



The U. S. Constitution Series
In Partnership with the National Constitution Center

AP[®] U.S. Government and Politics

Federalism, the Commerce Clause, and
the Tenth Amendment



Federalism, the Commerce Clause, and the Tenth Amendment

The U.S. Constitution Series in Partnership with the National Constitution Center

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About the National Constitution Center

The National Constitution Center was established by Congress to “disseminate information about the United States Constitution on a non-partisan basis in order to increase the awareness and understanding of the Constitution among the American people.” The Center hosts interactive exhibitions, constitutional debates, and other activities to increase awareness and understanding of the United States Constitution.

National Constitution Center and the College Board

In partnership with the National Constitution Center, the College Board has developed a series of classroom lessons and materials related to the U.S. Constitution. This series includes resources to support instruction in AP US Government and Politics, AP Comparative Government and Politics, AP US History, and AP English Language and Composition. These lessons and resources are available to AP teachers via the course homepages at AP Central and to all teachers through the National Constitution Center's website.

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Federalism, the Commerce Clause, and the Tenth Amendment

Plan

The Constitution includes language that can be interpreted as supporting a nation-centered view of federalism and other areas that one could argue support a state-centered perspective. Helping supply students with context and deeper understanding of the role of federalism is the National Constitution Center's Interactive Constitution that presents diverse interpretations of constitutional language, particularly that found in the enumerated powers of Article I, Section 8 and in the Tenth Amendment. While there are several enumerated powers included in Article I, Section 8, in this lesson module students will examine the Commerce Clause and its impact on federalism, as well as the Tenth Amendment and expert commentaries on the intent of the constitutional delegates, the impact of the Bill of Rights, and the precedents set by Supreme Court cases.

It should be noted that there are a number of sections in the Constitution that fuel the federalism debate--the enumerated powers of Article I, Section 8, and the Tenth, Thirteenth, and Fourteenth Amendments, particularly the enforcement power in Section 5 of the Fourteenth. Additional materials for the clauses and Amendments relevant to the debate continue to be posted to the interactive site.

Using the National Constitution Center Resources: Interactive Constitution

The National Constitution Center, in partnership with the American Constitution Society, the Federalist Society, and the John Templeton Foundation, developed the Interactive Constitution to promote discussion about and understanding of the Constitution and its meaning today. On the site, constitutional scholars interact to explore the Constitution's history and its place in our society. For each Article and Amendment of the Constitution, scholars from across the ideological spectrum discuss what they agree upon and what they disagree about. For more information about the Interactive Constitution, visit <http://constitutioncenter.org/interactive-constitution>

Learning Goals

Enduring Understandings

Students will understand that...

- ▶ Federalism reflects the dynamic distribution of power between national and state governments.
- ▶ The design of the judicial branch protects the court's independence as a branch of government, and the emergence and use of judicial review remains a powerful judicial practice.

Learning Objectives

Students will be able to...

- ▶ Explain how the appropriate balance of power between national and state governments has been interpreted differently over time.
- ▶ Explain the principle of judicial review and how it checks the power of other institutions and state governments.

Key Takeaways

- ▶ Managing an increasingly complicated, global array of interactions in the 21st century, the states and the federal government continue to forge an interactive relationship of conflict and cooperation in policymaking.
- ▶ Different interpretations of the Commerce Clause and the Tenth Amendment have led to debates regarding the scope of the federal government's powers.
- ▶ To maximize consistency and accountability of enforcement, the Supreme Court has interpreted the Commerce Clause and the Tenth Amendment to both expand and limit the power of the federal government, while preserving the sovereignty of the states.

Skills and Practices

- ▶ Explain how political processes relate to checks and balances
- ▶ Read, analyze, and interpret primary and secondary sources
- ▶ Draw conclusions about political behavior by applying diverse political perspectives or quantitative and qualitative information

Materials

- ▶ Student handouts
- ▶ National Constitution Center's Interactive Constitution (<http://constitutioncenter.org/interactive-constitution>)

Essential Question

How do constitutional provisions related to federal and state powers impact the way government functions and policies are developed or enforced?

Federalism, the Commerce Clause, and the Tenth Amendment

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How do constitutional provisions related to federal and state powers impact the way government functions and policies are developed or enforced?

Directions

Using the checklist below, indicate which level of government (federal, state, or local) is responsible for the development and/or enforcement of policy related to each topic. It is possible that more than one level of government is responsible for dealing with the issue, in which case you can indicate that by checking multiple boxes. Then, provide a brief rationale for your choices.

Issue	Federal	State	Local	Rationale
Health Care				
Legalization of Marijuana				
Immigration				
Gun Control				
Same-Sex Marriage				
Educational Reforms				
Environmental Hazards				

Teach

Federalism serves as a cornerstone of the U.S. republic in the way it defines boundaries between what state governments and the national government are each empowered to do, even when the issues or objectives are the same. It underscores a reason the U.S. Constitution was needed in the first place--to distribute sufficient power to a national government so as to protect the country from foreign powers and maintain a healthy economy, while granting the remaining powers to the states to preserve their autonomy and ensure accountability with the people.

Why is federalism so important to understanding how our government works today? Constitutional delegates believed there was good reason to create a strong national government emphasizing national unity over state sovereignty in particular areas. Having just fought the Revolutionary War, however, they also believed that "limited" government was preferable to what they perceived as a nearly "unlimited" government represented by King George and the British Parliament. Limitations placed on the national government range from the terse list of "enumerated powers" in Article I, including what has become known as the Commerce Clause, to the reminders in the Ninth and Tenth Amendments that all other powers are essentially "reserved" to the states and to the people, respectively. All of this reflects a profound distrust of centralized authority, and it was widely believed that limiting Congress to a short list of powers would protect the personal rights and property of the people.

Decentralizing sovereign power across levels of government distinguishes our federal structure from that of a unitary system, and there are certain advantages and protections in doing so. However, such a structure is not problem-free. One problem has to do with the provincial and sometimes inconsistent protection of civil liberties across states. Also, many states do not have the fiscal resources to address intransigent problems of poverty and economic stagnation within their boundaries. On the other hand, the national government's take-over of policy areas originally reserved to state legislatures has on occasion led to heavy-handed and coercive controls that stifle creative solutions to regional or state-wide problems. Political, economic, and technological developments have all affected what many believe is a contentious balance of power between the national and state levels of government.

Focus

Discuss with students the essential question above and ask them to determine which level of government is responsible for the development and/or enforcement of policy related to the following issues, acting alone or in concert with one or more of the others: health care, legalization of marijuana, immigration, gun control, same-sex marriage, mandated educational reforms, and environmental hazards. Then, have a brief discussion about students' ideas.

Explain that the class will be asked to analyze differing perspectives on how the relative scope of power between the state governments and national government has shifted, based on Congressional legislation and Supreme Court rulings applied to a variety of policy conflicts.

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Acquire

Building Your Understanding

Show students how to navigate the National Constitution Center's Interactive Constitution and where to find the Common Interpretation of Federalism.

1. Navigate your internet browser to the Interactive Constitution website: (<http://constitutioncenter.org/interactive-constitution>).
2. Click on the "Explore It" link near the bottom of the page to go to the main page of the Interactive.
3. The page includes links with the numbers and titles of the Amendments. It also includes a link in the top right-hand corner of the page to the Articles of the Constitution, titled "Article."
4. Click on the "Article" link and choose Article I. The main page of the Article contains the text of the Article, as well as links to specific sections of the Article. Click on the section titled "Powers of Congress."

Federalism, the Enumerated Powers, and the Commerce Clause

The Interactive Constitution: The Constitution includes sections that support a nation-centered view of federalism and other areas that support a state-centered perspective. In this lesson module you will examine federalism as laid out by the founding delegates in Article I and in the Tenth Amendment, as well as legal doctrine created from constitutional interpretations. Using the National Constitution Center's Interactive Constitution (<http://constitutioncenter.org/interactive-constitution>), you will analyze expert commentaries on the intent of the constitutional delegates, the impact of the Bill of Rights, and the precedents set by Supreme Court cases.

First, let's use the Interactive Constitution to determine what federalism is and how it has been implemented since the U.S. Constitution was adopted in 1787.

- ▶ Navigate your browser to the Interactive Constitution website: (<http://constitutioncenter.org/interactive-constitution>).
- ▶ Click on the "Explore It" link near the bottom of the page to go to the main page of the Interactive.
- ▶ The page includes links with the numbers and titles of the Amendments. It also includes a link in the top right-hand corner of the page to the Articles of the Constitution, titled "Article."
- ▶ Click on the "Article" link and choose Article I. The main page of the Article contains the text of the Article, as well as links to specific sections of the Article. Click on the section titled "Powers of Congress."
- ▶ Read Section 8 of Article I
- ▶ Read the Common Interpretation written by Barnett and Gerken. Then, answer the questions that follow.

Common Interpretation of Federalism

In the chart, indicate the four phases of federalism identified by Barnett and Gerken in their common interpretation. Then, describe each phase in your own words and explain how state power has or has not been protected in each phase.

Phases of Federalism

Enumerated Powers	Fundamental Rights	New Deal	State Sovereignty
<p>There was a balance between preserving the states' powers and the ability of the national government to act. In this phase, the national government was limited by the powers enumerated in the Constitution.</p> <p>State power was protected by limited federal power, not by giving specific powers to the states.</p>	<p>The federal government used its powers to protect the rights of citizens. In some cases, this meant limiting the states' power.</p> <p>State power was weakened in some ways because of the increasing power used by the federal government.</p>	<p>The power of the federal government expanded more through the courts' interpretations of the Commerce Clause. During this phase, the federal government could regulate areas that were formerly under state control.</p> <p>State power was at one of the weakest points due to the increased power of the federal government due to some Supreme Court rulings.</p>	<p>The Supreme Court has pushed back against federal power and attempted to shield states from some federal regulation.</p> <p>The court has marked where state power begins, thereby delineating where Congressional power ends. It has also recognized the need for a limiting principle when attempts are made to expand federal powers.</p>

Have students read Section 8 of Article I and then the Common Interpretation written by Barnett and Gerken and then complete the Phases of Federalism chart. Discuss students' responses, particularly their ideas about broader or more limited federal power.

CHECK FOR UNDERSTANDING

Check that students understand the idea of federalism and the relationship between the federal and state governments by analyzing two political cartoons. Two cartoons you may choose to use can be found at the following links: http://mrortlieb.weebly.com/uploads/8/9/7/6/8976286/1206334_orig.jpg and <http://media.townhall.com/Townhall/Car/b/gv100211dAPR20111001044611.jpg>.

Sample answers in the analysis chart refer to these two cartoons. Encourage students to complete the chart for Cartoon #1 as you think aloud and model the analysis.

Begin by asking yourself what you see in the cartoon. Create a list of the things you see, avoiding interpretation at this point. Remind students that in order to analyze the cartoon, you first need to identify what the artist has drawn.

Then, ask yourself what the artist may have intended the various pieces of the cartoon to represent or mean. This is when you will introduce interpretation into your analysis.

Next, ask yourself what the artist's perspective is.

Finally, have students work in pairs to analyze Cartoon #2 as you did with Cartoon #1. Have them complete the chart as they analyze the cartoon, and then have a discussion about their responses.

Why would it be important for the federal government to have broader powers?
Why would it be important to limit the powers of the federal government?

Answers will vary but may include a discussion about the role of the federal government in protecting citizens and consumers, which would require broader powers. On the other hand, with too much power the federal government may threaten the extent that local communities can live according to their different values and unique needs.

Check for Understanding

Review the two political cartoons dealing with federalism. As a class, analyze the cartoons and discuss the artists' perspectives on federalism and the relationship between the federal government and state governments.

Cartoon #1

http://mrortlieb.weebly.com/uploads/8/9/7/6/8976286/1206334_orig.jpg

Cartoon #2

<http://media.townhall.com/Townhall/Car/b/gv100211dAPR20111001044611.jpg>

AP U.S. GOVERNMENT AND POLITICS

STUDENT EDITION

	Cartoon #1	Cartoon #2
What do you see?	<p>Two men, one tall and one short. The tall one holds a bag that says "Federal Benefits" and a piece of paper that says "Federal Authority." He is wearing a top hat.</p> <p>The shorter man is wearing a coat that says "States Rights." The caption reads, "In two words, yes and no"</p>	<p>A man sits in a booth with his feet up. The booth is labeled "U.S. Justice Dept." Another man dressed in a law enforcement uniform with the word "States" across the shirt walks with a man who has his hands behind his back. In the background, several other people are running. The man in the booth tells the man in the uniform that it is his job.</p>
What do the various parts of the cartoon represent? How do you know?	<p>The taller man represents Uncle Sam and the United States government. Uncle Sam is often depicted with a top hat and tails. He also holds the bag and paper, both of which indicate his representation of the federal government. The benefits represent the money and other resources states receive from the federal government, while the paper represents the regulations and rules that come with that money.</p> <p>The shorter man represents the states and people that advocate for states' rights. We know this because his coat says so.</p>	<p>The man in the booth represents the federal government, specifically the Department of Justice, as evidenced by the title of the booth. The man in uniform represents the state governments, as he is labeled "States." The man with his hands behind his back is an undocumented immigrant, as are the people running. We know this based on the context of the cartoon, which appears to be at the US border.</p>

	Cartoon #1	Cartoon #2
What is the artist's claim about federalism and the relationship between the federal government and the states?	<i>The artist is claiming that although states and those who support states' rights want the money and resources from the federal government, they are not willing to accept the regulations that come with those resources. The way the small man is drawn in the cartoon expresses criticism of people (or states) that want benefits without the rules that come with them.</i>	<i>The artist is critical of the federal government's response to undocumented immigrants coming into the country through the border. Although immigration is a responsibility of the federal government, many people believe that it has failed to do its job, leaving the states to enforce immigration laws. This creates a tension between the federal and state governments.</i>

Enumerated Powers and the Commerce Clause

Second, let's look at one of the enumerated powers the founders granted to the federal government in Article I of the Constitution.

- ▶ On the Interactive Constitution, navigate to Article I.
- ▶ Choose Section 8, "Powers of Congress," then select the Commerce Clause.
- ▶ Read the highlighted text.
- ▶ Read the Common Interpretation of the Commerce Clause written by Barnett and Koppelman. Then, answer the questions that follow.

According to the Commerce Clause, the U.S. Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." With reference to the Commerce Clause, what is a value in having the federal government regulate interstate commerce?

Placing the power of regulating interstate commerce in the hands of the national government prevents states from taxing or banning commerce from neighboring states.

Is there a reason why states would want more power to govern or control behavior linked to interstate commerce? Explain your thinking.

One can make an argument that states should have more power to limit the private conduct of citizens as it relates to or impacts interstate commerce, since they are closer to the people and community issues.

Enumerated Powers and the Commerce Clause

Next, investigate the Commerce Clause in Article I, Section 8.

- ▶ On the Interactive Constitution, navigate to Article I.
- ▶ Choose Section 8, "Powers of Congress," then select the Commerce Clause.
- ▶ Read the highlighted text and the Common Interpretation of the Commerce Clause written by Barnett and Koppelman. Then, have students answer the questions related to it and briefly discuss Barnett and Koppelman's interpretation of the clause. Focus on their main points, the claims that they make, and the evidence used to support their claims. For example, you might point out that one of their claims is that the courts adopted an expansive reading of the Necessary and Proper Clause, which resulted in the expansion of federal power. One piece of evidence they use to support this claim is the Darby case, in which the Supreme Court ruled that the regulation of commerce could extend to intrastate commerce that affects interstate commerce. This ruling resulted in an expansion of federal power. Debrief this activity with students by discussing what they learned from the reading.

Barnett and Koppelman note that the Commerce Clause raises at least three questions of interpretation. Explain what those questions are and why they are important.

The three questions that Barnett and Koppelman ask are: What is the meaning of "commerce," what is the meaning of "among the states," and what is meant by "to regulate." These questions are important because the answers to each one change how the clause is read and understood, which in turn can change how it is applied in certain cases.

How did the decision in *U.S. v. Darby* change the legal definition of "commerce," and why was that significant?

The decision expanded the definition to include "intrastate activities which so affect interstate commerce as to make regulation of them an appropriate means to a legitimate end," which gave Congress sweeping powers to regulate the national economy (in this case to enforce the Fair Labor Standards Act).

Why was Justice Scalia's reasoning an important clarification of the Court's decision in the *Lopez* case?

*It upheld the doctrine that Congress could regulate noneconomic local activity if it supported the more general regulation of interstate commerce. The Court could not find that link in the *Lopez* case.*

AP U.S. GOVERNMENT AND POLITICS

STUDENT EDITION

In its ruling in the Affordable Care Act case (*NFIB v. Sebelius*, 2012), why did the Court NOT base its decision on the Commerce Clause?

Chief Justice Roberts reasoned that the Clause empowered Congress "to regulate interstate commerce, not to order individuals to engage in it." In effect, the Court was saying that requiring people to purchase insurance did not qualify as "regulating commerce," and therefore the Commerce Clause did not empower Congress to mandate insurance. It is noteworthy, however, that the Court held the law was a valid exercise of Congress's power under the taxing and spending clause, even though it was not regulating interstate commerce.

In an age of instant communication, growing diversity, urban growth, and digital commerce, what remain viable arguments supporting the preservation of state autonomy over unconstrained federal expansion?

The zone of autonomy is important to preserve innovation and accountability on a smaller scale within state boundaries. The Roberts Court has recognized the need for a limiting principle on federal power that all but eliminated state sovereignty during the New Deal. Even though the Court ruled in favor of the federal government in *NFIB v. Sebelius* (citing a different federal power - to tax and spend), Chief Justice Roberts recognized the danger of unbridled extension of the Commerce Clause beyond regulating commerce to "order(ing) individuals to engage in it."

Federalism, the Commerce Clause, and the Tenth Amendment | 11

Applying Your Understanding

You may wish to prepare for this section of the module by reading about the Lopez case on websites like <https://www.oyez.org/> or <https://www.law.cornell.edu/supct/html/93-1260.ZO.html>.

Next, share the scenario with students. Ask them to keep in mind the ideas from the two Common Interpretations, as well as the concept of judicial review, as you read it and think aloud. As you read, pause periodically to share your thinking with students. Share your reactions, questions, and other thoughts about the situation. For example, you might note that it is surprising that the state charges would be dropped and federal agents would arrest the student. You also might note that some people might consider the Gun-Free School Zones Act to be a reasonable limitation on gun rights, while others might consider it to be an unreasonable violation of the 2nd Amendment. When the Commerce Clause is mentioned, you could remind yourself of what it is and what it says, and you could react to the Court's ruling and its reasoning that there must be a direct link to interstate commerce that was not present in the case.

TEACHER TALK

If students need a quick review of judicial review, you can direct them to read the section of the Interactive Constitution.

- ▶ *From the main menu of the Interactive Constitution click "Article" at the top of the page, then click on "Article III."*
- ▶ *Click on Section 2 from the menu on the left side of the page.*

Scenario

A high school senior was arrested for bringing a .38 caliber handgun to school and was charged under state law with firearm possession on school premises. The next day the state charges were dismissed after federal agents arrested the student for violating a federal statute, the federal Gun-Free School Zones Act of 1990. Normally, police power and educational policies fall under the authority of state governments. However, Congress had passed this new law assuming it had such authority based on 55 years of the Supreme Court's interpretation of the Commerce Clause in Article I of the Constitution.

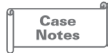
Only in this case the U.S. Supreme Court disagreed with the arguments of the federal government, ruling the Gun-Free School Zones Act unconstitutional and overturning the student's conviction. The government's principle argument supporting Congress's power to make carrying a gun to school a federal crime was that firearm possession in an educational environment would likely lead to violent crime, which in turn would affect the economy by raising insurance costs and limiting the willingness to travel in the area perceived to be unsafe. The Court's response was that this would create a slippery slope in which the federal government could regulate almost any activity simply by citing social costs instead of a more direct link to interstate commerce.

Applying Your Understanding

Now that you have read common interpretations about federalism and the Commerce Clause, keep the ideas from these interpretations, as well as the concept of judicial review in mind, as you listen to and read the following scenario. Then, complete the chart that follows.

A high school senior was arrested for bringing a .38 caliber handgun to school and was charged under state law with firearm possession on school premises. The next day the state charges were dismissed after federal agents arrested the student for violating a federal statute, the federal Gun-Free School Zones Act of 1990. Normally, police power and educational policies fall under the authority of state governments. However, Congress had passed this new law assuming it had such authority based on 55 years of the Supreme Court's interpretation of the Commerce Clause in Article I of the Constitution.

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Case: *U.S. v. Lopez*

Year: 1995

CASE BACKGROUND (include relevant events, legislation, or rulings):

Lopez took a concealed weapon into school and was charged under Texas law for having a weapon on school grounds. Federal agents then charged Lopez with violating the Gun-Free School Zones Act of 1990. The state charges were dismissed. Lopez was found guilty. He appealed and the case was heard by the Supreme Court of the U.S.

LAW, AMENDMENT, or CONSTITUTIONAL TEXT in question:

The question in the case related to the Commerce Clause and whether Congress had exceeded its authority under the clause.

MAJORITY OPINION

AUTHOR: *Rehnquist*

Key Claim(s):

The Gun-Free School Zone Act had nothing to do with interstate commerce or economic activity. Therefore, it was beyond the scope of Congress to regulate under the Commerce Clause.

Reasoning used to justify the opinion:

The lawyers for the U.S. argued that since many guns have crossed state lines in the production and sale, then they should be considered interstate commerce. However, possessing a gun in a school zone is not, in itself, an economic activity that might affect interstate commerce.

DISSENTING OPINION

AUTHOR: *Breyer*

Key Claim(s):

Gun violence could have an effect on the learning environment, which could impact interstate commerce. Therefore, Congress did have the authority to regulate under the Commerce Clause.

Reasoning used to justify the opinion:

Congress could rationally see the linkage between gun violence, its impairment of the learning environment, and negative economic effects. This was a rational basis for passing the law.

Implications:

With their decision, the Court stopped what many people saw as federal encroachment into issues that fall within the states' jurisdictions. The Court, following the idea of State Sovereignty Federalism, limited the federal government's involvement in areas that were not specifically related to interstate commerce.

[Source: adapted from, *Casing History* by Rhonda Webb, Lassiter High School, Cobb County, Georgia. Used with permission.]

Debrief the scenario with students by explaining that this was an actual case that was brought before the Supreme Court, *U.S. v. Lopez*. Turn to the Case Notes sheet and think aloud as you complete it, asking students to fill it in as you talk. Note the name and year of the case, as well as the fact that it dealt with the Gun-Free Schools Zone Act and the issue of federalism (there are also elements of the 2nd Amendment involved, but this module is more focused on federalism). Discuss the majority opinion, which focused on the issue of Congress exceeding its authority under the Commerce Clause, and its reasoning that gun ownership was not an economic activity that impacted interstate commerce. Also, note that this was an example of state sovereignty federalism that stopped the application of the Commerce Clause from increasing in scope. You might also note that a few years after the Lopez case, the U.S. Attorney General proposed changes as part of the Omnibus Consolidated Appropriations Act of 1997, bringing under federal jurisdiction any firearm that “has moved in or otherwise affects interstate commerce.” Since virtually all firearms have crossed state lines in interstate commerce at some point in their existence, no conviction under this revised federal law has been overturned by the Supreme Court. Discuss why this revision might stand in the era of State Sovereignty federalism.

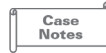
Practice

After engaging the class in discussion about Lopez, explain to students that they will have an opportunity to read about another case that deals with issues of federalism. Direct students to complete a Case Notes chart for *New York v. United States* (1992) on their own or with a partner.

Check to make sure students understand the major point the Court uses in supporting its decision as related to the “take title” provision and its effect on what is described as the “core of state sovereignty” under the Tenth Amendment. Discuss with the class the reasoning behind Justice White’s dissenting opinion as related to “cooperative federalism.” Have students look for similarities and differences between this case and the Lopez case in how the Court used the Commerce Clause to decide the issue and how it prioritized the balance of state and federal power. Consult the two websites given to students or <http://caselaw.findlaw.com/us-supreme-court/505/144.html> to obtain a summary of the case.

***New York v. United States* (1992)**

Complete the Case Notes chart below for the case of *New York v. United States*. You may use websites like <https://www.law.cornell.edu/supct/html/91-543.ZO.html> or <https://www.oyez.org/> to find information. Then, share your chart with a partner and discuss the information you have collected.



Case: *New York v. U.S.*

Year: 1992

CASE BACKGROUND (include relevant events, legislation, or rulings):

In 1985, Congress passed the Low-Level Radioactive Waste Policy Amendments Act, which required states to dispose of radioactive waste. States could open their own waste sites, and states that did not arrange for proper disposal would be required to take ownership (known as take title) of the waste and were liable for damages caused by the waste. New York state and some of its counties found it difficult to open their own sites because of resistance from residents, and New York filed suit.

LAW, AMENDMENT, or CONSTITUTIONAL TEXT in question:

Did the Low-Level Radioactive Waste Policy Amendments Act and its attempts to force a state to adopt federal regulations violate the Tenth Amendment?

MAJORITY OPINION

AUTHOR: O'Connor

Key Claim(s): Congress had the authority under the Commerce Clause to use financial incentives to influence states to adopt specific waste management practices. Congress did not have the authority to force states to take legal ownership and liability for the waste.

Reasoning used to justify the opinion:

The law violated the Tenth Amendment because it would force state governments to act on behalf of the federal government. This was not a power given to the federal government, and therefore the federal government could not use that power.

DISSENTING OPINION

AUTHOR: White

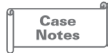
Key Claim(s): Congress was not forcing the states to enact its will. It was supporting the compromise between many states to deal with the waste disposal problem. It was also enacting “cooperative federalism” in which the states and federal government worked together to solve problems. Congress had the authority to regulate radioactive waste.

Reasoning used to justify the opinion:

The Constitution does not specifically limit the ability of Congress to direct the states to implement its legislation. By working together, the federal government and state governments could solve policy issues and address public concerns.

AP U.S. GOVERNMENT AND POLITICS

STUDENT EDITION

Case: *New York v. U.S.*

Year: 1992

Implications:

The Court's ruling was in line with State Sovereignty Federalism, in which the expansion of the federal government's power was slowed. The Court sided with the states and in favor of a stricter reading of the Tenth Amendment.

[Source: adapted from, *Casing History* by Rhonda Webb, Lassiter High School, Cobb County, Georgia. Used with permission.]

Guided Practice

Show students how to navigate to the Tenth Amendment on the National Constitution Center's Interactive Constitution site: (<http://constitutioncenter.org/interactive-constitution>).

Navigate your browser to the Interactive Constitution website: (<http://constitutioncenter.org/interactive-constitution>).

Click on the "Explore It" link near the bottom of the page to go to the main page of the Interactive. The page includes links with the numbers and titles of the Amendments.

Click on the Tenth Amendment. The link takes you to the main page for the Amendment.

Included on this page is the text of the Amendment, as well as the Common Interpretation. There are also links to the two Matters of Debate articles; each scholar has written one of these articles.

Next, assign students to groups of five to read the Common Interpretation and answer the questions related to it. Explain that everyone is to answer the first question and then each person in the group is responsible for answering one of the following questions. Each student may pair up with a student from another group to compare and edit responses before returning to the home group to present the answer. Students should then share their responses with their whole group.

The Tenth Amendment

Now let's explore the Tenth Amendment in more depth.

- ▶ Navigate your browser to the Interactive Constitution website: (<http://constitutioncenter.org/interactive-constitution>).
- ▶ Click on the "Explore It" link near the bottom of the page to go to the main page of the Interactive. The page includes links with the numbers and titles of the Amendments.
- ▶ Click on the Tenth Amendment. The link takes you to the main page for the Amendment.
- ▶ Included on this page is the text of the Amendment, as well as the Common Interpretation. There are also links to the two Matters of Debate articles; each scholar has written one of these articles.
- ▶ In small groups, read the Common Interpretation and then answer the questions that follow. Everyone should answer the first question. You should also answer your assigned question and be prepared to explain your answer to the other members of your group.

Do the scholars believe that the Tenth Amendment was necessary? Why or why not? Cite evidence from the text.

There are serious questions as to whether this Amendment was really necessary, since many signers of the Constitution believed the document was clear in principle at least of assigning specific powers to the national government, with the remaining powers resting with the states or the people. So, the Tenth Amendment may simply be mirroring "the Constitution's structure and design even before the Bill of Rights was ratified."

According to the Common Interpretation passage, what is the purpose of the Tenth Amendment?

It warns against using a list of rights to infer powers in the national government that were not granted—just because the Constitution does not list it, doesn't mean the national government can assume a given power.

AP U.S. GOVERNMENT AND POLITICS

STUDENT EDITION

What political concept creates the foundation for our federal system as implied by the wording of the Tenth Amendment? Explain your answer.

Limited government or the concept of popular sovereignty forms the foundation for ensuring that political power ultimately resides in the hands of the people—the federal structure is set up to prevent any one branch or level of government from acquiring so much power as to thwart the will of the people.

How does Alexander Hamilton's quotation, "For why declare that things shall not be done, which there is no power to do?" relate to the reluctance of Constitutional Framers to add a bill of rights to the Constitution? Why was one added anyway?

The framers thought a bill of rights might suggest that the national government had powers that it had not actually been granted, which could nullify the concept of limited government. Because all the state constitutions contained bills of rights, and because some states refused to ratify the Constitution unless and until a bill of rights was added, the founders relented and promised to do so.

What is meant by "Tenth Amendment doctrine," and how did it develop?

For a long time the Tenth Amendment was not considered to have any content independent of the basic principle that the federal government only has the power to do things that are enumerated in the Constitution. In *Garcia v. San Antonio Metropolitan Transit Authority* the Court held that a city had to comply with federal labor laws, and that state sovereignty interests should be protected through participation in the national political process rather than judicially-enforced principles of federalism. In the cases that followed, however, an effort to pair back on this willingness to impose federal law on states became known as the "Tenth Amendment doctrine," seeking to limit the federal government's power to impose rules and liability on state governments or commandeer state governments in enforcing federal laws.

What has the Tenth Amendment never been used to do by the U.S. Supreme Court that is surprising, since it is part of the Bill of Rights?

It has never been invoked by the Court to protect individual citizens against the exercise of federal power; the first eight amendments were likely designed with that in mind. (Exception may be Bond v. United States in which microbiologist Carol Bond was convicted under the Chemical Warfare Act for trying to poison her friend who had an affair with Carol's husband).

The Tenth Amendment: Matters of Debate

Now that you have read the Common Interpretation of the Tenth Amendment, read the Matters of Debate. The same scholars that wrote the Common Interpretation have written these articles, but they have included their own interpretations and understandings of the Tenth Amendment.

Read both articles and then use the organizers to summarize their main arguments and the evidence they use to support their positions.

Independent Practice

Assign students to read the commentaries by Gary Lawson and Robert Schapiro and summarize each scholar's main claim or thesis, as well as the reasoning and evidence each scholar provides in support of their positions. Explain to students that an author's reasoning is one piece of the larger argument and evidence is a specific example of the reason.

Then place each student into a small group of three and assign each member two questions from the six questions listed. Students may find a member from another group with the same questions to compare and edit their notes before reporting back to the home group. Ask the members in each triad to carefully think about the answers to all six questions.

Next, randomly call on different members to write their answers on the whiteboard or overhead projector. Afterwards, indicate to the class that they will be able to use their notes in responding to free response practice questions that will follow later in the lesson.

1. Explain what Lawson means when he says, "Virtually every case involving the application of the Bill of Rights to the federal government can, and probably should, be recast as a case about the scope of the federal government's enumerated powers."
2. Explain what Lawson means when he refers to our foundational document as a "zombie" Constitution?
3. How does Lawson's characterization of the Constitution affect the importance of the Tenth Amendment in preserving the balance of power?
4. How does Shapiro's essay compare in tone and theme with Lawson's?
5. How does Shapiro look at the Tenth Amendment differently from Lawson?
6. What evidence does Shapiro give to support his criticism of the Supreme Court's contemporary references to the Tenth Amendment doctrine in defending "dual federalism."?

Lawson's Claim or Thesis :

Lawson claims that although the Tenth Amendment did not formally change anything in the Constitution, it still has value. In particular, it has value as a reminder that the national government should not infer it has powers because of its existence as a government. The Tenth Amendment also has value as added security against the enumerated powers getting too misconstrued.

Reasoning:

The entire Bill of Rights is simply a declaration of facts about the power of the national government that were true even without the Bill of Rights.

Evidence:

Nothing in the Constitution gives the federal government the power to violate the rights spelled out in the Bill of Rights. The Constitution explicitly states and limits the powers of each of the branches.

Reasoning:

A straightforward reading of the text of the Tenth Amendment clearly indicates that the federal government does not have any powers simply because of its existence as a government. It only has the powers explicitly given to it in the Constitution.

Evidence:

In the late 19th and early 20th centuries, the Supreme Court sometimes permitted the federal government to do things (e.g., military draft, overseas colonies, etc.) simply because reasonable governments do those things.

Reasoning:

The enumerated powers have been misread to the point of not being true to the Constitution. Only the Bill of Rights can restore the original balance of power as provided in the Constitution.

Evidence:

Some Supreme Court cases had allowed the balance of power to become distorted in favor of expanding federal power. Various Tenth Amendment cases have served to return the balance of power to its original structure as described in the Constitution.

AP U.S. GOVERNMENT AND POLITICS

STUDENT EDITION

Shapiro's Claim or Thesis:

The original intention of the Tenth Amendment was to create a structure that gave power to both the federal and state governments. However, despite that structure evolving over time, the Supreme Court has created barriers to the federal government exercising its authority. Those barriers are not founded in the text or structure of the Constitution.

Reasoning:

In its current application, the Tenth Amendment functions to impose limits on the use of federal power. Those limits are not based in any text.

Evidence:

In New York v. US, the Supreme Court ruled against the federal government requiring states to handle radioactive waste disposal a certain way. In doing so, it interpreted the Tenth Amendment like it does the First Amendment - as limiting Congress's powers - but the text of the Amendment reads differently.

Reasoning:

Dramatic changes in society and the economy have led to expansion of areas subject to federal regulation. Therefore, it is difficult to clearly delineate the domains of state authority v. federal authority.

Evidence:

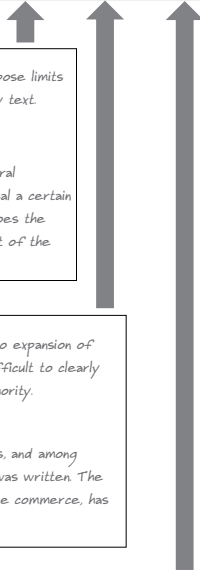
The power "To regulate commerce with foreign nations, and among the several states" has changed since the Constitution was written. The types of commerce, as well as the meaning of interstate commerce, has evolved and developed along with technology.

Reasoning:

Federalism is still alive and well. States still have power and still cooperate with the federal government in areas that overlap.

Evidence:

The Supreme Court's decision on the issue of same-sex marriage was the result of federal and state courts and legislatures participating in a dialogue.



Next, based on what you have read, respond to the questions you have been assigned. You may collaborate with a member of another group who has the same questions as you. However, you will be responsible for explaining your answers to your group. You will also be responsible for understanding the answers to all of the questions.

Explain what Lawson means when he says, "Virtually every case involving the application of the Bill of Rights to the federal government can, and probably should, be recast as a case about the scope of the federal government's enumerated powers."

The Tenth Amendment in particular and the Bill of Rights as a whole are meant to serve as an exclamation mark, underscoring that the national government is limited to the powers enumerated in the Constitution.

Explain what Lawson means when he refers to our foundational document as a "zombie" Constitution?

He believes that the Court in modern times has so misinterpreted the enumerated powers of Congress and the national government that the Constitution has been eviscerated and reduced to a mere husk, not really part of the governing structure at all. In particular, the Interstate Commerce and necessary and proper clauses have been extrapolated beyond all recognition in granting power to the national government.

How does Lawson's characterization of the Constitution affect the importance of the Tenth Amendment in preserving the balance of power?

Because the Supreme Court has so misconstrued the enumerated powers, the weight now falls on the Bill of Rights to restore the balance of power. In particular, "Tenth Amendment" cases may serve as a means of placing the guard rail around the enumerated powers in order to reach the correct balance of power between the states and national government.

AP U.S. GOVERNMENT AND POLITICS

STUDENT EDITION

How does Shapiro's essay compare in tone and theme with Lawson's?

Shapiro believes that federalism is alive and well today thanks to ongoing dialogue between and among federal and state courts and legislatures.

Unlike Lawson, Shapiro believes there are a number of areas of overlap between state and federal authority, and that it is foolish to try to limit this overlap by carving out protected areas of exclusive state or federal regulation. Like Lawson, however, he thinks this overlapping federalism flourishes in spite of Supreme Court decisions trying to carve out areas of state power that are immune from national regulation.

How does Shapiro understand and interpret the Tenth Amendment differently from Lawson?

Rather than seeing the Tenth Amendment as a "back-up" for limiting the federal government's usurpation of power, Shapiro thinks it is being used to create new and unnecessary barriers to the exercise of national authority. Instead, its function is to impose a non-textual limit on the use of federal power that should not be interpreted so literally in carving out boundaries.

What evidence does Shapiro give to support his criticism of the Supreme Court's contemporary references to the Tenth Amendment doctrine in defending "dual federalism"?

He questions the assertion that the Court has to draw a clear line between domains of state and federal authority in order to maintain accountability of government officials. Given the extensive overlap of state and federal power among so many areas today, he questions how important it is to maintain areas of state power exclusivity. There really are few areas left in which the federal government would be immune from responsibility from a citizen's perspective, so all the more reason to reject a "dual federalism" approach and recognize the overlap between state and federal powers. He refers to the Court's declaring a constitutional right to same-sex marriage as support for what he calls "overlapping federalism at work," in which extensive dialogue has taken place between state legislatures and federal and state courts.

EXTENSION ACTIVITY

Other Supreme Court cases dealing with issues of federalism that students could complete a Case Notes chart on include:

- ▶ *Gibbons v. Ogden* (1824)
- ▶ *Heart of Atlanta Motel, Inc. v. United States* (1964)
- ▶ *Printz v. United States* (1997)
- ▶ *United States v. Morrison* (2000)
- ▶ *Gonzales v. Raich* (2005)

Assess

Direct students to respond to one of the free response questions. The questions represent modified versions of free response questions on previous AP US Government and Politics exams. In some cases, students will need to reference concepts learned in other parts of the course. You may wish to modify these questions more to meet the needs of your students.

- A. The framers of the Constitution devised a federal system of government that affected the relationship between the national and state governments.
- Explain how the Commerce Clause has been used to expand the power of the federal government over the states.
 - Explain how Supreme Court decisions have played a role in the devolution of power from the national government to the states.

Modified from Free Response Question 2 on the 2015 exam

Scoring Guidelines for the original question can be found at the following link:

https://secure-media.collegeboard.org/digitalServices/pdf/ap/ap15_united_states_government_and_politics_sg.pdf

- B. The framers of the Constitution created a political system based on limited government. The original Constitution and the Bill of Rights were intended to restrict the powers of the national government. Later constitutional developments also limited the powers of state governments. Explain how each of the following limits the powers of the national government.

- › Federalism
- › Checks and balances

Modified from Free Response Question 4 on the 2010 exam

Assessment

Respond to the following question using what you have learned about federalism, the enumerated powers, the Commerce Clause, and the Tenth Amendment.

The framers of the Constitution devised a federal system of government that affected the relationship between the national and state governments.

- Explain how the Commerce Clause has been used to expand the power of the federal government over the states.
- Explain how Supreme Court decisions have played a role in the devolution of power from the national government to the states.

Modified from Free Response Question 2 on the 2015 exam

Assessment

Respond to the following question using what you have learned about federalism, the enumerated powers, the Commerce Clause, and the Tenth Amendment.

The framers of the Constitution created a political system based on limited government. The original Constitution and the Bill of Rights were intended to restrict the powers of the national government. Later constitutional developments also limited the powers of state governments. Explain how each of the following limits the powers of the national government.

- Federalism
- Checks and balances

Modified from Free Response Question 4 on the 2010 exam

Scoring Guidelines for the original question can be found at the following link:

http://apcentral.collegeboard.com/apc/public/repository/ap10_us_govt_politics_scoring_guidelines.pdf

- C. The power of the federal government relative to the power of the states has increased since the ratification of the Constitution.
- a. Describe the following provisions of the Constitution and explain how each has been used over time to expand federal power.
- ◆ The “necessary and proper” or “elastic” clause
 - ◆ The commerce clause

Modified from Free Response Question 2 on the 2005 exam

Scoring Guidelines can be found at the following link:

http://apcentral.collegeboard.com/apc/members/repository/_ap05_sg_gopo_us_46636.pdf

Assessment

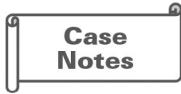
Respond to the following question using what you have learned about federalism, the enumerated powers, the Commerce Clause, and the Tenth Amendment.

The power of the federal government relative to the power of the states has increased since the ratification of the Constitution.

Describe the following provisions of the Constitution and explain how each has been used over time to expand federal power.

- ▶ The “necessary and proper” or “elastic” clause
- ▶ The commerce clause

Modified from Free Response Question 2 on the 2005 exam



Case:

Year:

CASE BACKGROUND (include relevant events, legislation, or rulings):

LAW, AMENDMENT, or CONSTITUTIONAL TEXT in question:

MAJORITY OPINION

AUTHOR:

Key Claim(s):

Reasoning used to justify the opinion:

DISSENTING OPINION

AUTHOR:

Key Claim(s):

Reasoning used to justify the opinion:

Implications:

[Source: adapted from, *Casing History* by Rhonda Webb, Lassiter High School, Cobb County, Georgia. Used with permission.]

Author's Claim or Thesis:
Reasoning:
Evidence:
Reasoning:
Evidence:
Reasoning:
Evidence:

The diagram consists of four rectangular boxes arranged vertically, each containing the labels 'Reasoning:' and 'Evidence:'. The top-most box is labeled 'Author's Claim or Thesis:'. Three arrows point upwards from the Reasoning/Evidence boxes to the Claim/Thesis box: one from the first Reasoning/Evidence box, one from the second, and one from the third. The fourth Reasoning/Evidence box at the bottom does not have an arrow pointing to the Claim/Thesis box.