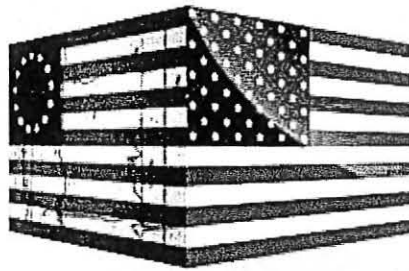


ROOTS
OF
LIBERTY



UNLOCKING
THE
FEDERALIST PAPERS

Edited by
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The Powers Delegated to the Federal Government Are Few and Defined

The Doctrine of Enumerated Powers

by Roger Pilon

Federalist Papers referenced in essay: #14, 23, 25, 32,
41, 42, 44, 45

A. The doctrine of enumerated powers stands for the idea that Congress has only those powers that are enumerated in the Constitution, which the people delegated to Congress when they ratified the Constitution or later amended it. Thus, the doctrine is of fundamental importance. It explains the *origin* of Congress's powers, their *legitimacy*, and their *limits*. By virtue of the doctrine, the Constitution of the United States establishes a government of delegated, enumerated, and thus limited powers.

B. The *Federalist Papers* contain many discussions of the doctrine of enumerated powers, but they are often difficult to understand because they make assumptions many people today don't fully understand. And they address a variety of particular issues rather than the general theory of the doctrine. Before examining those discussions, therefore, it will be useful to first outline the Constitution's basic theory of legitimacy, especially since the doctrine of enumerated powers is so central to it, and then show how the doctrine is manifest in the Constitution itself.

C. The Constitution's theory of legitimacy draws from the

theory that was first set forth in the *Declaration of Independence*. In that document America's Founders made it clear they wanted to rid themselves of British rule—which they thought was illegitimate in many respects—and to establish in its place legitimate government with legitimate powers. To make their case, they drew on the natural law tradition, stretching back to antiquity, which holds there is a moral law of right and wrong that should guide us in making actual laws. It is that moral law, especially concerning natural rights, that is referenced in the famous passage that begins, “We hold these Truths to be self-evident.” Thus, the Founders first set forth the moral order as defined by our natural rights and obligations—the moral rights and obligations we would have toward each other if there were no government—and only then did they set forth the conditions for legitimate government and governmental powers. And they did it that way because they understood that governments don't just happen; rather, they are created, by human action, and so we need to know how that happens legitimately—by right.

D. To do that, notice that the Declaration's self-evident truths begin by assuming we are all equal, at least in having equal rights to “life, liberty, and the pursuit of happiness.” But in holding that each of us has a right to pursue happiness, nothing more is said about what will make us happy, and for good reason—that will vary from person to person. Thus, the freedom to pursue happiness is left up to each individual, provided only that each of us respects the equal rights of others to pursue whatever makes them happy. Live and let live.

E. But we may not all agree about what our rights and obligations are. And even if we did agree, not everyone will always respect the rights of others. Either intentionally or accidentally, people will violate others' rights. The Founders understood this, so after they outlined the moral order, they turned

to the political and legal order and took up the question of legitimate government: “That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.” Notice the limits implicit in that language. The main purpose of government is to secure our liberty by securing our rights. But if the powers needed to do that are to be “just” or legitimate, they must be derived “from the Consent of the Governed.”

F. When they drafted the Constitution eleven years later, the Framers drew on that theory of legitimacy: individual liberty, secured by limited government, with its powers derived from the consent of the governed. We see the theory right from the start, in the document’s Preamble: “We the People,” for the purposes listed, “do ordain and establish this Constitution.” In other words, all power comes from the people. We created the government. We gave it its powers by ratifying the Constitution that sets forth its structures, powers, and protections. For those powers to be truly legitimate, however, we must first have had them ourselves before delegating them to the government to be exercised on our behalf. The Framers mostly abided by that principle, the major and tragic exception being the Constitution’s oblique recognition of slavery, which took the Civil War and the Civil War Amendments to correct. For the most part, however, they established a legitimate government with legitimate powers.

G. With the Constitution’s theory of legitimacy now before us, we can examine how the Framers implemented it through the doctrine of enumerated (listed) powers. To state the doctrine most simply, if you want to *limit* power, as the Framers plainly did, don’t give it in the first place. That strategy is evident in the very first sentence of Article I: “All legislative Powers herein granted shall be vested in a Congress.” Notice first that the subject is *all* legislative powers that are herein granted—which are the only such

powers in a Constitution of *delegated* powers—and they rest with the Congress. Second, the powers are “granted”—or delegated by the people, from whom they have to come if they are to be legitimate. Finally, as implied by this use of the words “all” and “herein granted,” *only* those powers “herein granted” were, in fact, *granted*. In sum, Congress has *no* legislative powers *except* those that were “herein granted”—powers that are limited to those that are enumerated in the document.

H. Congress’s powers are enumerated throughout the Constitution, but the main legislative powers are found in Article I, Section 8. There are only eighteen such powers. Plainly, the Framers wanted to limit the federal government to certain enumerated ends, leaving most matters in the hands of the states or the people themselves. In fact, that point was made perfectly clear when the Bill of Rights was added two years after the Constitution was ratified. As the Tenth Amendment states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Where the federal government has no power, the states or the people themselves have a right.

I. The doctrine of enumerated powers was crucial to the ratification debate. The *Federalist Papers* were written to convince skeptical electors and the delegates they sent to state ratifying conventions that the new constitution was necessary and, in particular, would not give the new federal government any more power than was absolutely necessary to carry out its responsibilities. The doctrine of enumerated powers—the main restraint on the new government—was most famously stated by James Madison (No. 45):

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are

to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

J. Notice those words: “few and defined.” The federal government was to have only limited responsibilities. Most power was to be left with the state governments. They were closer to the people who could then better control them.

K. Madison continues, “*It is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any* (No. 14).” Madison argues there are certain things—like national defense and foreign and national commerce—that are properly national concerns since they are largely beyond the competence of individual states. In fact, one of the main reasons the Framers sought to write a new constitution was because the Articles of Confederation afforded the federal government too little power to deal with such matters.

L. Alexander Hamilton picks up these themes (No. 23) while focusing on the document’s aims:

The principal purposes to be answered by union are these - the common defense of the members; the preservation of the public peace as well against internal convulsions as

external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.

Opponents, he continues,

ought not to have wandered into inflammatory declamations and unmeaning cavils about the extent of the powers. The POWERS are not too extensive for the OBJECTS of federal administration, or, in other words, for the management of our NATIONAL INTERESTS; nor can any satisfactory argument be framed to show that they are chargeable with such an excess.

M. Hamilton goes on to argue (No. 25) that there are two sides to the doctrine of enumerated powers. The main emphasis in the *Federalist Papers* is to show how the doctrine will limit the size and scope of the new government. The other side, however, is to ensure the federal government has enough power to do the things that a national government will need to do. Hamilton addresses that issue cleverly, in the name of ensuring the new government will remain limited:

Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.

N. Note Hamilton's word of caution. The new government's

powers are to be limited by enumeration, but those who would limit them even further run the risk of sowing the seeds—necessary breaches that then serve as precedents for future breaches—of future expansion. Be careful what you ask for!

O. Hamilton returns to the main theme of the limited delegation of authority to the federal government (No. 32): “*But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, Exclusively delegated to the United States.*” Hamilton’s main point is the convention had taken “the most pointed care” to ensure the powers “not explicitly divested in favor of the Union” remain “in full vigor” with the states.

P. The doctrine of enumerated powers is discussed throughout the *Federalist Papers*, but Madison’s discussion of three of those powers is especially important in light of developments in the twentieth century that have vastly expanded their scope. After reviewing the main areas over which the federal government would have power, he answers objections that were raised about the first of Congress’s enumerated powers: the power to tax “to provide for the common Defense and general Welfare of the United States.” That wording, skeptics charged, would allow the government virtually unlimited power toward those ends. Madison answers:

Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color for it. ... But what color [merit] can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than

a semicolon? ... Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. (No. 41)

In other words, the terms “common Defense” and “general Welfare” are simply general headings. It is in the enumerated powers that follow where Congress finds the objects over which it has authority—and for which it may tax.

Q. In a similar way, Madison addresses the function of Congress’s power to regulate “Commerce among the States,” saying without that power,

the great and essential power of regulating foreign commerce would have been incomplete and ineffectual. A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. (No. 42)

Thus, the commerce power was granted to ensure robust commerce—free especially from interference by the states. It was not, as it has become today, a power to regulate anything and everything for any reason whatsoever.

R. Finally, Madison answers those who had objected to the last of Congress’s eighteen enumerated powers—the power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.” It would have been impossible, he writes, to have attempted “a complete digest of laws on every subject to which the Constitution relates.” And what if Congress should misconstrue this or any other of its powers?

In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers. (No. 44)

Madison is confident the citizens of the nation will see to it that Congress does not exceed its delegated and enumerated powers.

S. And so in the *Federalist Papers*, as in the Declaration and the Constitution, we see the extraordinary thought and care that went into America's Founding. The doctrine of enumerated powers was central to the Framers' design. It granted the federal government enough power to discharge its responsibilities, but not so much as to threaten our liberty. But it is up to us, to each generation, to see to it that our officials are faithful to the principles the Framers secured through that extraordinary thought and care.