

1.8

Constitutional Interpretations of Federalism

Explain how the appropriate balance of power between national and state governments has been interpreted differently over time.

State sovereignty was not abolished with the ratification of a new constitution in 1787. On the contrary, as another example of compromise and prudence, the United States Constitution recognized the importance and sovereignty of individual state governments. The U.S. Constitution and the Bill of Rights distribute power not only to the people and the respective branches of the national government but also to innumerable state and local governments. **Federalism reflects the dynamic distribution of power between national and state governments.** The practical effects of federalism have been contested and mediated throughout our history.

Federalism provided for the separation of power between national, state and local governments. In essence our constitution welcomed dual sovereignty. Though the national government was supreme, state and local governments had reserved powers that existed outside the reach of the central government. Though federalism encouraged efficacy by placing significant political authority in the hands of local officials, it also was seen as a natural safeguard to individual liberty.

The relationship between these sovereign governments has never been easy to navigate. The relationship between governments at all levels, however, should not be perceived of as a layer cake. Rather our evolving federal model looks more like a marble cake. The duties and responsibilities of government at every level are now most likely shared. When the national government appropriates money for new roads they count on the local and state governments to oversee these shovel-ready projects. The money comes from Washington but the details including the construction crews are hired at the local level.

Delegated powers are those given exclusively to the national government. These would include the ability to go to war and negotiate foreign policy. Concurrent powers are those that are shared between national and state governments. An example of a concurrent power would be health care. National, state and local governments generally share health care costs. Reserved powers, as guaranteed in the Tenth Amendment, are given exclusively to the state governments. Though there are fewer and fewer examples, many reserved powers today deal with licenses and much of our education policy. The Tenth Amendment reserves powers to the states by declaring:

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.

The Supreme Court serves as the ultimate arbitrator when disputes arise. Disputes over the balance of power between the national and state governments have characterized much of our political history.

In most cases these disputes increased and consolidated power at the national level. The story of American government is a story of the aggrandizement of the national government. Over time the national government has taken on more and more authority and power. This has been somewhat expected due to the supremacy clause found in our constitution. The Supreme Court empowered the national government even more in the case *McCulloch v. Maryland* (1819). In this case the court expounded upon the meaning of the necessary and proper clause found in Article 1, Section 8 of the constitution. The particulars involved the creation of a national bank. No such bank had been enumerated in the original text. Nevertheless, the court ruled in the national government's favor. The court has also affirmed broad use of the commerce clause to expand the reach of the national government. In fact, the commerce clause has been used more than any other section of our constitution to expand the power of the national government.

Wars and economic crises help explain this consolidation of power. Both during and in the wake of the American Civil War the national government took on greater responsibility for the general welfare of the American people. In particular the abolition of slavery required an extraordinary act of political will power by the national government. Constitutional amendments would ultimately help in sealing this transfer of power. The Thirteenth Amendment freed the slaves. The Fourteenth Amendment extended to all citizens the following unprecedented protection:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifteenth Amendment extended suffrage to all African-Americans. With this new authority the national government assumed more and more power to help overcome discrimination against all marginalized groups. Securing individual liberties has increasingly become a national priority. Economic crises that followed the Civil War would also extend the authority of the national government.

The Great Depression of the 1930s, more so than any economic crises, welcomed an ever-expanding role for the national government. Franklin Roosevelt's New Deal programs consolidated unparalleled powers. The National Industrial Recovery Act (NIRA) of 1933, for example, empowered the national government to regulate American business in new ways. Regulatory powers over the economy would continue to expand.

The aggrandizement of the national government has not gone unnoticed. Conservatives have traditionally been the party of limiting the authority of the national

government. Groups like the Tea Party and others have organized around the goal of reducing the size of the federal government. This is not new. Republicans over forty years ago called for a New Federalism. Another name for this is devolution. New Federalism or devolution was an idea to shift power away from the national government and toward state governments. New Federalism has often been called a return to States rights. New Federalism is an attempt to return to classical federalism. This movement has had marginal success. Welfare reform during the 1990s returned much of the authority over poverty programs to State initiatives. Conservatives in Congress also passed the Defense of Marriage Act (1996) to protect certain state prerogatives. The U.S. Supreme Court also played a role in devolution in such cases as *U.S. v. Lopez* (1995).

This case proved that federalism is not a dead letter. The national government has grown exceedingly strong but it still has limits. In *U.S. v. Lopez* (1995) the Supreme Court ruled that the Gun-Free School Zones Act of 1990 went beyond what the Constitution's Commerce Clause could allow. For the first time since the New Deal the Court limited the scope and reach of the Commerce Clause. This heralded a triumph for conservatives who still championed federalism and states' rights.

Attempts made to reduce the size of the federal government may have achieved rhetorical success but little in the way of real reform. In the end the Defense of Marriage Act (1996) would not survive the test of time. With the attacks on September 11 the national government took on even more power and authority when protecting the lives of American citizens. With policies such as No Child Left Behind (2001) and the Affordable Care Act (2010) the national government took on greater responsibility for education and health care respectively.

Look into any crystal ball and you are likely to see that the age of big government is certainly not over.