FEATURES

What is the most sacred duty and the greatest source of our security in a Republic?...A sacred respect for the constitutional law is the vital principle...of a free government."
—Alexander Hamilton

THE PURPOSE AND LIMITS OF GOVERNMENT

BY ROGER PILON

Eleven years after they declared the nation's independence, the Founders drafted a constitution for the United States that reflected to a large degree the principles the Declaration had set forth. The document called for a limited national government, which ratification brought into being in 1789. In drafting the Constitution, the Founders needed to establish a government at once strong enough to secure our rights, and do the few other things they thought it should do, yet not so strong as to violate rights in the process. Toward that end they gave the national government limited powers, then limited the exercise of those powers through an intricate system of checks and balances.

The Doctrine of Enumerated Powers

It was the doctrine of enumerated powers that was meant to constitute the principal defense against overweening government. Since all power began with the people, the people could limit their government simply by giving it, through the Constitution, only certain of their powers. That, precisely, is what they did, through enumeration, thus making it clear that the government had only such powers as were found in the document.

The very first sentence of the Constitution, following the Preamble, makes the point: "All legislative Powers *herein granted* shall be vested in a Congress . . ." (emphasis added).

The point is reiterated in the Tenth Amendment, the final documentary statement of the Founding period: "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 word, power was delegated by the people, enumerated in the Constitution, and thus limited. The idea, plainly, was to limit government from the outset by limiting the things it could do, almost all of which, as Article I, Section 8 of the Constitution indicates, relate to securing rights. James Madison, the principal author of the Constitution, made the point in 1794 when he rose from the floor of the House to object to a welfare proposal, saying that he could not "undertake to lay [his] finger on that article of the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents."

Notice that Madison was not objecting to benevolence. Rather, he was making a point about constitutional principle—however worthy the end might be, Congress had no power to pursue it since the people, through their Constitution, had given Congress no such power. In 1887, exactly 100 years after the Constitution was drafted, President Grover Cleveland made a similar point when he vetoed a bill to buy seeds for Texas farmers suffering from a drought, saying he could "find no warrant for such an appropriation in the Constitution."

Rewriting the Constitution

The centerpiece of the Constitution, again, is the doctrine of enumerated powers, which limits the federal government to its authorized ends. Consistent with that doctrine, as Madison, Jefferson, and others made clear, the General Welfare Clause could not have afforded Congress an independent power to spend for the general welfare; for under such a reading, Congress would be able to spend for any end, enumerated or not, provided only that it served the "general" welfare, and thus would be able to evade the limits imposed by enumeration.

No, the clause was meant to serve as a shield against overweening power, not as a sword of power. It was meant to limit Congress' spending for enumerated ends by requiring that spending be for the general rather than for any particular or local welfare. It was meant, in short, to limit Congress' enumerated powers, not to undermine the doctrine of enumerated powers itself. Nevertheless, in 1936 the Supreme Court said...that Congress did have an independent power to spend for the general welfare; then in 1937 the court announced that conclusion as part of its holding and added that it would not thereafter police Congress as to whether it was spending for the general or for some particular welfare but would leave it to Congress to police itself.

If we are to restore constitutional government, however, we ourselves must take the first step.

The result, not surprisingly, has been an ever-expanding welfare state as Congress has been unable to resist (when it has not itself abetted) unrestrained demands on the public treasury, all in the name of the "general welfare." The story of the Commerce Clause is similar, for it too was meant to be a shield against power, not a sword of power as it is today. In this case, however, the Founders were concerned to restrain not federal but state power, which had been used under the Articles of Confederation to enact protectionist legislation aimed at protecting local manufacturers and merchants against competition from out-of-state interests. Seeking to ensure a national market and a regime of free trade among the states, the Founders gave Congress the power to regulate, or "make regular," commerce among the states. It was thus a power essentially to negate state efforts at restraining trade (it was so read in the first great Commerce Clause case in 1824) and to enable Congress to take such other measures as might be necessary and proper to ensure free trade.

Unfortunately, that functional account of the clause was gradually replaced over the years by a narrow, textual reading of the words "commerce" and "among," which left the court in 1937 with slim precedents as it faced the New Deal's regulatory juggernaut. Cowed by Franklin D. Roosevelt's court-packing scheme that year, the justices caved completely by saying that Congress had power to regulate anything that "affects" interstate commerce,which, of course, is virtually everything. With that, the modern regulatory state poured through the opening floodgates until today there seems to be almost no subject too personal or too trivial for federal regulatory attention.

Rewriting the Declaration

Having thus eviscerated the doctrine of enumerated powers, the court turned next to the Bill of Rights, which it gutted in a now-famous footnote in a case called *Carolene Products*. Details of the case aside, the doctrine that emerged, which is the foundation of modern constitutional law, is this: we have two kinds of rights, "fundamental" rights, like the right to vote and the free-speech rights that are associated with the democratic process, and "nonfundamental" rights, like rights of property and contract and rights associated with "ordinary commercial transactions." When legislation or enforcement actions implicate the first category of rights, the court will give those measures "strict scrutiny" and will most likely find them unconstitutional. By contrast, when measures implicate the second category of rights, they will be given minimal scrutiny by the court. If they are "rationally related" to some "conceivable" government end, they will pass constitutional muster.

With the government's redistributive and regulatory powers all but plenary after 1937, only our rights could be posed as a brake on federal power. After *Carolene Products*, however, even that brake was eviscerated, for only if we could show that the rights implicated by a given measure were "fundamental" could we hope to get a court to review the matter.

The value-laden distinction between two kinds of rights—to say nothing of the distinction between two levels of judicial review—is nowhere to be found in the Constitution, of course. It was written from whole cloth to pave the way for the redistributive and regulatory programs of the New Deal. Indeed, Rexford Tugwell, one of the principal architects of the New Deal, said as much some 30 years after *Carolene Products* was decided: "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document intended to prevent them." With that, the Constitution truly stood on its head. As written, it is

a document of enumerated powers, the exercise of which is limited by both enumerated and unenumerated rights. As it emerged from the New Deal, it was a document of effectively unenumerated powers, the exercise of which would thereafter be limited by rights interpreted narrowly by conservatives on the court and episodically by liberals on the court.

The rewriting of the Constitution, without benefit of amendment, goes far toward explaining how political forces bent on expanding government have been able to do so in the face of a document written plainly to prevent that. If we are to restore constitutional government, however, we ourselves must take the first step, for those "political forces" include a large portion of a people who have asked for, and even demanded, all the government we have today, constitutional restraints aside. As a first step, we must stop asking government to do what we had no right to ask it to do in the first place. But we must also recognize, from a more basic perspective, that constitutions cannot be written in stone: they rightly require some flexibility.

That is not to say that any interpretation of our Constitution will do, of course. In fact, most interpretations will not do, for the Founders, through the documents they drafted and the writings they left us, made it quite clear how they meant those documents to be understood. The Declaration and the Constitution, as amended, are consistent and elegant statements about the purpose and limits of government. They draw a simple yet inspiring picture of human affairs. As we go about the difficult task of limiting the leviathan we have created, we would do well to revisit those documents and relearn the wisdom they contain. At stake are nothing less than our liberty and the legitimacy of our legal affairs.

This article is an excerpt of a longer study of the same name, published by the Cato Institute. It is reprinted with permission from the Cato Institute. Roger Pilon is the founder and director of Cato's Center for Constitutional Studies. For the rest of Pilon's article, see www.cato.org.

RENEWING OUR COMMITMENT TO LIMITED GOVERNMENT

BY THE HONORABLE MIKE PENCE

I am deeply humbled to deliver the Krieble Lecture at the Heritage Foundation's Resource Bank meeting today. Robert Krieble's dogged advancement of the principles of freedom in the Soviet Union sowed the seeds that felled that wall and I am honored to speak in his memory.

Picture, if you will, a ship at sea. Shoulders back, a proud captain steps onto the sunlit deck of a tall ship plying the open seas of a simpler time. Its sails are full and straining in the wind. Its crew is tried and true. Its hull, mast, and keel are strong. But beneath the waves—almost imperceptibly—the rudder has veered off course and, in time, the captain and crew will face unexpected peril.

The conservative movement today is like that tall ship with its proud captain—strong, accomplished, but veering off course into the dangerous and uncharted waters of big government republicanism. I make this assertion quite aware that I do so before so many who have done so much for the cause of conservative values.

The Conservative Vision

As this Resource Bank Meeting comes to a close and we reflect on battles past and future, the words of a young King David—standing in the Valley of Elam just moments before facing Goliath—seem appropriate, "Without a vision the people perish." And he asked his countrymen, "Is there not a cause?"

Conservatives like those gathered here never suffer that question. Conservatives have the vision. Conservatives know the cause—to "establish justice, ensure domestic tranquility,