Unlimited Government

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It was typical summertime in Washington last July—temperature in the 90s, humidity in the 80s—yet the living was anything but easy. President Bush announced on prime-time television his nomination of Judge John Roberts to the Supreme Court, and Congress and the entire capital city sprang briskly into action. The next morning, senators appeared before throngs of reporters to pronounce on the nominee's qualifications, pundits and interest-group spokespeople hit the TV studios with their spins and admonitions, and lobbyists buzzed about the implications for their favorite legislative causes. By dinnertime the first responders had laid down the parameters for the confirmation battle to come, and the nation had begun to take the measure of the young jurist.

Thus began another national debate over the contemporary meaning of our Constitution—conducted over the airwaves and Internet and in the op-ed pages, culminating in Senate hearings in September where Judge Roberts was lectured and quizzed on Supreme Court case law by senators reciting from cue cards. But in many ways it was the sheer alacrity of the initial response rather than the substance of the ensuing legal arguments that said the most about current Constitutional practice. For the highly orchestrated announcement and responses took place during a season when, for much of American history and by deliberate design, Congress and the White House would have been closed for business and Washington deserted.

Thomas Jefferson played the pivotal role in choosing the site for our national capital, and selected what was essentially a malarial swamp. He had been in Paris when the Constitution was drafted, and he was not much impressed by its parchment provisions for limited government. So—anticipating the old dictum that "no man's life, liberty, or property is safe while the legislature is in session"—Jefferson added a climatologic backstop. Long, miserable summers were to serve as a natural deterrent to the growth of our national apparatus.

Leaving the Constitution out in the cold

It worked beautifully for more than a century. Legislators, lobbyists, and executive officials fled the capital en masse most summers, right through the late 1920s—when air conditioning was introduced. With the deployment of that subversive technology, there began a notable expansion of the federal leviathan.

Only the Supreme Court has held to the old ways. Having arranged things so that they not only get the last word on policy issues that interest them,

but do so on their own time, the justices still knock off for three months every summer. Humdrum politicians, however, now work more than they vacation from Independence Day through Labor Day. JFK described Washington as a town of northern charm and southern efficiency; it has since become more northern and more efficient.

The emergence of 24/7/52 legislating is one of many ways in which modern American government has become much busier and more businesslike than it used to be. While busyness is a virtue in most of life, the men who founded our nation would not have considered it advantageous to government. They carefully contrived a state that would be cumbersome and inefficient at getting its act together, with divided and contending powers both inside Washington and between Washington and the states, and a profusion of checks and balances throughout. They wanted government to be robust and decisive in a limited sphere, but also considered government a threat to freedom and happiness, and worried it would engross private society, property, commerce, and culture. “Government,” said John Adams, “turns every contingency into an excuse for enhancing power in itself.” “Government,” said George Washington, “is not reason; it is not eloquence; it is force. Like fire, it is a dangerous servant and a fearful master.” And those were the Federalists.

Certainly today’s Supreme Court has strayed far from its original assignment. Not only does it fail to enforce Constitutional limits on the activities of government, it has joined Team Big Government itself—becoming a super-legislature that decides many controversial matters that the Constitution manifestly leaves to the political branches, to the states, or to the people. That the confirmation process has become so contentious and extended—and now managed like election campaigns by supporters and opponents—proves the critics’ point that the Court has become a third political branch. When the justices stuck to legal interpretation and enforcement, most nomination hearings were perfunctory and lasted only a few days.

But at least we are having a debate on issues of judicial performance. Thanks to the check-and-balance of Presidential nomination and senatorial confirmation of new judges and justices, critics have some prospect of nudging the judiciary back toward its appointed rounds. The confirmation battles, however, are also a symptom of a broader and more important development: Modern political practices have left the Constitution in the dust in ways that no one is debating, and few have even noticed. Slowly and insensibly, James Madison’s parchment barriers have been worn down, just as surely as Thomas Jefferson’s climatologic barriers. Outside a few important strictures from the Bill of Rights, the very notion of “limited government”—the bedrock of our Constitutional order, brilliantly articulated for the ages in The Federalist Papers—has

become little more than an antiquarian curiosity.

Government Unlimited

Let me offer two examples of practices that are unquestionably un-Constitutional yet are hardly questioned at all. Neither even came up at Chief Justice Roberts's confirmation hearing. The first concerns taxation.

The framers, regarding taxation as the most politically sensitive of government powers, required that all bills for raising revenue must originate in the people's chamber, the House of Representatives. This is the sort of fussy procedural formality that is just a damn nuisance when it comes to running a modern, efficient government. Accordingly, twice in recent years Congress has empowered agencies to devise and collect taxes all on their own—first the Federal Communications Commission in 1996, and then the new Public Company Accounting Oversight Board established by the Sarbanes-Oxley Act in 2002. Both agencies decide how much they want to spend, set a tax that will generate the desired funds, and increase the tax as needed to keep their business plans on track.

The FCC tax, on long-distance telephone calls, has grown from 3 percent to 11 percent, and presently garners $6.5 billion a year. The Commission spends this on computers for schools and libraries, Internet connections for rural health clinics, and other worthy causes. The Accounting Oversight Board raises its entire operating budget with its own national tax levied on all publicly traded corporations of any size. The Board sets its budget for the year ($103 million for 2004, then up 33 percent to $137 million in 2005), divides that amount by the number of U.S. companies weighted by their market capitalizations, and sends each company a bill.

Neither Congress nor the President is in the loop on any of this. Of course Congress wrote the laws that established these procedures, but Congress is not supposed to be able to excuse itself from its assigned Constitutional duties—and none is more important than taking political responsibility for imposing taxes. With the emergence of bureaucracies with their own autonomous taxing-and-spending authority, we have crossed a great Constitutional Rubicon; it is an innovation in outside-the-box, plug-and-play government that is sure to replicate.

My second example concerns federalism. Justice Louis Brandeis wrote in a famous opinion that federalism fosters "laboratories of democracy," where policies can be tried in individual states and their good or poor results noted elsewhere. The growth of federal power has shuttered many of those laboratories. A federal government that can ban the personal use of medical marijuana grown right in your own backyard—which is plainly neither "interstate" nor "commerce," yet was easily upheld by the

Supreme Court last term—can do just about anything to blot out local policy choices.

Even more striking are the new coast-to-coast regimes being constructed by state officials like New York Attorney General Eliot Spitzer. He candidly admits that his mission is the wholesale restructuring of entire industries on a nationwide scale. The agreements he has imposed on Merrill Lynch and other financial services firms make detailed requirements of how the firms are to be managed in the future. This has created, thanks to collaboration with officials in other states, new national regulatory programs established entirely outside the legislative process and outside the public rule-making procedures of regulatory agencies. Instead, the deals are cut in lawyers' offices. The results are policy cartels with no exit for any firm or customer, no policy competition or experimentation, no federalism.

The emerging phenomenon is one of multiplying special-purpose national governments operating in parallel with the official national government and without any coterminous political accountability. This has come to pass because of the desuetude of several Constitutional provisions, none more important than the Compact Clause, which provides that "no State shall, without the Consent of Congress, enter into any Agreement…with another State." The requirement of Congressional approval is unqualified and it is fundamental. For a gang of states to go off on their own and set up independent governing regimes is, politically, a form of partial secession. Yet this protection has lapsed through judicial neglect.

Here the big innovation was the 1998 settlement agreement among most of the states and the leading tobacco companies. The agreement established a national regime for the marketing of tobacco products, including a de facto national excise tax on cigarettes designed to raise $246 billion over 25 years, a range of spending programs funded by the revenues, entry controls to limit competition from new manufacturers, and a host of other regulatory requirements. The states have become so addicted to the tobacco revenue windfall that the decline in cigarette smoking is now a serious fiscal worry.

The tobacco program was followed by the Spitzer-led initiatives for regulating investment firms. The pharmaceutical industry—already heavily regulated by the official federal government—is next. Attorney General activists are already closely coordinating a variety of cases in courts across the nation.

Who'll fight for the Constitutional order?

The issue here has nothing to do with the merits of taxing tobacco, or regulating investment companies, or controlling marijuana, or

subsidizing Internet connections in rural areas. These projects, which will strike some citizens as wonderful and others as terrible, all employ the coercive power of the state and compete with an endless number of other projects for society's limited resources. What's at issue is who decides these questions, and how.

My examples may seem arcane and tedious compared to abortion, religious displays in public places, detainment of suspected terrorists, and other hot issues now at the center of our Constitutional arguments. And that is exactly my point. The Constitution's own purposes, provisions, and architecture of government no longer attract our interest or give us much pause when they stand in the way of doing something that sounds good or is backed by an influential constituency. It is now invoked mostly in opportunistic ways to bulk up arguments about policies we support or oppose for other reasons.

Striking evidence of this is to be found in the decline of Constitutional observance in the two political branches—something that gets much less attention than the freelancing of the judicial branch. Many of us can remember when senators and representatives (usually curmudgeonly Midwesterners) would rise to object that proposed legislation, although perhaps desirable in its own terms, was simply beyond Congress's Constitutional powers. But today there is virtually no serious Constitutional deliberation in the Congress—no formal procedures for studying and advising on such matters and no self-appointed specialists whose views carry special weight with their colleagues.

And look at what has happened at the other end of Pennsylvania Avenue. In the Republic's early days, Presidents used their veto power almost exclusively to strike down bills they regarded as violating the Constitution, not those they disagreed with on policy grounds. With the arrival of Andy Jackson the policy veto was here to stay (although the most famous of his many vetoes, that of the rechartering of the Second Bank of the United States, was emphatically a Constitutional veto). But in modern times the original practice has been turned completely on its head. In recent decades, Presidents have routinely—about once a month on average—signed bills into law while announcing that they regard some of their provisions as un-Constitutional (before 1945, this strange procedure occurred only about once a decade).

Now the President's oath of office, spelled out in the Constitution itself, is different from that of every other federal official, and is dramatically brief and specific: He swears simply to execute the office of President and to preserve, protect, and defend the Constitution. So how can Presidents use their sole legislative power to enact laws they consider un-Constitutional, right out in broad daylight? I have raised this objection when working at the White House (in the Nixon and Reagan administrations), and must say

that it was always regarded as quite silly. Legislation these days is hundreds or thousands of pages long, and the product of months or years of negotiations among members of Congress and administration officials and their staffs and friends and foes among the lobbyists and interest groups. So it seems preposterous to suggest that the whole production should be jettisoned at the last minute because Congressman Jones slipped in an un-Constitutional rider when no one was watching. The Constitution's requirements are under such continuous assault today, at so many different margins, that making a stand in any one place and time has become quixotic.

This is not to suggest that Presidents and legislators lashed themselves to the mast of the Constitution in the good old days. As the political scientist Edward Banfield has shown, "the ink of the new Constitution was hardly dry" when many of the founders themselves began to renege on its commitments during the Washington administration. Thomas Jefferson himself famously made the Louisiana Purchase while believing he was without Constitutional authority to do so (he thought he needed a Constitutional amendment but feared Napoleon might acquire seller's remorse in the meantime).

But the modern practice, which may be described as Constitutional agnosticism in the political branches, is fundamentally different from the earlier practice of Constitutional contention within those branches. The Louisiana Purchase, the Jackson Bank veto, FDR's New Deal legislation and court-packing scheme, and Harry Truman's seizure of the steel industry were all subjects of passionate, often sophisticated Constitutional argument among political leaders. For many decades now, Presidents, senators, and congressmen have, for the most part, simply washed their hands of Constitutional issues—saying that those are matters for the courts to decide.

This division of labor in Constitutional interpretation is another instance of the streamlining of modern government. By removing one bone of political contention, it generates a much higher volume of legislation. By leaving the sorting out of Constitutional issues to the courts, the branch with the least democratic sanction, it ensures that resistance to governmental growth will be sporadic and anemic. The politicization of judicial appointments is in large part a result of the courts having acquired, through a process of incremental conquests of their own and incremental abdications by the political branches, de facto exclusive authority to interpret and apply the Constitution.

A telling illustration of the current practice is the McCain-Feingold Campaign Finance Reform Act of 2002—where a genuine First Amendment debate seemed to be brewing within and between the Bush administration and the Congress, only to fizzle out. As a candidate,

George W. Bush agreed that Presidents have a duty to veto bills they regard as un-Constitutional, and said that he would veto the then-gestating McCain-Feingold bill because of its infringements on political speech. Then, shortly after arriving at the White House, he sent the Senate a statement urging that campaign finance reforms should protect the rights of "individuals to participate in democracy" and "citizen groups to engage in issue advocacy." The statement added that if the courts found any provision of such a reform to be un-Constitutional, the entire law should fall.

But when McCain-Feingold passed in 2002, it contained even greater restrictions on individual speech and group issue-advocacy than earlier versions of the bill, and lacked any provision to invalidate the full law if parts proved un-Constitutional. Whereupon President Bush, under intense political pressure following six years of Congressional deliberation on the bill, signed it into law anyway—while noting his "serious Constitutional concerns" and his expectation that "the courts will resolve these legitimate legal questions."

When the law was challenged in court, however, the Department of Justice did not oppose the speech-limiting provisions the President said he objected to, but rather defended them based on extrapolations of Supreme Court precedents. With its way thus paved, the Court agreed with "the Government" and held the regulations to be Constitutional—noting for good measure its own "proper deference to Congress's ability to weigh competing Constitutional interests in an area in which it enjoys particular expertise."

Most of the recent instances of Presidents signing bills while raising Constitutional objections involve provisions that, unlike McCain-Feingold, encroach on the President's own Constitutional prerogatives. For example, an increasing number of appropriations bills include provisions requiring Administration officials to provide reports or legislative recommendations directly to Congress without going through the President, or even putting Congressional committees directly in the loop of program administration. In cases such as these, the President can enforce the Constitution himself—in effect nullifying just the provisions he objects to—by directing that the provisions be ignored or treated as merely advisory, and leaving it to Congress to decide how to deal with such "illegal" activity.

These inside-the-beltway Constitutional tussles are growing in frequency. That reflects the intensity of inter-branch combat over the minutiae of program administration in a government that has accumulated such extensive and finely calibrated power. It also shows that Presidents are still fully capable of standing up for the Constitution when their own institutional interests are threatened. It would be nice if

they were as energetic in defending the interests of states and citizens and the general interest in preserving the Constitutional order.

Government bloat 1980–2005

Well, what difference does all of this make? Why in the age of the Internet, globalization, and al-Qaeda should we attend fastidiously to a document written more than two centuries ago, in radically different circumstances, that itself contains many artful fudges and reflects many political compromises on issues that long ago lost their salience? Here are three reasons why we should be much more fastidious than we are.

First, the American political order is very old and very successful, and tolerable Constitutional adherence has already seen us through many epochs and crises. Have you heard the joke about the student who went to the reference librarian and asked for a copy of the French Constitution? "I'm sorry," the librarian replied, "we don't keep periodicals here." Ours is the oldest written Constitution, and our nation, for all of its problems and shortcomings, has been an unprecedented success. For most of our 216 years, other countries have been places of continuous political upheaval and oppression, punctuated by periods of mass violence. Progress and stability are cardinal virtues where political systems are concerned; when you find yourself in possession of them, hold fast to your institutional inheritance.

Second, the principle of limited government is not a bit less urgent today than it was two centuries ago. It has now been 25 years since Ronald Reagan arrived in Washington announcing his intention to "check and reverse the growth of government." That quarter century has been governed mainly by Republican Presidents, and increasingly by Republican legislatures, and even the one Democratic President declared that "the era of big government is over." Yet the federal government's annual domestic spending doubled during the period, from about $900 billion to about $1.8 trillion (in 2000 dollars). Today the federal government's fiscal imbalance—the excess of projected future expenditures over projected future revenues—is close to $70 trillion. About $20 trillion of this enormous sum was tacked on just in 2003, with the addition of a massive, unfunded Medicare entitlement to prescription drug benefits. Increasing taxes to pay for our standing policy commitments would move U.S. rates to the levels prevailing in today's socialist European nations.

In recent years, with the Republicans in charge of both houses of Congress, domestic expenditures (even excluding post-9/11 "homeland security" spending) have been growing faster than during the previous two decades of divided government, and the incidence of pork-barrel projects has reached an all-time high. The 2001–2005 period marks the

transformation of the Republican Party from its traditional role as a win-or-lose guardian of limited government to that of a majority governing party just as comfortable with big government as the Democrats, only with different spending priorities.

Perhaps the best illustration of this transformation is the Department of Education. Following the Department's creation under President Jimmy Carter in 1980, Republican leaders routinely called for its abolition, and the 1996 GOP platform did so explicitly on Constitutional grounds. Then, in 2000, the party dropped its platform pledge. And by 2004 the Bush administration was campaigning for re-election boasting of a "huge, historic, gargantuan increase in federal education spending." The claim was correct: the Department's annual budget grew 83 percent after inflation during President Bush's first term, by far the greatest rate of increase since its creation.

And the expenditure and debt figures offered here seriously understate the extent of recent government growth. That is because they ignore the burst of regulations whose costs are borne largely by the private sector. As with domestic spending, off-budget regulatory growth has been particularly pronounced in the recent years of unified Republican government. Examples include the institution of national "corporate governance" and accounting regulation under the Sarbanes-Oxley Act, national school testing requirements under the No Child Left Behind Act, the Securities and Exchange Commission's issuance of a profusion of new rules throughout the financial services sector, the Department of Justice's use of aggressive new legal theories to prosecute "economic crimes" and establish new forms of federal crime, and the national regulatory regimes established by state attorney general litigation described earlier. In 2005, political leaders of both parties proposed national price controls for gasoline, heating oil and gas, and pharmaceuticals. The bipartisan deregulation movement of the late 1970s and '80s has been supplanted by new, equally bipartisan enthusiasm for regulation.

These developments have not come without resistance, but the nature and futility of that resistance is highly instructive. With the decline in Constitutional adherence, political leaders (mainly Republican) have been searching for several decades now for substitute, sub-Constitutional devices for curbing government growth. During President Reagan's first term, I participated in lively White House debates where some promoted a "starve the beast" strategy of continuous tax reductions (reasoning that swelling government deficits would produce pressure for spending restraint), while others favored a "serve the check" strategy of matching taxes to current spending (on the theory that charging voters the full costs of government, rather than bucking some of them to our grandchildren through borrowing, would create a constituency for

spending control). Reagan came down unhesitatingly for tax reductions, with auspicious political and economic results that made tax cutting the new mantra among all practicing Republicans.

In the Congress, Senator Phil Gramm devoted much of his public career to devising budget rules that would oblige his colleagues to make difficult spending choices they would rather avoid. More recently, House Speaker Newt Gingrich's theme of an "opportunity society" and President George W. Bush's theme of an "ownership society" have aimed to popularize the personal benefits of shifting insurance and subsidy programs from government administration to private institutions and markets. But these and other expedients have had little durable effect. It seems that, when accepted external constraints on government action are abandoned, there is no solution within the political system to the problem of government's turning "every contingency into an excuse for enhancing power in itself."

Doing too much, badly

A third reason to be concerned over the decline in Constitutional discipline is that it is plausibly related to two of the most worrisome features of today's public sector—the nasty partisanship of our politics and the objectively poor performance of many government programs. A government that is empowered to do just about anything to or for anybody is one that it is very difficult to be civil about. It is also unlikely to do many things well.

In the absence of contrived institutional limits, we are left with natural human limits to interrupt the impulse to say yes to everything through ever-expanding government. Allocating one third of a $12.5 trillion economy by political means, and regulating the conduct of millions of individuals and thousands of institutions by administrative means, simply cannot be done well. The attempt leaves everyone involved overworked and short-tempered and results in many things being done sloppily, including public functions that really are essential. Two of the developments highlighted in this essay—the fierce politicization of judicial appointments and the now-incessant Legislative-Executive scrapping over the minutiae of program administration—illustrate how efforts to make government efficient, businesslike, and smoothly growing are eventually self-limiting.

Economists call this the problem of diseconomy of scale. One of the greatest, Ronald Coase, who won the Nobel Prize in 1991, puzzled over why so many studies of government programs found that they were ineffective or actually worsened the problems they were supposed to ameliorate. He concluded that "an important reason may be that government at the present time is so large that it has reached the stage

of negative marginal productivity, which means that any additional function it takes on will probably result in more harm than good.... If a federal program were established to give financial assistance to Boy Scouts to enable them to help old ladies cross busy intersections, we could be sure that not all the money would go to Boy Scouts, that some of those they helped would be neither old nor ladies, that part of the program would be devoted to preventing old ladies from crossing busy intersections, and that many of them would be killed because they would now cross at places where, unsupervised, they were at least permitted to cross."

That's amusing, and also a pretty accurate premonition of the government's Keystone Cops response to Hurricane Katrina in September 2005. The Katrina aftermath—combining an inept response to a major civil emergency (unquestionably an important government function) with a subsequent, panicky splurge of government spending (aiming essentially to reconstitute the entire Gulf Coast with federal dollars)—stands as a perfect testament to the predicament of unlimited government. Although the performance of certain federal officials came in for angry criticism, it's unlikely the performance would have been much different if George C. Marshall and Elihu Root (to take two of the most able government administrators in American history) had been in charge. Agency heads today have practically no management discretion. They are hemmed in by elaborate legislative and regulatory specifications of every element of program administration and by "ethics" rules that systematically wall them off from the outside world. They are beholden to multiple Congressional oversight committees—88 in the case of the Department of Homeland Security—whose members and staffs occupy their days with hearings, demands for information and reports, and political and constituent service requests. And they operate in a political environment where management is expected to be geared to the news cycle and the "permanent campaign."

Reviving respect for limits

The unraveling of Constitutional government seems to have deep causes, not only in modern organization and communications, but in modern habits of mind. The principle of limited government was long considered a cornerstone of liberal democracy—right up there with freedom of speech and association, regular elections, an independent judiciary, and an apolitical military. But although it is still often included in the litany, the reference has become reflexive and vestigial. Limited government—or limited anything—is profoundly alien to modern American sensibilities. We regard limits as inherently arbitrary and irrational, and celebrate innovation and growth that breaks through established boundaries. At the same time, a new political principle—"personal autonomy," or

freedom from all external constraints—is making a strong bid for addition to the pantheon of fundamental liberal values. It is telling that today's conservative politicians are employing concepts such as the "opportunity society" and the "ownership society" which emphasize growth rather than limits, the person rather than the institutional context.

The difficulty is that individual rights and personal strivings are no match for the growth of state regimentation. It is a mistake to transfer the modern be-all-you-can-be sentiment to government, or for that matter to any other organization. Even business firms and other private associations have constitutions of their own, in the form of articles of incorporation, bylaws, and mission statements that specify what they should and should not do. The purpose of such boundaries is not to make an organization cumbersome but to make it effective, not to hold its members back but to make them free and productive. Formal limitations are all the more important in the case of government—which possesses a monopoly on the use of coercion and is less constrained than other institutions by competitive pressures.

The decline of the principle of limited government has already placed enormous strain on one central institution of liberal democracy, the politically independent judiciary. If the post-Katrina calls for assigning important domestic functions to the military make any headway, another important institution—the apolitical military—may come under stress as well. But in the observation that limits on government can be freedom-enhancing, not only for individuals but for government itself, there may be a means of reviving appreciation for limited government in the modern mind.

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Endnotes

1. Congress was air conditioned in 1928–29. See "The Executive Privilege of Air Conditioning," Carrier company website, www.global.carrier.com/details/0,,CLI1_DIV28_ETI2324.html (accessed December 7, 2005). Annual sessions of Congress have run the following numbers of days on average during successive periods:

1800–99	—	165 days
1900–29	—	206 days
1930–69	—	268 days
1970–2004	—	321 days

These figures are inclusive from convening date to adjournment sine die without adjustment for weekend or vacation recesses. Calculated from "Session Dates of Congress," U.S. House of Representatives, Office of the Clerk, clerk.house.gov/histHigh/Congressional_History/Session_Dates/index.html (accessed December 7, 2005).

2. See Federal Communications Commission, "Universal Service Support Mechanisms," ftp.fcc.gov/cgb/consumerfacts/universalservice.html (accessed December 7, 2005), and the website of the Universal Service Administrative Company (the FCC subsidiary that administers the programs), www.universalservice.org (accessed December 7, 2005).

3. See Public Company Accounting Oversight Board, "Board Approves Revised 2005 Budget," December 30, 2004, www.pcaobus.org/news_and_events/news/2004/12-30.aspx (accessed December 7, 2005), and "Bylaws and Rules, Section 7—Funding," www.pcaobus.org/Rules/Rules_of_the_Board/Section_7.pdf (accessed December 9, 2005).

4. *Gonzales v. Raich*, 545 U.S. (June 6, 2005). Justice Thomas observed in dissent, "If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything, and the federal government is no longer one of limited and enumerated powers."

5. See *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978); Michael S. Greve, "Compacts, Cartels, and Congressional Consent," Missouri Law Review 68:285 (2003), and "Compacts and Collusion," AEI Federalist Outlook, no. 11 (April 2002), www.aei.org/publications/pubID.13782/pub_detail.asp (accessed December 7, 2005).

6. Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws:*

Reviving the Royal Prerogative (Westport, Conn.: Greenwood, 1998), 74–80. See also Christopher S. Kelley, "The Unitary Executive and the Presidential Signing Statement," Ph.D. dissertation, Miami University of Ohio, 2003, www.ohiolink.edu/etd/view.cgi?miami1057716977 (accessed December 7, 2005). I am indebted to Professor Kelley for sharing with me his compilation and categorization of presidential signing statements during the administration of President George W. Bush, which will be incorporated in the published version of his dissertation.

7. Edward C. Banfield, "Federalism and the Dilemma of Popular Government," in *Here the People Rule*, 2d ed. (Washington, D.C.: AEI Press, 1991), 23. Banfield is not denigrating the Framers; his point is that the characteristic American political style has been "rule by politicians rather than by statesmen, by persons skilled at patching up compromises among opposed interests rather than by persons who hold to a comprehensive and internally consistent view of the common good." Ibid., 3.

8. *McConnell v. Federal Election Commission*, 540 U.S. (December 10, 2003), quote from slip opinion, 27. References for the discussion of the McCain-Feingold Act are "Bush Flip-Flops Again," Pacific Views, www.pacificviews.org/weblog/archives/000390.html (accessed December 7, 2005), quoting George F. Will, interview with Governor Bush; The White House, "President Bush Outlines Campaign Reform Principles," March 15, 2001, www.whitehouse.gov/news/releases/2001/03/20010315-7.html (accessed December 7, 2005); The White House, "President Signs Campaign Finance Reform Act," March 27, 2002, www.whitehouse.gov/news/releases/2002/03/print/20020327.html (accessed December 7, 2005); and Akhil Reed Amar and Vikram David Amar, "Breaking Constitutional Faith: President Bush and Campaign Finance Reform," April 5, 2002, writ.findlaw.com/amar/20020405.html (accessed December 7, 2005).

9. Author's calculation based on U.S. Office of Management and Budget, The Budget of the United States Government, Fiscal Year 2006, February 2005, Historical Tables, table 1.3, www.gpoaccess.gov/usbudget/fy06/sheets/hist01z3.xls, and table 8.8, www.gpoaccess.gov/usbudget/fy06/sheets/hist08z8.xls (accessed December 7, 2005).

10. Jagadeesh Gokhale and Kent Smetters, *Fiscal and Generational Imbalances: New Budget Measures for New Budget Priorities* (Washington, D.C.: AEI Press, 2003), 36.

11. See Véronique de Rugy and Nick Gillespie, "Bush the Budget Buster," Reason, October 19, 2005, www.aei.org/publications/filter.all,pubID.23352/pub_detail.asp (accessed

December 7, 2005) See also Citizens against Government Waste, "Pork Barrel Report," www.cagw.org/site/PageServer?pagename=reports_porkbarrelreport (accessed December 7, 2005).

12. Frederick M. Hess, "The Limits of Money," *National Review*, October 11, 2004, www.aei.org/publications/filter.all,pubID.21291/pub_detail.asp (accessed December 7, 2005); author's calculation based on U.S. Office of Management and Budget, Budget of the United States Government, 2006, historical table 4.1, www.gpoaccess.gov/usbudget/fy06/sheets/hist04z1.xls (accessed December 7, 2005).

13. R. H. Coase, "Advertising and Free Speech," *The Journal of Legal Studies* 6, no. 1 (January 1977): 1,6–7.

14. MacKubin Thomas Owens, "Fighters, Not First Responders," *Weekly Standard*, October 24, 2005, 28–31.