Cato Handbook for Policymakers

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3. Congress, the Courts, and the Constitution

Congress should

- encourage constitutional debate in the nation by engaging in constitutional debate in Congress, as was urged by the House Constitutional Caucus during the 104th Congress;
- enact nothing without first consulting the Constitution for proper authority and then debating that question on the floors of the House and Senate;
- move toward restoring constitutional government by carefully returning power wrongly taken over the years from the states and the people; and
- reject the nomination of judicial candidates who do not appreciate that the Constitution is a document of delegated, enumerated, and thus limited powers.

In a chapter devoted to advising members of Congress about their responsibilities under the Constitution, one hardly knows where to begin—so far has Congress taken us from constitutional government. James Madison, the principal author of the Constitution, assured us in *Federalist* No. 45 that the powers of the federal government under that document were ''few and defined.'' No one believes that describes Washington's powers today. That circumstance raises fundamental questions about the constitutional legitimacy of modern American government.

For a while after the realigning election of 1994, it looked like Congress was at last going to rethink its seemingly inexorable push toward ever-larger government. In fact, the 104th Congress saw the creation in the House of a 100-strong Constitutional Caucus dedicated to promoting the restoration of limited constitutional government. And shortly thereafter, President Clinton announced that the era of big government was over.

But the spirit of that Congress waned in relatively short order. Today, it is hardly to be found.

The principles of the matter have not gone away, however, and nor, of course, has the Constitution itself. It is still the law of the land, however little Congress heeds it. And the moral, political, and economic implications of limited constitutional government have not changed either. That kind of government is the foundation for liberty, prosperity, and the vision of equality that many Americans still cherish—to say nothing of those around the world who in recent years have taken their inspiration from America's Constitution for limited government.

Yet all too many members of Congress seem still to believe that the good life is brought about primarily by government programs, not by individuals acting in their private capacities. And they believe equally that the Constitution authorizes them to enact such programs, even as many Americans know better. Below the level that polling usually reaches, those Americans understand that government rarely solves the problems it purports to solve; in fact, it usually makes those problems worse. More deeply, they understand that a life dependent on government is too often not only impoverishing but impoverished.

Reduce Government

If we are to move, then, toward restoring constitutional government—toward a world in which government is no longer expected to solve our problems; a world in which individuals, families, and communities assume that responsibility, indeed, take up that challenge—the basic questions are how much and how fast to reduce government. Those are not questions about how to make government run better—government will always be plagued by waste, fraud, and abuse—but about the fundamental role of government in this nation.

How Much to Reduce Government

The first of those questions—how much to reduce government—would seem on first impression to be a matter of policy. Yet in America, if we take the Constitution seriously, it is not for the most part a policy question, a question about what we may or may not want to do. For the Founding Fathers thought long and hard about the proper role of government in our lives, and they set forth their thoughts in a document that explicitly enumerates the powers of the federal government.

Thus, setting aside for the moment all practical concerns, the Constitution tells us as a matter of first principle how much to reduce government by telling us, first, what powers the federal government in fact has and, second, how governments at all levels must exercise their powers—by respecting the rights of the people.

That means that if a federal power or federal program is not authorized by the Constitution, it is illegitimate. Given the present size of government, that is a stark conclusion, to be sure. But it flows quite naturally from the Tenth Amendment, the final statement in the Bill of Rights, which says, ''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.'' In a nutshell, the Constitution establishes a government of delegated, enumerated, and thus limited powers. As the *Federalist Papers* make clear, the Constitution was written not simply to empower the federal government but to limit it as well.

Since the Progressive Era, however, the politics of government as problem solver has dominated our public discourse. And since the constitutional revolution of the New Deal, following President Franklin Roosevelt's notorious Court-packing scheme, the Supreme Court has abetted that view by standing the Constitution on its head, turning it into a document of effectively unenumerated and hence unlimited powers. (For a fuller discussion of the Constitution and the history of its interpretation, see Chapter 3 of the *Cato Handbook for Congress: 104th Congress*.)

Indeed, limits on government today, when we've had them, have come largely from political and budgetary rather than from constitutional considerations. Thus, it has not been because of any perceived lack of constitutional authority that government in recent years has failed to undertake a program but because of practical limits on the power of government to tax and borrow—and even those limits have failed in times of economic prosperity. That is not the mark of a limited, constitutional republic. It is the mark of a parliamentary system, limited only by periodic elections.

The Founding Fathers could have established such a system, of course. They did not. But we have allowed those marks of a parliamentary system to supplant the system they gave us. To restore truly limited government, therefore, we must do more than define the issues as political or budgetary. We must go to the heart of the matter and raise the underlying constitutional questions. In a word, we must ask the most fundamental question of all: Does the government have the authority, the constitutional authority, to do what it is doing?

How Fast to Reduce Government

As a practical matter, however, before Congress or the courts can relimit government as it was meant to be limited by the Constitution, they need to take seriously the problems posed by the present state of public debate on the subject. It surely counts for something that a substantial number of Americans—to say nothing of the organs of public opinion—have little apprehension of or appreciation for the constitutional limits on activist government. Thus, in addressing the question of how fast to reduce government, we must recognize that the Supreme Court, after over 70 years of arguing otherwise, is hardly in a position, by itself, to relimit government in the far-reaching way a properly applied Constitution requires. But neither does Congress at this point have sufficient moral authority, even if it wanted to, to end tomorrow the vast array of programs it has enacted over the years with insufficient constitutional authority.

For either Congress or the Court to be able to do fully what should be done, therefore, a proper foundation must first be laid. In essence, the climate of opinion must be such that a sufficiently large portion of the American public stands behind the changes that are undertaken. When enough people come forward to ask—indeed, to demand—that government limit itself to the powers the Constitution gives it, thereby freeing individuals, families, and communities to solve their own problems, we will know we are on the right track.

Fortunately, a change in the climate of opinion on such basic questions has been under way for some time now. The debate today is very different from what it was in the 1960s and 1970s. But there is a good deal more to be done before Congress and the courts can move in the right direction in any far-reaching way, much less say that they have restored constitutional government in America. To continue the process, then, Congress should take the lead in the following ways.

Encourage Constitutional Debate in the Nation by Engaging in Constitutional Debate in Congress

Under the leadership of a number of House freshmen, an informal Constitutional Caucus was established in the ''radical'' 104th Congress. Its purpose was to encourage constitutional debate in Congress and the nation and, in time, to restore constitutional government. Unfortunately, the caucus has been moribund since then. It needs to be revived—along with the spirit of the 104th Congress—and its work needs to be expanded.

The caucus was created in response to the belief that the nation had strayed very far from its constitutional roots and that Congress, absent leadership from elsewhere in government, should begin addressing the problem. By itself, of course, neither the caucus nor the entire Congress can solve the problem. To be sure, in a reversal of all human experience, Congress could agree in a day to limit itself to its enumerated powers and then roll back the countless programs it has enacted by exceeding that authority. But it would take authoritative opinions from the Supreme Court, reversing a substantial body of largely post–New Deal decisions, to embed those restraints in ''constitutional law''—even if they have been embedded in the Constitution from the outset, the Court's modern readings of the document notwithstanding.

The Goals of the Constitutional Caucus

The ultimate goal of the caucus and Congress, then, should be to encourage the Court to reach such decisions. But history teaches, as noted above, that the Court does not operate entirely in a vacuum, that to some degree public opinion is the precursor and seedbed of its decisions. Thus, the more immediate goal of the caucus should be to influence the debate in the nation by influencing the debate in Congress. To do that, it is not necessary or even desirable, in the present climate, that every member of Congress be a member of the caucus—however worthy that end might ultimately be—but it is necessary that those who join the caucus be committed to its basic ends. And it is necessary that members establish a clear agenda for reaching those ends.

To reduce the problem to its essence, members of Congress are besieged daily by requests to enact countless measures to solve endless problems. Indeed, listening to much of the recent campaign debate, one might conclude that no problem is too personal or too trivial to warrant the attention of the federal government. Yet most of the ''problems'' Congress spends most of its time addressing—from health care to mortgages to retirement security to economic competition—are simply the personal and economic problems of life that individuals, families, and firms, not governments, should be addressing. What is more, as a basic point of constitutional doctrine, under a constitution like ours, interpreted as ours was meant to be interpreted, there is little authority for government at any level to address such problems.

Properly understood and used, then, the Constitution can be a valuable ally in the efforts of the caucus and Congress to reduce the size and scope

of government. For in the minds and hearts of most Americans, it remains a revered document, however little it may be understood by a substantial number of them.

The Constitutional Vision

If the Constitution is to be thus used, however, the principal misunderstanding that surrounds it must be recognized and addressed. In particular, the modern idea that the Constitution, without further amendment, is an infinitely elastic document that allows government to grow to meet public demands of whatever kind must be challenged. More Americans than presently do must come to appreciate that the Founding Fathers, who were keenly aware of the expansive tendencies of government, wrote the Constitution precisely to check that kind of thinking and that possibility. To be sure, the Founders meant government to be our servant, not our master, but they meant it to serve us in a very limited way—by securing our rights, as the Declaration of Independence says, and by doing those few other things that government does best, as spelled out in the Constitution.

In all else, we were meant to be free—to plan and live our own lives, to solve our own problems, which is what freedom is all about. Some may characterize that vision as tantamount to saying, ''You're on your own,'' but that kind of response simply misses the point. In America, individuals, families, and organizations have never been ''on their own'' in the most important sense. They have always been members of communities, of civil society, where they could live their lives and solve their problems by following a few simple rules about individual initiative and responsibility, respect for property and promise, and charity toward the few who need help from others. Massive government planning and programs have upset that natural order of things—less so in America than elsewhere, but very deeply all the same.

Those are the issues that need to be discussed, both in human and in constitutional terms. We need, as a people, to rethink our relationship to government. We need to ask not what government can do for us but what we can do for ourselves and, where necessary, for others—not through government but apart from government, as private citizens and organizations. That is what the Constitution was written to enable. It empowers government in a very limited way. It empowers people—by leaving them free—in every other way.

To proclaim and eventually secure that vision of a free people, the Constitutional Caucus should reconstitute itself and rededicate itself to

that end at the beginning of the 111th Congress and the beginning of every Congress thereafter. Standing apart from Congress, the caucus should nonetheless be both of and above Congress—as the constitutional conscience of Congress. Every member of Congress, before taking office, swears to support the Constitution—hardly a constraining oath, given the modern Court's open-ended reading of the document. Members of the caucus should dedicate themselves to the deeper meaning of that oath. They should support the Constitution the Framers gave us, as amended by subsequent generations, not as ''amended'' by the Court's expansive interpretations.

Encouragement of Debate

Acting together, the members of the caucus could have a major effect on the course of public debate in this nation—not least, by virtue of their numbers. What is more, there is political safety in those numbers. As Benjamin Franklin might have said, no single member of Congress is likely to be able to undertake the task of restoring constitutional government on his own, for in the present climate he would surely be hanged, politically, for doing so. But if the caucus hangs together, the task will be made more bearable and enjoyable—and a propitious outcome made more likely.

On the caucus's agenda, then, should be those specific undertakings that will best stir debate and thereby move the climate of opinion. Drawn together by shared understandings, and unrestrained by the need for serious compromise, the members of the caucus are free to chart a principled course and employ principled means, which they should do.

They might begin, for example, by surveying opportunities for constitutional debate in Congress, then making plans to seize those opportunities. Clearly, when new bills are introduced, or old ones are up for reauthorization, an opportunity is presented to debate constitutional questions. But even before that, when plans are discussed in party sessions, members should raise constitutional issues. Again, the caucus might study the costs and benefits of eliminating clearly unconstitutional programs, the better to determine which can be eliminated most easily and quickly.

Above all, the caucus should look for strategic opportunities to employ constitutional arguments. Too often, members of Congress fail to appreciate that if they take a principled stand against a seemingly popular program—and state their case well—they can seize the moral high ground and ultimately prevail over those who are seen in the end as being more politically driven.

All of that will stir constitutional debate—which is just the point. For too long in Congress that debate has been dead, replaced by the often-dreary budget debate. This nation was not established by men with green eyeshades. It was established by men who understood the basic character of government and the basic right to be free. That debate needs to be revived. It needs to be heard not simply in the courts—where it is twisted through modern ''constitutional law''—but in Congress as well.

Enact Nothing without First Consulting the Constitution for Proper Authority and Then Debating That Question on the Floors of the House and the Senate

It would hardly seem necessary to ask Congress, before it enacts any measure, to cite its constitutional authority for doing so. After all, is that not simply part of what it means, as a member of Congress, to swear to support the Constitution? And if Congress's powers are limited by virtue of being enumerated, presumably there are many things Congress has no authority to do, however worthy those things might otherwise be. Yet so far have we strayed from constitutional thinking that such a requirement is today treated perfunctorily—when it is not ignored altogether.

The most common perfunctory citations—captured ordinarily in constitutional boilerplate—are to the general welfare and commerce clauses of the Constitution. It is no small irony that both those clauses were written as shields against overweening government; yet today they are swords of federal power.

The General Welfare Clause

The general welfare clause of Article I, section 8, of the Constitution was meant to serve as a brake on the power of Congress to tax and spend in furtherance of its enumerated powers or ends: the spending that attended the exercise of an enumerated power had to be for the *general* welfare, not for the welfare of particular parties or sections of the nation.

That view, held by Madison, Jefferson, and most others, stands in marked contrast to the view of Hamilton—that the Constitution established an *independent* power to tax and spend for the general welfare. But as South Carolina's William Drayton observed on the floor of the House in 1828, Hamilton's view would make a mockery of the doctrine of enumerated powers, the centerpiece of the Constitution, rendering the enumeration of Congress's other powers superfluous: whenever Congress wanted to do something it was barred from doing by the absence of a power to do

so, it could simply declare the act to be serving the ''general welfare'' and get out from under the limits imposed by enumeration.

That, unfortunately, is what happens today. In 1936, the Court came down, almost in passing, on Hamilton's side, declaring that there is an independent power to tax and spend for the general welfare. Then in 1937, in upholding the constitutionality of the new Social Security program, the Court completed the job when it stated the Hamiltonian view not as dicta but as doctrine. It then reminded Congress of the constraints imposed by the word ''general,'' but added that the Court would not police that restraint. Rather, Congress would be left to police itself, the very Congress that was distributing money from the treasury with ever greater particularity. Since that time, the relatively modest redistributive schemes that preceded the New Deal have grown exponentially until today they are everywhere.

The Commerce Clause

The commerce clause of the Constitution, which grants Congress the power to regulate ''commerce among the states,'' was also written primarily as a shield—against overweening *state* power. Under the Articles of Confederation, states had erected tariffs and other protectionist measures that impeded the free flow of commerce among the states. Indeed, the need to break the logjam that resulted was one of the principal reasons for the call for a convention in Philadelphia in 1787. To address the problem, the Framers gave *Congress* the power to regulate—or ''make regular''—commerce among the states. It was thus meant to be a power primarily to facilitate free trade.

That functional account of the commerce power is consistent with the original understanding of the power, the 18th-century meaning of ''regulate,'' and the structural limits entailed by the doctrine of enumerated powers. Yet today the functional account is all but unknown. Following decisions by the Court in 1937 and 1942, Congress has been able to regulate anything that even ''affects'' interstate commerce, which, in principle, is everything. Far from regulating to ensure the free flow of commerce among the states, much of that regulation, for all manner of social and economic purposes, actually frustrates the free flow of commerce.

As the explosive growth of the modern redistributive state has taken place almost entirely under the general welfare clause, so, too, the growth of the modern regulatory state has occurred almost entirely under the

commerce clause. That raises a fundamental question, of course: If the Framers had meant Congress to be able to do virtually anything it wanted under those two simple clauses alone, why did they bother to enumerate Congress's other powers, or bother to defend the doctrine of enumerated powers throughout the *Federalist Papers*? Had they meant that, those efforts would have been pointless.

Lopez and Its Aftermath

Today, as noted earlier, congressional citations to the general welfare and commerce clauses usually take the form of perfunctory boilerplate. When it wants to regulate some activity, Congress makes a bow to the doctrine of enumerated powers by claiming congressional findings that the activity at issue ''affects'' interstate commerce—say, by preventing interstate travel. Given those findings, Congress then claims it has authority to regulate the activity under its power to regulate commerce among the states.

Thus, in summer 1996, when the 104th Congress was pressed to do something about what looked at the time like a wave of church arsons in the South, it sought to broaden the already doubtful authority of the federal government to prosecute such acts by determining that church arsons ''hinder interstate commerce'' and ''impede individuals in moving interstate.'' Never mind that the prosecution of arson has traditionally been a state responsibility, there being no general federal police power in the Constitution. Never mind that church arsons have virtually nothing to do with interstate commerce, much less with the free flow of goods and services among the states. The commerce clause rationale, set forth in boilerplate language, was thought by Congress to be sufficient to enable it to move forward and enact the Church Arson Prevention Act of 1996—unanimously, no less.

Yet only a year earlier, in the celebrated case of *United States v. Lopez,* the Supreme Court had declared, for the first time in nearly 60 years, that Congress's power under the commerce clause had limits. To be sure, the Court raised the bar against federal regulation only slightly: Congress would have to show that the activity it wanted to regulate ''substantially'' affected interstate commerce, leading Justice Thomas to note in his concurrence that the Court was still a good distance from a proper reading of the clause. Nevertheless, the decision was widely heralded as a shot across the bow of Congress. And many in Congress saw it as confirming at last their own view that the body in which they served was simply out of

control, constitutionally. Indeed, when it passed the act at issue in *Lopez*, the Gun-Free School Zones Act of 1990, Congress had not even bothered to cite any authority under the Constitution. In what must surely be a stroke of consummate hubris—and disregard for the Constitution—Congress simply assumed that authority.

But to make matters worse, despite the *Lopez* ruling—which the Court reinforced in May 2000 when it found parts of the Violence Against Women Act unconstitutional on similar grounds—Congress passed the Gun-Free School Zones Act again in September 1996. This time, of course, the boilerplate was included—even as Sen. Fred Thompson (R-TN) was reminding his colleagues from the floor of the Senate that the Supreme Court had recently told them that they ''cannot just have some theoretical basis, some attenuated basis'' under the commerce clause for such an act. The prosecution of gun possession near schools—like the prosecution of church arsons, crimes against women, and much else—is very popular, as state prosecutors well know. But governments can address problems only if they have authority to do so, not from good intentions alone. Indeed, the road to constitutional destruction is paved with good intentions.

Congressional debate on these matters is thus imperative: it is not enough for Congress simply to say the magic words—''general welfare clause'' or ''commerce clause''—to be home free, constitutionally. Not every debate will yield satisfying results, as the examples above illustrate. But if the Constitution is to be kept alive, there must at least be debate. Over time, good ideas tend to prevail over bad ideas, but only if they are given voice. The constitutional debate must again be heard in the Congress of the United States as it was over much of our nation's history, and it must be heard before bills are enacted. The American people can hardly be expected to take the Constitution and its limits on government seriously if their elected representatives do not.

Move toward Restoring Constitutional Government by Carefully Returning Power Wrongly Taken over the Years from the States and the People

If Congress should enact no new legislation without grounding its authority to do so securely in the Constitution, so too should it begin repealing legislation not so grounded, legislation that arose by assuming power that rightly rests with the states or the people. To appreciate how daunting a task that will be, simply reflect again on Madison's observation

that the powers of the federal government under the Constitution are ''few and defined.''

But the magnitude of the task is only one dimension of its difficulty. Let us be candid: many in Congress will oppose any efforts to restore constitutional government for any number of reasons, ranging from the practical to the theoretical. Some see their job as one primarily of representing the interests of their constituents, especially the short-term interests reflected in the phrase ''bringing home the bacon.'' Others simply like big government, whether because of an ''enlightened'' Progressive Era view of the world or because of a narrower, more cynical interest in the perquisites of enhanced power. Still others believe sincerely in a ''living constitution,'' one extreme form of which—the ''democratic'' form—imposes no limit whatsoever on government save for periodic elections. Finally, there are those who understand the unconstitutional and hence illegitimate character of much of what government does today but believe it is too late in the day to do anything about it. All those people and others will find reasons to resist the discrete measures that are necessary to begin restoring constitutional government. Yet where necessary, their views will have to be accommodated as the process unfolds.

Maintenance of Support for Limited Government

Given the magnitude of the problem, then, and the practical implications of repealing federal programs, a fair measure of caution is in order. As the nations of Eastern Europe and the former Soviet Union have learned, it is relatively easy to get into socialism—just seize all property and labor and place it under state control—but much harder to get out of it. It is not simply a matter of returning what was taken, for much has changed as a result of the taking. People have died and new people have come along. Public law has replaced private law. And new expectations and dependencies have arisen and become settled over time. The transition to freedom that many of those nations have experienced, to one degree or another, is what we and many other nations around the world today are facing, to a lesser extent, as we too try to reduce the size and scope of our governments.

As programs are reduced or eliminated, then, care must be taken to do as little harm as possible—for two reasons at least. First, there is some sense in which the federal government today, vastly overextended though it is, stands in a contractual relationship with the American people. That is a very difficult idea to pin down, however. For once the genuine

contract—the Constitution—has broken down, the ''legislative contracts'' that arise to take its place invariably reduce, when parsed, to programs under which some people have become dependent on others, although neither side had a great deal to say directly about the matter at the outset. Whatever its merits, that contractual view is held by a good part of the public, especially in the case of so-called middle-class entitlements.

That leads to the second reason that care must be taken in restoring power to the states and the people, namely, that the task must be undertaken, as noted earlier, with the support of a substantial portion of the people—ideally, at the urging of those people. Given the difficulty of convincing people—including legislators—to act against their relatively short-term interests, it will take sound congressional judgment about where and when to move. More important, it will take keen leadership, leadership that can frame the issues in a way that will communicate both the rightness and the soundness of the decisions that are required.

In exercising that leadership, there is no substitute for keeping ''on message'' and for keeping the message simple, direct, and clear. The aim, again, is both freedom and the good society. We need to appreciate how the vast government programs we have created over the years have actually reduced the freedom and well-being of all of us—and have undermined the Constitution besides. Not that the ends served by those programs are unworthy—few government programs are undertaken for worthless ends. But individuals, families, private firms, and communities could accomplish most of those ends, voluntarily and at far less cost, if only they were free to do so—especially if they were free to keep the wherewithal that is necessary to do so. If individual freedom and individual responsibility are values we cherish—indeed, are the foundations of the good society—we must come to appreciate how our massive government programs have undermined those values and, with that, the good society itself.

Redistributive Programs

Examples of the kinds of programs that should be returned to the states and the people are detailed elsewhere in this *Handbook*, but a few are in order here. Without question, the most important example of devolution to come from the ''radical'' 104th Congress was in the area of welfare. However flawed the final legislation may have been from both a constitutional and a policy perspective, it was still a step in the right direction. Ultimately, as will be noted later in a more general way, welfare should not even be a state program. Rather, it should be a matter of private

responsibility, as it was for years in this nation. But the process of getting the federal government out of the business of charity, for which there is no authority in the Constitution, has at least begun.

Eventually, that process should be repeated in every other ''entitlement'' area, from individual to institutional to corporate, from Social Security and Medicare to the National Endowment for the Arts to the Department of Agriculture's Market Access Program, and on and on. Each of those programs was started for a good reason, to be sure, yet each involves taking from some to give to others—means that are both wrong and unconstitutional, to say nothing of monumentally inefficient. Taken together, they put us all on welfare in one way or another, and we are all the poorer for it.

Some of those programs will be harder to reduce, phase out, or eliminate than others, of course. Entitlement programs with large numbers of beneficiaries, for example, will require transition phases to ensure that harm is minimized and public support is maintained. Other programs, however, could be eliminated with relatively little harm. Does anyone seriously doubt that there would be art in America without the National Endowment for the Arts? Indeed, without the heavy hand of government grant making, the arts would likely flourish as they did long before the advent of the NEA—and no one would be made to pay, through his taxes, for art he abhorred.

It is the transfer programs in the ''symbolic'' area, in fact, that may be the most important to eliminate first, for they have multiplier effects reaching well beyond their raw numbers, and those effects are hardly neutral on the question of reducing the size and scope of government. The National Endowment for the Arts, the National Endowment for the Humanities, the Corporation for Public Broadcasting, the Legal Services Corporation, and the Department of Education have all proceeded without constitutional authority—but with serious implications for free speech and for the cause of limiting government. Not a few critics have pointed to the heavy hand of government in those symbolic areas. Of equal importance, however, is the problem of compelled speech: as Jefferson wrote, ''To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.'' But on a more practical note, if Congress is serious about addressing the climate of opinion in the nation, it will end such programs not simply because they are without constitutional authority but because they have demonstrated a relentless tendency over the years to evolve in only one direction—

toward even more government. Indeed, one should hardly expect those institutions to be underwriting programs that advocate less government when they themselves exist through government.

Regulatory Redistribution

If the redistributive programs that constitute the modern welfare state are candidates for elimination, so too are many of the regulatory programs that have arisen under the commerce clause. Here, however, care must be taken not simply from a practical perspective but from a constitutional perspective as well, for some of those programs may be constitutionally justified. When read functionally, recall, the commerce clause was meant to enable Congress to ensure that commerce among the states is regular, and especially to counter state actions that might upset that regularity. Think of the commerce clause as an early North American Free Trade Agreement, without the heavy hand of ''managed trade'' that often accompanies the modern counterpart.

Thus conceived, the commerce clause clearly empowers Congress, through regulation, to override state measures that may frustrate the free flow of commerce among the states. But it also enables Congress to take such affirmative measures as may be necessary and proper for facilitating free trade, such as clarifying rights of trade in uncertain contexts or regulating the interstate transport of dangerous goods. What the clause does not authorize, however, is regulation for reasons other than to ensure the free flow of commerce—the kind of ''managed trade'' that is little but a thinly disguised transfer program designed to benefit one party at the expense of another.

Unfortunately, most modern federal regulation falls into that final category, whether it concerns employment, health care, insurance, or whatever. In fact, given budgetary constraints on the ability of government to tax and spend—to take money from some, run it through the treasury, then give it to others—the preferred form of transfer today is through regulation. That puts it ''off budget.'' Thus, when an employer, an insurer, a lender, or a landlord is required by regulation to do something he would otherwise have a right not to do, or not do something he would otherwise have a right to do, he serves the party benefited by that regulation every bit as much as if he were taxed to do so, but no tax increase is ever registered on any public record. The temptation for Congress to resort to such ''cost-free'' regulatory redistribution is of course substantial, and the effects are both far-reaching and perverse. Natural markets are upset as incentives

are changed; economies of scale are skewed as large businesses, better able to absorb the regulatory burdens, are advantaged over small ones; defensive measures, inefficient from the larger perspective, are encouraged; and general uncertainty, anathema to efficient markets, is the order of the day. Far from facilitating free trade, redistributive regulation frustrates it. Far from being justified by the commerce clause, it undermines the very purpose of the clause.

Federal Crimes

In addition to misusing the commerce power for the purpose of regulatory redistribution, Congress has misused that power to create federal crimes. Thus, a great deal of ''regulation'' has arisen in recent years under the commerce power that is nothing but a disguised exercise of a police power that Congress otherwise lacks. As noted earlier, the Gun-Free School Zones Act, the Church Arson Prevention Act, and the Violence Against Women Act are examples of legislation passed nominally under the power of Congress to regulate commerce among the states. But the actions subject to federal prosecution under those statutes—gun possession, church arson, and gender-motivated violence, respectively—are ordinarily regulated under *state* police power, the power of states, in essence, to ''police'' or secure our rights. The ruse of regulating them under Congress's commerce power is made necessary because there is no federal police power enumerated in the Constitution—except as an implication of federal sovereignty over federal territory or an incidence of some enumerated power.

That ruse should be candidly recognized. Indeed, it is a mark of the decline of respect for the Constitution that when we sought to fight a war on liquor in the last century we felt it necessary to do so by first amending the Constitution—there being no power otherwise for such a federal undertaking. Today, however, when we engage in a war on drugs—with as much success as we enjoyed in the earlier war—we do so without as much as a nod to the Constitution.

The Constitution lists three federal crimes: treason, piracy, and counterfeiting. Yet today there are more than 3,000 federal crimes and perhaps 300,000 regulations that carry criminal sanctions. Over the years, no faction in Congress has been immune, especially in an election year, from the propensity to criminalize all manner of activities, utterly oblivious to the lack of any constitutional authority for doing so. We should hardly imagine that the Founders fought a war to free us from a distant tyranny only to establish a tyranny in Washington, in some ways even more distant from the citizens it was meant to serve.

Policing of the States

If the federal government has often intruded on the police power of the states, so too has it often failed in its responsibility under the Fourteenth Amendment to police the states. Here is an area where federal regulation has been, if anything, too restrained—yet also unprincipled, oftentimes, when undertaken.

The Civil War Amendments to the Constitution fundamentally changed the relationship between the federal government and the states, giving citizens an additional level of protection, not against federal oppression but against state oppression—the oppression of slavery, obviously, but much else besides. Thus, the Fourteenth Amendment prohibits states from abridging the privileges or immunities of citizens of the United States; from depriving any person of life, liberty, or property without due process of law; and from denying any person the equal protection of the laws. Section 1 of the amendment enables the courts to secure those guarantees. Section 5 gives Congress the ''power to enforce, by appropriate legislation, the provisions of this article.''

As the debate that surrounded the adoption of those amendments makes clear, the privileges or immunities clause was meant to be the principal source of substantive rights in the Fourteenth Amendment, and those rights were meant to include the rights of property, contract, and personal security—in short, our ''natural liberties,'' as Blackstone had earlier understood that phrase. Unfortunately, in 1873, in the notorious Slaughterhouse Cases, a bitterly divided Supreme Court essentially eviscerated the privileges or immunities clause. There followed, for nearly a century, the era of Jim Crow in the South and, for a period stretching to the present, a Fourteenth Amendment jurisprudence that is as contentious as it is confused.

Modern liberals have urged that the amendment be used as it was meant to be used—against state oppression. But they have also urged that it be used to recognize all manner of ''rights'' that are no part of the theory of rights that stands behind the amendment as understood at the time of ratification. Modern conservatives, partly in reaction, have urged that the amendment be used far more narrowly than it was meant to be used—for fear that it might be misused, as it has been.

The role of the judiciary under section 1 of the Fourteenth Amendment will be discussed later. As for Congress, its authority under section 5—''to enforce, by appropriate legislation, the provisions of this article''—is clear, provided Congress is clear about those provisions. And on that, we may look, again, to the debates that surrounded not only the adoption

of the Fourteenth Amendment but the enactment of the Civil Rights Act of 1866, which Congress reenacted in 1868, just after the amendment was ratified.

Those debates give us a fairly clear idea of what the American people thought they were ratifying. In particular, all citizens, the Civil Rights 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 persons and property.'' Such were the privileges and immunities the Fourteenth Amendment was meant to secure.

Clearly, those basic common-law rights, drawn from the reason-based classical theory of rights, are the stuff of ordinary state law. Just as clearly, however, states have been known to violate them, either directly or by failure to secure them against private violations. When that happens, appeal can be made to the courts, under section 1, or to Congress, under section 5. The Fourteenth Amendment gives no power, of course, to secure the modern ''entitlements'' that are no part of the common-law tradition of life, liberty, and property: the power it grants, that is, is limited by the rights it is meant to secure. But it does give a power to reach even intrastate matters when states are violating the provisions of the amendment. The claim of ''states' rights,'' in short, is no defense for state violations of individual rights.

Thus, if the facts had warranted it, something like the Church Arson Prevention Act of 1996, depending on its particulars, might have been authorized not on commerce clause grounds but on Fourteenth Amendment grounds. If, for example, the facts had shown that state officials were prosecuting arsons of white churches but not arsons of black churches, then we would have had a classic case of the denial of the equal protection of the laws. With those findings, Congress would have had ample authority under section 5 of the Fourteenth Amendment ''to enforce, by appropriate legislation, the provisions of this article.''

Unfortunately, in the final version of the act, Congress removed citations to the Fourteenth Amendment, choosing instead to rest its authority entirely on the commerce clause. Not only is that a misuse of the commerce clause, inviting further misuse, but, assuming the facts had warranted it, it is a failure to use the Fourteenth Amendment as it was meant to be used, inviting further failures. To be sure, the Fourteenth Amendment has itself been misused, both by Congress and by the courts. But that is no reason to ignore it. Rather, it is a reason to correct the misuses.

In its efforts to return power to the states and the people, then, Congress must be careful not to misunderstand its role in our federal system. Over the 20th century, Congress assumed vast powers that were never its to assume, powers that belong properly to the states and the people. Those need to be returned. But at the same time, Congress and the courts do have authority under the Fourteenth Amendment to ensure that citizens are free from state oppression. However much that authority may have been underused or overused, it is there to be used, and if it is properly used, objections by states about federal interference in their ''internal affairs'' are without merit.

Reject the Nomination of Judicial Candidates Who Do Not Appreciate That the Constitution Is a Document of Delegated, Enumerated, and Thus Limited Powers

As noted earlier, Congress can relimit government on its own initiative simply by restricting its future actions to those that are authorized by the Constitution and repealing those past actions that were taken without such authority. But for those limits to become ''constitutional law,'' they would have to be recognized as such by the Supreme Court, which essentially abandoned that view of limited government during the New Deal. Thus, for the Court to play its part in the job of relimiting government constitutionally, it must recognize the mistakes it has made over the years, especially following Roosevelt's Court-packing threat in 1937, and rediscover the Constitution—a process it began in *Lopez*, however tentatively, when it returned explicitly to ''first principles.'' (Unfortunately, in 2005, in *Gonzales v. Raich*, the California medical marijuana decision, the Court abandoned the principles it articulated in *Lopez*, so it isn't clear just where the Court now stands in its efforts over the previous decade to revive the doctrine of enumerated powers.)

But Congress is not powerless to influence the Court in the direction of constitutional restoration: as vacancies arise on the Court and on lower courts, it has a substantial say about who sits there through its power to advise and consent. To exercise that power well, however, Congress must have a better grasp of the basic issues than it has shown in recent years during Senate confirmation hearings for nominees for the Court. In particular, the Senate's obsession with questions about ''judicial activism'' and ''judicial restraint,'' terms that in themselves are largely vacuous, only distracts it from the real issue—the nominee's philosophy of the Constitution. To appreciate those points more fully, however, a bit of background is in order.

From Powers to Rights

The most important matter to grasp is the fundamental change that took place in our constitutional jurisprudence during the New Deal and the implications of that change for the modern debate. The debate today is focused almost entirely on rights, not powers. Indeed, until the 107th Congress and its focus on ideology, the principal concern during Senate confirmation hearings had been with a nominee's views about what rights are ''in'' the Constitution. That is an important question, to be sure, but it must be addressed within a much larger constitutional framework, a framework too often missing from recent hearings.

Clearly, the American debate began with rights—with the protests that led eventually to the Declaration of Independence. And in that seminal document, Jefferson made rights the centerpiece of the American vision: rights to life, liberty, and the pursuit of happiness, derived from a premise of moral equality, itself grounded in a higher law discoverable by reason, and all to be secured by a government of powers made legitimate through consent.

But when they set out to draft a constitution, the Framers focused on powers, not rights, for two main reasons. First, their initial task was to create and empower a government, which the Constitution did once it was ratified. But their second task, of equal importance, was to limit that government. Here, there were two main options. The Framers could have listed a set of rights that the new government would be forbidden to violate. Or they could have limited the government's powers by enumerating them, then pitting one against the other through a system of checks and balances—the idea being that where there is no power there is, by implication, a right, belonging to the states or the people. They chose the second option, for they could hardly have enumerated all our rights, but they *could* enumerate the new government's powers, which were meant from the outset to be, again, ''few and defined.'' Thus, the doctrine of enumerated powers became our principal defense against overweening government.

Only later, during the course of ratification, did it become necessary to add a Bill of Rights—as a secondary defense. But in so doing, the Framers were still faced with a pair of objections that had been posed from the start. First, it was impossible to enumerate all our rights, which in principle are infinite in number. Second, given that problem, the enumeration of only certain rights would be construed, by ordinary methods of legal construction, as denying the existence of others. To overcome those

objections, therefore, the Framers wrote the Ninth Amendment: ''The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.''

Constitutional Visions

Thus, with the Ninth Amendment making it clear that we have both enumerated and unenumerated rights, the Tenth Amendment making it clear that the federal government has only enumerated powers, and the Fourteenth Amendment later making it clear that our rights are good against the states as well, what emerges is an altogether libertarian picture. Individuals, families, firms, and the infinite variety of institutions that constitute civil society are free to pursue happiness however they wish, in accord with whatever values they wish, provided only that in the process they respect the equal rights of others to do the same. And governments are instituted to secure that liberty and do the few other things their constitutions make clear they are empowered to do.

That picture is a far cry from the modern liberal's vision, rooted in the Progressive Era, which would have government empowered to manage all manner of economic affairs. But it is also a far cry from the modern conservative's vision, which would have government empowered to manage all manner of social affairs. Neither vision reflects the true constitutional scheme. Both camps want to use the Constitution to promote their own substantive agendas. Repeatedly, liberals invoke democratic power for ends that are nowhere in the Constitution. At other times, they invoke ''rights'' that are no part of the plan, requiring government programs that are nowhere authorized, while ignoring rights that are plainly enumerated. For their agenda, conservatives rely largely on expansive readings of democratic power that were never envisioned, thereby running roughshod over rights that were meant to be protected, including unenumerated rights.

From Liberty to Democracy

The great change in constitutional vision took place during the New Deal, when the idea that galvanized the Progressive Era—that the basic purpose of government is to solve social and economic problems—was finally instituted in law through the Court's radical reinterpretation of the Constitution. As noted earlier, following the 1937 Court-packing threat, the Court eviscerated our first line of defense, the doctrine of enumerated powers, when it converted the general welfare and commerce clauses from shields against power into swords of power. Then in 1938, a cowed Court

undermined the second line of defense, our enumerated and unenumerated rights, when it declared that henceforth it would defer to the political branches and the states when their actions implicated ''nonfundamental'' rights like property and contract—the rights associated with ''ordinary commercial affairs.'' Legislation implicating such rights, the Court said, would be given ''minimal scrutiny'' by the Court, which is tantamount to no scrutiny at all. By contrast, when legislation implicated ''fundamental'' rights like voting, speech, and, later, certain ''personal'' liberties, the Court would apply ''strict scrutiny'' to that legislation, probably finding it unconstitutional.

With that, the Constitution was converted, without benefit of amendment, from a libertarian to a largely democratic document. The floodgates were now open to majoritarian tyranny, which very quickly became special-interest tyranny, as public-choice economic theory amply demonstrates should be expected. Once those floodgates were opened, the programs that poured through led inevitably to claims from many quarters that rights were being violated. Thus, the Court in time would have to try to determine whether those rights were ''in'' the Constitution—a question the Constitution had spoken to indirectly, for the most part, through the now-discredited doctrine of enumerated powers. And if it found the rights in question, the Court would then have to try to make sense of its distinction between ''fundamental'' and ''nonfundamental'' rights.

Judicial ''Activism'' and ''Restraint''

It is no accident, therefore, that until very recently the modern debate has been focused on rights, not powers. With the doctrine of enumerated powers effectively dead, with government's power essentially plenary, the only issues left for the Court to decide, for the most part, were whether there might be any rights that would limit that power and whether those rights are or are not ''fundamental.''

Both liberals and conservatives today have largely bought into this jurisprudence. As noted earlier, both camps believe the Constitution gives a wide berth to democratic decisionmaking. Neither side any longer asks the first question, the fundamental question: Do we have authority, constitutional authority, to pursue this end? Instead, they simply assume that authority, take a policy vote on some end before them, and then battle in court over whether there are any rights that might restrict their power.

Modern liberals, fond of government programs, call on the Court to be ''restrained'' in finding rights that might limit their redistributive and

regulatory schemes, especially ''nonfundamental'' rights like property and contract. At the same time, even as they ignore those rights, liberals ask the Court to be ''active'' in finding other ''rights'' that were never meant to be among even our unenumerated rights.

But modern conservatives are often little better. Reacting to the abuses of liberal ''activism,'' many conservatives call for judicial ''restraint'' across the board. Thus, if liberal programs have run roughshod over the rights of individuals to use their property or freely contract, the remedy, conservatives say, is not for the Court to invoke the doctrine of enumerated powers—that battle was lost during the New Deal—nor even to invoke the rights of property and contract that are plainly in the Constitution—that might encourage judicial activism—but to turn to the democratic process to overturn those programs. Oblivious to the fact that restraint in finding rights is tantamount to activism in finding powers, and in disregard of the fact that it was the democratic process that gave us the problem in the first place, too many conservatives offer us a counsel of despair amounting to a denial of constitutional protection.

No one doubts that in recent decades the Court has discovered ''rights'' in the Constitution that are no part of either the enumerated or unenumerated rights that were meant to be protected by that document. But it is no answer to that problem to ask the Court to defer wholesale to the political branches, thereby encouraging it, by implication, to sanction unenumerated *powers* that are no part of the document either. Indeed, if the Tenth Amendment means anything, it means that there are no such powers. Again, if the Framers had wanted to establish a simple democracy, they could have. Instead, they established a limited, constitutional republic, a republic with islands of democratic power in a sea of liberty, not a sea of democratic power surrounding islands of liberty.

Thus, it is not the proper role of the Court to find rights that are no part of the enumerated or unenumerated rights meant to be protected by the Constitution, thereby frustrating authorized democratic decisions. But neither is it the proper role of the Court to refrain from asking whether those decisions are in fact authorized and, if authorized, whether their implementation violates the rights guaranteed by the Constitution, enumerated and unenumerated alike.

The role of the judge in our constitutional republic is thus profoundly important and oftentimes profoundly complex. ''Activism'' is no proper posture for a judge, but neither is ''restraint.'' Judges must apply the Constitution to cases or controversies before them, neither making it up

nor ignoring it. They must especially appreciate that the Constitution is a document of delegated, enumerated, and thus limited powers. That will get the judge started on the question of what rights are protected by the document, for where there is no power, there is, again, a right, belonging either to the states or to the people. Indeed, we should hardly imagine that, before the addition of the Bill of Rights, the Constitution failed to protect most rights simply because most were not ''in'' it. But reviving the doctrine of enumerated powers is only part of the task before the Court; it must also revive the classical theory of rights if the restoration of constitutional government is to be completed correctly.

Those are the two sides—powers and rights—that need to be examined in the course of Senate confirmation hearings for nominees for the courts of the United States. More important than knowing a nominee's ''judicial philosophy'' is knowing his philosophy of the Constitution. For the Constitution, in the end, is what defines us as a nation.

If a nominee does not have a deep and thorough appreciation for the basic principles of the Constitution—for the doctrine of enumerated powers and for the classical theory of rights that stands behind the Constitution—then his candidacy should be rejected. In recent years, Senate confirmation hearings have become extraordinary opportunities for constitutional debate throughout the nation. Those debates need to move from the ethereal realm of ''constitutional law'' to the real realm of the Constitution. They are extraordinary opportunities not simply for constitutional debate but for constitutional renewal.

Alarmingly, however, in recent Congresses we saw the debate move not from ''constitutional law'' to the Constitution but in the very opposite direction—to raw politics. The demand that judicial nominees pass an ''ideological litmus test''—that they reflect and apply the ''mainstream values'' of the American people, whatever those may be—is tantamount to expecting and asking judges not to *apply* the law, which is what judging is all about, but to *make* the law according to those values, whatever the actual law may require. The duty of judges under the Constitution is to decide cases according to the law, not according to whatever values or ideology may be in fashion. For that, the only ideology that matters is the ideology of the Constitution.

Conclusion

America is a democracy in the most fundamental sense of that idea: authority, or legitimate power, rests ultimately with the people. But the

people have no more right to tyrannize one another through democratic government than government itself has to tyrannize the people. When they constituted us as a nation by ratifying the Constitution and the amendments that have followed, our ancestors gave up only certain of their powers, enumerating them in a written constitution. We have allowed those powers to expand beyond all moral and legal bounds—at the price of our liberty and our well-being. The time has come to return those powers to their proper bounds, to reclaim our liberty, and to enjoy the fruits that follow.

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—Prepared by Roger Pilon