



# WHY WE'RE LOSING LIBERTY

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How did the framers of the Constitution of the United States seek to preserve liberty and prevent tyranny? Pretty basic question. Here's the answer I usually get from my students.

"Well, Professor, to protect the individual and minorities against the tyranny of the majority, they added the Bill of Rights; and they gave the power to enforce those rights to the Supreme Court."

Are my students correct? The editorial boards of the New York Times or the Washington Post and many members of the U.S. Congress would say yes. Unfortunately, the answer is wrong. I say "unfortunately" because it reflects a common misunderstanding of the Constitution. And that misunderstanding has led to a serious erosion of our freedom.

Let me explain. Both the Bill of Rights and judicial review -- the idea that the courts can decide if a law is Constitutional or not -- were hotly debated items when the Constitution was being drafted in 1789. The Federalists, the group led by Alexander Hamilton that wanted a national constitution, opposed including a Bill of Rights. They feared it would actually undermine what the Federalists regarded as the main protections against tyranny in the document -- the limited nature of the national government itself.

The Constitution did not envision a national government of general jurisdiction -- meaning a government that could do whatever it wanted -- but rather, a government of enumerated and delegated powers -- a government that had authority over only specific areas of American life. All other powers were to be beyond the scope of the national government and reserved to the States or to the American people themselves. That's why, when political necessity forced the Federalists to yield to demands for a Bill of Rights, they took care to add two important amendments -- the ninth and tenth:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and "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."

These amendments reinforced the idea that the national government couldn't just assume powers it had not been specifically granted by the Constitution. Unfortunately, these amendments have not stymied the expansion of the national authority. The power grab the Federalists feared -- the national government taking more and more control over more and more areas of American life -- took place. Not immediately, but over time, and especially beginning in the second half of the 20th century.

That same time frame has seen a similar concentration of power in the judiciary, especially in the Supreme Court – so that now, most Americans think of the Supreme Court as the ultimate arbiter of almost every social and political dispute. The Founders never envisioned the court in this role.

How has the Court fared in playing it? Well, there have been moments of glory, to be sure, such as in the racial de-segregation case of *Brown v. Board of Education* in the 1950s. But it has also handed down decision after decision – from *Dred Scott v. Sandford* in the 1850s, which facilitated the expansion of slavery, to *Roe v. Wade* in the 1970s, which legalized abortion throughout the United States – in which the justices have plainly overstepped the bounds of their authority by creating law from the bench, thereby further expanding their own power and that of the national government.

Moreover, the Supreme Court has done little to stop the executive and legislative branches of the national government from unconstitutionally overreaching. Recently, the Court found a way, by a bare majority, to uphold an obvious case of constitutional overreach by the national government – the imposition of a law – or individual mandate, as it is known – requiring every citizen to purchase health insurance coverage as part of President Obama’s signature “Affordable Care Act.” The government defended this mandate as a legitimate exercise of its expressly delegated power to regulate commerce among the states. The trouble is that the mandate does not regulate commerce at all; rather, it forces people into commerce on pain of a financial penalty.

But why did the issue get to the courts at all? Congress and the president should have recognized and honored the fact that the Constitution simply does not empower the national government to impose a mandate on the people to purchase products, whether health insurance or anything else.

We’ve drifted a long way from the original vision of the Founders. The further we’ve drifted, the more powerful the national government has grown, and the less free Americans have become. Freedom can be taken away, but it can also be given away – out of sheer ignorance. If we Americans, we the people, want to get some of that freedom back, we need to read America’s founding documents. All the freedom we ever wanted is there.

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