
Restoring the Constitutional Restraints on Federal Power

by Howard Stephenson

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Apathy among voters has increased steadily for several years. Until recently, there wasn't a lot of concern from the electorate about the growth of government at all levels because we seemed to have the resources to pay the bills.

But economic times have changed and so has the apathy. There is a definite groundswell of dissatisfaction about overspending and overreaching on the part of the federal government. People intuitively know that somebody is ultimately going to have to pay for the current excesses.

Some of the most encouraging aspects of the current nationwide grassroots movements are that more people are focusing on principles, not rhetoric, action, not anger.

Today's activists cite the 9TH and 10TH Amendments to the Constitution in their arguments against what is happening in Washington. Their concerns about federal encroachment on personal liberties echo throughout American history, beginning with the debates over adopting the Constitution at all. Many opponents of the proposed Constitution, or Anti-Federalists as they came to be known, worried that the proposed Constitution did not have a bill of rights, and so would not protect fundamental rights like the free exercise of religion, freedom of the press, the right to keep and bear arms, etc.

In addition, they worried that the federal government, being necessarily distant from the people, would trample the rights of the people. They preferred to rely on the legislatures of the several states, who were much closer to the people, and therefore less likely to overstep their bounds.

The Constitution's supporters initially opposed adding a bill of rights, worrying most famously in *Federalist 84* that any rights inadvertently omitted from the list would be presumed unprotected. In many states, it was evident that the Constitution would not pass without a bill of rights. Recognizing this political conundrum, the Federalists generally, and James Madison in particular, became champions of a bill of rights.

On June 8, 1789, Virginia Representative James Madison spoke on the floor of House, and outlined what eventually became the Bill of Rights. As one of the three authors of *The Federalist Papers*, Madison still harbored the concerns that his proposed bill of rights would omit fundamental principles. To prevent that interpretation, his June 8 speech included two "catch-all" clauses, clauses that eventually became the 9TH and 10TH Amendments.

"The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution, but either as actual limitations of such powers, or as inserted merely for greater caution. The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively."

Clearly neither Congress nor the President has adhered to the 9TH and 10TH Amendments' limits on the powers of the federal government. Citizens are reconsidering the breadth of Congress'

authority, in particular how the 9TH and 10TH Amendments to the Constitution interact with the Commerce Clause.

Under the Commerce Clause (Article I, Section 8, Clause 3), Congress is empowered to “regulate Commerce ... among the several States.” Until the New Deal, the Supreme Court succeeded in limiting federal authority to interstate commerce only. For example, the Justices repeatedly rejected FDR’s attempts to regulate activities that did not touch commerce between two or more states.

Frustrated by what he saw as old men out of touch with reality, President Roosevelt proposed a scheme to pack the Supreme Court with Justices who would support his expansive view of federal authority. As the Supreme Court and President Roosevelt squared off, the Justices blinked, and began allowing President Roosevelt’s programs to stand.

The Court’s 1942 decision in *Wickard v. Filburn* articulated just how far the federal government has strayed from the limits the Founding generation – Federalist and Anti-Federalist alike – intended. In *Wickard*, the Court ruled that Congress’ authority under the Commerce Clause allowed them to regulate wheat production, even if the wheat was consumed on the same farm it was grown.

If Mr. Filburn had not grown his own wheat, the Court reasoned, he would have had to purchase wheat on the market, and the wheat he purchased might have travelled across state lines. Thus, as the Court saw it, Mr. Filburn’s homegrown and home-consumed wheat was properly subject to Congress’ regulatory authority under the Commerce Clause. With so expansive an interpretation of the Commerce Clause, it is hard to imagine any element of American life Congress’ Commerce Clause authority cannot include.

Important as the *Wickard* decision was, it is merely the clearest expression of a trend that had begun decades before. The passage of the 17TH Amendment in 1913 changed the election of United States Senators by the State Legislatures to election by the people. With this new set of constituents, Senators no longer felt compelled to represent their state government.

As the text of the 10TH Amendment and the original election method of Senators suggest, the Founders anticipated that the Senate would guard the rights of the states, while the House of Representatives would protect the rights of the people. With the passage of the 17TH Amendment, however, the link between Senators and the states was fundamentally altered. Instead of reporting to elected representatives who “refine and enlarge the public views,” Senators could “by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people“ (*Federalist 10*).

Without this overt state check on federal overreaching, Congress’ ability to ignore the 9TH and 10TH Amendments expanded dramatically. In combination with the *Wickard* decision, they have now conspired to buy 50% of General Motors, 90% of AIG, and mandated that every American purchase health insurance.

This election year is sure to change the complexion of Congress as voters exercise their prerogative to support candidates who support the 9TH and 10TH Amendments. The need for the people to stand up has never been greater, and I encourage all Utahns to educate themselves on the limits the Constitution sets on federal power, and how the people and the states can most effectively check federal overreaching.

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