



Dow Jones Reprints: This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers, use the Order Reprints tool at the bottom of any article or visit [www.djreprints.com](http://www.djreprints.com)

[See a sample reprint in PDF format.](#)

[Order a reprint of this article now](#)

**THE WALL STREET JOURNAL.**

WSJ.com

OPINION | JANUARY 4, 2011

## Congress Rediscovered the Constitution

*The House Republican majority has said it will require members to cite the specific authority for any bill they introduce.*

By **ROGER PILON**

If the new Congress to be sworn in on Wednesday is the tea party's cardinal achievement so far, its most symbolic achievement will come on Thursday, when the first order of business in the House will be a reading, aloud, of the Constitution. That event alone will not bring us any closer to limited government. But it will help get a debate going that for too long has been dormant.

Already, House Democrats are lining up to ridicule a closely related rule that the Republican majority has said it will adopt, requiring members to cite the specific constitutional authority for any bill they introduce. "It's an air kiss they're blowing to the tea party," says Barney Frank, outgoing chairman of the House Financial Services Committee. Henry Waxman, outgoing chairman of the House Energy and Commerce Committee, all but dismissed any role for Congress in assessing the constitutionality of its actions: "Whether it is constitutional or not is going to be whether the Supreme Court says it is."

As a legal matter, Mr. Waxman is right; at least since *Marbury v. Madison* in 1803, the Supreme Court has had the last word on what the Constitution authorizes Congress to do. But well before that, and long after, members of Congress took it upon themselves to have the first word, often citing their oath of office.

In 1794, for example, James Madison, the principal author of the Constitution, rose on the House floor to object to a bill appropriating \$15,000 for the relief of French refugees who had fled to Baltimore and Philadelphia from an insurrection in San Domingo. He could not, he said, "undertake to lay [his] finger on that article of the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents." The bill failed.

Throughout the 19th century, members of Congress and presidents alike rejected legislation because they believed there was no constitutional authority to enact it. The bedrock presumption of our polity, they understood, was individual liberty. The Constitution gave the federal government the authority to pursue certain limited ends, like national security and ensuring free interstate commerce, but otherwise left us free to pursue our ends either through the states or as private individuals. It did not authorize the federal government to provide us with the vast array of goods and services that today reduce so many of us to government dependents.



[View Full Image](#)

David Klein

Thus the first question the new Congress should ask of any proposed law is: Does the Constitution authorize us to pursue this end? If not, that ends the matter. If yes, the second question is: Are the means we employ "necessary and proper," as constrained by the principles of federalism and the rights retained by the people that are implied by a government of enumerated powers? In essence, the Constitution is no more complicated than that. It was written to be understood by ordinary citizens.

How, then, did modern constitutional law get so complicated and federal power so expansive? One reason is that several provisions in the Constitution were written broadly to allow for contingencies. But those provisions were never meant to open the floodgates to boundless congressional power. The presumption was that any political redress of unexpected problems would be done with due deference to the larger structure, aims and principles of the document. This brings us to the main reason Congress leapt its constitutional bounds: a fundamental shift in the climate of ideas.

Early 20th-century Progressives, inspired by European social democracies, rejected the Constitution's plan for limited government, advocating social engineering schemes instead. Rule by government experts was the order of the day. As people and politicians succumbed to those ideas, especially in the states, courts would often block the schemes in the name of constitutional liberty. When Progressives later took their agenda to the federal level, however, and the Supreme Court continued to block it, President Franklin D. Roosevelt unveiled his infamous plan to pack the court with six new members.

The threat cowed the court, which in a pair of 1937 decisions (*Helvering v. Davis* and *NLRB v. Jones & Laughlin Steel Corp*) essentially gave Congress the power to redistribute and regulate at will, eviscerating the very foundation of the Constitution: the doctrine of enumerated powers. A year later, in *U.S. v. Carolene Products*, the court reduced property rights and economic liberty to second-class status under the Constitution. And in *National Broadcasting Co. v. U.S.* (1943), it allowed Congress to delegate ever more of its vastly expanded legislative powers to administrative agencies in the quickly expanding executive branch.

Now that one-party rule has ended in Washington, we'll see President Obama use these agencies to bypass Congress and promote his progressive agenda. On Dec. 23, for example, the Environmental Protection Agency announced a schedule for setting greenhouse gas standards for power plants and oil refineries over the next two years, notwithstanding that Congress has rejected cap-and-trade legislation. The Obama administration has also quietly issued regulations providing for the end-of-life counseling that the Senate rejected when it passed ObamaCare. Expect far more of this in the next two years.

The 112th Congress will have its hands full simply monitoring what the more than 300 federal agencies are up to. But if the new members want to get to the root of the problem—if they want to start restoring limited constitutional government—they'll have to do far more.

First, they'll have to keep the debate focused on the Constitution, not simply on policy or practicality.

Second, they'll have to reject without embarrassment the facile liberal objection that the courts have sanctioned what we have today, and thus all a member need do when introducing a bill is check the box that says "Commerce Clause," "General Welfare Clause" or "Necessary and Proper Clause."

If these clauses in the Constitution enable Congress to enact the individual health-insurance mandate, then they authorize Congress to do virtually anything. The Supreme Court was wrong in allowing Congress to exercise power not granted it by the Constitution, and courts today are wrong when they uphold those precedents—even if they're not in a position today to reverse them until Congress takes greater responsibility.

Third, Congress has to start taking greater responsibility. Congress must acknowledge honestly that it has not kept faith with the limits the Constitution imposes. It should then stop delegating its legislative powers to executive agencies. Congress should either vote on the sea of regulations the executive branch is promulgating or, far better, rescind or defund those regulations, policies and programs that never should have been promulgated in the first place (rescission may not be possible during the next two years, but defunding is). And of course Congress should undertake no new policies not authorized by the Constitution.

This is all a tall order, and it will take years. But the alternative—our Leviathan state, which recognizes no limits on its power—is simply unconstitutional.

*Mr. Pilon is vice president for legal affairs at the Cato Institute and publisher of the Cato Supreme Court Review.*

Copyright 2010 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our [Subscriber Agreement](#) and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit [www.djreprints.com](http://www.djreprints.com)