

Problem #2: Introduction to U.S. Public Law: Separation of Powers & Federalism

1. Origins of the U.S. Constitution: the Articles of Confederation
  - a. Separation of Powers
    - i. In 1781, the U.S. formed a national government under an agreement among the new states that was called “the Articles of Confederation.” What was its main governing body?
    - ii. True or false: The first president of the U.S. was not George Washington. It was John Hanson. (This isn’t in the reading.)
    - iii. Have you ever heard of John Hanson? Who selected him? How powerful was his position? (This isn’t in the reading.)
    - iv. Did the Articles have separation of powers?
  - b. Federalism
    - i. Under the Articles, who had more power—the national government or the states?
    - ii. Did the national government have the ability to collect taxes?
    - iii. The U.S. had borrowed money from foreign nations in order to fight the American Revolution. Was the national government able to repay those debts?
    - iv. Did the national government maintain a powerful army?
    - v. How effective was the national government in negotiating with other nations?
    - vi. In matters of interstate commerce, the states behaved like independent nations, using different currencies and adopting trade policies that discriminated against businesses in other states. Was this a problem?
  - c. What was the constitutional convention? What role did George Washington play? (This isn’t in the reading.)
2. The Constitutional Convention: Separation of Powers
  - a. Under the constitution proposed at the Constitutional Convention in 1787, how many branches does the national government have?
  - b. Congress
    - i. What is the job of Congress—to make the law, administer the law, or interpret the law?
    - ii. There are two houses of Congress. What are they called?
    - iii. Can a law be passed by only one of these houses?

- iv. If both houses agree that a law should be passed, does that settle the issue? Or does someone else need to agree? Is there a way to proceed without this person's agreement? Why do you think the U.S. government is organized in this way?
  - v. California has the largest population and Wyoming has the smallest population. Do they have the same number of representatives in the House? The same number of senators? Why?
  - vi. How frequently are representatives elected? What about senators? Why do you think the framers designed the government in this way?
- c. President
- i. What is the job of the President—to make the law, administer the law, or interpret the law?
  - ii. In a parliamentary system, the leader of the majority party in the legislature becomes the head of the government. How is the president chosen?
  - iii. In the U.S., is it possible for one party to control the presidency and for another to control congress? Why was the U.S. government designed in this way?
- d. Judiciary
- i. What is the job of the courts—to make the law, administer the law, or interpret the law?
  - ii. One of the nation's founders, Alexander Hamilton, described the courts as "the least dangerous branch." Why do you think he thought this? (This isn't in the reading.)
  - iii. Which part of the U.S. government is responsible for nominating judges? Who has to approve them? Why is the government organized in this way?
- e. Example of the division of labor: Foreign policy and wars
- i. Which branch of the government commands the U.S. military?
  - ii. Which branch of the government funds the U.S. military?
  - iii. Which part of the U.S. government negotiates treaties? Who is required to approve them?
  - iv. Why do you think the U.S. government is organized in this way?

### 3. Judicial Review: *Marbury v. Madison* (1803)

- a. Which is more important—the constitution or a statute? For example, if the Constitution forbids a particular action, but Congress or the President takes it anyway, is that action legal?

- b. Who decides whether Congress or the President has gone beyond their authority? They take an oath to uphold the constitution, so can they police themselves (and each other)?
- c. What does the phrase “judicial review” mean?
- d. Facts of *Marbury v. Madison*: In 1800, John Adams (the second U.S. president) lost the presidential election to Thomas Jefferson. Two days before Adams’ term ended, he appointed a number of new judges, including William Marbury, but Marbury never got his paperwork. When Jefferson learned this, he refused to deliver it, as a way to keep Marbury from becoming a judge. An unhappy Marbury brought a lawsuit, asking the Supreme Court to order Jefferson to give him his paperwork.
- e. Think about the politics here. If Jefferson refused to implement John Adam’s order about Marbury, was there a risk that he also would refuse to respect an order from the Supreme Court? (Bonus: Who appointed John Marshall to the Supreme Court?)
- f. Did Chief Justice John Marshall have the power to force Jefferson to comply? For example, did the Supreme Court have its own army or police force? If Jefferson refused, what effect would that have on the power of the Supreme Court?
- g. Decision: The Court held that Jefferson was wrong not to deliver the paperwork, but that the Court could not help. Although Marbury was following the procedure specified by Congress in a statute, this statute was unconstitutional. The problem was that this statute required Marbury to go directly to the Supreme Court for relief, but the Constitution required him to go to a lower court instead. The Supreme Court struck down this law as unconstitutional and dismissed the case. "It is emphatically the province and duty of the judicial department," Marshall wrote, "to say what the law is."
- h. Did Marbury get to be a judge? So did Jefferson get what he wanted?
- i. Was Marshall’s decision a modest one, which emphasized the judiciary’s lack of power? (“Sorry, Marbury deserves to be a judge, but can’t help him.”)
- j. Or was Marshall’s decision an ambitious one, which claimed an important power for the judiciary? (“The reason we can’t help is that Congress made a mistake—and, by the way, it’s the Supreme Court’s job to decide when Congress has made a mistake.”)
- k. True or false: By establishing the power of judicial review, *Marbury v. Madison* is one of the most important judicial decisions in U.S. history.
- l. True or false: Chief Justice John Marshall was politically shrewd. He faced the risk that the Court would be seen as powerless, but in this weak

position he still managed to claim significant power—in a way that President Jefferson could not easily challenge.

- m. Who really won this case—William Marbury? Thomas Jefferson? Or someone else?

#### 4. The Constitutional Convention: Federalism

- a. U.S. lawyers use the term “the police power” to describe a general power to do whatever the people need, for instance, to regulate health, public safety, etc. Is this a power of the federal government or of state governments?
- b. U.S. lawyers use the term “enumerated powers” to describe specific powers given to the federal government. (“Enumerated” means “listed” or “on the list”). If a power to do something isn’t “enumerated”—in other words, if it’s not on the list—can the federal government do it?
- c. True or false: The national government (and, specifically, Congress) has the power to collect taxes.
- d. True or false: The national government (and, specifically, Congress) has the power to regulate commerce among the states.
- e. True or false: States can impose tariffs on goods produced in other states..
- f. True or false: The national government has the power to create an army and declare war.
- g. True or false: The national government has the power to negotiate treaties with foreign powers.

#### 5. Bill of Rights

- a. What was the Bill of Rights? Why was it enacted?
- b. To carry a concealed firearm in N.Y., the state requires citizens to “demonstrate a special need for self-protection distinguishable from that of the general community.” What Amendment could be violated by this “proper cause” requirement? See *N.Y. State Rifle & Pistol Ass’n v. Bruen* (2022).
- c. Joseph, a high school football coach, engaged in prayer with a number of students during and after school games. His employer, the Bremerton School District, asked that he discontinue the practice. He refused to stop, so they fired him. Which Amendment is relevant? *Kennedy v. Bremerton School District* (2022).
- d. A government employee sends the *New York Times* a confidential analysis by the U.S. military of its war effort, and the U.S. government

sues to prevent the Times from printing it. What amendment is relevant? See *N.Y. Times v. United States* (1971).

- e. When Ernesto was in police custody, he confessed to kidnapping and rape, and his confession was used in his trial, but the police never told him that he had the right to lawyer, as well as the right to remain silent. What amendments are relevant? *Miranda v. Arizona* (1966).
  - f. Antoine owned a nightclub. Suspecting him of selling illegal drugs, the police attached a GPS tracking device to his car without getting a valid warrant from a judge. Antoine wants to prevent the police from using information from this GPS device in his trial. What amendment is relevant? See *Jones v. United States*.
  - g. During the Revolutionary War, the British forced colonists to provide food and shelter to its troops. What amendment prevents the U.S. government from doing this?
  - h. Vernon killed a police officer, who was trying to mediate a dispute between Vernon and Vernon's girlfriend. He was sentenced to death, but the legal proceedings took a long time. While awaiting execution over twenty years later, Vernon suffered severe strokes, which caused severe dementia. He could no longer remember his crime or understand the reason for his pending execution. What amendment is relevant? See *Madison v. Alabama*.
  - i. The tenth Amendment provides as follows. Please explain the meaning of this language: "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."
6. The Civil War and the Reconstruction Amendments
- a. Is the U.S. a voluntary union of sovereign states, who are free to leave the union? How was this issue resolved?
  - b. What did the 13th Amendment provide?
  - c. What did the 15th Amendment provide?
  - d. The Fourteenth Amendment provides as follows: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
    - i. New York passed a law limiting the work week for bakers to sixty hours. Did this economic regulation violate the 14th Amendment? *Lochner v. New York* (1905); *West Coast Hotel v. Parrish* (1937). How is this a case about federalism?

- ii. Louisiana had racially segregated trains, and Kansas had racially segregated schools. Did segregation violate the 14th Amendment? *Plessy v. Ferguson* (1896); *Brown v. Board of Education* (1954). How are these cases about federalism?
- iii. Abortion violated a criminal statute in Texas. Did limits on abortion violate the 14th Amendment? *Roe v. Wade* (1973); *Dobbs v. Jackson Women’s Health Org.* (2022). How is this a case about federalism?

7. Advantages of Federalism: Choices, Competition, and Experimentation,

- a. Texas and New York offer different approaches to state government. Texas has lower taxes and provides fewer social services, while New York imposes higher taxes and provides better mass transit and a more generous social safety net. Some citizens prefer one package of taxes and services, while other citizens prefer the other. Economist Charles Tiebout argued that citizens benefit from having these choices, as well as from the competition among states for citizens. What do you think of the “Tiebout model” of fiscal federalism?
- b. True or false: Local conditions can vary, making a “one-size fits all” approach to government problematic. Federalism offers the flexibility to tailor laws to local circumstances. For example, the speed limit on a lightly trafficked and flat highway in Kansas should be different from the speed limit on Broadway in Manhattan or on a winding mountain road in Colorado.
- c. Justice Louis Brandeis offered a related but different defense of federalism. What does he mean? Do you agree?

The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. . . . There must be power in the States and the Nation to re-mold, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. [\*New State Ice Co. v. Liebmann\*, 285 U.S. 262](#) (1932) (Brandeis, dissenting).

8. Disadvantages of Federalism: Economies of Scale, Externalities, and “Race to the Bottom”
  - a. During the coronavirus pandemic, government experts have had to test vaccines and treatments to determine whether they are safe and effective. Do you think those tests were conducted by federal, state, or local agencies? Why?
  - b. New York has strict gun control laws, but gun crimes are still common in New York. How do criminals get these guns? 74% of the guns recovered by law enforcement in N.Y. come from out of state (34,344 of the 46,514), a percentage that is well above the national average. Almost half of these guns originated in six states with fairly weak gun control laws: Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, and Florida. Do the regulatory choices in these states affect other states? Does this reality suggest that some policies need to be set nationally?
  - c. Economists use the term “externality.” What does it mean? (This is not in the reading.)
  - d. Countries have different corporate tax rates. Some countries (e.g., Ireland, the Cayman Islands) have adopted a strategy of imposing a lower rate as a way to persuade businesses to shift economic activity (or to use tax planning strategies to shift profits) to their jurisdiction. A few months ago, the OECD struck an agreement to require its members to have a minimum corporate tax rate of 15%. Proponents of this plan say it prevents a “race to the bottom.” What do you think they mean? What is the lesson for federalism? (This is not in the reading.)
  - e. In game theory, do you know what the “prisoner’s dilemma” is? (This is not in the reading.)
  
9. Case Study of Fracking
  - a. Over the past several years, what country has supplied most of Europe’s oil and natural gas? Why are European nations now trying to replace this supplier?
  - b. Where does Asia get most of its oil and gas?
  - c. The U.S. was the largest producer of oil and gas in 1970. What about in 2000? What about today? What changed?
  - d. What is “fracking”?
  - e. Fifteen years ago, as the “shale revolution” was beginning, environmentalists worried that fracking would lead to significant water contamination. In fact, instances of water contamination have been quite rare. Why?
  - f. In deciding which jurisdiction should regulate an activity—localities, states, or the national government—some scholars favor a “matching” principle: the scope of regulation should match the harm, so that a problem whose effects are local should be regulated locally, while a problem that affects the entire nation should

be regulated nationally. Are the harms from water contamination likely to be local or national?

- g. Worried about water contamination, New York banned fracking, while Pennsylvania did not. Because of fracking, Pennsylvania has become a major natural gas producer. Given this difference between New York and Pennsylvania, do you think water contamination has been regulated by the states or by the national government? What are the advantages of regulating fracking at this level of government? Recall that we have talked about a number of advantages of federalism, including choice, competition, local tailoring, and experimentation. Which, if any, apply here?
- h. A number of other countries have deposits of oil and gas in shale, including the U.K., France, Poland, and China. Why haven't other countries been as successful as the U.S. in drilling for this oil and gas? In addition to geological reasons, there are two others. (Hints: federalism and mineral rights)
- i. In discussing fracking, our focus so far has been on water contamination. But with any fossil fuel, there is another issue: climate change. Is the harm from greenhouse gas emissions local or national (or international)? Applying the matching principle, noted above, what level of the U.S. government should regulate this issue?