

# Our Unconstitutional Congress

by Stephen Moore

*Mr. Moore is Director of Fiscal Policy Studies, Cato Institute. His remarks were delivered at the March 1997 seminar, “Between Power and Liberty,” on the Hillsdale College campus at Hillsdale, Michigan.*

*His speech reveals the essential nature of “constitutionalists”. Simply put, constitutionalists are people who believe in an independent and self-reliant lifestyle, and the necessary correlations: limited government and respect for the Federal Constitution, which exists primarily to a limit government size and power. Constitutionalists are not anti-social and recognize the need for essential government activities like providing police, roads, postal service and military defense, but prefer personal freedom to any collectivist system. Most of all, constitutionalists believe even government must obey the rule of law. Government, of course, rejects this insistence on obeying the Constitution as naive or even seditious — hence, today’s conflict between those who advocate the “benefits” of big and bigger government and the constitutionalists who advocate personal responsibility and freedom.*

In 1800, when the nation’s capital was moved from Philadelphia to Washington, D.C., all of the paperwork and records of the United States government were packed into twelve boxes and then transported the one hundred and fifty miles to Washington in a horse

and buggy. That was truly an era of lean and efficient government

In the early years of the Republic, government bore no resemblance to the colossal empire it has evolved into today. In 1800, the federal government employed three thousand people and had a budget of less than \$1 million (\$100 million in today’s dollars). That’s a far cry from today’s federal budget of \$1.6 trillion and total government workforce of eighteen million.

Since its frugal beginnings, the U.S. federal government has come to subsidize everything from Belgian endive research to maple syrup production to the advertising of commercial brand names in Europe and Japan. In a recent moment of high drama before the Supreme Court, during oral arguments involving the application of the Constitution’s interstate commerce clause, a bewildered Justice Antonin Scalia pressed the solicitor general to name a single activity or program that our modern-day Congress might undertake that would fall outside the bounds of the Constitution. The stunned Clinton appointee could not think of one.

During the debate in Congress over the controversial 1994 Crime Bill, not a single Republican or Democrat challenged the \$10 billion in social spending on the grounds that it was meant to pay for programs that were not the proper responsibility of the federal government. No one asked, for example, where is the authority under the Constitution for Congress to spend

money on midnight basketball, modern dance classes, self-esteem training, and the construction of swimming pools? Certainly, there was plenty of concern about “wasteful spending,” but none about unconstitutional spending.

Most federal spending today falls in this latter category because it lies outside Congress’s spending powers under the Constitution and it represents a radical departure from the past. For the first one hundred years of our nation’s history, proponents of limited government in Congress and the White House routinely argued — with great success — a philosophical and legal case against the creation and expansion of federal social welfare programs.

## ***A rulebook for government***

The U.S. Constitution is fundamentally a rulebook for government. Its guiding principle is the idea that the state is a source of corruptive power and ultimate tyranny. Washington’s responsibilities were confined to a few enumerated powers, involving mainly national security and public safety. In the realm of domestic affairs, the Founders sought to guarantee that federal interference in the daily lives of citizens would be strictly limited. They also wanted to make sure that the minimal government role in the domestic economy would be financed and delivered at the state and local levels.

The enumerated powers of the federal government to spend money are defined in the Constitution under Article

I, Section 8. These powers include the right to “establish Post Offices and post roads; raise and support Armies; provide and maintain a Navy; declare War...” and to conduct a few other activities related mostly to national defense. No matter how long one searches, it is impossible to find in the Constitution any language that authorizes at least 90 percent of the civilian programs that Congress crams into the federal budget today.

The federal government has no authority to pay money to farmers, run the health care industry, impose wage and price controls, give welfare to the poor and unemployed, provide job training, subsidize electricity and telephone service, lend money to businesses and foreign governments, or build parking garages, tennis courts, and swimming pools. The Founders did not create a Department of Commerce, a Department of Education, or a Department of Housing and Urban Development. This was no oversight: They did not believe that government was authorized to establish such agencies.

Recognizing the propensity of governments to expand, and, as Thomas Jefferson put it, for “liberty to yield,”

the Founders added the Bill of Rights to the Constitution as an extra layer of protection. The government was never supposed to grow so large that it could trample on the liberties of American citizens. The Tenth Amendment to the Constitution states clearly and unambiguously:

“The powers not delegated to the United States by the Constitution... are reserved to the States respectively, or to the people.” In other words, if the Constitution doesn’t specifically permit the federal government to do something, then it doesn’t have the right to do it.

The original budget of the U.S. government abided by this rule. The very first appropriations bill passed by Congress consisted of one hundred and eleven words — not pages, mind you, *words*. The main expenditures were for the military, including \$137,000 for “defraying the expenses” of the Department of War; \$190,000 for retiring the debt from the Revolutionary War, and \$95,000 for “paying the pensions to invalids.” As for domestic activities, \$216,000 was appropriated. This is roughly what federal agencies spend today in fifteen seconds.

As constitutional scholar Roger Pilon documented, even expenditures for the most charitable of purposes were routinely spurned as illegitimate. In 1794, James Madison wrote disapprovingly of a \$15,000 appropriation for French refugees: “I cannot undertake to lay my finger on that article of the Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents.” This view that Congress should follow the original intent of the Constitution was restated even more forcefully on the floor of the House of Representatives two years later by William Giles of Virginia. Giles condemned a relief measure for fire victims and insisted that it was not the purpose nor right of Congress to “attend to what generosity and humanity require, but to what the Constitution and their duty require.”

In 1827, the famous Davy Crockett was elected to the House of Representatives. During his first term of office, a \$10,000 relief bill was proposed for the widow of a naval officer. Colonel Crockett rose in stern opposition and gave the following eloquent and successful rebuttal:

“We must not permit our respect for the dead or our sympathy for the living to lead us into an act of injustice to the balance of the living. I will not attempt to prove that Congress has no power to appropriate this money as an act of charity. Every member upon this floor knows it. We have the right as individuals to give away as much of our own money as we please in charity; but as members of Congress we have no right to appropriate a dollar of the public money.”

In a famous incident in 1854, President Franklin Pierce courageously vetoed an extremely popular bill intended to help the mentally ill, saying: “I cannot find any authority in the Constitution for public charity.” To approve such spending, he argued, “would be contrary to the letter and the spirit of the Constitution and subversive to the whole theory upon which the Union of these States is founded.” Grover Cleveland, the king of the veto, rejected hundreds of congressional spending bills during his two terms as president in the

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late 1805, because, as he often wrote: "I can find no warrant for such an appropriation in the Constitution."

Were Jefferson, Madison, Crockett, Pierce, and Cleveland merely hardhearted and uncaring penny pinchers, as their critics have often charged? Were they unsympathetic toward fire victims, the mentally ill, widows, or impoverished refugees? Of course not. They were honor bound to uphold the Constitution. They perceived — we now know correctly — that once the government genie was out of the bottle, it would be impossible to get it back in.

With a few notable exceptions during the nineteenth century, Congress, the president, and the courts remained faithful to the letter and spirit of the Constitution with regard to government spending. As economic historian Robert Higgs noted in *Crisis and Leviathan*, until the twentieth century, "government did little of much consequence or expense" other than running the military. The total expenditures for the federal budget confirm this assessment. Even as late as 1925, the federal government was still spending just 4 percent of national output.

### **Abandoning constitutional protections**

Several major turning points in American history mark the reversal of this ethic. The first was the passage in 1913 of the Sixteenth Amendment, which permitted a federal income tax. This was the first major tax that was not levied on a proportional or uniform basis. Hence, it allowed Congress a political free ride: It could provide government benefits to many by imposing a disproportionately heavy tax burden on the wealthy. Prior to enactment of the income tax, Congress's power to spend was held in check by its limited power to tax. Most federal revenues came from tariffs and land sales. Neither source yielded huge sums. The income tax, however soon became a cash cow for a Congress needing only the feeblest of excuses to spend money.

The second major event that weakened constitutional protections against big government was the ascendancy of Franklin Roosevelt and his

New Deal agenda to the White House during the Great Depression. One after another, constitutional safeguards against excessive government were ignored or misinterpreted. Most notable and tragic was the perversion of the "general welfare" clause. Article 1, Section 8 of the Constitution says: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts, provide for the common defense, and promote the *general welfare* of the United States." Since the 1930s, the courts have interpreted this phrase to mean that Congress may spend money for any purpose, whether there is an enumerated power of government or not, as long as legislators deem it to be in the "general welfare" of certain identifiable groups of citizens like minorities, the needy, or the disabled. This *carte blanche* is exactly the opposite of what the Founders intended. The general welfare clause was supposed to limit government's taxing and spending powers to purposes that are in the national interest.

Jefferson had every reason to be concerned that the general welfare

clause might be perverted. To clarify its meaning, he wrote in 1798: "Congress has not unlimited powers to provide for the general welfare but only those specifically enumerated." In fact, when some early lawmakers suggested that the general welfare clause gave Congress a generalized spending authority, they were always forcefully rebuked. In 1828, for example, South Carolina Senator William Drayton reminded his peers, "If Congress can determine what constitutes the general welfare and can appropriate money for its advancement, where is the limitation to carrying into execution whatever can be effected by money?"

Exactly.

Nonetheless, by the late nineteenth century, Congress had adopted the occasional practice of enacting spending bills for public charity in the name of "promoting the general welfare." These laws often made a mockery of this clause. In 1884, Senator John Morgan of Alabama stormed to the Senate floor to describe the impact of a relief bill approved by Congress to provide \$400,000 of funds for victims of a

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flood on the Tombigbee River. Morgan lamented:

"The overflow had passed away before the bill passed Congress, and new crops were already growing upon the lands. The funds were distributed in the next October and November elections upon the highest points of the sand mountains throughout a large region where the people wanted what was called "overflow bacon." I cannot get the picture out of my mind. There was the General Welfare of the people invoked and with success, to justify this political fraud; the money was voted and the bacon was bought, and the politicians went around with their greasy hands distributing it to men who cast greasy ballots. And in that way the General Welfare was promoted!"

But the real avalanche of such special interest spending did not start until some fifty years after in the midst of the Depression. In their urgency to spend public relief funds to combat hard times, politicians showed their contempt for constitutional restraints designed to prevent raids on the public purse. "I have

no patience whatever with any individual who tries to hide behind the Constitution, when it comes to providing foodstuffs for our citizens," argued New York Representative Hamilton Fish in support of a 1931 hunger relief bill. James O'Conner, a Congressman from Louisiana, opined, "I am going to give the Constitution the flexibility . . . as will enable me to vote for any measure I deem of value to the flesh and bloods of my day."

Porkbarrel spending began in earnest. In the same year, for instance, Congress introduced an act to provide flood relief to farmers in six affected states. By the time the bill made its way through Congress, farmers in fifteen states became its beneficiaries. One Oklahoma congressman succinctly summarized the new beggar-thy-neighbor spending ethic that had overtaken Capitol Hill: "I do not believe in this pie business, but if we are making a great big pie here . . . then I want to cut it into enough pieces so that Oklahoma will have its piece."

In 1932, Charles Warren, a former assistant attorney general, wrote a popu-

lar book titled *Congress as Santa Claus*. He argued, "If a law to donate aid to any farmer or cattleman who has had poor crops or lost his cattle comes within the meaning of the phrase 'to provide for the General Welfare of the United States, why should not similar gifts be made to grocers, shopkeepers, miners, and other businessmen who have made losses through financial depression, or to wage earners out of employment? Why is not their prosperity equally within the purview of the General Welfare?'"

Of course, we now know Congress's answer: All of these things are in the "general welfare." This is why we now have unemployment compensation, the Small Business Administration, the Department of Commerce, food stamps, and so on. Of course, all this special interest spending could have been-no, should have been- summarily struck down as unconstitutional. However, the courts have served as a willing coconspirator in congressional spending schemes.

In a landmark 1936 decision, the Supreme Court inflicted a mortal blow to the Constitution by ruling that the Agricultural Adjustment Act was constitutional. The Court's interpretation of the spending authority of Congress was frightful and fateful. Its ruling read: "The power of Congress to authorize appropriations of public money for public purposes is not limited by the grants of legislative power found in the Constitution."

James M. Beck, a great American legal scholar and former solicitor general, likened this astounding assault on the Constitution to the *Titanic's* tragic collision with the iceberg. "After the collision," wrote Beck, "which was hardly felt by the steamer at the time, the great liner seemed to be intact and unhurt, and continued to move. But a death wound had been inflicted under the surface of the water, which poured into the holds of the steamer so swiftly that in a few hours the great ship was sunk."

The New Deal Court essentially told Congress: It doesn't matter what the Constitution says or what limits on government it establishes, you are empowered to spend money on whatever you

please. And so Congress does, even though its profligacy has placed the nation in great economic peril.

Other than the Great Depression, by far the most important events that have fostered the growth of government in this century have been the two World Wars. Periods of national crisis tend to be times in which normal constitutional restraints are suspended and the nation willingly bands together under government for a national purpose of fighting a common enemy. Yet the recurring lesson of history is that once government has seized new powers, it seldom gives them back after the crisis ends. Surely enough, this phenomenon is one of Parkinson's famous laws of the public sector:

"Taxes (and spending) become heavier in times of war and should diminish, by rights, when the war is over. This is not, however, what happens. Taxes regain their pre-war level. That is because the level of expenditure rises to meet the wartime level of taxation."

In the five years prior to World War I, total federal outlays averaged 2 percent of GDP. In the five years after the war, they averaged 5 percent of GDP. In the years prior to that war the top income tax rate was 7 percent. During the war the tax rate shot up to 70 percent, which was reduced afterward, but only to 24 percent—or more than three times higher than it had originally been.

Government regulations of the private economy also proliferate during times of war and often remain in force afterward. Robert Higgs notes that during World War I, the federal government nationalized the railroads and the telephone lines, requisitioned all ships over 2,500 tons, and regulated food and commodity prices. The lever Act of 1917 empowered government to regulate price and production of food, fuel, beverages and distilled spirits. It is entirely plausible that, without the war, America would never have suffered the failed experiment of Prohibition.

World War II was also the genesis of many modern-day government intrusions—which were and still are of dubious constitutionality. These include wage and price controls, conscription (which lasted until the 1970s), rent con-

trol in large cities, and, worst of all, federal income tax withholding. In the post-World War II era, Congress has often relied on a war theme to extend its authority into domestic life. Lyndon Johnson launched the modern welfare state in the 1960s when he declared a "'war on poverty.'" In the early 1970s, Richard Nixon imposed across-the-board wage and price controls — the ultimate in government command and control—as a means of winning the "'inflation war.'" In the late 1970s, Jimmy Carter sought to enact a national energy policy with gas rationing and other draconian measures by pleading that the oil crisis had become the "'moral equivalent of war.'"

While government has been the principal beneficiary of national emergency, the principal casualty has been liberty. As Madison warned, "'Crisis is the rallying cry of the tyrant.'" This should give us pause as Congress now sets out to solve the health care crisis, the education crisis, and the crime crisis. To Congress, a crisis is an excuse to expand its domain.

### Turning back the clock

Shortly before his death, Benjamin Franklin was asked how well the Constitution would survive the test of time. He responded optimistically that, "Everything appears to promise it will last." Then he added his famous warning, "But in this world nothing is certain but death and taxes." Ironically, the mortal wounds of the Constitution have been inflicted by precisely those who insist that they want to make it "a living document." Yet to argue that we return to the spirit and the true meaning of this living document is to invite scorn, malice, or outright disbelief from modern-day intellectuals.

Those few brave souls (mainly outside the Beltway) who urge that government should be guided by the original intent of the Constitution are always accused of trying to "'turn back the clock.'" But turning back the clock in order to right a grievous wrong is precisely what we ought to do. There is nothing reactionary or backward-looking about dedicating ourselves to the ideas and principles that guided our

Founders and formed the bedrock of our free society.

By all means, let's turn back the clock. Who knows? In the process we might even encourage a few Jeffersons and Madisons to run for Congress.

*Mr. Moore has identified the problem we have – unconstitutional government – but hasn't explained how it happened. In a sense, he's just as bewildered by our federal government as the rest of us. We know they're doin' it to us, but we don't know how. Subsequent articles in this issue will seek to illuminate government's unconstitutional behavior and offer alternative explanations for how seemingly unlawful behavior became "legal".*

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