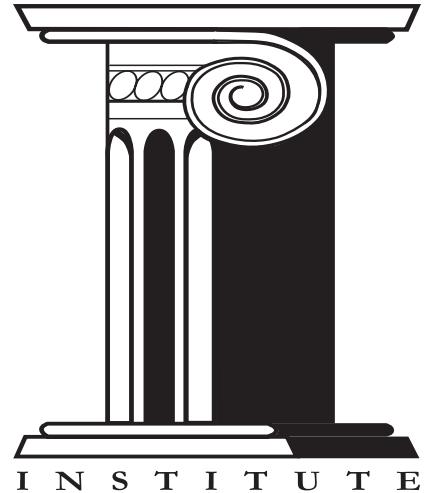


LIMITS



On Power and the Use of Coercion

Big Government Does Too Much, Badly

by Rep. Linda Upmeyer

Around the country there have been calls to raise the minimum wage, to impose strict regulations on our businesses, and to forcibly adopt a health-care system that nationalizes one-sixth of our economy.

The intended role of the federal government established by our Founding Fathers was to protect the rights of all Americans. Nowhere in our Constitution is there a clause that mandates government to act as an employer, a health care provider, or a charity — nor should it. However, over the years the role of government has shifted from protecting rights to selectively distributing them. This, in turn, has spawned a host of

redistributionist policies that have been thrust upon the public as commandments. Many people are beginning to wonder why they are being forced to pay for their neighbors.

This big-government-fixes-all mentality — the view that government can and should be responsible for solving the ills of society — is the cause of the many failures behind national policy initiatives, no matter how well-intentioned they may seem.

Our nation's education system is a perfect example of the nanny-state mentality that encapsulates today's policy decisions. Americans were told students would graduate from school “career-ready,” yet the result has been students who can barely compete with their international counterparts. Just last month, Secretary of Education Arne Duncan commented on the newly

released results of the Program of International Student Assessment, saying “...[t]he big picture of U.S. performance on the 2012 PISA is straightforward and stark: It is a picture of educational stagnation.”

Our students are not the only victims of nanny-state national policy. The incredibly unpopular Affordable Care Act, President Obama's signature legislation, is hardly an affordable alternative to what the private market had to offer. The resulting legislation has forced employers to make painful decisions: either scale down their workforces or risk going out of business due to the overwhelming fees and taxes forced upon them.

Worse, Obamacare has forced millions of Americans to accept higher premiums and more expensive health care, with

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Big Government Does Too Much, Badly

by
Rep. Linda Upmeyer
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some facing premium increases of nearly 40 percent. Time will tell if the ACA makes health care more affordable, but in the foreseeable future, it is hard to argue that broad legislation serves Americans better than private health-care providers.

As the list of failing big government policies goes on, Americans continue to search for people and parties to blame. However, many are beginning to realize that a philosophy, not a party, is behind ineffective government. The record 42 percent of Americans who now identify as independents is a testament to this realization. The fight to limit big government is against a philosophy: a philosophy of nanny-state, all-encompassing government.

Surely it is not hard to see that big government is doomed to fail by its own devices. Government was not designed to operate as every sector of the economy, and its attempts to do so have been woefully inadequate. Until the nation soundly rejects the idea that government should legislate every part of life, America will continue to see government grow unchecked.

It's time to return to the idea that a good government is a limited one that trusts its own people to live their

lives peacefully and to decide for themselves what is best. Innovation, economic growth, and charity flourish when people are given the ability to keep what they earn and the freedom to choose how to live.

Rep. Linda Upmeyer is the Iowa House Majority Leader and National Chairwoman of the American Legislative Exchange Council.

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The Constitution's Vanishing Act

by Richard Epstein

The United States Constitution is at its core a classical liberal document. But over the last hundred years, much of it has turned into a progressive text thanks in large part to Supreme Court justices who interpret it creatively, thereby skirting the laborious amendment process of Article V. Here, I address one major, if underappreciated, cause of the problem — the fine art of making its critical words and letters just disappear through the Court's imaginative application of its power of judicial review. This constitutional disappearing act does not take sides in the longstanding debate over judicial restraint and activism. In some cases, it unduly expands judicial power; in other cases, it wrongly contracts it. The two best illustrations of how this process works are found in the Eighth Amendment and in Article 1, which sets out the federal government's taxing power.

Cruel and Unusual Punishments

The Eighth Amendment reads in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Its use of the passive voice creates an interpretive ambiguity. Does the amendment bind only the federal government or does it bind the states as well? Using the word

"excessive" twice in one 16-word sentence is not a model of clarity.

But for these purposes, the most critical word is "punishments." The letter "s" has disappeared during the arduous process of constitutional interpretation. Just Google the phrase "cruel and unusual punishment," and 1,740,000 entries come up. Add the "s" and that number drops by 80 percent to 330,000 entries, most of which refer to punishments without the "s."

The importance of the slip is evident from the 2012 Supreme Court decision *Miller v. Alabama*, which struck down a mandatory lifetime sentence for a fourteen-year-old guilty of murder. In writing her opinion, Justice Elena Kagan included the "s" in quoting the clause. But during the analysis, that "s" disappears, thereby transforming the constitutional text:

The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.' That right, we have explained, 'flows from the basic "precept of justice that punishment for crime should be graduated and proportioned"' to both the offender and the offense.

Justice Kagan faithfully references earlier cases that take her position. But the wealth of precedent does not conceal the major shift in constitutional focus. The prohibition against "cruel and unusual punishments" conjures up a list of punishments that should be rejected because they are cruel, no matter what the offense. The issue of proportionality never arises.

That interpretation makes sense because this clause is lifted word for word from the English Bill of Rights of 1689, after it accuses the deposed King James II of inflicting "illegal and cruel punishments." The clause outlaws the rack, the thumb-screw, drawing and quartering, and other fiendish activities. In no sense did it outlaw the death penalty. Nor could that reading be sensibly made of our own Constitution, whose Fifth Amendment contains references to the death penalty in connection with due process, grand jury presentments, and double jeopardy.

Yet once the "s" is dropped, it is far easier to read the clause as Justice Kagan did, demanding proportionality between the offense and the punishment. At this point, the Court can question the death penalty in many cases, including child rape. In 2008, the Court in *Kennedy v. Louisiana* found that the Eighth Amendment

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should be read in light of “the evolving standards of decency that mark the progress of a maturing society.” But this line of reasoning is simply pop sociology. Historically, there has been much principled and popular opposition to the repeal of the death penalty that should not be so easily cast aside.

Even the most austere account of limited government offers no coherent theory to explain whether the death penalty should be retained or junked, and if so, for what offenses. If there were ever a legislative function, this is it. The disappearance of that “s” was not just a random event. It paved the way for the justices to create a code of criminal sentencing, whose effects are so widespread and profound that it must be regarded as a constitutional amendment, and an unwise one at that.

The Taxing Power

My second example of a disappearing constitutional provision concerns the taxing power found in Article I:

Section 8. Clause 1. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the

Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

This clause is a big deal because it remedies one of the major defects of the Articles of Confederation, under which the federal government had to beg the individual states for the revenues needed to discharge its own collective function. But in overturning earlier practice, the Founders were nervous about lurching too far in the opposite direction, so they limited the general power of taxation to three specified objects: “payment of debts, provision of common Defence, and the general Welfare of the United States.”

So it is important to understand that the clause is not a catchall that sweeps in every objective under the sun. Federal taxes are meant to fund only a short list of public — i.e. nonexcludable — goods that only the central government can provide. The Congressional power to levy taxes is needed to prevent free-riding by individual states. The limited purposes help prevent politically corrosive cross-subsidies between states that could sink the Union.

The proper interpretation of the clause raises thorny questions about whether, for example, the United States could provide disaster relief that benefits some

but not all states. President Grover Cleveland thought that the answer was an emphatic “no” in 1887 when he vetoed the Texas Seed Bill, which allocated \$10,000 for Texas drought relief. Under the Constitution, he did “not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit.”

Indeed, the vital element in this clause is that it prohibits any transfer payment from one group of individuals to another, as those cannot serve the “general welfare of the United States.” To see why, take the analogous case where a corporate charter allows the Board of Directors to adopt only those measures that advance the general welfare of the corporation. Without question, the so-called business judgment rule insulates corporate officers and directors when they work in good faith to advance the welfare of the corporation, and thus all its shareholders, in transactions with third parties. But it is a per se violation of that rule for the directors to tax one subclass of shareholders in order to pay dividends to a second subclass. All transfer payments among shareholders clearly violate their duty to advance the welfare of shareholders as a group.

That same logic applies to the federal constitution, where the words “of the United States” block any abuse of the power of

taxation to secure a system of individual transfer payments. As with corporations, the long-term health of the polity depends on cutting down transfer payments that give rise to factional battles. Yet those critical words “of the United States” have disappeared in the case law, most recently in *National Federation of Independent Business v. Sebelius*, where Chief Justice Roberts relied on the taxing power to uphold the individual mandate under Obamacare, after rejecting the view that it fell within the scope of the Court’s indefensibly broad reading of the commerce power.

Chief Justice Roberts reached his conclusion by invoking Congress’s enumerated power to “lay and collect Taxes” — full stop — which makes it a lot easier to conclude that “the breadth of Congress’s power to tax is greater than its power to regulate commerce.” Although he first quotes the clause in full, it is no accident that his actual analysis stops with the words “general Welfare,” which is then entrusted to the determination of Congress.

The four conservative justices (Scalia, Kennedy, Thomas, and Alito) also disregarded the original understanding when they wrote in the dissent, “The power to make any expenditure that furthers ‘the general welfare’ is obviously very broad,” giving Congress “wide leeway to decide whether an expenditure

qualifies.” In so doing they bought into the low-scrutiny rational basis test, which bears no relation to the text, history, or structure of the Constitution. They are surely right that, since the New Deal, no taxation program has been found to fall outside Congress’s taxing power, which is what makes their dissent so unpersuasive.

The consequences of this constitutional disappearing act are enormous. The full range of federal transfer programs is not sustainable under any sensible interpretation of either the commerce or the taxing power.

Think of the disastrous Obamacare program. Focusing solely on the individual mandate meant that the weird collection of unsustainable special taxes and this vast expansion of the taxing power passed constitutional muster without a murmur of judicial protest. This is especially ironic as we grapple with the near bankruptcy of hundreds of federal transfer programs — including unemployment benefits, social security, Medicare, and Medicaid — which were only created because judicial interpretation vaporized key constitutional terms.

These two constitutional vignettes are, in one sense, polar opposites. The current law on cruel and unusual punishments injects the Supreme Court into matters that properly fall beyond its purview, while the taxing power cases remove the judicial

oversight needed to prevent government bankruptcy. Both errors stem from the willingness of the justices to drift ever farther from the constitutional text on matters of first principle. Sure, the Constitution raises lots of thorny issues. But those complexities should never let us overlook this simple proposition: Every word of the Constitution must be quoted and analyzed. The Constitution is short and to the point. Making words disappear is the surest way to distort its meaning.

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The Unstoppable Leviathan

by John Hendrickson

President Barack Obama in discussing his forthcoming budget proposal is calling for “an end to the era of austerity.”¹ Austerity in political terms refers to an era of painful budget cuts, but the reality is that after record levels of spending which created large deficits and a dangerous level in the national debt, President Obama’s fiscal policies are nowhere close to austerity. The Congressional Budget Office (CBO) recently issued their budget and economic outlook for 2014 and they projected a \$514 billion deficit for 2014, which while down from the annual trillion-dollar deficits which first occurred during the Obama administration, is still not good.² The fact remains that the federal government continues to face a serious spending problem as demonstrated by the \$17.5 trillion national debt, which continues to grow and endanger the security of the nation.

Federal spending continues to increase at a rapid pace. In 2000 the federal budget was close to \$1.8 trillion and the budget today (2013) is \$3.5 trillion.³ In 2015 it is possible that the federal government will set a new record with a \$4 trillion budget. As Wayne R. Crews, Jr., who serves a Vice President for Policy at the

Competitive Enterprise Institute (CPI), wrote:

Trillion-dollar deficits were once unimaginable; such sums signified the level of budgets themselves, not shortfalls. President Obama’s 2014 budget projects smaller deficits, with 2013’s claimed \$901 billion to fall to \$575 billion in 2018, but to rise thereafter. At no point is spending projected to balance in the coming decade. To be sure, many other countries’ government outlays make up a greater share of their national output, compared with 40 percent for the U.S. government. However, in absolute terms, the U.S. government is the largest government on the planet — whether one’s metrics is revenues, expenditures, deficits, or accumulated debt.⁴

Federal spending will continue to grow unless it is checked and restrained by Congress. The CBO predicts that “the federal government will add \$10 trillion to the national debt by 2024 — bringing the total to over \$27 trillion.”⁵ In addition the CBO is also projecting that trillion-dollar deficits will return

by 2022.⁶ The national debt is projected to increase by \$8.5 trillion under President Obama’s administration.⁷

President Obama will call for the federal government to spend \$3.9 trillion in 2015 along with calling for increasing tax rates on top-income earners in order to pay for his spending priorities.⁸ This is not sound economic policy for an economy that is still very weak in the aftermath of the Great Recession. Unemployment continues to be a problem with more people not seeking work, and for many wages have not increased. *Investor’s Business Daily* noted that “the ranks of those not in the labor force climbed nearly 11 million, driving the labor force participation rate down from 65.7 percent to today’s 63 percent — a level not seen since 1978.”⁹

In addition to the problem of unemployment the economy is also confronted with the problem of inflation:

The official inflation data confirm this.

Overall, food prices are up 9% since June 2009, according to the Bureau of Labor Statistics. And the cost of many staples is skyrocketing. Pork prices have climbed 14%; poultry is up 12%; eggs, 27%; milk, 20%.

Meanwhile, energy prices have climbed 18% during the recovery, and the price of gasoline is up a whopping 31.5%. Then there's college tuition, up 23%. At the same time, wages aren't budging. In fact, measured in real terms, the median household income is 4% below where it was four-1/2 years ago. And while the official unemployment rate is down, that's due to millions quitting the workforce altogether.¹⁰

The reason for the lackluster economy is the economic and fiscal policies that have emerged from Congress and President Obama's administration. Some of these policies include the massive stimulus spending bill, tax increases, the Dodd-Frank financial reform bill, the Patient Protection and Affordable Care Act (ACA), and the recent proposal to increase the minimum wage. All of these policies, including the fiscal crisis as symbolized by the out-of-control spending, are causing uncertainty in the economy. The massive number of regulations being imposed on the economy is especially troublesome. "Federal environmental, safety and health, and economic regulations cost hundreds of billions, perhaps trillions, of dollars annually..." notes Crews who is author of the annual CPI report *Ten Thousand Commandments: An*

Annual Snapshot of the Federal Regulatory State.¹¹ Crews notes that "for the first time in history, the estimated cost of regulation exceeds half the level of the federal budget itself. Regulatory costs of \$1.806 trillion amount to 11.6 percent of the U.S. gross domestic product (GDP), estimated at \$15.549 trillion in 2012."¹²

John B. Taylor, a Senior Fellow at the Hoover Institution and a Stanford University Economist, also argues that "poor economic policies of the past few years are a reasonable explanation for today's weak economy."¹³ As Taylor argues:

Fiscal policy has at best provided temporary stimulus before fading away with no sustainable impact on growth. More costly and confusing regulations — including many mandates in the Affordable Care Act and the Dodd-Frank Act — have reduced the willingness of firms to invest and hire. The Federal Reserve has employed a variety of unconventional and unpredictable monetary policies with not very successful results.¹⁴

The Affordable Care Act itself, parts of which have been delayed by the President, is not only causing uncertainty to businesses and individuals, but also creating more fiscal burdens. As Michael Tanner,

a Senior Fellow with the Cato Institute wrote:

When all additional costs are included, ACA's real 10 year cost appears to be much closer to \$2.4 trillion. Since the legislation includes roughly \$1.18 trillion in new or increased taxes through 2023 to pay for the benefits it provides, a calculation of the law's full costs suggests it will add \$1.16 trillion to the national debt over that period.¹⁵

This is an additional entitlement adding to the crisis in entitlement spending caused by the escalating unfunded mandates of Social Security, Medicare, and Medicaid.

During the 1930s the nation was in the midst of the Great Depression and President Franklin D. Roosevelt's New Deal. Former President Herbert Hoover understood that the New Deal was not only a threat to constitutional government, but he warned that "no nation or individual has been able to squander itself into prosperity."¹⁶ President Obama's policies are not only threatening the constitutional foundations of the Republic, but also leading the nation closer to economic destruction. It appears the 2015 budget request will call for more spending and higher taxes, while not addressing the urgent need to reduce spending.

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The Unstoppable Leviathan by John Hendrickson (continued from page 7)

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