STATEMENT

of

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before the

Committee on Homeland Security and Governmental Affairs
Subcommittee on Federal Financial Management, Government Information, and International Security

October 25, 2005

RE: Guns and Butter: Setting Priorities in Federal Spending in the Context of Natural Disasters, Deficits, and War

Mr. Chairman, distinguished members of the subcommittee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies.[1] I want to thank you, Mr. Chairman, for inviting me to testify today on "Guns and Butter: Setting Priorities in Federal Spending in the Context of Natural Disasters, Deficits, and War"—the purpose of the hearing being, as your letter of invitation states, "to focus on the limits and role of our federal government as outlined in the Constitution."

I can well understand your concern to focus on that issue, Mr. Chairman. In *Federalist* 45, James Madison, the principal author of the Constitution, spoke to a skeptical nation, worried that the document the Constitutional Convention had just drafted gave the central government too much power. Be assured, he said, the powers of the new government were, and I quote, "few and defined." How things have changed. Yet in its 218 years, the Constitution itself has changed very little. The questions before us, then, are (1) under that Constitution, how did we go from limited to essentially unlimited government, (2) what are the implications, and (3) what should be done about it?

A closely related question is whether Madison understood and correctly reported on the document he'd just drafted, or whether modern interpretations of the Constitution, which have allowed our modern Leviathan to arise, are correct. Let me say here that Madison was right; the modern interpretations are wrong. As a corollary, most of what

[1] A biographical sketch is attached.

the federal government is doing today is unconstitutional because done without constitutional authority. That contention will doubtless surprise many, but there you have it. I mean to speak plainly in this testimony and call things by their proper name.

But before I defend that contention by addressing those questions, let me note that the nominal subject of these hearings—"setting priorities in federal spending"—concerns mainly a matter of policy, not law. Unless some law otherwise addresses it, that is, how Congress prioritizes its spending is its and the people's business—a political matter. By contrast, the subtext of these hearings, which I gather is the subcommittee's principal concern, is "the limits and role of our federal government as outlined in the Constitution," and that is mainly a legal question. I distinguish those questions, let me be clear, for a very important reason. It is because we live under a Constitution that establishes the rules for legitimacy. Thus, in the case at hand, Congress may have pressing policy reasons for prioritizing spending in a given way, but such reasons are irrelevant to the question of whether that spending is constitutional.

Constitutional Legitimacy

Because that distinction and the underlying issue of legitimacy are so central to these hearings, they warrant further elaboration at the outset. In brief, our Constitution serves four main functions: to authorize, institute, empower, and limit the federal government. Ratification accomplished those ends, lending political and legal legitimacy to institutions and powers that purported by and large to be morally legitimate because grounded in reason. Taken together, the Preamble, the first sentence of Article I, the inherent structure of the document, and especially the Tenth Amendment indicate that ours is a government of delegated, enumerated, and thus limited powers. The Constitution's theory of legitimacy is thus simple and straightforward: To be legitimate, a power must first have been delegated by the people, as evidenced by its enumeration in the Constitution. That is the doctrine of enumerated powers, the centerpiece of the Constitution. For the Framers, it was the main restraint against overweening government. In fact, the Bill of Rights, which we think of today as the main restraint, was an afterthought, added two years later for extra precaution.

Once that fundamental principle is grasped, a second follows: Federal powers can be expanded only by constitutional amendment, not by transient electoral or congressional majorities. Over the years, however, few such amendments have been added. In the main, therefore, Article I, section 8 enumerates the 18 basic powers of Congress—the power to tax, the power to borrow, the power to regulate commerce with foreign nations and among the states, and so forth, concluding with the power to enact such laws as may be necessary and proper for executing the government's other enumerated powers. It is a short list, the idea being, as the Tenth Amendment makes explicit and the *Federalist* explains, that most power is to remain with the states—or with the people, never having been delegated to either level of government.[2]

[2] The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In fact, given the paucity and character of the federal government's enumerated powers, it is plain that the Framers meant for most of life to be lived in the private sector—beyond the reach of politics, yet under the rule of law—with governments at all levels doing only what they have been authorized to do. Far from authorizing the ubiquitous government planning and programs we have today, the Constitution allows only limited government, dedicated primarily to securing the conditions of liberty that enable people to plan and live their own lives. I turn, then, to the first of the questions set forth above: How did we move from a Constitution that limited government to one that is read today to authorize effectively unlimited government?

From Limited to Unlimited Government

The great constitutional change took place in 1937 and 1938, during the New Deal, all without benefit of constitutional amendment; but the seeds for that change had been sown well before that, during the Progressive Era.[3] Before examining that transition, however, I want to lay a proper foundation by sketching briefly how earlier generations had largely resisted the inevitable pressures to expand government. It is an inspiring story, told best, I have found, in a thin volume written in 1932 by Professor Charles Warren of the Harvard Law School. Aptly titled, *Congress as Santa Claus: or National Donations and the General Welfare Clause of the Constitution*, this little book documents our slow slide from liberty and limited government to the welfare state—and that was 1932! In truth, however, Warren's despair over that slide notwithstanding, the book is a wonderful account of just how long we lived under the original design, for the most part, before things started to fall apart during the Progressive Era. And so I will share with the subcommittee just a few snippets and themes from the book, along with material from other sources, to convey something of a sense of how things have changed—not only in the law but, more important, in the culture, in our attitude toward the law.

When Thomas Jefferson wrote that it was the natural tendency for government to grow and liberty to yield, he doubtless had in mind his rival, Alexander Hamilton, for hardly had the new government begun to operate when Hamilton proposed a national industrial policy in his 1791 *Report on Manufactures*.[4] To Hamilton's argument that Congress had the power to pronounce upon the objects that concern the general welfare and that these objects extended to "the general interests of learning, of agriculture, of manufacturing, and of commerce,"[5] Madison responded sharply that "the federal Government has been hitherto limited to the specified powers, by the Greatest Champions for Latitude in expounding those powers. If not only the *means*, but the

[3] For a discussion of the Progressives' approach to the Constitution, see Richard A. Epstein, "The Monopolistic Vices of Progressive Constitutionalism, 2004-2005 Cato Sup. Ct. Rev. 11 (2005); Richard A. Epstein, How Progressives Rewrote the Constitution (2006) (forthcoming).

[4] See Arthur Harrison Cole ed., Industrial and Commercial Correspondence of Alexander Hamilton 247 (1968).

[5] Id.

objects are unlimited, the parchment had better be thrown into the fire at once."[6] Congress shelved Hamilton's *Report*. He lost that battle, but over time he won the war.

The early years saw numerous attempts to expand government's powers, but the resistance mostly held. In 1794, for example, a bill was introduced in the House to appropriate $15,000 for the relief of French refugees who had fled to Baltimore and Philadelphia from an insurrection in San Domingo,[7] whereupon Madison rose on the floor to say 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."[8] Two years later a similar bill, for relief of Savannah fire victims, was defeated decisively, a majority in Congress finding that the General Welfare Clause afforded no authority for so particular an appropriation.[9] As Virginia's William B. Giles observed, "[The House] should not attend to what … generosity and humanity required, but what the Constitution and their duty required."[10]

Those early attempts to expand Congress's power, and the resistance to them, centered on the so-called General Welfare Clause of the Constitution, found in the first of Congress's 18 enumerated powers.[11] Hamilton argued that the clause authorized Congress to tax and spend for the general welfare. Not so, said Madison, Jefferson, and many others. South Carolina's William Drayton put it best in 1828:

> If Congress can determine what constitutes the General Welfare and can appropriate money for its advancement, where is the limitation to carrying into execution whatever can be effected by money? How few objects are there which money cannot accomplish! … Can it be conceived that the great and wise men who devised our Constitution … should have failed so egregiously … as to grant a power which rendered restriction upon power practically unavailing?[12]

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[6] Letter to Henry Lee, in 6 The Writings of James Madison, at 81n. (Gaillard Hunt ed., 1906) (original emphasis).

[7] Act of Feb. 12, 1794, 6 Stat. 13.

[8] 4 Annals of Cong. 170 (1794).

[9] 6 Annals of Cong. 1727 (1796).

[10] Id. at 1724.

[11] "The Congress shall have Power To lay and collect Taxes, Imposts and Excises, to pay the Debts and provide for the common Defense and General Welfare of the United States; . . . ."

[12] 4 Reg. Deb. 1632-34 (1828). Madison made a similar point on several occasions. See, e.g., James Madison, "Report on Resolutions," in 6 *The Writings of James Madison* 357 (Gaillard Hunt ed., 1900): "Money cannot be applied to the *general welfare*, otherwise than by an application of it to some *particular* measure conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made." (emphasis in original). And Jefferson also addressed the issue. See, e.g., "Letter from Thomas Jefferson to Albert Gallatin" (June 16, 1817) in *Writings of Thomas Jefferson* 91 (Paul Leicester Ford ed., 1899): "[O]ur tenet ever was, and, indeed, it is almost the only landmark which now divides the federalists from the republicans, that Congress had not unlimited powers to provide for the general welfare, but were restrained to those specifically enumerated; and that, as it was never meant they should . . . raise money for purposes which the enumeration did not place under their action; consequently, that the specification of powers is a limitation of the purpose for which they may raise money."

Stated differently—with reference to constitutional structure—what was the point of enumerating Congress's powers if any time it wanted to do something it was not authorized to do, because there was no power granted to do it, Congress could simply say it was spending for the "general welfare" and thus make an end-run around the limits imposed by the doctrine of enumerated powers? Enumeration would have been pointless.

That argument largely held through the course of the 19th century. To be sure, inroads on limited government were made on other constitutional grounds, as Warren recounts. Congress made gifts of land held in trust under the Public Lands Clause, for example, with dubious consideration given in return; then gifts of revenues from the sale of such lands; and finally, gifts of tax revenues generally.[13] But there were also numerous examples of resistance to such redistributive schemes. Thus, in 1887, 100 years after the Constitution was written, President Grover Cleveland vetoed a bill appropriating $10,000 for distribution of seeds to Texas farmers suffering from a drought.[14] In his veto message he put it plainly: "I can find no warrant for such an appropriation in the Constitution."[15] Congress sustained the veto. And as late as 1907 we find the Supreme Court expressly upholding the doctrine of enumerated powers in *Kansas v. Colorado*:

> The proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in [,] the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. … The natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment.[16]

Thus, although the doctrine of enumerated powers faced political pressure from the start, and increasing pressure as time went on, the pattern we see through our first 150 years under the Constitution can be summed up as follows. In the early years, measures to expand government's powers beyond those enumerated in the Constitution rarely got out of Congress because they were stopped by objections in that branch—*constitutional* objections. Members of Congress actually debated whether they had the power to do whatever it was that was being proposed; they didn't simply assume they had the power and then leave it to the courts to check them. *Congress took the Constitution and the limits it imposed on congressional action seriously*.[17] Then when constitutionally dubious bills did get out of Congress, presidents vetoed them—not simply on policy but on *constitutional* grounds. And finally, when that brake failed, the Court stepped in. In short, the system of checks and balances worked because the Constitution was taken seriously by sufficient numbers of those who had sworn to uphold it.

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[13] Charles Warren, Congress as Santa Claus 32 (1932).
[14] H.R. 10203, 49th Cong., 2d Sess. (1887).
[15] 18 Cong. Rec. 1875 (1887).
[16] Kansas v. Colorado 206 U.S. 46, 89 (1907).
[17] Contrast that with Congress's enactment of the Gun-Free Schools Act of 1990 (18 U.S.C. § 922 (q)(1)(A) (1988 ed., Supp. V), which the Court found unconstitutional in 1995, holding for the first time in nearly 60 years that Congress had exceeded its authority under the Commerce Clause. United States v. Lopez, 514 U.S. 549 (1995). In enacting the statute, Congress had not even bothered to cite its constitutional authority for doing so.

The Progressive Era called all of that into question. Marked by a fundamental change in the climate of ideas, it paved the way for the New Deal. In fact, as early as 1900 we could find *The Nation*, before it became an instrument of the modern left, lamenting the demise of classical liberalism. In an editorial entitled "The Eclipse of Liberalism," the magazine's editors surveyed the European scene, then wrote that in America, too, "recent events show how much ground has been lost. The Declaration of Independence no longer arouses enthusiasm; it is an embarrassing instrument which requires to be explained away. The Constitution is said to be 'outgrown.'"[18]

The Progressives to whom those editors were pointing, sequestered often in elite universities of the East, were animated by ideas from abroad: British utilitarianism, which had supplanted the natural rights theory on which the Constitution rested; German theories about good government, as reflected in Chancellor Otto von Bismarck's social security experiment; plus our own homegrown theories about democracy and pragmatism.[19] Combined with the emerging social sciences, those forces constituted a heady brew that nourished grand ideas about the role government could play in improving the human condition. No longer viewing government as a necessary evil, as the Founders had, Progressives saw the state as an engine of good, an instrument through which to solve all manner of social and economic problems. In a word, it was to be better living through bigger government.[20]

But a serious obstacle confronted the political activists of the Progressive Era—that troublesome Constitution and the willingness of judges to enforce it. Dedicated to liberty and limited government, and hostile to government planning garbed even in "the public good," the Constitution stood as a bulwark against overweening government, much as the Framers intended it would. Not always,[21] to be sure, but for the most part.

With the onset of the New Deal, however, Progressives shifted the focus of their activism from the state to the federal level. But they fared little better there as the Court found several of President Franklin Roosevelt's schemes unconstitutional, holding that Congress had no authority to enact them.[22] Not surprisingly, that prompted intense debate

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[18] The Nation, Aug. 9, 1900, p. 105.

[19] See Robert S. Summers, Pragmatic Instrumentalism: America's Leading Theory of Law, 5 Cornell L. F. 15 (1978).

[20] Progressives did not limit their attention to economic regulation. In 1927, for example, we find Justice Oliver Wendell Holmes, the "Yankee from Olympus," writing for the Court to uphold a Virginia statute that authorized the sterilization of people thought to be of insufficient intelligence. Buck v. Bell, 274 U.S. 200 (1927). There followed in this country some 70,000 sterilizations. For an insightful discussion of the case and surrounding issues, see William E. Leuchtenburg, Mr. Justice Holmes and Three Generations of Imbeciles, ch. 1 in The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (1995).

[21] *Buck v. Bell*, *supra* note 20, is a good example, as is *Euclid v. Ambler Realty*, 272 U.S. 365 (1926), which upheld a zoning ordinance involving a regulatory taking of property without compensation.

[22] Thus, on "Black Monday," May 27, 1935, in three 9-0 decisions, the Court invalidated the National Industrial Recovery Act and the Frazier-Lemke Act on mortgage moratoria and, in *Humphrey's Executor v. United States*, circumscribed the president's power to remove members of independent regulatory commissions. For a discussion of this era, see Leuchtenberg, The Supreme Court Reborn, *supra* note 20.

within the administration over how to deal with "the nine old men." It ended early in 1937, following the landslide election of 1936, when Roosevelt unveiled his infamous Court-packing scheme—his plan to pack the Court with six new members. The reaction in the country was immediate. Not even the overwhelmingly Democratic Congress—nearly four to one in the House—would go along with the scheme. Nevertheless, the Court got the message. There followed the famous "switch in time that saved nine" and the Court began rewriting the Constitution—again, without benefit of constitutional amendment.

It did so in two main steps. In 1937 the Court eviscerated the doctrine of enumerated powers. Then in 1938 it bifurcated the Bill of Rights and invented a bifurcated theory of judicial review. For the purpose of these hearings, it is one half of the 1937 step that is most important, the rewriting of the General Welfare Clause; but the rest merits a brief discussion as well, to give a more complete picture of this constitutional revolution.

In 1936, in *United States v. Butler*,[23] the Court had found the Agricultural Adjustment Act[24] unconstitutional. But in the course of doing so it opined on the great debate between Madison and Hamilton over the meaning of the so-called General Welfare Clause, coming down on Hamilton's side—yet only in dicta and hence not as law. A year later, however, following the Court-packing threat, the Court elevated that dicta as it upheld the Social Security Act[25] in *Helvering v. Davis*.[26] The words were ringing: "Congress may spend money in aid of the 'general welfare,'"[27] said the 1937 Court. Moreover, "the concept of the general welfare [is not] static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation."[28] Thus were the floodgates opened. The modern welfare state was unleashed.

But if Congress could now engage in unbounded redistribution, so too could it regulate at will following the Court's decision that same year in *NLRB v. Jones & Laughlin Steel Corp.*[29] The issue there was the scope of Congress's power to regulate interstate commerce, a power Congress had been granted to address the impediments to interstate commerce that had arisen under the Articles of Confederation as states were imposing tariffs and other measures to protect local merchants and manufacturers from out-of-state competition. Thus, the power was meant mainly to enable Congress to ensure the free flow of goods and services among the states—to make that commerce "regular," as against state and other efforts to impede it.[30] It was not a power to regulate anything

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[23] 262 U.S. 1, 65-66 (1936).
[24] 7 U.S.C.A. 601 (1933).
[25] 49 Stat. 620 (1935).
[26] 301 U.S. 619, 640 (1937).
[27] Id.
[28] Id. at 641.
[29] 301 U.S. 619 (1937); see also Wickard v. Filburn, 317 U.S. 111 (1942).
[30] See Randy E. Barnett, The Original Meaning of the Commerce Clause, 68 U. Chi. L. Rev. 101 (2000); Brief of *Amicus Curiae* Cato Institute, Jones v. United *States*, 529 U.S. 848 (2000) (visited Oct. 21, 2005) www.cato.org/pubs/legalbriefs/jvsusa.pdf.; Cf., Richard A. Epstein, The Proper Scope of the Commerce Power, 73 Va. L. Rev. 1387 (1987).

for any reason. Yet that, in effect, is what it became as the 1937 *Jones & Laughlin* Court held that Congress had the power to regulate anything that "affected" interstate commerce, which is virtually everything.

The doctrine of enumerated powers now effectively eviscerated—the floodgates open for the modern redistributive and regulatory state to pour through—only the Bill of Rights stood athwart that unbounded power. So in 1938, in famous footnote 4 of *United States v. Carolene Products*,[31] the Court addressed that impediment to Leviathan by distinguishing "fundamental" and "nonfundamental" rights, in effect, and inventing a bifurcated theory of judicial review to complement that distinction. If a law implicated "fundamental" rights like speech or voting, the Court would apply "strict scrutiny" and would doubtless find it unconstitutional. By contrast, if a law implicated "nonfundamental" rights like property, contract, or the rights we exercise in ordinary commercial relations, the Court would uphold the law as long as there was some "rational basis" for it.[32] That judicial deference to the political branches regarding economic rights, coupled with strict scrutiny for political rights, amounted to the democratization and to the politicization of the Constitution, to opening the door to political control of economic affairs, public and private alike, beyond anything the Framers could have imagined.[33]

The rest is history, as we say, with redistributive and regulatory schemes, federal, state, and local, pouring forth. Others on this panel can testify as to the numbers that illustrate that explosion in government programs. My concern, rather, is to outline how it happened that under a Constitution meant to limit government we got a government of effectively unlimited power.

Toward that end, and beyond the history of the matter, let me add that most of the spending that is the focus of these hearings has arisen under the so-called General Welfare Clause, which the Court has also referred to as the Spending Clause. In truth, however, there are no such clauses in the Constitution,[34] which is why I have invoked the term "so-called." A careful reading of the first of Congress's 18 enumerated powers, which is the nominal source of those so-called clauses, coupled with reflection on the structure of the document, will reveal merely a power to tax at the head of Article I, section 8, much as the second of Congress's enumerated powers is the power to borrow. If Congress exercises either or both of those powers—or its Article IV power to "dispose" of public lands, for that matter—and it wants then to appropriate and spend the proceeds on any of the ends that are authorized to it, it must do so under the Necessary and Proper Clause. For taxing, borrowing, disposing, appropriating, and spending are distinct powers. The first three are expressly authorized to Congress. Appropriating and spending, by contrast, are necessary and proper *means* toward executing the powers authorized to the government—means provided for under the Necessary and Proper

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[31] 304 U.S. 104 (1938). For a devastating critique of the politics behind the *Carolene Products* case, see Geoffrey P. Miller, The True Story of *Carolene Products*, 1987 Sup. Ct. Rev. 397.

[32] I have discussed that methodology in Roger Pilon, Foreword: Substance and Method at the Court, 2002-2003 Cato Sup. Ct. Rev. vii. (2003).

[33] See Bernard H. Siegan, Economic Liberties and the Constitution (1980).

[34] See Gary Lawson, Making a Federal Case Out of It: *Sabri v. United States* and the Constitution of Leviathan. 2003-2004 Cato Sup. Ct. Rev. 119 (2004).

Clause. As such, they are not *independent* but only *instrumental* powers, exercised in service of ends *that in turn limit their use to those ends*. Put simply, Congress cannot appropriate and spend for any end it wishes, but only for those ends it is authorized to pursue—and they are, as Madison said, "few and defined."

We come, then, to the nub of the matter. Search the Constitution as you will, you will find no authority for Congress to appropriate and spend federal funds on education, agriculture, disaster relief, retirement programs, housing, health care, day care, the arts, public broadcasting—the list is endless. That is what I meant at the outset when I said that most of what the federal government is doing today is unconstitutional because done without constitutional authority. Reducing that point to its essence, the Constitution says, in effect, that everything that is not authorized—to the government, by the people, through the Constitution—is forbidden. Progressives turned that on its head: Everything that is not forbidden is authorized.

But don't take my word for it. Take the word of those who engineered the constitutional revolution. Here is President Roosevelt, writing to the chairman of the House Ways and Means Committee in 1935: "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation."[35] And here is Rexford Tugwell, one of the principal architects of the New Deal, reflecting on his handiwork some thirty years later: "To the extent that these new social virtues [i.e., New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them."[36] They knew exactly what they were doing—turning the Constitution on its head. That is the legacy we live with today.

Implications of the Constitutional Revolution

That legacy has many implications. Let me distinguish five. First, and perhaps most important, is the loss of legitimacy—moral, political, and legal. Today, we tend to think mainly of political legitimacy, failing to see how the several grounds of legitimacy go together. We imagine that the people, by their periodic votes, tell the government what they want; and to the extent that it responds to that expression of political will, consistent with certain state immunities and individual rights that might check it, the government and its actions are legitimate. Whatever moral legitimacy flows from that view is a function of the moral right of self-government, but that right is largely open-ended regarding the arrangements it might produce. It could produce limited government. But it

[35] Letter from Franklin D. Roosevelt to Rep. Samuel B. Hill (July 6, 1935), in 4 *The Public Papers and Addresses of Franklin D. Roosevelt* 91-92 (Samuel I. Rosenman ed., 1938).

[36] Rexford G. Tugwell, A Center Report: Rewriting the Constitution, Center Magazine, March 1968, at 20. This is a fairly clear admission that the New Deal was skating not simply on thin ice but on no ice at all. For comments from the other side, see, e.g., Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231 (1994): "The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution;" Richard A. Epstein, Commerce Clause, *supra* note 30, at 1388: "I think that the expansive construction of the [commerce] clause accepted by the New Deal Supreme Court is wrong, and clearly so."

could as easily produce unlimited government.[37] And without a keen sense of the role and place of moral legitimacy, we are indifferent as to which it is.

That view characterizes legitimacy in a parliamentary system, more or less; it is not how legitimacy operates in our constitutional republic. Rather, as shown by the Declaration of Independence, the main principles of which shaped the Constitution, we find our roots in Lockean state-of-nature theory and its underlying theory of natural rights.[38] Legitimacy is first defined by the moral order, by the rights and obligations we have with respect to each other. Only then do we turn to political and legal legitimacy, through the social contract—the Constitution—that facilitates and reflects it. As outlined earlier, the federal government gets its powers by delegation from the people through ratification—reflecting mainly the (natural) powers the people have to give it—not through subsequent elections, which are designed primarily to fill elective offices. To be sure, many of the powers thus delegated leave room for discretion by those elected. That is why elections matter: different candidates may have different views on the exercise of that discretion—the discretion to declare war, to take a clear example. But through elections the people can no more give government a power it does not have than they can take from individuals a right they do have. In a constitutional republic like ours, it is the Constitution that sets the powers, not the people through periodic elections.

But when powers or rights are expanded or contracted not through ratification but through elections and the subsequent actions of elected officials, and the courts fail to check that, the Constitution is undermined and the powers thus created are illegitimate. That happened when the New Deal Court bowed to the political pressure brought on by Roosevelt's Court-packing threat. And that paved the way for powers that have never been *constitutionally* authorized by the people—for illegitimate powers, that is—and for the accompanying loss of rights.

Some would argue that we could correct that problem of illegitimacy simply by putting our present arrangements to a vote through the supermajoritarian amendment and ratification procedures provided for in Article V. Were that vote successful, that would indeed produce political and legal legitimacy. But because the Constitution as it stands

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[37] That was pretty much the view of Justice Holmes in his famous dissent in *Lochner v. New York*, 198, U.S. 45 (1905). Declaring that the case was "decided upon an economic theory which a large part of the country does not entertain," and adding that his "agreement or disagreement [with the theory] has nothing to do with the right of a majority to embody their opinions in the law," Holmes proceeded to read out of the Constitution all economic substance: "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire." Id. at 75. But we find a similar view in many modern conservatives as well. Thus, Robert H. Bork speaks of the "two opposing principles" of what he calls the "Madisonian dilemma." Our first principle, Bork says, "is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule." Robert H. Bork, The Tempting of America 139 (1990). That gets Madison exactly backward. Madison's vision was that in *wide* areas of life individuals are entitled to be free simply because they are born free. Nonetheless, in *some* areas majorities are entitled to rule because we have authorized them to rule, giving them powers "few and defined."

[38] John Locke, The Second Treatise of Government, in Two Treatises of Government (1960) (1690).

today reflects fairly closely, in my judgment, the moral order that can be justified—in other words, the Framers and those who subsequently amended the document got it right, for the most part—I would object to amending the Constitution simply to lend political and legal legitimacy to the modern welfare state. Better, I believe, to be able to point not simply to that state's moral illegitimacy but to its political and legal illegitimacy as well.

The second untoward implication of our departure from the Constitution is the chaos that follows for law more generally.[39] The judicial methodology the Constitution contemplates for most constitutional questions is really quite simple. Assuming a court has jurisdiction in a case challenging a given federal statute, the first question is whether Congress had authority to enact the statute. If not, that ends the matter. If yes, the next question is whether and how the act may implicate rights, enumerated or unenumerated.

Those questions are not always easy to answer and often involve close calls. But the difficulties are multiplied exponentially when the floodgates are opened and federal, state, and local legislation pours through, producing often inconsistent and incoherent "law" from every direction. Add to that, as noted above, the tendentious and politicized judicial methodology that flowed from *Carolene Products*—today we have three and sometimes four "levels" of judicial review,[40] each with its own standards, and multi-factored "balancing" tests—and it soon becomes clear that we are far removed from a Constitution that was written to be understood at least by the educated layman. Life is complicated enough on its own terms. When government intrudes in virtually every corner of life, the complications can easily become overwhelming and unbearable. The Constitution was meant to bring order. If under it "anything goes," order goes too, and chaos follows.

Closely related to those two implications is a third: disrespect for the Constitution entails disrespect for the rule of law itself. If Congress can redistribute and regulate virtually at will, unrestrained by the limits the Constitution imposes, the rule of law is at risk. By definition, unauthorized powers intrude on rights retained by the people; but a cavalier attitude toward powers can lead more directly to the same attitude toward rights: if powers can be expanded with impunity, so too can rights be contracted.[41] In fact, a "living constitution," interpreted to maximize political discretion, can be worse than no constitution at all, because it preserves the patina of constitutional legitimacy while unleashing the political forces that a constitution is meant to restrain. And how long can "anything goes" for officials go unnoticed by the citizenry? A general decline in respect for law must follow.

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[39] I have discussed this issue more fully in Roger Pilon, Foreword: Can Law this Uncertain Be Called Law? 2003-2004 Cato Sup. Ct. Rev. vii (2004).

[40] For my critique of an opinion by Justice Anthony Kennedy distinguishing four "levels" of review, *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994), see Roger Pilon, A Modest Proposal on "Must-Carry," the 1992 Cable Act, and Regulation Generally: Go Back to Basics, 17 Hastings Comm/Ent. L.J. 41 (1994).

[41] That is arguably what happened in *McConnell v. FEC*, 124 S. Ct. 619 (2003), upholding the McCain-Feingold Campaign Finance Act, 116 Stat. 81 (2002), which President George W. Bush signed while saying it was unconstitutional. See Eric S. Jaffee, *McConnell v. FEC*: Rationing Speech to Prevent "Undue Influence," 2003-2004 Cato Sup. Ct. Rev. 245 (2004).

Fourth, when constitutional integrity declines we lose the discipline a constitution is designed to impose on government. A constitution makes it harder for government to act, which is one of the main reasons for having one. This implication speaks to one of the basic functions of a constitution, which is not only to empower but to *limit* the government that is created through it. In the original position, when we created and ratified the Constitution, we agreed to limit the government's power as an act of self-discipline. We could have set no limits on the government's power, of course; but that would have left us to a future determined by the political winds, and experience had taught us the perils of that course. Thus, we struck what we thought was a careful balance, giving the government enough power to do what we thought it should do, but reserving to ourselves the liberty appropriate to a free people. With that balance struck, the Constitution would serve to discipline us and future generations who might be tempted, given the circumstances, to grant the government more power than, in our considered judgment, we thought prudent.

Future generations could adjust that balance, of course, by amending the Constitution, provided sufficient numbers among them wanted to do so. In fact, that is just what happened following the Civil War. Troubled as the Framers were about the institution of slavery, which they recognized only obliquely in the Constitution to ensure union, they left its regulation to the states. After the Civil War, however, a new generation not only abolished slavery but, through the Fourteenth Amendment, fundamentally changed the balance between the federal government and the states. With the ratification of that amendment we finally had federal remedies against state violations of our rights.[42] Thus, although the amendment is properly read as having expanded *federal* power, it was done to discipline *state* power. A new balance was struck, to be sure, but because it was done through the constitutional process it did not amount to abandoning the discipline a constitution imposes, which is what happens when we stray from the document's principles. In fact, the contrast between the different ways in which the Civil War and the New Deal generations changed the rules is stark and instructive. The Civil War generation did it the right way—through the ratification process. The New Deal generation, faced with a choice between amending the Constitution and changing it by judicial legerdemain, chose the latter.

But the larger picture regarding discipline should not be lost. For just as the Constitution disciplines the government, so too it disciplines the people in their daily lives. Professor Warren captures that point nicely with a quote from South Carolina's Warren R. Davis, speaking in the House on April 4, 1832:

> This system of transferring property by legislation—of giving pensions and gratuities to individuals, companies, corporations, and the States— … will degrade the States by inducing them to look for bounties, to the Federal Government; will degrade and demoralize the people, by making them dependent

[42] See Robert J. Reinstein, Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment, 47 Temp. L. Rev. 361 (1993). In 1833 the Court had ruled that the Bill of Rights applied only against the government created by the document (the U.S. Constitution) to which it was appended. Barron v. Mayor and City Council of Baltimore, 32 U.S. 243 (1833).

> on the Government; will emasculate the free spirit of the country …. As soon as the people of ancient Rome were taught to look to the public granaries for support, the decay of public virtue was instantaneous.[43]

Vast numbers of Americans today look to Washington for a rich array of "entitlements" that speak of nothing so much as the illusion of something for nothing. And politicians nurture that illusion, propelling us all in the downward spiral that Thomas Hobbes aptly called a war of all against all. Stated otherwise, as contributors to public largesse become fewer and recipients more numerous, the downward spiral becomes a death spiral. And we are headed in that direction as discipline continues to erode.

Finally, and closely related, let me little more than mention the economic implications of effectively unlimited government as I expect that others on the panel will address those more fully. By this point in human history, and especially after the collapse of the socialist experiments of the 20th century, we have a fairly clear understanding of the connection between liberty and prosperity—a connection that Adam Smith articulated so well in 1776,[44] and economists like Mises, Hayek, and Friedman, among many others, have refined and extended in our own time. What that understanding points to, once again, is the prescience of the Framers in drafting a constitution dedicated to securing our liberty and hence our extraordinary prosperity. But neither liberty nor prosperity is guaranteed by a mere parchment, especially by one that is ignored. The American economy has proven resilient enough to withstand the blows imposed by the galloping government of the 20th century—although we will never know how much more prosperous we might have been had that government been better reined. In future, however, to the extent we ignore the lessons of economics we invite the consequences that have befallen so many other nations that have chosen economic planning over economic liberty. And the basic lesson of economics is that liberty, property, and contract are the fundamental preconditions of prosperity.

What Is to Be Done?

We did not create our overextended, unconstitutional government overnight. We cannot restore constitutional government overnight—too many people have come to rely on the irresponsible promises that have been made. But we can begin the process of restoration. For that, the most important thing to do now is to start restoring a constitutional ethos in the nation. And that should be the business of all branches, not simply the Court, which can hardly do the job by itself, even if it were the right body to do so. What we have here, in short, is not simply or even mainly a legal problem. Rather, it is a political and, more deeply still, a moral problem.

Because I have discussed what needs to be done in some detail in chapter 3 of the *Cato Handbook on Policy*,[45] copies of which are available in every congressional office, I will simply outline those proposals here.

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[43] Warren, Santa Claus, *supra* note 13, front page, citing only to 22d Cong., 1st Sess.
[44] Adam Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations (1776).
[45] Roger Pilon, Congress, the Courts, and the Constitution, ch. 3, in Cato Handbook on Policy (2005).

Limits on government today, when we've had them, have come largely from political and budgetary rather than from constitutional considerations. 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. To restore 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. In a word, we have to ask the most fundamental question of all: Does the government have the authority, the constitutional authority, to do what it is doing?

That means, of course, that we are going to have to come to grips with 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 Constitution's limits on activist government. Thus, when thinking about how and how fast to reduce government, we have to recognize that the Court, after nearly 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 it is given in the Constitution, 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 than it was in the 1960s and 1970s. But there is a good deal more to be done before Congress and the courts are able to move in the right direction in any far-reaching way.

To continue the process, Congress should take the lead by engaging in constitutional debate in Congress, much as happened in the 19th century, thereby encouraging constitutional debate in the nation. That was urged by the House Constitutional Caucus during the 104th Congress. Under the leadership of House freshmen like J. D. Hayworth and John Shadegg of Arizona, Sam Brownback of Kansas, and Bob Barr of Georgia, together with a few more senior congressmen like Richard Pombo of California, an informal Constitutional Caucus was established in the ''radical'' 104th Congress. 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.

By itself, of course, neither the caucus nor the entire Congress can solve the problem before us. To be sure, in a reversal of all human experience, Congress in a day could agree 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 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, every day members of Congress are besieged by requests to enact countless measures to solve endless problems. Indeed, one imagines that no problem is too personal or too trivial not to warrant *federal* attention, no less. Yet most of the ''problems'' Congress spends most of its time addressing—from health care to day care 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—quite apart from the absence of constitutional authority to address them.

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.

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 Framers, 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, 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 that government does best, as spelled out in the Constitution.

In all else, as discussed above, 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 in the 109th Congress and at the beginning of every Congress hereafter. 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.

Acting together, the members of the caucus 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 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 agenda of the caucus, 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 prevail ultimately over those who are seen in the end to be more politically craven.

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.

Before concluding, Mr. Chairman, let me leave the subcommittee with three basic recommendations, which I have discussed more fully in the *Cato Handbook* I referenced above:

- Enact nothing without first consulting the Constitution for proper authority and then debating that question on the floors of the House and the Senate.

- Move toward restoring constitutional government by carefully returning power wrongly taken over the years from the states and the people.

- Reject the nomination of judicial candidates who do not appreciate that the Constitution is a document of delegated, enumerated, and thus limited powers.

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 each other 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 forefathers 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.

BIOGRAPHICAL SKETCH OF ROGER PILON

Roger Pilon is vice president for legal affairs at the Cato Institute where he holds the B. Kenneth Simon Chair in Constitutional Studies and directs Cato's Center for Constitutional Studies, which he founded in 1989. Prior to joining Cato he held five senior posts in the Reagan Administration, at the Office of Personnel Management, the State Department, and the Justice Department. A philosopher of law by profession, Mr. Pilon did his undergraduate work at Columbia University, earning a B.A. in philosophy in 1971. He did his graduate work at the University of Chicago, earning an M.A. in 1972 and a Ph.D. in 1979, both in philosophy. In 1988 he earned a J.D. from the George Washington University School of Law. He taught philosophy at the California State University at Sonoma in 1977 and philosophy of law at the Emory University School of Law from 1978 to 1979. From 1979 to 1980 he was a national fellow at the Hoover Institution on War, Revolution and Peace at Stanford University and from 1980 to 1981 an Institute for Educational Affairs fellow at the Institute for Humane Studies in Menlo Park, California. Mr. Pilon has published and lectured widely in the area of moral, political, and legal theory. He testifies often before Congress and is a frequent guest on television and radio programs discussing legal issues of the day. In 1989 the National Press Foundation and the Commission on the Bicentennial of the U.S. Constitution presented him with the Benjamin Franklin Award for excellence in writing on the U.S. Constitution. In 2001 Columbia University's School of General Studies awarded him its Alumni Medal of Distinction.