CONGRESS, THE COURTS, AND THE CONSTITUTION

Congress should

- encourage constitutional debate in the nation by engaging in constitutional debate in Congress and in public discussions, as in the nation's earlier history;
- 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
- center judicial confirmation hearings on the principle that the Constitution is a document of delegated, enumerated, and thus limited powers.

For much of our history, the Constitution was alive in the hearts and minds of the American people and our leaders alike. We saw the document as defining us as a people animated by liberty; and we understood, albeit unevenly at times, that its basic function was to authorize and then limit the powers that were instituted through it. More often than not, therefore, measures aimed at expanding the federal government never made it out of Congress or, if they did, they were vetoed by presidents—not only on policy grounds but, more importantly, on constitutional grounds as well.

Today, however, so far have we strayed from constitutional government, especially since the dawn of the 20th century, that one hardly knows where to begin. James Madison, the principal author of the Constitution, assured us in *Federalist* no. 45 that the powers of the new government would be "few and defined." No one believes that describes Washington's powers today. Instead, Congress and the president exercise vast powers that are nowhere authorized by the Constitution as originally understood. Individuals and busi-

nesses are regulated as never before. And Congress is so indifferent to constitutional constraints on its spending that our national debt now exceeds $30 trillion and is growing, and our unfunded federal and state liability runs well over a staggering $100 trillion.

As history demonstrates, this cannot go on. If we do not begin to restore constitutional discipline—and, indeed, constitutional legitimacy—America will go the way of other nations that have ignored the basic moral, political, legal, and economic principles that our Constitution was written and ratified to secure.

Limited government is the foundation for liberty, prosperity, and the vision of equality still cherished by countless Americans, to say nothing of millions around the world. Yet many in Congress today, and many who vote for them, seem to believe that prosperity comes primarily from government programs, not from individuals acting in their private capacities in the private sector. And they believe that the Constitution authorizes Congress to enact such programs. But others in this deeply divided nation know better. They understand that government rarely solves problems as promised; in fact, it often makes problems worse. More important still, they understand that a life dependent on government is both impoverishing and impoverished. They want no part of such dependence. They want to be free to plan and live their own lives.

Reducing Government

But if we're to move toward restoring constitutionally limited government and the prosperity it encourages—toward a world in which government is no longer expected to solve our every problem, but individuals, families, firms, and communities assume that responsibility, indeed, take up that challenge—theoretical and practical questions will need to be addressed. And where better than in Congress, where we the people are directly represented? Two such questions come immediately to mind: how much to reduce government and how fast to do it.

How Much to Reduce Government

That first question might seem initially to be a matter simply of policy: What do we want the federal government to do and not do? Yet if we take the Constitution seriously, the Framers largely answered the question. Indeed, they thought long and hard about the proper role of the federal government. Drawing on fundamental moral principles about individual liberty that were first set forth in the Declaration of Independence, they outlined the proper

ends of government in the Constitution, expressly enumerating—and thereby limiting—the federal government's powers.

Thus, setting aside for the moment all practical concerns, the Constitution tells us as a matter of first principle how much to reduce government. It tells us, first, what powers or ends the federal government in fact has. And second, by operation of the last of those enumerated powers, the Necessary and Proper Clause, it tells us that the federal government must employ proper means toward those ends, namely, those that respect the powers of the states and the rights of the people.

That means that if a federal power or program is not *authorized* by the Constitution, it is illegitimate. Given the present size and scope of the government, that's a sobering conclusion, to be sure. But it flows quite naturally from the document's enumeration of Congress's powers. And the Tenth Amendment, the final documentary evidence from the Founding period, states the principle explicitly: "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 only to authorize, institute, and empower the federal government but to limit it as well—and to limit also what we the people may demand of our government.

Since the Progressive Era, however, the politics of government-as-problem-solver has dominated our public discourse. And since the New Deal constitutional revolution, following President Franklin Roosevelt's infamous Court-packing threat, 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.

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

The Founders 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 begin restoring truly limited government, therefore, we have to do more than define the issues as political or budgetary. We have to go to the heart of the matter and raise the underlying *constitutional* questions. We have to ask that most fundamental of constitutional questions: Does Con-

gress or the executive branch have the *authority*, the *constitutional* authority, to do what it is doing?

How Fast to Reduce Government

As a practical matter, however, before Congress can begin restoring constitutionally limited government, it will need to take seriously the dependence of so many on the constitutionally unauthorized programs it has created since the Progressive Era began. Thus, Congress will have to move carefully and smartly, much as private companies have done in moving, for example, from defined benefit to defined contribution retirement programs for their employees and from "Cadillac" health care programs to more sustainable high-deductible insurance programs that include health savings accounts. Strictly speaking, of course, new *public* programs like those would still be constitutionally unauthorized, but they are the kinds of "transitional" moves that Congress might make toward returning private matters like retirement security and health care to private responsibility.

But another practical problem Congress faces is the present state of public opinion on such matters. After all, a substantial number of Americans have little understanding of the near-term insolvency of our major entitlement programs. And they know even less about the constitutional limits on activist government. Indeed, many Americans want even more government. For Congress to be able to do what needs doing, therefore, a proper political foundation must first be laid. At bottom, public opinion must evolve such that a sufficiently large part of the public supports the necessary changes. When enough people come forward to ask—indeed, to demand—that government be limited to its constitutional powers, thereby freeing individuals, families, firms, and communities to solve their own problems, we will know we're on the right track.

We are a long way today from the Founders' vision of limited government. To move the process along, therefore, Congress should take the lead in the following ways.

Engage in Constitutional Debate in Congress and in Public Discussions

For much of America's early history, the Constitution played a prominent role in our political discourse. Members of Congress and presidents actively debated whether proposed measures were consistent with the Constitution. Unlike so often today, they didn't simply assume that they had the authority to enact or sign any and every bill and then leave it to the courts to determine the act's constitutionality. Nor did presidents make a practice of ruling by

executive order. They took seriously their oaths to uphold the Constitution. That sense of moral and constitutional responsibility needs to be revived.

Revive the Constitution Caucus

During the first year of the 104th Congress, after the realigning midterm elections of 1994, an informal 100-strong Constitution Caucus was created to reinvigorate the tradition of constitutional debate in Congress and the nation and, in time, to begin restoring constitutional government. By itself, of course, neither such a caucus nor the entire Congress is likely to fully correct the constitutional problem. Congress could, in theory, roll back its many unconstitutional programs and agree to limit itself to its enumerated powers. But to ensure that such limits are respected by future Congresses as binding *constitutional* limitations, the Supreme Court would need to reverse a substantial body of largely post–New Deal decisions and embed those restraints in "constitutional law," even though they've been in the Constitution the whole time.

Thus, the goal of a Constitution Caucus and Congress should be not just to influence Congress itself, but to encourage the *Court* to reach such decisions. True, that reverses the normal order of things: under our written Constitution, we ordinarily think of the Court as employing reason and applying law to check the will of the political branches. But history teaches that the Court does not operate entirely in a vacuum. Realistically, to some degree, public opinion is the precursor and seedbed of the Court's decisions, if only insofar as the Court's composition is determined through the political confirmation process. 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 today's political climate that every member of Congress be a member of the caucus, however worthy that ideal might be. For after all, many in Congress will be adamantly opposed to the caucus's ends: they campaign on platforms calling for ever more government. 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.

Here is the problem in a nutshell. Every day, members of Congress are besieged by requests to enact countless measures to solve endless problems. Indeed, listening to much campaign debate, one might conclude that no problem is too personal or too trivial to warrant the attention of the *federal* government no less. Yet most of the "problems" Congress spends most of its time addressing—from health care to childcare, education, housing, economic competition, and more, *albeit often created by government*—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, save for those that *it* has created—which today, alas, are many.

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 many. Thus, a central purpose of congressional debate should be to bring about a better understanding of our basic legal document and to restore the idea in the minds of the people that the Constitution does not authorize the kind of government we have today. In particular, members of Congress need to tell importuning constituents, "I have no authority to do what you want me to do."

The Constitutional Vision

But if the Constitution is to be so used, Congress must candidly address the main misunderstanding surrounding it, namely, that, without further amendment, it is an infinitely elastic document that allows government to grow to meet whatever the public wants. Americans must come to see that the Founders, who were keenly aware of the expansive tendencies of government, wrote the Constitution precisely to check that kind of thinking. True, they meant for 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 we have authorized it to do, as spelled out in the document, which is why it was written and ratified.

In all else, we were meant to be largely free from interference by the federal government—to plan and live our own lives, to solve our own problems. That is what freedom is all about. Some may characterize that vision as tantamount to saying, "You're on your own." But that 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.

Those are the issues that need to be discussed, in both human and constitutional terms. As a people, we need to rethink our relationship to government. We need to ask not what our 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 the federal government in a very limited way. It empowers people—by leaving us free—in every other way.

To proclaim and eventually secure that vision of a free people, the Constitution Caucus should rededicate itself to that end at the beginning of every Congress. The caucus should be both of and above Congress—as the constitutional conscience of Congress. Every member of Congress, before taking office, swears to support "this" Constitution. Today, that's 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 politically cowed New Deal Court's expansive readings of the document.

Encouraging Debate

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

On the constitutional agenda, then, should be those 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 make 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. To get things going, 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 to be 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. America 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. Debate centered on the Constitution 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.

Consult the Constitution for Proper Authority and Debate That Point in Congress

It would hardly seem necessary to require Congress, before it legislates, to cite its constitutional authority for doing so. After all, is that not part of what it means to carry out, as a member of Congress, one's oath to support the Constitution? And if Congress's legislative powers are limited by virtue of being enumerated, then presumably there are countless things Congress has no authority to do, however worthy they might otherwise be. Yet so far have we strayed from constitutional thinking that such a requirement today is followed perfunctorily—when followed at all.

The most common perfunctory citations—usually captured in boilerplate—are to the Constitution's General Welfare, Commerce, and Necessary and Proper Clauses. It is no small irony that those clauses were written not only as grants of power, but also as shields against overweening government, yet today they are simply swords of federal power.

The General Welfare Clause

The first of Congress's 18 legislative powers enumerated in Article I, Section 8, is the power to tax (and, by implication, spend) "to pay the Debts and provide for the common Defence and general Welfare of the United States." In *Federalist* no. 41 and elsewhere, Madison argued, as did Jefferson and others, that the General Welfare Clause was meant to serve as a brake on Congress's power to tax and spend in furtherance of its *other* enumerated powers or ends, all of which, he said, were subsumed under "the general welfare." Taxing and spending pursuant to those ends had to serve the *general* welfare, not the welfare of particular parties or sections of the country. Madison's view contrasted sharply with that of Hamilton, who believed that Congress had an *independent* power to tax and spend *for the general welfare*.

The problem with Hamilton's view was stated clearly in 1828 by South Carolina's William Drayton. Rising on the floor of the House, he said that it would undermine the very centerpiece of the Constitution, the doctrine of enumerated powers, rendering Congress's 17 other powers superfluous. Since money can accomplish anything, he continued, whenever Congress wanted to do something that was not listed as an enumerated power—such as, say, regulate public education—it could simply declare the act to be serving "the general welfare" and thus escape the limits imposed by enumeration. Indeed, he concluded, what was the point of enumerating Congress's other powers if it could do whatever it wanted under this sole power?

Unfortunately, in 1936, in dicta and almost in passing, the Supreme Court revisited this early debate and came down, as a practical matter, on Hamilton's side, declaring that there is an *independent* power to tax and spend for the general welfare, albeit limited by the word "general." Then in 1937, in upholding the constitutionality of the new Social Security scheme, the Court completed the job when it stated the Hamiltonian view not as dicta but as doctrine. But while it reminded Congress of the constraint imposed by the word "general," the Court added that it would not itself police that restraint but would leave it to Congress 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.

In truth, textualists must grant that this was not the most artfully written part of our Constitution. Not surprisingly, Congress, to say nothing of the courts, often found the line it draws difficult to discern and apply, even before the New Deal Congresses effectively ended fiscal discipline. Yet a middle ground between Madison and Hamilton can be found if we focus on the power of Congress to tax and spend for the *general* welfare *of the United States*, as was done during most of the pre–New Deal era, albeit less as time went on. That interpretation would allow for spending on "public goods" as defined by economists citing free-rider problems, nonexcludability, and nonrivalrous consumption—things like national defense, clean air and water, and certain infrastructure—as distinct from private goods like education and health care, for which there is no authority to spend under the Constitution.

But owing to the imprecision of this clause, it falls rather more to Congress than to the courts to exercise the discipline that is necessary to preserve the Constitution's overall structure for limited government. Congress needs to rediscover that discipline. Indeed, this is quintessentially an area where *Congress* needs to take the lead in debating the virtues of limited constitutional government as a *political* matter rather than leaving it to the courts to find lines that are difficult to find as a *legal* matter.

The Commerce Clause

The Commerce Clause of the Constitution, which grants Congress the power to regulate "Commerce . . . among the several States," was also written primarily as a shield—in this case against overweening *state* power. As Madison explained in *Federalist* no. 42, under the Articles of Confederation, to protect local merchants and manufacturers from out-of-state competitors, states had erected tariffs and other protectionist measures that impeded the free flow of commerce among the states. In fact, the need to break the logjam that resulted was one of the principal reasons for the call for a constitutional 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 meant primarily as a power to facilitate free trade among the states. And that was how the Court read the clause in 1824 in the first great Commerce Clause case, *Gibbons v. Ogden*.

That functional account of Congress's commerce power is consistent with the original understanding of the power, the text of the clause (especially the original meaning of "regulate"), and the structural limits entailed by the doctrine of enumerated powers. Yet today, following decisions by the Court in 1937, 1942, and beyond, Congress is able to regulate anything that even "affects" interstate commerce, which in principle is everything. Far from ensuring 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. In effect, the commerce power has become a general police power of a kind that the Framers reserved to the states.

The Necessary and Proper Clause

Congress often exercises those redistributive and regulatory powers through the last of the 18 powers enumerated in Article I, Section 8, the Necessary and Proper Clause. Discussed by Madison in *Federalist* no. 44, the clause affords Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Thus, it is an *instrumental* power, providing Congress with the *means* for executing its other powers or pursuing its other enumerated ends. As such, the means it affords Congress are limited by those other enumerated powers or ends, limited simply to carrying them into execution—it is not an independent power. Moreover, not any such instrumental powers will do: they must be both necessary for their purpose and proper— "proper" in respecting the other branches, the sovereignty of the states, and the rights of the people.

Just as the explosive growth of the modern redistributive state has taken place almost entirely under the General Welfare Clause, so has the growth of the modern regulatory state taken place almost entirely under the Commerce Clause—as complemented by the Necessary and Proper Clause in both cases. That raises the fundamental question that Drayton had raised, which members of Congress need to keep in mind: If the Framers had meant for Congress to be able to do virtually anything it wanted under just those three clauses, why did they bother to enumerate Congress's other powers, or defend the doctrine of enumerated powers throughout the *Federalist Papers*? Those efforts would have been pointless.

Lopez *and Its Aftermath: A Case Study in Congressional Indifference*

Today, as previously noted, congressional citations to the General Welfare, Commerce, and Necessary and Proper Clauses usually take the form of perfunctory boilerplate. When it wants to regulate some activity, for example, Congress makes a bow to the doctrine of enumerated powers simply by claiming that it has made findings that the activity at issue "affects" interstate commerce. Given those findings, Congress then claims it has authority to regulate the activity under its power to regulate commerce among the states.

Yet in 1995, in the celebrated case of *United States v. Lopez*, the Supreme Court had before it a case in which Congress, when it passed the Gun-Free School Zones Act of 1990, hadn't even bothered to cite its authority under the Constitution, even in boilerplate. In what must surely be a stroke of consummate hubris—and disregard for the Constitution—Congress simply assumed its authority. At oral argument, the lawyer for the government belatedly pointed to the Commerce Clause, but the Court would have none of it. For the first time in 58 years, appealing to "first principles," the Court's majority ruled that Congress's power under the Commerce Clause has limits.

There followed a similar ruling in 2000 in *United States v. Morrison*. But in 2005, in *Gonzales v. Raich*, the California medical marijuana case, a divided Court went the other way, only to reverse itself in another celebrated case, *National Federation of Independent Business v. Sebelius*, the 2012 challenge to the individual mandate of the Affordable Care Act. There, five justices held that Congress lacked the power under the Commerce and Necessary and Proper Clauses to compel individuals to buy health insurance or pay a fine. (Nevertheless, Chief Justice John Roberts saved the act by treating the fine as a tax, even though he could not identify the tax as of a kind the Constitution recognizes.)

Thus, the *Lopez* line of cases has revived the doctrine of enumerated powers and its implications for limiting Congress's power. It is imperative, therefore, that Congress debate this fundamental constitutional matter. It is not enough for Congress simply to say the magic words—"General Welfare Clause," "Commerce Clause," "Necessary and Proper Clause"—to be home free, constitutionally. Not every debate will yield satisfying results, 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 introduced, to say nothing of enacted. The American people can hardly be expected to take the Constitution and its limits on government seriously if their elected representatives do not.

Restore Constitutional Government by Carefully Returning Power Wrongly Taken 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 promise that the powers of the federal government under the Constitution would be "few and defined."

But the magnitude of the task is only one dimension of its difficulty. Let's be candid: there are many in Congress who 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: "enlightened" progressives, so-called national conservatives who want the government to promote families and help the working man, or those with 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 limits whatever on government save for those arising from 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 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. Where necessary, their views will have to be accommodated as the process unfolds.

Maintaining Support for Limited Government

Given the magnitude of the problem, and the practical implications of repealing federal programs, a fair measure of caution is in order. It's not simply a matter of returning what was taken, for much 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.

Thus, as programs are reduced or eliminated, care must be taken to do as little harm as possible—for two reasons at least. First, there is an important sense in which the federal government today, vastly overextended though it is, stands in a contractual relationship with the American people. That idea is very difficult to pin down, however, for once the real contract—the Constitution—has broken down, the "legislative contracts" that arise to take its place invariably come down to programs under which some people have become dependent on others, although neither side had much say in the matter at the outset. Whatever its merits, that contractual view is held by a good portion of the public, especially regarding so-called middle-class entitlements.

That leads to the second reason why 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 is able to 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 staying on message and keeping the message simple, direct, and clear. The aim, again, is both freedom and prosperity. 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 bring about 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 rather than give it to governmental redistributors. If individual freedom and individual responsibility are values we cherish—indeed, are the foundations of a 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 warrant mentioning here. There hasn't been a significant devolution of welfare programs since 1996. However flawed the final bill that President Bill Clinton signed then may have been from both a constitutional and a policy perspective, it was still a step in the right direction. Ultimately, as discussed more generally below, welfare should not even be a state program. Rather, it should be a matter of private responsibility, as it long was in America. But the process of getting the government out of the business of charity—and the federal government especially, for the Constitution grants it no such authority—was at least begun in the 104th Congress.

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 (NEA) to the Department of Agriculture's Market Access Program, and on and on. One assumes that each of those programs was started for a good reason, yet each involves taking from some and giving to others—policies 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 minimize harm and maintain public support. Other programs, however, could be eliminated with relatively little harm. Does anyone seriously doubt that there would be art in America without the NEA? 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 critics would not be made to pay, through their taxes, for art they abhor.

In fact, it is the transfer programs in "symbolic" areas that may be the most important to eliminate first since 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. As a matter of principle, does anyone seriously believe there is any constitutional authority whatever for the National Endowment for the Arts, the National Endowment for the Humanities, the Corporation for Public Broadcasting, or the Department of Education? Yet each raises concerns about free speech—to say nothing of their potential for undermining the cause of limiting government. Not a few critics have pointed to the heavy hand of government in those symbolic areas. And of equal importance 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 rest on no constitutional authority but because they have demonstrated a relentless tendency toward propagating ever more government. Indeed, one can hardly expect those institutions to underwrite programs that advocate less government when they themselves were brought into being and continue to 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 many 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 and commercial freedom. 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 might be necessary and proper to facilitate free trade, such as clarifying rights of trade in uncertain contexts or regulating the interstate transportation of dangerous goods. What the clause does not authorize, however, is regulation for reasons much beyond ensuring the free flow of commerce—the kind of managed trade, for example, that is little more than a thinly disguised transfer program designed to benefit one party at the expense of another, picking winners and losers.

Unfortunately, much modern federal regulation falls into that final category, whether it concerns employment or health care, insurance, banking, or whatever. In fact, given political and budgetary constraints on the ability of government to tax and spend—to take money from some, run it through the Treasury, and then give it to others—the preferred form of transfer today is through regulation. That puts such transfers "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 politically "cost-free" regulatory redistribution is substantial, of course, yet 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 broader perspective, are encouraged; and general uncertainty, anathema to efficient markets, is the order of the day. Far from facilitating free trade—the commerce power's basic purpose—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 also misused it to create federal crimes. Thus, a great deal of regulation has arisen under the commerce power that is nothing but a disguised exercise of a general police power that Congress otherwise lacks. The Gun-Free School Zones Act previously discussed is an example of legislation passed nominally under the power of Congress to regulate commerce among the states; but the actions it criminalizes are properly regulated under a *state's* general police power, the power of states to "police" or secure our rights. There is no general federal police power except as an implication of federal sovereignty over federal territory or as may be necessary and proper for carrying into execution Congress's enumerated powers or ends.

The ruse of using the commerce power to criminalize acts that are the proper jurisdiction of the states should be candidly recognized. Indeed, it is a mark of the decline of respect for the Constitution's limits on federal power that when we fought a war on liquor early in the 20th century, we felt it necessary to do so by first amending the Constitution, there being no power otherwise for such a federal undertaking; but today, when we fight a war on drugs—with as much success as we enjoyed in the earlier war—we do so without so much as a nod to the Constitution.

The Constitution lists three federal crimes: treason, piracy, and counterfeiting. No one knows how many federal statutory crimes there are today, to say nothing of crimes hiding in the *Code of Federal Regulations*, but the numbers 3,000 and 300,000, respectively, have often been given as estimates. 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 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 the States

The federal government has not only intruded on the police power of the states, but in the opposite direction it has too often shirked its responsibility to police the states pursuant to the Fourteenth Amendment. Here is an area where federal regulation has been, if anything, *too* restrained—yet when undertaken, often unprincipled as well.

The Civil War Amendments changed America's federalism fundamentally and very much for the better, giving citizens an additional level of protection, not against federal but against state oppression—the oppression of slavery, obviously, but much else besides. Thus, the Fourteenth Amendment, ratified in 1868, begins by defining both federal and state citizenship, making it clear that the recently freed slaves were citizens of both the United States and the states wherein they resided. It then provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Those provisions of Section 1 are self-executing, which means that *individuals* can go straight into court to see to their enforcement. And Section 5 gives *Congress* the "power to enforce, by appropriate legislation, the provisions of this article."

Unfortunately, almost from the start, confusion surrounded the interpretation and enforcement of the Fourteenth Amendment. As the debate over the adoption of the amendment makes clear, the Privileges or Immunities Clause was meant to be the principal source of substantive rights under the amendment, and those rights were meant to include the rights of free people everywhere: property, contract, personal security—in short, our "natural liberties," as William Blackstone, the eminent 18th century English jurist, had earlier understood "privileges or immunities" to mean. But 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 as contentious as it is confused.

Increasingly over the 20th century, especially in the second half, modern liberals urged that the amendment be used as it was meant to be used—against oppression by the states; but their uses were selective, often reflecting a political agenda. They also ignored or denigrated rights that were meant to be protected, like economic liberty and property and contract rights. For their part, modern

conservatives, partly in reaction, chose a course of "judicial restraint" (perhaps better termed "judicial abdication"), calling for the amendment to be used far more narrowly than it was meant to be used—for fear that it might be misused, as it has been. To sort this confusion out, there is no better place to begin than with the text of the abandoned Privileges or Immunities Clause. (Judicial methodology will be discussed more fully below.)

Again, the clause says that no state shall abridge "the privileges or immunities *of citizens of the United States*" (emphasis added). We need to know, therefore, what the privileges or immunities of U.S. citizens are. And for that, we turn to the constitutional text where we find the few rights mentioned in the original Constitution; the rights enumerated in the Bill of Rights, at least as those can be applied against states by the Privileges or Immunities Clause; and the many unenumerated rights we "retained" as recognized by the Ninth Amendment and as implied by the doctrine of enumerated powers as discussed above. (Where there is no power, by implication there is a right that the exercise of such a power might otherwise have overridden.) But as the Supreme Court held in *Barron v. Baltimore* (1833), when the Bill of Rights was ratified, those rights, except as otherwise provided, were not held against the *states* but only against the federal government, the government created by the Constitution, to which the Bill of Rights was appended. With the ratification of the Fourteenth Amendment, however, that changed, and changed radically. No longer could *states* freely abridge those privileges or immunities. Again, Section 1 of the amendment was self-enforcing: individuals could go directly to court to enforce their rights. But if the courts failed to do so, Congress could legislate to protect those rights pursuant to Section 5.

That reading is perfectly consistent with the debates that surrounded not only the adoption of the Fourteenth Amendment but the prior enactment of the Civil Rights Act of 1866, which the amendment was meant to constitutionalize and which Congress reenacted in 1868, just after the amendment was ratified. All citizens, the Civil Rights Act said in part, "have the right to make and enforce contracts, to sue, be parties and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property." Such were some of the "privileges or immunities" the Fourteenth Amendment was meant to secure.

Clearly, those basic common-law rights, drawn from the classic Lockean, reason-based theory of natural rights, were meant to be protected first by ordinary *state* law. But just as clearly, states often violated them, either directly or by failing to secure them against private violations, which is why the Fourteenth Amendment was needed. And states continued to violate them even after the amendment was ratified. Now, however, invoking one's *constitutional*

rights against one's own state, appeal could be made to the courts, under Section 1 of the amendment, or to Congress, under Section 5, as just noted.

But once the Supreme Court eviscerated the Privileges or Immunities Clause in 1873, Fourteenth Amendment jurisprudence took a wandering turn. With the clause no longer available, courts began deciding cases under the Due Process or Equal Protection Clauses. That led in time to opposing complaints: on one hand were charges, made mainly by modern conservatives, that the more open-ended concept of "substantive due process" encouraged judges to invent "rights" nowhere to be found even among our unenumerated rights and thus to override democratic majorities; on the other hand were charges, made mainly by modern liberals, that a narrow "procedural due process" encouraged judges to defer to democratic majorities that were overriding individual rights. As the debate played out over the second half of the 20th century, it became increasingly clear that the heart of the problem was the demise of the Privileges or Immunities Clause and, with it, the theory of rights that stood behind the clause. Yet neither side seemed willing to revive the clause, much less do the serious work of discovering its true content.

That stalemate gave rise to a group of *classical* liberals and libertarians and to a call for returning to first principles, not only those of our Founding but those of our second Founding as well, when the principles of the Declaration of Independence, including equal protection, were incorporated at last into the Constitution. Classical liberals like this author urged reviving not only the doctrine of enumerated powers and the original understanding of the Ninth and Tenth Amendments but the Privileges or Immunities Clause too. Responding to objections from conservatives, we made it clear that doing so would give the courts and Congress no power to secure modern "entitlements," which are no part of the common-law tradition of life, liberty, and property, to say nothing of the natural rights tradition. Rather, the power to secure rights that would be revived would be limited by the rights that there were to be secured. To be sure, that power would now reach *intrastate* matters when states were violating the provisions of the Fourteenth Amendment. But that is exactly what the amendment was meant to do. And that is the fundamental issue that the *Slaughterhouse* majority failed to recognize.

Congress today rarely looks to Section 5 of the Fourteenth Amendment as a source of power. Instead, it usually relies on a capaciously interpreted Commerce Clause. Not only is that a misuse of its commerce power, inviting further misuses in the future, but assuming the facts warrant it, it is also a failure to use the Fourteenth Amendment as it was meant to be used, inviting future failures. The Fourteenth Amendment has been both underused and misused by Congress and misapplied by the courts. But that is no reason to ignore it. Rather, it is a reason to correct the errors and use it properly.

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 and into the 21st, 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—free from "grassroots tyranny." 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.

Center Judicial Confirmation Hearings on the Principle That the Constitution Is a Document of Delegated, Enumerated, and Thus Limited Powers

There is a crucial difference between the Constitution and "constitutional law"—the body of Supreme Court decisions that have interpreted and applied the Constitution, correctly or not, as cases have come before the Court over the years. As noted earlier, Congress could restore constitutional government on its own initiative simply by limiting its actions to those that are authorized by the Constitution and repealing its past actions that were taken without such authority. But for those limits to become constitutional law, they would have to be recognized as such in decisions 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 restoring constitutional government—or returning to rule under a properly read Constitution—it must recognize the mistakes it has made, especially following Roosevelt's Court-packing threat in 1937, and then rediscover "the Constitution."

As noted earlier, a small measure of constitutional restoration occurred in 1995 in the *Lopez* decision. Unfortunately, a decade later, in its 2005 California medical marijuana decision, *Gonzales v. Raich*, a divided Court abandoned many of the principles it had articulated in *Lopez* (and had articulated more fully in *United States v. Morrison* [2000]). But in the 2012 decision in *National Federation of Independent Business v. Sebelius*, the Court returned to principle, at least insofar as it held that there are limits on Congress's commerce and spending powers. What those and several other related decisions portend for the future of constitutional restoration by the Court is thus uncertain. At the least, however, after over eight decades of effectively unlimited government, we can say that the idea of a government of constitutionally limited powers is back in play.

But apart from its own restorative actions, Congress is not powerless to influence the Court in the direction of constitutional restoration. As vacancies arise on the Court and on lower courts, the Senate has a substantial say about who sits on those courts through its advice and consent powers. But to exercise those powers well, senators must have a better grasp of the basic issues than many have shown in recent Senate confirmation hearings for nominees for the courts. In particular, the obsession with "judicial activism" and "judicial restraint," terms that in themselves are largely vacuous, only distracts from the real issue: the nominee's philosophy of government and conception of the Constitution. To appreciate those points more fully, 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. For decades after the New Deal constitutional revolution, but especially with the Warren and Burger Courts during the third quarter of the 20th century, debate focused far more on rights than on powers, and not surprisingly since the 1937 Court had effectively eviscerated the doctrine of enumerated powers. Thus, in Supreme Court confirmation hearings, senators sought mainly to learn 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 larger constitutional framework, and that is what has been missing too often from recent hearings.

Clearly, the great American debate began with rights—with the protests that led eventually to the Declaration of Independence. 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 or natural law discoverable by reason—all to be secured by a government of limited powers made legitimate through consent.

But when the Framers met 11 years later to draft a constitution, they focused mainly on *powers*, not rights, and for two main reasons. First, their initial task was to create and empower a stronger government than had been authorized by the Articles of Confederation, which the Constitution did once it was ratified. But their second task, of equal importance, was to limit that government. For that, they had two main options. They 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, structurally, by pitting one power against another through a system of checks and balances—the idea being, again, that where there is no federal power there is, by implication, a

right, belonging to the states or to 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, as Madison said, "few and defined." Thus, *the doctrine of enumerated powers* became our principal defense against overweening government.

Only later, during the ratification debates in the states, 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." Clearly, we cannot "retain" what we do not first have to be retained—the natural rights we never gave up when we authorized and instituted the federal government through ratification.

Constitutional Visions

Thus, with the Ninth Amendment making it clear that we have both enumerated and unenumerated rights, the Tenth Amendment stating that the federal government has only enumerated powers, and the Fourteenth Amendment later making our rights good against the states as well, what emerges is an inspiring vision of freedom. Individuals, families, firms, and the infinite variety of institutions that constitute civil society are free to pursue happiness as they wish, in accord with whatever values they have, 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 the people, through their constitutions, have authorized and empowered them to do.

That picture is a far cry from the modern liberal vision, rooted in the Progressive Era. But it is a far cry too from the modern conservative vision, especially in the emerging movement for "national conservatism." Both camps would empower government to manage all manner of economic affairs and a range of political and personal affairs as well. Neither vision reflects the true constitutional scheme. Both want to use the Constitution to promote their own substantive agendas. Repeatedly, liberals invoke democratic power for ends that are nowhere authorized by our Constitution of limited powers; at other times, they invoke redistributive "rights" that are no part of our unenumerated rights, requiring government programs that are nowhere authorized, while denigrating rights like property and freedom of contract that were

plainly meant to be protected. But conservatives too rely on expansive readings of democratic power, thus running roughshod over rights that were meant to be protected, especially unenumerated rights.

From Liberty to Democracy

What we've seen over the course of the 20th century and the first decades of the 21st, then, is a steady progression from liberty to democracy, from judge-made common law to statutory law, from individual self-rule to collective rule. The idea that animated early 20th-century progressives—that the Constitution was outdated, that the basic purpose of government is to solve what in truth are personal problems—became the intellectual foundation for the New Deal constitutional revolution, which instituted that vision, not with an opinion here and there, as had already been happening, but systematically through several Supreme Court decisions that amounted to a radical reinterpretation of the Constitution, standing it on its head.

More specifically, as noted earlier, following President Roosevelt's 1937 Court-packing threat, the New Deal Court eviscerated our first line of defense against overweening government, the doctrine of enumerated powers. In a pair of decisions, the cowed Court converted the shields contained in the General Welfare and Commerce Clauses into swords of power. Then in 1938, in a famous footnote, the 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 those associated with "ordinary commercial transactions." Legislation implicating such rights would be given minimal scrutiny, the Court said in effect, which in practice amounted essentially 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," rendering most such laws unconstitutional. Finally, in 1943, the Court jettisoned the nondelegation doctrine, grounded in the first clause of the Constitution after the Preamble: "*All* legislative powers herein granted shall be vested *in a Congress* . . . ." (emphasis added). That allowed Congress to delegate ever more of its legislative powers to the executive branch agencies it had been creating, which is where most of our law today is written in the form of regulations, rules, interpretations, and more. That undermined a core constitutional principle, the separation of powers. And it sanctioned the modern administrative state, the largely unaccountable executive state that regulates so much of life today.

Through those seminal decisions, the Constitution was transformed, without benefit of amendment, from a limited, libertarian, and supermajoritarian docu-

ment to an effectively unlimited, simple-majoritarian document. The floodgates were thus opened to the potential for majoritarian tyranny, which very quickly became special-interest tyranny, including "crony capitalism," as public choice economic theory demonstrates should be expected. And that led in turn, increasingly, to claims from many quarters that rights were being violated by these expanding programs. Thus, the Court, focusing now not on powers but on rights, would have to try to determine whether the rights being claimed were or were not "in" the Constitution—a question the Constitution had spoken to only 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 determine whether they were "fundamental" rights, to be protected under "strict scrutiny," or "nonfundamental" rights, which would be ignored if there were some "rational basis," some conceivable reason for the legislation that implicated them. Where in the Constitution is this judicial methodology to be found? Nowhere. The Court invented it from whole cloth to make the world safe for the New Deal's social engineering schemes.

Judicial "Activism" and "Restraint"

Thus, it is no accident that until very recently the modern debate focused on rights, not powers. With the doctrine of enumerated powers effectively dead and government's powers effectively unlimited, the main issue left for the Court to decide, apart from structural and related issues, was whether there might be any rights that would restrain that power and whether those rights were or were not "fundamental," since "nonfundamental" rights no longer counted for much. In the post–New Deal era both liberals and conservatives bought into this jurisprudence: liberals because they liked this government power, conservatives because they thought the battle a lost cause. Both camps saw the Constitution as giving a wide berth to democratic decisionmaking. Neither side asked the first question, the fundamental *constitutional* question: Does Congress have *authority* to pursue this end? Instead, that authority was simply taken for granted. Congress takes a policy vote on whatever proposal is before it and leaves it to the courts to determine whether there are any "fundamental" rights that might restrict their power.

As these fundamental changes played out, modern liberals, enamored of government programs, urged the Court to be "restrained" in finding rights that might limit their redistributive and regulatory schemes, especially "second-class" rights concerning property, contract, and economic liberty. At the same time, they urged the Court to look to "evolving social values" and to be "active" in finding "rights" invented from whole cloth, rights that served their political agenda.

But modern conservatives were often little better. Reacting to abuses by liberal judicial "activists," most conservatives called for judicial "restraint" across the board. Thus, if liberal programs ran roughshod over the rights of individuals to use their property or freely contract, the remedy, many conservatives said, was not for the Court to invoke the doctrine of enumerated powers or 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 ignoring the fact that it was the unrestrained democratic process that gave us those programs in the first place, too many conservatives offered us a counsel of despair amounting to a denial of constitutional protection.

In the era of the Warren and Burger Courts, conservatives too often overstated and misstated their complaints about the Court's "activism," especially in areas like civil rights and criminal procedure. At the same time, no one doubts that those Courts discovered "rights," especially redistributive rights, that are nowhere to be found in the Constitution, even among our unenumerated rights. 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.

The role of the judge in our constitutional republic is thus profoundly important and often profoundly complex. "Activism" is no proper posture for a judge, but neither is "restraint" amounting to abdication. Judges must apply the Constitution to cases or controversies before them, neither making that law up nor ignoring it. They must be actively *engaged* with the document and, especially, with its underlying principles. In particular, they must appreciate keenly 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 again, where there is no power, there is a right, belonging either to the states or to the people. Indeed, we should hardly imagine that, during the three years before the addition of the Bill of Rights, the Constitution could be read properly as failing to protect *any* rights simply because most, save for those few in the original document, were not "in" that document.

But reviving the doctrine of enumerated powers is only part of the task before the Court. Especially when assessing the character and scope of *state*

police power—the basic power of states to secure our rights—judges and justices in the wake of the Civil War Amendments must have a deep understanding of the classical theory of rights that stands behind the Constitution if it is to be restored correctly. In particular, when a plaintiff challenges a state statute by invoking an unenumerated right, rather than ask the plaintiff to find such a right "in" the Constitution, the better course would be for a judge to ask the state defendant what right its statute is protecting under its police power—again, the power, at bottom, to secure rights. To illustrate with a famous example from 1925, *Pierce v. Society of Sisters*, what right was the state of Oregon protecting with its statute effectively prohibiting parents from sending their children to nongovernmental schools? Since the state could not plausibly point to any such right, the unenumerated right of fit parents to direct the education of their children was implicitly "found" by the Supreme Court—and the burden of proof was placed correctly on the state. That approach can be used in an unlimited number of cases where unenumerated rights are at issue. Don't require the plaintiff to find an unenumerated right. Require the state to show what right its statute is protecting.

Those are the two sides—powers and rights—that senators need to examine in confirmation hearings for nominees for our courts. It's important to know a nominee's "judicial philosophy," to be sure. But it is even more important to know a nominee's understanding of the Constitution, for in the end it is the Constitution that defines us as a nation.

If nominees do 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 underpins the Constitution—then their nomination should be rejected. In recent years, Senate confirmation hearings have provided opportunities for constitutional debate throughout the nation. Those debates need to move from the ethereal and often arid realm of "constitutional law" to the real realm of the Constitution. They are extraordinary opportunities not simply for constitutional debate but for constitutional renewal.

Unfortunately, in recent Congresses we have seen the debate move not from "constitutional law" to the Constitution but rather to raw politics. We have heard demands that judicial nominees pass "ideological litmus tests," for example, as if judges in their work were supposed to reflect popular views of one sort or another. That is tantamount to asking judges not to *apply* the law, which is what judging requires, but to *make* the law according to those values, whatever the actual law may require, and to commit to doing so during the judicial confirmation process no less. The duty of a judge under the Constitution is to decide cases according to the law, not according to whatever values or

ideology may be in fashion. To perform that duty, the only ideology that matters is that of the Constitution.

Conclusion

America is a democracy only in the most fundamental sense of that idea: authority, or legitimate power, rests ultimately with the people as manifest in the Constitution. Having authorized that power, the people have no more right thereafter to tyrannize each other through majoritarian acts 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, earlier generations gave up only certain of their powers as enumerated in the document, leaving us otherwise free to live our lives as we wish. We have allowed and even encouraged 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 start returning those powers to their proper bounds, to reclaim our liberty, and to enjoy the fruits that follow.

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