

Federalism

Today, an extremely brief history of constitutional law decisions by the Supreme Court.

We'll focus on the changing nature of federalism due to the federal government's growth.

We'll also consider how the commerce clause has allowed the federal government's growth.

Historically, there's been a shift from “dual federalism” to “cooperative federalism”

1. Dual federalism = Federal gov't & states are co-equals, each sovereign. Constitutional powers of federal government are narrowly interpreted.
2. Cooperative federalism = Federal gov't is supreme over states. Constitutional powers of federal gov't are broadly interpreted. Federal gov't takes lead and then states cooperate in executing programs.

Constitutional Provisions Delimiting Federal Power

- Powers reserved to the states (Amendment X).
- The Supremacy Clause (Art. VI).
- Commerce Clause (Art. 1, § 8, cl. 3).
- The Necessary and Proper Clause (Art. I, § 8, cl. 18).

Amend. X

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.

Supremacy Clause (Art. VI, Section 2)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.

Commerce Clause (Art. 1, § 8,
cl. 3).

[Congress has the power to]
regulate Commerce with foreign
Nations, and among the several
States.

The Necessary and Proper Clause (Art. I, § 8, cl. 18).

Congress shall have Power To
...[enumerated powers]...

18. To make all Laws which shall
be necessary and proper for
carrying into Execution the
foregoing powers.

McCulloch v. Maryland

(1819) (Burnham p22)

- Issue: Does Congress have the power to create a national bank under the “necessary and proper” clause (Art. I, § 8, cl. 18)?
- This power isn’t among Congress’ enumerated powers. But those include the power to tax and spend for the general welfare, borrow money, regulate interstate commerce, support armies and navies.

- The “necessary and proper” clause allows Congress “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] powers.”
- “If the **end** be legitimate, and within the scope of the Constitution, all the **means** which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.”

- *McCulloch* 1st major decision by SCt under Chief Justice John Marshall about the relationship between states and national gov't.
- Foreshadowed future broad interpretations of “necessary & proper” clause.

Gibbons v. Ogden (1824)

(not in Burnham)

- Facts:
 - New York licensed shipping on the Hudson river.
 - Federal gov't authorized Gibbons to ship on Hudson within the state of New York.
 - New York denied him passage due to lack of state license.
- Held: Congress' power to "regulate commerce ... among the ... states" includes power to regulate (a) not just trade but also navigation; & (b) *intrastate* activities that affect interstate commerce.

Dred Scott v. Sandford (U.S. 1857)

(Burnham at 24)

Facts: Scott a slave owned by doctor in Missouri (slave state), who moved with Scott to Illinois & Wisconsin (free states) and then back to Missouri.

Claim: The Missouri Compromise of 1820 was that as U.S. expanded westward, the numbers of slave & free states would remain =, maintaining the balance of power. Scott claimed that by residing in free states, he had become free.

Holding:

- (1) No diversity jurisdiction because Scott isn't a "citizen" of a state.
- (2) Missouri compromise unconstitutional because it violated the 5th amendment's prohibition: No person shall be deprived of property without due process of law.

Evaluation:

- (1) Taney argued that the Constitution allowed continued importation of slaves & required return of escaped slaves so blacks are property not citizens. But Scott argued he was a *free* black, a group not explicitly addressed in the constitution.
- (2) 5th amendment's due process clause only requires proper administrative or judicial procedures for deciding cases and does not limit the substance of laws (i.e., there is no constitutional right to "substantive due process"). So wrong to hold Missouri Compromise unconstitutional.

Evaluation (cont'd):

- (3) Judicial review should only be exercised as a last resort, as a way to show respect to other branches & encourage democracy. Once jurisdiction issue resolved, unnecessary to address statutory issue. Striking down statute is unnecessary judicial activism & cts unlikely to be able to solve most divisive political issue of time (slavery).

Evaluation (cont'd):

(4) Ruling polarized U.S., leading it closer to civil war:

- Northerners outraged.
- Southern slave holders pleased.
- Blacks lost hope.
- Influenced Lincoln's election as President in 1860. Accelerated path towards civil war.

Evaluation (cont'd):

- (5) Reduced respect for ct because decision seemed to be politically motivated & because decision didn't resolve the slavery issue.
- New York Tribune wrote that the decision had no more moral weight than the judgment of those in a bar.
- Lincoln's inaugural address said decision binding only on parties & he would ignore the ruling that the statute was unconstitutional. (He issued passports to free blacks, further restricted slavery in western territories).

1. Civil War (1861-1865)
2. Civil War Amendments to Constitution:
XIII & XIV (1865)

1. **New Deal:** FDR's response to Great Depression.
2. **SCt declares 9 statutes unconstitutional 1935-1937.** E.g., Schechter Poultry Corp. v. US (1935) (Nat'l Industry Recovery Act federal minimum wage and maximum hours laws not constitutional under the commerce clause because Act regulates "intrastate" activities that only "indirectly" affect interstate commerce.).
3. **FDR's court packing threat:** Increase SCt to 15 justices.
4. **SCt overruled precedents** narrowly interpreting the commerce clause, further expanding federal gov't power. E.g., US v. Darby (US 1941) (Federal Labor Standards Act, making it illegal to ship in interstate commerce goods manufactured by children or by workers making less than the national minimum wage, was constitutional under commerce clause as activities substantially affecting interstate commerce.)

Revival of Federalism?

- By the 1980s and 1990s, many Americans began to think that the national government was too big, too strong, and too distant to understand their concerns.
- Reagan Revolution / New Federalism proposed a return of powers to the states



- Beginning in 1980's, the Supreme Court once again played a role in the evolution of federalism.
- Several members of the Rehnquist Court supported limitations on Congressional power and greater state autonomy (e.g., *Lopez*)