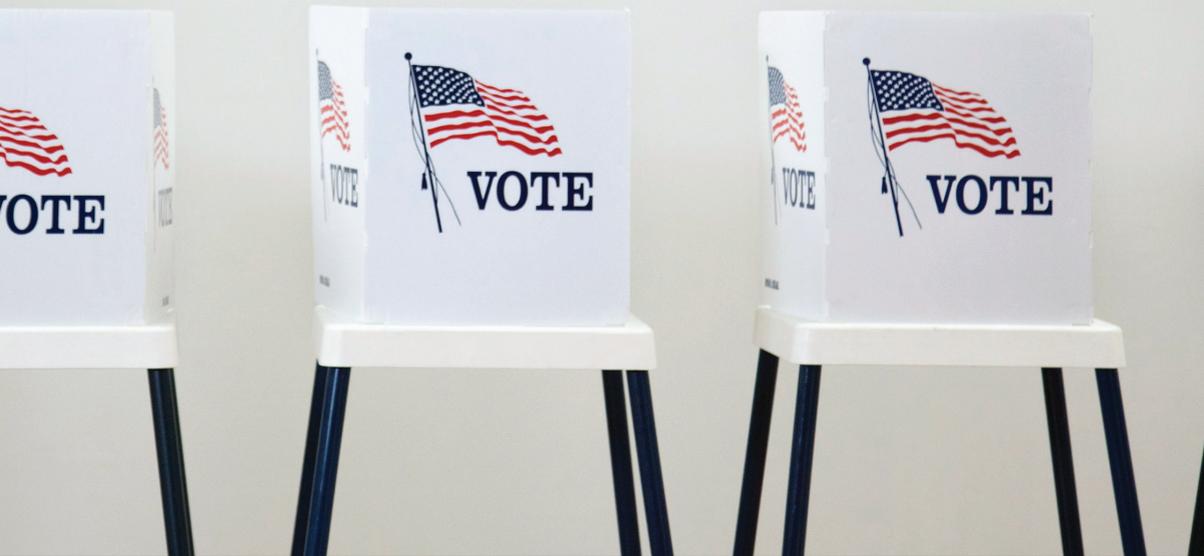




Changing America's Course

What's at stake in 2012





Restoring Constitutional Government

MOST AMERICANS RECOGNIZE THAT OUR fiscal affairs are in grave disarray. Many are also aware that the world has grown more dangerous. Yet the most difficult task ahead—perhaps the greatest challenge we have ever faced—is to restore constitutional government in the United States.

The Constitution is central to American life. It is not simply an organizational structure. Rather, it is the arrangement that formally constitutes “We, the People” as the authority for our national government. It orders our politics, defines our nation, and protects our freedom.

The purpose of the United States Constitution is to secure the rights and liberties promised in the Declaration of Independence through an energetic national government of limited powers, focused on core functions and with the structural arrangements that preserve the consent of the governed and make the American experiment in republican government work.

Today, the federal government has acquired an all but unquestioned dominance over virtually every area of American life, acting without constitutional limits and restricted only by expediency, political will, and (less and less) budget constraints. The unlimited scope and depth of its rules means that the *federal* government increasingly regulates more and more of our most basic activities, like how much water is in our toilets and what kind of light bulbs we can buy. This is a government that is unlimited by any organizing principle, increasingly undemocratic and damaging to popular self-government.

The welfare state is deeply entrenched, and unraveling today's regulatory government will be extremely difficult. Nevertheless, the objective must be clear: to restore limits on a government that is out of control and increasingly oblivious of constitutional restraint.

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Rogue Justice

The rise of unlimited government is most familiar and most prominent in the form of judicial activism.

The Founders thought the judiciary would be the “least dangerous branch,” but progressive judges have usurped the functions of the other two branches and transformed the courts into policymaking bodies that wield wide-ranging power. As a result, the final answer to virtually every major public policy question in America today is provided by unelected judges.

Judicial activism occurs when judges abandon their duty to interpret the Constitution and laws as written. Rather than deferring to the lawmaking role of the elected branches of government, activist judges seek to impose their own policy preferences, undermining the democratic process that is vital to our system of government.

Several egregious examples of judicial activism have occurred over the past decade:

- In *Kelo v. City of New London*, for example, the Supreme Court interpreted the Constitution to allow government to seize citizens' homes—not to build a road or fulfill some other public use but to transfer property to a private corporation in order to generate more tax revenue.
- In the “Mt. Soledad Cross” case, the United States Court of Appeals for the Ninth Circuit found that the federal government could not acquire and maintain a war memorial that included a cross honoring veterans because the court believed that such a display violated the Constitution’s prohibition on Congress respecting an establishment of religion.
- In *Boumediene v. Bush*, for the first time in U.S. history, the Supreme Court bestowed a constitutional right to *habeas corpus* on alien enemies detained abroad by our military forces in the course of an ongoing war. Justice Antonin Scalia highlighted the real-world impact of the decision, noting in his dissent that the game of bait-and-switch engaged in by the Court’s wartime decisions “will almost certainly cause more Americans to be killed.”
- Despite our nation’s great progress toward equality under the law, in *Grutter v. Bollinger*, the Supreme Court held that public institutions of higher education may engage in racial discrimination by giving members of minority groups preference “to achieve a diverse student body.”
- In upholding the individual health care mandate of Obamacare, the Sixth Circuit Court of Appeals recently found that Congress, pursuant to its constitutional authority to regulate interstate commerce, could force Americans who are not engaged in commercial activity to purchase a product continuously from a private company—an interpretation that would result in an unprecedented expansion of government authority and fundamentally rewrite the Constitution’s limitations.

We need learned judges who take the Constitution seriously and follow it faithfully. A constitutionalist judge interprets the laws as they are written, regardless of whether he or she personally approves of the laws or would prefer a different outcome in a particular case. Candidates and officeholders should promote robust debate regarding the importance of approving constitutionalist judges. Judicial appointments and confirmations are important opportunities for Presidents, nominees, and the Senate to advance and explain the proper role of judges and the legitimate parameters of constitutional interpretation. Most important, the President should appoint, and the Senate should use its advice and consent role to confirm, only constitutionalist judges.

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An Imperial President

As a part of his reelection campaign, President Obama has launched an effort called “We Can’t Wait” to highlight his actions independent of Congress. Setting aside the usual politics of a President running for reelection against Congress, this effort is built on a much more troubling idea: that the President, charged with the execution of the laws, doesn’t have to wait for the lawmaking branch to make, amend, or abolish the laws but can and should act on his own. This violates the spirit—and potentially the letter—of the Constitution’s separation of the legislative and executive powers of Congress and the President.

Indeed, behind this effort is a persistent pattern of disregard for the powers of the legislative branch in favor of administrative decision-making without—and often in spite of—congressional action. This Administration has issued a series of new federal rules without legislative authority:

- Even though the Democrat-controlled Senate rejected President Obama’s cap-and-trade plan, his Environmental Protection Agency classified carbon dioxide, the compound that sustains vegetative life, as a pollutant so that it could regulate it under the Clean Air Act.

- Although Congress defeated the Development, Relief, and Education for Alien Minors Act (known as the DREAM Act), Immigration and Customs Enforcement has adopted enforcement parameters designed to bring about the same ends as the DREAM Act.
- After the Employee Free Choice Act—designed to bolster labor unions’ dwindling membership rolls—was defeated by Congress, the National Labor Relations Board announced a rule that would implement “snap elections” for union representation, limiting employers’ abilities to make their case to workers and virtually guaranteeing a higher rate of unionization at the expense of workplace democracy.
- After an Internet regulation proposal failed to make it through Congress, the Federal Communications Commission announced that it would regulate the Web anyway, even despite a federal court’s ruling that it had no authority to do so.
- Although Congress consistently has barred the Department of Education from getting involved in curriculum matters, the Administration has offered waivers for the No Child Left Behind law in exchange for states adopting national education standards, all without congressional authorization.

Likewise, the Administration has often simply refused to enforce laws duly enacted by Congress:

- Since it objects to existing federal immigration laws, the Administration has decided to apply those laws selectively and actively prevent the states from enforcing those laws themselves.
- Rather than push Congress to repeal federal laws against marijuana use, the Department of Justice (DOJ) simply decided it would no longer enforce those laws.
- In a similar move with respect to the Defense of Marriage Act, DOJ announced that it would stop enforcing the law or defending it from legal challenge rather than seeking legislative recourse.

A more recent example crosses the threshold of constitutionality. The President has the power to make appointments with the advice and consent of the United States Senate. On January 12, 2012, President Obama announced that the Senate was not in session and exercised the power to make “recess appointments” of three members to the National Labor Relations Board and the head of the new Consumer Financial Protection Bureau. The problem was that these “recess appointments” were made when the Senate was not in recess at all but meeting in regular, brief sessions—the very circumstances used previously by Senate Democrats (including then-Senator Barack Obama) to block President Bush’s judicial appointments. These actions not only violate the spirit of the Constitution and its structure of the separation of powers, but also circumvent the letter of the law by trampling on the Senate’s responsibility of advice and consent.

There is no telling where such disregard may go next, but the trend is clear, and it leads further and further away from the constitutional rule of law.

The President has unique and powerful responsibilities in our constitutional system as chief executive officer, head of state, and commander in chief. Those powers do not include the authority to make laws or to decide which laws to enforce and which to ignore. The President—like judges or Members of Congress—takes an oath to uphold the Constitution in carrying out the responsibilities of his office. Indeed, the President takes a unique oath to “faithfully execute the Office of President of the United States” and “preserve, protect and defend the Constitution of the United States.” We need a President who will defend and vigorously exert his or her legitimate powers, recognizing that those powers are not arbitrary or unlimited.

Bureaucratic Tyranny

But there is a deeper current at issue. For too long, Congress has legislated without regard to any limits on its powers. Although the Constitution vests legislative powers in Congress, the majority of “laws” are actually promulgated by agencies and bureaucracies in the guise of “regulations.” As a result, key policy decisions which were previously the constitutional responsibility of elected legislators are delegated to executive branch administrators whose rules have the full force and effect of laws passed by Congress. Having passed

massive, broadly written pieces of legislation with little serious deliberation, Congress is increasingly an administrative body overseeing a vast array of bureaucratic policymakers and rule-making bodies.

This new bureaucratic rule and its arbitrary discretion can be seen in the early implementation of the Patient Protection and Affordable Care Act (Obamacare). In a demonstration of its benevolent authority, even before the law fully takes effect, the Administration has granted almost 2,000 waivers (mostly for union and business friends) to its own health care regulations. Although one whole program—the Community Living Assistance Services and Supports Act, or CLASS Act, Obamacare’s long-term care insurance plan—has been unilaterally cancelled as completely unworkable, it has been kept on the books for possible future implementation.

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We now have the first real taste of what is to come. It turns out that regulations issued pursuant to Obamacare, despite earlier denials, dictate that all insurance plans must cover, at no charge, abortion-inducing drugs, contraceptives, sterilization, and patient education and counseling for women of reproductive age. Religious employers such as Catholic hospitals, Christian schools, and faith-based pregnancy care centers will have to provide and pay for such coverage for their employees regardless of their religious beliefs. Although religious institutions vehemently objected that the proposed rule would force them to provide services that as a matter of faith they find morally objectionable, Health and Human Services issued the final rule in its entirety and without the slightest change.

This is not a one-time exception to the rule of Obamacare but the essence of the law itself. One can only imagine what life would be like when the Independent Payment Advisory Board (IPAB) begins rationing health benefits to reduce

Medicare spending. It is not merely the details in Obamacare that are the problem, but the form of governance established therein, by which unelected experts are empowered to make the rules as they go along and as they see fit.

What is happening has little to do with health care or even public policy and everything to do with the role of government in the most immediate and intimate matters of our lives. In the liberal-progressive worldview, all is subject to government control, regulatory dictate, and administrative whim.

To reverse this course, we must:

- **Dismantle the administrative state.** The Constitution creates three branches of government, yet administrative agencies and vast bureaucracies operate in practice as a headless fourth branch. Rather than spending its time micromanaging the bureaucracy through oversight, Congress should reassert its authority as the nation's legislature by refusing to delegate its power to bureaucrats and taking responsibility for all the laws (and regulations) that govern us.
- **Decentralize government.** True self-government cannot be revived without a decided reversal of administrative centralization in the United States. This requires more than merely shifting bureaucratic authority to states that are themselves bureaucratic and increasingly dependent on federal largesse. Vast areas of federal policymaking must be returned to states, local communities, neighborhoods, families, and individual citizens. The best way forward starts with practical but significant reforms that will change the federal-state dynamic in key policy matters such as health care, education, and transportation.
- **Reverse the explosion of federal criminal law.** Federal criminal law used to focus on inherently wrongful conduct: treason, murder, counterfeiting, and the like. Today, an unimaginably broad range of conduct is criminalized by scores of federal departments and agencies. The Congressional Research Service estimates these offenses to be in the "tens of thousands." Congress

must halt this overcriminalization rampage and begin to eliminate vague, overbroad criminal offenses that punish individuals who without criminal intent violate one of these innumerable federal criminal offenses.

- **Require the regular review and evaluation of every major program.** Too many programs, once started, are automatically reauthorized and become part of the permanent bureaucracy. Congress should subject government programs to regular reevaluation of their authority, purpose, and effectiveness, creating an ongoing mechanism that works against the automatic expansion of government. Any program that Congress has not reauthorized should be suspended for review. Committees should not be permitted to create new programs with automatic funding or that specify minimum funding levels to circumvent the appropriations process. Likewise, to prevent the perpetuation of outdated regulations, all new regulations should include a “sunset” date on which they expire automatically unless specifically renewed.

Restoring Constitutional Government

The restoration of constitutional government will not occur all at once or across the board. Nor will it result from one judicial decision, presidential order, or comprehensive piece of legislation. This means we must think strategically, defining and pursuing a realistic path that measurably reintroduces constitutional limits by focusing government on its primary obligations, restoring its responsibility and democratic accountability, and correcting its worst excesses.

Constitutional government requires those who make, interpret, and enforce the law to be guided by the Constitution above ordinary legislation, beyond the political winds of the times. Upholding the Constitution is a responsibility of all three branches of government. After all, it is the Constitution—and not the legislature, the executive, or the courts—that is the supreme law of the land. Just as the Supreme Court must be faithful to the Constitution in interpreting the laws in cases before it, so Congress in making laws and the President in signing and then executing laws are required to do the same in

the exercise of their functions. For the elected branches of government to turn their authority over to the courts—or for Congress to give its legislative powers to bureaucrats—is an abdication of both constitutional responsibility and popular consent.

One of the most important tasks of public officials is to articulate how the principles and limits of their constitutional responsibilities inform and guide their actions and the public-policy choices they make. Congressmen should do this in committee deliberations and floor debates on proposed legislation, judges in their written opinions interpreting the real meaning of the Constitution in the cases before them, and Presidents in executive orders, in legislative signing statements, and especially in official addresses.

We must recommit ourselves as a nation to the principles and policies of American constitutionalism.

In the end, the question of constitutional government can be settled only by the American people. Therefore, the path of restoring constitutional government also requires a popular constitutionalism that fosters and builds a new public consensus favoring liberty and limited government, reforming and reshaping public policy over time to reflect a constitutional framework of limited government.

In order to get government under control—especially its skyrocketing spending and debt—and refocus it on its core functions, we must turn the healthy public sentiment of the moment, which stands against a partisan agenda to revive an activist state, into a settled and enduring political opinion about the nature and purpose of constitutional government. We must recommit ourselves as a nation to the principles and policies of American constitutionalism. 🏛️