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Limited Government, Unlimited Administration: Is it Possible to Restore Constitutionalism?

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When the Constitution was sent to the states for ratification in 1787, many citizens worried that the new national government proposed by the document was a Leviathan in waiting. During the crucial New York ratification debate, James Madison, writing as Publius, sought to allay these fears in the 45th Federalist Paper by emphasizing that adoption of the Constitution would create a government of enumerated, and therefore strictly limited, powers. Madison said: "The powers delegated by the proposed Constitution to the federal government are few and defined… [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce…."[1] Federal tax collectors, Madison assured everyone, "will be principally on the seacoast, and not very numerous."[2] Exactly six months after publication of this essay, New York became the 11th state to ratify the Constitution.

Once the national government was up and running, disputes naturally arose about the proper *scope* of its "few and defined" powers and about the proper institutional form for the exercise of those powers. It is helpful to examine just a few of those early disputes to get a sense of the frontiers of constitutional argument in the Founding era—that is, to gauge the kinds of claims regarding federal power that generated serious discussion. Those examples provide an interesting basis for comparison with modern law.

THE FOUNDERS' CONSTITUTIONAL FRONTIER

One of the most contentious and long-running Founding-era controversies concerned, of all things, Congress's enumerated power in Article I, section 8, clause 7 "to establish Post Offices and post Roads." For more than half a century, some of the country's most eminent legal minds, including Thomas Jefferson, James Madison, James Monroe, and Joseph Story, vigorously debated whether this clause gave Congress power to *create* new roads or merely to *designate* existing, state-created roads as postal delivery routes. Jefferson and Monroe, among others, staunchly maintained the latter, and the issue divided the Supreme Court as late as 1845 before the matter was definitively settled in favor of congressional power to create roads.[3]

I do not raise this controversy in order to re-argue it—as an original matter, it requires some very tricky intratextual analysis—but merely to illustrate the Founding generation's idea of a cutting-edge constitutional debate.

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[1] The Federalist No. 45 (James Madison), at 292 (Clinton Rossiter ed., 1961).

[2] *Id*.

[3] For a short summary of the controversy, see Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 267 n.3 (1993). For a more complete account, see Lindsay Rogers, The Postal Power of Congress: A Study in Constitutional Expansion 61–96 (Johns Hopkins U. Stud. in Hist. & Pol. Sci., Vol. 34, No. 2, 1916).

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The postal power was also the locus for one of the earliest discussions of the so-called nondelegation doctrine, which explores the limits, if any, on Congress's power to vest broad discretion in executive or judicial actors. During the Second Congress, in 1791, the House of Representatives debated a proposal to authorize the carriage of mail "*by such route as the President of the United States shall, from time to time, cause to be established*."[4] Several representatives objected strenuously that the amendment, by granting the President unconstrained discretion to determine postal routes, would unconstitutionally delegate legislative power. Representative John Page of Virginia, for example, declared:

> If the motion before the committee succeeds, I shall make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction.[5]

The amendment was defeated, and the final legislation specifically designated the postal routes town by town. The first postal route established, for example, was described in the statute as follows:

> From Wisscassett in the district of Maine, to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester, Springfield, Hartford, Middletown, New Haven, Stratford, Fairfield, Norwalk, Stamford, New York, Newark, Elizabethtown, Woodbridge, Brunswick, Princeton, Trenton, Bristol, Philadelphia, Chester, Wilmington, Elkton, Charlestown, Havre de Grace, Hartford, Baltimore, Bladensburg, Georgetown, Alexandria, Colchester, Dumfries, Fredericksburg, Bowling Green, Hanover Court House, Richmond, Petersburg, Halifax, Tarborough, Smithfield, Fayetteville, Newbridge over Drowning creek, Cheraw Court House, Camden, Statesburg, Columbia, Cambridge and Augusta; and from thence to Savannah….[6]

To be sure, one cannot say definitively that Congress chose to specify the precise postal routes solely or even primarily because of constitutional concerns; after all, the power to designate a town as part of a postal route was the 18th century version of an earmark.[7] But, again, this example illustrates the kinds of questions that raised serious constitutional concerns in the Founding era.

My final example concerns a proposed federal bailout. On November 26, 1796, the city of Savannah, Georgia, was devastated by a fire. Representatives introduced legislation calling for federal aid to rebuild the city. In the course of significant debate on the measure, Representative Nathaniel Macon from North Carolina remarked that:

> The sufferings of the people of Savannah were doubtless very great; no one could help feeling for them. But he wished gentlemen to put their finger upon that part of the Constitution which gave that House power to afford them relief…. He felt for the sufferers…but he felt as tenderly for the Constitution; he had examined it, and it did not authorize any such grant.[8]

Representative Andrew Moore of Virginia, among others, agreed: "[E]very individual citizen could, if he pleased, show his individual humanity by subscribing

[4] Annals of Cong. 229 (1791) (quoting Representative Sedgwick) (emphasis in original). The Senate may have had similar debates on the proposal, but Senate debates were not reported before 1795.

[5] *Id*. at 233 (statement of Rep. Page).

[6] Act of Feb. 20, 1792, ch. VII, § 1, 1 Stat. 232.

[7] *See* George L. Priest, *The History of the Postal Monopoly in the United States*, 18 J.L. & Econ. 33 (1975).

[8] 6 Annals of Cong. 1717 (1796).

to their relief; but it was not Constitutional for them to afford relief from the Treasury."[9]

Obviously, some weightier and more famous constitutional issues than these arose in the Founding era—matters such as the creation of a national bank and the terms of removal for officers in the Department of Foreign Affairs—but the examples I have described are not unrepresentative of the issues that generally filled up constitutional discourse in the nation's early years. The vision of the national government that James Madison's 45th Federalist Paper presented to the citizens of New York on January 26, 1788, may not have fully prevailed in the Founding era, but a lot of people took that vision very seriously.

WHAT A DIFFERENCE A DAY (GIVE OR TAKE 220 YEARS) MAKES

Now fast-forward to October 3, 2008, when Congress enacted and the President signed the Emergency Economic Stabilization Act of 2008. The Act appropriates at least $250 billion—and perhaps as much as $750 billion—for the Secretary of the Treasury to do…what? The seemingly interminable statute[10] contains highly detailed provisions regarding various oversight boards, reporting requirements, and fast-track treatment for future appropriations legislation; but with respect to its substantive prescriptions, it is remarkably brief.

- Section 101(a)(1) says that "[t]he [Treasury] Secretary is authorized to purchase…troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary…."
- "Troubled assets," in turn, are defined in section 3(9)(A) as "residential and commercial mortgages and any securities, obligations or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability."
- In case there is any doubt about the Secretary's authority, section 101(c) clarifies that "[t]he Secretary is authorized to take such actions as the Secretary deems necessary to carry out the authorities in this Act…."

To be fair, the Secretary's discretion under the law is not *completely* unlimited. The Secretary must "prevent unjust enrichment of financial institutions," and in section 103, Congress specifically instructs the Secretary to "take into consideration" nine different factors when purchasing troubled assets, including such things as "protecting the interests of taxpayers"; "providing stability and preventing disruption to financial markets in order to limit the impact on the economy and protect American jobs, savings, and retirement security"; "the need to help families keep their homes"; "the need to ensure stability for…counties and cities"; "protecting…retirement security" (something evidently important enough to show up twice in the list); and generally promoting any good thing and preventing any bad thing for any relevant interest group that Congress could think to list.

It seems doubtful that, with such vague congressional instructions, the Secretary and his general counsel are going to spend very many long nights worrying about constraints on their discretion.

While this law obviously generated substantial discussion in Congress before its enactment, to the best of my knowledge, no one in any position of power raised any constitutional objections to the substantive provisions that I just described: neither about the scope of congressional power to enter the mortgage market nor about Congress's ability to delegate sweeping, effectively limitless discretion to the Secretary. And under current governing legal doctrine, no such objections would be even remotely plausible. Indeed, anyone who raised them would be dismissed as a crank.

Obviously, there is considerable distance between the constitutional discourse of 1788 and the relevant conversations of 2008. What changed?

[9] *Id*. at 1718.

[10] The PDF file of the slip copy of the law exceeds 200 pages.

There are two ways to approach that question. The first, and conceptually most straightforward, approach is simply to describe changes in governing constitutional doctrine, which requires describing the kind of government permitted by the Constitution of 1788 and then comparing it to modern institutions. Everyone knows, at some level, that modern government and the Constitution are a poor fit, but it is not clear that everyone knows just how wide a gap has emerged over two centuries. The second, and conceptually trickier, approach is to try to understand *why* doctrine has moved so far away from the constitutional design and to use that understanding to formulate strategies for restoring the constitutional order.

I will start with the description and then try to suggest a possible course of action.

A GOVERNMENT OF ENUMERATED POWERS

In the movie *City Slickers*, Curly Washburn, the character played by Academy Award winner Jack Palance, tells Billy Crystal's character Mitch Robbins that the secret to life is "[o]ne thing. Just one thing." The trick is to figure out, in your own particular context, what that "one thing" turns out to be.

Curly would have made an excellent constitutional scholar. The United States Constitution is fundamentally about "[j]ust one thing": the principle of enumerated federal powers. Everything else is a consequence, application, inference, or specification of that one thing.

- *Federalism?* The word never appears in the Constitution; it is a consequence of the principle of enumerated powers.
- *Separation of powers?* The phrase never appears in the Constitution; it is a consequence of the principle of enumerated powers.
- *Nondelegation of legislative power?* The term never appears in the Constitution; it is a consequence of the principle of enumerated powers.

To be sure, the term "enumerated powers" does not appear in the Constitution either, but it is not difficult to trace its pedigree. It emerges from the oft-ignored Preamble to the Constitution, which declares that "We the People of the United States…do *ordain and establish* this Constitution for the United States of America."

The government that emerges from the Constitution, like the Constitution itself, is a *created* entity—one might even say an act of intelligent design. The act of creation determines the scope of the created entity, which explains why the new government can perform *only* those acts that its creators have granted it power to perform. The United States government cannot claim, for example, the divine right of kings because it did not have a divine origin. When in 1791 the Tenth Amendment expressly confirmed the principle of enumerated powers by declaring that "[t]he 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," it was merely clarifying the principle that was implicit in the Constitution's creation three years earlier.

In theory, of course, "We the People" could have chosen to create a government of enormous, nearly unlimited power. To say that a government is limited is not to say how far it is limited. Thus, in order to figure out what this created federal government can do, one must read the provisions in the Constitution that grant the government power, and that means reading them honestly as they would be read by a reasonable interpreter.[11] It is not enough to reason from what governments typically or previously did, or what it would be expedient for a government to be able to do, because

[11] There is obviously a plethora of debates concerning interpretation in general and constitutional interpretation in particular, and I cannot engage those debates here. Most of those debates are, in my opinion, misdirected. If one is trying to figure out what a document such as the Constitution means, the only plausible way to perform that task is to figure out how it would have been read by a reasonable person at the time that it was written. There are many other cognitive operations that one can perform with such a document, but none of those other operations can sensibly be called "interpretation," *see* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 Const. Comm. 47 (2006), though some of those operations may turn out, as a matter of moral and political theory, to be more important than any act of interpretation.

there may well be traditional or expedient powers that are simply not granted to this government in its constitutive document.

This fact of enumerated powers immediately yields the principle of federalism: The new national government does not automatically sweep the board with respect to governmental power, so there may well be residual, and quite possibly overlapping, powers possessed by the pre-existing—literally in the case of the original 13 states and conceptually in the case of subsequently admitted states—state governments. As far as the federal Constitution is concerned, all is permitted to state governments unless it is forbidden; all is forbidden to the national government unless it is permitted.

To discover what is permitted of the national government, the obvious first move is to gather together all of the provisions in the Constitution that grant power to the federal government. This proves to be an unexpectedly easy task, because *there are no such provisions*. The Constitution *never* grants power to "the federal government" as a unitary entity: Every grant of power is a grant to a specific institution of the federal government. Certain institutions or individuals are granted various powers, but never "the government" as a whole.

This basic fact about the Constitution's enumerations of power yields the principle of separation of powers: Anybody granted power by the Constitution can do only what their own particular power grant authorizes them to do, not what "government as a whole" can do. You cannot reason out the allocation of power prescribed by the document through general theorizing about governments or political theory. There is no substitute for reading the document.

This essay obviously cannot work through the Constitution's entire list of enumerated powers to specific institutions, but it is possible to highlight some of the key provisions. Articles IV–VII are actually some of the most interesting parts of the Constitution, but the majority of the power-granting provisions are found in Articles I–III, which create and empower the legislative, executive, and judicial departments.

Start with Article III, which deals with the affairs of the federal courts. There are exactly two sentences in Article III that grant any person or institution any power.

- Article III, section 2, clause 2 gives to Congress, in addition to the powers that it gets from Article I and elsewhere, "Power to declare the Punishment of Treason," subject to some constraints ("but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained").
- The opening sentence of Article III says, "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

That is the only sentence in Article III that grants power to any federal judicial official. The Appointments Clause of Article II, section 2, clause 2[12] authorizes federal judges to receive from Congress power to appoint inferior federal officers, and the Article I, section 3, clause 6 Impeachment Clause empowers the Chief Justice to preside over presidential impeachment trials, but nothing in Article III beyond the first sentence empowers the judiciary.

The rest of Article III describes the characteristics of the federal courts, limits the exercise of judicial power to certain classes of cases, and divides that limited jurisdiction among various courts. Nothing else in Article III grants power to any federal judge or any other actor.[13] Federal judges get *only* the judicial pow-

[12] "[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[13] Conventional wisdom, among both scholars and judges, says that Article III's so-called Exceptions Clause grants Congress power to make exceptions to the Supreme Court's appellate jurisdiction. *See id.* art. III, § 2, cl. 2 (giving the Supreme Court appellate jurisdiction over a class of cases "with such Exceptions, and under such Regulations as the Congress shall make"). The conventional wisdom is wrong: This clause refers to powers previously granted to Congress in Article I but does not grant new powers. *See*

er—quintessentially, the power to decide cases according to governing law, plus a few powers incidental to the case-deciding function—but because the Article III Vesting Clause vests in them "[t]he judicial Power" without qualification, they get *all* of that judicial power in one undifferentiated chunk.

Now go to Article I, which is the principal article defining and empowering Congress. That article begins, "All legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." This clause reflects a power-granting strategy that is different from what one finds in Article III. Instead of giving Congress everything that could fall into the conceptual category "legislative powers," the Constitution gives it only the subset of those powers "herein granted," meaning granted in more specific clauses elsewhere in the Constitution. You cannot gauge the extent of Congress's powers by general theorizing about legislation. You must read the particular grants of power found later in the Constitution.

Those grants, fairly read, describe a relatively modest subset of the entire potential universe of legislative powers. Congress can raise money through taxation, by borrowing, or by disposing of government property such as public lands. Its regulatory jurisdiction extends to such things as foreign, interstate, and Indian commerce; naturalization; bankruptcy; money and counterfeiting; post offices; patents and copyrights; inferior tribunals; crimes on the high seas and against the law of nations; declaring war; raising, supporting, and regulating the military; consenting to various state activities otherwise prohibited by the Constitution; defining treason, governing federal territory; admitting new states; enforcing interstate full faith and credit rules; and proposing constitutional amendments.

Also, Congress can pass "all laws which shall be necessary and proper for carrying into Execution" any of these powers or those granted to other federal actors. Some post-1788 amendments abolish slavery, place various restrictions on the states, and expand voting rights, and Congress is given power to enforce those amendments. But in the end, the powers of Congress look very much as James Madison described them on January 26, 1788.

ENUMERATED POWERS IN PRACTICE: THE CASE OF SAVANNAH

To get a good handle on the scope of these granted powers, it is useful to see how they played out in 1796 when Congress was asked to help rebuild Savannah. There is no clause in the Constitution that seems directly addressed to this circumstance: We have a taxing clause, a borrowing clause, a bankruptcy clause, a postal clause, a copyright clause, a counterfeiting clause, a letter of marque and reprisal clause, but no "rebuilding a city after a fire" clause. In the face of this silence, the advocates of aid to Savannah in 1796 made (at least by interpolation) three basic arguments, none of which ultimately corresponds to any power granted to Congress by the Constitution.

First, they said that rebuilding Savannah would promote the general welfare, drawing on language in Article I, section 8, clause 1, which says, "The Congress shall have power To lay and collect Taxes, Duties, Imposts and Excises, to pay the debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." If this clause indeed authorizes Congress to spend money for the general welfare, the only issue would seem to be whether parochial aid to a single town or region is sufficiently "general," and that is an issue for which there certainly appears to be two sides.[14]

Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 Colum. L. Rev. 1002, 1039–41 (2007).

[14] For explorations of the generality requirement of this clause, see John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 Chapman L. Rev. 63 (2001); Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 Tex. Rev. L. & Pol. 239 (2007).

However, there is one very large problem with this argument: The provision invoked by the aid advocates is a Taxing Clause, not a Spending Clause. It is very clear textually, grammatically, and structurally that the only power granted by this clause is the power to lay and collect taxes. The language about the general welfare describes one of the *purposes* for which taxes may be layed and collected: "to pay the debts and provide for the common Defense and general Welfare of the United States."

That is not a trivial function: It makes it clear that Congress can use taxes for regulatory ends, such as protectionism, and not merely to raise revenue, which resolved a rather significant and thorny 18th century dispute about theories of taxation. But the general welfare language is a tag-along qualification to the taxing power, not a stand-alone grant of spending or regulatory authority.[15] Indeed, it is downright silly to try to locate Congress's spending power in the Taxing Clause: Just think about what that might mean for money brought into the treasury from borrowing or land sales.[16] Sometimes, as Freud might have said, the power to lay and collect taxes is just the power to lay and collect taxes.

But Congress obviously gets the power to spend money from somewhere; maybe that source rescues the good citizens of Savannah. As it happens, there is no express, dedicated "spending clause" in the Constitution, so finding that source of power requires a bit of digging. The plausible candidates come down to two.

- The Article IV Property Clause authorizes Congress to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," so that spending would be "dispos[ing]" of federal property.
- The Article I Necessary and Proper Clause gives Congress power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," so that a bill appropriating money would be a law "necessary and proper for carrying into Execution" some other federal power.

If the Property Clause is the right source of federal spending authority, the aid advocates would have a good argument, because there is no obvious internal limitation on the scope of Congress's power to "dispose of" federal property. The case for the Property Clause as Spending Clause is actually more plausible than it might seem at first glance,[17] but in the end, a reasonable observer would not expect to find Congress's spending power buried in the bowels of Article IV in the same phrase with "Rules and Regulations respecting…Territory." One would expect to find it in the middle of Article I along with every other fiscal power of the government, which makes the Necessary and Proper Clause the far more plausible candidate.[18] Accordingly, Congress can pass laws appropriating money as long they are "necessary and proper for carrying into Execution" some other federal power.

The problem for Savannah in 1796 was to find some federal power that spending money to rebuild Savannah would carry into execution. After all, the Necessary and Proper Clause only gives Congress power to spend *for executing powers that it otherwise possesses*; it does not (as would the Property Clause if it was the correct source of power) grant a free-standing power to spend for any purpose whatsoever.

[15] *See* Jeffrey T. Renz, *What Spending Clause? (Or The President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 John Marshall L. Rev. 81 (1999).

[16] *See* David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1, 49 (1994).

[17] For spirited advocacy of this case, see *id*. and David E. Engdahl, *The Basis of the Spending Power*, 18 Seattle U.L. Rev. 215 (1995).

[18] *See* Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion & American Legal History 27–32 (2004).

This leads to the second argument advanced by the aid advocates in 1796. They pointed out that Savannah was a commercial center the rebuilding of which would promote commerce and yield more tax revenue, so that taxpayers would get back their investment. One can easily translate this into constitutional language as an argument that aid to Savannah is "necessary and proper" for carrying into execution other federal powers. The only remaining step in the argument is to identify the federal powers that would be carried into execution.

Modern observers will hastily fill in that gap with the Commerce Clause. People in 1796 would not have been so hasty. The Commerce Clause says that Congress has power "to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." It is actually a very straightforward clause. Commerce means essentially trade and navigation.[19] It does not mean activities that produce items that might eventually find their way into trade or navigation—such activities as manufacturing, agriculture, or (most relevant to the rebuilding of Savannah) construction. That is why Madison noted in the 45th Federalist Paper that the Commerce Clause was a provision "from which no apprehensions are entertained." Rebuilding Savannah simply would not "carry into Execution" the power to regulate trade or navigation with foreign nations, among the states, or with the Indian tribes.

But the aid advocates were right to intimate that in some sense, rebuilding Savannah could increase the total amount of foreign, interstate, or Indian commerce. Is it therefore "necessary and proper for carrying into Execution" the power to regulate commerce to spend money for things that might increase Congress's opportunities directly to exercise its commerce power?

It is a clever argument, but ultimately a faulty one. The power granted by the Necessary and Proper Clause is limited in three important ways: It must *carry into execution* some other federal power, it must be *necessary* for carrying into execution some other federal power, and it must be *proper* for that purpose. Aid to Savannah flunks all three tests.

First, does creating opportunities for the exercise of a power really "carry[] into Execution" that power? If so, then one might as well say that rebuilding Savannah carries into execution the post roads power, or the patent power, or the punishment-of-counterfeiting power (after all, a flourishing Savannah probably generates more opportunities to punish counterfeiters than does a burnt-out Savannah). It is not linguistically impossible to read the Constitution in this fashion, but it is not the reading of the words that most naturally commends itself to a reasonable observer.

Second, laws under the Necessary and Proper Clause must be *necessary* for carrying into execution other federal powers. And thereby hangs a tale. First-year law students quickly hear of the vigorous debates concerning this requirement of necessity that arose in connection with the creation of the Bank of the United States, culminating in Chief Justice Marshall's epic opinion upholding Congress's power to create the bank in *McCulloch v. Maryland*.[20] Students are introduced to the Scylla of Thomas Jefferson's strict view, which claims an implementing law cannot be necessary under the Necessary and Proper Clause unless it employs "means without which the grant of the [implemented] power would be nugatory," and the Charybdis of Alexander Hamilton's (and to a lesser extent John Marshall's) position that a law is necessary if it "might be conceived to be conducive" to the exercise of a power.[21]

James Madison's elegant navigation between those extreme positions is often lost in the shuffle—and, I

[19] For the utterly overwhelming evidence for this proposition, see Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003); Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 St. John's L. Rev. 789 (2006).

[20] 17 U.S. (4 Wheat.) 316 (1819).

[21] For a short recap of this debate, see Gary Lawson, *Making a Federal Case Out of It:* Sabri v. United States *and the Constitution of Leviathan*, 2003–04 Cato Sup. Ct. Rev. 119, 142–43.

suspect, utterly unknown even to many constitutional law scholars. That is unfortunate, because the strict Jeffersonian view is intratextually indefensible,[22] the Hamiltonian–Marshallian view is both textually and intratextually indefensible,[23] and Madison had it just right when he concluded that a necessary law requires "a definite connection between means and ends" in which the means and ends are linked "by some obvious and precise affinity."[24] Building a city to enlarge the scope for the commerce, post road, or counterfeiting power seems a bit of a stretch.

Finally, the requirement that laws for executing federal power must be "proper" is a shorthand way of saying that they must stay within the jurisdictional boundaries of Congress as defined by the constitutional structure of federalism, separated powers, and retained rights.[25] It is not a mechanism for bootstrapping Congress's limited powers beyond their natural scope. The opponents of aid to Savannah were correct that it was outside the spending power of Congress.

The aid advocates in 1796 also had a third argument, which was essentially: Why are you heartless beasts prattling about the Constitution when people are suffering? I will take up the implications of that claim a bit later in this essay.

CONSTITUTIONAL STRUCTURE AND THE EXECUTIVE POWER

To return to the larger constitutional structure, both Congress and the courts are, in keeping with the plan of the Preamble, institutions of limited power. (Congress is even more limited by being subdivided into two chambers, with the President given a qualified veto and the Vice President made president of the Senate with tie-breaking authority.) But in the modern world, most of the laws are not actually made by Congress, and most of the cases are not actually decided by courts. The vast bulk of the decisions that affect people's lives are made by administrative agencies, which are nominally executive actors. Where does the executive fit into this constitutional scheme?

Article II begins by saying, "The executive Power shall be vested in a President of the United States of America." From one angle, it thus resembles Article III, seemingly giving the President a conceptual lump of power called the executive power. From another angle, however, Article II looks more like Article I, because it contains a whole series of provisions reading "the President shall have power to," thus suggesting that, like Congress, the President can exercise only those powers specifically enumerated outside of the opening Vesting Clause.

At the end of the day, the first angle proves to be correct: The first sentence of Article II gives the President whatever counts as executive power in one lump sum, just as Article III gives the federal courts whatever counts as judicial power in one lump sum.[26] Because the Constitution gives that executive power—*all* of the executive power—directly to the President, Congress is not free to fragment that power away from presidential control, though the precise forms of control that the President must possess are a matter of some con-

[22] As Chief Justice Marshall pointed out in *McCulloch*, the Constitution itself distinguishes the word "necessary" in the Necessary and Proper Clause from the phrase "absolutely necessary" in the Imposts Clause, which makes it very hard to argue that the bare word "necessary" should carry the same strong meaning as the explicit phrase "absolutely necessary."

[23] Textually, both dictionaries and common usage in the 18th century rendered Hamilton's loose understanding of "necessary" untenable. Intratextually, the Constitution uses the term "needful" rather than the term "necessary" in contexts where a loose Hamiltonian means–ends connection is intended. *See* Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 Geo. Wash. L. Rev. 235, 245–46 (2005).

[24] Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 The Writings of James Madison 447, 448 (Gaillard Hunt ed., 1908).

[25] Or so I have spent most of my professional life maintaining. *See* Lawson, *supra* note 23; Lawson & Granger, *supra* note 3.

[26] This important insight about the structure of Article II was pioneered among modern scholars by Professor Steven G. Calabresi, alone and in various collaborations with others. For a detailed argument that summarizes, builds upon, and expands that insight, see Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 Ill. L. Rev. 1, 22–43.

troversy. At a minimum, the President must be able personally to direct the exercise of all discretionary executive power; at a maximum, the President must additionally be able to dismiss any subordinates that the President believes interfere with that control.

Both the executive and judicial powers, of course, entail some elements of discretion. No law is ever completely free of ambiguity, and interpreting ambiguities in the course of applying laws is part and parcel of executing and judging. Congress does not violate the Constitution by passing laws that do not crisply and obviously resolve every possible issue that can arise under them.

But if so much is left unresolved by a law that the President or judges are actually making the law under the guise of implementing it, they are no longer exercising executive or judicial power; they are using legislative power. As long as the categories of executive and judicial power mean something different from legislative power, and as long as the executive and judicial powers are the only powers granted by the Constitution to executive and judicial actors, then there is a certain kind and quality of discretion that they can never exercise—which is precisely what the classical nondelegation doctrine prescribes.[27] As with everything else in the Constitution, it is a consequence of the principle of enumerated powers: Government actors can do only what they are empowered to do. If an actor is given only executive or judicial power, that actor can only execute or judge, not make law.

How can we tell whether a law impermissibly delegates legislative power or permissibly allows executive or judicial actors to exercise the kind and quality of discretion that is appropriate to executive or judicial tasks? In the Supreme Court's first major tussle with that problem in 1825, involving whether Congress could let federal courts by rule determine the form of payment for satisfaction of federal judicial judgments, Chief Justice Marshall distinguished "those *important subjects*, which must be entirely regulated by the legislature itself, from those of *less interest*, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[28] It is hard to imagine a more vague, circular, and ill-defined standard for identifying unconstitutional delegations.

It has, I think, proven impossible for anyone in two centuries to improve upon Marshall's vague, circular, and ill-defined standard, which captures the relevant inquiry as well as words can capture it. There is no algorithm for determining the constitutionally permissible degree of discretion in any particular case, and application of the nondelegation doctrine accordingly requires a fair degree of potentially contestable judgment. The Constitution, alas, does not always frame its governing rules as crisply as some would like.[29]

That does not mean, however, that there are not easy cases to be found. It would, for example, hardly be the establishment of post roads for Congress simply to tell the President to come up with some post roads, and it would hardly be the exercise of any plausible legislative power to tell the Secretary of the Treasury to buy up whatever mortgages he thinks it would be good to buy.

In sum, the Constitution of 1788 sets up a Congress with relatively limited jurisdiction both to regulate and to spend; a President with law-implementing, but not lawmaking, powers that cannot be fragmented away and given to uncontrollable subordinates; a judiciary with law-deciding, but not lawmaking, powers; and

[27] For my extensive defense of the classical nondelegation doctrine, see Lawson, *supra* note 23; Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002).

[28] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (emphasis added).

[29] The difficulty (I would say impossibility) of formulating a test for the nondelegation doctrine that does not leave a fair degree of room for judgment has led some writers, most notably Justice Scalia, to conclude that the doctrine is meaningless or unenforceable. *See* Mistretta v. United States, 488 U.S. 361, 415–16 (1989 (Scalia, J., dissenting) ("while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."). This seems rash. The *possibility* of judicial error in application of a doctrine hardly justifies the *certainty* of judicial error in its abandonment.

some significant but hard-to-pin-down limits on the extent to which Congress can vest discretion in the President or the courts. Moreover, while there have been 27 amendments to the Constitution since 1788, none of those amendments alters the structure and allocation of federal powers that I have just described. There is no amendment giving Congress power to regulate manufacturing, agriculture, or construction and no amendment saying that executive or judicial actors can also exercise non-executive or non-judicial functions.

In other words, the world has changed a great deal since 1788, but with respect to the basic structure and powers of the federal government, the Constitution of 1788 has not.

GOVERNMENT GONE WILD: THE UNCONSTITUTIONAL ADMINISTRATIVE STATE

Given the care with which the Constitution divides and subdivides power among its various institutions, the most absurd abomination under our Constitution would be a putatively executive institution that exercises sweeping authority over subjects that are far beyond the enumerations of legislative power in the Constitution; does so under a statutory mandate so vague that the executive institution is effectively making rather than enforcing or interpreting law when it acts; is not subject to the plenary control of the President in its executive functions; conducts adjudications that usurp some of the business of the federal courts without having the tenure during good behavior and protections against diminishments in salary while in office that are constitutionally required for those who exercise the federal judicial power; circumvents the Seventh Amendment right to a civil jury in the bargain; and, to add the final insult, combines legislative, executive, and judicial functions in the same people at the same time.

That would be exactly the sort of thing that the Constitution of 1788 is specifically designed to forbid—about as clearly unconstitutional as a title of nobility or a 28-year-old President. And that, of course, precisely describes the typical modern administrative agency in America.

Many administrative agencies have authority over matters that are far removed from any of the enumerations in the Constitution. Typically, those agencies have power to promulgate rules under statutory mandates that are literally meaningless, such as mandates to set clean air standards "requisite to protect the public health"; to award broadcast licenses "if public convenience, interest, or necessity will be served thereby"; or to purchase real estate mortgages "the purchase of which the Secretary determines promotes financial market stability." The agencies also often adjudicate matters under their statutes with only limited court review.

Many of these agencies—the so-called independent agencies—are statutorily insulated from presidential control. And to cap things off, the agencies perform all of the functions of government at the same time: They promulgate the rules, enforce the rules, and adjudicate their own enforcement actions.[30]

In order to accommodate the modern administrative state, every single principle, consequence, and inference that comes from the Constitution's "one thing"—the enumerated powers doctrine—has systematically been purged from modern law with respect both to the scope of federal power and to the institutional form for its exercise.

- The Commerce Clause is now routinely read as though it authorizes regulation of anything that is remotely "economic," such as growing plants in your kitchen window that might become part of a market in some indefinite future.[31]
- Apart from a few cases involving federalization of obviously local crimes such as domestic violence[32] or gun possession near a school[33]—and even those cases generated hotly contested 5-to-4 decisions that are prime candidates for

[30] *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248–49 (1994).
[31] *See* Gonzalez v. Raich, 545 U.S. 1 (2005).
[32] *See* United States v. Morrison, 529 U.S. 598 (2000).
[33] *See* United States v. Lopez, 514 U.S. 549 (1995).

overruling as soon as the Court's composition changes—modern law treats Congress's regulatory power as very close to plenary.

- The Necessary and Proper Clause is now routinely read, per Alexander Hamilton, as though it authorizes regulation of anything remotely tangential to governmental affairs; in *Sabri v. United States* in 2004,[34] the Supreme Court described the clause as "establishing review for means-ends rationality," and constitutional law buffs know that "rationality"—so-called rational basis review—is code for "the government wins."
- The general welfare tag on the Taxing Clause is routinely read as though it authorizes congressional spending for the general welfare; as the Supreme Court put it in *Sabri*, "Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare," citing the Taxing Clause as sole authority.
- Fragmentation of executive power through the creation of agencies independent of the President is pervasive and permitted as long as the Court does not judge the agency's operations to be "central to the functioning of the Executive" and does not think limiting presidential control "unduly trammels on executive authority" or "impermissibly burdens the President's power to control and supervise" subordinates.[35]
- Vacuous statutes that effectively create executive and judicial lawmakers are accepted as long as they contain an "intelligible principle"—and statutes such as the Clean Air Act, the Communications Act, and the Emergency Economic Stabilization Act are considered paradigms of intelligibility.[36]
- The combination of functions within agencies is so widely accepted that no one has even bothered to challenge it in more than 60 years.

[34] *See* Sabri v. United States, 541 U.S. 600 (2004).
[35] *See* Morrison v. Olson, 487 U.S. 654 (1988).
[36] *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).

If the basic structural features of the Constitution are as clear as I have made them sound—and while some of them are obviously more complicated than I can deal with in a short essay, at least some of them *really are* as clear as I have made them sound—surely, someone must have raised those points when the modern administrative state was being constructed. Indeed they did, and since the prospect of a *new* New Deal is looming, this is a good time to go back for a moment to the old one to see what responses these challenges brought forth.

PROGRESSIVISM, THE NEW DEAL, AND THE FOUNDATIONS OF THE MODERN ADMINISTRATIVE STATE

Possibly the single most important intellectual figure in the New Deal was James Landis. He was a member of the Federal Trade Commission and the Securities and Exchange Commission and one of the principal authors of the Securities Exchange Act of 1934. For nearly a decade, he was Dean of the Harvard Law School. He was in many ways the intellectual architect of the modern administrative state.

In 1938, Landis gave some lectures at Yale Law School that were printed as a book called *The Administrative Process*. Much of the book was a response to critics of the New Deal who pointed out the incompatibility between administrative governance and the Constitution, particularly with respect to the delegation of legislative authority to agencies and the combination of governmental functions within agencies.

In his book, Landis frankly acknowledged that the rise of the administrative state was inconsistent with the Constitution:

> The insistence upon the compartmentalization of power along triadic lines gave way in the nineteenth century to the exigencies of governance. Without too much political theory but with a keen sense of the practicalities of the sit-

> uation, agencies were created whose functions embraced the three aspects of government.[37]

Landis heartily approved of this development, writing that agencies in the modern state need to have "not merely legislative power or simply executive power, but whatever power might be required to achieve the desired results."[38] Accordingly, he continued, the administrative state "vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of government."[39]

Lest one doubt how Landis really viewed legal impediments to administrative action, he candidly observed:

> One of the ablest administrators that it was my good fortune to know, I believe, never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry and, upon that understanding, he sought his own solutions.[40]

Many of Landis's predecessors from the Progressive Era sounded similar themes.[41] The architects of the modern administrative state did not misunderstand the Constitution. They understood it perfectly well. They just didn't like it.

Today, James Landis's administrative state is sufficiently entrenched that a head-on assault against it would be futile. The Supreme Court, with the occasional exception of Justice Clarence Thomas, has made it very clear that it will not touch the major institutions of modern governance, such as near-plenary congressional powers, open-ended delegations, or the combination of functions in agencies. Some of the Justices will pick away at a few of the margins, such as the Appointments Clause, the legislative veto, and flagrantly non-economic regulations of "commerce," but only because these moves do not call into question the basic integrity of administrative governance. As I have observed elsewhere, "When the basic institutions of modern administrative governance are at stake, the Court closes ranks and hurls the constitutional text into the Potomac River."[42]

Congress and the executive are obviously just as bad or worse. The courts, after all, cannot uphold unconstitutional institutions unless Congress and the President first create them. When was the last time that anyone saw a President veto a bill because it exceeded the enumerated powers of Congress or delegated legislative power? When was the last time that Congress failed to enact something for such reasons?

RESTORING CONSTITUTIONAL GOVERNMENT: SOME MODEST PROPOSALS

Faced with this onslaught, what should someone who actually takes the Constitution seriously try to do? It is easy to say what *not* to do: Do not try to slam your head against the wall of the courts, the Congress, and the President. This is pointless and wasteful, at least at present. Any strategy must be long-term, and it requires three critical elements, in ascending order of importance.

The *first element* is to de-legitimize precedent. As long as precedent is considered a conversation-stopper, all is lost, because there are strong precedents for unraveling each and every feature of the Constitution that stands in the way of the administrative state. That means encouraging courts—even courts that one does not like—to reconsider precedents and encour-

[37] James M. Landis, The Administrative Process 2 (1938).
[38] *Id*. at 10.
[39] *Id*. at 12.
[40] *Id*. at 75.
[41] *See* R.J. Pestritto, *The Birth of the Administrative State: Where It Came From and What It Means for Limited Government*, Heritage First Principles Series No. 16 (2007).
[42] Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 St. Louis U.L.J. 885, 891 (2005).

aging Congress and the President—even Congresses and Presidents that one does not like—to exercise their own independent judgments even when the courts have had their say. As it happens, a critical look at precedent is not only strategically imperative, but also constitutionally sound.[43]

The *second element* is to continue developing the case for the correct meaning of the Constitution. The correct constitutional baseline is obviously not as simple and straightforward as I have made it seem in this brief essay. Under any plausible understanding of the Constitution, modern government falls far short (or, perhaps more accurately, extends too far), but there is ample room for disagreement about many of the details—for example, the appropriate scope of the nondelegation doctrine, the character and extent of executive power, and the precise meaning of the word "proper" in the Necessary and Proper Clause.

People committed, broadly speaking, to a jurisprudence of original meaning can, do, and should continue to explore such issues. The intellectual foundation for constitutionalism has to be properly constructed, even if that foundation is not enough by itself to restore the constitutional order.

The *third element* is the most critical of all, and here is where it becomes important to understand why the Constitution is so much out of favor these days. James Landis displayed open contempt for the Constitution, but in order for Landis and his associates to gain power, a lot of people had to agree with him. Indeed, in a metaphorical sense, James Landis soundly beat James Madison in the election of 1936. A similar election today would yield a similar, or even more dramatic, result. There just are not a great many people who care very much about the Constitution. Politicians, in turn, will not care about the Constitution until and unless enough people care about it to make a difference. Right now, the Constitution has no constituency. It needs one large enough to compete in the political marketplace with other interest groups.

The good news is that basic public choice theory teaches that a constituency does not have to be a majority or even close to a majority to have significant influence. The bad news is that building even a modest minority constituency for the Constitution faces two huge problems.

First, it is actually quite difficult to explain to anyone why they should care about the federal Constitution any more than James Landis did. As a matter of political *theory*, it is no mean feat to explain how a document voted on by a few people 230 years ago should have any relevance today. As a matter of political *practice*, the Constitution is abstract, while aid to Savannah—or to New Orleans, or to AIG, or to Puerto Rican rum-makers—is concrete. Public choice theorists have also taught us that the concrete, particularly a concrete that affects cohesive, identifiable interest groups, has a huge advantage over the abstract.

Second, there is the problem of rational ignorance. Most people have no idea what the Constitution actually requires, even if they are inclined to care about it, and it frankly makes no more sense for them to take the time to acquire that knowledge than it makes sense for a law professor to acquire extensive knowledge of plumbing. I am accordingly ignorant—rationally ignorant—of plumbing. Most people, who have lives to lead, are ignorant—rationally ignorant—of the rather intricate institutional design of the Constitution. It is not a solution to rational ignorance for law professors to write articles in scholarly journals.

These are difficult problems, but they are not new. Plato has come in for a great deal of criticism over the past 2,500 years for suggesting in *The Republic* that rulers teach their subjects a fable about the different kinds of metals in people's souls as a way to communicate that everyone has a fixed place in the social

[43] On the constitutional problems with precedent in adjudication, see Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol'y 23 (1994); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 Ave Maria L. Rev. 1 (2007). On the need for independent constitutional judgment by executive and legislative actors, see Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267 (1996).

order.[44] This strategy has come to be called, derisively, the "Noble Lie." I am no admirer of Plato, his philosophy, or his metals, but I do believe that some of this criticism is misplaced. Plato was responding to the same problems of public choice incentives and rational ignorance that plague modern constitutionalists, and it is important to separate the *content* of his suggestion from its *form*.

Put another way, the Noble Lie is the Noble Lie only because it is a lie. If it was in fact the truth, it would be the Noble Truth: noble because it would be a convenient device for economizing on information in a world of rational ignorance while providing a normative foundation for the social order. If there is something wrong with that, I frankly don't see it. Perhaps constitutionalists need a Noble Truth of their own.

The fable of the metals is already taken, but perhaps the fable of the Founders can fit the bill—and it has to be at least in part a fable both because it must oversimplify the facts if it is to serve its cognitive function and because the Founders were not a uniform group. They did not all agree with each other, they did not all agree with me, and some of them were not even necessarily nice people. But the core truth at the heart of the fable that needs to be developed is that the people who designed the Constitution's structural allocation of powers were *really smart*. More than that, they were really *wise* in important ways, particularly with respect to human nature.[45] At the very least, they were smarter and wiser than anyone who one can name as their modern counterparts. They designed the Constitution as they did because they understood how people behave in certain institutional settings.

We need the Framers to be, for lack of a better word, venerated in the general culture—not necessarily for who they were but for what they did. It is important to keep the focus on the work product. That is why continuing public fascination with the personalities of the Founding, reflected in the success of biographies, historical novels, and television series, is a positive development *but not sufficient* to build a constitutional constituency. Something needs to link veneration of the personalities with veneration of the Constitution. That kind of veneration serves both as a shorthand reminder of the constitutional design that they built and as a reason to stick with that design even when the immediate tug of politics suggests otherwise.

Early architects of the modern administrative state understood very well the importance of having—or in their case destroying—this constitutional veneration. Frank Goodnow, one of the leading Progressive thinkers in the first part of the 20th century, complained in 1911:

> For one reason or another the people of the United States came soon to regard with an almost superstitious reverence the document into which this general scheme of government was incorporated, and many considered, and even now consider, that scheme, as they conceive it, to be the last word which can be said as to the proper form of government—a form believed to be suited to all times and conditions.[46]

That "superstitious reverence" was an obstacle that Goodnow and his fellows had to destroy. Two decades later, Goodnow and his fellows were triumphant. Constitutionalists would do well to learn from this experience.

CONCLUSION

Right now, if you mention the Founders in the general culture, the response is likely to be something like "dead white male slaveowners." The administrative state will steamroll the Constitution until that response is something like "dead white male slave-

[44] *See* The Republic of Plato 106–07 (Francis MacDonald Cornford ed. 1941).

[45] *See* Steven G. Calabresi & Gary Lawson, *Foreword: Two Visions of the Nature of Man*, 16 Harv. J.L. & Pub. Pol'y 1 (1993).

[46] Frank J. Goodnow, Social Reform and the Constitution 9–10 (1911).

owners who were really smart people wise in the ways of human nature."

How to get there? Those who can write and speak in a fashion accessible to a popular culture need to do so as loudly and as often as they can. That is not my strength; I am in the academy precisely because I am an academic. There are surely, however, many people who believe in the Constitution who can propagate a fable—a noble, essentially truthful fable—that can cross the cognitive barriers of rational ignorance and public choice.

It is possible, of course, that things have moved so far that there is no way to recover the cultural foundations for a constitutional constituency. But it seems wrong to give up without a fight.

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