

# Why the Constitution Does Not Help

David R. Riemer

It would be convenient if the U.S.'s foundational concept—limited government—helped to define the specific functions that American government should perform. It would be particularly helpful if our founding charters—the Declaration of Independence and above all the U.S. Constitution—told us, precisely, how government's broad purposes should be translated into a series of detailed policies that would solve contemporary America's most serious problems.

But neither the concept of limited government, nor the Declaration of Independence, nor the U.S. Constitution provides much useful guidance as to *exactly* what government should do at the granular level of policy, program, taxation, and delivery.

## The Concept of “Limited Government” Does Not Help

“Limited government” is the fundamental idea that underpins the American experiment, inspired our Declaration of Independence, and weaves itself through the Constitution's articles and clauses.

Unfortunately, the concept provides virtually no help in deciding exactly what functions government should perform (or not), including what parts of the New Deal to augment, repair, or discard.

A big part of the difficulty is that Americans are conflicted about limiting government.

Our primary national impulse is a belief in constraining and excluding government. The profound and intense conviction that government should be kept under strict control, off our backs and out of our lives, was the linchpin of the American Revolution. It has been the centerpiece of our history—the *leitmotif* of the American experiment—ever since. We draw upon the concept in our response to almost all political, social, and economic issues. It remains the staple of today's politics

But the truth is that, in many situations, we really do not want to constrain or exclude government at all. In the real world of day-to-day, year-to-year life, our belief in limited government is, itself, limited.

When the nation was attacked on September 11, 2001, or when the economy collapsed as it did in 2008, almost no one in America wanted our government's response to be limited.

When Hurricane Katrina devastated New Orleans in 2005, and when Hurricane Harvey dumped 50 inches of water on Houston in 2017 with Hurricanes Irma and Maria soon

followed to rip through Florida and Puerto Rico, many of the most conservative members of Congress demanded prompt government intervention and massive taxpayer spending.<sup>1</sup> The two Cruzes—Mayor Carmen Yulín Cruz, the liberal Democratic Mayor of San Juan, Puerto Rico, and U.S. Senator Ted Cruz, the conservative Republican Senator from Texas—may agree on little. But they were both on the same page in demanding that the federal government should *not* be limited when it came to repairing the devastation to their communities.

Nor do we want to constrain or exclude government when there is a burglar at the door, a fire in the kitchen, brown sludge coming out of the tap, a giant pothole in the street, a broken red light at the intersection, an overflowing garbage cart, or a knife fight at our children's school.

We do not want to handcuff government when it comes to honoring the commitments it made, once we turn 65, to enroll us in Medicare and pay our medical bills.

We certainly do not want government to limit our Social Security checks.

Rather, in all these situations, we want government to be visible, strong, on our side, and true to its word.

When the United States is attacked, as on 9/11, we want government to hit back soon and hard. We will even support the deployment of government planes, government ships, and government troops (“boots on the ground”) to destroy enemies halfway around the world.

When the economy crumbles, we want government to act swiftly to bring about a recovery. We will even tolerate a massive increase in government debt and spending to bail out banks “too big to fail,” if that's what it takes to stop the meltdown of the nation's economy.

On a smaller scale but more frequent schedule, we want government to act—to act now, and to act efficiently—to protect us against criminals and safeguard us from health risks; to help our kids to get an education and to guarantee us a predictable pension; to keep inflation in check and make sure we do not get mangled at work or swindled by the bank. We particularly want government to honor its pledges to us: to guarantee us the Unemployment Insurance payments, Medicare coverage, and Social Security benefits that we worked years, typically decades, to earn.

Yet at the same time, we want government to stay away—far, far away—from most of the day-to-day personal decisions we make. Should we take a nap or sit on the porch?

---

<sup>1</sup> See, e.g., Carl Hulse, “Hurricane Harvey Shifts Political Winds in Washington,” *New York Times*, August 31, 2017, <https://www.nytimes.com/2017/08/31/us/politics/hurricane-harvey-shifts-political-winds-in-washington.html>

Our call. Eat a hot dog or pizza? Our call. Drink a soda or a beer? Our call. Wear sneakers or dress shoes? Our call.

Work, quit, retire, worship, read, listen, write, relax, vacation, join, invest, wed, divorce, rent, own? All our calls. In 99% of the decisions that we make each day, both large and small, we want government to play no role whatsoever

In short: Americans want government to perform dozens of specific functions that make our lives physically safe, economically secure, and protected from the abuses of the marketplace, *and* at the same time we want government to be extremely limited in its reach and power so that we can remain free individuals in a free society with a free economy.

Given how Americans truly feel about limiting government—passionately wanting it with every fiber of our collective being, but *not* wanting to limit government action too much when giant national catastrophes occur and a long list of smaller dangers crop up—it is plain that the broad concept of “limited government” provides little guidance in resolving this book’s central question of exactly what functions we want American government to perform.

### The Declaration and Constitution Do Not Help

If the concept of limited government provides no useful guidance about exactly what American government should do, what about America’s founding instruments?

Do the Declaration of Independence and U.S. Constitution even affirm the three broad purposes of government in a democratic society with a market economy: (1) protect and enhance public safety, health, resources, and infrastructure; (2) provide economic security and equal opportunity; and (2) create an effective market?

Do the Declaration and Constitution go beyond these broad purposes to articulate the specific functions that government should perform?

### *The Declaration, Constitution, and the Purposes of Government*

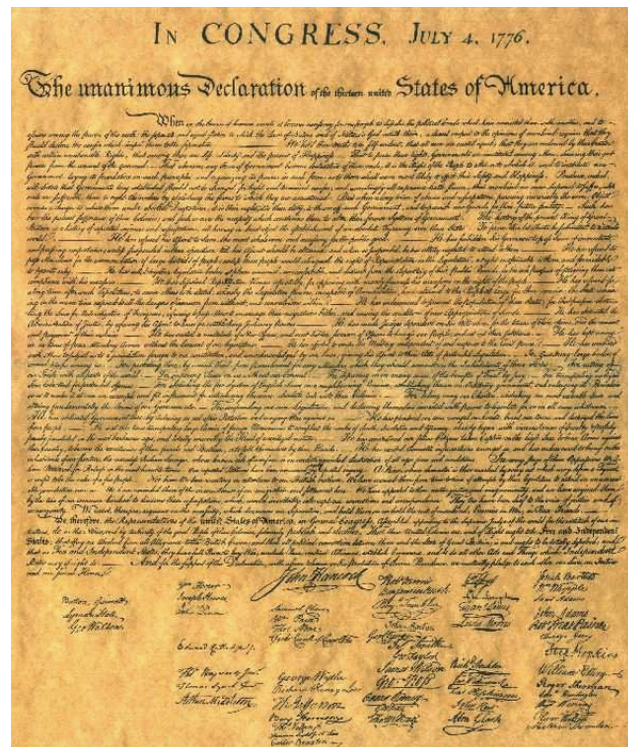
It is safe to say that both the Declaration and Constitution defined public safety and an effective market as central purposes of the new United States. The Constitution can also be interpreted to embrace economic security and equal opportunity as one of America’s core purposes.

#### *First Purpose: to protect and enhance public safety, health, resources, and infrastructure*

The Declaration explicitly states that, since people have an unalienable right to life, government has an obligation “to secure” that right, i.e., to protect public safety. Several of the specific denunciations of King George III’s “long train of abuses and usurpations” further underscore government’s obligation to protect public safety by decrying exactly

the opposite course of action. According to the Declaration, by the middle of 1776 George III had already “plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.” Worse, he was “transporting large Armies of foreign Mercenaries to compleat the works of death, desolation, and tyranny, already begun with circumstances of Cruelty & Perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.”

The clear implication is that one of the purposes of the government of the emerging United States of America was to do what King George had failed to do: protect the safety of the American people. Indeed, the Declaration does more than merely imply a commitment to safety. The conclusion of the Declaration specifically states that the new United States of America have the “full power to levy war, conclude peace, contract alliances . . . and to do all other acts and things which independent states may of right do.” There can be no dispute that the U.S.A. was established in part to create a vehicle that—through the conduct of war, negotiation of peace, and formation of alliances—would promote the public’s safety.



The Constitution is even more explicit that America government has a commitment to promote public safety. Its preamble declares that the “more perfect Union” has been created “in Order to...ensure domestic Tranquility” and “provide for the common defense.” Of the enumerated powers given to Congress in Article I, Section 8, close to half relate to safety. “The Congress shall have Power:

- “[T]o lay and collect Taxes, Duties, Imposts and Excises, to...provide for the common Defense” (Clause 8.1)
- “To declare War...” [Clause 8.11)

- ”To raise and support Armies....”(Clause 8.12)
- ”To provide and maintain a Navy” (Clause 8.13)
- ”To make Rules for the Government and Regulation of the land and naval Forces” (Clause 8.14)
- ”To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” (Clause 8.15)
- ”To provide for organizing, arming, and disciplining, the Militia...”(Clause 8.16)

In addition, the Constitution vests Congress with powers to create a national road network. Congress may “establish Post Offices and post Roads” (Clause 8.7). As President Eisenhower made clear two centuries later, a good road system is a tool in national defense and, thus, public safety. By definition, it is infrastructure.

Finally, the general authority “to lay and collect Taxes, Duties, Imposts and Excises, to...provide for...the general Welfare of the United States” (Clause 8.1) has been construed over time to empower Congress—if it so chooses—to spend revenue promote the public safety, health, resources, and infrastructure.

*Second Purpose: to provide economic security and equal opportunity*

It would stretch beyond recognition the wording of the Declaration of Independence to discern in it an endorsement of economic security and equal opportunity as purposes of government in general or American government in particular. The Declaration’s noble statement that “all men are created equal,” and its assertion that “the pursuit of Happiness” is a unalienable right that government exists “to secure,” do not readily point to the WPA, minimum wage, collective bargaining, Unemployment Insurance, Social Security, national health insurance, universal public K12 education...or any other specific policy for advancing economic security or equal opportunity

Nor does the explicit language of the Constitution appear to embrace economic security or equal opportunity as an aim of American government. The Preamble indicates that one of new nation’s goals include is to “promote the general Welfare.” As already mentioned, Article I, Section 8, vests Congress with broad power “to lay and collect Taxes, Duties, Imposts and Excises, to...provide for...the general Welfare of the United States” (Clause 8.1). But the wording is vague and thus open-ended. What is the “general welfare?”

Yet if the wording of the Constitution neither requires nor explicitly authorized the creation of a national system of economic security, the Framers’ language certainly gives Congress the power to create such a system if Congress determines that the “general welfare of the United States” warrants it. To begin with, Congress’s power under Commerce Clause, Article I, Section 8, Clause 3, could reasonably be interpreted—and, after years of resistance, *was* finally interpreted by the U.S. Supreme Court—to give Congress the power to require businesses engaged in interstate commerce to improve the wages, hours, and safety of their employees. Of greater importance, even prior to the Court’s turn-around on the scope of the Commerce Clause, the taxing power of Congress (i.e., the previously mentioned power of Congress under Article I, Section 8, Clause 1, to

lay and collect Taxes, Duties, Imposts and Excises, to...provide for...the general Welfare of the United States”) provided Congress with the constitutional basis for enacting the Social Security Act (thus: Unemployment Insurance, Social Security old-age pensions, and in time Medicare and, per Chief Justice Roberts’ reasoning, the Affordable Care Act).

In short, the wording of the Constitution provides Congress with plenty of regulatory and spending tools to use to cobble together a comprehensive system of economic security. That authority, together with the gradually evolving belief of most Americans that it is an important function of government to protect them against what FDR called the “hazards and vicissitudes” of a modern economy, support the conclusion that the Constitution can be seen as confirming economic security as one of the purposes American government.

The argument that the Constitution intended equal opportunity to be one of the purposes of the nation’s government, at least following the Civil War, is stronger. The 14<sup>th</sup> Amendment explicitly makes it illegal for “any state...[to] deny to any person within its jurisdiction the equal protection of the laws.” Yet neither the states nor Congress is explicitly required by the U.S. Constitution to create programs that provide equal access, equal treatment, or equal funding via programs such as free K12 education, state universities, or Medicaid. State legislatures may—or may not—be required to create such programs under the varying terms of state constitutions. For Congress, however, there is no mandate.

The absence of a mandate, however, does not mean the absence of power. Congress (as just discussed) has the authority to create programs that guarantee equal opportunity under the Taxing Power of Article I, Section 8, Clause 1. Moreover, *if* states (whether required to do so, or not) set up programs that raise “colorable” questions of denial of equal protection, the federal judiciary’s application of the 14<sup>th</sup> Amendment can result in injunctions to states (or local governments) to equalize opportunity.

It is precisely this interaction between a state’s requirement that young children get a public education, and the 14<sup>th</sup> Amendment’s requirement that states may not deny equal protection, that resulted in the U.S. Supreme Court’s ruling in *Brown v. Board of Education*.<sup>2</sup> Kansas had no obligation to create a public education system at all, as far as the U.S. Constitution is concerned. But *if* Kansas or any state established a public education system, *then* Topeka was not allowed to segregate students based on race because the 14<sup>th</sup> Amendment demanded equal treatment.

The meaning of the 14<sup>th</sup> Amendment’s Equal Protection Clause has given rise to decades of litigation, but some things are clear. States cannot deny access to K12 schools, state universities, or health insurance programs like Medicaid based on race, ethnicity, and

---

<sup>2</sup> *Brown v. Board of Education of Topeka*, (347 U.S. 483 (1954))

other invidious forms of discrimination. On the other hand, states can set up K12 financing systems under which children in different communities end up with quite different amounts spent on their education.<sup>3</sup>

The overall point, however, is this. The Constitution, as used by Congress and amended over the centuries, can be seen as confirming both economic security and equal opportunity as purposes of American government. To the extent there is room for disagreement on the rather subtle meaning of the Constitution's "purposes" (original intent? evolving consensus? current agreement?), there can be little disagreement that one of the purposes of the Constitution was to vest Congress with the *power* to enact laws that create systems of economic opportunity and equal opportunity.

### *Third Purpose: to create an effective market*

There can be zero disagreement about whether one of Constitution's central purposes is to create an effective American market. A major reason for convening the Constitutional Convention in Philadelphia in 1787 was to invigorate the nation's market. The Constitution achieved that goal, and it has been one of the Constitution's greatest achievements for nearly 250 years.

The Declaration of Independence also emphasizes, albeit indirectly, the need for an effective market. In its long list of vociferous complaints about King George III, the Declaration mentions several instances of British interference with the American market. The clear implication is that it is the role of government to foster a well-functioning market, not cripple it. It is hardly a surprise, then, that the conclusion of the Declaration specifically states that one of the "full powers" of the new United States of America is "establish Commerce." The Declaration's focus on the market prefigures the Constitution's obsession with it.

The Constitution goes into great detail in making the creation of an effective national market a central purpose of American government. Indeed, the most unique feature of the Constitution was its creation of what might be called the Atlantic Seaboard Free Trade and Economic Integration Zone, the original NAFTA (North American Free Trade Agreement).

Of the many powers that the Constitution grants to Congress in Article I, a very large number relate to creating an effective market. They include:

- Providing for uniform rules for commerce between the states within the new nation's boundaries ("The Congress shall have Power... To...regulate Commerce ... among the several States, and with the Indian Tribes." Article I, Section 8.3);
- Providing for standard rules for foreign trade ("The Congress shall have Power...To regulate Commerce with foreign Nations...." Article I, Section 8.3);
- Setting up a mechanism to establish a common currency and guarantee its integrity ("The Congress shall have Power... To Coin Money, [and] regulate the Value

---

<sup>3</sup> *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

thereof..." (Article I, Section 8.5) and "To provide for the Punishment of counterfeiting the Securities and current Coin of the United States" (Article I, Section 8.6);

- Setting up a mechanism to standardize weights and measures ("The Congress shall have Power... To...fix the Standard of Weights and Measures" Article I, Section 8.5);

- Authorizing the establishment of a central bank, by giving Congress the power "To borrow money on the Credit of the United States" (Article I, Section 8.2);

- Authorizing a unified patent policy ("The Congress shall have Power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Article I, Section 8.8);

- Authorizing a uniform bankruptcy policy ("The Congress shall have Power... To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Article I, Section 8.4);

- Authorizing a uniform immigration and naturalization policy ("The Congress shall have Power... (4) To establish an [sic] uniform Rule of Naturalization...." Article I, Section 8.4);

- Authorizing a national postal service ("The Congress shall have Power...To establish Post Offices...." Article I, Section 8.7); and

- Authorizing a continental road system ("The Congress shall have Power...To establish ... post Roads." Article I, Section 8.7).

To further strengthen the new national market, the Constitution deprives the states of the right to interfere in the market in several specific ways that the Framers felt would undermine the market's success. Thus:

- "No State shall ... pass any ... Law impairing the Obligation of Contracts...." (Article I, Section 10.1);

- "No State shall ... coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts...." (Article 1, Section 10.1);

- "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress. (Article I, Section 10.2);

- "No State shall, without the Consent of Congress, lay any Duty of Tonnage.... (Article 1, Section 10.3);

- "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." (Article IV, Section 1);

- "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." (Article IV, Section 2.1)

Finally, to further strengthen the national market, the Constitution also denied to Congress itself—i.e., denied the government of the United States of America—the ability



to take several measures that the Framers perceived to be inimical to the market's success. The Framers told Congress that it could not "mess with" the market in the following areas:

- "No Tax or Duty shall be laid on Articles exported from any State" (Article 1, Section 9.5);
- "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another" (Article I, Section 9.6)

With a document so saturated with provisions aimed at establishing, protecting, and strengthening the American market, there can literally be zero dispute that creating an effective market was one of the Constitution's core purposes.

### *The Declaration, the Constitution, and the Powers of the U.S. Government*

We switch now from discussing *purpose* to analyzing *power* and *policies*. The Declaration of Independence has come down to us as mostly an affirmation of principles ("We hold these truths to be self-evident...), a denunciation of the misconduct of King George III and his military forces, and (as the name makes clear) a formal announcement that "these united colonies are, and of right ought to be free and independent states." But the Declaration is also an instrument of legal empowerment. It grants to the newly created United States of America the following specific powers: "full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do."

Two observations about the Declaration's empowering of Congress are relevant.

First: The powers that the signers of the Declaration vested in the newly minted United States of America are limited to the highest level of public safety ("full power to levy war, conclude peace, contract alliances") and the most abstract level of creating an effective market ("full power to...establish commerce"). There is virtually no detail about public safety; there is no detail about an effective market. Moreover, the Declaration says nothing at all about empowering the newborn U.S.A. to promote economic security or equal opportunity. Only by stretching the catch-all ("as free and independent states, they have full power to... do all other acts and things which independent states may of right do") does the Declaration even tiptoe in the direction of economic security or equal opportunity.

Second: To the extent that the Declaration *grants* powers to the new United States, it does not *require* the newly "free and independent states" to use those powers to do anything at all. It spells out no specific policies. It mandates nothing. The Declaration of Independence would technically have been honored if, after its adoption, Congress adjourned and dissolved.

What then about the Constitution? Unlike the Declaration, the Constitution spells out in far greater detail the powers of the new U.S. government. Those powers provide a clear

foundation for pursuing, if Congress wishes, all three of the commonly recognized purposes of modern government.

*Public Safety, Health, Resources, Infrastructure:* Article I, Section 8, gives that Congress the power (A) “lay and collect Taxes, Duties, Imposts and Excises, to...provide for the common Defense”; (B) “declare War”; (C) “raise and support Armies”; (D) provide and maintain a Navy”; (D) make Rules for the Government and Regulation of the land and naval Forces”; (E) “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”; and (F) provide for organizing, arming, and disciplining, the Militia.” In addition, the Constitution vests Congress with powers to create a national road infrastructure. Congress may also “establish Post Offices and post Roads.” And of course, Congress has the catch-all authority “to lay and collect Taxes, Duties, Imposts and Excises, to...provide for...the general Welfare of the United States.”

*Economic Security and Equal Opportunity:* Congress’s authority the under Commerce Clause, Article I, Section 8, Clause 3, has long been interpreted to give Congress the power to require businesses engaged in interstate commerce to improve the wages, hours, and safety of their employees. Of greater importance, the taxing power of Congress (i.e., “to lay and collect Taxes, Duties, Imposts and Excises, to...provide for...the general Welfare of the United States”) provides Congress with ample constitutional legroom to enact social insurance laws that depend on taxation, e.g., most of the Social Security Act, as well as other programs that use tax revenue for designated “general Welfare” purposes. Separately, the 14<sup>th</sup> Amendment’s requirement that states must guarantee their residents “the equal protection of the laws” provides a basis for insisting that state programs ensure equal access, equal treatment, or equal funding in state-run health, education, and other programs.

*Effective Market:* Finally, it is overwhelmingly clear that the Constitution gives Congress the power—indeed, many and overlapping powers—to create an effective market. Perhaps more than any other reason for convening the Constitutional Convention in 1787, the most power drive was to create the Original North American Freed Trade Agreement. Article I, Section 8, alone says that Congress may (1) “regulate Commerce ... among the several States, and with the Indian Tribes”; (2) “regulate Commerce with foreign Nations”; (3) “Coin Money, [and] regulate the Value thereof”; (4) “provide for the Punishment of counterfeiting the Securities and current Coin of the United States”; (5) “fix the Standard of Weights and Measures”; (6) “borrow money on the Credit of the United States”; (7) “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”; (8) “establish . . . uniform Laws on the subject of Bankruptcies throughout the United States”; (9) “establish an [sic] uniform Rule of Naturalization”; (10) “establish Post Offices”; and (11) “establish ... post Roads.” In addition, the Constitution denies states the right to interfere in the national market in several specific ways. States are not allowed to “pass any ... Law impairing the Obligation of Contract”; “coin Money; emit Bills of Credit,” or “make any Thing but gold and silver Coin a Tender in Payment of Debts.” States are also denied the power, without Congress’s

consent, to “lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws,” or “lay any Duty of Tonnage.” Finally, states must give “Full Faith and Credit ... to the public Acts, Records, and judicial Proceedings of every other State,” and the “Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

But “may” (*possesses the power to*) is not the same as “shall” (must *use* the power to). The Constitution does not translate the *powers* it gives Congress into *requirements* that Congress must ever use those powers. It permits, but does not compel. It authorizes, but does not direct. The Founders stopped short of forging a national charter that specifies precisely what functions American government is compelled to carry out in order to achieve public safety etc., economic security etc., and an effective market. Instead, the Constitution lets Congress decide whether, when, and how to act—and change its mind, and change its mind again—in order, within the limits of constitutional power, to best fulfill the three core purposes of government.

It is no criticism of the Constitution to point out that the charter is silent about if, when, and how Congress and the President should ever actually exercise its powers in any specific way to meet the nation’s evolving needs. The charter’s silence is appropriate. As Washington, Madison, Hamilton, James Wilson and the other Founders understood, it is one thing to establish a semi-permanent (i.e., hard to amend) structure and process for making decisions and imagine that might successfully last—and the Constitution has endured—for over two centuries. It is quite another thing—indeed, as the Founders fully appreciated, it would have been an arrogant and foolish exercise in 1787—to embed in an almost static legal framework the thousands of specific, substantive decisions the federal government would actually need to make about spending, taxing, and regulating, and expect those decisions to make sense 50 years later...much less 100, 200, or 250 years later.

Power, then, is the Constitution’s focus. The charter defines, divides, and limits power. It says who can vote.<sup>4</sup> It spells out how Representatives, Senators, and Presidents are elected, and how the Supreme Court is chosen.<sup>5</sup> (It also explains how they may be removed from power.) The Constitution explains how the different branches of the federal government may exercise their respective powers. Most importantly for our

---

<sup>4</sup> Amendment XV: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

Amendment XIX: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”

Amendment XXVI: “The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any State on account of age.”

<sup>5</sup> Congress: Article I, Sections 2 and 3, and Amendment XVII; President: Article II, Section 1, Amendment XII, Amendment XXIII, and Amendment XXV; Supreme Court: Article 2, Section 2, and Article III, Section 1.

purposes, the Constitution spells out in very broad terms the substantive areas within which—if Congress and the President choose to act—they *may* regulate, *may* tax, and *may* spend. With the addition of the Bill of Rights and the 14<sup>th</sup> Amendment, the Constitution also limits the powers of both the federal government and state governments by vesting the people with the right to due process and equal protection.

But to define, divide, and limit the power of the federal government says nothing about whether, when, and how—consistent with the definition, division, and limitation of governmental power—Congress and Presidents *must or should* actually and specifically exercise that power. The taxing power of Congress created by Article I (“The Congress shall have power to lay and collect taxes, duties, imposts, and excises” and “All bills for raising revenue shall originate in the House of Representatives”) does not compel Congress to raise any taxes at all. Should Congress voluntarily choose to collect taxes, Article I, Section 8.1, provides that the revenue raised *may* be used within three extremely broad categories: to pay the nation’s debts, provide for its defense, and promote its “general welfare.” What exactly Congress *should* do is left to Congress. Nor does the Constitution say anything about how states and localities should exercise their powers.

The other powers created by the Constitution are, likewise, powers that *may* be exercised, not duties that Congress *must or should* perform. Article I, Section 8.2 through 8.17 vests in Congress the exclusive power to raise an army, maintain a navy, regulate foreign and interstate, establish policies for naturalization and bankruptcies, coinage, weights and measures, counterfeiting, the establishment of post offices and post roads, patents, etc. A catch-all power, Article I, Section 8.17, authorizes Congress “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.” But again, exactly what Congress *should* do left to Congress.

In short, the Constitution of the United States, however brilliant an instrument for making it possible to achieve Lincoln’s aim that “government of the people, by the people, and for the people shall not perish from this earth,” is virtually silent about what America’s democratic governments *should* actually do. Article IV, Section 4, does impose on the United States the obligation to “guarantee to every state...a Republican form of government” and the duty to “protect each of them against invasion.” Even here, the way in which Congress must provide this guarantee and protection is left to Congress to sort out.



But what about the amendment process? Has the Constitution's mechanism for amending itself served as a vehicle for solving the question of what American government should do actually do?

For better or worse, the answer is no. It is extremely hard to amend the U.S. Constitution. Under Article V, two-thirds of both the House of Representatives and the Senate must agree on the wording of an amendment, and then three-fourths of the states must ratify the amendment for it to take effect. In the nearly 230 years since 1787, there have only been 27 amendments, including the first Ten Amendments that comprise the Bill of Rights.<sup>6</sup>

When the amendment process has been used to revise the Constitution, it has tended to deal with issues of individual rights and the structure of the federal government, not what Congress should do with its pre-existing power or new power. Of the Constitution's 27 amendments, the great majority (including the Bill of Rights) vest Americans with individual rights or alter the ways in which the original document defines, divides, or limits the federal government's structure or authority. A total of 24 amendments address who is a citizen, what rights the federal government and the states cannot impair, who gets to vote, how the President is elected and when sworn in, and what happens if the President dies or is incapacitated.

Only five amendments even touch on what the federal government has the power to do. The 2<sup>nd</sup> clause of the 13<sup>th</sup>, 5<sup>th</sup> clause of the 14<sup>th</sup>, and 16<sup>th</sup> Amendments respectively authorize (but do not require) Congress to act to stop slavery, vindicate the due process and equal protection rights of U.S. citizens, and raise revenue by collecting an income tax. Only the 18<sup>th</sup> Amendment, the Prohibition Amendment, in essence orders Congress

---

<sup>6</sup> Many consider the Bill of Rights as an addendum to the original text of the Constitution, since it was already in the works prior to the Constitution's ratification.

to implement a specific public policy, leaving Congress discretionary power only with respect to whether and how to enforce the ban on “the manufacture, sale, or transportation of intoxicating liquors.” It is perhaps no coincidence that the only amendment to the Constitution that dictates a specific public policy is also the only amendment we mock today and the only amendment to be repealed in its entirety. By the end of the Roaring Twenties, the 18<sup>th</sup> Amendment had grown so unpopular that Congress repealed it via the 21<sup>st</sup> Amendment.

Taken altogether, the powers that the U.S. Constitution vests in Congress—the sum of the original powers that the Framers in 1787 assigned to Congress, plus the few amendments that augmented Congress’s power in what might be called the “clean-up” of the constitutional framework—do not add up to anything close to a clear, comprehensive, and consistent blueprint for what American government as a whole *should* do.

History is clear, with respect to many of the constitutional provisions that formally “merely” confer power on Congress, that the Framers fully expected (after ratification of the Constitution) that Congress should—and would—exercise those powers. The Framers hardly labored through the hot summer of 1787, in a stuffy room in central Philadelphia without the benefit of air conditioning, with the hope that Congress would merely think about whether to create an army, launch a navy, displace the states’ oversight of interstate and foreign commerce, and set up a post office. The Framers fully intended Congress to use these powers and additional ones. (And Congress did.) Later on, the authors of the 14<sup>th</sup> Amendment (equal protection and due process), 16<sup>th</sup> Amendment (income tax), and others also fully expected Congress to use its newly granted powers under these provisions to enact specific legislation. (And Congress did.)

Yet for all of the detailed language that the Constitution uses to suggest the broad purposes and delineate the specific powers of American government—and the powers of the U.S. Congress in particular—the Constitution is officially silent (with the embarrassing exception of Prohibition) when it comes to *requiring* Congress to carry out any particular policy. If Congress had chosen *not* to create an army, *not* to launch a navy, *not* to regulate interstate commerce, *not* to set up a post office—not to do all the things that Article I lets Congress do—it would have acted as “constitutionally” as if it decided to use its powers to carry out all of those functions.

In conclusion: the U.S. Constitution does not clear away the fog as we look for a coherent blueprint for what functions American government should perform to rescue us from the fine mess in which America is mired in the early decades of the 21<sup>st</sup> century. Despite The wisdom (and errors) of the Framers in writing the Constitution of the United States, it remains up to every generation of Americans to decide for itself—within the wide range of policy options that the Constitution permits—what *exactly* we want American government to do. We must look outside the Constitution to escape the fog and find daylight about what specific policies we want American government to enact.