

AP[®]

 CollegeBoard

ANALYTICAL READING ACTIVITIES
TOPIC 1.8

AP United States Government and Politics

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Topic 1.8: Constitutional Interpretations of Federalism

Source Analysis

Before You Read

To prepare for reading two arguments about the Tenth Amendment, list what you know about powers that the states have and some that the federal government has. List your thoughts in the chart below. Then, respond to the questions that follow the chart.

Powers that States Have	Powers that the Federal Government Has	Powers that both States and the Federal Government Have

Why do you think the founders gave some powers to the states and some powers to the federal government?

Why would some people want to limit the powers given to the federal government?

Required Document:
The Tenth Amendment to the Constitution of the United States

Paired with: Matters of Debate essays from the National Constitution Center

Related Concepts:

- Federalism
- Bill of Rights
- Federalist and Antifederalists
- Necessary and Proper Clause
- Enumerated Powers
- Implied Powers

Comparison

Explain the reasons for similarities and differences

Source Analysis

Explain how the author's argument or perspective relates to political principles, institutions, processes, policies, and behaviors.

The Tenth Amendment to the U.S. Constitution

As you read and analyze the Tenth Amendment, focus on understanding the meaning of the text of the amendment and how it relates to the different concepts underlying federalism. The first 10 amendments form the Bill of Rights.

Amendment X (Ten)

Rights Reserved to States or People

Passed by Congress September 25, 1789

Ratified December 15, 1791

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.

Check Your Understanding

What does the phrase “delegated to the United States” mean in the context of the Tenth Amendment?

Connect to Content

In the space below the text of the amendment, describe and explain one example of a power “reserved to the states.”

After You Read

Thinking Like a Political Scientist

Reasoning Process: Comparison

Both *McCulloch v. Maryland* (1819) and *United States v. Lopez* (1995) were cases related to federalism. Explain how the Tenth Amendment relates to one of these cases. How did the case either narrow or broaden the scope of the Tenth Amendment?

Political Science Disciplinary Practices

Source Analysis

Identify and describe how the Tenth Amendment is related to the debates between the Federalists and Anti-Federalists.

Explain how the Tenth Amendment is related to federalism.

Essays on the Tenth Amendment

Now you are going to read and analyze two arguments about the Tenth Amendment. The first argument is from Gary Lawson, Philip S. Beck Professor of Law at the Boston University School of Law. The second argument is from Robert Schapiro, Griggs Candler Professor of Law at the Emory University School of Law. Both of their arguments explain how each scholar interprets the Tenth Amendment and its importance today.

THE TENTH AMENDMENT: A TRUISM WITH TEETH

by Gary Lawson

The Tenth Amendment formally changed nothing in the Constitution. As the joint statement indicates, no law that would have been constitutional before ratification of the Tenth Amendment is unconstitutional afterwards. The Tenth Amendment simply makes clear that institutions of the federal government exercise only limited and enumerated powers—and that principle infused the entire idea and structure of the Constitution from 1788 onwards. Nonetheless, there is significant constitutional value in the Tenth Amendment—and perhaps even enough value to justify the seemingly odd line of cases that use the provision directly to invalidate congressional laws and thereby create Tenth Amendment “doctrine.”

As a matter of the Constitution’s original meaning, the entire Bill of Rights of 1791 was principally declaratory of facts about national power that were true even without the Bill of Rights. The enumerated powers of the national government, as the Constitution’s defenders consistently maintained, simply did not give the national government much power to violate the rights articulated in the first eight amendments and referenced by the Ninth Amendment. The Constitution’s enumerations of power include no “issuance of general warrants clause,” “congressional regulation of religion clause,” “abolition of civil juries clause,” “limitation on the right to keep and bear arms clause,” and so forth.

Academic Vocabulary

Describe the following phrase in the context of this paragraph:

Tenth Amendment “doctrine”

Source Analysis

Highlight or underline the claim the author makes about the 10th Amendment in the first paragraph.

Source Analysis

How does the author use the list of powers in the third sentence of this paragraph to support his claim?

The Constitution does contain one clause that quite specifically allows Congress to limit freedom of speech: The Copyright Clause of Article I, section 8, clause 9, which authorizes Congress to secure “to Authors ... the exclusive Right to their ... Writings” and thereby limits the freedom of speech of persons who want to reproduce or use someone else’s writings. As a number of prominent Federalists pointed out during the ratification debates, this carefully targeted authorization to limit speech cuts strongly against any more general national power in the area. The enumerated powers of the President and the federal courts are similarly limited; no reasonable person in 1788 would think that grants of “executive Power” and “judicial Power” were free-standing authorizations to violate widely understood rights. Nor could Congress violate rights in the course of implementing federal powers under the so-called “Necessary and Proper Clause,” as any such rights-violating laws would not be “necessary and proper” for executing those powers. As the Federalists argued to tedium, the whole Bill of Rights was mostly just a big exclamation point.

Source Analysis

What does this paragraph reveal about the author’s perspective regarding the necessary and proper clause and implied powers?

Check Your Understanding

Underline or highlight the areas of text that explain why, to the Federalists, the whole Bill of Rights was “mostly just a big explanation point.”

In that respect, the Tenth Amendment is not materially different from the rest of the Bill of Rights. It may make little formal sense to speak of “Tenth Amendment doctrine,” but it makes almost as little formal sense to speak of “First Amendment doctrine” or “Fourth Amendment doctrine.” Those other provisions make only marginal, if any, changes in the pre-1791 legal baseline (and those changes mostly involve persons in federally-owned territory, over whom Congress exercises much broader power than it does over residents of states). 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 numerous cases applying various provisions of the Bill of Rights to actions of state governments via the Fourteenth Amendment are a whole different story that is not relevant here.) Thus, if there is any value at all in speaking of “First Amendment doctrine,” “Fourth Amendment doctrine,” etc., in connection with the federal government, the same considerations make it valuable to talk about “Tenth Amendment doctrine.”

Source Analysis

What does this paragraph reveal about the author’s perspective regarding how the Tenth Amendment and the Bill of Rights should be interpreted?

There are two other, and more concrete, ways in which the Tenth Amendment has constitutional value. First, the reminder that powers not delegated to institutions of the national government do not belong to institutions of the national government should prevent anyone from inferring particular federal powers from the general nature of governments, rather than from specific grants of power to this specific federal government. Nonetheless, the Supreme Court, especially in the late nineteenth and early twentieth centuries, has sometimes been very fond of arguments that run something like: “All self-respecting governments can do X, our national government is a self-respecting government, therefore our national government can do X.” This kind of reasoning was used to support dubious federal powers to exercise eminent domain, to implement a military draft, to hold overseas colonies, and to pass laws concerning immigration. (If one actually reads the Constitution, one finds enumerated congressional power over naturalization but not a power over immigration, which therefore left the latter to the individual states unless it can be jammed into the idea of “Commerce with foreign Nations” or is somehow an “executive Power.”) A straightforward reading of the Tenth Amendment forecloses that line of reasoning.

Second, the Tenth Amendment, along with the rest of the Bill of Rights, might have value as a kind of backstop in case the original Constitution’s meaning gets too deranged. In modern times, the enumerated powers of the national government have been misread beyond all recognition, to the point that the actual Constitution is not really part of the governing structure at all. We live with a shadow, or “zombie,” Constitution that has the outer husk of the original document but none of its actual substance. Once the enumerated powers are misconstrued out of existence, weight falls on the rest of the Constitution, most notably the Bill of Rights, to restore to some very modest degree the original balance of power. The various “Tenth Amendment” cases decided by the Supreme Court may serve this function. Congress, for instance, has no enumerated power to conscript state legislatures or executives into enforcing federal law (though it does actually have enumerated power to conscript state courts into hearing federal cases through the Article I Tribunals Clause). But if arguments that rest on a lack of enumerated power are foreclosed by wretchedly bad prior cases, then subbing in the Tenth Amendment to reach the correct result is not a completely irrational strategy. It may not be as good as getting the enumerated powers right in the first place, but it may be a plausible second-best solution.

Source Analysis

Highlight or underline the claim regarding the 10th Amendment the author returns to in this paragraph.

Source Analysis

What reasoning does the author use to justify his claim and argument in this paragraph?

Source Analysis

In the space below this paragraph, summarize what the author reveals about his perspective on implied powers.

Check Your Understanding

Circle the sentences where the author reveals his thoughts about the best method of limiting the power of the federal government.

Connect to Content

Based on what you have read and what you know about federalism, how does Lawson’s argument relate to the political principle of federalism? In his opinion, what should the relationship be between the states and the federal government?

THE DISAPPEARANCE AND UNFORTUNATE REVIVAL OF THE TENTH AMENDMENT

By Robert Schapiro

When initially added to the United States Constitution, the Tenth Amendment stood as a reminder of the continuing importance of states and of the foundational role of the people. The Amendment was significant not for the text it supplied, but for the structure it emphasized. That structure has evolved over time. Recently, the United States Supreme Court has sought to revive the Amendment, with unfortunate results. The Court has found in the Amendment a license to create new barriers to the exercise of national authority, barriers that lack foundation in the text or structure of the Constitution or in sound policies of federalism.

In the early part of the Twentieth Century, the Supreme Court relied on the Tenth Amendment in resisting expanded assertions of national power. However, during the New Deal, Congress enacted a range of federal regulatory programs, such as Social Security, designed to stabilize the economy, protect workers, and promote the general welfare. Once the Court acquiesced in the New Deal's vision of a more active federal government, the Tenth Amendment receded from view. From the late 1930's to the mid-1970's, the Tenth Amendment essentially disappeared from U.S. Constitutional law. After a brief reemergence, the Tenth Amendment went back underground in 1985, before returning, apparently to stay, in 1992.

Good reasons existed for the disappearance of the Tenth Amendment. The Amendment refers to the "The powers not delegated to the United States by the Constitution. ..." With the expanded role of the national government validated in the New Deal era, the domain designated as "reserved to the States ... or to the People" shrank dramatically. Further, during the Civil Rights era, when Congress and federal courts were taking measures to end racial discrimination, the Tenth Amendment became associated with assertions of "states' rights" to resist claims of civil rights. The Tenth Amendment suffered from the assertion that the powers reserved to the states included the power to enforce racial inequality. Politically, socially, and morally, the Tenth Amendment seemed to speak to the past, not the present or the future.

Check Your Understanding

Highlight or underline what the author doesn't like about how the Supreme Court has used the Tenth Amendment in recent years.

Check Your Understanding

How did the New Deal impact the scope of the Tenth Amendment?

Source Analysis

Highlight or underline Schapiro's claim regarding the Tenth Amendment in this paragraph.

Source Analysis

Highlight or underline the evidence Schapiro uses to support his claim in this paragraph.

Check Your Understanding

Circle the explanation of how the domain designated as "reserved to the States ... or to the People" shrank.

The revival of attention to the Tenth Amendment in the 1990's formed part of the Supreme Court's New Federalism. In addition to renewed reliance on the Tenth Amendment, the Court also imposed greater scrutiny on Congress's power to regulate interstate commerce. Along similar lines, the Court invoked the Eleventh Amendment to limit the ability of Congress to subject states to suit in federal court, even for claims that the states were violating federal law.

The Court's New Federalism doctrines, in general, and its Tenth Amendment cases, in particular, lack foundations in text or sound policy. Even while reinvigorating the Tenth Amendment in *New York v. United States* (1992), the Court reaffirmed that the Tenth Amendment is a "truism" and "essentially a tautology." The Court stated that the impact of the Amendment is "not derived from its text." Indeed, by its terms, the Tenth Amendment applies to powers "not delegated to the United States by the Constitution." The Tenth Amendment thus appears to have no application to the exercise of Congress's enumerated powers. In its current incarnation, however, the function of the Tenth Amendment is to impose a non-textual limit on the use of federal power. The Court has held that even when the federal government is regulating interstate commerce, as authorized by Article I, section 8 of the Constitution, the federal government still may not invade certain protected enclaves of state sovereignty. The national government cannot "commandeer" the operation of state governments by forcing states or their political subdivisions to regulate in accordance with a federal plan or to enforce federal law. For example, in *New York v. United States*, the Court held that the Tenth Amendment prohibited Congress from enacting a comprehensive plan for the disposal of radioactive waste that required states to assume responsibility for the disposal of waste within their borders. The Court reads the Tenth Amendment as functioning like the First Amendment, as carving out part of Congress's enumerated powers. That reading runs counter to the text of the Tenth Amendment.

By way of policy justification, the Court has suggested that it must draw clear lines between domains of state and federal authority. The blurring of federal and state functions, the Court asserts, would undermine the accountability of government officials. The citizens would not know to which government entity they should address policy concerns. Scholars have questioned the empirical underpinnings of this line of argument. Are people really so easily confused? Moreover, given the extensive overlap of state and federal power in so many areas, how important is it that some area of state exclusivity be maintained? Citizens would need a fairly sharp sense of discernment to know which would be the few areas in which the federal government was immune from responsibility.

enclaves: distinct and/or protected areas

commandeer: take control of something without permission

Source Analysis

How are the ideas of a "renewed reliance on the Tenth Amendment" and "[imposing] greater scrutiny on Congress's power to regulate interstate commerce" related?

Check Your Understanding

Circle how the court interpreted the Tenth Amendment in *New York v. United States*.

Source Analysis

Highlight or underline the claim Schapiro makes in this paragraph regarding the Supreme Court's New Federalism doctrines.

Source Analysis

Highlight or underline the evidence Schapiro uses to support his claim.

Academic Vocabulary

Explain what *domain* means in the context of the third paragraph.

The basic problem is that the language of the Tenth Amendment appears to assume a clear demarcation of state and federal domains of authority. This conception, sometimes termed “dual federalism,” no longer comports with reality. The areas of society subject to federal regulation have grown significantly over time. The power “To regulate commerce with foreign nations, and among the several states” encompasses a greater realm of activity that (sic) in prior centuries. That expansion results from the dramatic changes in society and the economy, along with the Framers’ choice to use the broad term of “commerce.” Accordingly, there are vast areas of overlap between state and federal authority. It is a fool’s errand to try to limit the overlap by carving out protected enclaves of exclusive state and exclusive federal regulation.

The good news is that federalism is alive and well in the United States today. States remain vital centers of policy debate and experimentation. State and federal power intersects and overlaps in many ways that promote the well-being of the people. The interplay of state and federal decisions leading to the Supreme Court’s declaring a federal constitutional right to same-sex marriage offers one recent example of federalism at work. Federal and state courts and legislatures engaged in a dialogue that eventually resulted in the recognition of a national right. However, this federalism does not rely on outdated notions of exclusive areas of state sovereignty. This healthy federalism flourishes in spite of, not because of, the Supreme Court’s efforts to demarcate enclaves of state power immune from national regulation. For the moment, these exclusive state domains remain relatively small, offering little resistance to the exercise of enumerated federal powers. Should the Court expand these enclaves, however, current Tenth Amendment doctrine would become a more significant, and pernicious, force.

demarcation: a boundary or dividing line

Connect to Content

Why has the Court suggested that it must draw clear lines between the domains of state and federal authority?

Source Analysis

Highlight or underline the claim that Schapiro makes regarding federalism in this paragraph.

Source Analysis

Circle the evidence Schapiro uses to support this claim in this paragraph.

Source Analysis

Based on what you have read and what you know about federalism, how does Schapiro’s argument relate to the political principle of federalism? In his opinion, what should the relationship be between the states and the federal government?

After You Read

Thinking Like a Political Scientist

Process: Comparison

In the chart below, identify two relevant categories you could use to compare Lawson's and Schapiro's arguments and describe each scholar's ideas related to each category of comparison.

Category of Comparison	Lawson's Argument	Schapiro's Argument

Political Science Disciplinary Practices

Source Analysis

Compare the reasoning behind Lawson and Schapiro's arguments. Which do you think was the most compelling? Why?

Making Connections

Write a brief summary of the majority opinions (including the Constitutional reasoning used to support the rulings) for both *U.S. v. Lopez* (1995) and *McCulloch v. Maryland* (1819). Then, think about the positions of Lawson and Schapiro. Based on their arguments, explain whether each would be more likely to have supported or not supported the rulings in each case.

Case	Lawson	Schapiro
<i>U.S. v. Lopez</i> (1995)		
<i>McCulloch v. Maryland</i> (1819)		

Explain at least two ways in which the principles of federalism impact you and your life.
