

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Over the 20th century, the federal government has assumed a vast and unprecedented set of powers. Not only has the exercise of those powers upset the balance between federal and state governments; run roughshod over individuals, families, and firms; and reduced economic opportunity for all; but most of what the federal government does today—to put the point as plainly and candidly as possible—is illegitimate because done without explicit constitutional authority. The time has come to start returning power to the states and the people, to relimit federal power in our fundamental law, to restore constitutional government.

To that end, the 104th Congress should

- **declare that the Constitution remains, despite the growth of government over the 20th century, a document of delegated, enumerated, and thus limited federal powers;**
- **declare that most of what the federal government does today is done without constitutional authority;**
- **identify the precise constitutional authority for doing so before enacting any new legislation;**
- **restore the Commerce Clause to its original purpose—to enable Congress to ensure the free flow of commerce among the states;**
- **restore the General Welfare Clause to its original purpose—to ensure that Congress's enumerated powers are exercised not for the welfare of particular persons but for the general welfare;**
- **restore the Necessary and Proper Clause to its original purpose—to ensure that the means Congress employs in exercising any of its enumerated powers are both necessary and proper;**
- **restore those provisions of the Bill of Rights and the Civil War Amendments that have fallen into disregard—privileges and immunities, property rights, and economic liberties.**

A Government of Enumerated Powers

The U.S. Constitution, as amended, is the fundamental law of the land. Under it, the powers of the federal government in general and Congress in particular are *delegated* by the people, *enumerated* in the document, and thus *limited.* The Tenth Amendment, the final member of the Bill of Rights, makes that point perfectly clear when it states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Congress may act in any given area or on any given subject, therefore, only if it has authority under the Constitution to do so. If not, that area or subject must be addressed by state, local, or private action.

The doctrine of enumerated powers, as just stated, was meant by the Framers to be the centerpiece of the Constitution. As such, it serves two basic functions. First, it explains and justifies federal power: flowing from the people to the government, power is legitimate insofar as it has been thus delegated. But second, the very doctrine that justifies federal power serves also to limit it, for the government has only those powers that the people have given it. Indeed, it was the enumeration of powers, not the enumeration of rights in the Bill of Rights, that was meant by the Framers to be the principal limitation on government power. For the Framers could hardly have enumerated all of our rights, whereas they could enumerate federal powers. By implication, where there is no power, there is a right belonging to the states or the people.

Unfortunately, over the course of this century Congress has largely ignored the constitutional limits on its power. And the courts, especially after Franklin Roosevelt threatened to pack the Supreme Court with six additional members, have only abetted the resulting growth of government by fashioning constitutional doctrines that have no basis whatever in the Constitution. As a consequence, many of the programs Congress oversees today are without constitutional foundation, having resulted from acts that Congress had no authority to pass.

The first order of business for the new Congress, therefore, is to affirm, as clearly and unequivocally as possible, that despite the extraordinary growth of government over this century, the Constitution remains a document of delegated, enumerated, and thus limited powers. Second, the new Congress should candidly admit that much of what the federal government does today is done without genuine constitutional authority. Finally, before undertaking anything new, Congress should first locate the source of its authority for the action in the Constitution.

Those basic steps—taking the form primarily of declarations—will set the constitutional tone of the new Congress. They will begin moving us back toward limited, constitutional government. And they will make it clear that questions about constitutionality are not for the courts alone to decide, for Congress too is responsible for upholding the Constitution.

The model for all of this should be James Madison, the father of the Constitution. Faced with a welfare bill in 1794, Madison rose from the floor of the House to declare that he could not "undertake to lay his finger on that article of the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents." Two years later, when faced with a similar bill, Madison's colleague from Virginia, William B. Giles, went to the heart of the matter, and to the oath of office, when he declared, "[The House] should not attend to what . . . generosity and humanity required, but what the Constitution and their duty required."

By way of contrast, Franklin Roosevelt wrote to the chairman of the House Ways and Means Committee in 1935, "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation." Thirty-three years later, Rexford Tugwell, one of the principal architects of the New Deal, would observe, "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them." It is time to end the "tortured interpretations" the modern Court too often produces as it tries to square the Leviathan Congress has created with the plain language of the document. After all, the Constitution was not meant to be the preserve of a privileged few but was meant instead to be understood by the average American, the kind of American who ratified it in the first place.

The importance of clearing the constitutional air cannot be overstated, for candor is the basis of the trust that the American people have largely lost. By its statements and deeds, the new Congress needs to place itself squarely on the side of limited, constitutional government—on the side of the Constitution. As an added benefit, congressional candor may embolden the courts to do what they should have done all along, even in the face of Roosevelt's Court-packing scheme, namely, declare acts of Congress that are unconstitutional to be just that. (If the Roosevelt administration wanted to enlarge the powers of the federal government, it should have done so by urging the amendment of the Constitution, not by coercing the Court to ignore it.)

But constitutional candor is only the beginning. Words need to be followed by deeds. Yet deeds need always to be accompanied by words if the American people are to understand exactly where they are going and why. If they are treated honestly and respectfully, Americans will likely support the process of constitutionally relimiting government. If they do not support that process, then we need to amend the Constitution. In either event, what must end is the intellectual dishonesty that surrounds so much of our modern constitutional debate.

As the process of constitutionally relimiting government unfolds, practical questions will arise, of course, about which reasonable people can have reasonable differences. Indeed, nations that are more socialized than America are discovering—even when there is substantial agreement on the direction of change—that it was much easier to get into their situation than it is now to get out of it. In general, individuals, families, firms, and states may need to adjust in an orderly way to less federal involvement in their lives. Thus, it may be necessary, where appropriate, to phase out rather than to immediately abolish programs that were undertaken without genuine constitutional authority, even though the continuation of such programs amounts to a continuation of unconstitutional activity. It will be important, then, to pay careful attention to the distinction between strategy and tactics.

As relimitation proceeds, however, it will be essential for Congress to keep its eye on the mark and on the general strategy. Fortunately, the Constitution itself can help in that. In fact, what follows is a kind of constitutional road map that focuses on the primary sources of the modern problem—those few clauses in the Constitution that have been used to expand federal power over the century, even if the seeds of that expansion may have been sown in the previous century. These are the sources of power that have been misread—ultimately, by the Supreme Court—to enable Congress to do what the Framers plainly never intended it to do. They are the powers that Congress itself must now relimit if constitutional government is to be restored. In addition to relimiting its powers, however, Congress should act to restore those rights that have fallen into disregard as a result of the expansion of federal power. Each of these steps, as discussed below, will reduce the scope of federal power and enlarge the scope of state and private power.

The Commerce Clause

The growth of federal power and programs over this century—involving the regulation of business, the expansion of "civil rights," the production

of environmental goods, and much else—has taken place in large measure through the power of Congress to regulate "commerce among the states." That power has been read so broadly by the modern Court that Congress today can regulate anything that even "affects" commerce, which in principle is everything. As a result, save for the restraints imposed by the Bill of Rights, the commerce power is now essentially plenary, which is hardly what the Framers intended when they enumerated Congress's powers. Indeed, if they had meant for Congress to be able to do anything it wanted under the commerce power, the enumeration of Congress's other powers—to say nothing of the defense of the doctrine of enumerated powers throughout the *Federalist Papers*—would have been pointless.

The purpose of the Commerce Clause, quite simply, was to enable Congress to ensure the free flow of commerce among the states. Under the Articles of Confederation, state legislatures had enacted tariffs and other protectionist measures that impeded interstate commerce. To break the logjam, Congress was empowered to make commerce among the states "regular." In fact, the need to do so was one of the principal reasons behind the call for a new constitution.

When the Founders drafted and ratified the commerce power, therefore, not remotely did they believe that they were empowering Congress to affirmatively "regulate" the way it does today. Rather, they thought that they were enabling Congress simply to override those state measures that impeded interstate commerce, as Chief Justice Marshall read the power in the first great Commerce Clause case, *Gibbons v. Ogden* (1824). They thought that they were giving Congress a shield to guard against overweening state power, not a sword with which to pursue an endless array of social and economic policies.

The problem today, of course, is that all three branches of the federal government spend most of their time laboring under such policies—regulating, overseeing, enforcing, or adjudicating affairs that arise under statutes that have been "authorized" under this single, brief clause of the Constitution. It is nothing short of preposterous to think that that is what the Framers had in mind when they drafted the Commerce Clause, yet that is what we have come to, constitutionally.

Thus, on November 8, 1994, the very day the 104th Congress was being elected, the Supreme Court was hearing oral argument in *United States v. Lopez,* a case in which the government was defending the power of Congress to regulate the mere possession of a handgun on the ground that such possession "affected" interstate commerce. When Congress

today wants to regulate something not authorized by the Constitution, it bows to the doctrine of enumerated powers by claiming that the thing it is regulating "affects" commerce. That constitutional sleight of hand—reading the limited power the Framers delegated as an unlimited power to regulate anything and everything—must be ended if constitutional government is to be restored.

Limiting Congress's commerce power will not be easy, of course, because many of the ends pursued "under" it are otherwise worthy. The point to be kept in view, however, is absolutely crucial: no matter how worthy the end, if its pursuit is not authorized by the Constitution, there is no power to pursue it. Instead, it must be pursued by state or private action. When Madison and Giles rejected welfare measures—aimed, respectively, at relief for those who had fled an insurrection and relief for victims of a fire—they were not questioning the merits of those measures. Nor was President Grover Cleveland questioning the merits of a measure he vetoed in 1887 that would have provided seeds for drought-stricken farmers, saying that he could "find no warrant for such an appropriation in the Constitution." Rather, Madison, Giles, and Cleveland were saying, simply, that there is no federal power to pursue those ends, however worthy they might otherwise be.

Again, the vast regulatory structure the federal government has erected in the name of the commerce power cannot be ended overnight, in many cases, but the pretense that such programs are constitutional can be ended, even as the programs themselves are phased out over time. From the outset, however, and frequently thereafter, the new Congress should make it clear that it has no plenary power to regulate commerce and that the commerce power it does have, in domestic matters, is limited to ensuring that states do not interfere with the free flow of commerce among them.

The General Welfare Clause

Not until late in the 19th century did the Commerce Clause emerge as a source of expanding federal power, and only with the New Deal did its use explode. By contrast, the General Welfare Clause of article 1, section 8, of the Constitution attracted advocates of federal expansion throughout the 19th century, although here too expansion of federal power under the clause remained relatively modest until the New Deal.

The question early on with the General Welfare Clause was whether it was meant to limit Congress's enumerated powers by requiring them to be exercised for the general rather than for any particular welfare—

whether this clause too was a shield guarding against the misuse of enumerated powers—as Madison, Jefferson, and others argued, or whether the clause instead constituted an independent, enumerated power—albeit limited to serving the general welfare—as was argued by Alexander Hamilton, ever the friend of federal power.

Plainly, Madison, not Hamilton, was correct, for as South Carolina's William Drayton noted in 1828, "If Congress can determine what constitutes the General Welfare and can appropriate money for its advancement, where is the limitation to carrying into execution whatever can be effected by money?" Whatever Congress is barred from doing because there is no power with which to do it, he continued, it could do by simply appropriating the money with which to do it, claiming that it was exercising a power to provide for the general welfare. Like the modern reading of the Commerce Clause, such a reading of the General Welfare Clause would utterly eviscerate the doctrine of enumerated powers, the centerpiece of the Constitution.

Nevertheless, over the 19th century Congress gradually assumed a general welfare power. Thus, sales of land under the Territorial Power Clause evolved into gifts of land for agricultural colleges, then into gifts of proceeds from the sale of land, and finally into gifts from the Treasury generally. As congressional raids on the Treasury increased in the 20th century, legal challenges were brought, but they were frustrated by problems of standing. In 1936, however, the New Deal Court finally heard such a challenge. Coming down on the side of Hamilton on the basic question, a year later the Court went Hamilton one better in the Social Security case, saying that although "the line must still be drawn between one welfare and another, between particular and general," the Court itself would not draw that line. Rather, "the discretion belongs to Congress"—the very branch that was redistributing from the Treasury with ever-greater particularity. Not even Hamilton had called for that.

Today, of course, the redistributive powers of Congress are everywhere—except in the Constitution. The result is the feeding frenzy that is modern Washington, the Hobbesian war of all against all as each tries to get his share and more of the common pot the tax system fills. That must be ended. It is unseemly and wrong. More than that, it is unconstitutional, whatever the slim and cowed majority on the New Deal Court may have said. The Framers did not empower government to take from some and give to others. They did not establish a welfare state.

Like the regulatory structure, the vast redistributive structure the federal government has erected cannot be ended overnight, in many cases, but

the pretense of constitutionality can be ended. And here too the new Congress should make it clear from the outset that it has no independent power to provide for the general welfare—much less for the welfare of particular parties—but instead is limited in exercising its enumerated powers to providing for the general welfare alone.

The Necessary and Proper Clause

Little noticed as a source of expanding federal power, because long abandoned as a restraint on power, is the Constitution's Necessary and Proper Clause, which authorizes Congress "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers." This clause addresses not the ends available to Congress—which the Commerce and General Welfare Clauses have been used to expand—but the means Congress may employ in pursuit of any of its enumerated ends or powers, limiting Congress to means that are both necessary and proper. Were Congress not so limited, were it able to choose any means it wished in pursuit of an enumerated end or power, the constitutional enumeration of powers would prove an illusory restraint indeed.

During the ratification debates, both Madison and Hamilton were anxious to assure those who feared the clause would be a fertile source of power that, with or without it, Congress would still have those implied powers that are necessary for executing explicitly enumerated powers—failing which, enumeration would make no sense. Inclusion of the clause, however, made the requirements of necessity and propriety explicit. Moreover, given the doctrine of enumerated powers—and this is one such power—Congress has no authority to employ means that are not both necessary and proper. Were Congress to employ unnecessary or improper means, it would be acting beyond its authority and hence unconstitutionally.

Unfortunately, the Supreme Court itself gutted this restraint early on when Chief Justice Marshall, in *McCulloch v. Maryland* (1819), the famous National Bank case, held that "necessary" meant "appropriate" rather than a condition "without which," thus making one of the more elementary mistakes of logic—confusing a sufficient with a necessary condition. As a result, Congress has been under no restraint—apart from that imposed by the Bill of Rights, as discussed below—to carefully tailor the means it chooses when pursuing an enumerated power.

A good example—and one on which the new Congress should act—involves the Postal Service. However unwise it may be from several perspectives for the federal government to be in the business of delivering

mail, there can be no doubt that Congress has the constitutional authority "to establish Post Offices." It does not have the authority, however, to bestow monopoly privileges on the postal system, for that means is neither necessary nor proper. The monopoly privilege is not necessary because Congress could easily establish and operate a postal system without prohibiting competition. (If such a system would not be competitive, that is another matter. Note that the Constitution does not require a postal system; it only authorizes one.) And the monopoly privilege is not proper because it violates the rights of private parties to engage in an otherwise lawful business. On both grounds, then, the monopoly privilege is unconstitutional.

The new Congress should take it upon itself, then, to restore the Necessary and Proper Clause to its original purpose—to ensure that the means Congress employs in exercising any of its enumerated powers are both necessary and proper, necessary for exercising those powers and proper in not violating rights retained by the people, to which we now turn.

Rights Retained by the People

The demise of the doctrine of enumerated powers, as just outlined, has had profound and far-reaching implications for our system of government. Today, the presumption is on the side of government power, the burden of resisting that power is on the individual. When a question about the constitutional limits of government power arises, no longer do we ask whether government has a power. Instead, we try to find some right that government's power might violate.

The importance of that shift in focus—from government to the individual, from powers to rights—cannot be overstated. Under the Framers' design, it fell to government, when challenged, to show that it had a power. According to the modern view—except in certain limited areas, as discussed below—government action is simply presumed to be constitutional. Those who want to challenge a given act as unconstitutional show not that the act is unauthorized but that it violates a right the Supreme Court has recognized or might recognize. The burden is upon the individual to show that he has a right, not upon the government to show that it has a power.

Not only does that shift make it more likely, as a practical matter, that government will win—and grow—but the presumption in favor of government turns the Framers' design on its head. Fearing overweening power, which they had just fought a war to overcome, the Framers sought

to limit power by strictly authorizing and enumerating it. In their scheme, the Bill of Rights was an afterthought, added to the Constitution some two years later as a kind of secondary, fall-back defense. Indeed, recognizing the impossibility of enumerating all of our rights, the Framers resorted to the Ninth Amendment by way of remedy: "The enumeration in the Constitution of certain Rights shall not be construed to deny or disparage others retained by the people." Today, rather than interpret that amendment as a function of enumerated powers—where there is no power there is a right—we try instead to tease rights out of its "penumbras" or out of other broadly worded provisions of the Bill of Rights, all because we have abandoned the natural reading of the Constitution. Today, the Bill of Rights is our primary line of defense.

Yet even that defense has been severely eroded—to enable government to grow. Once again, the issues came to a head during the New Deal, from which we emerged with a bifurcated set of rights—"fundamental" and "nonfundamental"—that looks nothing like what the Framers had in mind when they spoke of rights. (That point will be developed below.) But the seeds were sown much earlier—by the slow demise of enumerated powers, the loss of the Fourteenth Amendment's Privileges and Immunities Clause just after the Civil War, and the rise of the Progressive Era view that government should be used to solve social problems. The story—and what now needs to be done—is best told historically, if only in outline.

The Privileges and Immunities Clause

The promise of the Declaration of Independence, the Constitution, and the Bill of Rights has never been perfectly realized for anyone, of course, but no people were more denied it than southern slaves. With the Civil War and the constitutional amendments that followed, that promise was at last secured in law, if not in fact, for the freed slaves. As the debates that surrounded the adoption of the amendments make clear, once emancipation and the right to vote were secured through the Thirteenth and Fifteenth Amendments, respectively, the three main clauses of the Fourteenth Amendment—pertaining to privileges and immunities, due process, and equal protection—were meant to secure all other rights against infringement by the states. The better part of the substantive burden, however, was to be borne by the Privileges and Immunities Clause. Echoing the similar clause of the Constitution itself, which applied against the federal government, "privileges and immunities" referred to our "natural liberties," said the English jurist William Blackstone.

And what are our natural liberties? John Locke, the English philosopher who inspired so many of the Founders, spoke of "Lives, Liberties and Estates, which I call by the general Name, *Property.*" Jefferson transcribed that as "life, liberty, and the pursuit of happiness," while the Constitution and Bill of Rights speak in such generic terms as life, liberty, property, and contract. Perhaps most important, because contemporaneous, was the language of the Civil Rights Act of 1866, which Congress reenacted in 1870, just after the Fourteenth Amendment was ratified. All citizens, the act declared, "have the right to make and enforce contracts, to sue, be parties and give evidence; to inherit, purchase, lease, sell, hold, and convey real personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." Such were the privileges and immunities the Fourteenth Amendment was meant to secure.

Unfortunately, in 1872, shortly after it was adopted, a five-to-four, sharply divided Supreme Court gutted the Privileges and Immunities Clause in the *Slaughter-House* cases, upholding a classic piece of special-interest legislation, a Louisiana statute chartering a private monopoly. The effect of the statute was to prevent butchers who were not part of the monopoly, including black butchers, from practicing their trade. Apart from a brief appearance in 1935, which was overridden in 1940, the clause has never been revived; nor has the federal version played any significant role in constitutional adjudication.

If the new Congress is serious about our natural liberties, then, it will revisit the debates that surrounded the adoption of the Privileges and Immunities Clause and will breathe new life into the clause, thereby reminding the Court that the plain language of the Constitution is not to be ignored. That clause reads, quite simply: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

In breathing life back into the clause, however, Congress needs to be sensitive to a certain "states'-rights" objection, often associated with concern about "judicial activism" and about rights jurisprudence generally. The concern is not without merit, for unlike enumerated powers jurisprudence—at least in principle—rights jurisprudence is always an uncertain business, requiring the Court to have a fairly well worked out theory of rights, which most jurists do not have. That is why the Framers—who imagined the courts would be "the bulwark of our liberties," as Madison put it—placed their emphasis on enumerated powers, not on unenumerated and unenumerable rights. Rather than expect jurists to dis-

cern rights ab initio, that is, the Framers expected them to discern and define explicitly enumerated constitutional powers, absent which there would be rights.

The concern arises in the case of the Privileges and Immunities Clause because it is directed against the states, not against the federal government, which would seem to deprive jurists of their enumerated-powers touchstone as they try to discern rights only generally described in the clause. The concern is misplaced, however, for the clause prohibits states from abridging "the privileges or immunities of citizens *of the United States,*" which are discerned and defined in light of enumerated *federal* powers, whatever the source of abridgement, federal or state. To define our privileges and immunities, therefore, judges need be no more "active" than they would need to be in interpreting enumerated federal powers, which is their principal responsibility. As for running roughshod over states' rights, it was precisely to deny states any "right" to run roughshod over their citizens' rights—their rights as Americans—that the Civil War Amendments were passed in the first place.

In sending power back to the states and to the people, then, the new Congress must be careful not to signal that states, with their reacquired powers, can handle local problems in any way they wish. The authors of the Civil War Amendments got it right when they grounded those amendments on our founding principles. For just as the Commerce Clause was written to enable Congress to ensure that commerce would be free from state interference, so too the Civil War Amendments were written to enable Congress to ensure that individuals would be free from state interference. Reviving the Constitution's Privileges and Immunities Clauses, including the federal version, will go far toward ensuring an America free from overweening power, whether wielded by federal or by state officials.

Property Rights

With the demise of the Privileges and Immunities Clause, Jim Crow had a free hand in the South, the effects of which are with us still. Meanwhile, in the North, the Industrial Revolution was setting in—and with it the idea of laissez faire. Rights of property and contract, the foundations of a free society, were in vogue in both the legislatures and the courts as late 19th century America witnessed unprecedented economic growth.

But the seeds of change were being sown at that time as well, in the universities, the churches, and the social welfare movement. With

industrialization and urbanization came "social problems." With the advance of science came the belief that such problems could be solved through "social science." It was but a short step to believing that "we" could solve those problems through public action. Thus emerged the Progressive Era and the belief in government. Far from a "necessary evil" needing restraint, as the Framers had seen it, government for the progressives was an institution of good, an instrument of social change, an engine of social progress. By century's end the editors of the *Nation* could write, in a piece lamenting the eclipse of liberalism, that "the Declaration of Independence no longer arouses enthusiasm; it is an embarrassing instrument which requires to be explained away." The shift in thinking could not have been greater. The New Deal marked simply the institutionalization of ideas that found their roots in the Progressive Era.

Before the shift was secured through the New Deal's "tortured interpretation" of the Constitution, however, it had already begun with the most basic right of all, the right to which all other rights can be reduced, whether "lives, liberties, or estates"—property. If individuals could use their property as they wished, save only for respecting the equal rights of others, then how would social planners ever be able to coordinate uses toward socially progressive ends? Plainly, property and the rights of property owners stood in the way of social progress.

War having ever been the engine of the state, World War I under the progressive Mr. Wilson was no exception—in fact, was perhaps the exemplar. During the course of that war, the cities of New York and Washington imposed rent controls, a paradigmatic example of using property owners for the public good without compensating them for that use. Landlords in those cities thought that the Fifth Amendment's prohibition against taking private property for public use without just compensation would make them whole, and so in 1921 they found themselves before the Supreme Court and Mr. Justice Holmes, himself a thoroughly schooled product of the Progressive Era he had also helped to shape.

Unfortunately for those landlords, Justice Holmes found that the controls were justified by "exigent circumstances"—the very circumstances that in one form or another were being used increasingly by legislatures, if not by courts, to justify a whole range of progressive programs. But a year later, when faced with a statute that transferred property rights from coal companies to owners of surface estates—rights those owners had previously transferred to the companies by contract—Justice Holmes went the other way, saying that if a regulation goes "too far" it amounts to a

taking requiring compensation under the Fifth Amendment's Takings Clause. With that, we have had what Justice Scalia in 1992 called 70-odd years of "essentially ad hoc" takings jurisprudence, even as he was adding yet another year to the string. Today, there is no worthy end—from the uniformity of zoning to the preservation of flora, fauna, wetlands, views, historic sites, and more—that property owners are not expected to pay for by forgoing their rights and bearing the loss that follows.

It is time to end such theft, which is precisely what to call it when government takes what it wants from individuals without paying for it. The Framers included the Takings Clause in the Bill of Rights to make it clear that if government, in exercising any of its enumerated powers, had to take private property for a public purpose, the cost of that property would be borne by the public that wanted it, not by the individual from whom it had to be taken. Not only would that make the individual whole and protect him from being further used by the public, but it would discipline the public appetite for public goods. If the public had to pay for what it took, it would think twice about whether the goods were worth the price. Absent that discipline, the public appetite would in principle be infinite—which is precisely what has happened under the reign of "free" regulatory takings.

Few have had any difficulty understanding or applying the takings principles when the entire holding, including the underlying estate, is taken. The problem has arisen when the underlying estate is left with the individual owner but uses or other estates are taken through regulation. With the rise of the regulatory state over the course of this century, such regulatory takings have become all too common, often leaving owners with greatly devalued property—sometimes with essentially worthless property. In such cases, under current Supreme Court law, the owner is entitled to compensation only if his economic loss is total or he has suffered an actual physical invasion. What the Court has done, in effect, is turn the Takings Clause on its head: rather than determine whether there is a taking and then ask what the value of the loss is, the Court asks what the value of the loss is to determine whether there is a taking.

As every first-year law student learns, "property" is not simply the underlying estate but all the uses that go with it, which the law divides into separate estates in any number of contexts. Madison put it well: "As a man is said to have a right to his property, he may be equally said to have a property in his rights." Take one of those rights or uses or estates through regulation, and you take what belongs to the owner. When govern-

ment regulations take otherwise legitimate uses—which exclude uses that themselves take, such as those that create nuisances or endanger unrelated parties—government must pay for the benefits it thereby acquires, just as any private citizen would have to do if he wanted an easement over his neighbor's property. There is nothing in the Takings Clause, then, that prevents government from pursuing worthy public ends—from the preservation of habitat to the promotion of whatever—by taking what it needs for those ends. The clause simply requires that government pay for what it takes.

Thus, when Holmes said that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," he overstated the point, but not by much. Securing rights through the police power is the principal function of government, which requires no compensation to those whose actions are thus regulated because those actions are wrong to begin with. A good deal of environmental regulation—the part that is nuisance law writ large—will fall under the police power rationale and so will not require compensation. Other regulations, which benefit and burden classes that are roughly coextensive, involve in-kind compensation and so do not draw on the public fisc either. But regulations that involve unequally distributed benefits and burdens, while enjoying no police power rationale, require compensation either from the beneficiaries or from the public that orders the regulations. If that requirement results in less government—as it likely will—then it means simply that the public, when required to pay for public goods, will demand fewer of them. That should hardly surprise.

The alternative is to go "off budget," which is what we do now when we make individuals pay for the goods the public demands. Not only is that wrong morally and constitutionally but it is foolish fiscally, for we deceive ourselves about the true costs of the public goods we thus acquire. The direct costs fall silently, in most cases, on the individuals from whom we take. But those costs are only part of the equation. The indirect costs include depressed property values (and tax bases), inefficient uses, unexploited opportunities, and much more, all of which are borne by the entire community.

When the Framers wrote the Takings Clause, they got the ethics, law, and economics right. When we disregard the clause, we fail on all counts. The new Congress needs to breathe life back into this most basic of rights by enacting legislation that makes it clear (1) that "property" includes all the uses that can be made of a possession and (2) that whenever a

regulation takes an otherwise legitimate use, just compensation for the owner is required.

Economic Liberties

The importance of the property right cannot be overstated. Broadly understood as "lives, liberties, and estates," property separates one individual from another, forming the basis of our entire legal system and of the free society itself. To the extent that the property right is compromised, so too are the rule of law and the freedom it secures. The classical theorists understood that, which is why they said repeatedly that the purpose of government is to secure property.

But if the just-compensation principle is compromised, as happened before the New Deal, there is still the question of whether an owner has any way to resist public control of his property. Plainly, that question was brought to the fore by the Progressive Era belief in public planning, for the corollary of more public planning is less private planning and control. During the New Deal, however, the question was presented starkly with respect to controlling the means of production: were those who owned the means to control them, or was the public to be in control?

During the first third of the 20th century, both federal and state legislatures had chipped away at private control as the Court sought to restrain those legislative efforts, episodically, with theories of substantive due process. But those theories were less than well thought out. What is more, they were up against the intellectual climate of the day, which is no small matter for jurists trying to justify their decisions in written opinions.

By the time the Court faced the legislative juggernaut of the New Deal, therefore, it was hardly in a position of strength. Still, it managed to hold the line, for the most part, until Roosevelt introduced his notorious Court-packing scheme. There followed the "switch in time that saved nine," which culminated in famous footnote 4 of *Carolene Products* (1938) and in the end of economic liberty as a serious constitutional right. The New Deal was not to be denied—either by enumerated powers or by individual rights.

Long forgotten for its facts, which involved a blatant piece of special-interest legislation, *Carolene Products* stands today for a doctrine of bifurcated rights and review. There are "fundamental" rights—involving voting, speech, and other incidents of democracy and, in the years since, various rights of "personhood." Then there are "nonfundamental" rights—involving "ordinary commercial relations" such as property rights

and freedom of contract. Legislation that implicates fundamental rights gets strict judicial scrutiny: the presumption is against such legislation; the burden of demonstrating constitutionality is on the government. By contrast, legislation that implicates nonfundamental rights gets minimal judicial scrutiny: it is presumed constitutional; the burden is on the individual to show that it is not.

Needless to say, the doctrine of bifurcated rights and review is nowhere to be found in the Constitution. It was made of whole cloth, to pave the way for the modern regulatory, redistributive state. Having finally dispatched the doctrine of enumerated powers the year before, the Court now dispatched the Bill of Rights, save for a few preferred rights. The way was clear at last for the growth of government.

A perfect, if somewhat comical, example of what the bifurcation doctrine has become can be found in the Supreme Court's June 1994 *Turner Broadcasting* decision, which yielded no fewer than five separate opinions and many more cross-concurrences and dissents, all by way of deciding whether the Cable TV Act of 1992 was constitutional. Being both speech and commerce, like everything else in life, cable TV presented a problem for the bifurcation theory. What emerged from the decision, therefore, was not two but four "levels" of judicial review: newspaper regulation gets strict scrutiny; regulation of "mere" commerce gets minimal scrutiny; between those, broadcast regulation gets "relaxed" scrutiny; cable regulation gets scrutiny somewhere between relaxed and strict. If constitutional law is no longer understood by the layman, neither does the Constitution seem any longer to be understood by the Court.

Nevertheless, the practical result of the bifurcation theory has been an explosion of economic regulation—from local licensure to the regulation of international trade and countless matters in between—that is largely immune from constitutional restraint, unless the issues can be recast to in some way implicate "fundamental" rights. That regulation is the death of economic liberty. Nothing in the Constitution remotely suggests that economic liberty should be treated any differently than any other kind of liberty.

The new Congress should therefore move early on to declare (1) that liberty is indivisible, (2) that the doctrine the New Deal Court set forth in footnote 4 of *Carolene Products*—recognized today as the foundation of modern constitutional law—is no part of the Constitution, (3) that no legislation is to be "presumed constitutional" except to establish an initial burden of proof in litigation, and (4) that all legislation is subject to strict

judicial scrutiny as to (a) whether it is enacted pursuant to a constitutionally enumerated power, (b) whether it employs means that are both necessary and proper, and (c) whether it respects both enumerated and unenumerated constitutional rights.

Conclusion

When George Washington reminded his countrymen that "government is not reason, it is not eloquence, it is force," he was voicing a simple insight that is as true today as it was then. Over the 20th century we have lost sight of that truth and have paid the price with more government than any of us could ever have wanted. It is time to go forward by looking back to the principles that brought us together in the first place: individual liberty, individual responsibility, limited government—all secured through fundamental law. By its words and its deeds, the 104th Congress can start the process of restoring constitutional government in America. It is time to begin.

Suggested Readings

Bailyn, Bernard. *The Ideological Origins of the American Revolution.* Cambridge, Mass.: Belknap, 1967.

Corwin, Edward S. *The "Higher Law" Background of American Constitutional Law.* Ithaca, N.Y.: Cornell University Press, 1955.

Dorn, James A., and Henry G. Manne, eds. *Economic Liberties and the Judiciary.* Fairfax, Va.: George Mason University Press, 1987.

Epstein, Richard A. "The Proper Scope of the Commerce Power." *Virginia Law Review* 73 (1987).

———. *Takings: Private Property and the Power of Eminent Domain.* Cambridge, Mass.: Harvard University Press, 1985.

Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers.* New York: Mentor, 1961.

Locke, John. "Second Treatise of Government." In *Two Treatises of Government.* Edited by Peter Laslett. New York: Mentor, 1965.

Pilon, Roger. "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles." *Notre Dame Law Review* 68 (1993).

———. "On the Folly and Illegitimacy of Industrial Policy." *Stanford Law & Policy Review* 5 (1993).

Siegan, Bernard H. *Economic Liberties and the Constitution.* Chicago: University of Chicago Press, 1980.

Warren, Charles. *Congress as Santa Claus: Or National Donations and the General Welfare Clause of the Constitution.* 1932. Reprint, New York: Arno Press, 1978.

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