The Heritage Foundation
LEADERSHIP FOR AMERICA

LECTURE

DELIVERED DECEMBER 14, 2012 No. 1231 | JUNE 25, 2013

How to Limit Government in the Age of Obama

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Abstract

In spite of the outcome of the 2012 election, conservatives need not abandon their core project to restore limited constitutional government. Even in the age of Obama, there are still three major concrete avenues to push back against unlimited government: Congress, the courts, and the states. In Washington, Congress can use the legislative power to starve the administrative state and rein in some of its excesses. In the courts, litigants can seek judgments against the Environmental Protection Agency, the Department of Health and Human Services, and other agencies as a way to push back against unlimited government. And beyond the Beltway, a majority of states have the capacity to push back against federal overreach on a range of issues, most notably Obamacare. This panel was held on the occasion of the release of Joseph Postell's Special Report *"From Administrative State to Constitutional Government," on which he based his remarks.*

The Role of Congress

Joseph Postell, PhD: Limiting government in the age of Obama is a tall order, but it is a tall order not simply because of who occupies the White House. It is a tall order because it requires limiting government in the age of the administrative state, which stacks the deck against those hoping to place limits on government.

To mount an effective challenge to the expansion of the national government, we must first understand what we are up against. Only then can we devise a strategy to get us back towards limited government.

This paper, in its entirety, can be found at **http://report.heritage.org/hl1231**

Produced by the B. Kenneth Simon Center for Principles and Politics

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Key Points

- To challenge the expansion of the national government effectively, we must first understand the nature of the modern administrative state, recover a proper vision of what constitutional government is under our written Constitution, and develop a strategic vision that will put us on the path to restoring constitutional government.
- In confronting the administrative state, conservatives should first and foremost follow the Hippocratic Oath: Do no harm. We are currently experiencing a massive expansion of the administrative state, and holding the line has to be a priority.
- To advance the project of restoring limited constitutional government, conservatives need both ideas and the opportunity to implement those ideas. Even in the age of Obama, there are opportunities for Congress, the courts, and the states to push back against unlimited government.

What Is the Administrative State?

Our government today resembles an administrative state more than a republic. What is an administrative state? It is not simply "Big Government," nor does it describe the modern welfare state. It does not refer to the size of government, nor to the creation of entitlements to be distributed by government. The administrative state is defined by the *structure* of our modern state—a structure which is deeply in tension with our central constitutional principles.

The administrative state describes a form of government that delegates massive powers and discretion to *modern* administrative agencies. Modern agencies are very different from the kinds of agencies that existed at the time of our Founding. They exercise powers of rulemaking, execution, and adjudication. Most of the personnel in these agencies are not chosen by the people directly through elections or even indirectly through presidential appointments. In short, modern agencies possess legislative, executive, and judicial powers, and they are not subject to regular elections.

The administrative state is not simply meant to describe the size of the government or the scope of its functions. It assumes these expanded functions and then creates a new branch of government to carry them out efficiently without the cumbersome constraints of elections and the separation of powers.

The administrative state undermines two central principles of our Constitution: the separation of powers and representative democracy. The typical administrative agency today makes law, executes law, and adjudicates. Today's agencies do not separate the three powers of government: They *consolidate and unify* these powers for the sake of efficiency. Those who supported the creation of these agencies, such as Herbert Croly and James Landis, openly admitted this to be the case.

These agencies also undermine the principle of representative democracy based on the consent of the governed. Madison and the Founders defined a republic very clearly as "a government in which the scheme of representation takes place." The Founders were clear about this: A republican government is a government where we choose our representatives through elections. This is why Madison called "the definition of the right of suffrage...a fundamental article of republican government." In Madison's mind, this direct electoral connection between citizens and legislators was crucial, since legislators make the rules that we must follow under penalty of law. Yet today's administrative agencies regularly promulgate rules carrying the force of law, despite the fact that the bureaucrats are unelected.

Thus, the administrative state is not simply meant to describe the size of the government or the scope of its functions. The administrative state is something more sinister. It assumes these expanded functions and then creates a new branch of government to carry them out efficiently without the cumbersome constraints of elections and the separation of powers. As some of Franklin Roosevelt's closest advisors—of all people!—observed, the administrative state represents a "headless fourth branch of government." As such, it is a direct challenge to the principles that *all* Americans—liberal and conservative—hold dear. It subjects citizens to unchecked, unaccountable, arbitrary power.

This is why it is so challenging to limit government today. Not because of who occupies the representative branches of our government, but because of how we have set up a fourth branch of government which is outside of constitutional checks and balances. By destroying these checks on power—the internal checks that come from the separation of powers and the external checks that come from periodic elections—government today is designed to operate on auto pilot, hardly affected by what happens in the political branches.

The administrative state was quite literally created to overcome the Constitution's bias in favor of limited government. Programs, once created, are never questioned: They are only transferred to a bureau to be administered.

How Can Congress Confront the Administrative State?

In confronting this new form of government, what can we do to restore our constitutional principles? I believe that much can be done to limit this administrative state, both in the short and long term.

In the interests of time, I will only focus on a few prescriptions.

In confronting the administrative state, conservatives should first and foremost follow the Hippocratic Oath: Do no harm. We are currently experiencing a massive expansion of the administrative state, and holding the line has to be a priority.

In order to hold the line, of course, it will be tempting to fall back on the usual methods of congressional control of agency policymaking: namely, using the power of the purse and oversight hearings. For decades, Congress has proved adept at using hearings and defunding to interfere with agency rulemaking. Most agencies are dependent on Congress for authority and for money, and Congress has long used this dependence to exert its control over bureaucracy.

It is probably essential for Congress to continue to use these tools to check the Administration, but we should not forget that appropriations riders and oversight are not panaceas. For one thing, using the appropriations process is difficult because it requires action by the whole Congress. But more important, these are tools for obstruction, not positive advancement. At best, they can prevent a rule here, a rule there...but they cannot get conservatives to where they should be going.

Defunding threats and oversight hearings have served to arouse passion but do not advance the long-term goal of restoring constitutionalism. While Congress uses its well-established methods to hold the line against further encroachment, it should consider real and lasting reforms that will produce long-term progress.

Consider this simple question: Have defunding threats and oversight hearings in any way reduced the growth and intrusion of the administrative state? Can we point to any *positive* gains that these methods have made? They have served to arouse passion, to heap scorn on particular bureaucrats, but they do not advance the long-term goal of restoring constitutionalism.

Thus, while Congress uses its well-established methods to hold the line against further encroachment, it should consider real and lasting reforms that will produce long-term progress. For long-term progress, I see three possibilities.

The First Option. The first and most obvious solution to the problem of the administrative state is to cut off the flow of power to it. Congress delegates powers to the agencies, and Congress can reclaim those powers if it wishes. If Congress would simply stop delegating its legislative powers to the agencies, much of the problem would be eliminated. It is important to understand that no regulatory scheme would necessarily be eliminated if this were to happen. But for any regulatory scheme to survive, it would have to be sanctioned by the people's representatives first—an important check on the growth of regulation.

Unfortunately, in the present situation, the odds of Congress reassuming its powers are slim to none. The REINS Act, which would have required all major agency rules to be ratified by Congress and the President, actually passed the House but was dead on arrival in the Senate.

A similar existing law, the Congressional Review Act, has been ineffective since it was passed in 1996. This Act allows Congress to reject proposed agency rules by joint resolution of both houses. Immediately, the House can fix some of the structural defects of this law. In particular, the House should change its rules to provide an expedited consideration procedure for disapproving of proposed agency rules. However, in the current political climate, the CRA is probably not going to be an effective tool for limiting the growth of the state.

The Second Option. There is, however, a second-best option. In order to place *some* legal checks on an administrative state that is unchecked by constitutional principles, Congress enacted the Administrative Procedure Act in 1946 to define procedures that agencies have to follow and the scope of judicial review of these agencies. Unfortunately, the statute has largely been unchanged since it was enacted in 1946. Congress should carefully study possible amendments to the Administrative Procedure Act that would reintroduce important checks and balances back into the administrative state.

A single house of Congress can create select committees to investigate important issues. The creation

of a Select Committee on Administrative Reform by the House could provide a venue for study and investigation of serious, long-term reforms to the administrative state. By bringing together scholars and practitioners to examine such reforms, conservatives in Congress would be armed with reforms to enact when the opportunity arises.

One attempt at lasting reform is worth specific mention. In December of 2011, the Regulatory Accountability Act passed the House of Representatives. Had it passed the Senate, it would have amended the Administrative Procedure Act to authorize judicial review of major agency rules to require that they meet a basic cost-benefit standard. Devising principled yet creative reforms such as these—and publicizing and defending them so they can be enacted—should be the agenda of such a committee.

The Third Option. A third option for Congress to consider is granting additional power over agency decision making to the President. Making agencies more accountable to the President would increase the accountability of agencies to the people. This would increase the external checks placed on these agencies. Under modern law, the President's ability to control the day-to-day activities of the agencies is substantially diminished, particularly with regard to the so-called independent regulatory commissions. Presidents over the past 100 years have tried to get control over the agencies. Congress could settle some of these matters immediately by granting the President powers to hire, fire, and overturn the decisions of these officials.

This might be especially shrewd given the current political situation, since it might appeal to members of both political parties. To take a single example: The Civil Service Reform Act of 1978 gave President Jimmy Carter additional political appointees to influence the bureaucracy but was used to great effect by his successor.

As an alternative, if Congress does not want to give the President control over more agency personnel, it could strengthen the White House's regulatory review process. This process was established by executive order but has not received sanction from Congress. Congress could enact legislation explicitly authorizing this process of regulatory review and could also expand it to include major rules promulgated by independent regulatory commissions such as those established by Dodd–Frank. (At present, the regulatory review process only applies to executive agencies.)

Putting the President in charge of the Administration through these various proposals has the benefit of increasing the accountability of administrative agencies and also has the benefit of decreasing Congress's incentives for delegating power in the first place. If Congress realizes that it is actually ceding power to the President when it delegates, it should become more reluctant to do so.

Good Machiavellian Advice

All of these suggestions are intended to be tentative. All reforms should be carefully considered before moving forward. Confronting the administrative state will require a great degree of prudence. It is something that the best conservative minds should be organizing to do right now.

To conclude, it is helpful to turn to Niccolo Machiavelli, the political thinker who should always be consulted in dire circumstances. Machiavelli examined great lawmakers throughout history and found that "in examining their actions and lives one cannot see that they owed anything to fortune beyond opportunity.... Without that opportunity their powers of mind would have been extinguished, and without those powers [of mind] the opportunity would have come in vain."

You need, Machiavelli teaches us, both ideas and the opportunity to implement those ideas. When circumstances deny you the opportunity, the best thing you can do is fire up the idea factory so that you will be ready if the opportunity does come. This is the task before conservatives today.

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The Role of the States

Robert E. Moffit, PhD: The expansive growth of government is one of the most pressing issues facing the country, and it threatens the civic life we have as Americans. At the Philadelphia Constitutional Convention in 1787, our Founders devised a wise division of authority between a national government, focused on general concerns, and particular state governments, focused on particular state concerns. In defending this scheme, in *Federalist* No. 10, James

Madison writes: "The federal constitution forms a happy combination, in this respect. The great and aggregate interests being referred to the national, the local and particular to the state legislatures."

Why did they do this? The Founders were convinced that the concentration of power is the single greatest threat to liberty. Under the Constitution of 1787, the status of the general and particular governments is equal, and the Founders made sure that each would be supreme within its own sphere. In other words, neither could encroach upon the other without the well-balanced constitutional framework being disrupted.

This division of power is very important because today we face a challenge of a concentration of power that no one had anticipated: the administrative state. To confront it, we must draw from our own resources—basically, the inheritance we have as American citizens.

Today we face a challenge of a concentration of power that no one had anticipated: the administrative state. To confront it, we must draw from our own resources—basically, the inheritance we have as American citizens.

We are heirs of an innovative achievement in practical political science. Every person in this room holds a unique dual citizenship. Every one of you is equally a citizen of the United States and a citizen of the state in which you live.

On a practical level, this means that every elected official who swears an oath to the Constitution, whether that official is a federal official or a state official, has a solemn duty to protect your rights as a citizen not only of the United States, but also of your state. Let's be clear about one thing: Under Article VI of the federal Constitution, the national law is supreme, but as Hamilton and Madison routinely emphasized in the *Federalist*, each is supreme within its own sphere of constitutional authority.

The rise of the administrative state, fostered by Progressive ideology, is the most serious challenge to that balanced constitutional order. The states have institutional and legal recourse to the excesses of this administrative state, and the recourse is in the body of our Constitution itself.

The Constitution ultimately is a political document. It articulates a political relationship between the states and the national government as well as a legal relationship. Let me then outline some political responses by state officials to the excesses of the administrative state.

What the States Can Do to Revive Real Federalism

Get an Attitude Adjustment. First of all, state officials need to get an attitude adjustment when it comes to Washington. A year ago, I listened to a state official tell me about how pleased she was that her governor was able to secure a meeting with a functionary at the Department of Health and Human Services. We're talking here about a civil servant, not HHS Secretary Kathleen Sebelius.

This state official was thrilled that this functionary had time to discuss how the state could organize its health insurance exchange in accordance with Obamacare. Her recollection of the episode was that the functionary listened very patiently. She didn't in fact give an awful lot of information or answer a lot of questions, but Good Lord, the governor got an audience with this functionary in the Department of Health and Human Services!

Can you imagine how Madison or Hamilton or any of the other Founders would react to such a story? Too many of us, including people in public life, operate with a strange prejudice in favor of the federal government. Too many Americans, including public officials, seem to be under the false impression that the relationship between the national government and the governments of the states is some kind of a vertical relationship. The federal government is at the top of the political totem pole, and the states are at the bottom.

Any sound reading of the *Federalist* makes clear, of course, that this is not the case. Constitutionally, the relationship between the federal government and the states is in fact a horizontal relationship. Each is equal to the other in its own sphere of authority. As Chief Justice John Roberts reminded us in *NFIB v. Sebelius*, "The states are separate and independent sovereigns. Sometimes, they have to act like it."

Challenge Federal Officials. Second, state officials should directly engage federal officials who write the rules which affect their citizens at the state

level and frankly invite federal officials to explain those rules in public hearings. In *Federalist* No. 28, Alexander Hamilton writes: "Projects of national usurpation will be detected by state legislatures at the distance and possessing all of the organs of civil power and the confidence of their people, they can adopt a regular plan of opposition."

Well, the Affordable Care Act is perhaps the greatest single attempt in recent years to constrain the power of the states. Its implementation right now is very rocky, and state officials have excellent opportunities to mount an effective political response. What could they do?

State legislators could hold very high-profile public hearings on the impact of the law on the citizens of the state. They could focus, for example, on the cost and access to coverage and care, the level of new taxpayer obligations at the state level, the impact of the law on the economy, the impact of the law on doctors and hospitals and employers and employees. State legislatures could gather this data, publish it, and then hold high-profile public hearings and invite the federal rulemakers to appear and explain themselves.

Energy is another ripe area for public education. State officials, particularly those in regions which produce a great deal of coal and natural gas, could focus on the impact of the Environmental Protection Agency on employment and economic growth within the state.

If you reply that it's never really been done very often, that still doesn't mean that they can't do it. If federal officials want to write detailed rules and regulations that affect the people at the local level, then they should have no objection to testifying in an open forum, defending the imposition of their rules, while listening very patiently to the views of those whose lives and livelihoods they are directly affecting.

Will federal officials agree to testify? Who knows? But either way, the data, the hearings, the press conferences, even the drama itself of federal officials appearing in state legislative hearings—this, in and of itself, would stimulate debate on the rules that affect so many of our fellow citizens.

Make Senators Accountable. Last, we need to remind our Senators that they represent the states. The direct election of Senators under the Seventeenth Amendment does not make Senators any less representatives of their states. Since they represent the states as civic entities, state legislators, who once elected Senators, should invite them to attend public sessions of the state legislature or open hearings, whichever seems best, and account publicly for those decisions in Washington that directly affect the citizens whom they formally represent.

They can also ask them why they supported initiatives by the Environmental Protection Agency, federal energy policies, education policies, federal tax policies—all of these areas are ripe for public discussion. It's a target-rich environment. Of course, Senators could refuse or not cooperate with state legislatures: That's perfectly fine. Their non-cooperation simply fuels an even greater political opposition to federal policies that injure state interests.

Governors, legislators, and attorneys general should vigorously target any attempt at federal commandeering of state officials to carry out federal rules. The challenge to federal overreach should be renewed at every opportunity in the federal courts.

Todd Gaziano is going to talk to you in greater detail about litigation. I would like to emphasize that state legislators, state governors, and state attorneys general should do their best to keep federal lawyers very busy. They should constantly challenge federal transgressions in the federal courts.

Governors, legislators, and attorneys general should vigorously target any attempt at federal commandeering of state officials to carry out federal rules. The United States Supreme Court has previously struck down congressional attempts at commandeering as a violation of the Constitution. That challenge to federal overreach should be renewed at every opportunity in the federal courts.

Confronting Obamacare

I just want to mention the special case of Obamacare. Obamacare is, as I said, probably the greatest single challenge to the states. It is also the greatest opportunity for the revitalization of state authority. The Obama Administration wants state officials to cooperate with them, but no state legislature is obliged to vote one single cent of state

taxpayers' money to enforce a federal law that is either unconstitutional or harmful to their citizens. Federal regulators may write highly prescriptive rules, but they exercise no authority over state legislators' power over the state purse.

State officials are already emerging as champions of federalism, and the states themselves are becoming institutional centers of opposition to Obamacare.

State officials are already emerging as champions of federalism, and the states themselves are becoming institutional centers of opposition to Obamacare. Today is the deadline for states to agree to set up exchanges. As of last night, 21 states declared that they would not set up the law's health insurance exchanges; 17 states have agreed to do so. Moreover, many states are saying that they are not going to expand Medicaid up to the statutory level enacted into the law.

The fact is that the state authority over health policy has been largely preempted but not entirely erased. Based on what we know so far, the federal government will set up health insurance exchanges in roughly half of the states, but state officials can still create alternatives for persons who do not want to enroll in the exchanges. States can explore the promotion of alternative coverage and health care financing arrangements for their citizens who object to either the costs or the benefit mandates that are being imposed by Washington.

Winning the Debate

Ladies and gentlemen, this is going to be a great challenge over the next couple of years. I think you can look to the states. There you are going to see a resurgence of popular passion to preserve and extend personal liberty, to protect the rights of property and retaliate against excessive taxation. You already see it in the ongoing debate over Obamacare, the power of the Environmental Protection Agency, and the role of government itself, fueled by record deficits and mounting debt.

The size and scope and power of the federal government are once again a source of popular anxieties. A recent survey shows that 64 percent of voters said that Washington has too much money and too much power. That means that this debate can be won if conservatives frame the argument correctly and offer attractive policy alternatives. There is no reason why we have to grovel before the administrative state.

*—**Robert E. Moffit, PhD,** is a Senior Research Fellow in the Center for Health Policy Studies at The Heritage Foundation.*

The Role of the Courts

Todd F. Gaziano: Although the judiciary can help limit the power of the administrative state, it is important to begin with a few caveats about the courts' proper role. We shouldn't overstate what the judiciary can accomplish in this regard, especially in the short run. By recognizing the limits of judicial actions and remedies, we can better identify what the judicial hammer can fix—and what is best left to the political branches.

First, judicial power is a crude instrument for limiting the aggregate scope of agency action, especially once agency power is firmly entrenched. Court decisions are necessarily confined to the questions raised in a given case. They cannot sweep nearly as broadly as what Congress can cover, for example, by enacting the REINS Act, which would fundamentally alter the regulatory process. The courts may invalidate a particular regulation, but even when they strike down such a rule, the agency can often issue another one—sometimes the same one—with additional evidence or reasoning in the rulemaking record.

Nevertheless, since it is unlikely that major regulatory reform like the REINS Act will pass in the near future, it may still pay to consider a conscious plan to invoke judicial power to limit government, even if it is a quite narrow tool.

Second, the judicial power is further limited because judges cannot reach out and issue opinions on any subject of their choosing; they can only act on cases filed by others. Moreover, there are limits to the type of cases that litigants can properly file and, thus, the type of rulings courts may issue thereon. Judicial power, especially in federal court, is confined to those cases and controversies of a judicial nature that are properly within the courts' jurisdiction.

In federal courts, the "case or controversy" requirement of Article III of the U.S. Constitution

has been interpreted to bar suits that are not judicially "ripe," that are "moot," that seek an "advisory opinion," or that are brought by parties without proper "standing" to sue. The standing element, among other things, requires that the party filing the suit demonstrate a particularized injury that is distinct from the rest of the public and that the requested relief is within the court's power to grant and will solve or "redress" his or her injury.

Since the federal government is not interested in checking its own powers and rarely would have a judicially cognizable "injury" if it argued it had too much power, we must rely on individual citizens, organizations (associations or corporations), and possibly state governments to bring actions to limit federal agency power. That's a hit or miss proposition. For example:

- Many corporations benefit as much or more from government power (through what economists label "rent-seeking behavior") as are disadvantaged by it, or they rightly fear angering the regulatory power that they must deal with in the future whether they win or lose any individual case.

- State governments are regularly at the federal trough, and they also might not want to challenge a federal power that they exercise—even if a constitutional distinction exists that would allow them to bring suit.

- Most individuals don't have the time or resources to take on the federal government, even assuming they monitored statutory enactments and regularly read the *Federal Register* for questionable regulations.

Third, many constitutionalist judges, including such stalwarts as Justice Antonin Scalia, will not undo the worst constitutional abominations of the administrative state if the government functions or institutions at issue are supported by a long line of judicial precedent. And some judges, who should at least stop the unconstitutional expansion of the administrative state, may back down from doing the right thing, as may have happened with Chief Justice John Roberts in the Obamacare case, if strong political pressure is brought to bear on the courts.

Finally, the judges who are faithful to the Constitution and are willing to rule according to the Constitution in every case (or the great majority of cases) are a wasting asset, especially in the second term of the Obama Administration. Retiring constitutionalists are being replaced with at least some results-oriented activists, so we've got to act quickly to try to bring appropriate cases—at least in the short run.

Reasons for Optimism

Despite these limitations, constitutional and administrative litigation can not only overturn individual agency rules or actions, but also sometimes help create large fissures that will reopen a political debate. For example, if the individual mandate to buy health insurance in the Obamacare statute had been properly struck down instead of reconceptualized by the Supreme Court as a "tax," the entire Obamacare edifice might have unraveled—as the United States conceded in its briefs. As it is, even the high court's limited ruling in another part of the opinion holding that states can opt out of the Medicaid expansion without giving up all of their federal funding support will create problems of administration that might require Congress to legislate again.

Many constitutionalists who are uncomfortable about overturning well-established (even if erroneous) constitutional precedents will at least draw the line at extending them. That is still important, especially as Congress becomes more lawless.

Many constitutionalists who are uncomfortable about overturning well-established (even if erroneous) constitutional precedents will at least draw the line at extending them. In essence, they say: "I'm not going to overturn a century of legislation that is based on a mistaken understanding of Congress's power, but I will not allow the Constitution to be perverted any further." That is still important, especially as Congress becomes more lawless.

There also are some discrete remedies—including challenging a particular regulation—that can help galvanize public opinion to draw attention to what's

wrong in the larger administrative state. For example, the *Sackett v. EPA* case decided by the Supreme Court this past spring involved two examples of governmental overreach that any citizen could understand. First, the EPA applied a particularly expansive reading of what constitutes a "wetland" under obscure and vague Clean Water Act regulations: Any landowner could empathize with the plaintiffs, who suddenly had their private property declared a protected "wetland" with no clear statutory basis. *Sackett* also involved procedural chicanery on the part of the EPA, which issued bankrupting daily fines but denied the property owners a reasonable process to challenge the wetlands determination.

Not only is there a broad-based interest in relimiting the national government by those in the Tea Party and similar movements, but the separation of powers, federalism, and administrative law scholarship in the past 20 years has drawn attention to problems created by the administrative state.

The public was largely unaware of these problems until the case reached the Supreme Court, but then it was discussed on the front page of *The Washington Post* and prominently in other news outlets. When the Sacketts won, it didn't change the underlying wetlands regulations, which are still too broad, but it has helped educate policymakers and the public about how arbitrary and abusive EPA can be in the exercise of its power. And the constitutional due process principle is transferable to other agencies; it gives individuals some additional opportunities to challenge an agency that tries to insulate its unreasonable behavior.

Even court losses sometimes do a great deal of good to bring about needed reform. In *Kelo v. City of New London* (2005), the Supreme Court wrongly upheld the city's power to take property from private homeowners and give it to a large corporation under a "public benefit" theory that the corporation might pay more in taxes. Although that is an improper reading of the "public benefit" language of the Takings Clause of the Constitution's Fifth Amendment, the public outrage resulted in dozens of state law reforms designed to prevent state and local governments from the worst abuses.

Let me add another note of optimism regarding the popular and intellectual climate that is vital for reform to take hold and prosper. Not only is there a broad-based interest in relimiting the national government by those in the Tea Party and similar movements, but I'm especially encouraged by the quality of the separation of powers, federalism, and administrative law scholarship in the past 20 years that has drawn attention to problems created by the administrative state. It's not been since the 1920s and the waning days of real constitutional government that we've had such wonderful scholarship.

Ideas *do* matter—both in the political science literature and in the legal literature. That scholarship is quite valuable in analyzing constitutional and administrative principles and problems as well as in proposing first- and second-order solutions.

A Strategic Vision for Litigation

Occasionally, a private individual with a broad vision of our constitutional order will bring a case that helps us all. That's wonderful when it happens, but for the reasons I explained previously, the most likely source of constitutional reform litigation comes from public interest suits brought by organizations with a strategic vision of how to use the courts. In part because the need was so pressing, the conservative and libertarian public interest litigation movement has grown much richer in the past 30 years.

We have the privilege in the Center for Legal and Judicial Studies at The Heritage Foundation of hosting a conference twice a year that brings the leading conservative and libertarian public interest law firms together. Ed Meese dubbed it a gathering of the "Freedom-based Public Interest Legal Movement," because the group focuses on the broader public interest in individual liberty instead of the narrow special interest of certain segments of society. (As an aside, broad protections for speech and religious liberty are foundational liberties that benefit us all even if only some of us regularly engage in government criticism or practice a religious faith.) At our gatherings, we focus on various strategic goals and priority issue areas, including protecting property rights, religious liberty, equal protection for all Americans, free speech and free association, federalism, and the constitutional separation of powers.

For this approach to succeed, two things are required: a proper vision of what constitutional government is under our written Constitution and what strategic litigation will get us closer to restoring constitutional government. No single win is going to restore it, but those engaged in this endeavor must begin with a proper vision of what constitutional government is or they will dissipate their resources or act in counterproductive ways. Let me give you two examples of what constitutional government does and does not entail.

The constitutional separation of powers is not just a power-sharing arrangement between the branches that keeps the different oligarchs in equal counterpoise. I don't care about Congress's prerogatives for Congress's sake, especially since I no longer work for Congress. I also don't care about presidential prerogatives for the President's sake, especially since I never will be the President. As Madison explained in *Federalist* Nos. 47–51, the actual separation of powers in our Constitution was designed to promote individual liberty. It's the interest of the citizens that matters.

For this reason, the separation of powers in our Constitution incorporates a specific design of separation. It isn't just a power-sharing deal so that if the authority of all three branches of the federal government were increased equally, no one could complain. It is a particular separation that promotes the liberty of the people. Madison explained in *Federalist* No. 51 that the proper separation of powers would tend to prevent tyranny because ambition would counter ambition, but that was for our benefit. The Constitution is not satisfied whenever political ambitions are in competition.

So the original design of separation in the written Constitution is the only one that we ought to restore, not any other power-sharing arrangement between inflated oligarchs. For example, some big-government-minded academics propose letting Congress appoint the heads of new administrative agencies since they believe that this would promote technocratic/scientific "independence" and might counter the "imperial presidency" that they argue is not sufficiently responsive to congressional mandates. They even argue that this would restore an "equal" separation of powers that is out of whack after decades of expansive congressional delegations.

Our answer should be a loud and emphatic "No!" That proposal cuts deeply against individual liberty for several reasons, primarily by further limiting democratic accountability for the execution of the law. But no matter how "equal" any such proposal appears to be, the text of the Appointments Clause of the Constitution (Article II, section 2, clause 2) forbids it.

The habit of departing from the text whenever a pragmatic argument can be made for doing so (no matter how strong) carries an additional set of risks. What's next? Exceptions to the First Amendment to ban harsh criticism of the government to improve public confidence in government? If the problem is excessive legislative delegations, that must be solved through constitutional means, such as the REINS Act. One constitutional abomination does not justify another.

Like the constitutional separation of powers, constitutional federalism requires (or at least works best pursuant to) a particular division of national and state power.

Or consider constitutional federalism. There's real federalism, about which Michael Greve has written, and then there's the confused idea of federalism that it's about states' rights, seemingly because we like state power for its own sake. I'm not interested in states' power to discriminate on the basis of race or color. We amended the Constitution to prevent that. I hope the courts and the federal government interfere forcefully with states' attempts to do many things, such as take people's property without just compensation, ban the ownership of guns necessary for self-defense, and interfere with our right of free association. In short, I am not interested in strong state governments because I prefer state tyrants to federal tyrants.

Federalism, as Madison again explained in *Federalist* No. 46, will work to promote individual liberty because the different sovereigns will compete for citizens' affection, and we can turn to either sovereign for aid if the other becomes tyrannical. Like the constitutional separation of powers, constitutional federalism requires (or at least works best pursuant to) a particular division of national and state power. That division was altered by several

constitutional amendments, some very good ones and some that are not so good, such as the federal income tax amendment. So while real federalism should be promoted in public interest litigation, that does not mean supporting the states as against the national government in every instance.

What to Expect from the Courts

Let's now look at 10 subject areas that are key targets for litigation while realizing that there are no silver bullets in any of them.

Limits to the Commerce Clause. First, we should continue to develop one small jurisprudential victory in the Obamacare decision: the Court's affirmation that the Commerce Clause did not authorize the mandate on individuals to buy health insurance. Indeed, the Court had to revert to its questionable tax ruling because it had foreclosed the conclusion that the Commerce Clause authorized Congress to regulate inaction.

The Obamacare opinion sets up potential challenges to other laws with questionable Commerce Clause justifications and no conceivable tax hook. If we knock out some wrongful assertions of federal power, the regulatory agencies can do less damage.

To the extent that the commerce power was limited, I am proud to note that it was three years and a week ago in this room that we released a Heritage paper by Randy Barnett and Nathaniel Stewart (that I also joined) challenging the constitutionality of the mandate under the Commerce Clause.[1] In the next three years, there weren't more than five law professors who thought we would succeed with that argument. We were part of the 0.1 percent. We were right; the 99.9 percent were wrong. Chief Justice John Roberts blinked on a tax theory the government only devoted a few paragraphs to in its brief, but he endorsed the commerce power limits first advanced in our paper.

While the Obamacare tax ruling upholds the health care mandate, I am among those who think the tax power is subject to some political and other checks (including possible congressional procedural rules) that don't apply to an exercise of Commerce Clause power. Moreover, I think a part of the tax ruling is so questionable and novel that it may be overturned by a later court decision or limited in some meaningful way. If the Court had endorsed the expansive Commerce Clause theory, it would have been much harder to overturn.

In any event, the Obamacare opinion sets up potential challenges to other laws with questionable Commerce Clause justifications and no conceivable tax hook. This isn't a direct challenge to administrative agencies as such, but if we knock out some wrongful assertions of federal power, the regulatory agencies can do less damage. There are many statutes that exist only on a strained theory of the Commerce Clause. We need to develop that.

Assertions of Power Beyond the Commerce Clause. Second, we should examine Congress's substantive assertions of power beyond the Commerce Clause, remembering that Congress has no power to act except that which is expressly enumerated. For example, I joined an amicus brief in the U.S. Court of Appeals for the Fifth Circuit challenging an aspect of the federal hate crimes statute. The defendant in that case seems like a bad person, a white supremacist who committed an assault (although his motivations for the assault are somewhat unclear), but part of the federal hate crimes statute is predicated on a theory of the Thirteenth Amendment that just doesn't work. The Thirteenth Amendment is about slavery; it doesn't justify the federalization of all violent crime.

Federalism and Individual Liberty. Third, there are violations of federalism that seriously undermine individual liberty even if there is, or at least was, an arguable basis for federal involvement. Shelby County, Alabama, is before the Supreme Court now arguing that the repeated reauthorization of the preclearance provisions (sections 4(b) and 5) of the Voting Rights Act, including in 2006 for 25 more years, was not constitutional. It is a very important enumerated powers and federalism case

1. See Randy Barnett, Nathaniel Stewart, and Todd F. Gaziano, "Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional," Heritage Foundation *Legal Memorandum* No. 49, December 9, 2009, http://www.heritage.org/research/reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprecedented-and-unconstitutional.

that tests an unusual emergency provision of the Voting Rights Act that was supposed to last only five years.

Although the original preclearance provisions were constitutional in 1965, it was a rare exception to several notions of sovereignty, including the "equal sovereignty doctrine" of the states, and placed certain states and portions of states in a partial receivership vis-à-vis the federal government. The principal question in the case is whether the federal government can maintain that unusual control, seemingly in perpetuity, when the special prophylactic provision is no longer congruent and proportional to any violation of the Fourteenth Amendment.

Unconstitutionally Expansive Interpretations of the Treaty Power. Fourth, we need to limit unconstitutionally expansive interpretations of the treaty power. In short, we need to challenge the notion that the President and the Senate can conclude a treaty on any subject and make it binding federal law.

Some transnational scholars seem to believe that America could join a treaty prohibiting the "defamation of religion," which would require punishment for criticism of any religion, despite our First Amendment right to free speech. Others think the Bill of Rights might limit the treaty power but that there are no other subject matter limitations. For example, if Obamacare's mandate had been struck down, they believe that President Obama and the Senate could simply conclude a treaty with the European Union that requires the same thing in order to harmonize social costs between the trading partners.

We need to limit unconstitutionally expansive interpretations of the treaty power. We need to challenge the notion that the President and the Senate can conclude a treaty on any subject and make it binding federal law.

A related issue is whether there are limits to Congress's power to enact statutes implementing treaties and international agreements: in other words, whether Congress must still act pursuant to an enumerated power other than the Treaty Clause. Former Solicitor General Paul Clement will argue a case in the Supreme Court next fall that raises that issue. The case is *Bond v. United States*, which is now back in the Supreme Court a second time, the standing issue having been resolved the first time.

On the merits, now before the court, a criminal defendant is challenging the strained application of the Chemical Weapons Convention Implementation Act of 1998, enacted pursuant to the 1993 Chemical Weapons Convention. It's an interesting case because few of us doubt the President's power to enter into the treaty.

But there is a serious question whether Congress can use that treaty to regulate minor criminal conduct no one would classify as "chemical warfare" inflicted on a woman who had an affair with the defendant's husband. If there is no subject matter limit to Congress's power to enact statutes pursuant to treaties, the other enumerated powers are much less important in an age of increasing "transnational" law.

"Disparate Impact" Regulations. Fifth, we need to challenge wrongful "disparate impact" regulations that violate true equal protection. The federal government's power to prevent discrimination is limited to stopping intentional discrimination. It does not have the power to mandate equality of result in all aspects of life. Yet in the guise of preventing intentional discrimination, many federal agencies have prohibited certain acts that have a "disparate impact" on certain racial, ethnic, or other favored groups, whether that impact is intended or not.

The fundamental problem is that almost no act has exactly the same impact on all segments of society. A hiring practice that employs only the best hockey players in the NHL will tend to select the outstanding hockey players from certain northern states, which happen to have few black or Hispanic citizens. Federal agencies have not yet banned the hiring practices of the NHL, NBA, or other professional sports leagues, but their theory of power would allow it.

The Education and Justice Departments' school discipline guidance and the Equal Employment Opportunity Commission's criminal background check guidance are two examples that are generating commentary and potential litigation. The Education Department threatens liability for school districts under Title VI if Asian students are not disciplined as much as white or black students. The

EEOC threatens liability under Title VII if employers use criminal background checks to see if potential job applicants are violent felons, since some racial populations in America have a higher rate of criminal conviction.

These are just two examples of dangerous "disparate impact" regulations, but there is a challenge in the Supreme Court to the "disparate impact" regulations under the Fair Housing Act. If the Court takes the case and we get a good ruling in it, it will constrain regulatory agencies in many ways.

"Diversity" and Racial Preference. Sixth, there is the remarkable decision of the U.S. Court of Appeals for the Sixth Circuit, sitting en banc, which held last November that Michigan's Proposition 2, which prohibits discrimination on the basis of race, color, national origin, and gender, is unconstitutional. That 8–7 decision is loosely based on two older Supreme Court cases that need to be appropriately limited. The result is so ridiculous that I think the Supreme Court has to take the case and reverse it. A state law implementing the core meaning of the Equal Protection Clause can't violate the Equal Protection Clause.[2]

Public interest litigators and others can file amicus briefs explaining how the Court's mistaken decision in *Grutter v. Bollinger* (2003) led the Michigan citizens to enact Proposition 2 and why the Court needs to clarify that racial preferences are not required under the Constitution. Preferably, the Court would reverse *Grutter* and explain that racial preferences are never justified to advance the phony "diversity" rationale offered by their proponents.

Enumerated Individual Rights. Seventh, in addition to challenging federal agency action as unauthorized by Congress's enumerated powers, we can bring other cases to enforce our enumerated individual rights in the Bill of Rights. For example:

- In *Hosanna-Tabor v. EEOC* (2012), the Court unanimously held that the Religion Clause in the First Amendment prevents the government from using antidiscrimination laws to interfere with the hiring and firing of "ministers" serving religious organizations.

- In *Heller v. DC* (2008) and *McDonald v. Chicago* (2010), the Court upheld the Second Amendment rights of individuals who wanted to keep a gun in their home for self-protection against the federal and state agency claims that they could ban such gun ownership.

- In *Citizens United v. FEC* (2010), the Court upheld the First Amendment rights of a nonprofit corporation against the Federal Election Commission's restriction on its political speech.

And with respect to most enumerated individual rights, Anthony Kennedy is not a swing vote. He is a very strong defender of individual rights.

Appointment Clause and Separation of Powers. Eighth, while the courts are unlikely to reverse course on 80 years of excessive congressional delegations, the courts should still draw the line on clear Appointment Clause violations and other separation of powers problems. In *Free Enterprise Fund v. Public Company Accounting Oversight Board* (PCAOB) (2010), the Court struck down a double, for-cause removal provision that considerably insulated an executive official from removal by the President, even for cause. Unfortunately, Congress loves these types of tricks to get around presidential control, including letting the agency set its own budget, collect its own fees or taxes, or allow some other agency, like the Federal Reserve, to approve its exorbitant finances. They've been creeping into TARP, in the Sarbanes–Oxley/PCAOB creation, in the Dodd–Frank law that created the Consumer Financial Protection Board (CFPB), and the Independent Payment Advisory Board (IPAB) in Obamacare. These all need to be eliminated.

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There are current challenges to the CFPB (even apart from the unconstitutional recess appointment of its director) and the IPAB. The structure of the

2. The Supreme Court did agree to hear the case this coming fall.

CFPB, for example, is currently being challenged in federal court as violating constitutional separation of powers principles because the agency's budget derives from the Federal Reserve rather than congressional appropriation, insulating the CFPB director from removal by the President, and because the enabling statute limits judicial review of its legal determinations.

The IPAB, an integral part of the Obamacare apparatus, also suffers from constitutional infirmity. Not only did Congress delegate incredibly broad powers to the IPAB, but the enabling provisions actually attempt to limit Congress's ability to repeal the IPAB, requiring any repeal bill to be introduced within one month from January 1 to February 1, 2017, and enacted no later than August 15, 2017, by a three-fifths supermajority of Congress. Needless to say, such a provision is flatly unconstitutional: Tinkering with the repeal process requires a constitutional amendment, not just a simple congressional statute.

***Chevron* Doctrine.** The ninth area of litigation is a moderation of the *Chevron* doctrine, which provides that the courts will defer to any reasonable agency interpretation of a statute it is directed to enforce, with certain exceptions. I think the Court should abandon the *Chevron* doctrine entirely. It was a court-created doctrine that arguably saves the courts from the temptation to substitute their own policy preferences for those of the President, but it creates larger problems when we understand the public-choice forces that cause agencies to maximize their own bureaucratic power at the expense of individual liberty. Justice Scalia was one of the doctrine's champions. Scalia may now be seeing the error of his ways. That's a great sign.

In *City of Arlington v. FCC*, the Court is currently considering whether the *Chevron* doctrine should apply so that the courts defer to an agency's determination of what is within its jurisdiction. It's one thing to say that the courts will defer to an agency's policy expertise when we know Congress intended it to address a particular problem, but the same rationale for deference doesn't apply when there is doubt about whether the particular entity or problem was one the agency was granted jurisdiction over in the first place.

Thus, at least when an agency is defining its own jurisdiction, maybe there ought not to be super-duper deference. It should also go without saying that agencies shouldn't get deference to interpret statutes that were designed to restrict their power.

Administrative Law Challenges. Tenth, there are basic administrative law challenges that seek to overturn a regulation or agency action because of a violation of administrative procedure, in particular the federal Administrative Procedure Act. Those include the non-compliance with a regulatory requirement, such as a failure to undertake cost-benefit analysis, or because the action was arbitrary and capricious or not supported by substantial evidence in the record. Some of those challenges, in turn, will depend on what kind of record was created in the rulemaking, which public interest litigators and policy advocates can help improve.

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