

Rollover ▶

**Trade-In and Trade-Up**

Step 1  
Step 2  
Step 3

With Dell™, trading in your electronics is as easy as 1, 2, 3

**DELL**

Trade In Now ▶



Grand New Party

## Our Unlimited Government

Reihan Salam, 04.12.10, 4:54 PM ET

As John Paul Stevens retires from the Supreme Court after a long and distinguished career, it's worth remembering that he was a complicated and, in many respects, very admirable figure, and not just because of his legendary personal charm. Though considered the Court's leading liberal jurist, Stevens embraced a number of libertarian ideas.

[Tim Lee](#), writing for the libertarian Cato Institute, called Stevens "a defender of high-tech freedom," citing his forceful dissents in *Eldred v. Ashcroft* and *Diamond vs. Diehr*. In *Eldred*, the majority found that Congress could retroactively extend copyright terms, despite the fact that the U.S. Constitution explicitly called for copyrights to be restricted to "limited Times." Justice Stevens understood that this meant that powerful interests would secure yet another retroactive extension of copyright terms a few decades hence, hoarding intellectual property and stymieing intellectual progress for generations to come. (See: "[The Stevens Legacy: Mixed Verdict](#).")

In the 1981 *Diamond* decision, the majority effectively reversed 1978's *Parker v. Flook* decision to disallow software patents. As [Lee has persuasively argued](#), software patents have proven an overwhelmingly destructive force that inhibits economic growth by crippling small, innovative software developers. In both of these decisions Justice Stevens worked to limit the power of the government to reward entrenched interests. Yet this is a kind of jurisprudence that many, on the right and on the left, object to on grounds of judicial restraint.

For example, one could argue that the plaintiffs in *Kelo v. New London* were motivated by the same goal as the plaintiffs in *Eldred* or opponents of software patents. Just as endless retroactive copyright extensions benefit the rich and powerful, eminent domain abuse almost always involves transferring wealth from the politically weak to the politically strong. Nevertheless, Justice Stevens wrote the majority decision that upheld "economic development" condemnations, noting that state legislatures were free to take action to limit them in the future. His own distaste for the practice wasn't at issue. Rather, the complex web of precedent that makes up our constitutional consensus must be preserved. That is an entirely defensible view. But it does beg the question of whether the U.S. federal government is limited in any meaningful sense.

Though the U.S. Constitution has been in force since 1787, the intervening years have seen dramatic changes to how we interpret the founders' vision of an extended republic. And though we think of constitutional debates as abstract and intellectual, the truth is that facts on the ground have proven far more consequential. After the end of the Civil War the U.S. entered the ranks of the world's great powers, and that created pressures for a more centralized state.

From the 1870s to the 1930s a dominant Republican party--as dominant as the corrupt PRI in Mexico during its long reign, or the corrupt LDP in post-war Japan--created an economic and political order founded on the gold standard, a protective tariff and an unregulated national marketplace. The presidency defended the gold standard. Congress was in charge of the tariff and disbursing the revenues it raised to key Republican constituencies, like veterans of the Union Army. And the Supreme Court, composed almost entirely of Republican nominees, preserved an unregulated national marketplace by imposing a very narrow understanding of Congress's enumerated powers and leaving the 14th and 15th Amendments to the Constitution, designed to protect the interests of African American citizens, almost entirely unenforced. This was a deeply flawed arrangement, most of all because it enabled the oppression of tens of millions of Americans.

But it did have some virtues. By strictly limiting the scope of what Congress could and could not do, this constitutional settlement created a system of competitive federalism that spurred the states to create the most conducive environments for economic development. Moreover, it allowed truly national firms to emerge and to flourish, a key reason the U.S. became the world's richest and most innovative country.

During the New Deal this constitutional settlement was replaced by a new one, which prevails to this day. Congress's authority over interstate commerce was broadened to include virtually all imaginable economic activity. The system of competitive federalism has been replaced by one in which the states have been rendered increasingly dependent on federal largesse. While

the federal government has done a much better job of defending the interests of women and minorities in this era, it often seems that we've thrown out the baby with the bathwater.

Rather than a federal union of 50 state-level democracies, we are evolving in the direction of a single, homogenized national democracy. Some embrace this idea while others bitterly oppose it. Consider the frustration that progressives have expressed with the antiquated U.S. Senate and the barriers it poses to majoritarian democracy. Then consider the growing belief on the right that the individual mandate in the Affordable Care Act is unconstitutional. This deeper struggle about the nature of our constitutional order will lie beneath the next confirmation battle.

---

Simply put, the right will lose this debate. It's impossible to imagine the Supreme Court ruling the mandate unconstitutional. That battle was lost in 1937, when FDR leaned on the Supreme Court to embrace a more expansive understanding of federal power. In all likelihood, President Obama will succeed in replacing John Paul Stevens with a centrist liberal devoted to entrenching the power of the federal government. But the left will nevertheless have a very difficult time creating something like a European-style parliamentary democracy, and pervasive constitutional frustration will continue. What we need is a new constitutional settlement, one that enables a multi-speed federal republic that allows some states to become robust social democracies while others embrace laissez-faire.

*Reihan Salam is a policy advisor at e21 and a fellow at the New America Foundation. The co-author of Grand New Party: How Republicans Can Win the [Working Class](#) and Save the [American Dream](#), he writes a weekly column for Forbes.*

**Read more Forbes opinions [here](#).**