THE GREAT COURSES®

Topic
History

Subtopic
American History

The Evolution of American Federalism

Course Guidebook

Joseph L. Hoffmann, JD

Printed in the United States of America

4840 Westfields Boulevard, Suite 400
Chantilly, VA 20151-2299
USA
1-800-832-2412
www.thegreatcourses.com

Joseph L. Hoffmann, JD

Joseph L. Hoffmann is the Harry Pratter Professor of Law Emeritus at Indiana University Maurer School of Law, where he has taught since 1986. He earned his JD from the University of Washington School of Law. He has taught about American federalism at leading universities in France, Germany, Hungary, India, Japan, Kazakhstan, Poland, and Thailand. At Indiana University, he has received the Leon H. Wallace Teaching Award, the Trustees' Teaching Award, the Teaching Excellence Recognition Award, and the Gavel Award.

Table of Contents

1

Federalism: America's GREAT INNOVATION

The American system of government involves a unique and ever-changing balance between state and federal power. This balance of power is called Federalism. American Federalism is based on the idea of dual sovereignty. At the nation's founding, the states agreed to surrender some of their sovereign powers to the new federal government, including the power to protect national security, while retaining power over other matters, such as public schools and public safety. In this course, you'll examine how Federalism has defined the history, politics, and governance of the United States from its beginnings to the present day—and how Federalism continues to evolve with the changing needs and interests of the American people.

QUESTIONS OF FEDERALISM

On the morning of November 8, 2000—the day after Election Day—George W. Bush, the Republican candidate for president, led his Democratic opponent, Vice President Al Gore, in Florida by fewer than 1,800 votes. The candidate who prevailed in Florida would become America's next president. Under Florida state law, the razor-thin margin triggered an automatic machine recount that reduced Bush's lead to a mere 327 votes—and that was only the start of the trouble.

Ballot issues meant that many votes for both candidates were not counted at all. However, if a voter's intent was clear, shouldn't their vote be counted? A team of lawyers representing Vice President Gore argued just that. Two days after the election, Gore invoked his right to ask for manual recounts in four Florida counties with large Democratic majorities where there were known problems with the ballots. These manual recounts were likely to favor Gore. In response, Republican lawyers complained that such a selective recount would be unfair to their candidate, George W. Bush.

Under Florida law, all recounts must be completed by 1 week after Election Day. So, the arguments over disputed ballots, vote counts, and manual recounts needed to be resolved by 5 pm on Tuesday, November 14. The Gore campaign obtained rulings from several Florida state judges ordering this deadline to be pushed back and the manual recounts to proceed. The Bush campaign then sued in federal court, asking a federal judge in Miami to issue an injunction and halt the manual recounts because different counties proposed to use different rules to conduct the recounts—which would violate Florida voters' federal constitutional rights.

When the judge declined to issue the injunction, the Bush lawyers appealed to the 11th Circuit, the federal appellate court based in Atlanta, Georgia. A chaotic situation ensued involving multiple competing lawsuits in varying courts—some in the Florida state courts and some in the federal courts, including the US Supreme Court.

When a serious dispute about the outcome of a US presidential election occurs, is it a matter of state law because the US Constitution places the primary responsibility for federal elections with the states? Or is it a matter of federal law because the president is the chief executive of the federal government and Congress ultimately must validate the election? Who gets to answer such questions—state officials, state legislatures, and state courts or Congress and the federal courts?

DUAL SOVEREIGNTY

The framers of the US Constitution first devised the novel idea of dividing the powers of government between state and federal sovereigns to ensure that neither one would ever become strong enough to threaten the liberty of the American people. That idea has worked well for more than 2 centuries. Despite occasional episodes of tension, confusion, and even chaos, American Federalism truly represents the nation's greatest gift to the world of politics and political theory.

Modern-day Federalists are trying to reduce the power of the federal government and return power to the states. However, the framers of the new US Constitution originally wanted to create a stronger federal government to help protect and defend the newly independent American colonies against the great powers of Europe that might threaten their prosperity and even survival.

The Second Continental Congress adopted the Articles of Confederation in November 1777, allowing each individual state to choose for itself whether to contribute toward the common good. That weakness almost cost America the War of Independence by starving the Continental Army of adequate levels of funding. After the war, most colonists understood the need for a stronger federation but still resisted the idea of creating a new federal government that might grow into a tyrannical power that could threaten individual liberty. So, the framers proposed that the US Constitution be based on the idea of dual sovereignty.

At the time, all of the sovereign powers that protected the general health, safety, and welfare of the people belonged to the individual states. Under the US Constitution, the states would transfer only a relatively narrow, clearly defined list of powers to the new federal government—a list of powers specifically enumerated within the text of the Constitution itself. Most of these enumerated federal powers were listed in Article I, Section 8. The original list included raising tax money and spending it for the common defense and general welfare, regulating interstate and foreign commerce, regulating a federal district (today, the District of Columbia), and making any laws "necessary and proper" to carry out these enumerated powers. Article II added the power to make treaties.

The new federal government would be strictly limited to the list of enumerated powers. All other sovereign powers would remain with the states. This system of government continues to define America today.

THE VIRGINIA PLAN

James Madison was the main architect of American Federalism and much of the Constitution itself. After the War of Independence, Madison traveled to Philadelphia in May 1787 as one of Virginia's seven delegates for the Constitutional Convention. He developed the so-called Virginia Plan, which eventually became the template for the draft Constitution.

Madison had the keen insight that the three branches of the new federal government—the executive, the legislative, and the judiciary—should have both substantial independence and a limited ability to check and balance the other branches so that none of them would ever become too powerful. The idea of Federalism based on dual sovereignty was an even more important innovation. This notion allowed the new federal government to reign supreme with respect to all powers specifically transferred to it by the Constitution while preserving state sovereignty with respect to all other powers not so transferred.

The Virginia Plan gave Congress the authority "to legislate in all cases to which the separate States are incompetent." The plan also provided that federal law would take precedence over conflicting state laws. However, this principle of federal supremacy gave rise to an obvious question—and a related problem. In the case of a dispute about the proper scope of an enumerated federal power, who should decide the issue? Most framers agreed that the federal government must have the final word lest disagreements among the states lead to confusion, paralysis, and even civil war. But how could the federal government be prevented from aggrandizing its own power at the expense of the states?

Madison's brilliant solution was political: Those powers of government most essential to the daily lives of the people—for example, the power to regulate marriage and families—should remain with the states. As a result, the people would always be more interested in and loyal to their state governments than to the federal government, which would be largely preoccupied with remote matters, such as national defense. If the federal government ever did try to encroach too much on the powers of the states, the people would have the ability to vote for new federal government officials who would promise to stop doing so. In short, Madison's plan trusted the American people with the ultimate control over the future of Federalism.

JUDICIAL REVIEW

Madison served in the first US House of Representatives; he also drafted and introduced the first set of amendments to the Constitution, 10 of which were adopted in December 1791 and became known as the Bill of Rights. He then became President Thomas Jefferson's secretary of state, and he served two terms as president himself from 1809 to 1817.

As secretary of state, Madison was one of the named parties to the most important decision ever rendered by the US Supreme Court: the case of *Marbury v. Madison*. While the framers mostly agreed that the federal government must always have the final word in determining the scope of federal power under the Constitution, they had to ask what branch of federal government should have the final word.

In *Marbury v. Madison*, the Supreme Court ruled, "It is emphatically the province and duty of the judicial department to say what the law is." This case established the fundamental principle of judicial review, which includes the judicial power to declare that a statute enacted by Congress is "repugnant to the Constitution" and to strike down that statute as null and void.

SOLVING *BUSH V. GORE*

Although the election of a president is prescribed by the US Constitution, most of the specific rules governing the election of the presidential electors are made by the states. This provision is why the game of "musical courts" in *Bush v. Gore* started out mostly in the Florida state courts.

Remember that Florida law set a deadline of 5 pm on Tuesday, November 14, to complete all recounts. That deadline couldn't be met by the four large counties where the votes were disputed. On November 15, Florida's Republican secretary of state, Katherine Harris, asked the Florida Supreme Court to order a halt to the manual recounts, but the court declined to do so. The Gore campaign offered to withdraw its lawsuits if the Bush campaign would agree to allow the manual recounts in the four counties to continue. The Bush campaign declined.

The Florida Supreme Court didn't say whether Harris had to accept any manual recounts submitted after the original November 14 deadline. After further consideration, Harris announced that she would not accept any such late results and would certify the Florida results on November 18. If upheld, this decision would make Bush the winner. On November 17, the Florida Supreme Court blocked Harris from certifying the election the following day. Several days later, the same court extended the certification deadline to 5 pm on November 26 and ordered Harris to accept the results of any manual recounts submitted prior to that date.

The new deadline also came and went, and the manual recounts still weren't finished. So, Harris went ahead and certified Bush as the winner in Florida. The Gore campaign returned to the Florida courts to challenge the certification. Simultaneously, the Bush campaign sought a ruling from the US Supreme Court about whether the Florida Supreme Court's extension of the original certification deadline violated the US Constitution.

On December 4, the Gore campaign lost its case in the state courts. The US Supreme Court ordered the Florida Supreme Court to reconsider its earlier decision extending the original November 14 deadline. On December 8, the Florida Supreme Court authorized a new statewide manual recount. The next day, the US Supreme Court temporarily halted all manual recounts in Florida and scheduled an expedited hearing on the federal constitutionality of the Florida Supreme Court's decision.

That hearing led to the historic final ruling in *Bush v. Gore*, issued on December 12, 2000. By 5 to 4, the high court decided that a separate Florida state law required the selection of its presidential electors to be concluded by no later than that same day, December 12—and that a statewide manual recount could not be implemented in time without relying on inconsistent standards that would violate the equal protection clause of the Fourteenth Amendment to the US Constitution. Thus, George W. Bush became the 43rd president of the United States.

READING

Bush v. Gore, 531 US 98 (2000). https://supreme.justia.com/cases/federal/us/531/98.

Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers*. 1787–1788. Library of Congress. https://guides.loc.gov/federalist-papers/full-text.

Marbury v. Madison, 5 US 137 (1803). https://supreme.justia.com/cases/federal/us/5/137.

2

How Federalism SHAPES American POLITICS

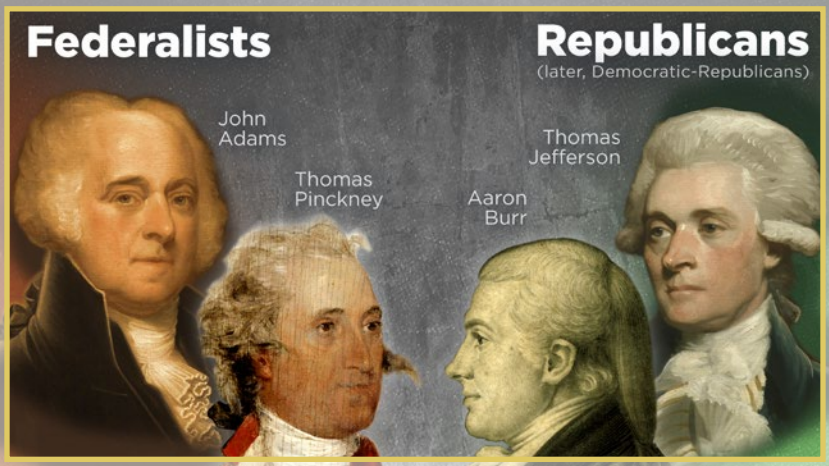
Today, it's difficult to imagine a United States of America without the Republican Party and the Democratic Party. The two-party system has become the American way. However, things weren't supposed to be this way. Might the ever-changing views of Americans about Federalism bring about yet another transformation in political party identity? Or might a new party emerge from America's current polarization and replace either the Republicans or the Democrats? If you think back over the six eras of party politics you'll learn about today—from the first era of the framers to the sixth era of today—you'll see that most of the political transformations had a great deal to do with Federalism and the related issue of "states' rights."

THE FIRST ERA

The seeds of the two-party system were sown even before the US Constitution was ratified, when the Federalists (who wanted a stronger federal government) and the Anti-Federalists (who wanted to preserve the original power of the states) squared off against each other over ratification. The Federalists eventually carried the day, and the Constitution was ratified. The bitter battles over Federalism between these parties defined what historians today call the first era of political parties in America.

The presidential election of 1796 pitted John Adams, the Federalist candidate, against Thomas Jefferson, the Republican candidate. Each man also had a running mate who hoped to become vice president—Thomas Pinckney for the Federalists and Aaron Burr for the Republicans.

The original rules for the Electoral College made it difficult for a party to elect both of its nominees. Basically, each party's electors had to cast one of their two electoral votes for their presidential candidate—but then try to ensure that their vice-presidential candidate didn't quite get as many electoral votes as their presidential candidate lest the two tie, sending the choice of president to the House of Representatives.



In 1796, both parties fumbled things. Federalist Adams received 71 electoral votes, barely enough to win the presidency. However, second place went to Republican Jefferson, with 68 electoral votes. The newly elected President Adams was stuck with his political opponent as his vice president.

Four years later, the 1800 election was a rematch between Adams and Jefferson. By this time, the two parties were somewhat more organized. However, Jefferson and his running mate, Burr, finished in a tie, each receiving 73 electoral votes. As such, the House of Representatives had to choose between the Democratic-Republican running mates, and it would vote by state delegation, not individually.

The Federalist Party controlled exactly half of the state delegations in the House and had no interest in choosing their leading political opponent Jefferson as president. So, the House deadlocked. Over 8 days in February 1801, 35 votes were taken, and each ended in a tie between Jefferson and Burr. Finally, on the 36th ballot, some Federalist House members switched their votes, and the House chose Jefferson as president. Burr became vice president.

This fiasco led Congress to propose the Twelfth Amendment to change the rules of the Electoral College to have separate votes for president and vice president. The amendment was ratified just in time for the 1804 election.

THE SECOND AND THIRD ERAS

By the 1820s, the Federalist Party had faded away as a national political force—in part because the party refused to support the War of 1812 under Democratic-Republican President Madison. Toward the end of this decade, a new political force emerged within the Democratic-Republican Party that split the party in two—Jacksonian democracy.

Andrew Jackson had served as a judge, congressman, and senator from Tennessee before gaining national fame as a general during the War of 1812. In 1824, he ran for president and won a plurality of both the popular and electoral votes. However, because there were four presidential candidates that year, Jackson fell short of a majority in the Electoral College—and he then lost to John Quincy Adams when the House of Representatives decided the election.

By 1828, Jackson had created the Democratic Party, and he won the presidency in a landslide. After he was reelected in 1832, his political opponents, led by Henry Clay and Daniel Webster, formed the Whig Party. The second era of political parties had begun.

Jacksonian democracy represented a clean break from the elitist politics of the past. Jackson supported near-universal suffrage for White men over the age of 21, the popular election of state judges and prosecutors, and the political appointment of federal government officials to avoid a permanent class of civil servants. In terms of Federalism, in his first inaugural address, he promised to protect the sovereignty of the states—pledging the Democratic Party as the party of states' rights.

The next great shift in American politics occurred as the direct result of slavery. On March 20, 1854, in Ripon, Wisconsin, the Republican Party was founded in opposition to the Kansas-Nebraska Act. This legislation allowed the issue of slavery to be decided by popular sovereignty in the new territories of Kansas and Nebraska. By the time Abraham Lincoln was nominated in 1860, the new Republican Party had gained political control throughout the Northeast and Midwest—resulting in an unbroken string of presidential victories over the next 2 decades.

The Republican Party originally did not seek to end slavery where it already existed in the South. However, by strictly opposing any expansion of slavery, the Republicans placed themselves on a collision course with the Southern slavery states. Meanwhile, the Democratic Party fractured. The Northern segment, led by Stephen Douglas, advocated that the slavery question should be decided by the people of each state or territory. The Southern segment openly supported slavery based on both individual property rights and the rights of the states.

In short, the third era of political parties in America was marked by major disagreements over Federalism as America gradually descended into civil war. The war itself was fought between the federal government—or Union—and the Confederacy, a group of rebellious states that tried to break away from the Union to preserve slavery, which they saw as a matter of states' rights.

THE PROGRESSIVE ERA AND THE NEW DEAL

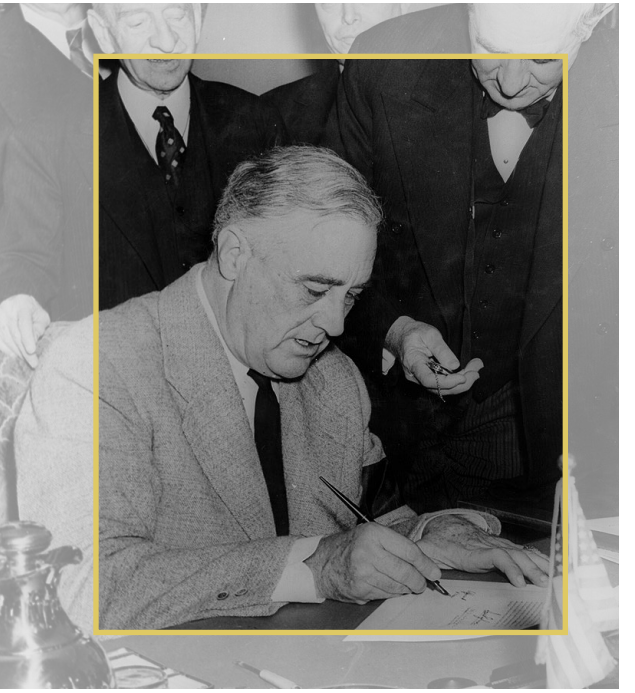
After the war and the Union's triumph, the Republican Party continued to stand for a strong federal government to ensure the rights of the new Black freedmen. The Thirteenth, Fourteenth, and Fifteenth Amendments were meant to guarantee those rights and to pledge federal protection for them, thus achieving the most significant shift in the balance of Federalism in American history. Meanwhile, the Democratic Party became the party of defiant Southerners who sought to resist Reconstruction—the federal government's occupation of the former Confederate states—and to suppress the emerging political power of Black Americans.

Although Reconstruction largely ended as a result of the compromise between the Republicans and the Democrats that resolved the disputed presidential election of 1876, the Republican Party remained the dominant political party in America well into the early 20th century.

The Progressive Era (from the 1890s through the 1920s) was all about the economy—the busting of monopolies and "trusts," the rise of labor unions, and the impacts of immigration. During this era, Republicans were generally the party of "big business" and limited federal regulation.

From Lincoln's election in 1860 through the election of Herbert Hoover in 1928, only two Democrats—Grover Cleveland and Woodrow Wilson—managed to defeat their Republican opponents in a presidential election. Then, in October 1929, the bottom dropped out on the Republican Party when the US stock market crashed, and the Great Depression followed. By 1932, Americans were desperate for a "New Deal"—and Democrat Franklin Delano Roosevelt (FDR) was elected president in a landslide.

This election heralded the start of the fifth era of political parties in America and brought about another major political realignment. Under FDR and his successors, the Democratic Party became the party of big government as the American people turned to Washington DC to address economic problems too big for their states to handle. This political shift dramatically altered the balance of Federalism. The New Deal resulted in the creation of many new federal administrative agencies—such as the Securities and Exchange Commission—and an expanded role for many more. FDR also boosted



the power of the presidency by issuing executive orders to accomplish whatever he couldn't persuade Congress to do.

These New Deal expansions of federal power at the expense of the states happened because a majority of the American people allowed them to happen. FDR's forceful use of federal power—first to overcome the Great Depression and later to defeat America's adversaries during World War II—was popular too.

THE SIXTH ERA

FDR's successor, Harry S. Truman, set in motion the next major transformation in American party politics. In June 1947, Truman—who'd grown up in the former slavery state of Missouri—became the first president to address the annual meeting of the National Association for the Advancement of Colored People. Then, in February 1948, Truman made a bold civil rights speech before a joint session of Congress, advocating the passage of new federal legislation to prohibit lynching, protect the right to vote, and support equal opportunity in employment.

These moves splintered the Democratic Party. At the party's convention in July 1948, delegate Hubert Humphrey—then mayor of Minneapolis—proposed a strong civil rights plank for the party's platform. Truman supported the proposal. In protest, many Southern delegates voted for Georgia Senator Richard Russell instead of the incumbent President Truman. A new States' Rights Democratic Party quickly formed and nominated South Carolina Senator Strom Thurmond as its presidential candidate. Less than 2 weeks after the convention, Truman issued two executive orders mandating the racial desegregation of the federal government workforce and the US military. He went on to win the 1948 presidential election in a major upset over Republican Thomas E. Dewey.

Southern Democrats' resistance to desegregation and civil rights continued to undermine party unity and ultimately brought about yet another major political transformation. On November 22, 1963, President John F. Kennedy—a Democrat and supporter of civil rights—was assassinated. Vice President Lyndon B. Johnson was sworn in as the new president.

Johnson immediately took up the mantle of civil rights reform and convinced Congress to enact a series of landmark federal civil rights statutes, including the Voting Rights Act of 1965. In 1964, Johnson won easily over Republican Barry Goldwater, but Goldwater took five of the Deep South states. And in 1968, when Hubert Humphrey was the Democratic candidate, four of those same Deep South states gave their electoral votes to third-party candidate George Wallace, a staunch segregationist from Alabama. The rest of the South—with the exception of Texas—went for Republican Richard M. Nixon, who became the nation's 37th president.

In 1972, Nixon swept the South, although he was later forced to resign due to the Watergate scandal. In 1976, Democrat Jimmy Carter reclaimed the Southern vote. However, in 1980, Republican Ronald Reagan won by a landslide.

President Reagan completed the political sea change by proposing a major rebalancing of Federalism, returning power from the federal government back to the states. The so-called Reagan Revolution that began in 1980 was arguably the most significant shift in the direction of the states that had occurred in the history of American Federalism thus far.

READING

Boyd, James. "Nixon's Southern Strategy." *The New York Times*, May 17, 1970. https://www.nytimes.com/1970/05/17/archives/nixons-southern-strategy-its-all-in-the-charts.html.

Hamilton, Alexander. *Federalist* No. 9: "The Utility of the Union as a Safeguard against Domestic Faction and Insurrection." 1787. https://guides.loc.gov/federalist-papers/text-1-10#s-lg-box-wrapper-25493272.

Madison, James. *Federalist* No. 10: "The Union as a Safeguard against Domestic Faction and Insurrection." 1787. https://guides.loc.gov/federalist-papers/text-1-10#s-lg-box-wrapper-25493272.

Mansfield, Harvey C. "Parties vs. Factions in America." *Defining Ideas*, September 21, 2017. https://www.hoover.org/research/parties-vs-factions-america.

———. "The Virtue of Party Politics." *Defining Ideas*, September 20, 2017. https://www.hoover.org/research/virtue-party-politics.

3

States CAN'T NULLIFY Federal Law

Can a state simply declare that it "rejects" a federal law with which it disagrees or that it believes is beyond the constitutional authority of the federal government? Isn't that a violation of the supremacy clause in the US Constitution? However, if the federal government really does overreach its constitutional authority, what's a state supposed to do? These thorny questions have arisen time and again throughout American history—and these are the questions this lecture will discuss.

SUPREMACY AND NULLIFICATION

The relationship between federal and state law involves two closely related concepts—supremacy and nullification. Supremacy refers to the fundamental principle that federal law is supreme, no matter what state law might say. The lack of a supremacy clause was one of the largest defects of the Articles of Confederation, allowing any state to effectively thwart a federal law or policy simply by refusing to go along with it. The supremacy of federal law was so important to the framers that at the Constitutional Convention, Madison proposed that Congress should have the power to "nullify" any state law that might get in the way of achieving a federal goal. However, the supremacy clause was seen as sufficient to take care of the problem.

Shortly after the Constitution was ratified and the American political system split into the Federalist Party and the Democratic-Republican Party, a political controversy arose that prompted Madison to temporarily alter his position. The catalyst was Jefferson's outrage over the adoption of the Alien and Sedition Acts in 1798, which made it a federal crime to utter false statements against the federal government, Congress, or the president—who happened to be John Adams, Jefferson's political rival.

Jefferson saw this as a clear violation of the First Amendment and therefore started a secret campaign to rally state opposition. He drafted and promoted the so-called Kentucky Resolutions, which argued that individual states possessed the power to nullify any federal laws that they believed to exceed the constitutional authority of the federal government. This idea of state nullification was based on the theory that the Constitution was an agreement between the states—meaning that any single state could enforce the limitations on federal power in the agreement or even decide to leave it entirely if those limitations were ignored.

Jefferson's claim of state power to nullify federal law was widely seen as extreme and perhaps dangerous. John Breckinridge—the Kentucky legislator who sponsored Jefferson's resolutions—therefore deleted the key sentence about "nullification." Meanwhile, in Virginia, Jefferson recruited Madison's help to draft similar Virginia Resolutions. In his 1798 draft of these

resolutions, Madison carefully avoided using the word *nullification*. Instead, he wrote that the states "have the right, and are in duty bound to interpose to arrest the evil." Despite Jefferson's best efforts, no other state ever signed on to the Kentucky and Virginia Resolutions, and Madison soon reverted to his original position on state nullification.

THE NULLIFICATION CRISIS OF THE 1830S

Another major nullification crisis erupted in the 1830s, when regional divisions over slavery and economic policy were beginning to tear the nation apart. In 1828, the federal government imposed a set of harsh tariffs designed to reduce the importation of manufactured goods from Great Britain. Southerners viewed these federal tariffs as especially damaging to their own economic prospects. Without a manufacturing base, the South was more reliant on imported goods. Moreover, any reduction in British imports would generate less money for the British to buy Southern cotton.

After Southerner Andrew Jackson became president in 1829, hopes ran high that the Tariff of 1828 might be eliminated or greatly reduced. However, Jackson signed a new set of tariffs similar to the 1828 version into law in July 1832. On November 24, 1832, a South Carolina state convention adopted the Ordinance of Nullification, declaring the Tariffs of 1828 and 1832 unconstitutional and unenforceable in the state. President Jackson responded by issuing a proclamation to South Carolina:

> I consider … the power to annul a law of the United States, assumed by one State, incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed.

South Carolina began preparing for the possibility of federal military intervention. On March 1, 1833, Jackson obtained a Force Bill from Congress authorizing the use of the US military against South Carolina. Fortunately, on the very same day, Congress also passed the Compromise Tariff of 1833. South Carolina accepted this new tariff and repealed its Ordinance of Nullification.

The Nullification Crisis of the 1830s was only the first shot in a much larger conflict over slavery, states' rights, and Federalism that eventually culminated in the Civil War. Secession is the ultimate form of nullification.

CIVIL WAR

By 1850, slavery had become the dominant political issue of the day. Tensions between Northern antislavery states and Southern proslavery states ran high. The so-called Compromise of 1850 was intended to lower the temperature by approving California as a new free state and banning the slavery trade in the District of Columbia. The compromise also created the new territories of New Mexico and Utah—allowing popular sovereignty to decide the slavery question there—and, most importantly, it enacted the federal Fugitive Slave Act of 1850, which made it easier for owners of enslaved persons to obtain the return of escapees.

Northern states responded to the Fugitive Slave Act with various forms of attempted nullification. Several Northern states enacted laws seeking to assist runaways in defiance of the federal law. As early as 1809, the US Supreme Court held that Pennsylvania's legislature lacked the authority to pass a state statute declaring a federal court's decision to be "null and void." Since then, the court has never wavered in its view that state nullification of federal law is strictly prohibited by the supremacy clause.

In 1854, Congress created the territories of Kansas and Nebraska and allowed them to decide for themselves whether to allow slavery through popular sovereignty. This action repealed the Missouri Compromise of 1820, which had prohibited slavery in all new territories that were part of the Louisiana Purchase and located north of the 36-degree, 30-minute latitude line. The Kansas-Nebraska Act outraged many antislavery Northerners and led directly to the formation of the new Republican Party, which opposed any expansion of slavery. The election of Republican Abraham Lincoln as president in 1860 was the final straw that led South Carolina to declare secession on December 20, 1860. Ten additional Southern states soon followed in seceding from the Union and formed the new Confederate States of America, which led to the Civil War between North and South.

The aftermath of the Civil War—including the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution—dramatically altered the balance of Federalism and sought to redefine America as a single nation. However, in the South, a new, revisionist interpretation of the Civil War downplayed the significance of slavery in favor of the claim that the Confederacy was simply seeking to defend the rights of the states to resist unauthorized federal power. This "just cause" theory facilitated Southern resistance to Reconstruction, which in turn led to the Jim Crow era of racial segregation and White supremacy.

Almost a century after the Civil War, states' rights and nullification returned with a vengeance. The triggering event was the Supreme Court's 1954 decision in *Brown v. Board of Education*, which held that the equal protection clause of the Fourteenth Amendment required the desegregation of America's public schools. Prominent Southern leaders asserted the right to resist federal law on the subject of racial integration in schools and, later, in public facilities and accommodations.

However, just as before, these attempts to nullify federal civil rights law and federal judicial decisions ultimately failed. Courageous federal judges, such as Frank Johnson of Alabama, used their judicial authority to enforce *Brown*. When necessary, the armed forces and the National Guard were called in to help. For example, in 1957, President Dwight Eisenhower mobilized the 101st Airborne Division and nationalized the Arkansas National Guard to ensure that Black children could safely attend Little Rock Central High School.

Today, states mostly understand that it's futile to try to nullify federal law. So, instead, unhappy states usually try to make some kind of "end run" around an unpopular federal law—as Texas did in 2021 when it enacted a state law authorizing private citizens to sue doctors who performed abortions that, at the time, were constitutionally protected by the Supreme Court's 1973 decision in *Roe v. Wade*. Occasionally, however, individual state and local government officials attempt to conduct acts of nullification. In virtually every instance, though, federal law ultimately prevails.

THE MISSOURI SECOND AMENDMENT PRESERVATION ACT

The Second Amendment to the US Constitution provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." At least since 1934, the federal government has enacted numerous statutes regulating firearms. Most of these federal laws have been in place for decades. However, on June 14, 2021, the governor of Missouri signed the so-called Second Amendment Preservation Act into law.

The statute provided that any current or future federal law imposing a tax on firearms that might create a "chilling effect" on their purchase or ownership; or requiring the registration or tracking of firearms or their ownership; or prohibiting the possession of any firearm by a law-abiding citizen "shall be considered infringements" of both the Second Amendment and the Missouri Constitution.

The statute further provided that all such federal laws "shall be invalid to this State, shall not be recognized by this State, shall be specifically rejected by this State, and shall not be enforced by this State." Under the law, all state courts and state law enforcement officials must "protect the rights of law-abiding citizens to keep and bear arms within the borders of this State." Any person who assists in the enforcement of federal firearm laws in Missouri can be sued by any affected person for $50,000 per violation—plus attorney's fees and costs. Finally, no person who ever worked as a federal official enforcing federal firearm laws can later be employed by any state department or agency in Missouri.

Consider whether this act is constitutional or violates the supremacy clause. The Supreme Court has interpreted the Tenth Amendment to prohibit the federal government from "commandeering" state legislatures or state government officials to enforce federal laws or carry out federal policies. So, although voluntary cooperation between federal and state law enforcement authorities is perfectly legal, the federal government can't order Missouri state officials to help with the enforcement of federal firearm laws. Doing so would be unconstitutional.

However, the Missouri statute seems to go much further by declaring the federal law to be "invalid" and even seeking to punish federal officials who enforce that federal law within the state. These aspects would seem to place the statute in the same category as the 1832 South Carolina Ordinance of Nullification—which is why a federal district judge struck down the statute as unconstitutional in early 2023.

READING

Ableman v. Booth, 62 US 506 (1858). https://supreme.justia.com/cases/federal/us/62/506.

Bass, Jack. *Unlikely Heroes: The Southern Judges Who Made "Brown" Work*. Tuscaloosa: University of Alabama Press, 1990.

Desai, Samarth. "Looking Back: Nullification in American History." *Constitution Daily Blog*, February 4, 2022. https://constitutioncenter.org/blog/looking-back-nullification-in-american-history.

4

The Federal Government Can TAX and SPEND

The federal government's enumerated powers under the commerce clause give Congress the power to regulate interstate and foreign commerce. However, the federal government lacks the plenary power—the key power of sovereign governments to protect the general health, safety, and welfare of the people. This power has always belonged to the states. As you will see in this lecture, where the government cannot act on its own, such as regarding the minimum drinking age, it can enact legislation that gives the states a financial nudge to get them to adopt state laws that meet federal goals. The constitutional authority for such action comes from the taxing and spending clause.

THE TAXING AND SPENDING CLAUSE

Regarding the taxing and spending clause, Article I, Section 8 states:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

The framers wanted to be clear about the federal government's constitutional power to raise taxes to "provide for the common defense." The taxing and spending clause provides that federal tax money can be spent for the "general welfare of the United States." Today, that has become one of the broadest—and most important—sources of federal authority in the entire Constitution. The clause creates a back-door federal version of the plenary power. One modern example is Operation Warp Speed from the early days of the COVID-19 pandemic, when the federal government jump-started the effort to develop safe and effective vaccines with federal tax dollars.

Sometimes, achieving the federal government's goal to protect the general health, safety, and welfare of the American people requires more than just federal tax money. Sometimes, it also requires laws and regulations. In those situations, the federal government can use the taxing and spending power to nudge the states to pass those laws and regulations. Conversely, the federal government can promise to give new federal money to the states on the condition that they enact the state laws and regulations necessary to achieve the federal goal.

Recall that Madison tried to prevent the federal government from becoming too powerful by proposing that the states should retain power over the subjects that matter most to people in their everyday lives, such as marriage and education. As a result, even today, the federal government isn't supposed to be able to regulate education. However, in 2001, the federal government decided it was important to try to improve educational outcomes for all students. The No Child Left Behind Act of 2001 was enacted by Congress and signed by President Bush in January 2002. The act required all public schools, teachers, and students to meet certain standards based on periodic assessments. The law proved controversial from the outset.

The federal government got away with regulating education in the first place through the taxing and spending power. The No Child Left Behind Act didn't directly create, implement, or enforce uniform national education standards. Instead, the law prescribed that each state must adopt its own standards and develop and implement its own assessments—within certain federal guidelines and parameters. If they didn't, they would lose some of their federal funding for primary and secondary education.

UNITED STATES V. BUTLER

Around the time of the framing, Madison argued that the taxing and spending clause didn't expand the powers of the federal government at all because it authorized federal taxing and spending only in pursuit of the federal powers already enumerated elsewhere in the Constitution. However, Hamilton claimed that the clause conferred a distinct enumerated power upon the federal government—namely, the power to tax and spend in pursuit of the "general welfare." Over the years, legal experts debated these two competing views without resolution. Then, in the 1936 case of *United States v. Butler*, the US Supreme Court finally weighed in, providing its interpretation of the clause.

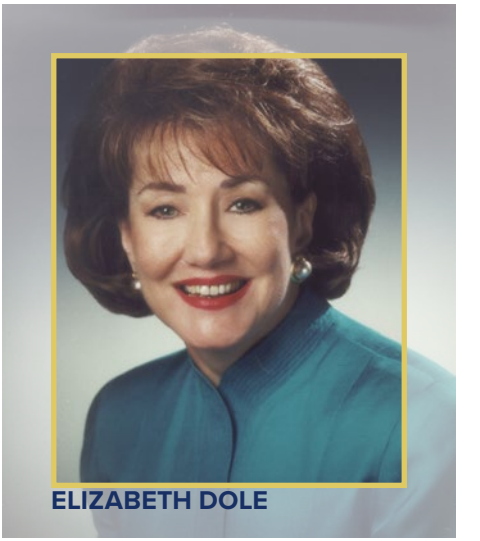
During the Great Depression, Congress passed a federal law imposing a special tax on cotton gin operators, mill owners, and other processors of farm products to pay farmers a subsidy for reducing their crop acreage to prop up farm commodity prices. The law helped to increase farm incomes by 50%. However, William Butler sued on behalf of a bankrupt cotton processor—the Hoosac Mills Corporation—claiming that the federal law was unconstitutional because the power to regulate agriculture belonged solely to the states. The federal government responded that the legislation was actually a tax law within Congress's taxing and spending power.

The Supreme Court ruled in favor of Butler and struck down the challenged federal law, primarily because the legislation couldn't qualify as a true "tax law" since the money raised was paid out directly to farmers rather than going into the federal government's general budget. More importantly, the court gave an expansive reading to the taxing and spending clause: "The power of Congress to authorize expenditure of public moneys for public purposes is not

limited by the direct grants of legislative power found in the Constitution." In other words, the court adopted Hamilton's view that the clause expanded the enumerated powers of the federal government.

SOUTH DAKOTA V. DOLE

Despite the broad scope of the federal government's power under the taxing and spending clause, that power is not unlimited. The lead case on the subject is *South Dakota v. Dole*, which was decided in 1987. The case involved a constitutional challenge to the National Minimum Drinking Age Act of 1984. South Dakota sued Elizabeth Dole, the secretary of transportation. The state argued that the federal statute was a thinly disguised attempt by the federal government to mandate a national drinking age. South Dakota stated that the law exceeded the enumerated powers of the federal government and was incompatible with the broad power of the states to regulate alcohol under the Twenty-First Amendment. In response, the feds argued that although the Twenty-First Amendment authorized state regulation of alcohol, it didn't explicitly prohibit Congress from enacting additional regulations.


ELIZABETH DOLE

In *Dole*, the US Supreme Court decided that there was no need to resolve difficult questions about the scope and meaning of the Twenty-First Amendment. Instead, the court held that Congress had the authority to enact the challenged statute because it was a legitimate exercise of the taxing and spending power. Citing the *Butler* decision from 1936, the court

explained that the taxing and spending power is not limited to the list of federal powers otherwise enumerated in the Constitution. Simultaneously, the court articulated four restrictions on the federal government's taxing and spending power:

- The power must be exercised by Congress for the "general welfare";
- the federal statute must clearly define the choice presented to the states so that they can decide whether they want to accept the conditions placed on the federal funding;
- the federal government must act in pursuit of a federal interest in a national project or program; and
- the federal statute can't violate any specific prohibitions contained in the Constitution.

The court found that all four of these requirements were satisfied by the challenged federal statute in *Dole*. However, they added one more potential restriction: "In some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" What kind of financial incentive might be viewed as passing the point at which "pressure turns into compulsion"? Apparently not the kind provided in *Dole*. The court described that as "relatively mild encouragement" for the states to adopt a minimum drinking age of 21—and therefore upheld the National Minimum Drinking Age Act.

COMPULSION

In 2012, the Supreme Court did find "compulsion" in part of the federal Patient Protection and Affordable Care Act (ACA)—also known as Obamacare. Enacted in 2010, the ACA was the signature piece of federal legislation enacted during President Obama's first term. However, the act was almost immediately challenged in court on constitutional grounds. The National Federation of Independent Business, 26 states, and several individuals took aim at two different parts of the law. The first was the so-called individual mandate—the part of the law that required all covered individuals to buy health insurance if they didn't already have insurance from their employer or a government program, such as Medicare.

They challenged the mandate on the grounds that it exceeded the federal government's enumerated power under the commerce clause—because the law had the effect of forcing people to participate in commerce by buying health insurance. The prosecution argued that this wasn't what the framers meant by the term *regulating commerce*. The situation was more like creating commerce.

A majority of the Supreme Court agreed with the argument that the individual mandate was not within the commerce clause power of Congress. Then, in a surprise twist, a different majority of the court held that the individual mandate could be upheld anyway—because it was a valid exercise of Congress's taxing power. Under the Obamacare law, the only method for enforcing the individual mandate was to make people declare whether they had health insurance on their federal income tax return. If they didn't, they had to pay an extra amount of tax. According to the court, the fact that the individual mandate was enforced solely through income tax meant that it was really a tax law—and therefore valid.

The second constitutional challenge to the Obamacare law involved the part of the law that tried to use the federal government's taxing and spending power to nudge the states into expanding insurance coverage under the Medicaid program. Medicaid is a government health insurance program for poor people that is paid for by a combination of federal and state tax money. However, it's run mostly by the states, within certain broad guidelines set by the feds. In other words, Medicaid itself is a classic example of the federal government's taxing and spending power. In all states, the feds provide at least 50% of the money for Medicaid.

Under the Obamacare law, the states were offered a new Medicaid bargain: If they agreed to expand Medicaid coverage to every person whose income was below 133% of the federal poverty line and who didn't already have health insurance, the federal government would pick up 100% of the tab for that expansion for the first 3 years, gradually declining to 90% and remaining there indefinitely. However, if the states didn't expand Medicaid coverage to the 133% level, the government would take away all of their federal Medicaid funding.

The federal financial subsidies to help people buy health insurance were available only to people with incomes above 100% of the federal poverty line. However, the drafters of the law assumed that every state would agree to expand Medicaid up to the 133% level with the promise of the new

federal funding. As such, every needy person would be able to obtain health insurance, either through existing Medicaid, the Obamacare expansion of Medicaid up to the 133% level, or buying health insurance with the help of a federal subsidy.

However, the Supreme Court decided that the Obamacare expansion of Medicaid violated the "compulsion" restriction on the federal government's taxing and spending power. According to the court, the problem was the statute's threat to take away all of a state's federal Medicaid funding if it refused to expand Medicaid up to the 133% level. In the end, the court invalidated the specific provision in the Obamacare law that contained the threat to take away all federal Medicaid funding. The court left the rest of the law intact.

READING

Congressional Research Service. "Medicaid and Federal Grant Conditions After *NFIB v. Sebelius*: Constitutional Issues and Analysis." CRS Report, updated July 17, 2012. https://crsreports.congress.gov/product/pdf/R/R42367.

Justia US Law. "Spending for the General Welfare." https://law.justia.com/constitution/us/article-1/26-spending-for-the-general-welfare.html.

South Dakota v. Dole, 483 US 203 (1987). https://supreme.justia.com/cases/federal/us/483/203.

5

GUNS, the MILITARY, and FOREIGN AFFAIRS

On January 6, 2021, a mob stormed the US Capitol in protest of Joe Biden being elected president. The Capitol Police and DC Metropolitan Police officers defending the building were overwhelmed, but hundreds of Guardsmen and women stationed at the nearby DC Armory did not deploy until almost 4 hours after the start of the assault. Why was the DC National Guard so slow to respond? As you will see in this lecture, the answers to this question are complicated, and many of them involve pure politics. However, this is also a story about Federalism and the shared legal authority—involving both the federal government and the states—to summon and command military forces during a domestic uprising.

NATIONAL DEFENSE

The experience of the Revolutionary War motivated the framers to create a new federal government that would never have to beg the individual colonies for support. However, they also didn't want to create a federal government that would become too powerful and threaten the people's liberty. So, they invented a new kind of Federalism—based on dual sovereignty—as a key part of their plan to ensure a strong national defense.

This plan for national defense relied upon two key components—one under federal control and the other largely under state control. Article I, Section 8 of the Constitution grants Congress the enumerated power "to raise and support Armies" and "to provide and maintain a Navy," together with the related power to collect taxes, duties, imposts, and excises to "provide for the common defense." Congress was also granted the power to declare war and to make rules to govern and regulate the armed forces.

The second part of the framers' plan involved the state militias. Article I, Section 10 of the Constitution provided that "no State shall, without the Consent of Congress … keep Troops, or Ships of War in time of Peace." However, as early as 1792, Congress authorized—by statute—the existence

of state militias, largely under the control of the civilian authorities within each state. Article I, Section 8 also granted Congress the power "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions." Furthermore, Congress gained the power "to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States." However, the states retained the power to appoint militia officers and to train the state militias to federal standards.

Today, the federal government maintains a standing army, navy, marine corps, air force, and space force—along with reserve forces that can be activated whenever necessary. The US military branches are all subject to the Posse Comitatus Act of 1878, which makes it a federal crime for any person to "willfully" use any part of the federal armed forces to engage in domestic law enforcement. The most important statutory exception to this act is the Insurrection Act of 1807, which allows for the use of federal troops to suppress civil disorders, insurrections, and rebellions after certain legal requirements are met.

THE INSURRECTION ACT

In general, federal military intervention to deal with domestic disturbances must first be requested by a state's governor or legislature. This factor doesn't apply if a situation has already reached the point where it's impossible to enforce the law or if a state is unable or unwilling to protect the federal constitutional rights of the citizens. Still, before sending in federal troops, the president must first issue a proclamation ordering those who are violating the law to disperse. The Insurrection Act has been invoked at least 30 times in US history.

Note the difference between the Insurrection Act and martial law: Martial law isn't specifically mentioned anywhere in the Constitution, and it isn't specifically authorized by any federal law. The term usually refers to the suspension of civilian authority and the temporary substitution of military authority. Pursuant to the states' plenary power, state laws often authorize a governor to declare martial law and use military force to restore order under certain defined circumstances. Whenever they do, the state's militia—today, the National Guard—usually carries out the order. For the most part, federal authorities have tried to impose martial law only during times of war.

By contrast, the Insurrection Act doesn't necessarily deprive the civilian authorities of their usual powers. The courts remain open, and the government operates as usual. However, under certain circumstances, the president is allowed to use the federal armed forces to enforce the laws in a manner that would normally be prohibited by the Posse Comitatus Act.

THE NATIONAL GUARD

Until the early 1900s, state militias existed under the legal authority of the aforementioned 1792 federal statute, which authorized the existence of a militia in each state. Occasionally, the federal government would call up these small state militias to supplement its standing armed forces. However, after the Spanish-American War, people became concerned that these traditional state militias might not be capable of serving as an effective military force. So, in 1903, Congress passed a new Militia Act. The act set up a new National Guard that the states would be required to train and prepare for federal military service as needed. The body also set up a new Reserve Militia, which wouldn't need training or preparation and wouldn't be subject to federal mobilization. This militia consisted of all able-bodied young American men who weren't members of the new National Guard.

The new system created in 1903 was supposed to address national defense readiness concerns. Yet under the explicit terms of the Constitution, the federal government can mobilize the state militia only "to execute the Laws of the Union, suppress Insurrections and repel Invasions." What if the federal government wants to call on the National Guard in another kind of military conflict, like an overseas war? In 1916, Congress tried to solve this problem while also preparing the United States for possible entry into World War I.

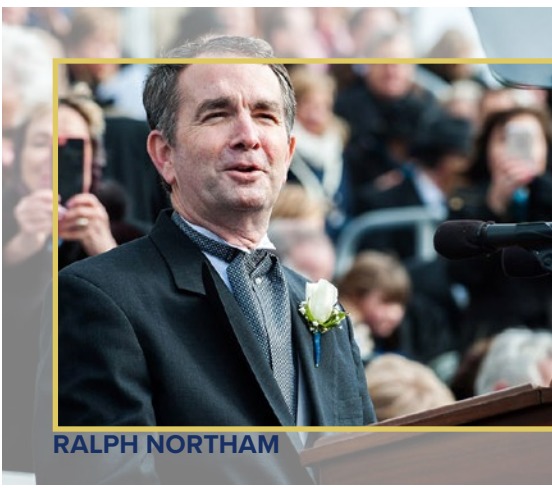
Congress enacted a new federal statute requiring every member of the National Guard to take a dual oath to support both the nation and their own state and to obey the orders of both the president and their own governor. The 1916 statute also authorized the president to draft individual members of the National Guard into the federal armed forces. But this solution created another problem. Under the 1916 statute, any member of the National Guard who was drafted into federal service would be released from their National Guard unit and freed from any future obligations to it. However, so many members were drafted into federal military service during World War I that it

essentially destroyed the National Guard. So, in 1933, Congress tweaked the system by creating a new National Guard of the United States and mandating that all people who joined their own state's National Guard would also take a dual enlistment—or dual commission—in the National Guard of the United States.

Instead of having to draft individual National Guard members into the armed forces under the 1916 statute, the president could call up entire National Guard units. These units would also be part of the new National Guard of the United States and would be placed into federal service. As soon as their federal mobilization ended, these units would return to their usual role with their state National Guard. So, ever since 1933, the National Guard has been a hybrid federal-state force that remains a state militia while simultaneously comprising a federal reserve armed force subject to being called into active duty.

THE ATTACK ON DC

What happened to the District of Columbia National Guard during the uprising at the US Capitol on January 6, 2021? A governor doesn't need anyone else's permission to order the National Guard of their state into service to suppress a riot or domestic disturbance. The governor can simply make it happen. At the request of the DC authorities, Virginia Governor Ralph Northam mobilized the Virginia National Guard, even though the riot wasn't occurring within his own state. However, the District of Columbia is a federal enclave—not a state—and the home of the federal government.



RALPH NORTHAM

Legally speaking, DC is a strange place. For example, like every state, the district has its own criminal code to deal with everyday crimes on the streets of the district, such as assault and robbery. But it has a mayor rather than a governor, and this mayor doesn't have control over the DC National Guard. That control belongs to the president of the United States. The DC mayor can only ask the president to mobilize the DC National Guard. As the Capitol was being ransacked on January 6, the DC mayor and the chief of the Capitol Police did exactly that—but President Trump didn't give the mobilization order.

The DC National Guard's commanding officer possessed the authority to act alone under emergency conditions, but he waited for a presidential order that never came. Vice President Pence—who was hiding inside the Capitol—eventually issued the order that finally mobilized the DC National Guard.

DISTRICT OF COLUMBIA V. HELLER

Another important instance of the word *militia* in the Constitution is in the Second Amendment, which reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In the 2008 case of *District of Columbia v. Heller*, the court ruled that "well regulated Militia" was never meant to limit the Second Amendment to the members of a state militia. Instead, the Second Amendment protects the individual right of all Americans to keep and bear arms for the purpose of personal self-defense. The *Heller* decision severely restricted the power of federal, state, and local governments to enact and enforce gun control laws.

However, is that what the framers thought the Second Amendment was all about? The key language appears in *Federalist*, no. 46, in which Madison listed many reasons why the American people should not fear the proposed new federal government. Then, he posed the ultimate question: What if the federal government tries to use its standing army to seize power from the states? His response was that this could never happen because the standing army would be dwarfed by the collective size of the organized state militias. But he also added that the American people would possess "the advantage

of being armed." In short, the same man who would soon draft the Second Amendment believed that guns were an important "last resort" in a possible future battle between the federal government and the states.

Does anyone today believe that the Second Amendment remains an important aspect of Federalism because it enables the American people to use their own guns to defend their states against federal tyranny? Or did the Supreme Court intentionally alter the original meaning of the Second Amendment in the *Heller* decision by recasting it as constitutional protection for an individual right of self-defense?

READING

Congressional Research Service. "The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law." CRS Report, updated November 6, 2018. https://crsreports.congress.gov/product/pdf/R/R42659.

District of Columbia v. Heller, 554 US 570 (2008). https://supreme.justia.com/cases/federal/us/554/570.

Nunn, Joseph. "Martial Law in the United States: Its Meaning, Its History, and Why the President Can't Declare It." Brennan Center for Justice. August 20, 2020. https://www.brennancenter.org/our-work/research-reports/martial-law-united-states-its-meaning-its-history-and-why-president-cant.

6

Borders, Immigration, and CITIZENSHIP

Who is in charge of the US border? Who gets to decide when and under what circumstances non–US citizens are allowed to cross that border? And once these people do cross the border, who gets to decide what happens to them—including whether they'll ever have a path to becoming a US citizen? These questions concern some of the most important issues in American Federalism today, and as you will soon learn in this lecture, not all of the constitutional answers are clear.

NATURALIZATION

As enumerated in Article I, Section 8 of the Constitution, the federal government possesses the sole constitutional authority "to establish a uniform rule of naturalization." That is, the question of how a migrant to the United States becomes naturalized is a matter for the federal government to decide. Naturalization was important to the framers of the US Constitution. Some of the framers were naturalized citizens, and almost all of the framers were no more than 3 generations removed from being immigrants.

Once the Constitution was ratified, Congress immediately took up the task of defining a "uniform rule of naturalization." The Naturalization Bill of 1790 limited eligibility for naturalization to free White immigrants of good character—effectively, those coming from Europe—who had resided in the United States for at least 2 years, along with their children under the age of 21. The law also stated that children born outside the United States to American citizens would be considered citizens.

Although the naturalization statutes usually didn't specifically say so, for most of American history, immigrant women could acquire citizenship only through marriage to a citizen due to an old legal doctrine known as coverture. Under the doctrine, an American woman could lose her citizenship if she married an alien. Federal law did not protect the rights of women to apply for naturalization on their own and to remain a citizen without regard to marriage until 1922. Even then, a woman could still lose her US citizenship if she married an alien man who was ineligible to become a naturalized citizen.

The racial barrier that originally allowed only White immigrants to be naturalized remained in effect until 1870. Then, Congress passed an amendment to allow "aliens of African nativity" and "persons of African descent" to apply for naturalization. Courts administering the new law struggled to apply it and often resorted to common understandings or social perceptions of race. This factor resulted in the denial of naturalization petitions filed by people of Arab, Asian, and Southern European descent, all of whom were perceived to be neither White nor African. In 1882, Congress enacted the Chinese Exclusion Act, explicitly prohibiting both immigration and naturalization of Chinese persons. This rule remained in effect until 1943.

What about acquiring US citizenship other than through the naturalization process? The original text of the Constitution doesn't say how this occurs. However, an existing provision states that a person can't become president of the United States unless they're a "natural-born citizen." The framers clearly intended that there must be something called a natural-born citizen. Unfortunately, they never defined that term.

At the time, the consensus view of judges in both England and the American colonies was that the term *natural-born citizen* included any person born within the borders of the country—except for those born to parents who were foreign diplomatic officers or part of an occupying foreign force. The United States had another exception: For more than 75 years after the framing, a Black person couldn't be a US citizen. This holding of the US Supreme Court resulted from the infamous *Dred Scott v. Sandford* case of 1857. The decision applied even to free Black people living in free states that didn't recognize slavery.

THE FOURTEENTH AMENDMENT

The *Dred Scott* decision wasn't overturned until after the Civil War, when the Civil Rights Act of 1866 was enacted. This legislation was followed by the 1868 ratification of the Fourteenth Amendment to the US Constitution. The amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Before the Civil War, people generally thought of citizenship as something that described their relationship to their home state. However, the Civil War revealed that states couldn't always be trusted to protect the civil rights of their own citizens. As a result, the Fourteenth Amendment emphasized the idea of national citizenship in addition to state citizenship.

The Fourteenth Amendment also extended US citizenship to Black Americans who'd been denied it by the *Dred Scott* decision. Together with the Thirteenth and Fifteenth Amendments, this amendment further guaranteed that the federal government would protect the civil rights of all US citizens against violations by their own states. Finally, the last section of

the Fourteenth Amendment conferred upon Congress the power "to enforce, by appropriate legislation," the rest of the amendment—thus creating a new federal enumerated power over citizenship.

The Fourteenth Amendment made US citizenship a matter of birthright for anyone born in the United States and "subject to the jurisdiction thereof." In the 1898 case of *United States v. Wong Kim Ark*, the Supreme Court held that the phrase "subject to the jurisdiction thereof" meant the same thing as the principle of jus soli—namely, all children born within the territorial jurisdiction of the United States, except for those of foreign diplomats and occupying foreign forces. So, Wong Kim Ark acquired US citizenship simply by being born in the United States despite being the child of Chinese immigrants who were ineligible to become US citizens through naturalization because of the racial restrictions in federal law.

However, the same Fourteenth Amendment rule did not apply to Native Americans. In the 1884 case of *Elk v. Wilkins*, the Supreme Court held that Native Americans born within the United States but subject at birth to tribal jurisdiction as members of the tribe could not claim birthright citizenship. Instead, they could only become US citizens through the process of naturalization. In 1924, Congress enacted the Indian Citizenship Act, declaring all Native Americans born "within the territorial limits of the United States" to be US citizens.

Today, the Immigration and Nationality Act tracks the text of the Fourteenth Amendment, extending US citizenship by birthright to those born in the United States and subject to the jurisdiction thereof. The act also grants citizenship to those born in the United States to Native American parents; to those born outside the United States to parents who are both US citizens and at least one of whom resided in the US at some time before the birth; and to several other categories of persons born outside the United States with at least one US citizen parent.

IMMIGRATION

The US Constitution says nothing about immigration, and there were no general limitations on immigration under federal law until 1875. At that point, Congress passed a federal statute barring the entry of criminals and

prostitutes in addition to forced laborers from Asia. Ever since, federal immigration law has changed with the times. For example, in 1882, to protect American workers against an influx of foreign labor, Congress enacted the Chinese Exclusion Act. The law banned the entry and authorized the deportation of all Chinese laborers. Another law that same year excluded paupers and the "mentally defective."

In 1921, the federal government instituted a new system of immigration quotas based on nationality. Originally, these quotas were set at 3% of the foreign-born US population from each country according to the 1910 census—but with no limit on immigrants from the Western Hemisphere and no immigration at all from Asia. The 1921 law also limited total immigration per year to 350,000. In 1924, the annual limit was reduced to 165,000, and the nationality quotas were reduced to 2% based on the 1890 census. In 1940, because of the outbreak of World War II, the United States began to require all noncitizens living in the US to register with the federal government and receive an "Alien Registration Receipt Card"—now called a green card.

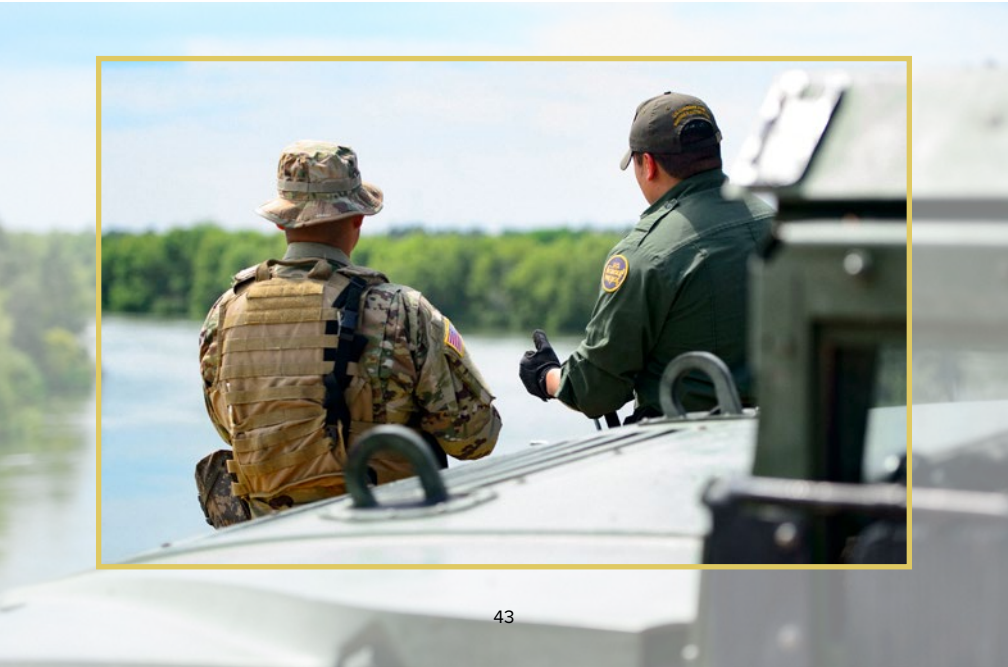
During World War II, the United States suddenly needed more people to labor in many workplaces adversely affected by the loss of young, able-bodied men and women to the armed forces. In 1942, Mexican nationals were allowed to enter the US as temporary agricultural workers—a temporary change that remained in effect until 1964. And in 1943, the Chinese Exclusion Act was formally repealed. After the war, in 1952, Congress enacted the first Immigration and Nationality Act, which eliminated race as a basis for exclusion and added Asian nations to the nationality quota system. The act set the quotas at one-sixth of 1% of each nationality in the 1920 census. This aspect effectively limited immigration to those from the United Kingdom, Ireland, and Germany.

The nationality quota system remained in place until 1965, when Congress replaced it with a new system of immigration preferences based on various factors. Today, those factors include family reunification, employment skills and needs, and diversity. Each category is subject to a statutory quota. Also, special exceptions exist for "highly skilled" temporary workers and seasonal, nonagricultural workers.

In an 1889 case involving the constitutionality of exclusion from entry under the Chinese Exclusion Act, the Supreme Court held that the federal government possesses the implied power to regulate immigration as "an incident of sovereignty." The court explained:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition we do not think open to controversy. Jurisdiction over its territory to that extent is an incident of every independent nation. It is part of its independence.

In 1893, the court reached the same conclusion with respect to deportation. As possible constitutional sources for this power, later court decisions cited the naturalization clause (because immigration is the first step toward naturalization); the commerce clause (because the movement of people is part of commerce); and the Executive Branch's implied Article II power over foreign affairs. The court has also held that the federal power over immigration is nearly exclusive—meaning the states can't exercise much power in this area.



ILLEGAL IMMIGRATION

Although the states are limited in what they can do to address the problem of illegal immigration, they can use their plenary powers to do some things. For example, they don't have to extend certain benefits to illegal immigrants. However, even then, the states need to be careful. In 1982, the Supreme Court held that Texas acted unconstitutionally when it denied enrollment in public schools to children who weren't legally in the country, saying that this would create a "shadow population" of uneducated persons in violation of the equal protection clause.

Texas also created Operation Lone Star to patrol the Mexican border. By the end of 2022, this program—which was implemented by the Texas Department of Public Safety and the Texas National Guard—had resulted in more than 336,000 detentions of people crossing the border into Texas.

Will any of these state initiatives in the area of immigration withstand constitutional scrutiny? Are they examples of legitimate exercises of reserved state power, or do they violate the principles of Federalism and the supremacy clause? The jury—or, in this case, the US Supreme Court—is still out.

READING

Congress.gov. "Art 1.S8.C18.8.1: Overview of Congress's Immigration Powers." Constitution Annotated. https://constitution.congress.gov/browse/essay/artI-S8-C18-8-1/ALDE_00001255. (The sections that follow this page are also recommended.)

Madison, James. *Federalist* No. 42: "The Powers Conferred by the Constitution Further Considered." 1788. https://guides.loc.gov/federalist-papers/text-41-50#s-lg-box-wrapper-25493406.

United States v. Wong Kim Ark, 169 US 649 (1898). https://supreme.justia.com/cases/federal/us/169/649.

7

Commerce Clause: A Source of FEDERAL POWER

In March 1992, 12th-grader Alfonso Lopez Jr. carried a concealed .38 caliber handgun and five bullets into his high school in San Antonio, Texas. Lopez was arrested and eventually charged with a federal crime under the Gun-Free School Zones Act of 1990, which states that it is illegal to "knowingly to possess a firearm" in a school zone. In the US Supreme Court, the defense argued that the aforementioned act goes beyond the federal government's limited constitutional power. Lawyers for the federal government responded that the commerce clause authorizes the act because violent crime in and around schools affects interstate commerce. Such crime imposes various costs on crime victims by making people afraid to travel to dangerous neighborhoods and by disrupting the students' learning environment. As this lecture illustrates, these debates about the scope of the federal government's authority under the commerce clause are important in defining American Federalism.

GIBBONS V. OGDEN

Under the Articles of Confederation, the economy stagnated due to narrow, protectionist laws and policies that favored the interests of individual colonies over the interests of the nation. As such, the framers gave the power to regulate interstate commerce to the new federal government.

Early on, the Supreme Court read the commerce clause broadly. The court's first big decision on the subject was the 1824 case of *Gibbons v. Ogden*. New York had granted a monopoly over steamboat travel on New York waters to Robert Fulton and his partner Robert Livingston, codevelopers of the first commercially successful steamboat. In 1815, Aaron Ogden purchased a license to operate a steamboat from Elizabethtown, New Jersey, to New York City across New York's portion of the Hudson River from Livingston's heirs.

In 1818, Thomas Gibbons—a former partner of Ogden—began competing on the same route under a federal license issued pursuant to a statute enacted by Congress in 1793. Ogden sued in New York state court and obtained an injunction against Gibbons. However, Gibbons appealed to the US Supreme Court, arguing that New York had no authority to bar him from operating a federally licensed steamboat in New York waters.

Gibbons's lawyer—the famed Daniel Webster—argued that Congress has the exclusive power to regulate interstate commerce under the commerce clause. Writing for the court, Chief Justice John Marshall agreed. Marshall rejected Ogden's suggestion that the enumerated federal powers should be strictly construed because that might prevent the federal government from fulfilling its proper role under the Constitution. Marshall explained that the word *commerce* isn't limited to buying and selling or to the interchange of commodities. Rather, the term also encompasses navigation, which is essential for commercial intercourse or interaction and, thus, for commerce.

Next, Marshall determined that the federal government's power to regulate commerce "among the several States" includes commerce that makes its way from the outside into or through the interior of a state. As New York's steamboat monopoly law sought to regulate navigation in a manner inconsistent with Congress's exercise of federal constitutional authority, the Supreme Court sided with Gibbons.

THE *LOCHNER* ERA

Until the early 20th century, the Supreme Court continued to give the commerce clause a broad reading. However, the court soon began making decisions that severely cut back on the powers of both the states and the federal government to enact and enforce business regulations. Some of these decisions were based on the theory that the Constitution's due process clause implicitly protected a person's liberty to enter into almost any kind of contract. As a result, state and federal laws that restricted working hours, established a minimum wage, and encouraged the formation of labor unions were all held unconstitutional. This period became known as the *Lochner* era—named after the 1905 case of *Lochner v. New York*, in which the Supreme Court invalidated a New York state law that prohibited bakeries from requiring their employees to work more than 10 hours a day or 60 hours a week.

During the *Lochner* era, the court also began to cut back on the scope of the federal government's power under the commerce clause by insisting on a much closer relationship between the federal law or regulation at issue and "commerce" moving from one state to another. For example, the 1918 *Hammer v. Dagenhart* decision struck down a federal law that tried to stop child labor by prohibiting the interstate sale of any goods manufactured by children under the age of 14. A man named Roland Dagenhart—whose two young sons worked alongside him in a cotton mill in Charlotte, North Carolina—claimed the federal law was unconstitutional and sued. The Supreme Court agreed.

According to the court, the federal government just didn't like how the goods under question were being made. However, the states should regulate this matter using their plenary power. The court also cited the Tenth Amendment, which reserves all powers not delegated to the federal government for the states or the people.

The court's hostility to the commerce clause as a basis for federal legislation continued through the 1920s and into the Great Depression. Then, along came FDR. Americans chose a new president who promised a New Deal.

THE NEW DEAL

Within his first 100 days in office, FDR pushed numerous federal programs through a progressive Democratic Congress and implemented others by executive order to jump-start the nation's economy and put people back to work. However, a conservative Supreme Court—hostile to federal regulation of business—found many of the federal laws creating these New Deal programs unconstitutional. For example, in 1935 and 1936, the Supreme Court invalidated the Railroad Retirement Act and the Municipal Bankruptcy Act, among many others.

The court held that some of these federal laws exceeded the scope of the commerce clause and held that others violated constitutional provisions, such as the takings clause in the Fifth Amendment, which states that private property can't be taken for public use without "just compensation." FDR decided to get tough. In February 1937, he announced that he would ask Congress to enact a new Judicial Procedures Reform Bill that would allow him to appoint more members to the Supreme Court, thereby securing a more favorable court majority. However, the plan was never adopted.

However, barely 2 months after FDR first proposed his plan, the court suddenly reverted to its earlier, expansive reading of the commerce clause. The court also abandoned its controversial *Lochner* decision and began to approve most state and federal labor laws. FDR's New Deal federal laws and programs were safe.

In April 1937, the court upheld the federal National Labor Relations Act of 1935. The ruling stated that under the commerce clause, Congress can regulate economic activities that are purely intrastate in character so long as they're closely and substantially related to interstate commerce. In 1938, in the case of *United States v. Carolene Products Company*, the court upheld a federal law prohibiting the shipment of milk combined with non-milk fat or oil, holding that Congress needs only a "rational basis" to enact economic legislation under the commerce clause. As long as Congress's belief that the subject of the federal law is substantially related to interstate commerce is rational, then the law satisfies the rational basis test.

Perhaps the most expansive of all modern commerce clause decisions was the 1971 case of *Perez v. United States*. Alcides Perez was convicted in federal court of using extortion to collect debts—loan sharking—in violation of the federal Consumer Credit Protection Act. Specifically, Perez threatened to commit acts of violence against the owner of a butcher shop who stopped making payments on a business loan he'd gotten from Perez. On appeal, Perez argued that the case involved purely local activity and that Congress lacked the constitutional authority to enact a federal statute criminalizing such local activity. However, Congress had identified loan sharking as a national problem and therefore enacted a federal statute to handle it. So, despite agreeing with Perez that the case posed a "substantial" constitutional question, the Supreme Court upheld the federal loan-sharking statute and affirmed the conviction.

UNITED STATES V. LOPEZ

The federal government's undefeated streak in commerce clause cases, which began in 1937, came to an end in 1995 when the Supreme Court decided the case of *United States v. Lopez*. Congress surely believed it was on firm constitutional ground when it enacted the Gun-Free School Zones Act of 1990. However, in *Lopez*, the court found the federal statute unconstitutional under the commerce clause. According to the court's opinion, Congress can regulate three categories under the commerce clause: the channels of interstate commerce, like highways and waterways; the instrumentalities of interstate commerce and items moving in commerce, such as railroads, ships, and the goods and people they carry; and activities that "substantially affect" interstate commerce.

The Gun-Free School Zones Act of 1990 wasn't about regulating the channels or instrumentalities of interstate commerce. So, to be constitutional under the commerce clause, the act must have involved the third category—activities that "substantially affect" interstate commerce. However, the act didn't regulate economic activity. Instead, the legislation prohibited simply walking into a school with a gun in one's hand, pocket, or bag.

The court considered—but ultimately rejected—the argument that the act could nevertheless be sustained because Congress rationally concluded that the presence of guns in or near schools has a substantial effect on interstate commerce. If accepted, this argument would basically mean that there are no limits on the regulatory power of the federal government.

One year after the *Lopez* decision, the federal Gun-Free School Zones Act of 1990 was amended, and Congress added a new section to the statute requiring that the gun in question must have "moved in" or otherwise affected interstate commerce. Nearly every gun in existence has moved in interstate commerce at some point during the process of being manufactured, imported, bought, or sold.

DEFINING FEDERAL POWER

Since the *Lopez* decision, the Supreme Court has found two other federal statutes to exceed the limits of the commerce clause, at least in part. One case involved the federal Violence Against Women Act of 1994. One section gave any person victimized by gender-based violence the right to sue the perpetrator in federal court for damages. In the 2000 case of *United States v. Morrison*, the court held that this section of the statute was designed to regulate violence, which does not have a substantial effect on interstate commerce. The court therefore struck down the aforementioned section of the federal statute.

The second case was the 2012 constitutional challenge to the Obamacare federal statute. The Supreme Court held that Congress can't use the commerce clause to force people to buy health insurance—through the individual mandate—because the regulation forces people into commerce. However, the court ultimately upheld the Obamacare individual mandate because it was enforced solely through federal income tax, which made it a legitimate exercise of the federal government's enumerated power to tax.

These modern cases help define the outer limits of the federal government's power under the commerce clause. Regarding economic activity, Congress still has broad power to regulate purely local actors as long as the local activity can plausibly be said to have a substantial effect on interstate commerce in the

aggregate. Regarding noneconomic activity, Congress can still regulate such activity by including a provision in the statute that the item in question must have previously been connected with interstate commerce.

READING

Congressional Research Service. "Congress's Authority to Regulate Interstate Commerce." CRS Report, November 15, 2021. https://crsreports.congress.gov/product/pdf/IF/IF11971.

Leuchtenburg, William E. "When Franklin Roosevelt Clashed with the Supreme Court—and Lost." *Smithsonian*, May 2005. https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994.

United States v. Lopez, 514 US 549 (1995). https://supreme.justia.com/cases/federal/us/514/549.

8

Commerce Clause: A Limit on STATE POWER

In May 2021, Florida enacted a new state law prohibiting social media platforms from willfully "deplatforming" any candidate for public office. The Florida law also prohibited censoring the posts of any "journalistic enterprise" based on content. Four months later, Texas enacted a similar law, prohibiting social media platforms with more than 50 million active monthly users from "censoring on the basis of user viewpoint, user expression, [and] the ability of a user to receive the expression of others." These state laws were enacted in response to the deplatforming of President Donald J. Trump after some of his followers attacked the US Capitol in January 2021. Today, you will learn whether these laws violate the commerce clause of the US Constitution, which grants Congress the power to regulate interstate commerce.

THE COMMERCE CLAUSE

The commerce clause in Article I, Section 8 gives Congress the power "to regulate commerce … among the several States" as well as with the Native American tribes and foreign nations. The interstate commerce clause refers to the language that addresses "commerce ... among the several States." This clause defines an enumerated federal power that authorizes federal regulation of virtually every aspect of the American economy but limits the regulatory power of the states.

The interstate commerce clause falls within a grant of power category called partial federal exclusivity. That is, the power to regulate interstate commerce is neither a concurrent power shared by the federal government and the states nor an exclusive power that the states are prohibited from exercising at all. Regarding interstate commerce regulation, there are two different kinds of constitutional limits on state power.

First, whenever Congress chooses to exercise its commerce clause authority to regulate some aspect of interstate commerce, it can preempt state legislation on the same subject—either expressly by implication in situations where the federal and state laws conflict or where the text and structure of the federal law leave no room for state regulation. Second, by granting the federal government an enumerated power to regulate interstate commerce, the dormant commerce clause itself implies that certain kinds of state regulation of interstate commerce must be prohibited, regardless of whether Congress has decided to regulate on the subject.

THE DORMANT COMMERCE CLAUSE

Ever since the framing, it's been clear that the commerce clause must have both a positive impact (conferring the power to regulate interstate commerce on the federal government) and a negative impact (limiting the power of the states to do the same thing). As such, the Supreme Court has recognized the existence of the dormant commerce clause for more than 150 years.

The first court decision striking down a state law under the dormant commerce clause was the 1872 case of *Reading Railroad Company v. Pennsylvania*. The court invalidated a Pennsylvania law requiring every

transport company carrying freight into or out of the state to pay a freight tax based on weight. The court explained that this was precisely the kind of burdensome regulation the framers were trying to eliminate.

Today, the dormant commerce clause is generally held to impose two different kinds of limits on the states. First, the states are prohibited from enacting and enforcing any state law that discriminates against interstate commerce in the form of out-of-state goods or nonresidents. Second, even state laws that don't discriminate against interstate commerce can still run afoul of the clause if they impose a significant burden on interstate commerce that outweighs any legitimate benefits to the state. These two tests have certainly complicated matters.

For example, the dormant commerce clause is the reason you see so many enormous semitrailer trucks on the highways these days. The federal government could regulate the maximum length of trucks under the commerce clause, but instead, federal law imposes weight limits. One federal law says the states can't impose a length limit of less than 48 feet. So, at least some state laws on truck length would be expressly preempted by federal law. However, beyond 48 feet, the states can regulate truck length in the interests of public safety and road maintenance, but only up to a point. Two US Supreme Court decisions—one in 1978 and the other in 1981—used the dormant commerce clause to strike down state laws designed to cut back on the length of semis.

In the first case, Wisconsin passed a law generally limiting the length of semis to 55 feet—the length of a standard tractor plus one trailer. The law also authorized special permits for "trailer trains" involving more than one trailer, but those permits were limited to the transport of municipal refuse or waste, empty trailers, and trailers carrying milk. Otherwise, only a single trailer was allowed in Wisconsin. The Supreme Court held that this imposed a substantial burden on interstate commerce because doubles—tractors pulling two smaller trailers, with a total length of 65 feet—had to detour around the state. Meanwhile, Wisconsin presented no evidence to show that 55-foot semis were safer than 65-foot doubles.

In the second case, Iowa passed a law limiting the maximum length of regular semis to 55 feet and that of double-trailer semis to 60 feet. However, most doubles are 65 feet long. The Iowa law made exceptions for mobile homes, vehicle trailers, and trailers carrying livestock. The law contained another exception allowing longer trucks to operate in Iowa cities on the border of another state. The Supreme Court held that Iowa's statute also imposed a substantial burden on interstate commerce. To comply with the Iowa law, national trucking companies using 65-foot-long doubles had to either transfer their loads to smaller trucks when they reached Iowa or detour around the state. The court also found the safety benefit to Iowa to be relatively small.

PLENARY POWER LIMITATIONS

The dormant commerce clause significantly limits the ability of the states to exercise their plenary power to protect the health, safety, and welfare of their citizens. The clause can even limit a state's power to raise money through taxes if it does so in a manner that discriminates against or substantially interferes with interstate commerce.

In the 1992 case of *Quill Corporation v. North Dakota*, the Supreme Court invalidated a North Dakota law that imposed a sales tax on purchases that state residents made by mail order from out-of-state companies that didn't have any physical presence within North Dakota. The court held that the imposition of this unusual sales tax—plus the requirement that those out-of-state companies must collect and remit the sales tax—significantly burdened interstate commerce in violation of the dormant commerce clause. The *Quill* decision was later applied to e-commerce—which is why Americans didn't

have to pay any sales tax on most of the stuff they bought on the internet for a long time.

However, in the 2018 case of *South Dakota v. Wayfair, Inc.*, the Supreme Court noted that technology had advanced to the point where it was relatively easy for online vendors to track the physical locations of their purchasers and collect the sales taxes due on their purchases. Moreover, various studies showed that the *Quill* decision was costing the states between $8 billion and $33 billion a year in lost tax revenues while putting traditional brick-and-mortar stores at a major competitive disadvantage because they still had to charge sales tax. In the end, the court held that a physical presence within the state no longer mattered and that the states could impose sales taxes on all online purchases.

The dormant commerce clause can be triggered even in the context of alcohol, where the states enjoy a special constitutional grant of authority under the Twenty-First Amendment. In 1984, the Supreme Court invalidated part of a Hawaii excise tax on wholesale alcohol sales because the Hawaii law exempted a local brandy and fruit wine manufactured within the state. The court said that this legislation impermissibly discriminated against interstate commerce.

In 2018, California voters approved a state ballot initiative prohibiting the sale within California of pork products derived from pigs that were raised in an inhumane manner. California argued that the law was a valid exercise of the state's plenary power because it protected the general welfare of Californians by ensuring that the food they ate was produced in a morally acceptable manner. Moreover, the state law applied only to pork sold within California.

The opponents of the law—including the National Pork Producers Council—argued that the legislation was unconstitutional under the dormant commerce clause because California was effectively trying to regulate how pig farmers

in other states treat their pigs. However, by 5 to 4, the Supreme Court upheld the California pork law. The court began by noting that the law doesn't discriminate against out-of-state pork—it applies equally to all pork. As for the alleged burden on interstate commerce due to the alleged cost of changing the way pigs are traditionally raised, a majority of the court either found those allegations too speculative or felt there was no good way for the court to balance the economic harms to pork producers against the moral benefits of the California law.

INTERNET REGULATION

Electronic communications across the internet are clearly part of interstate—and even foreign—commerce. So, the commerce clause gives the federal government the power to regulate the internet, which it already does in significant ways. Section 230 of the federal Communications Decency Act of 1996 primarily insulates internet service providers and social media companies from liability for the content that gets posted on their platforms. The section also mostly shields internet companies from liability for their "good faith" decisions to remove content they deem "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

At one time, state regulation of the internet would likely have imposed a significant burden on interstate commerce because it would have been difficult to make 50 different versions of the same website for users in 50 different states. Today, technology has made it easier for internet companies to provide different content to different users. Does that mean Florida and Texas can enact and enforce state laws that prohibit social media platforms from discriminating against certain individuals or organizations?

The Florida and Texas laws would require companies like Facebook to completely change the way they do business—by changing the fundamental algorithms that decide what content gets provided to each individual user. Those algorithms are responsible for individual posts receiving more or less visibility, which is exactly what the state laws are trying to regulate. However, changing those algorithms would change the nature of Facebook itself. But is that what American Federalism really means?

READING

Friedman, Barry, and Daniel T. Deacon. "A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause" *Virginia Law Review* 97 (2011): 1877. https://virginialawreview.org/wp-content/uploads/2020/12/1877.pdf.

National Pork Producers Council v. Ross, 598 US __ (2023). https://supreme.justia.com/cases/federal/us/598/21-468.

Volokh, Eugene. "The Dormant Commerce Clause and Internet User Protections." *Reason*, September 9, 2022. https://reason.com/volokh/2022/09/09/the-dormant-commerce-clause-and-internet-user-protections/.

9

How FEDERAL CITIZENSHIP Emerged

Until the Civil War, the very concept of national—or federal—citizenship was more theoretical than real. In the mid-19th century, most Americans would have defined their citizenship in terms of their state, not the United States. So, how did state citizenship become federal citizenship in America? When did Americans begin to think of themselves as US citizens first and state citizens second? And what does federal citizenship mean? You'll be learning about these important questions of Federalism in this lecture.

CREATING THE AMERICAN NATION

The federal government created by the framers was never intended to be a finished product. Instead, the Constitution established a process by which a single nation composed of federal citizens could gradually emerge. The framers understood that, in 1789, there could be no such thing as a single "American" nation. The colonists—who were now citizens of 13 tiny, independent nation-states—were not yet ready to transfer their loyalties and their citizenship to the new federal government. Trying to move too quickly would risk failure, so the framers devised a brilliant and patient plan.

First, they drafted a constitution that granted to the new federation all powers necessary for America's survival in the face of ongoing external threats. Second, they reassured everyone that the new federal government would be strictly limited to those powers enumerated in the Constitution. All other sovereign powers would remain with the states. Third, they emphasized that the people would always retain control over the federal government through the political process—especially because they'd always be able to elect their own federal government officials. Finally, the framers reminded the people that they could always use their militias and guns to resist federal tyranny if necessary.

The two key features of this plan were the dynamic nature of American Federalism and the democratic nature of the federal government.

DYNAMIC FEDERALISM

Regarding dynamic Federalism, the framers believed that individual liberty would be better protected by having two sovereign governments rather than one. Each sovereign government would try to prevent the other one from becoming too powerful. From the beginning until today, the federal government has had to compete with the states in a perpetual struggle for power.

In America, the boundaries between state and federal power are constantly changing. These changes are driven by the ever-changing views of the American people, for whom Federalism is instinctive. Whenever Americans believe that the balance of federal and state power needs to change to solve some new problem, they can make that happen. Sometimes, the change is implemented by amending the Constitution.

However, American Federalism also changes in much more frequent and much less dramatic ways—through new federal statutes, new federal executive or administrative actions, and new federal judicial decisions. In short, American Federalism was designed to be dynamic rather than static.

THE DEMOCRATIC NATURE OF THE FEDERAL GOVERNMENT

As Madison explained in *Federalist,* no. 46, if the American people ever decide they want the federal government to have more power or return some power to the states, they can accomplish that goal by electing new federal leaders who will make it happen. In America, the people always retain the ultimate political control over both their state and federal government.

The federal government is more like a democratic republic. The president is elected indirectly through the selection of the members of the Electoral College. The House of Representatives is directly elected by districts that are roughly equal in population. However, senators are elected at the state level, which gives relatively more power to the smaller states and less to the larger ones. Federal judges aren't elected at all.

However, all three branches of the federal government are strongly dependent on the democratic will of the American people. The president is chosen by the Electoral College, whose members are determined by the majority vote of the people in each state (or, in Maine and Nebraska, in each legislative district). Both chambers of the federal legislature are likewise elected by the people. Finally, federal judges are appointed by whoever has been elected president at the time when a vacancy occurs, with the "advice and consent" of the elected Senate. As for the US Supreme Court, the justices are acutely aware that the court's ultimate authority depends entirely upon the respect of the American people.

In short, under the Constitution, the American people have the power to control both their state and federal government officials through the political process. Over the course of American history, this has facilitated the evolution of federal citizenship—of allegiance primarily to the United States rather than to a particular state—in response to several major national crises that persuaded the American people to use their political power to alter the original balance of Federalism.

THE EFFECTS OF CIVIL WAR

The most significant crisis was the Civil War. The horrors of slavery and the Confederacy's attempts to preserve that evil institution demonstrated that the states can't always be trusted to protect and preserve the civil rights of all of their people. As such, after the war, a majority of the American people supported the decision of their government officials to amend the US Constitution and change the balance of Federalism. The Civil War Amendments to the Constitution—the Thirteenth, Fourteenth, and Fifteenth Amendments—were the first major provisions in the Constitution aimed squarely at the states and directly limiting their powers.

The Thirteenth Amendment prohibited slavery and involuntary servitude throughout the United States. The Fifteenth Amendment prohibited both the federal government and the states from denying or abridging the right to vote on the basis of race, color, or previous condition of servitude. However, the Fourteenth Amendment had the most significant impact on American Federalism. Consider the first sentence of Section 1 of the amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Birthright citizenship became enshrined in the US Constitution through this language.

The drafters of the Fourteenth Amendment wanted to extend federal citizenship to all formerly enslaved Black people who'd been born in the United States—and also to all Black people who'd never been enslaved. That sentence also expressed the deep commitment that the federal government should protect the civil rights of all American citizens. However, in the 19th century, the term *civil rights* didn't necessarily include political rights. Even

after the Civil War and especially after the end of Reconstruction, Black Americans were still denied equal political power and equal voting rights. This injustice continued throughout the 20th century and persists even today.

The Fourteenth Amendment also expressed the essence of what it means to be a federal citizen. In the remaining three clauses of Section 1, the amendment defined three civil rights that would henceforth be enjoyed by all federal citizens and protected by the federal government against state interference. The first clause prohibited the states from denying the "privileges or immunities" of federal citizenship to any citizen of another state. The second clause prohibited the states from depriving any person of life, liberty, or property without "due process of law." And the third clause prohibited the states from denying the "equal protection of the laws" to any person within their jurisdiction. These clauses—the privileges or immunities clause, the due process clause, and the equal protection clause, respectively—represented a solemn promise by the federal government to all American citizens.

THE FUTURE OF FEDERAL CITIZENSHIP

The Civil War changed American ideas about citizenship forever. The war taught Americans that the federal government sometimes must step in—with military force, if necessary—to compel the states to respect the civil rights of their own people. This dramatic change was a direct manifestation of the framers' plan to let the American people determine the future course of Federalism.

Since the Civil War, the American people have turned to the federal government for help on several more occasions, such as during the New Deal of President Franklin D. Roosevelt to resolve the economic crisis of the Great Depression. Each time, the framers' plan worked because the American people were able to alter the balance of Federalism in whatever manner they saw fit. In the aggregate, over time, most of these changes have led to increased federal power and an ever-stronger sense of federal citizenship. Today, most Americans tend to see themselves as US citizens first and state citizens second. This feeling of federal citizenship has also been boosted in many other ways, such as by the patriotism represented by the American flag and the common experience of national military service.

However, the American system of dynamic federalism based on democratic principles is far from perfect. Societal advances are often followed by periods of backlash and retrenchment. For example, the civil rights era of the 1960s was followed by a resurgence of racism, hate crimes, and the rise of the alt-right. Hopefully, Americans can say that the overall trend line remains positive—but that doesn't mean that America is always moving in the right direction.

What does the future hold for federal citizenship in America? Nobody knows for sure. Due to contemporary America's extreme political polarization, at least some people seem to be identifying more with their red or blue states than with the United States. However, the idea of state citizenship doesn't always have to be divisive. Sometimes, it might even be inclusive. Several interesting recent developments involving immigration might portend the revival of a more positive kind of state citizenship that can unite rather than divide.

For years, federal immigration law has been stuck in a political stalemate that leaves US borders under severe pressure yet provides no path to US citizenship for many hard-working and potentially deserving immigrants who are already here. In response, some states have tried to take the lead. Since 2014, the New York legislature has been considering a proposed state law called the New York Is Home Act. The legislation would grant state citizenship to some qualified undocumented immigrants living within New York who are legally ineligible to pursue US citizenship. The law would provide such state citizens—who are already living, working, and paying taxes in the state—with various legal rights and benefits, including the right to vote in state and local elections and to obtain driver's licenses and state ID numbers.

Should you view these state initiatives as attempts to nullify or undermine federal immigration law? Or are they merely a creative, modern way of repurposing the old concept of state citizenship to improve the daily lives of people whose dreams of becoming American citizens have been thwarted? As always, the Supreme Court will ultimately have the final word.

READING

Amar, Akhil Reed, and John C. Harrison. "The Citizenship Clause: Common Interpretation." National Constitution Center. https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/700.

Madison, James. *Federalist* No. 46: "The Influence of the State and Federal Governments Considered." 1788. https://guides.loc.gov/federalist-papers/text-41-50#s-lg-box-wrapper-25493411.

Tocqueville, Alexis de. *Democracy in America*. 1835 and 1840. Translated by Harvey C. Mansfield and Delba Winthrop. Chicago: University of Chicago Press, 2000.

10

Equal Protection's FAILED Promise

On May 30, 1921, Black teenager Dick Rowland entered the Drexel Building in downtown Tulsa, Oklahoma, to use the public bathroom. He startled a White elevator girl, who screamed and accused Rowland of assaulting her. Rowland was arrested and taken to the local courthouse. On May 31, the sheriff refused to hand Rowland to a mob of White residents, so they rampaged through the city, attacking Black people, neighborhoods, and businesses. In the aftermath, a city commission blamed all the violence on the Black community. But why didn't the federal government step in and prosecute the perpetrators of the Tulsa race massacre? What about the federal government's guarantee—expressed in the Fourteenth Amendment—that it would protect the civil rights of all citizens of the United States? This lecture tells the story of how the equal protection clause failed and how that failure still reverberates in America.

THE CIVIL RIGHTS ACT OF 1866

Although the Civil War officially ended on August 20, 1866, America's racial problems were far from over. In the former Confederacy, new state laws restricting the rights of the freedmen were swiftly enacted. These Black codes bound formerly enslaved persons to their employers as indentured servants; prevented them from making contracts or owning property; and deprived them of the right to vote, to be educated, and to possess guns. The Black codes also made it a crime—called vagrancy—for a Black person to be unemployed; this law led to the imprisonment of many formerly enslaved persons who were then leased out as convict labor to plantation owners.

Outside the South, people perceived the Black codes as blatant attempts to recreate the conditions of slavery. Such an act was prohibited in Confederate-held areas by President Lincoln's Emancipation Proclamation in January 1863 and nationwide by the Thirteenth Amendment in December 1865. In response to the Black codes, the Radical Republican Congress enacted the Civil Rights Act on March 13, 1866.

The stated purpose of the act was "to protect all persons in the United States in their civil rights and furnish the means of their vindication." The act declared that all persons born in the United States and not subject to any foreign power were entitled to be citizens without regard to their race, color, or previous condition of slavery or involuntary servitude. The legislation provided that all citizens have the same rights as White citizens to make and enforce contracts, to sue and be sued, to give evidence in court, and to own property. Finally, the act guaranteed to all citizens the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by White citizens," along with "reasonable protection to all persons in their constitutional rights of equality before the law."

Congress enacted the Civil Rights Act of 1866 to ensure that Black Americans would enjoy the same rights and legal protections as White Americans. However, as the legislation dealt with contracts and property—two subjects traditionally within the power of the states—supporters of the act feared that it might be held unconstitutional as exceeding the enumerated powers of the federal government. So, Congressional Republicans simultaneously drafted a constitutional amendment designed to accomplish the same goals—the Fourteenth Amendment.

THE FOURTEENTH AMENDMENT

Section 1 began by declaring a new principle of national, or federal, citizenship: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The section then provided that no state can abridge the "privileges or immunities" of citizens of the United States; nor deprive any person of life, liberty, or property without due process of law; nor deny to any person the "equal protection of the laws."

Section 5 of the Fourteenth Amendment added that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." The section expanded Congress's enumerated powers and ensured the constitutionality of the Civil Rights Act of 1866. But what specific evil was the equal protection clause designed to prevent?

On May 1, 1866—about 6 weeks before Congress passed the Fourteenth Amendment—two carriages collided in Memphis, Tennessee. One of the drivers was Black. When White police officers tried to arrest the Black driver, a crowd of onlooking Black residents protested, and a single shot rang out, injuring a police officer. These events triggered 3 days of rioting, during which 46 Black people and 2 White people were killed. Many White policemen and firefighters joined the mob and participated in the violence. No White person was ever charged with a crime in connection with the Memphis race massacre.

Such events shaped the debate over the equal protection clause. The drafters of the Fourteenth Amendment recognized that the federal government couldn't compel unwilling states to prosecute White people who attacked Black victims. So, the clause was designed to provide legal authority for the federal government to step in and prosecute such crimes whenever state and local governments refused to do so. This radical new idea would shift power from the states to the federal government.

In July 1868, the Fourteenth Amendment was finally ratified and became part of the Constitution. By then, however, the nature of racial violence against Black citizens in the South had changed. Most state and local governments in the former Confederacy were run by Republicans appointed

SCENES IN MEMPHIS, TENNESSEE, DURING THE RIOT—SHOOTING DOWN NEGROES ON THE MORNING OF MAY 2, 1866.—[SKETCHED BY A. R. W.]

by the federal government. Many of these appointees came from the North. As such, most racial violence in the South was now inflicted by the local White population, often acting collectively through White supremacist organizations like the Ku Klux Klan.

THE COLFAX MASSACRE

The most infamous example is the Colfax massacre. In Colfax, Louisiana, Republicans created a new Black-majority jurisdiction called Grant Parish from parts of other neighboring jurisdictions. After the 1872 elections, both the Republicans and the Democrats—now the party of segregationist Southern Whites—claimed victory in Grant Parish. Two White Republicans named Daniel Wesley Shaw and Robert C. Register, serving as sheriff and judge, feared a violent takeover by the Democrats. They therefore deputized about 150 local Black men to protect the parish courthouse in Colfax, and then they fled the scene.

These Black citizens—now temporary government officials—were armed with a few shotguns and pistols. They dug a trench outside the courthouse and waited. Several hundred White Democrats soon showed up with Enfield rifles and a cannon and surrounded the courthouse. On April 13, 1873, the Whites attacked. Cannon fire forced the Black deputies to retreat into the courthouse, which was then set ablaze. The Whites shot the Black deputies as they tried to escape and even after they surrendered.

The Colfax massacre didn't just mark the end of Reconstruction—it also marked the end of the Fourteenth Amendment's equal protection clause as a federal guarantee of equal justice for Black Americans. The local US attorney stepped in to try to obtain justice for the Black victims. In 1874, the federal prosecutor managed to obtain indictments against nearly 100 local Whites for various federal crimes in connection with the massacre—but only nine of the suspects could be located, arrested, and brought to trial.

CRUIKSHANK AND *REESE*

Bill Cruikshank was one of the nine defendants charged by the federal prosecutor in connection with the Colfax massacre, and he was convicted. On appeal, Cruikshank argued that he shouldn't be subject to federal prosecution because the Fourteenth Amendment applies only to state governments and government officials—not to private citizens. The Supreme Court agreed and reversed Cruikshank's conviction. The court held that the Fourteenth Amendment cannot be used to enact federal crime statutes authorizing the federal prosecution of a private citizen because it "does not … add anything to the rights which one citizen has under the Constitution against another." According to the court, only the states have the authority to prosecute private actions that deny equal rights.

On the same day as the *Cruikshank* decision, the court also decided the case of *United States v. Reese*. In that case, Kentucky officials refused to allow a Black person to register to vote, even after he offered to pay the required poll tax. The Kentucky officials were convicted of violating the federal Enforcement Act, which prohibits discrimination by state officials in voter registration. Once again, the Supreme Court reversed. Although the defendants in *Reese* were government officials, the court held that the act was still unconstitutional because it didn't require proof that the defendants were motivated by racial hostility. The court later extended the same reasoning to the Fourteenth Amendment, holding that the equal protection clause prohibits only intentional discrimination based on race, which is difficult to prove.

The *Cruikshank* and *Reese* decisions remain the law today. Because of *Cruikshank*, the equal protection clause doesn't authorize the federal government to prosecute the actions of private citizens who deny the equal

rights of Black Americans. Even today, no effective federal legal remedy exists for a Black victim of a crime committed by a private citizen—if the state and local authorities choose not to pursue the case. Meanwhile, due to *Reese*, a violation of the equal protection clause by a state or local government official requires proof of a racially discriminatory intent or motive.

What about situations where the claim of discrimination is about a prosecutor's decision to prosecute a Black defendant? Such a case clearly involves state government action, as required by *Cruikshank*. However, these cases remain subject to the same requirement from the *Reese* case—proof of the prosecutor's intent to discriminate against the Black defendant on the basis of race.

UNEQUAL PROTECTION

The failed promise of the equal protection clause continues to plague American criminal justice today. Even with clear statistical evidence of discriminatory outcomes, Black defendants can't prevail without proof of what was going through the mind of the relevant government official. Due to Supreme Court decisions from the 1870s, the equal protection clause is essentially a dead letter in criminal cases today.

Moreover, in the late 19th century, the Supreme Court also restricted the ability of Black Americans to use the equal protection clause as a remedy for racial discrimination in civil cases. In the so-called Civil Rights Cases of 1833, the court extended the holding of *Cruikshank* to bar federal civil lawsuits against private individuals. This ruling is also still the law today—and it's why the federal government had to turn to the commerce clause to enact new federal statutes outlawing private discrimination in the 1960s.

In the infamous 1896 case of *Plessy v. Ferguson*, the court held that even state-mandated racial segregation didn't violate the equal protection clause as long as the mandatory separate facilities for Black people were roughly "equal" to those for Whites. That decision led to a half-century of separate—and decidedly unequal—public schools for Black children.

The separate but equal doctrine was finally overruled in 1954 via *Brown v. Board of Education*, where the court held that segregated public schools violate the equal protection clause. However, in June 2023, the Supreme Court relied upon *Brown* to hold that public universities violate the equal protection clause when they consider an applicant's race as part of an effort to admit a diverse entering class for the educational benefit of all students.

READING

Crowe, Kweku Larry, and Thabiti Lewis. "The 1921 Tulsa Massacre: What Happened to Black Wall Street." *Humanities* 42, no. 1 (Winter 2021). https://www.neh.gov/article/1921-tulsa-massacre.

McCleskey v. Kemp, 481 US 279 (1987). https://supreme.justia.com/cases/federal/us/481/279.

Stuntz, William J. "The Fourteenth Amendment's Failed Promise." Chap. 4 in *The Collapse of American Criminal Justice*. Cambridge: Belknap Press of Harvard University Press, 2011.

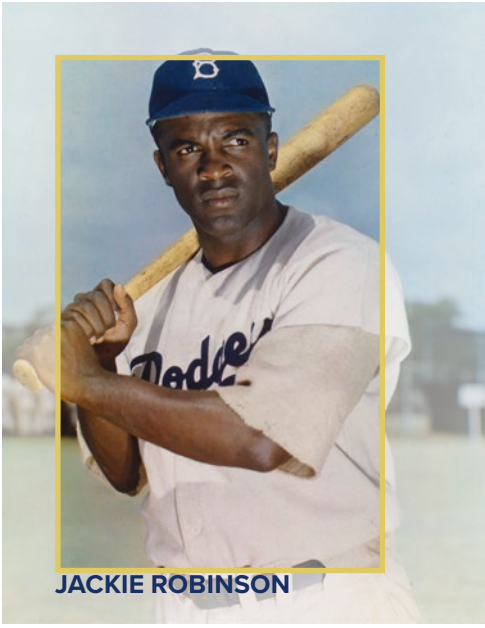
11

Prohibiting Private DISCRIMINATION

On February 1, 1960, four Black college students sat down in the Whites-only Woolworth's in Greensboro, North Carolina, and tried to order food. The men were asked to leave, but they refused. When the police arrived, they decided they had no grounds to arrest the men, so the Greensboro Four remained at the counter until closing time. This peaceful demonstration—a "sit-in"—helped to change America. The movement reached restaurants and other segregated businesses in 55 cities in 13 states by the end of March. Today, the restaurant's discrimination would be illegal because events like the Greensboro sit-in changed American public opinion, which led the federal government to enact a federal statute prohibiting racial discrimination and segregation in any place that serves food for consumption on the premises. In this lecture, you'll discover how the federal government was able to legally enact such an anti-discrimination law.

THE CIVIL RIGHTS MOVEMENT

Racial segregation in America continued to exist as a matter of state law until well into the 20th century. The equal protection clause never became the kind of broad protection for the rights of Black Americans that it was originally intended to be. However, after World War II—in which so many Black Americans served bravely—a new moral order began to emerge that would no longer tolerate apartheid in America. In 1948, President Harry Truman desegregated the US military by executive order. Meanwhile, courageous women and men like Rosa Parks and Jackie Robinson stood up against racial segregation with strength and dignity.



JACKIE ROBINSON

In 1954, in *Brown v. Board of Education*, the Supreme Court overruled *Plessy v. Ferguson* and held that segregated public education is "inherently unequal" in violation of the equal protection clause. The *Brown* decision triggered massive political and public resistance in the South (and elsewhere). However, despite its significance, the decision couldn't directly impact the kind of private discrimination that kept America racially segregated. In fact, to avoid the impact of *Brown*, Southerners created new, segregated private schools, which were completely legal.

When the Greensboro Four decided to start the sit-in that eventually led Woolworth's to desegregate its lunch counters in 1960, they were hoping to bring about social change through the economic impact of their protest and the sheer moral force of their cause—and their strategy worked. However, in

the absence of an equal protection clause federal remedy, many states refused to take the steps that could have ended blatant racial discrimination by private businesses.

In February 1962, in the case of *Bailey v. Patterson*, the Supreme Court made an important decision that pointed the way toward a different legal path. Samuel Bailey and two other Black plaintiffs filed a federal lawsuit in Mississippi, claiming they were denied the right to nonsegregated interstate (and intrastate) transportation facilities due to several Mississippi state laws that required all transportation facilities operating within the state to maintain strict racial segregation. The court ultimately agreed with the plaintiffs that the Mississippi laws were unconstitutional—not because they violated the equal protection clause but instead because they violated the commerce clause by imposing an unreasonable burden on interstate transportation.

The *Bailey* decision helped the civil rights movement gain momentum. In June 1963, President John F. Kennedy proposed the most comprehensive federal civil rights bill in American history, saying the United States "will not be fully free until all of its citizens are free." However, the bill stagnated in the House of Representatives due to segregationist Southern Democrats who didn't share the president's progressive views about race. In the Senate, the filibuster allowed a small minority of Southern Democrats to block the legislation.

On August 28, 1963, some 250,000 people participated in the March on Washington and listened as Dr. Martin Luther King delivered his famous "I Have a Dream" speech. Several months later, on November 22, President Kennedy was assassinated in Dallas. His successor was Lyndon Baines Johnson, a Southerner from Texas who had served for 12 years in the House and 12 in the Senate.

THE CIVIL RIGHTS ACT OF 1964

On November 27, only 5 days after becoming president, Johnson addressed Congress, saying, "We have talked long enough in this country about equal rights. We have talked for 100 years or more. It is time now to write the next chapter, and to write it in the books of law."

Seven months later, the Civil Rights Act of 1964 became the law of the land. Title I prohibited unequal restrictions on voting rights. Title II prohibited racial discrimination in public accommodations that affected interstate commerce—including hotels and motels, restaurants, and movie theaters. Title III required equal access to public facilities, such as public swimming pools. Title IV gave the US attorney general new authority to enforce *Brown v. Board of Education* and the desegregation of public schools. Title V created a new federal Civil Rights Commission, and Title VI prohibited racial discrimination in any program receiving federal funding. Finally, Title VII guaranteed equal opportunity in employment.

The main constitutional question now was whether the act could survive as a legitimate exercise of Congress's enumerated power under the commerce clause—given that it applied not only to interstate businesses but also to wholly intrastate businesses if they affected interstate commerce. Within months, two constitutional challenges to the Civil Rights Act of 1964 reached the court.

The first challenge was filed by the owner of the Heart of Atlanta Motel in Atlanta, Georgia. The motel was close to Interstates 75 and 85 and two state highways, and it refused to rent to Black people. The second constitutional challenge was filed by Ollie McClung, who ran a local family-owned restaurant in Birmingham, Alabama, called Ollie's Barbecue. The restaurant was located on a state highway and was only 11 blocks from an interstate highway; 46% of the meat purchased by the restaurant came from outside Alabama. The restaurant refused to serve Black people in its dining room.

Both challengers argued that their businesses were not proper subjects of federal regulation under the commerce clause. In both cases, the challengers lost. The Supreme Court held that these businesses were sufficiently connected with interstate commerce to be regulated by the federal Civil Rights Act. The court's decisions made it clear that Congress can use the commerce clause to regulate for the moral purpose of prohibiting racial discrimination by private businesses.

In 1971, the Supreme Court boosted the impact of Title VII of the Civil Rights Act, which prohibits employment discrimination. The court held that such discrimination can be proved not only by evidence of intentional discriminatory treatment but also by evidence that an employer's facially

neutral policy created a disparate impact upon one of the groups of people protected by the statute. This decision made Title VII employment discrimination cases much easier to prove than comparable cases under the equal protection clause, which requires proof of discriminatory intent.

Since 1964, numerous other federal statutes have been enacted to broaden the scope of federal anti-discrimination protection. For example, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in most educational programs that receive federal funding. Meanwhile, the Americans with Disabilities Act of 1990 provides broad federal protection against discrimination on the basis of disability.

TITLE VII

The main purpose of the Civil Rights Act of 1964 was to address racial discrimination. However, late in the process of adoption, the word *sex* was added to Title VII, thus making it an important part of modern sex discrimination law. Today, Title VII claims can be based not only on outright sex discrimination in employment but also on quid pro quo harassment involving explicit or implicit requests or demands for sexual favors in exchange for employment-related benefits. Title VII also prohibits "hostile work environments" based on unwelcome sexual behavior that "unreasonably interferes with an individual's job performance" or creates an "intimidating, hostile, or offensive working environment." The federal government can enforce these rights either by itself or through lawsuits filed in federal court by affected victims.

In 2020, in the case of *Bostock v. Clayton County, Georgia*, the Supreme Court held that the inclusion of the word *sex* in Title VII means that the statute also prohibits employment discrimination based on sexual orientation and transgender status. The court's decision was based on a literal reading of the statute. According to the majority opinion of Justice Neil Gorsuch:

> An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Simultaneously, the court noted that under certain circumstances, certain employers might be able to avoid the impact of Title VII by asserting their own competing claims to religious liberty. The Civil Rights Act of 1964 contains an exemption for religious organizations, such as churches—and even without such a statutory exception, the First Amendment might protect such religion-based claims and override the statute. Moreover, the Religious Freedom Restoration Act requires the federal government to take religious liberty claims into special account before applying or enforcing federal laws, which might include Title VII.

These difficult issues involving the interaction between claims of religious liberty and claims of discrimination under the Civil Rights Act of 1964 currently remain unresolved. Similar conflicts involving state anti-discrimination laws have already arisen.

MASTERPIECE CAKESHOP, LTD. V. COLORADO CIVIL RIGHTS COMMISSION

In the 2018 Supreme Court case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, Jack Phillips—the owner and operator of a Lakewood, Colorado, bakery called Masterpiece Cakeshop—refused to create a special-order wedding cake for two gay men, Charlie Craig and David Mullins. Phillips claimed that designing and baking a cake to celebrate a gay wedding would violate his Christian religious beliefs and, thus, his First Amendment right to the free exercise of religion. However, he was willing to sell the men existing baked goods from the store.

Craig and Mullins complained to the Colorado Civil Rights Commission, which held that Phillips violated the Colorado Anti-Discrimination Act by discriminating against the two men based on their sexual orientation. The commission ordered Masterpiece Cakeshop to serve gay couples in the same manner as all other customers.

In this situation, the federal government couldn't take action on behalf of Craig and Mullins because only Title VII of the Civil Rights Act of 1964 contains the word *sex*. *Bostock* held that the term includes sexual orientation—but Title VII only prohibits discrimination in employment. No comparable

federal anti-discrimination law exists to require businesses to serve gay customers. So, Craig and Mullins had to turn to state anti-discrimination law for a remedy.

The US Supreme Court eventually overturned the Colorado Civil Rights Commission's decision by holding that the commission didn't give Phillips a fair hearing on his religious liberty claim. In effect, the commission acted as a biased judge against religion, thus necessitating a reversal. Americans are still waiting for the court to tell them how to balance the First Amendment religious liberty rights of a business owner like Phillips and the rights of customers like Craig and Mullins to be free from discrimination as defined by either federal or state law.

READING

303 Creative LLC v. Elenis, 600 US __ (2023). https://supreme.justia.com/cases/federal/us/600/21-476.

Gettinger, Ted, and Allen Fisher. "LBJ Champions the Civil Rights Act of 1964." *Prologue Magazine* 36, no. 2 (Summer 2004). https://www.archives.gov/publications/prologue/2004/summer/civil-rights-act.

Wilson, Christopher. "The Moment When Four Students Sat Down to Take a Stand." *Smithsonian*, January 31, 2020. https://www.smithsonianmag.com/smithsonian-institution/lessons-worth-learning-moment-greensboro-four-sat-down-lunch-counter-180974087.

12

Due Process TRANSFORMS FEDERALISM

In 1911, the New York state legislature enacted the Sullivan Act, which required all people in the state who wanted to possess a handgun to apply for a license from a police magistrate. To obtain a concealed carry license, an applicant had to demonstrate "good moral character" and "proper cause." In June 2022, the US Supreme Court held the Sullivan Act unconstitutional. Justice Clarence Thomas concluded that by making the license so difficult to obtain, the state law violated New Yorkers' Second Amendment right to "bear arms" in public for self-defense. Why did the Supreme Court take so long to decide that the act was unconstitutional? Why shouldn't New Yorkers be able to decide for themselves whether they want to have a state gun control law? This lecture will answer these questions—and in the process, you'll see how the due process clause of the Fourteenth Amendment transformed American Federalism.

DUE PROCESS

Shortly after the Civil War ended, the Thirteenth, Fourteenth, and Fifteenth Amendments were added and imposed new constitutional limits on the states that would henceforth be enforced by the federal government. The Thirteenth Amendment reinforced President Lincoln's Emancipation Proclamation by prohibiting slavery throughout the United States. The Fifteenth Amendment prohibited the states and the federal government from restricting the right to vote based on race, color, or previous condition of servitude. And the due process clause of the Fourteenth Amendment provided that no state may "deprive any person of life, liberty, or property, without due process of law."

Because of the due process clause, the states must provide due process of law. That is, the clause guarantees some kind of legal procedure before a state can take away your life, liberty, or property. The word *due* refers to something that's owed to someone—something they're entitled to or deserve. So, due process of law must refer to whatever legal procedure you're owed. Due to the inherent circularity of this clause, the Supreme Court was left to define the meaning of the phrase, and shortly after the Civil War, the court gave it a very narrow interpretation.

The evolution of due process occurred primarily in criminal cases. In 1884, a California state prosecutor charged Joseph Hurtado with first-degree murder. After Hurtado was tried and convicted, he appealed, arguing that he was entitled to have a grand jury make the initial decision about whether to charge him. The Fifth Amendment required the federal government to use grand juries in all serious federal criminal cases. Some states also provided grand juries as a matter of state law, but California wasn't one of them. Hurtado argued that denying him a grand jury violated his right to due process of law under the Fourteenth Amendment.

The Supreme Court disagreed, holding that the Fourteenth Amendment's due process clause means only that the states must obey their own statutes, regulations, and procedural rules before taking away a person's life, liberty, or property. That is, they have to obey the "rule of law." Under this narrow interpretation of the due process clause, as California state law didn't provide Hurtado with the right to a grand jury, he wasn't constitutionally entitled to a grand jury.

Based on the *Hurtado* case, the due process clause would never have significantly limited the powers of a state. If a state wanted to provide some legal procedure to a person accused of a crime, it could write that procedure into state law. And if the state didn't want to provide that legal procedure, it didn't have to. State law could always be amended to take away the right to any particular legal procedure. The due process clause was interpreted in this way for more than half a century after the adoption of the Fourteenth Amendment. Then, in the early 1900s, the Supreme Court was confronted with cases involving the serious mistreatment of defendants by the criminal justice systems in several Southern states.

THE FUNDAMENTAL FAIRNESS AND SHOCK THE CONSCIENCE TESTS

In the 1937 case of *Palko v. Connecticut*, the court explained that due process also means that a state may not violate the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." This holding later became known as the "fundamental fairness" test.

In July 1949, three LA County deputy sheriffs burst into the bedroom of Antonio Richard Rochin, a suspected drug dealer. On the nightstand, the sheriffs saw two drug capsules, which Rochin promptly swallowed. The sheriffs took Rochin to a doctor, against his will, and had his stomach forcibly pumped to recover the drugs. Rochin was convicted of drug possession—but the Supreme Court reversed the conviction, finding that he was denied due process because the behavior of the sheriffs "shocks the conscience." The *Rochin* case added a new dimension to the court's evolving due process test.

As compared with the toothless rule of law approach from *Hurtado*, the fundamental fairness and shock the conscience tests were big steps forward, allowing federal courts to make normative decisions about whether a state satisfied the due process clause. However, a new problem arose: Why should the nine justices of the US Supreme Court have the power to decide what's fundamentally fair? Why should their shocked consciences be the only consciences that matter? And since the justices aren't elected at all, why should the American people be bound by any decisions they make?

JUDICIAL LEGITIMACY

This is called the judicial legitimacy problem. The Supreme Court is one of America's most powerful institutions, but it's undemocratic. Additionally, the court lacks the power to enforce its own rulings, relying entirely on the other two branches of federal government to do that. If the court ever loses the public's respect, then the elected branches of federal government might decide not to enforce the court's rulings, and the American people might stop obeying those rulings. So, while the court frequently must make unpopular decisions, it is always sensitive to the problem of judicial legitimacy. This factor is why the court pivoted once again with respect to the meaning of the due process clause.

First, the court asked whether a particular legal procedure was both fundamentally fair and part of the tradition of "ordered liberty" underlying America's legal institutions. Later, the court began looking to historical documents—like the Declaration of Independence—to determine what procedures really are part of Americans' shared history and tradition. By the 1960s, the court decided that the due process clause was intended to make the Bill of Rights apply to the states—that is, the incorporation of the Bill of Rights into the Fourteenth Amendment due process clause.

In 1925, the court held that the First Amendment's protections of freedom of speech and freedom of the press were binding on the states as part of the Fourteenth Amendment due process. In 1937, the court added freedom of assembly and, by 1947, freedom of religion—thereby completing the incorporation of the First Amendment.

In 1949, in *Wolf v. Colorado*, the court incorporated the Fourth Amendment protection against "unreasonable" searches and seizures. In the 1960s and 1970s, the court found that most of the remaining procedural protections for federal criminal defendants in the Bill of Rights were part of due process and thus applicable to state criminal cases through incorporation. Among other provisions from the Bill of Rights, the court also incorporated the Fifth Amendment right not to be compelled to incriminate oneself in 1964 and the Eighth Amendment right to be free from cruel and unusual punishment in 1972.

One issue that wasn't resolved right away was whether the incorporation of these provisions meant that the states had to provide these rights in exactly the same way that the federal government did—a theory called jot-for-jot incorporation. In 2019, the court finally resolved that issue in the case of *Timbs v. Indiana*. Tyson Timbs was a drug user and part-time drug dealer who often transported his drugs in his $42,000 Land Rover.

After Timbs pled guilty to drug possession, Indiana seized the Land Rover because it was used in the commission of the crime. Timbs appealed the seizure, claiming that it violated the provision in the Eighth Amendment that prohibits "excessive fines." However, the excessive fines clause had never been incorporated—so nobody knew whether it would apply to Indiana. After reviewing the history and tradition surrounding the clause, the Supreme Court found the clause applicable to the states through due process incorporation. The court added that incorporated rights are

> enforced against the States … according to the same standards that protect those … rights against federal encroachment. Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.

In short, no tweaking was allowed. The Indiana courts subsequently agreed with Timbs that the seizure of his Land Rover was an excessive fine under the Eighth Amendment.

STATE AND LOCAL GUN-CONTROL LAWS

The Second Amendment provides: "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." In 2008, the Supreme Court ruled in *District of Columbia v. Heller* that this right is not limited to keeping and bearing arms as a member of a "militia." Instead, the court held that the Second Amendment protects the right to keep and bear arms for personal self-defense. As such, DC's strict gun-control law—which prohibited the possession of any handgun and required all legally possessed guns inside the home to be disassembled or disabled by a trigger lock—was unconstitutional.

However, the District of Columbia is a federal enclave, and the DC gun control law in *Heller* was therefore a federal law. In 2008, the Supreme Court hadn't yet incorporated the Second Amendment into the Fourteenth Amendment due process clause. So, the *Heller* decision didn't immediately apply to states or cities—but that changed quickly. In 2010, in the case of *McDonald v. City of Chicago*, the court addressed Chicago's gun control law, which effectively banned all handgun possession by most private citizens.

In an opinion by Justice Samuel Alito, the court found the Second Amendment to be "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." The court added that the right to keep and bear arms for personal self-defense was well understood and widely acknowledged at the time the Fourteenth Amendment was ratified shortly after the Civil War. As such, the court held that the Second Amendment must be incorporated into the Fourteenth Amendment due process clause and therefore applies to states and cities.

This decision is why New York's handgun licensing law became vulnerable to a Second Amendment challenge in 2022—and it's also why the Supreme Court ultimately held that the New York state law was unconstitutional in the case of *New York State Rifle & Pistol Association, Inc. v. Bruen*.

Today, the due process clause of the Fourteenth Amendment governs virtually every aspect of state criminal proceedings—from the initial crime investigation and charging process to the trial, verdict, and sentencing. The clause has effectively transformed the way that states handle criminal cases, and it plays a significant role in limiting the power of the states in other contexts.

For example, states are bound by the First Amendment in the same manner as the federal government. Individuals can use the due process clause to challenge their detention under state civil commitment laws for severe mental illness or drug addiction or through state medical quarantine. Moreover, due process enables federal judicial oversight of the procedures used by state and local governments to make and enforce decisions about zoning, annexation, taxation, welfare, and unemployment benefits.

READING

Congress.gov. "Amdt 14.S1.4.1: Overview of Incorporation of the Bill of Rights." Constitution Annotated. https://constitution.congress.gov/browse/essay/amdt14-S1-4-1/ALDE_00013744. (The sections that follow this page are also recommended.)

Hall, Matthew, and Joseph Daniel Ura. "Loss of Supreme Court Legitimacy Can Lead to Political Violence." *The Conversation*, July 1, 2024. https://theconversation.com/loss-of-supreme-court-legitimacy-can-lead-to-political-violence-233316.

McDonald v. City of Chicago, 561 US 742 (2010). https://supreme.justia.com/cases/federal/us/561/742.

13

HABEAS CORPUS Helps Enforce Federal Law

Elizabeth Turner was born into slavery in Maryland. On November 1, 1864, the state abolished slavery through a state constitutional amendment. However, 2 days later, Elizabeth was returned to the custody of her former owner as an indentured apprentice. The indenture document was based on a Maryland statute—enacted shortly before the state's abolition amendment took effect—and provided that Elizabeth was the "property and interest" of her enslaver. In September 1867, Elizabeth's mother and stepfather sought a writ of federal habeas corpus to order her release. On October 13, 1867, Chief Justice Salmon P. Chase found that the indenture indeed violated the Thirteenth Amendment and the federal Civil Rights Act of 1866. Elizabeth was finally free. As this lecture discusses, ever since the Civil War, federal judges have used federal habeas corpus to protect anyone whose liberty is restrained by a state in violation of federal law.

HABEAS CORPUS

Habeas corpus is an ancient legal procedure that empowers a judge to investigate the legality of a person's detention and, if necessary, order their release. The framers were so familiar with the procedure that they wrote a suspension clause—Article I, Section 9—into the US Constitution, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." To further underscore the importance of habeas corpus, Congress included it in the Judiciary Act of 1789, which was one of the first federal statutes enacted during the first legislative session after the ratification of the Constitution.

Throughout history, however, a person in custody convicted of a crime couldn't use habeas corpus to challenge their criminal conviction. The original version of habeas corpus that came over to America before the framing can still be used today in many situations that don't involve a challenge to a criminal conviction. For example, the procedure can be used whenever someone is held or otherwise subjected to a significant deprivation of their liberty under a medical quarantine law. Moreover, if someone is detained for an immigration law violation, they can file a habeas petition—as can a person who has been charged but not yet convicted of a crime and is being held in jail while awaiting trial.

In such situations, the person who files a habeas petition isn't necessarily going to be released. For instance, if someone awaiting trial presents a serious danger to the public or a flight risk, then their petition will be denied. Moreover, until the end of the Civil War, being convicted and sentenced for a crime by a court with proper jurisdiction was also legally sufficient to justify the custody.

THE HABEAS CORPUS SUSPENSION ACT

The first significant expansion of habeas corpus due to Federalism occurred in 1833. Historically, a person in the custody of a state would have to file their habeas corpus petition in state court. However, in response to South Carolina's attempt to nullify a federal tariff, Congress enacted a statute authorizing a federal court to issue a writ of habeas corpus on behalf of any federal government official detained by a state for acts pursuant to federal law.

When the Civil War broke out in April 1861, the federal government in Washington DC suddenly found itself in a precarious position. On one side was Virginia, the largest state in the Confederacy. On the other side was Maryland, which never left the Union but was home to many slaveowners and Confederate sympathizers. And many federal judges were Southerners by birth—or at heart—and might have been inclined to use their habeas corpus power to release pro-Confederacy federal prisoners. All of these problems arose while Congress was out of session.

So, on April 27, 1861, President Abraham Lincoln unilaterally suspended the writ of habeas corpus along the threatened rail lines between Washington and Philadelphia. Chief Justice Roger Taney declared Lincoln's action unconstitutional because only Congress was authorized to suspend the writ. Congress was called into special session on July 4, 1861, but it couldn't manage to pass a resolution authorizing suspension.

In February 1862, Lincoln defused the controversy by ordering the release of almost all of the relevant federal prisoners, with amnesty. However, in September 1862, he suspended habeas corpus nationwide to implement the military draft and enable the suppression of any opposition without judicial interference. In January 1863, Congress finally enacted the Habeas Corpus Suspension Act, authorizing the president to suspend habeas for as long as the war continued.

Lincoln used this new authority to suspend the writ throughout the United States with respect to prisoners of war, spies, traitors, and members of the military—and, later, for all purposes in Kentucky, where rebels and rebel sympathizers were stirring up major trouble. These suspensions remained in effect until Lincoln's successor, President Andrew Johnson, revoked them in December 1865.

THE HABEAS CORPUS ACT OF 1867

The most significant change to habeas corpus in American history occurred immediately after the Civil War. Black Americans who'd just been freed from slavery in the former Confederate states found themselves subjected to trumped-up state criminal charges or abusive indenture contracts that placed

them back into the conditions of slavery. Some federal government officials in the occupied South were also charged with nonexistent state crimes. Such actions were all about resistance to Reconstruction in the former Confederacy.

In response, Congress enacted the Habeas Corpus Act of 1867. This new statute authorized federal judges to use habeas corpus to review "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." For the first time, federal judges had the power to review the constitutionality of all state detentions—and even detentions by private persons. Even more importantly, the act gave federal judges the power to investigate whether a facially valid state criminal conviction actually complied with federal law. The mere existence of a criminal conviction would no longer serve as a defense to habeas corpus.

In terms of Federalism, the significance of the Habeas Corpus Act of 1867 cannot be overstated. Henceforth, all "citizens of the United States" would be protected by the federal government against any infringement of their rights by the states. The act gave federal judges—with the help of federal marshals and, at the time, the US military—the ability to enforce this federal guarantee in all cases of imprisonment or any other significant restraint on liberty by a state. Today, those same judicial orders would be enforced by federal marshals and, if necessary, the National Guard. While the US Supreme Court already possessed jurisdiction to review the constitutionality of state criminal convictions, it didn't—and still doesn't—have the time to review even a significant fraction of all allegedly unconstitutional state criminal convictions.

The Supreme Court agrees to review fewer than 75 total cases each year—including civil and criminal cases. As such, whenever it becomes necessary to police the way state criminal courts interpret and apply federal law, the Supreme Court needs help. That help usually comes from the federal district courts, of which there's at least one in every state. And those federal district courts have the jurisdiction to review state custody resulting from state criminal convictions because of the Habeas Corpus Act of 1867.

THE WARREN COURT

Think of habeas corpus as a legal weapon that can be used by the federal judiciary to protect people from unconstitutional deprivations of liberty by the states. Whenever a state court ignores or disobeys federal constitutional law, a federal judge can use habeas corpus to order the release of state prisoners whose federal rights have been violated, thereby prodding defiant state courts into federal constitutional compliance. This action proved necessary after the Civil War and again during the 1960s and 1970s, when the US Supreme Court—under Chief Justice Earl Warren—expanded the federal constitutional rights of defendants charged with crimes in state courts as part of the broader civil rights movement.

The so-called Warren Court revolution involved a series of decisions that established brand new federal constitutional rights for defendants in state criminal cases. These decisions included *Duncan v. Louisiana* in 1968, which provided defendants the right to a jury trial in all serious criminal cases. During the same period, the Warren Court also expanded the scope of federal habeas corpus review, making it easier for federal district judges to help ensure that the state courts would faithfully enforce those new federal rights.

After many years and thousands of federal habeas corpus petitions, most state courts stopped resisting the application of these new federal constitutional rights in state criminal cases. Then, the Supreme Court and Congress took steps to limit the scope of federal habeas corpus review. What's the point of a federal court reviewing the constitutionality of a state criminal conviction if the state courts are doing a decent job of it on their own? As such, the Supreme Court reversed some of the expansions of federal habeas corpus it had implemented during the 1960s. In 1996, the same thinking led Congress to amend the Habeas Corpus Act of 1867.

The amended federal habeas corpus statute was called the Anti-Terrorism and Effective Death Penalty Act. The new statute imposed a 1-year time limit after conviction for filing most federal habeas corpus petitions and limited most convicted persons to only one federal habeas petition. Most importantly, it required federal habeas judges to defer to a state court's prior constitutional decisions—allowing a habeas petition to be granted only if the state court was both wrong and "unreasonable."

CAPITAL CASES

In the United States, the death penalty remains hugely controversial, and the Supreme Court continues to develop new federal constitutional rules to try to improve the administration of capital punishment by the states. Most of these new rules are based on the Eighth Amendment's "cruel and unusual punishments" clause. The court has held that the death penalty would be a cruel and unusual punishment without special rules designed to enhance fairness, equality, and individualized justice for capital defendants.

The few states that still actively use the death penalty don't particularly like federal judges intervening by means of federal habeas corpus—issuing last-minute stays of execution and even reversing some death sentences. State courts realize that all state criminal cases must comply with the due process clause of the Fourteenth Amendment and with all of the procedural protections in the Bill of Rights that go along with it. However, those state courts are much less familiar with the special procedural rules established by the Supreme Court for a death sentence to pass muster under the Eighth Amendment. These rules are sometimes called super due process, and they are continually changing, upsetting state courts, which can't always keep up.

In the noncapital context, federal habeas courts today don't review state criminal cases nearly as aggressively as they once did. The active, ongoing war of Federalism has long been over. However, habeas corpus is always ready to be used by the federal courts to compel state court compliance with federal law.

READING

Congress.gov. "Art III.S1.6.9: Habeas Review." Constitution Annotated. https://constitution.congress.gov/browse/essay/artIII-S1-6-9/ALDE_00001186.

Keating, Dennis. "Lincoln's Suspension of Habeas Corpus." *The Cleveland Civil War Roundtable*, May 26, 2020. https://www.clevelandcivilwarroundtable.com/lincolns-suspension-of-habeas-corpus.

King, Nancy J., and Joseph L. Hoffmann. *Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ*. Chicago: University of Chicago Press, 2011.

14

Sex, Marriage, and REPRODUCTIVE RIGHTS

Substantive due process is the idea that the Constitution protects certain fundamental rights that are beyond the scope of state or federal government regulation. But where did this idea come from? How do Americans know what rights are so fundamental that they're protected against government interference in this way? And why should people be prevented from pursuing legislation because of a claimed federal constitutional right that doesn't appear anywhere in the Constitution? You'll discover the answers to these difficult questions throughout this lecture.

SUBSTANTIVE DUE PROCESS

The idea of substantive due process first appeared in Supreme Court decisions more than a century ago. In 1897, the court reviewed a Louisiana statute that required all insurance companies doing business in Louisiana to have an agent within the state. A Louisiana shipping company was fined for entering into an insurance contract with a New York insurance company that didn't have a local agent. The Supreme Court held that the Louisiana statute violated the due process clause of the Fourteenth Amendment—which says that no state may deprive anyone of "life, liberty, or property" without due process of law—because the state law interfered with the shipping company's liberty to enter into the insurance contract.

Over the next several decades, the court used similar reasoning to strike down several state and federal statutes designed to regulate businesses and improve the working conditions of laborers. The most famous of these cases was *Lochner v. New York* in 1905. New York's Bakeshop Act made it a crime for bakeries within the state to employ bakers for more than 10 hours per day or 60 hours per week. Joseph Lochner, a bakery owner, was convicted of violating the act. However, the Supreme Court reversed, holding that the act infringed the due process "liberty" right of Lochner and his employees to enter into whatever kind of labor contract they wished. The state was barred from regulating such contracts unless there was a compelling public health or public safety justification.

The same theory of a constitutionally protected freedom of contract was later used by the court to invalidate state and federal laws restricting child labor; establishing a minimum wage for women and children; mandating pension contributions; and requiring employers to allow employees to join labor unions. The *Lochner* era ended during the New Deal—around the same time that the Supreme Court also began allowing the federal government to use its enumerated power under the commerce clause to regulate local businesses that have a substantial effect on interstate commerce. Starting in the late 1930s, the court reversed its course and began to uphold state and federal regulation of various kinds of business relationships—including labor contracts.

Today, the *Lochner* theory of freedom of contract is almost universally viewed as a misguided interpretation of the due process clause. However, the underlying principle of substantive due process has survived. Even during the *Lochner* era, the court made a couple of substantive due process decisions that remain good law today. These decisions were about the fundamental right of parents to make decisions about the upbringing and education of their children—a right that still exists today.

The Supreme Court reaffirmed its earlier decisions regarding parental rights in the 2000 case of *Troxel v. Granville*. The court struck down a Washington state law allowing a judge to grant child visitation rights to any person based on the "best interests of the child"—even over the objection of the child's parents. The court found the law incompatible with "the interest of parents in the care, custody, and control of their children … perhaps the oldest of the fundamental liberty interests recognized by this court."

THE ZONE OF PRIVACY

The other main area where fundamental liberty interests have long been recognized by the court is with respect to intimate personal decisions about sex, marriage, and reproduction. In the 1965 case of *Griswold v. Connecticut*—where the Supreme Court ruled that Connecticut's ban on the use of contraceptives violated citizens' right to marital privacy—the majority opinion was written by Justice William O. Douglas. Douglas began by acknowledging that *Lochner* was no longer good law. However, he pointed out that the court had long recognized constitutional rights that aren't mentioned or enumerated in the Constitution. According to Douglas, these unenumerated rights arise in the "penumbra" of rights that are mentioned in the Constitution. For example, a First Amendment right to "freedom of association" exists even though the text of the amendment doesn't explicitly say so.

Douglas listed several enumerated constitutional rights that all concern protecting a "zone of privacy"—including the First Amendment (protecting private thoughts, beliefs, and expressions) and the Fourth Amendment (protecting privacy by prohibiting unreasonable searches and seizures). He also quoted the Ninth Amendment, which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

In 1973, the court made perhaps the most famous substantive due process decision in history—*Roe v. Wade*. In an opinion written by Justice Harry Blackmun, the court recognized a "fundamental right of privacy" for pregnant women to choose whether to have an abortion and therefore struck down a Texas state law that prohibited abortions except where the mother's life was in danger. The end result of *Roe* was that all existing state laws regulating abortion suddenly became unconstitutional—except in New York, Washington, Alaska, and Hawaii, where abortion was already generally legal, subject to a doctor's discretion.

The court made its next big decision about fundamental rights in the 2003 case of *Lawrence v. Texas*, which involved a Texas statute criminalizing homosexual sodomy. John Lawrence Jr. and Tyron Garner were arrested after local sheriff's deputies found the two gay men in Lawrence's bedroom, having sex. Lawrence and Garner were convicted and fined $200 each. In the Supreme Court, the defendants argued that the Texas statute violated both the equal protection clause—because Texas criminalized homosexual sodomy but not heterosexual sodomy—and the due process clause. However, the court's ultimate decision to strike down the Texas law was based solely on the due process clause. In a majority opinion written by Justice Anthony Kennedy, the court held that a fundamental right exists for two consenting adults to privately engage in intimate sexual activity—whether that activity is heterosexual or homosexual.

After the *Lawrence* decision—and given the rapidly shifting tides of American public opinion on the issue of same-sex marriage—it was only a matter of time before the court would need to answer the constitutional question of whether there's a fundamental right for two people of the same sex to get married. On June 26, 2015, the court finally answered that question in the affirmative in the landmark case of *Obergefell v. Hodges*.

Once again, Justice Kennedy wrote the majority opinion, finding several state laws prohibiting same-sex marriage to violate both the equal protection clause (because they treated opposite-sex marriages differently from same-sex marriages) and substantive due process (because the right to marry is a fundamental right that can't be infringed without a truly compelling state interest). Kennedy explained that marriage is "fundamental" in part because it facilitates other fundamental rights, such as the right to raise children. Marriage is also a "keystone of our social order."

DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

The Supreme Court's modern substantive due process jurisprudence regarding the fundamental right of privacy in relation to intimate matters proceeded in a nearly unbroken line from *Griswold* in 1965 to *Obergefell* in 2015. However, on June 24, 2022, in the case of *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overruled *Roe* and held that no "fundamental right" exists for a pregnant woman to make the choice whether to have an abortion. In the process, the court raised deep concerns about the theory of substantive due process itself—the full repercussions of which may not be known for many years.

The *Dobbs* case arose after Mississippi enacted a law in 2018 banning most abortions after the first 15 weeks of pregnancy. The law was specifically designed to bring the abortion issue back to the Supreme Court in the hope that a new coalition of justices might take the opportunity to reconsider the decision in *Roe*. The court in *Dobbs* upheld Mississippi's 15-week abortion law as constitutional by a vote of 6 to 3. Justice Samuel Alito wrote the majority opinion.

Alito acknowledged that there are some unenumerated rights not explicitly mentioned in the Constitution but that such rights must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." The right to an abortion was never so "deeply rooted." Alito also stressed that *Roe* differed from all other substantive due process cases because abortion involves more than just the fundamental rights of a pregnant woman—it also involves what some people call a "potential life," and others call "the life of an unborn human being."

What about stare decisis—the longstanding legal principle that courts should adhere to their previous decisions unless there's an important reason to change them? Chief Justice John Roberts declined to join Alito's majority opinion because he felt that stare decisis counseled a more cautious approach, such as upholding the Mississippi law while preserving a constitutional right to abortion at earlier stages of pregnancy. However, according to Alito, the court was under no obligation to adhere to *Roe* because "*Roe* was egregiously wrong from the start."

Are the court's other major substantive due process decisions involving sex, marriage, and reproduction now at risk of being overruled as well? In *Dobbs*, Alito tried to reassure everyone that the court's new reasoning wouldn't necessarily extend to those other cases. However, Justice Clarence Thomas wrote a concurring opinion in *Dobbs* arguing that the court should go further and reconsider all of its substantive due process cases—including *Obergefell, Lawrence,* and *Griswold*. Simultaneously, he suggested that a future Supreme Court might decide to protect at least some of the same rights via a different provision in the Constitution—the privileges or immunities clause of the Fourteenth Amendment, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States." In 1873, the Supreme Court severely limited the clause in the Slaughterhouse Cases. According to Thomas, that decision might have been a mistake that should also be reconsidered.

THE FUTURE OF SUBSTANTIVE DUE PROCESS

The battle over substantive due process and fundamental rights has only just begun. Despite Justice Alito's reassurances in *Dobbs*, many Americans are convinced that the Supreme Court might soon take away additional constitutional rights. Would the American people accept the Supreme Court's reversal of *Obergefell*, which would surely lead to a rash of new state laws banning same-sex marriages? Would Americans tolerate new state laws prohibiting all kinds of nontraditional sexual activity or banning contraceptives, even for married couples? And what would the complete elimination of substantive due process mean for parental rights?

Finally, public respect for the Supreme Court has plummeted since the *Dobbs* decision. Will the court ever be able to recover its traditional exalted position in American society—or will it inevitably be dragged further into America's "culture wars," thereby undermining judicial legitimacy and the rule of law?

READING

Congressional Research Service. "Privacy Rights Under the Constitution: Procreation, Child Rearing, Contraception, Marriage, and Sexual Activity." CRS Legal Sidebar, September 14, 2022. https://crsreports.congress.gov/product/pdf/LSB/LSB10820.

Dobbs v. Jackson Women's Health Organization, 597 US __ (2022). https://supreme.justia.com/cases/federal/us/597/19-1392.

Griswold v. Connecticut, 381 US 479 (1965). https://supreme.justia.com/cases/federal/us/381/479.

15

Alcohol and Drug REGULATION

John Smith lives in Denver, Colorado. He likes to use marijuana because it calms his nerves. In November 2012, Colorado legalized the possession and use of small amounts of marijuana for recreational purposes. One day, John decides to buy a gun for hunting. At a local gun shop, the clerk asks John to fill out the Firearms Transaction Record required by the Bureau of Alcohol, Tobacco, Firearms and Explosives. The form asks: "Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?" In bold print, an additional statement says that possessing or using marijuana remains unlawful under federal law. Given that the US Constitution says federal law is the "supreme law of the land," how can Colorado maintain an inconsistent state law? In this lecture, you'll explore this topic, which remains at the frontiers of American Federalism.

PROHIBITION

Broadly speaking, American ambivalence about intoxicating substances long predates contemporary concerns about marijuana. For example, in the 1800s, the temperance movement—led by religious organizations in New York and Massachusetts—sought to ban alcohol due to its harmful effects on families and society at large. Maine enacted the first statewide ban in 1846, and 12 other states followed during the pre–Civil War period.

After the war, many prohibitionists linked alcohol with immorality and corruption in large cities and especially with the rapid growth of urban immigrant populations during the late 1800s and early 1900s. Such ideas fit with a broader distrust of newcomers who threatened America's ethnic, social, cultural, and economic status quo. In short, Prohibition was closely related to nativism—the belief that the interests of native-born Americans must be protected against the negative impacts of immigration.

By 1917, the political winds were clearly blowing in favor of Prohibition. In December of that year, Congress passed a constitutional amendment—proposed by Wayne Wheeler, the charismatic head of the Anti-Saloon League—prohibiting the "manufacture, sale, or transportation of intoxicating liquors." Upon ratification by three-fourths of the states, this became the Eighteenth Amendment in January 1919.

Prohibition and the Eighteenth Amendment didn't last long, and alcohol remained widely available despite Congress's passage of the Volstead Act, which was designed to enforce the Eighteenth Amendment. In December 1933, the Twenty-First Amendment was ratified, bringing Prohibition to an end. The amendment included the following language: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Each state was now primarily responsible for regulating alcohol, and the amendment placed the enforcement power of the federal government behind the states to ensure that no alcohol would enter any state in violation of that state's laws.

This legislation shifted the balance of Federalism. After the Twenty-First Amendment, the federal government could no longer directly regulate alcohol for its own purposes through the exercise of its commerce clause power. Instead, that power was granted to the states, many of which adopted blue laws prohibiting the sale of alcohol on Sundays—for religious observance and to preserve Sunday as a day of rest. Today, at least with respect to alcohol, the states operate as true "laboratories of democracy," each with different policies and legal rules.

THE WAR ON DRUGS

The somewhat analogous situation involving marijuana regulation officially started almost exactly as Prohibition was ending during the 1930s. After some sketchy research linked marijuana with violent crimes, more than half of the states enacted bans on marijuana possession and use. Then, in 1936, the anti-marijuana propaganda film *Tell Your Children* was released. Within a year, Congress enacted the Marijuana Tax Act, which effectively prohibited most marijuana possession by imposing a new federal excise tax on the authorized

possession of marijuana while restricting such authorization to a narrow range of medical and industrial uses. In the 1950s, marijuana possession became a serious federal crime under the Narcotic Control Act.

As time went on, two official federal reports questioned the earlier claims that marijuana was a "gateway" drug that led to violence. In 1972, a bipartisan federal panel called the Shafer Commission recommended the federal decriminalization of marijuana. Eleven states decriminalized the drug during the 1970s, and many others reduced their criminal penalties.

However, the federal government remained steadfast. President Richard Nixon declared a "war on drugs," and the Controlled Substances Act of 1970 set up a new system for regulating various drugs based on criteria that included the potential for abuse, the existence of accepted medical uses, safety and the potential for addiction, and treatment under international treaties. The new system was administered by the federal Drug Enforcement Administration (DEA) and classified marijuana as a Schedule I drug—meaning it was believed to pose a substantial risk of abuse, had no accepted medical uses, and was not safe even under medical supervision.

In the 1980s, America's war on drugs kicked into higher gear. President Ronald Reagan signed the Comprehensive Crime Control Act in 1984, increasing federal criminal penalties for marijuana and instituting new mandatory minimum sentences. Reagan also increased funding for FBI drug enforcement by more than tenfold.

FEDERAL VERSUS STATE GOVERNMENT

Over time, a substantial disparity emerged between the severe sentences for possessing and selling marijuana under federal law and the less severe penalties imposed under most state laws. And in 1996, California became the first state to legalize marijuana for certain medical purposes. Alaska, Oregon, and Washington followed in 1998, Maine in 1999, and Colorado, Hawaii, and Nevada in 2000. As of late 2023, more than three-fourths of the states had legalized medical marijuana.

The federal government initially tried to resist these initiatives. President Bill Clinton threatened to revoke the prescribing authority of doctors who prescribed medical marijuana, ban them from participating in Medicare and Medicaid, and prosecute them for federal crimes. However, a federal appellate court ruled that although doctors could be punished for prescribing a substance that was illegal under federal law, they had a First Amendment right to recommend medical marijuana to their patients.

The federal government also went after the producers and providers of medical marijuana in California and elsewhere. This policy of criminal and civil law enforcement eventually led to the Supreme Court's 2005 decision in *Gonzales v. Raich*, which held that the federal government can prohibit—and criminally punish—the production, possession, and use of medical marijuana even where it's legal under state law. Angel Raich and Diane Monson were Californians who used homegrown medical marijuana at the recommendation of their physicians to relieve severe pain. Monson grew her own medical marijuana, while Raich obtained hers through two primary caregivers, all in compliance with California state law. Federal DEA agents raided Monson's home and seized and destroyed six of her marijuana plants.

Raich and Monson then sued the DEA and US Attorney General Alberto Gonzales, arguing that the agency's enforcement actions against them—under the Controlled Substances Act—violated the commerce clause and the Ninth and Tenth Amendments because their homegrown medical marijuana was a purely local product with no substantial effect on interstate commerce. The Supreme Court ruled against the two women, finding that federal regulation of marijuana was part of a "closed regulatory system" designed to eliminate

all commerce in any drug that didn't comply with the Controlled Substances Act. For marijuana as a Schedule I drug, that provision meant all commerce except for a narrow range of federally approved research studies.

The court reiterated what it had said ever since the 1942 case of *Wickard v. Filburn*: Even purely local activities can be regulated under the commerce clause if they have a substantial effect on interstate commerce. And Congress could rationally conclude that homegrown and home-consumed marijuana would have such an effect by affecting the price and market for marijuana in general. Moreover, the court explained that if the production of homegrown marijuana for *medical* purposes was beyond the regulatory power of the federal government, then the production of homegrown marijuana for recreational purposes would also be beyond the federal power to regulate.

Finally, the court noted that creating an exception to the commerce clause for medical marijuana that's legal under state law would be incompatible with the supremacy clause—which establishes that the federal government's power over interstate commerce "is 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' however legitimate or dire those necessities may be."

THE COLE MEMORANDUM

Gonzales v. Raich did not end the war of Federalism between the federal government and the states over marijuana. Today, more than 20 states have legalized recreational marijuana, and more states are moving toward legalization. In addition, other states have decriminalized marijuana possession, even though the drug remains illegal according to state law.

At present, the production, sale, and possession of marijuana for any purpose other than federally approved research remains a serious federal crime, carrying serious penalties. However, as a general matter (and with some important exceptions), the federal government has decided that it doesn't really want to prosecute those who produce, sell, or possess marijuana in compliance with the relevant state law.

In 2013, the Department of Justice under President Barack Obama issued a document called the Cole Memorandum. The document instructed federal prosecutors to exercise their prosecutorial discretion—and not to prosecute marijuana crimes under federal law—where the activity was legal under state law and where the state's regulatory framework reasonably ensured the fulfillment of certain important federal policies. Those federal policies included preventing the distribution of marijuana to minors, preventing marijuana from reaching states where it's illegal, and preventing marijuana revenues from going to gangs or cartels. In effect, the memorandum established a truce between the federal and state governments.

As long as there remains a conflict between federal and state marijuana laws, any such truce must remain tenuous. In January 2018, President Donald Trump's Attorney General, Jeff Sessions, rescinded the Cole Memorandum, declaring that federal prosecutors should follow established prosecutorial principles—and their own judgment—in deciding whether to pursue marijuana charges under federal law. Since then, even though the Cole Memorandum hasn't been reinstated, federal prosecutors have continued to stay their hand. And in October 2022, President Joe Biden pardoned all those previously convicted of simple possession of marijuana under federal law.

On August 29, 2023, the US Department of Health and Human Services recommended to the DEA that marijuana should be reclassified under the Controlled Substances Act from Schedule I to Schedule III. Reclassification would likely mean that medical marijuana would become federally regulated by the Food and Drug Administration rather than federally punished as a crime. This provision would make life a little easier for marijuana growers, distributors, and sellers.

As long as almost all uses of marijuana are illegal under federal law, most banks and financial institutions will hesitate to serve marijuana-related businesses due to the legal risks and the costs of federal compliance laws that would require them to closely monitor such businesses. Moreover, Visa and Mastercard won't permit such businesses to use their credit card networks. Reclassification would likely change all of that—at least for those businesses involved with medical marijuana. However, reclassification would have no direct impact on how the federal government treats recreational marijuana, meaning that the legal problems faced by people like John Smith in Colorado will likely continue.

READING

Adler, Jonathan, ed. *Marijuana Federalism: Uncle Sam and Mary Jane*. Washington DC: Brookings Institution Press, 2020.

Gonzales v. Raich, 545 US 1 (2005). https://supreme.justia.com/cases/federal/us/545/1.

History.com Editors. "The 18th and 21st Amendments." History.com, updated July 28, 2023. https://www.history.com/topics/united-states-constitution/18th-and-21st-amendments.

16

Public HEALTH and Homeland SECURITY

In the nightmare situation of a deadly pandemic, who should make the difficult decisions concerning vaccine mandates, quarantines, or travel bans? Should the federal government get to decide because it's a massive national crisis involving a virus that knows no boundaries, thus necessitating uniform national rules and policies? Or should state and local governments get to decide because local people always know best what rules and policies will work in their own situation? As discussed in this lecture, the constitutional structure of American government provides some answers.

THE HOMELAND SECURITY ACT

Under the terms of the implied social contract by which people consent to be governed—that is, to give up some freedoms in exchange for new rights and new responsibilities as citizens—all sovereign governments possess the power and obligation to protect the health, safety, and welfare of the people. This so-called plenary power is virtually without limits.

In America, the plenary power has always belonged to the states and has never been granted to the federal government. So, whenever there's a need for governmental action to protect the health, safety, and welfare of the people, the states must act. This fact is true for public health emergencies, natural disasters, and most man-made crises, from everyday street crimes to large-scale domestic terrorism. For most of American history, the states could generally be relied upon to deal with such situations. In modern times, however, the US has experienced several crises bigger than what the relevant states could handle—and in such situations, the American people have willingly turned to the federal government for a solution.

One such crisis occured on September 11, 2001, when militant Islamic jihadists hijacked four commercial airliners on domestic flights within the United States and used the airplanes as missiles, destroying the Twin Towers of the World Trade Center in New York City and heavily damaging the Pentagon near Washington DC. A fourth plane crashed in Shanksville, Pennsylvania, after brave passengers fought the hijackers. In all, nearly 3,000 people died on the day—and hundreds more died later due to exposure to toxic chemicals during the rescue and cleanup efforts.

September 11 altered the balance of Federalism. Fourteen months after the attacks, President George W. Bush signed into law the Homeland Security Act of 2002—which merged many existing federal agencies and responsibilities into a new cabinet-level agency called the US Department of Homeland Security. Among the act's many provisions, Title V created a new Directorate of Emergency Preparedness and Response, which was given the primary responsibility to prepare for and respond to all major natural disasters and other emergencies to "reduce the loss of life and property and protect the Nation from all hazards."

Because the September 11 attacks effectively represented a declaration of war against the United States by a foreign enemy, the federal government obviously took the lead in responding to that crisis. However, since then, the government has also assumed a broader responsibility to protect Americans against all kinds of domestic hazards, from hurricanes to microscopic viruses. The Homeland Security Act was a federal assertion of the same kind of plenary power that had previously belonged only to the states. The shift in Federalism that resulted from September 11 is still a work in progress. Outside the special context of international terrorism, the federal government remains deferential to the states when it comes to emergency preparedness and emergency response.

SHARED SOVEREIGNTY DIFFICULTIES

The federal role in providing disaster relief and emergency assistance is still primarily defined by the Stafford Act, which was enacted in 1988, with amendments in 2000, 2006, and 2018. Under this act, the feds are generally supposed to wait for a state to request specific kinds of emergency assistance before getting involved. The current National Response Framework implements the same approach. After a major natural disaster, the feds aren't supposed to move in until a state asks for help.

Usually, this cooperative Federalism works well—but not always. For example, after Hurricane Katrina struck on August 29, 2005, communications between the federal government, Louisiana, and the besieged City of New Orleans repeatedly broke down, leading to catastrophic delays. Some people died while awaiting help that didn't arrive soon enough.

At the time, the 2004 National Response Plan provided that the secretary of Homeland Security could declare an "incident of national significance" in the rare instances when a crisis "almost immediately exceeds the resources normally available" to state and local authorities. Then, the federal government could take immediate action without waiting for a state request. However, after Hurricane Katrina, this declaration wasn't made until the evening of August 30—a day and a half after the hurricane first made landfall and more than 24 hours after the levees broke. By that time, the situation in New Orleans was beyond catastrophic.

The following day, the Department of Defense activated Joint Task Force Katrina and began a full-scale response throughout the Gulf region. However, large numbers of federal troops and equipment moved into New Orleans almost a week later. The federal government also asked to have the Louisiana National Guard placed under the command and control of Joint Task Force, but Louisiana Governor Kathleen Blanco rejected the request, preferring to have the National Guard remain under state control. In short, the shared sovereignty of the federal and state governments made it difficult for either one to deal effectively with Hurricane Katrina.

America's recent experience with COVID-19 suggests that whatever lessons might have been learned from Katrina, they weren't learned very well. On January 17, 2020, after receiving troubling information about an emerging new viral disease in China, federal authorities began screening travelers at airports in San Francisco, New York, and Los Angeles. On January 20, the National Institutes of Health announced that work had begun on a vaccine. That same day, the first COVID-19 case in the United States was reported in Washington.

On January 30, 2020, the first case of domestic transmission in the US was confirmed. On March 11, the World Health Organization officially termed the COVID-19 outbreak a "pandemic." Two days later, President Trump declared a national emergency, making $50 billion in federal funding available to fight the virus. In May, he announced the start of Operation Warp Speed—a partnership between the federal government and pharma companies to develop an effective vaccine within 8 months. By the end of 2020, more than 19 million Americans had been infected, and more than 350,000 were dead as a direct result of COVID-19.

Meanwhile, what were state governments doing? During the early months, almost all states responded to the pandemic in similar ways—such as by imposing "stay-at-home" requirements, business and school closures, and mask mandates. However, soon, partisan politics led to divergent state strategies. Liberal states tended to follow the advice of public health experts to maintain mask mandates and other COVID-19–related restrictions. Meanwhile, conservative states prioritized a quick return to normal operations for schools, businesses, and public venues. In essence, the COVID-19 pandemic gave all Americans an object lesson in the intricacies of American Federalism.

JACOBSON V. MASSACHUSETTS

Ever since the landmark 1905 case of *Jacobson v. Massachusetts*, the US Supreme Court has recognized the constitutional authority of the states—and local governments, which get their authority directly from the states—to take protective health measures. The *Jacobson* case arose after a smallpox outbreak in Cambridge, Massachusetts. The local health board imposed a mandatory vaccination requirement for all people in the city over the age of 21. Henning Jacobson, a local pastor, refused to comply, and he was convicted and fined $5.

In the Supreme Court, Jacobson argued that the vaccine mandate was "unreasonable, arbitrary and oppressive," thus violating his federal constitutional right to liberty and due process. The court was unpersuaded. According to the court, even if Jacobson didn't personally believe that the smallpox vaccine was effective, he was still required to comply with the vaccine mandate, which was plausibly based on science. He didn't have the right to decide the matter for himself.

To this day, the *Jacobson* case provides broad legal authority for the states to use their plenary power and take almost any action plausibly related to the goal of protecting public health as long as it doesn't violate a specific provision in the federal constitution. As such, the states had the authority to impose the restrictive measures that became commonplace during the early months of COVID-19 and to delegate such authority to local governments as well. Moreover, once COVID-19 vaccines became available in late 2020, the states almost certainly could have mandated them—although none chose to do so.

STATE POWER

During the pandemic, more than half of the states imposed some kind of COVID-19–related travel restriction, at least for a short while. In time, these travel restrictions surely would have been challenged under the US Constitution's commerce clause, the privileges or immunities clause, or the due process clause—but in the end, they might well have survived the challenge.

Recall that the commerce clause grants the federal government the power to regulate interstate and foreign commerce. One key aspect of the clause is that states cannot discriminate against commerce from another state. However, in a 1926 case, the Supreme Court held that quarantines of people, animals, or plants for the purpose of protecting public health do not violate the commerce clause. And in a 1970 case, the court explained that the test is whether the challenged state regulation of commerce is designed to address a legitimate public interest—which controlling a pandemic certainly would be.

Regarding the privileges or immunities clause—which has been held to guarantee American citizens the right to travel from one state to another—no Supreme Court cases exist directly on point. However, the court has made it clear that the right to travel is violated only by state laws that "unreasonably" burden interstate travel. As long as a state's travel restriction is reasonable, it will pass muster under the privileges or immunities clause. As for the due process clause, a state only needs to demonstrate that the challenged regulation is rationally related to a "legitimate public interest"—which should be simple to do for reasonable travel restrictions during a pandemic.

FEDERAL POWER

Within certain constitutional limits, the states can do almost anything to protect public health during a pandemic. But what can the federal government do?

First, the federal government can act to protect itself and its own personnel. With respect to federal departments and agencies, the government can impose the same kinds of public health restrictions that the states imposed more broadly during COVID-19. Second, the federal government can spend its own money—raised through federal taxes—to promote the "general welfare," such as by supporting vaccine research. The government can also purchase and distribute tests and personal protective equipment, and it can support businesses and individuals financially harmed by the pandemic.

Third, the federal government can try to control the spread of the pandemic at the country's borders through reasonable border restrictions and testing requirements. Fourth, the government can use its enumerated power over interstate commerce to require masks and other precautions on public transportation.

Finally, other enumerated powers might be invoked. For example, the Defense Production Act authorizes the president to require companies to produce items deemed essential for the nation's defense. President Trump used the act as leverage to persuade companies to produce more personal protective equipment during the COVID-19 pandemic.

READING

Fauci, Anthony. "The First Three Months: What I Saw inside the Government's Response to COVID-19." *The Atlantic*, June 16, 2024. https://www.theatlantic.com/magazine/archive/2024/07/anthony-fauci-covid-trump-white-house-response/678491.

Jacobson v. Massachusetts, 197 US 11 (1905). https://supreme.justia.com/cases/federal/us/197/11.

Nivola, Pietro S. "Reflections on Homeland Security and American Federalism." Brookings Institution, May 13, 2002. https://www.brookings.edu/articles/reflections-on-homeland-security-and-american-federalism.

17

Environmental PROTECTION

Automakers ultimately decide what kinds of motor vehicles are manufactured and sold in the United States. However, they must comply with many laws and regulations—including those that set the environmental standards all vehicles must meet. But who gets to decide those standards? Should it be the federal government, or should each state be able to set its own environmental standards? And what about other kinds of environmental laws that protect the air, land, water, and other natural resources? Who gets to decide about those laws? In America, the story of environmental law is a story about Federalism. As you'll see in this lecture, even though the federal government has assumed the primary role in protecting the environment, the states have been allowed to take the lead in certain areas.

THE EXTERNALITY PROBLEM

The states possess broad legal authority to use their plenary power to do whatever is necessary to ensure the health, safety, and welfare of the people. This power includes the power to enact and enforce state laws to protect against environmental dangers. However, this broad state power can be overridden by the legitimate exercise of federal enumerated power, which always reigns supreme under the Constitution—and the federal government has usually been seen as more effective in protecting the environment due to the "externality problem."

A huge separation often exists between the cause of an environmental problem and the adverse effects of that problem. In many cases, an environmental hazard occurs in one place, but those most harmed by it live far away. Consider traditional power plants, most of which have extremely tall smokestacks. Those smokestacks release hazardous, polluted air up into the atmosphere, where it disperses over a much larger area. This practice keeps the locality around the power plant relatively free from air pollution, but it increases the amount of pollution that affects other people downwind. This factor is called an externality.

States are often reluctant to force their own local businesses and municipalities to reduce pollution that mostly affects other people who live far away. So, if anyone's going to take action, it must be the federal government.

ENVIRONMENTAL PROTECTION

The 1960s saw the first wave of modern federal environmental legislation—starting with the first Clean Air Act in 1963, the Land and Water Conservation Act in 1964, and the Water Quality Act and Motor Vehicle Air Pollution Control Act, both in 1965. The first Endangered Species Act was enacted in 1966, followed by the Wild and Scenic Rivers Act of 1968.

On January 1, 1970, President Nixon signed into law the most significant environmental legislation in US history—the National Environmental Policy Act, which created a new, cabinet-level federal office called the Environmental Protection Agency (EPA). On April 22, 1970, the first Earth Day took place. The more comprehensive Clean Air Act of 1970, the Clean Water Act of

1972, and the Endangered Species Act of 1973 soon followed. By the end of the decade, the legal infrastructure for modern federal environmental law was set.

THE FEDERAL BASIS OF POWER

Federal environmental law can be premised on the enumerated federal power to protect federal lands and federally owned natural resources. The federal government owns roughly 28% of the total land area of the United States. Article IV, Section 3 of the Constitution grants Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Under this provision, the federal government can protect national parks and all other federal lands from environmental hazards. The Supreme Court has held that the federal government can also act to protect the flora and fauna that inhabit federal lands.

Other provisions of federal environmental law are based on the government's enumerated power to raise money through taxes and to spend that money for the general welfare, such as by providing federal funding for research. This taxing and spending power is articulated in Article I, Section 8 and enables the federal government to pursue the same goals as the plenary power of the states—so long as those goals are pursued through federal spending.

The federal government can also offer federal money to the states—conditioned on each state's agreement to enact and enforce state laws and regulations that implement federal policies. This indirect method of federal regulation is entirely permissible as long as the purpose of the federal funding is reasonably related to the conditions imposed on that funding and as long as the amount of money isn't so large that it effectively "coerces" the states into compliance.

Other federal enumerated powers occasionally come into play. Of all those that support modern federal environmental law, the most important is the power of the federal government to regulate interstate and foreign commerce, pursuant to the commerce clause in Article I, Section 8 of the Constitution. Most environmental laws fit easily within the commerce clause because those

laws regulate businesses that either directly engage in interstate commerce—like the big automakers—or that substantially affect interstate commerce in the aggregate, like the more than 100,000 corner gas stations across America.

Under the commerce clause, the federal government also possesses the power to regulate the "channels" of interstate commerce—the lands, roads, railways, waterways, and even the atmosphere—where pollution is often generated and disseminated. For decades, the federal courts have held that air pollution, water pollution, and waste are items of interstate commerce because they consist of physical substances that can be bought, sold, and traded and that frequently move or are transported from one state to another.

In a similar vein, federal courts have routinely held that the federal Endangered Species Act can be based on the commerce clause power because the loss of species that are identified as endangered or threatened has a substantial effect on interstate commerce. Also, there's a commercial market for some endangered species, which makes them actual items of interstate commerce.

SACKETT V. ENVIRONMENTAL PROTECTION AGENCY

Using the commerce clause so broadly to support modern federal environmental laws has generated significant pushback. For example, ever since the nation's founding, the federal government has regulated the navigable waters of the United States as part of interstate commerce. As long as some kind of boat can move along it, the body of water is a navigable water and thus falls within the federal government's jurisdiction under the commerce clause. States can regulate navigable waters, but only when there's no conflict with federal law or policy and when the state doesn't discriminate against or significantly burden interstate commerce.

In 1972, Congress enacted the Clean Water Act to ensure the health and vitality of the nation's waters. By its terms, the act protects all "waters of the United States." Over time, the federal government claimed that this term included not only the aforementioned navigable waters but also all tributaries of such waters; all waterways and wetlands adjacent to such waters; all waters that straddled state lines, even if they weren't navigable; and all other waters

that substantially affected interstate commerce—including wholly intrastate waters that could be used for recreation by interstate travelers, could produce fish or shellfish for interstate sale, or could be used by industries engaged in interstate commerce.

In 1985, the Supreme Court upheld the "adjacent wetlands" interpretation of the Clean Water Act. However, in 2006, the court ruled that isolated, nonadjacent wetlands without a physical connection to navigable waters can't be considered waters of the United States under the act.

Then, in May 2023, the court decided the case of *Sackett v. Environmental Protection Agency*. Michael and Chantell Sackett owned a small piece of property near Priest Lake, Idaho, and they started to backfill some low areas on the property to build a house. However, the EPA said the low areas were federally protected wetlands subject to the Clean Water Act. The Sacketts were ordered to restore the wetlands and to pay a fine for disturbing them—so they sued the EPA.

Before the Supreme Court, the EPA argued that federal jurisdiction was proper because the wetlands in question were located close to a drainage ditch that fed into a creek that emptied into Priest Lake—a navigable interstate waterway. Any pollution or sediments entering the wetlands could easily make their way into the lake. However, in a majority opinion by Justice Samuel Alito, the court held that the term *waters of the United States* refers only to "those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" The court further held that the only adjacent wetlands covered by the Clean Water Act are those with a "continuous surface connection" to waters of the United States such that "there is no clear demarcation between 'waters' and wetlands."

Since the Sacketts' wetlands could easily be distinguished from any nearby waters of the United States, the EPA couldn't regulate them. As a result of the *Sackett* decision, roughly half of the estimated 118 million acres of US wetlands lost their federal protection and are now protected solely by state law—if at all.

AUTOMOBILE EMISSIONS

Under the commerce clause, the federal government can clearly regulate automobile emissions because the auto industry is a huge part of interstate—and foreign—commerce. However, before the federal government ever started regulating auto emissions, California had already established its own state auto emission standards.

California's largest cities are hemmed in between the mountains and the sea and receive massive amounts of sunlight. This perfect combination produces smog. So, in 1967, under Governor Ronald Reagan, California exercised the state's plenary power to create the California Air Resources Board, with the authority to adopt and enforce air quality standards, including for automobile emissions.

Later that same year, Congress enacted the Air Quality Act, mandating new federal auto emission standards. However, the act granted California a waiver, grandfathering its existing state emission standards—which were tougher than the new federal standards. The act also authorized the EPA to renew the waiver as long as California could show an ongoing need to maintain its tougher standards. Moreover, in 1977, federal law was amended to allow other states with difficult air pollution problems to choose whether to follow the federal standards or the tougher California emission standards. By September 2023, 17 states had taken advantage of this provision and chosen to apply the California standards.

Over time, the automakers figured out that it made sense to simply comply with the tougher California standards on most matters. As a result, California—and not the federal government—effectively became the primary regulator of automobile emissions in the United States. This unusual situation continued until September 2019, when President Donald J. Trump declared his intention to revoke the California waiver.

California and 22 other states sued the EPA, seeking to preserve the waiver. Once President Joe Biden took office in January 2021, one of his very first executive actions was to order a review and reconsideration of the decision to revoke the California waiver. The waiver was soon reinstated. But consider this: Is it fair for the federal government to allow one state to effectively dictate environmental policy for the entire nation?

READING

Congressional Research Service. "Constitutional Bounds on Congress' Ability to Protect the Environment." EveryCRSReport.com, updated December 18, 2002. https://www.everycrsreport.com/files/20021218_RL30670_9b5c9dfe3bf8f2de727346e09ceb084b18a61db5.pdf.

Ohio v. EPA, No. 22-1081 (D.C. Circuit 2024). https://law.justia.com/cases/federal/appellate-courts/cadc/22-1081/22-1081-2024-04-09.html.

Rothman, Lily. "Here's Why the Environmental Protection Agency Was Created." *Time*, March 22, 2017. https://time.com/4696104/environmental-protection-agency-1970-history.

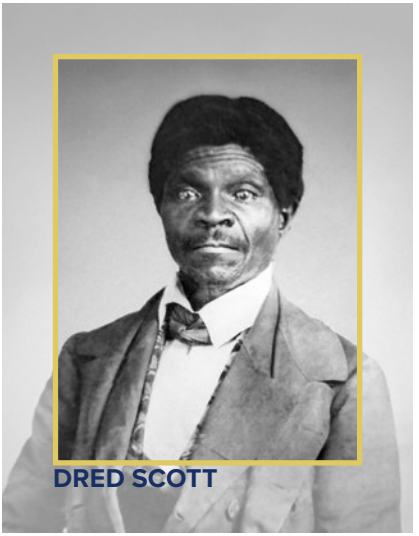
18

VOTING Rights

The right to vote helps to protect and defend all other rights enjoyed by American citizens. If you can't vote, you can't choose the federal and state government officials who hold power over you. And if you can't vote, those government officials have little reason to care about you and your opinions. The right to vote in both state and federal elections is primarily determined by each individual state as a matter of state law. However, as federal law is always supreme, state laws about voting rights must always comply with the US Constitution and with any federal statute enacted pursuant to an enumerated federal power set forth in the Constitution. As you will learn in this lecture, the question of who ultimately gets to decide about voting rights is complicated.

THE HISTORY OF VOTING RIGHTS

From the framing until the Civil War, the states controlled the right to vote, and that right was mostly limited to White men of "good standing" who owned a sufficient amount of real or personal property. For a brief period, in many Northeastern and Mid-Atlantic states, free Black men of property could vote if they satisfied the property ownership requirements. However, as America's emerging political parties determined how to shape state election rules to their own political advantage, racial restrictions on voting rights became commonplace. By 1840, only four New England states—Massachusetts, Vermont, New Hampshire, and Maine—allowed free Black men to vote on the same terms as White men.


DRED SCOTT

At the time, federal immigration law prohibited all Black people from becoming naturalized American citizens. And in the infamous *Dred Scott* decision of 1857, the US Supreme Court ruled that people of African descent were never meant to be included in the term *citizen* as that term appears in the US Constitution. If you're not an American citizen, then you don't possess any rights as an American citizen—including the right to vote.

After the Civil War, in 1868, the Fourteenth Amendment extended American citizenship to all persons "born or naturalized in the United States, and subject to the jurisdiction thereof"—including Black Americans. However, federal citizenship alone wasn't enough to guarantee that the former Confederate states would respect the civil and political rights of Black Americans. So, for the first time, the US Constitution and the federal government began to address voting rights in a major way.

The Fifteenth Amendment—which was ratified in 1870—provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The amendment also gave Congress the power to enforce the amendment by "appropriate legislation." Additionally, the Fourteenth Amendment provided that no state shall deprive any person of life, liberty, or property without "due process of law," nor deny the "equal protection of the laws" to any person.

As Reconstruction began, the federal government moved swiftly to try to ensure full political participation by freedmen in the South. The Reconstruction Act of 1867 required all former Confederate states to extend suffrage to Black men. For a while, these efforts succeeded. Overall, during Reconstruction, almost 2,000 Black men served as elected or appointed

public officials across the South. But then came the Compromise of 1877, in which the Republican Party agreed to effectively end Reconstruction in exchange for winning the contested presidential election between Republican Rutherford B. Hayes and Democrat Samuel Tilden.

The end of Reconstruction meant that the South was largely freed from federal oversight. The promise of equal rights for Black Americans would no longer be enforced by the federal government—and the Jim Crow era began.

DISENFRANCHISEMENT

In the 1876 case of *United States v. Reese*, the Supreme Court held that only intentional discrimination against Black voters violated the Fifteenth Amendment. So, alternative methods to disenfranchise Black citizens were soon devised. One example was the poll tax—a tax that must be paid before casting a vote. Most poor Black people couldn't pay the tax, so they couldn't vote. The Supreme Court upheld the poll tax as constitutional because it didn't explicitly discriminate against Black voters.

Disenfranchisement for committing a felony crime was another provision that had a seriously disproportionate impact on Black people, especially given the racially discriminatory nature of many criminal justice systems in the South. Finally, White supremacist groups inflicted rampant racial violence on terrorized Black people who tried to assert their political rights by voting or running for office.

The effects on Black political participation in the South were staggering. For example, during Reconstruction, more than 90% of all Black men of voting age in Mississippi were registered to vote. By 1892, that number was reduced to less than 6%.

WOMEN'S SUFFRAGE

At the Seneca Falls Convention of 1848, Elizabeth Cady Stanton and Frederick Douglass successfully argued in favor of a resolution advocating women's suffrage. Just 2 years later, suffrage became one of the main goals of the annual National Women's Rights Convention.

The fight for women's suffrage soon moved into the courts. On October 15, 1872, in St. Louis, suffragist Virginia Minor tried to register to vote. When she was denied because Missouri law limited voting rights to men, Minor sued the election registrar. She claimed that the state's refusal to let her vote was a violation of her rights as a citizen of the United States under the Fourteenth Amendment.

VIRGINIA MINOR

Minor's case eventually made its way to the Supreme Court. In March 1875, the court unanimously upheld Missouri's law and rejected Minor's Fourteenth Amendment claim. The court acknowledged that "women have always been considered as citizens the same as men" but concluded that US citizenship does not include the right to vote. According to the court, that conclusion was compelled both by the text of the original Constitution and by the long history of state restrictions on voting rights based on sex.

The *Minor v. Happersett* decision was disappointing, but it didn't stop the suffragist movement. Instead, suffragists shifted their focus to two new political goals: reforming state election laws and amending the US Constitution. The first state to grant women full suffrage on the same terms as men was Wyoming—which had done so as a territory in 1869 and successfully petitioned Congress to accept its position on women's suffrage when it became a state in 1890. Between 1893 and 1914, 10 additional Western states—Colorado, Idaho, Utah, Washington, California, Oregon, Arizona, Kansas, Montana, and Nevada—followed suit. Four more states, including New York and Michigan, granted women suffrage in 1917 and 1918.

At the federal level, a constitutional amendment prohibiting the denial or abridgment of the right to vote based on sex was first introduced in the Senate in 1878. The proposal was defeated in the full Senate in 1887. However, years later, World War I gave the suffragists a new argument—namely, that women deserved the right to vote in recognition of their contributions to the war effort. The proposed amendment was reintroduced in 1914 and again in 1918, but it failed both times.

In 1919, President Woodrow Wilson—who supported the amendment—convened a special session of Congress to consider it once again. On May 21, the House voted in favor, and on June 4, the Senate also gave its required two-thirds approval. The battle would move on to the states for ratification—where 36 states would need to ratify. By mid-1920, 35 states had ratified. All eyes focused on Tennessee, where the state legislature convened in August 1920. The ratification proposal passed by exactly one vote in the Tennessee House—and the Nineteenth Amendment was officially ratified.

THE VOTING RIGHTS ACT

The civil rights movement—which started in the 1950s and gained momentum in the 1960s—prompted a fundamental reexamination of American society and the vital role of the federal government in protecting civil and political rights. On August 6, 1965, as part of a major wave of federal civil rights legislation, President Johnson signed the Voting Rights Act of 1965 into law. The act was based on the power granted to Congress in the Fifteenth Amendment to enforce that amendment by "appropriate legislation."

Section 2 of the act, as amended, prohibited any voting standard, practice, or procedure that discriminated on the basis of race, color, or membership in a language minority. In 1980, the Supreme Court held that Section 2 essentially restated the Fifteenth Amendment and thus required proof of an invidious discriminatory motive by a government official. However, Congress responded by amending Section 2 to allow claims to be based on proof that the challenged procedure has a discriminatory impact on minority voters, denying them equal opportunity to participate in the political process.

Section 5 of the act, as amended, was designed to "freeze" any proposed changes to voting procedures in jurisdictions with a pre-1965 history of racial discrimination in voting rights until those proposed changes could be reviewed and "precleared" by the US attorney general or a federal district court judge. The jurisdictions originally covered by Section 5 and subject to the preclearance requirement were the states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, plus local jurisdictions in several other states.

Section 4(b) of the act contained the formula for deciding which jurisdictions were covered by Section 5 and when those jurisdictions would no longer be covered. This section was amended in 1970 and 1975, resulting in Arizona and Texas being covered as well.

Sections 2 and 5 had a huge and immediate impact on Black voting rights in the South. By the end of 1965, more than half a million new Black voters were registered in the 13 Southern states. By the end of 1966, only 4 of those 13 states had rates of Black voter registration that were less than 50%.

Section 2 of the Voting Rights Act remains in effect today. However, Section 5 wasn't so fortunate. On June 25, 2013, in the case of *Shelby County v. Holder*, the court held that the preclearance formula in Section 4(b) was unconstitutional because it hadn't been updated since 1975 and because it violated the fundamental constitutional principle of equal sovereignty of the states. Basically, the court held that Congress can't treat some states differently from others, especially based on a decades-old formula that may no longer reflect current realities. As a result, Section 5 of the Voting Rights Act can no longer be enforced.

Black voter registration rates across the South have declined significantly since the Shelby County decision. Where does that leave the issue of voting rights in the 21st century? Felony disenfranchisement remains a significant problem. About half of the states currently disenfranchise at least some felons for some period of time after their release from prison. And what about other kinds of voting restrictions—like voter ID requirements and limited numbers of polling places? Are these restrictions mere political ploys to favor one party or the other, or are they more insidious because they disparately impact Black people and poor people? In the end, it may all come down to one simple question: Should voting in America be easier or harder?

READING

Carnegie Corporation of New York. "Voting Rights: A Short History." November 18, 2019. https://www.carnegie.org/our-work/article/voting-rights-timeline.

DeRienzo, Matt. "How a Jim Crow–Era Strategy Blocked 4.6 Million People from Voting in 2022." The Center for Public Integrity. Who Counts? Series. December 8, 2022. https://publicintegrity.org/politics/elections/who-counts/how-a-jim-crow-era-strategy-blocked-4-6-million-people-from-voting-in-2022.

Shelby County v. Holder, 570 US 529 (2013). https://supreme.justia.com/cases/federal/us/570/529.

19

One Person, ONE VOTE

"One person, one vote" is fundamental to the American political system, but it may surprise you to learn that this principle is quite new. The text of the original Constitution says little about elections, as the framers decided to leave the subject almost entirely to the states. Moreover, for almost 2 centuries after the nation's founding, federal courts didn't want to become too involved in the political process. But what exactly does "one person, one vote" mean? And who is primarily responsible for making sure this principle is put into practice—the federal government or the states? You'll find the answers in this lecture.

REDISTRICTING

For much of American history, state governors and legislatures were essentially free to do whatever they wanted in pursuit of ensuring that whatever party was in power would stay in power—and even gain more power. However, the situation changed dramatically in 1962 when the Supreme Court decided the landmark case of *Baker v. Carr*.

Charles Baker was a Republican politician from Shelby County, Tennessee. He sued Tennessee Secretary of State Joe Carr, a Democrat, in federal court, claiming that Tennessee's state legislative districts violated the equal protection clause of the Fourteenth Amendment. The basis of Baker's claim was that the Tennessee state constitution required the legislative districts to be redrawn every 10 years based on a decennial census so that the districts would remain roughly equal. However, Tennessee hadn't actually done a reapportionment since 1901. As a result, urban areas with strong population growth—like Shelby County—were now seriously underrepresented as compared to rural areas with much slower growth.

Tennessee responded that the whole issue was "non-justiciable" because it involved a so-called political question, which meant that the courts simply couldn't intervene. The Supreme Court granted review in *Baker v. Carr* to reconsider the issue of justiciability and heard oral arguments in the case in April 1961. However, the court couldn't reach a decision before the end of the term, so the case was reargued when the court reconvened in October. Finally, on March 26, 1962, the Supreme Court handed down its ruling—holding that the issue of whether legislative districting violates the equal protection clause is a question of law that can be decided by a court. As such, the court remanded the case back to the lower courts. After examining the facts, the lower courts found in favor of Baker and ordered Tennessee to conduct a reapportionment.

Two years after *Baker v. Carr*, in 1964, the Supreme Court took up two more cases involving equal protection challenges to state legislative redistricting and used those cases to establish the legal ground rules for reapportionment cases. The first case was *Wesberry v. Sanders*, where the challenge was to Georgia's redrawing of its 10 federal congressional districts. Under a 1931 Georgia statute, one congressional district included the entire city of Atlanta plus

surrounding areas—with a current population more than double the average of all Georgia districts and more than triple the population of the smallest district. The court said that kind of disparity was unconstitutional and that redistricting must be guided by the principle of "one person, one vote."

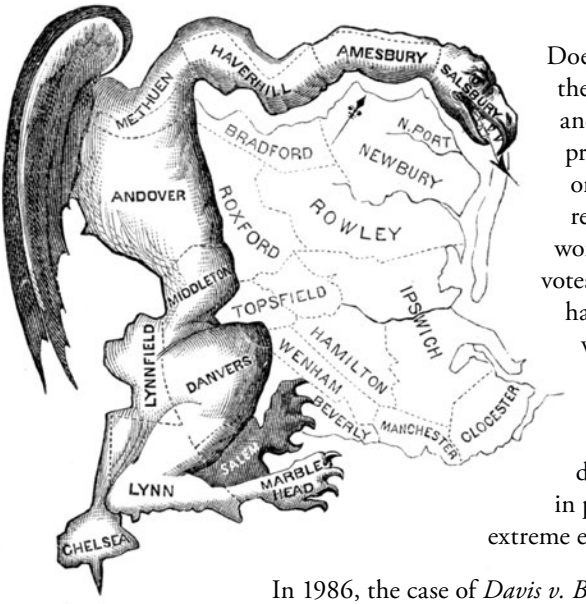
The second case was *Reynolds v. Sims*, where the challenge was to Alabama's method of apportioning state senators. Under Alabama law, each county was allocated exactly one state senator. At the time, the largest urban county in Alabama had a population 41 times that of the smallest rural county—but both still had only one state senator. Alabama argued that this couldn't be unconstitutional because the US Senate was set up in the same way—with two senators per state, no matter how large or small the state. The Supreme Court acknowledged the irony but held that the equal protection clause of the Fourteenth Amendment requires the states to follow the principle of "one person, one vote" in both branches of the state legislature.

Reynolds v. Sims had a major impact because many states organized their state senates the same way that Alabama did at the time. In the end, states across the nation were forced to restructure their state senates so that they were based on districts with roughly equal populations.

But how equal is "equal"? According to later Supreme Court decisions, a redistricting plan can deviate somewhat from perfect equality to pursue other legitimate goals—like ensuring a competitive balance between political parties. However, any disparities greater than 10% are presumptively impermissible unless the state can show a convincing reason for the disparity.

PARTISAN GERRYMANDERING

Gerrymandering is the practice of drawing district lines in a manner that makes it easier for the party in power to maintain or even expand their political power. This action can be implemented in two different ways. In cracking, the opposing party's voters are spread out into lots of different districts in numbers too small to win any of them. In packing, the opposing party's voters are concentrated into only a few districts so that the party will win those districts but no others.



Does gerrymandering violate the equal protection clause and the fundamental principle of "one person, one vote" because it results in some votes being worth more than other votes? The Supreme Court has occasionally toyed with the idea that there might be something unconstitutional about partisan gerrymandering designed to favor the party in power—at least if it's extreme enough.

In 1986, the case of *Davis v. Bandemer* involved a Democratic challenge to Republican-led redistricting in Indiana, and the court held that the issue of whether political gerrymandering violates the equal protection clause is a justiciable issue that courts can review. The court established the following legal standard: The complaining party must prove that the redistricting was done with an intent to discriminate against them and also had a discriminatory effect by consistently degrading their influence on the political process as a whole.

However, that legal standard was so vague that it eventually proved to be unworkable. As such, in 2004, four of the justices concluded that political gerrymandering claims are nonjusticiable. The fifth justice who voted along with the four—Anthony Kennedy—wrote a separate opinion expressing his view that workable legal standards for evaluating claims of political gerrymandering might still emerge at some point in the future.

On June 27, 2019, the court finally resolved the question of whether partisan or political gerrymandering is a justiciable issue in the case of *Rucho v. Common Cause.* The court's decision put to rest the idea that the federal courts might play a significant role in policing political gerrymandering by the states. The *Rucho* case involved a challenge to North Carolina's

Republican-led Congressional redistricting plan—which produced 10 Congressional seats for Republicans to only 3 seats for Democrats in the 2016 election even though the Republican Party won only 55% of the statewide vote. In the Supreme Court, the question was whether claims of political gerrymandering are justiciable—or whether it's impossible for the courts to develop useful legal standards to decide when such political line-drawing goes too far.

In the end, the court decided that such claims are not justiciable. Writing for the majority, Chief Justice John Roberts explained that claims of political gerrymandering boil down to an argument that legislative representation should be determined in rough proportion to each party's statewide vote. However, America doesn't use proportional representation. Instead, Americans elect their representatives by district. In theory, a political party could receive 49% of the statewide vote and not win a single legislative seat. Once the argument for proportional representation is rejected, then there isn't any good way to distinguish a "fair" redistricting plan from an "unfair" one.

Roberts concluded that any future remedy for political gerrymandering must lie with Congress or the relevant state legislature—which could solve the problem by requiring redistricting to be done by a nonpartisan commission, for example.

RACIAL GERRYMANDERING

Racial gerrymandering implicates not only the equal protection clause but also the Fifteenth Amendment and the Voting Rights Act of 1965. These important sources of federal law were specifically designed to protect the equal voting rights of Black Americans. The original text of Section 2 of the Voting Rights Act basically restated the language of the Fifteenth Amendment—and was similarly interpreted to require proof that a government official acted with the intent to discriminate. However, in 1982, Section 2 was amended to provide that a claim of racial discrimination in voting rights can also be based on proof that the actions of a government official had a discriminatory effect. The text of the 1982 amendment emphasized that this provision was meant to guarantee that Black voters would have an equal opportunity to elect representatives of their choosing.

Since the 1982 amendment, Section 2 has been used by the federal courts to review and—in many cases—overturn state redistricting plans that involved racial gerrymandering. Obviously, tension exists between enforcing Section 2 and maintaining the core idea that race isn't supposed to be used as a basis for redistricting. The Supreme Court has struggled to balance these two competing principles and has acknowledged that "racial gerrymandering, even for remedial purposes … threatens to carry us further from the goal of a political system in which race no longer matters." However, at least for the time being, the court is holding that race must sometimes be considered to move closer to the ideal of racial equality in voting rights.

In 2023, the court made another important decision in the specific context of Congressional redistricting. Article I, Section 4 of the US Constitution says that "the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Some people have argued that this language means only the state legislature can decide how state law applies to Congressional elections—including redistricting. The independent state legislature theory states that the state courts are constitutionally prohibited from reviewing alleged violations of state statutes or state constitutional law in connection with Congressional elections and redistricting.

On June 27, 2023, in the case of *Moore v. Harper*, the Supreme Court rejected this theory. As a result, Congressional redistricting—and Congressional elections in general—continue to be governed not only by federal law but also by state law, as interpreted and applied by the state courts. So, who should be counted in determining equality of voting rights? At the time, every state started the redistricting process by looking at total population, and only seven states made any later adjustments. For example, Hawaii excluded military service members temporarily stationed within the state.

According to the court, history, precedent, and practice all supported the notion that the states are free to base redistricting on total population. In terms of history, the court noted that the framers used total population to apportion the US House of Representatives. Regarding precedent, the court pointed out that every judicial reapportionment decision since *Baker v. Carr* used total population as the benchmark for applying the 10% rule. Finally, concerning practice, the court emphasized that population-based redistricting

had been used by the states "for decades, even centuries." In the end, the court explained that population-based redistricting is the best way to ensure that all people—including those who can't vote—are equally represented in the legislature.

READING

Allen v. Milligan, 599 US __ (2023). https://supreme.justia.com/cases/federal/us/599/21-1086.

Congress.gov. "Amdt 14.S1.8.6.3: Partisan Gerrymandering." Constitution Annotated. https://constitution.congress.gov/browse/essay/amdt14-S1-8-6-3/ALDE_00013394. (The sections that follow this page are also recommended.)

Rucho v. Common Cause, 588 US __ (2019). https://supreme.justia.com/cases/federal/us/588/18-422.

20

Equal Rights for WOMEN

The text of the proposed Equal Rights Amendment (ERA) is quite straightforward: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." However, as you will learn in this lecture, behind this seemingly simple text lies more than a century of controversy over the role of women in American society—and the role of the federal government in protecting women's rights.

FAILED RATIFICATION

The ERA was first introduced in Congress in 1923, but it languished in committee for decades. Then, in 1970, Martha Griffiths—a Democratic representative from Michigan—persuaded a majority of the House of Representatives to sign a rare discharge petition to bring the ERA up for a vote. The House approved the ERA by the required two-thirds majority vote, but with the Vietnam War still raging, the Senate tried to amend the amendment to exempt women from the military draft. That action prevented a final vote from being taken before the Senate adjourned. Undaunted, Griffiths tried again the next year. This time, the ERA passed overwhelmingly in both the House and the Senate.

The focus then shifted to the states, of which three-fourths would have to ratify. Congress placed a 7-year time limit on ratification and set the deadline as March 22, 1979. By early 1973, 30 states had already ratified. But then, things slowed down dramatically—in large part because of a highly effective anti-ERA lobbying effort spearheaded by Phyllis Schlafly, a downstate Illinois lawyer and conservative political activist.

According to Schlafly, the ERA would compel women to put their children in government-run childcare and work outside the home, jeopardize Social Security benefits for widows, and deprive women of child custody and force them to pay alimony after a divorce. The amendment would also make women eligible for the military draft and for combat—and eliminate single-sex women's bathrooms.

PHYLLIS SCHLAFLY

Between 1973 and 1977, only five additional states ratified the ERA. Moreover, five states that had previously ratified it enacted new laws rescinding their ratifications. As the 1979 deadline approached, Congress extended the deadline to June 30, 1982. However, no additional ratifications occurred, and by 1982, no more states were waiting in the wings to ratify.

EQUAL RIGHTS LEGISLATION

The first major federal initiative in the area of women's rights was the Nineteenth Amendment. The amendment was ratified on August 18, 1920, and guaranteed women the right to vote in all state and federal elections. And in December 1923, the ERA—drafted by two famous suffragists, Alice Paul and Crystal Eastman—was first introduced in Congress. For the next 5 decades, the ERA was mostly stuck in committee.

The 1960s represented a major turning point in the struggle for women's rights. Lacking a constitutional ERA, women's rights advocates turned to Congress for help. In 1963, Congress used its commerce clause power to enact the Equal Pay Act—a federal statute amending the Fair Labor Standards Act to require equal pay for equal work that requires equal skill, effort, and responsibility and that's performed under similar conditions, without regard to the employee's sex.

In 1964, the landmark Civil Rights Act broadly prohibited discrimination on the basis of race, color, religion, and national origin in voter registration, education, public transportation and accommodations, and employment.

Late in the legislative process, Title VII of the act—the section dealing with employment discrimination—was amended to add the word *sex* to the list of prohibited discriminations. The amended act passed, and Title VII became a major federal legal protection for women in the workplace.

Applying generally to employers with 15 or more employees, Title VII prohibits discrimination in employment based on sex and—due to a 1978 amendment—on pregnancy. The Supreme Court has also interpreted the section to include discrimination based on sexual orientation and gender identity. Today, Title VII claims can be made on the basis of not only outright discrimination but also "quid pro quo" harassment involving requests or demands for sexual favors in exchange for an employment-related benefit, such as a promotion.

Title VII also prohibits "hostile work environments"—defined by the US Equal Employment Opportunity Commission as unwelcome sexual behavior that "unreasonably interferes with an individual's work performance" or creates an "intimidating, hostile, or offensive work environment." The federal government can enforce these federal rights directly, and affected victims can also file lawsuits in federal court to enforce them.

In 1972, Congress amended the Civil Rights Act by adding Title IX, which prohibits discrimination on the basis of sex in any educational program or activity receiving federal financial assistance—including federal financial aid provided to students. Title IX was based on the federal government's enumerated power to raise and spend federal funds to promote the general welfare. Several exceptions exist, such as for the membership practices of organizations like the Boy Scouts and Girl Scouts.

Although Title IX is about education in general and makes no specific reference to sports, one of its most visible impacts has been on the opportunities for women and girls to participate in school-based athletics programs. In 1972, about 300,000 American women and girls played college and high school sports. By 2012, more than 3 million did. Title IX also requires educational institutions to take appropriate steps to protect students from sexual harassment and sexual violence. Each institution covered by the section must have a Title IX coordinator, who has the responsibility of ensuring that the institution fulfills these obligations.

THE WOMEN'S RIGHTS PROJECT

In 1972, the American Civil Liberties Union launched the Women's Rights Project to use carefully planned litigation to try to reshape how courts—especially the Supreme Court—interpreted the equal protection clause. An attorney and law professor named Ruth Bader Ginsburg—who later became a Supreme Court justice herself—cofounded and directed the project.

The project pursued more than 300 cases of gender discrimination, and Ginsburg personally worked on 6 cases before the Supreme Court, winning 5 of them. In 1971, she wrote the brief in *Reed v. Reed*—a case challenging Idaho's state law that favored men over women in the appointment of the executor of an estate. The court struck down the Idaho law and, for the very first time, held that the equal protection clause applies to discrimination against women.

Five years later, Ginsburg wrote an amicus brief in the landmark case of *Craig v. Boren*. The case involved an equal protection challenge to an Oklahoma state law that allowed young women—but not young men—between the ages of 18 and 21 to buy beer with no more than 3.2% alcohol. In other words, the Oklahoma law actually discriminated against men. The Supreme Court held that this was unconstitutional because Oklahoma did not have a sufficiently strong reason to draw such a gender-based distinction.

Today, *Craig v. Boren* is viewed as the key Supreme Court precedent establishing the legal standard for gender discrimination claims based on the equal protection clause. Under that legal standard, laws or policies that draw distinctions based on gender are presumptively unconstitutional—unless the challenged law or policy furthers an "important" government interest in a manner that's "substantially related" to that interest. This legal standard is called intermediate scrutiny.

THE FUNDAMENTAL RIGHT TO PRIVACY

The 1965 case of *Griswold v. Connecticut* involved a constitutional challenge to an 1879 Connecticut state law that made it a crime for any person to use any "drug, medicinal article or instrument" to prevent conception. The law also made it a crime to aid and abet anyone else to do so. The Supreme Court held that the Connecticut law invaded the fundamental right of

privacy of a married couple to use contraceptives in their own bedroom. Although the word *privacy* never appears in the Constitution, the court found that a constitutional right to privacy emerged from the penumbra of other constitutional provisions—like the First Amendment, which protects the privacy of one's beliefs.

In 1973, *Roe v. Wade* involved a constitutional challenge to a Texas state law that prohibited abortions except when the mother's life was in danger. Building on *Griswold*, the court recognized a fundamental right of privacy for women to choose whether to have an abortion.

The fundamental right of privacy recognized by the court in *Griswold* and *Roe* is known as a substantive due process right—because it emanates from the due process clause of the Fourteenth Amendment, which bars any state from taking away a person's life, liberty, or property without due process of law. In essence, the right of privacy in these cases involves a "liberty" interest so fundamental and with respect to such intimate matters that the state cannot interfere with it in the absence of a compelling reason.

Such substantive due process rights may now be in jeopardy as a result of the court's June 2022 decision to overrule *Roe* in the case of *Dobbs v. Jackson Women's Health Organization*. In that case, the court held that the right of a woman to choose whether to obtain an abortion is not a fundamental right protected by the due process clause. That is, the states are now free to regulate abortions—as many already have.

NEARLY SUCCESSFUL RATIFICATION

In 2017, Nevada's legislature voted to ratify the ERA, and the next year, Illinois did the same. On January 27, 2020, Virginia became the 38th state to ratify the ERA—the exact number needed for the amendment to be officially added to the Constitution. However, a problem arose.

Under a federal statute enacted in 1984, the archivist of the United States was responsible for declaring constitutional amendments ratified upon receiving the ratification certificates from the required number of states. The archivist at that time—David Ferriero—did not accept Virginia's ratification and did not declare the ERA ratified.

After Ferriero had accepted the ratification certificates from Nevada and Illinois, Alabama, Louisiana, and South Dakota had sued him in federal district court to block him from accepting any further state ratifications. And on January 6, 2020—just 3 weeks before Virginia's ratification vote—the US Department of Justice's Office of Legal Counsel had issued a formal legal opinion declaring that the ERA was no longer "pending" and that any effort to ratify it would have to start over from the beginning. The ratification deadline had long since passed.

Enough uncertainty surrounds the state ratifications of the ERA that no court is likely to decide that the amendment has now become part of the Constitution. However, in the meantime, almost half of the states have added an equal rights amendment to their own state constitutions.

READING

Cohen, Alex, and Wilfred U. Codington III. "The Equal Rights Amendment Explained." Brennan Center for Justice. January 23, 2020. https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained.

Fisher, Allen. "Women's Rights and the Civil Rights Act of 1964." National Archives. https://www.archives.gov/women/1964-civil-rights-act.

US Department of Justice. "Equal Access to Education: Forty Years of Title IX." Justice.gov. June 23, 2012. https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf.

21

NATIVE American RIGHTS

Dual sovereignty is the idea that the federal government and the states are both sovereign, each with respect to the governmental powers constitutionally assigned or reserved to them. However, what happens when a third sovereign exists? What is the constitutional status of the Native American tribes, which predate both the federal government and the states? How are the rights of Native Americans protected today—by the federal government, the states, the tribes, or some combination of all three? And who has jurisdiction to prosecute crimes in "Indian country"? This lesson will discuss these fascinating Federalism questions.

MCGIRT V. OKLAHOMA

On July 9, 2020, the US Supreme Court decided the case of *McGirt v. Oklahoma*. The case involved Jimcy McGirt, a member of the Seminole tribe living in Broken Arrow, a suburb of Tulsa, Oklahoma. After he sexually abused his 4-year-old step-granddaughter—also a tribal member—McGirt was arrested, charged, and convicted under Oklahoma law with rape, sodomy, and molestation. More than 2 decades later, McGirt challenged his conviction in the US Supreme Court. He argued that Oklahoma had no legal jurisdiction to prosecute him because the crime involved a Native American defendant and a Native American victim and occurred in what federal law defines as Indian country.

The land where Broken Arrow sits today was originally settled by the Muscogee. The federal government forced them to leave their ancestral homelands in Alabama and Georgia and move west along the Trail of Tears during the 1830s. In two treaties, the federal government promised the Muscogee that in exchange for giving up their lands east of the Mississippi River, the tribe would be granted legal title to and sovereignty over new lands. These new lands were located in what would eventually become Oklahoma.

Over time, many of the federal government's treaty promises were broken. By 2020, the original boundaries of the Muscogee reservation had been altered, and most parcels of land on the reservation were primarily owned by non-Indian individuals. However, the Supreme Court agreed with McGirt that the federal government never abolished the reservation. So, McGirt's crimes did occur in Indian country. As such, an 1885 federal statute called the Major Crimes Act gave the federal government exclusive jurisdiction to prosecute those crimes. In the end, the court reversed McGirt's state convictions. He was then prosecuted and convicted in federal court.

The broader significance of the *McGirt* decision is that the Muscogee reservation remains a reservation. And although the Supreme Court didn't specifically say so in *McGirt*, the same reasoning has been held to require re-recognizing other reservations. All told, more than 19 million acres of land in Oklahoma are now re-recognized as Indian country.

REDUCED SOVEREIGNTY

In the earliest years, the relationship between the United States and the Native American tribes was one of more or less equal sovereigns—almost as if the tribes were foreign governments. Almost everything was handled by treaty, and only the federal government was allowed to make treaties with the tribes.

As America's population began to spread westward, federal legislation began to reduce the tribes' sovereignty—especially with respect to non-Indians. For example, the General Crimes Act of 1817 extended federal criminal jurisdiction to crimes committed in Indian country. The act provided that such crimes should be prosecuted by the federal government using the federal criminal statutes that apply generally to other federal lands, such as national parks. However, the act made exceptions for crimes committed by Indians against Indians, crimes committed by Indians that had already been punished by the tribe, and crimes where a treaty gave exclusive jurisdiction to the tribe.

During the same period, the Supreme Court made three important decisions that further altered the legal status of the tribes and tribal lands. The first case was *Johnson v. McIntosh* in 1823, in which the court unanimously held that the Native American tribes never had the right to convey land to anyone. In an opinion written by Chief Justice John Marshall, the court stated that when European settlers first arrived in North America, their "discovery" of "new" lands gave those nations the exclusive right to acquire land and to extinguish whatever rights the Native Americans might have had in their native lands.

The second case was *Cherokee Nation v. Georgia*, which was decided in 1831. In 1828, Georgia passed a series of statutes stripping the Cherokee of their rights under state law. The Cherokee Nation filed a lawsuit directly in the Supreme Court, seeking an injunction against enforcement of the Georgia statutes. However, the court ruled that the Cherokee weren't allowed to file such a lawsuit. The constitutional provision allegedly authorizing it applied only to foreign nations, and the tribe was not a foreign nation. The lawsuit was dismissed.

In 1832, the court decided the third case—*Worcester v. Georgia*. Samuel Worcester and Elizur Butler were missionaries to the Cherokee who were prosecuted for violating a Georgia statute prohibiting White people from

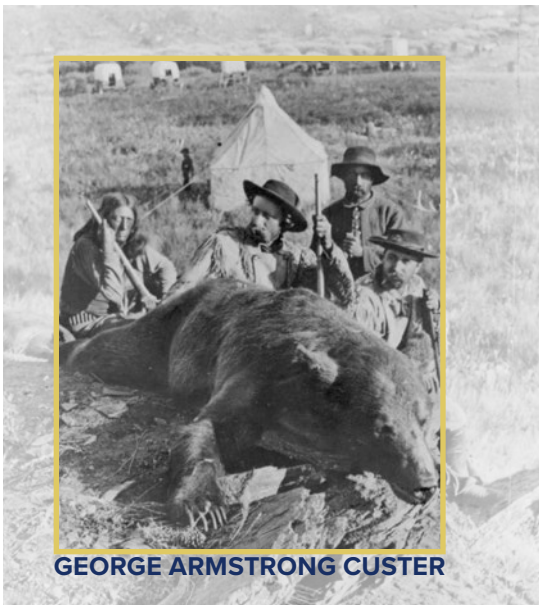
living on Indian lands without a state license. The court held that Georgia had no power to legislate with respect to Indian lands because that power belonged exclusively to the federal government.

ALLOTMENT

After the Civil War, federal policy toward Native Americans changed again, largely as a result of White Americans' growing desire to "settle" the West and exploit Western natural resources. During this period, the federal government tried to eliminate reservations through the process of allotment and force Native Americans to assimilate into White culture.

In 1851 and again in 1868, the federal government entered into treaties with the Sioux, Cheyenne, and other Northern Plains tribes. About 25% of the Dakota Territory—including the Black Hills—was "set apart for the absolute and undisturbed use and occupation" of the Sioux, with a federal promise to allow no one else to "pass over, settle upon, or reside in the territory."

Then, in the summer of 1874, a US Army expedition led by General George Armstrong Custer found gold in the Black Hills, sparking a gold rush. Meanwhile, other White men had their eyes on the rich timber and land resources there. In late 1875, President Ulysses S. Grant and Army leaders decided to stop evicting White trespassers and instead prepare for military action against the Sioux and Cheyenne.



GEORGE ARMSTRONG CUSTER

In February 1876, General Philip Sheridan ordered his forces to attack the "hostiles," thus launching the Great Sioux War. By 1877, most of the Indians had surrendered and were relocated to reservations in other parts of South Dakota, Montana, and Oklahoma. On February 28, 1877, Congress approved an "agreement"—signed by only 10% of the Sioux—that transferred the Black Hills to the federal government in exchange for a promise of subsistence rations.

The federal policy of allotment and assimilation continued until 1934, when the Indian Reorganization Act abolished the allotment system, prohibited further sales of Native American lands, and provided for official federal recognition of Native American tribes. The following period was typified by inconsistent federal policy toward Native Americans. The federal government first tried to restore the reservations but then terminated many of them during a renewed push for assimilation after the end of World War II. In the 1950s, the federal government even terminated the federal recognition of some tribes on the theory that they no longer needed federal help or supervision.

CIVIL RIGHTS FOR NATIVES

Starting in the 1960s, social and political changes brought about by the civil rights movement impacted the legal treatment of Native Americans. The most significant events during this period include the Indian Child Welfare Act of 1978, which established three special "preferences" that must be applied by the states to any case involving the placement of a Native American child into adoption or foster care. The first preference is to place the child with their extended family, and the second is to place them with other members of the same tribe. The third is to place them with members of a different tribe.

In 1968, Congress enacted the Indian Civil Rights Act. This legislation made most provisions in the Bill of Rights, the due process clause, and the equal protection clause applicable to the Native American tribes and allowed tribal members to use federal habeas corpus to remedy illegal detentions.

Under a federal statute called Public Law 280, some states have received special authorization from the federal government to apply their criminal and civil laws to Native American reservations—with the consent of the tribes. However, in 1987, the Supreme Court held that California couldn't use that

authority to prohibit high-stakes bingo and poker on reservation lands unless all such gambling was prohibited in the state. That decision led Congress to enact the 1988 Indian Gaming Regulatory Act.

The act covers three different kinds of gambling. The first is "traditional" Indian gambling and social gambling for nominal prizes—these are within the exclusive sovereign power of the tribes to authorize and regulate. The second is bingo, poker, and other similar card games, which can be authorized and regulated by the tribes as long as the relevant state doesn't completely prohibit such gambling. The third is all other gambling, including casino gambling and electronic gambling. This type of gambling can be authorized and regulated by the tribes but only if the particular kind of gambling is allowed in the relevant state and only if the tribe has entered into a compact with the state defining the regulations applicable to such gambling on the reservation.

OKLAHOMA V. CASTRO-HUERTA

What does the *McGirt* decision mean for public security and law enforcement in the millions of acres of Oklahoma that are directly affected by the decision? For all crimes involving Indian perpetrators or Indian victims, *McGirt* restores either federal or tribal jurisdiction—or both—over crimes that were previously prosecuted by the state. However, that effect is much lighter than it could have been because of the court's 2022 decision in the case of *Oklahoma v. Castro-Huerta*.

Victor Manuel Castro-Huerta, a non-Indian, was convicted of child neglect under Oklahoma law for not feeding his 5-year-old stepdaughter—a member of the Cherokee tribe—who nearly died. However, after the *McGirt* decision and because Castro-Huerta's crime occurred in Tulsa on reservation lands, the conviction was overturned by the state courts. In the meantime, he was prosecuted by the federal government, pleaded guilty, and received a sentence of 7 years.

Why such a light sentence? After *McGirt*, the federal government was overwhelmed by the huge number of criminal cases that suddenly shifted from state to federal jurisdiction. The feds had to make deals with defendants just to manage the new caseload.

The Supreme Court held that—notwithstanding *McGirt*—Oklahoma retains concurrent jurisdiction to prosecute non-Indians for crimes committed against Indians on reservation lands. The General Crimes Act doesn't say that federal jurisdiction is exclusive, so it doesn't preempt state criminal law. The ruling essentially overturned the 1832 *Worcester* decision, which had held that the states possess no power to legislate about Indian lands. As a result of the *Castro-Huerta* decision, the main impact of *McGirt* going forward will be on crimes committed by Indians. All crimes committed by non-Indians on the newly re-recognized reservation lands can still be prosecuted by Oklahoma.

READING

Ball, Milner S. "John Marshall and Indian Nations in the Beginning and Now." *UIC Law Review* 33, no. 4 (2000): 1183. https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1529&context=lawreview.

Boxer, Andrew. "Native Americans and the Federal Government." *History Review* 64 (September 2009). https://www.historytoday.com/archive/feature/native-americans-and-federal-government.

McGirt v. Oklahoma, 591 US __ (2020). https://supreme.justia.com/cases/federal/us/591/18-9526.

22

Congress Can Preempt STATE LAW

According to preemption doctrine, whenever the federal government acts in an area where it has the constitutional power to do so and either expressly or impliedly "preempts" the states from acting in the same area, then the states are preempted and cannot act because of the supremacy clause. The Supreme Court has emphasized that the "ultimate touchstone" of federal preemption is Congressional intent. In analyzing this intent, the court often applies a "presumption against preemption"—reasoning that the plenary powers of the states shouldn't be preempted unless that was Congress's "clear and manifest" purpose. However, as you'll explore in this lecture, various difficult issues lie behind this seemingly simple summary of federal preemption doctrine.

EXPRESS PREEMPTION

Six months before Burma gained its independence from the British in 1948, its incumbent elected leader—Aung San—and most of his cabinet were assassinated. Ever since, the new nation has been plagued by constant fighting between various ethnic groups. The Burmese military overthrew the elected government in March 1962 and has remained in control ever since. In 1990, free elections were held for the first time in almost 30 years. The winner was Aung San Suu Kyi, daughter of Aung San. However, the military detained Suu Kyi even before the election and refused to give up power, keeping her under house arrest for most of the next 21 years.

In June 1996, Massachusetts responded to the repressive military rule in Burma by enacting a state law prohibiting any state government entity from buying goods or services from any person or business on a "restricted purchase list" as a result of doing business with Burma. In September 1996, Congress enacted federal sanctions against Burma, which were set to last until the president of the United States certified that the country had made sufficient progress in protecting human rights and implementing democracy.

In June 2000, the US Supreme Court held that the Massachusetts Burma law was unconstitutional under the supremacy clause in Article VI, Section 2—which provides that the Constitution and the federal laws are the supreme law of the land. The court's decision was based on preemption.

The most straightforward kind of federal preemption is "express" preemption. For example, in the Airline Deregulation Act of 1978, Congress included a provision that "no State … shall enact or enforce any law… relating to rates, routes, or services of any air carrier." In the 1992 case of *Morales v. Trans World Airlines*, the Supreme Court held that the words *relating to* declared a particularly broad version of federal preemption—prohibiting any state statute or regulation from having any "connection with" or making any "reference to" airline prices, routes, or services.

A different kind of express preemption occurs when a federal statute provides that state laws imposing requirements "in addition to, or different from" the federal requirements are preempted. Under this language, the court has held that identical or parallel state law requirements are not preempted; nor are state laws that provide additional state remedies for violations of the federal

requirements. A federal statute can also expressly preserve state laws, allowing the states to continue regulating in a certain area—as long as the state law doesn't conflict with the federal law.

IMPLIED PREEMPTION

Regarding "implied" federal preemption, federal law that doesn't expressly preempt state law may nevertheless preempt state law in two different ways—either by "occupying the field" and leaving no room for state law on the subject or by preempting state laws that "conflict" with the federal law. A state law can conflict with federal law by making it essentially impossible to comply with both the federal law and the state law or by "obstructing" the achievement of the goals of the federal law.

What does it mean for a federal statute to occupy the field and therefore preempt state law? Here's an example: The 1956 case of *Pennsylvania v. Nelson* involved a state criminal statute called the Pennsylvania Sedition Act—enacted in 1919—that prohibited advocating, encouraging, or taking violent action to overthrow the government of either the United States or Pennsylvania. In 1952, self-declared Communist Steve Nelson was convicted in state court of violating the Pennsylvania statute and sentenced to 20 years in state prison.

The US Supreme Court reversed Nelson's conviction, holding that the Pennsylvania Sedition Act was impliedly preempted when Congress enacted the Alien Registration Act of 1940—commonly known as the Smith Act—which prohibited advocating or encouraging the violent overthrow of the government of the United States or of any state. In fact, in 1953, Nelson had also been convicted and sentenced under the Smith Act.

Although Congress didn't specifically say in the Smith Act that it was occupying the field, the court obtained the same result for three reasons: First, "the scheme of federal regulation is so pervasive as to make reasonable the inference that the Congress left no room for the states to supplement it." Second, sedition is an area where "the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject." And third, the Pennsylvania statute posed "a serious danger of conflict with the administration of the federal program"—due to potential confusion over which government was responsible for investigating and prosecuting cases of sedition.

ARIZONA V. UNITED STATES

Arizona v. United States involved several of the categories of federal preemption and was decided by the Supreme Court on June 25, 2012. The case concerned a longstanding conflict between the federal government and Arizona over illegal immigration. Arizona has an extensive border with Mexico, and migrants illegally crossing the Arizona border has long been a problem.

In April 2010, Arizona's legislature enacted the Support Our Law Enforcement and Safe Neighborhoods Act. The statute declared an official state policy of "attrition through enforcement" to reduce illegal immigration and implemented that state policy through four specific provisions. The Supreme Court ultimately held that three of the four provisions were preempted by federal law and therefore unconstitutional under the supremacy clause.

The court first considered Section 3, which made it a state crime not to carry a federal alien registration document. This section basically added a new state penalty to conduct that was already prohibited by federal law. However, according to the court, the federal alien registration law occupied the field—meaning there was no room left for Arizona to regulate. As the Arizona law would allow state criminal prosecution even if the feds decided that prosecution would "frustrate federal policies," Section 3 was therefore preempted.

Next, the court examined Section 5(C), which created a new state crime for unauthorized aliens who tried to work in Arizona—where there wasn't an existing federal crime. Here, the court found that the state law created an obstacle to achieving the goals of the relevant federal law and was therefore subject to "conflict" preemption. According to the court, the Immigration Reform and Control Act of 1986 set up a comprehensive federal framework to address the problem of employment of illegal aliens. However, the federal law penalized only the employers who hired illegal aliens, not the employees. Punishing the employees would be "inconsistent with federal policy and objectives." Arizona's law would upset the balance struck by the federal law and interfere with achieving the federal law's purpose. For those reasons, Section 5(C) was preempted.

The court then turned to Section 6, which authorized the arrest of any person based on probable cause to believe they were deportable from the United States. According to the court, this provision also created an obstacle to the removal system that Congress had created. In general, it's not a crime under federal law for a removable alien to remain in the United States. Whenever an alien is suspected of being subject to removal, the federal government issues a "notice to appear"—which notifies the alien to appear at a removal hearing. That hearing can result in the issuance of an "order of removal."

Section 6 of the Arizona law tried to give state and local police greater authority to arrest aliens subject to removal than was given to federal officials under federal law. Moreover, the Arizona law applied even if an order of removal hadn't yet been issued by the federal government. The Supreme Court said that the statute would "allow the State to achieve its own immigration policy," which "violates the principle that the removal process is entrusted to the discretion of the federal government." Section 6 thus created an "obstacle to the full purposes and objectives of Congress" and was preempted.

Lastly, the court discussed Section 2(B), which required state and local police to investigate a detained person's immigration status upon reasonable suspicion that they might be an illegal alien. The court noted that Arizona had already limited the potential impact of this provision by creating a presumption of legal status for those with a valid Arizona driver's license or ID and by cautioning officers not to consider race, color, or national origin. Additionally, Arizona instructed officers to act in a manner "consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." Moreover, the court couldn't assess the provision's real-world impact until it went into effect and officers started to enforce it.

As such, the court declined to invalidate Section 2(B) but left the door open for a future legal challenge. Four years later, after several more rounds of litigation in the lower courts, Arizona agreed to no longer mandate such investigations—instead leaving the matter up to the discretion of the individual officer in each situation.

THE MASSACHUSETTS BURMA LAW

So, why exactly was the Massachusetts Burma law preempted? According to the Supreme Court, the state law interfered with the goals of the federal law imposing sanctions against Burma in three separate ways.

First, the federal law was designed to give the president maximum flexibility and discretion to decide whether and when sanctions might be lifted in response to political and social progress in Burma. The Massachusetts law undermined this flexibility, effectively devaluing some of the president's bargaining chips.

Second, the sanctions imposed and authorized by Congress were carefully limited. For example, they applied only to US persons and businesses and exempted contracts to sell or purchase goods, services, and technology. However, the Massachusetts sanctions included some of the very same areas exempted from the federal sanctions.

Finally, the Massachusetts law was "at odds with the President's intended authority to speak for the United States" in developing a comprehensive, multilateral Burma strategy—an authority based on the federal government's exclusive constitutional power to engage in foreign diplomacy. In such a context, states must get out of the way.

READING

Arizona v. United States, 567 US 387 (2012). https://supreme.justia.com/cases/federal/us/567/387.

Congressional Research Service. "Federal Preemption: A Legal Primer." CRS Report, updated May 18, 2023. https://crsreports.congress.gov/product/pdf/R/R45825.

Rotunda, Ronald D. "Sheathing the Sword of Federal Preemption," *Constitutional Commentary* 5 (1988): 311. https://core.ac.uk/download/pdf/217203053.pdf.

23

Residual **STATE POWERS** and the Tenth Amendment

By 1990, sportsbooks were commonplace in Nevada casinos. Most everywhere else, sports gambling was strictly prohibited by state law, and professional and amateur sports organizations lobbied for a federal law to stop sports gambling from spreading beyond Nevada. In 1992, Congress enacted the Professional and Amateur Sports Protection Act (PASPA). The statute made it unlawful for any state to "license, or authorize by law or compact," a sports gambling operation. As such, existing state laws were okay—but no state legislature could enact any new state laws. In the 2018 case of *Murphy v. NCAA*, the Supreme Court ruled that PASPA violated the principles of Federalism under the Tenth Amendment and was therefore unconstitutional. But what exactly is the Tenth Amendment, and what does it add to the understanding of American Federalism? This lecture will discuss the answers to these questions.

THE TENTH AMENDMENT

The text of the Tenth Amendment states: "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 Tenth Amendment is part of the Bill of Rights, which was intended to satisfy those who wanted additional language added to the Constitution to emphasize some of the limits on the new federal government created by that document.

For most of American history, the Supreme Court treated the Tenth Amendment largely as a truism—a restatement of the obvious, meant solely to reassure those who remained suspicious of federal government authority. In the landmark 1819 case of *McCulloch v. Maryland*, Maryland cited the Tenth Amendment in support of its argument that the federal government lacks the constitutional authority to create a national bank because the Constitution doesn't explicitly say anything about the subject. However, a unanimous court led by Chief Justice John Marshall held instead that the creation of a national bank qualifies as a "necessary and proper" action by the federal government to be able to exercise its enumerated powers.

McCulloch v. Maryland still stands for the proposition that the federal government can't be limited solely to the powers that are explicitly mentioned in the Constitution. The case also stands for the related proposition that the Tenth Amendment doesn't impose any such limitation. That is, the amendment doesn't say that the powers of the federal government must be explicitly or expressly delegated by the states.

In 1931, the Supreme Court declared: "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted.... It added nothing to the instrument as originally ratified." In 1941, the court explained: "The amendment states but a truism that all is retained which has not been surrendered." So, it seems that the Tenth Amendment might be a mere rhetorical flourish intended to calm the fears of those worried about federal tyranny.

However, for about a decade during the latter part of the 20th century, a narrow majority of the Supreme Court attempted to revive Federalism as a more meaningful limit on the powers of the federal government—and the Tenth Amendment had its moment in the sun.

STATES AS STATES

In the 1976 case of *National League of Cities v. Usery*, the Supreme Court held that the federal government cannot impose the minimum wage and maximum working hour restrictions contained in the Fair Labor Standards Act upon state governments because that would violate the Tenth Amendment. That is, federal labor law restrictions can't be applied to state governments because doing so would be regulating the "States as States." The court added that the federal act could "impair the States' integrity or their ability to function effectively in a federal system." According to the court, although the Tenth Amendment was previously characterized as a truism, "it is not without significance."

Then, in 1981, the Supreme Court upheld a federal statute called the Surface Mining Control and Reclamation Act in the case of *Hodel v. Virginia Surface Mining*. Virginia argued that the statute was an unconstitutional regulation of the "States as States" because it displaced the traditional state authority to regulate land uses, including surface mining. The state also argued that the statute effectively coerced the states into enforcing federal law because it set new federal standards for surface mining that the states were not free to go below. The court rejected Virginia's Tenth Amendment arguments, holding that the statute created a "program of cooperative federalism" that allowed the states to continue to regulate surface mining within the limits set by the new federal standards.

What's the difference between *Usery* and *Hodel*? Why did one case involve a regulation of the "States as States" while the other case did not? Such questions tormented lower courts trying to determine the true meaning of the *Usery* decision. In the end, the Supreme Court's revival of the Tenth Amendment proved to be brief. In 1985, the court reversed course and overruled its decision in *Usery*.

PRINTZ V. UNITED STATES

Although it has largely faded into the background as a source of constitutional decision-making, the Tenth Amendment occasionally has something to say about the method the federal government uses to exercise one of its enumerated powers. In one such line of cases, the Supreme Court held

that the federal government can't "commandeer" the states into serving the interests of the federal government—either by forcing them to enact state laws or by forcing state officials to enforce federal laws.

The 1997 case of *Printz v. United States* involved the Brady Handgun Violence Prevention Act, a federal gun control statute. James Brady was the White House press secretary to President Ronald Reagan. On March 30, 1981, John Hinckley Jr. tried to assassinate President Reagan outside the Washington Hilton hotel. Hinckley fired six bullets, the first of which struck Brady in the head, permanently disabling him. President Reagan survived the assassination attempt, although he was also wounded.

After Brady's remarkable recovery from his injuries, he and his wife became strong advocates for gun control. Federal legislation known as the Brady bill was introduced in Congress in 1987 and was eventually enacted and signed into law by President Bill Clinton in 1993. The act's key provision was a requirement that background checks must generally be conducted before any person can obtain any firearm from any federally licensed gun dealer, manufacturer, or importer. To implement this requirement, the act provided that the US attorney general must establish a national instant background check system before November 30, 1998. In the meantime, the act required state and local law enforcement officers to make reasonable efforts to carry out background checks within 5 days after being notified of a pending firearm transfer.

Two county sheriffs—Jay Printz of Ravalli County, Montana, and Richard Mack of Graham County, Arizona—objected and filed lawsuits claiming that the provision of the Brady Act that required state government officials to perform federal background checks was unconstitutional. The Supreme Court ultimately agreed.

The court began by noting that the Constitution says nothing explicit about this issue. The court also reviewed the course of American history and found almost no examples of federal laws that imposed obligations upon state and local officials to enforce federal laws. Turning to the structure of the Constitution, the court concluded that the framers didn't believe that the new federal government should be able to act "upon and through the States" but instead "designed a system in which the State and federal governments would exercise concurrent authority over the people."

Finally, the court relied upon its previous decision in a 1992 case called *New York v. United States*. Although the federal government's commandeering in *Printz* was aimed at state executive officials rather than at the state legislature, the court found this to be a distinction without a difference. According to the *New York* case: "The Federal Government may not compel the States to enact or administer a federal regulatory program." In *Printz*, the court added that "Congress cannot circumvent that prohibition by conscripting the States' officers directly." Either way, the Tenth Amendment says no.

MURPHY V. NCAA

Since 1997, the Supreme Court has made only one anti-commandeering decision—*Murphy v. NCAA*, the case about sports gambling. Remember that Congress drafted the PASPA to basically "freeze" all existing state laws about sports gambling as of the statute's effective date. Nevada would be grandfathered, but no other state could join Nevada.

In 2011, New Jersey voters amended the state constitution to allow the state legislature to authorize sports gambling in the casinos, and in 2012, the legislature did so. The National Collegiate Athletic Association (NCAA) and professional sports leagues then sued New Jersey Governor Philip Murphy in federal court, seeking an injunction based on the federal PASPA law.

In 2018, the Supreme Court ruled that PASPA violated the Tenth Amendment's anti-commandeering rule. The federal government can prohibit sports gambling on its own under the commerce clause. However, the federal government can't achieve its federal goal by ordering the state legislatures to do—or not to do—something. The court said that this interferes with "the Constitution's structural protections of liberty."

SHELBY COUNTY V. HOLDER

So, is there anything else to the Tenth Amendment? Are there any other "structural protections of liberty" in the Constitution that might be similar to the anti-commandeering rule? One more important example is the 2013 case of *Shelby County v. Holder*, in which the Supreme Court invalidated Section 4(b) of the Voting Rights Act of 1965. That provision required certain

states and their subdivisions with a history of racial discrimination in voting rights to submit any proposed changes to their election laws for preclearance by either the US attorney general or the US District Court for the District of Columbia—to make sure that those proposed changes wouldn't have a negative impact on minority voting rights.

The Supreme Court noted that Section 4(b) hadn't been significantly updated since 1975. Moreover, the power to regulate both federal and state elections generally resides with the states, subject only to a few federal requirements. From there, the court concluded that Section 4(b) violated the fundamental constitutional requirement of equal sovereignty of the states—a requirement derived from the Constitution's structure. The federal government can't treat some states differently from other states, especially based on an outdated statute that might no longer reflect current conditions.

No other modern Supreme Court cases interpret the Tenth Amendment to limit the powers of the federal government.

READING

Congress.gov. "Amdt 10.4.1: Modern Tenth Amendment Jurisprudence Generally." Constitution Annotated. https://constitution.congress.gov/browse/essay/amdt10-4-1/ALDE_00013626. (The sections that follow this page are also recommended.)

Kettl, Donald F. "The Centuries-Old Debate behind the Fight over Sanctuary Cities." *Time*, March 10, 2020. https://time.com/5799871/federalism-immigration-history.

Murphy v. National Collegiate Athletic Association, 584 US __ (2018). https://supreme.justia.com/cases/federal/us/584/16-476.

24

AGGRESSIVE Federalism: The BATTLE Continues

Aggressive Federalism refers to state efforts to aggressively oppose federal laws and policies, to experiment with creative new strategies to shield state laws from possible federal intervention, and to push the impact of state laws outside the borders of the state. Recall that the balance of Federalism enables the states to pursue their own interests in all areas where the federal government lacks constitutionally enumerated power or where the federal government's power isn't exclusive. As you will see in this lecture, the states can thus serve as true laboratories of democracy—experimenting with different laws and policies from which the entire nation could benefit.

WEAPONIZING FEDERALISM

The traditional idea of Federalism is that it protects the states against federal interference. The most notable historical exception involved slavery. Even though the framers allowed slavery's legality to continue to be determined by state law, they also inserted a provision known as the Fugitive Slave Clause into the Constitution. Without using the word *slavery*, this clause required "free" states to return people who'd managed to escape from slavery to their former masters in states where slavery was legal. In other words, free states were required to help pro-slavery states enforce slavery—effectively extending the laws of those pro-slavery states beyond their own state borders.

In the run-up to the Civil War, this clause became a significant issue—especially after the enactment of the Fugitive Slave Act in 1850. The act was part of the larger Compromise of 1850 between pro-slavery and antislavery states over the legal status of slavery in the western territories. However, in reality, the act made such a compromise almost impossible. The 1860 South Carolina Declaration of Secession singled out Northern states' frequent refusal to comply with the clause and the act—and the federal government's failure to enforce them—as primary reasons for seceding.

In short, you could easily conclude that the attempt to harness the power of the federal government to help pro-slavery states extend the impact of their state laws outside their state borders directly led to America's greatest national crisis—and nearly destroyed America in the process. Today, states on both sides of America's deep political divide have once again begun to think of Federalism as a weapon that can be used to combat federal laws and policies with which they disagree.

SUING THE FEDERAL GOVERNMENT

In 2010, Congress enacted the ACA, popularly known as Obamacare. One of its provisions was the individual mandate—the requirement that most Americans must obtain health insurance, with a monetary penalty for not doing so. In 2012, the Supreme Court upheld the mandate because the monetary penalty for violating it was assessed through a person's income tax return. In 2017, a Republican-led Congress enacted an amendment to the Obamacare statute, reducing the monetary penalty for violating the

individual mandate to $0. This action was done in an attempt to make the mandate unconstitutional: Now, the mandate and the income tax would have no connection.

In 2018, Texas and more than a dozen other conservative states sued the federal government to have the individual mandate declared unconstitutional. These states were joined by two individuals who were legally required by the Obamacare statute to buy health insurance. California and more than a dozen other liberal states jumped in to defend the mandate. On June 17, 2021, the Supreme Court decided not to decide in the case of *California v. Texas*—holding that no party in the case had legal standing to challenge the individual mandate.

Article III of the Constitution limits the federal judicial power to deciding "cases or controversies." That is, under Article III, federal courts—including the Supreme Court—aren't allowed to issue purely "advisory" legal opinions. Their decisions must actually resolve a real case or controversy with real-world impact. In *California v. Texas*, the court easily dismissed the claim by the two individuals because the individual mandate had no possible method of legal enforcement once Congress eliminated the monetary penalty. That is, the two individuals' decision to buy health insurance couldn't be "fairly traced" to the mandate.

Turning to Texas and the other conservative states, the court held that they also lacked legal standing to challenge the mandate. Texas argued that it suffered a financial loss from the mandate in two different ways. First, it purported that several health insurance programs run by the state—including Medicaid—received more participants due to the mandate, thus costing the state more money. However, the court pointed out that the mandate couldn't have caused this because Congress had made the mandate legally unenforceable.

Second, Texas argued that the Obamacare statute led to increased administrative costs for the state. However, the court explained that those alleged costs didn't stem from the mandate itself; rather, they came from other legal requirements in the statute. Those other legal requirements would still exist even if the court struck down the mandate. In short, the court held that Texas simply didn't have any legal interest that justified filing a federal lawsuit to challenge the individual mandate.

The phenomenon of states suing the federal government or joining lawsuits filed by others to try to block or overturn federal laws or policies that the states don't like is booming. For example, in 2023, 18 states—many of them located nowhere near a national border—challenged the federal government's asylum policies at the borders in the case of *Indiana v. Mayorkas*.

THE TEXAS HEARTBEAT ACT

Another interesting recent phenomenon concerns creative state efforts to shield state laws from possible federal judicial review and reversal. In May 2021, Texas Governor Greg Abbott signed Senate Bill 8 into law. The Texas Heartbeat Act prohibits virtually all abortions in Texas after the moment when a "fetal heartbeat" or "cardiac activity" is detected—usually about 6 weeks into a pregnancy. The only statutory exception is for when "a physician believes a medical emergency exists that prevents compliance."

At the time of its adoption, the Texas law clearly violated the 1973 governing precedent from the US Supreme Court—*Roe v. Wade*, which held that states are constitutionally prohibited from regulating abortions during the first trimester of a pregnancy. However, the act was deliberately and carefully designed to make it impossible for anyone to challenge the statute in federal court prior to its actual enforcement.

By its terms, the act can't be legally enforced by any state or local government official. Instead, the law provides that the only method of enforcement is through a civil lawsuit filed by a private citizen against any person who performs, induces, or aids and abets an abortion in violation of the statute. And the Texas law grants "citizen standing" to all citizens. "Aiders and abetters" could include clinic staff, counselors, anyone who pays for an abortion, and even Uber or Lyft drivers who bring patients to abortion clinics. The law awards "not less than $10,000" in statutory damages to successful plaintiffs for every abortion performed or facilitated—plus court costs and attorney's fees.

As a general matter, when someone wants to challenge a state statute in federal court for violating the federal constitution before the statute is actually enforced, they must sue the state official responsible for enforcing the statute and try to get an injunction against its enforcement. However, under the

Texas Heartbeat Act, there's no such state official to be sued. As such, any person opposed to the Texas law has to wait until they are actually sued for violating it and then raise their federal constitutional objections as a defense to the lawsuit. Even if someone were willing to take that risk, the state would still be able to argue that the law can't possibly violate the Fourteenth Amendment's due process clause because that clause applies only to "state action"—and no "state actor" is involved in enforcing the act.

The Supreme Court will someday need to decide whether these creative new strategies can be used by states to insulate their state laws from federal judicial review and thereby avoid the supremacy clause of the US Constitution. As of November 2023, however, the Texas Heartbeat Act remains in effect.

INTERSTATE TRAVEL

The Supreme Court has long held that the right to travel freely from one state to another is a constitutionally protected aspect of the "privileges or immunities" of citizens of the United States under Section 1 of the Fourteenth Amendment. But what if a state were to pass a broad law prohibiting any person from helping any state resident to obtain an abortion outside the state?

The issue of state laws trying to reach behavior occurring outside state borders is complex. In the 1941 case of *Skiriotes v. Florida*, the Supreme Court held that Florida could legally prosecute a Florida resident—Lambiris Skiriotes—who used diving equipment to harvest sponges in the Gulf of Mexico off the Florida coast in violation of Florida law. Skiriotes argued that Florida had no right to prosecute him because the waters in question were international waters outside the borders of the state. Florida responded that the waters actually belonged to Florida.

However, the Supreme Court decided that either way, Florida could enforce its law against Skiriotes. The Florida law didn't conflict with any federal laws, nor were the rights of any other state implicated. The court ultimately held that Florida had the sovereign power to regulate the behavior of its own state residents—even in international waters—without violating anything in the Constitution.

Today, would the court apply that old precedent to a contemporary situation involving individuals traveling from one state to another to obtain an abortion? Or would the court say that the situation is completely different because another sovereign state is involved? Nobody knows for sure.

Speaking of interstate travel, what about the states that have rounded up and "exported" aliens present within their state to other states? In September 2022, Florida Governor Ron DeSantis sent about 50 asylum-seeking migrants to Martha's Vineyard in Massachusetts by plane. Texas Governor Abbott later made a similar move. Is that legal? Is there anything another state can do to try to protect itself against such a maneuver? Should the federal government try to intervene? Such questions are now being asked in this new world of aggressive Federalism.

READING

Beatty, Lauren Moxley. "The Resurrection of State Nullification—and the Degradation of Constitutional Rights: SB8 and the Blueprint for State Copycat Laws." *Georgetown Law Journal Online* 111 (2022): 18. https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2022/08/Beatty-State-Nullification.pdf.

Beienburg, Sean. "States' Rights Gone Wrong? Secession, Nullification, and Reverse-Nullification in Contemporary America." *Tulsa Law Review* 53, no. 2 (Winter 2018): 191. https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=3097&context=tlr.

Klibanoff, Eleanor, and William Melhado. "Texas Conservatives Test How Far They Can Extend Abortion and Gender-Transition Restrictions beyond State Lines." *The Texas Tribune*, February 9, 2024. https://www.texastribune.org/2024/02/09/texas-abortion-transgender-care-outside-state-borders.

Image Credits

Cover image: © jaflippo / Shutterstock; i: © Jeff Mauritzen – inPhotograph.com; 4: Howard Chandler Christy,/Wikimedia Commons/Public Domain; 14: Library of Congress, Prints and Photographs Division; 27: US Department of Transportation/ Wikimedia Commons/Public Domain; 32: National Archives and Records Administration; 35: Craig/Wikimedia Commons/CC BY 2.0; 43: Texas Military Department; 54: Getty Images/iStockphoto; 56: Getty Images; 62: Library of Congress, Prints and Photographs Division; 69: Tennessee Virtual Archive; 74: National Portrait Gallery, Smithsonian Institution; 91: Supreme Court of the United States; 98: Elvert Barnes/Flickr/CC BY-SA 2.0; 102: Library of Congress, Prints and Photographs Division; 104: Nixon Presidential Library and Museum; 121: Getty Images; 124: Picture History/Wikimedia Commons/Public Domain; 125: Library of Virginia; 127: Library of Congress, Prints and Photographs Division; 134: MattWade/ Wikimedia Commons/Public Domain; 139: Library of Congress, Prints and Photographs Division; 140: Library of Congress, Prints and Photographs Division; 148: Library of Congress, Prints and Photographs Division