Common Interpretation on '*Article I, Sec. 8: Federalism and the Overall Scope of Federal Power*'

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In practice, federalism has waxed and waned since the founding, and federal-state relations have always been contested. Nonetheless, federalism underwent four distinct phases during four different eras in our constitutional history: post-Founding, post-Civil War, post-New Deal, and from the Rehnquist Court to today.

Enumerated Powers Federalism

In 1787, the Constitution replaced the Articles of Confederation—which was essentially a treaty among sovereign states—with a new constitution ratified by the people themselves in state conventions rather than by state legislatures. The Founders provided the national government with powers it lacked under the Articles and ensured it would be able to act on behalf of the citizenry directly without going through the state governments. But the Founders also thought it important to preserve the states' power over their own citizens.

The Founders struck this balance by granting the new national government only limited and enumerated powers and leaving the regulation of intrastate commerce to the states. State legislative powers were almost exclusively limited by their own constitutions.

Federalism at the Founding can therefore best be described as "Enumerated Powers Federalism." The national government was conceived as one of limited and enumerated

powers. The powers of states were simply *everything left over* after that enumeration. This is expressed in the first words of Article I, which created Congress: "All legislative powers *herein granted* shall be vested in a Congress of the United States." The Tenth Amendment reinforces this principle: "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." State power, then, was protected not by affirmatively shielding state power, but by limiting the ability of the federal government to act in the first place.

Fundamental Rights Federalism

Federalism changed in the wake of the Civil War. The Republicans in the Thirty-Eighth Congress enacted the Thirteenth Amendment, eliminating the power of states to enforce slavery within their borders. But Southern states almost immediately used the rest of their vast police powers to enact Black Codes to oppress the newly freed slaves. Their aim was to come as closely as possible to restoring slavery in everything but name.

In response to this, the Republicans in the Thirty-Ninth Congress used their Thirteenth Amendment enforcement power to enact the Civil Rights Act of 1866. Although they overrode the veto of President Johnson by super-majorities in both houses, some in Congress saw the need to write these protections into the Constitution lest courts question Congress's power to enact the Civil Rights Act.

The Republicans thus created the Fourteenth Amendment. Section 1 forbade states from violating the fundamental rights of their own citizens, placing new federal constraints on all three branches of state governments. Section 5 granted Congress the power to enforce those constraints. With the passage of the 14th Amendment, the federal government could now

prevent states from violating the privileges and immunities of their citizens; depriving anyone of life, liberty, or property without due process; and denying anyone equal protection. Following on its heels, a similar provision was enacted to prevent states from denying citizens the right to vote based on their race. The Reconstruction Amendments, taken together, thus ushered in what we can call "Fundamental Rights Federalism."

Soon after its enactment, however, the Supreme Court systematically neutered the Fundamental Rights Federalism of the Reconstruction Amendments through such cases as *The Slaughter-House Cases* (1873), *U.S. v. Cruikshank* (1875), *The Civil Rights Cases* (1883), *Plessy v. Ferguson* (1896), and *Giles v. Harris* (1903). As a result, the powers accorded to the federal government lay dormant until the Court and Congress took them up again in the early Twentieth Century to protect economic liberties in cases like *Lochner v. New York* (1905) and *Buchanan v. Warley* (1917). Eventually, beginning in the 1930s until today, the Court largely withdrew from this area in favor of to protecting so-called "fundamental rights" and the civil rights of "suspect classes" like racial minorities.

New Deal Federalism

With the New Deal, the Court expanded federal regulatory power. Relying primarily on the Commerce Clause and the Necessary and Proper Clause to expand Congress's reach, the Court effectively brought about the demise of the Enumerated Powers Federalism of the Founding Era. The Court interpreted Article I to give Congress the power to regulate wholly intrastate economic activity that substantially affects interstate commerce. Because the scope and importance of the national economy had vastly outpaced the vision of interstate commerce held by the Founders, the power to regulate anything that affects interstate commerce amounts to the power to regulate almost everything. As a result, the federal

government could now regulate in areas once governed exclusively by the states. It could even regulate the states themselves. So what becomes of the states in the wake of New Deal Federalism?

State Sovereignty Federalism

Enter the Rehnquist Court. After William Rehnquist became Chief Justice in 1986, the Court began developing what came to be known as the "New Federalism," but which in this story could be called "State Sovereignty Federalism."

First came the Court's so-called Tenth Amendment cases of *New York v. United States* (1992), *Gregory v. Ashcroft* (1991), and *Printz v. United States* (1997). In each of these cases, the Court attempted to carve out a zone of state autonomy that the federal government could not invade. States were thus shielded from federal regulation in a fashion that private parties were not. Then came the Eleventh Amendment cases of *Seminole Tribe of Florida v. Florida* (1996) and *Alden v. Maine* (1999), immunizing states from some lawsuits in federal court in order to preserve their sovereign status.

The Rehnquist Court later began tentatively to revive Enumerated Powers Federalism in cases like *United States v. Lopez* (1995) and *United States v. Morrison* (2000). Pushing back against New Deal Federalism, the Court continued to license federal regulation of wholly intrastate *economic* activity that had a substantial effect on interstate commerce while drawing a line at the regulation of *noneconomic* intrastate activity.

The Roberts Court has now taken up the mantle. Like its predecessor, it has continued both to (1) invoke state sovereignty to preserve a zone of state autonomy, and (2) build out a modern version of enumerated powers federalism by interpreting the New Deal federalism as the "high water mark" of federal power such that federal powers cannot be expanded still further

without a limiting principle. The first strategy places external limits on Congress's power, marking where Congress's power ends by identifying where state power begins and using sovereignty as a touchstone. The second derives those limits internally without reference to the states. But both are efforts to cut back on the expansive view of federal power that had evolved in the wake of the New Deal and thereby preserve a zone of autonomy for the states.

Further Reading:

- For an explanation of how the Court relied mainly on the Necessary and Proper Clause to expand Congress's reach during the era of New Deal Federalism, see Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J. of Law and Liberty 581 (2010).
- For a comparison of the two different strategies the Court has used to cut back on the expansive view of federal power that emerged from the New Deal, see Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 Harv. L. Rev. 85 (2014).

Common Interpretation on "*Necessary and Proper Clause*"

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The Constitution enumerates a great many powers of Congress, ranging from seemingly major powers, such as the powers to regulate interstate and foreign commerce, to seemingly more minor powers, such as the power to establish post offices and post roads. But there are many powers that most people, today or in 1788 (when the Constitution was ratified), would expect Congress to exercise that are not part of those enumerations. The Constitution assumes that there will be federal departments, offices, and officers, but no clause expressly gives Congress power to create them. Congress is given specific power to punish counterfeiting and piracy, but there is no explicit general authorization to provide criminal—or civil – penalties for violating federal law. Several constitutional provisions give Congress substantial authority over the nation's finances, but no clause discusses a national bank or federal corporations.

These unspecified but undoubted congressional powers, and many others, emerge from the Clause at the end of Article I, Section 8, which gives Congress power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the other federal powers

granted by the Constitution. This residual clause—called at various times the "Elastic Clause," the "Sweeping Clause," and (from the twentieth century onward) the "Necessary and Proper Clause"—is the constitutional source of the vast majority of federal laws. Virtually all of the laws establishing the machinery of government, as well as substantive laws ranging from antidiscrimination laws to labor laws, are enacted under the authority of the Necessary and Proper Clause. This Clause just might be the single most important provision in the Constitution.

At first glance (and keep in mind that first glances are not always last glances), close analysis of the words of the Necessary and Proper Clause suggests three criteria for a federal law to be within its scope: Laws enacted pursuant to the Clause must be (1) necessary, (2) proper, and (3) for carrying into execution some other federal power.

Historically, most of the controversy surrounding the meaning of the Necessary and Proper Clause has centered on the word "necessary." In the 1790s during the Washington administration, and again two decades later in the Supreme Court, attempts to create a national bank in order to aid the nation's finances generated three competing understandings of what kind of connection with another federal power makes a law "necessary" for implementing that power. Those understandings ranged from a strictly essential connection "without which the [implemented] grant of power would be nugatory" (Thomas Jefferson), to an intermediate requirement of "some obvious and precise affinity" between the implemented power and the implementing law (James Madison), to a very loose requirement allowing any law that "might be conceived to be conducive" to executing the implemented power (Alexander Hamilton). In *McCulloch v. Maryland* (1819), the Supreme Court's most famous

case interpreting the Necessary and Proper Clause, the Court sided with Hamilton, giving Congress very broad authority to determine what is "necessary" for implementing federal powers. Subsequent cases have been at least as generous to Congress, finding necessity whenever one can imagine a "rational basis" for connecting implementing means to legislative ends. Indeed, no congressional law has ever been held unconstitutional by the Supreme Court on the stated ground that it was not "necessary" to implement a federal power.

Until quite recently, the word "proper" played no serious role in constitutional debates about the meaning of the clause. Indeed, a number of Founding-era figures, including such luminaries as Patrick Henry, James Monroe, and Daniel Webster, thought that the word "proper" was surplusage that added nothing to the word "necessary." In 1997, however, following some academic commentary that sought to give substance to the requirement of propriety, the Supreme Court held in *Printz v. United States* that a federal law compelling state executive officials to implement federal gun registration requirements was not "proper" because it did not respect the federal/state boundaries that were part of the Constitution's background or structure. Some later cases extended that holding to other matters involving federal/state relations. In *NFIB v. Sebelius* (2012), a constitutional challenge to "Obamacare," the federal health care law, the Court sharply divided over whether a law could ever fail to be "proper" if it did not involve direct federal regulation of state governments or state officials. The subject is likely to be a point of contention in the future.

There was also little action until recently regarding what it means for a law to be "for carrying into Execution" another federal power. For a long time, the standard assumption has been that laws can carry federal powers into execution by making other laws grounded in

those powers more effective. For example, the Court assumed in *Missouri v. Holland* (1920) that Congress could use the Necessary and Proper Clause to "carry[] into Execution" the treaty power by implementing and extending the substantive terms of a treaty. In recent years, however, three Justices have followed the lead of certain legal scholars by arguing that carrying the treaty power into execution means providing funds for ambassadors, pens and ink, and travel to foreign nations—in other words, it means making it possible to negotiate, draft, and ratify a treaty rather than to make the treaty more effective once it is negotiated, drafted, and ratified. Again, this subject is likely to be a point of contention in the future.

All of the foregoing, however, assumes that the right way to interpret the Necessary and Proper Clause is to pick apart its individual words and give each key term an independent meaning. That is not the only way to interpret the clause. Instead, one might look at the clause as a single, undifferentiated provision and try to discern the range of laws that the Clause, viewed holistically and purposively, tries to authorize.

One such vision (reflected in one of our separate statements) sees the Clause as a codification of principles of agency law that allow agents to exercise certain defined powers that are "incidental" to the main objects of the documents that empower the agents. Another such vision (reflected in the other of our separate statements) views the Clause as carrying forward ideas from a resolution adopted by the Constitutional Convention that would allow Congress to legislate "in all cases for the general interests of the Union . . . and in those to which the states are separately incompetent."

If the Necessary and Proper Clause has a relatively broad scope, as the second vision and two centuries of case law has largely maintained, it provides constitutional authorization for much of the existing federal machinery. If it has a narrower scope, as the first vision and a small but vocal group of Justices and scholars maintains, a great many federal laws that have been taken for granted for a long time might be called into question. The correct interpretation of the Necessary and Proper Clause might – just might – be the single most important question of American constitutional law.