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What Happened to Federalism?

"Don't make a federal case out of it" was at one time an effective rebuke to someone making a big deal out of a small matter. In other words, the remark was a commonly understood recognition that most matters are better handled in one's own community. After all, reduced to its essence, the reason behind the separation of the colonies from the British Empire was that they did not want to be ruled by a distant government on matters that were essentially mostly local concerns.

When adopting the Constitution of the United States, the Framers of that document intended to establish a federal republic, not a unitary democracy. That is the form of government that the state ratifying conventions also believed they were agreeing to when they ratified the Constitution. Finally, to emphasize the point, the 10th Amendment clearly stipulated this principle and was enshrined in the founding document of the Republic: "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."

One political theorist widely respected by the Founding Fathers was the Baron de Montesquieu of France. It is not unusual for government textbooks to teach his admiration of the concept of separation of powers, which he attributed to the British system in his *The Spirit of Laws*, published in 1748. Less known is that Montesquieu had issues with the overly centralized system of parliamentary sovereignty found in Britain.

Instead, he advocated for a confederal arrangement, which he believed retained the best of small and large political units, while at the same time diminishing the disadvantages of either — leaving most matters to be resolved at the local level, while at the same time providing for a common defense against foreign states. Following the American War for Independence, the United States attempted to implement this wise counsel, first in the Articles of Confederation, and finally in the Constitution.

Yet, the actual working relationship between the states and the national government in Washington, D.C., would hardly be recognizable by the delegates at the Constitutional Convention. In all likelihood, they would be gravely disappointed at the reduction of the states to little more than administrative units of a growing federal behemoth.

What Killed Federalism?

How did this present state of affairs happen? What can be done, if anything, to reverse this trend and restore the proper balance of power between the states and the central government?

We cannot examine every single cause of this distortion of the intent of the Framers, and many of the causes overlap. However, an examination of some of the more egregious of these causes will enlighten us not only as to how it happened, but also as to what can be done to mitigate our present problems.

First, there is no question that the American Civil War greatly damaged the concept that most issues should be resolved at the state level. The war resulted from the secession of several southern states from the Union, and the avowed goal of President Abraham Lincoln to bring those states back into the Union by military force removed the threat of secession as a check on the central government. One can argue that the decision to secede was imprudent and unjustified. Or, one can argue that just because the larger and better equipped Union armies won does not mean they were in the right on the question of secession — might does not make right.

The reality is, regardless of one's own view of the matter, the North viewed Southern secession as a rebellion and waged war against the South to keep the South in the Union. After the Union victory, secession was no longer considered a viable threat to check growing federal power.

In the war's aftermath, Congress passed the 14th Amendment, which was ratified under questionable circumstances. The 14th Amendment had the noble goal of providing civil rights protections for the millions of former slaves, but some of its provisions — at least the way they are now interpreted — certainly increased the power of the federal government at the expense of the states, both Northern and Southern.

The 14th Amendment stipulated that state governments could not deprive any person under their jurisdiction of the right to life, liberty, or property, without due process of law; it also said that no state could deny any person within its jurisdiction the equal protection of the laws. The first part means that every person is entitled to all the due process rights in its judicial system as any other person. The second part means that every person within the state's jurisdiction is to be protected by law enforcement — a person's life, liberty, and property should be protected equally.

The Incorporation Doctrine

Unfortunately, federal courts began to interpret these two provisions under the so-called Incorporation Doctrine. This means that the Bill of Rights, adopted in 1791 for the express purpose of protecting U.S. citizens and the states from the newly created federal government, could be enforced against states. And who would now determine if a state or local government is obeying the Bill of Rights? The federal courts, of course, which meant a massive transfer of power from the states and localities to the federal government — to the federal courts.

This is why we often hear that a Supreme Court decision is "the law of the land." Of course, Article I, Section 1, of the U.S. Constitution explicitly states, "*All* legislative [law-making] powers herein granted shall be vested in a *Congress*." (Emphasis added.) By simple logic, if all law-making power is granted to Congress (and the extent of that power is limited by the Constitution), then no law-making power is left to the federal courts, or to the president.

But because of this expansive interpretation of the 14th Amendment, which stands the Bill of Rights on its head, almost every legal dispute in the country is a potential "federal case." By this Incorporation Doctrine, the First Amendment's prohibition against Congress making any law "respecting an establishment of religion" was extended to the states and even local school boards, and prayer and Bible reading (deemed an establishment of religion by judicial fiat) were thrown out of the public schools. Of course, the First Amendment also blocks Congress from "prohibiting the free exercise of religion," and when the Constitution was first enacted, the federal government celebrated God and

Christian Holy Days.

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This unjustified interpretation of the 14th Amendment is the principal pretext the Supreme Court cited when state laws restricting abortion were declared "unconstitutional" in *Roe v. Wade*, and more recently states were told to recognize "marriage" between persons of the same sex as just as legal as the thousands- of-years-old traditional definition of marriage as between a man and a woman.

Closely related to the dubious Incorporation Doctrine is the often-cited but fictitious "National Supremacy Clause." There is, to be sure, a "supremacy clause" in the Constitution, but it is a reference to the Constitution itself. It is not a statement repudiating the federal system of government established by the Constitution. What it does say is this: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Anyone with a basic understanding of sentence structure can readily grasp that it is "this Constitution" that is the "supreme law of the land." Note that before a law of the United States can be considered the "law of the land" at all, much less a "supreme law," it must be passed "in pursuance" of the Constitution. Bluntly put, if Congress passes a "law" that is not in pursuance of the Constitution, it is no law at all.

Considering that many who are advocates of "national supremacy" are far too often also advocates of globalism, one should understand that treaties with foreign governments only become the law of the land in the United States if they are adopted under the authority of the United States. This requires, first, a two-thirds ratification vote by the U.S. Senate, and second, that any treaty must conform to the Constitution of the United States. The Constitution, in Article V, provides how the Constitution can be amended — and amendment through the treaty-making process is not one of the ways mentioned in that article.

Unfortunately, this false doctrine that any federal law is somehow "supreme" over state laws is widely believed, because this is what is taught in America's public (and far too often, private) schools, from kindergarten to graduate school. I can distinctly recall an incident from years ago when I was teaching a high-school government class. In the "workbook" that accompanied the textbook, the question was asked, "Why was Congress able to require the states to lower their national speed limits to 55 miles per hour?" The provided answer was, "Because federal law is supreme over state law." I wrote the publisher (this was before e-mail), explaining that this was incorrect, and they wrote me back, admitting that they had messed up, and would "correct" that answer in future editions.

The actual "correct" answer to the question about Congress setting speed limits within the states hinges on the next, and perhaps most important, reason why the states have lost their power.

The Effect of the 16th Amendment

What I believe is among the most underrated reasons for the vast expansion of federal power at the expense of the states is the 16th Amendment, which gave Congress the authority to enact a federal income tax. Ratified in 1913, the 16th Amendment said, "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived." Congress soon used that power via the

Underwood-Simmons Act, enacting a progressive income tax, signed into law by President Woodrow Wilson.

In short, the federal income tax gave the federal government a source of revenue that would soon dwarf the financial resources of the states. Without the income tax, the modern welfare state of the U.S. government and the modern military establishment, complete with the interventionist foreign policy (what neoconservatives often approvingly refer to as a "muscular foreign policy") that has been pervasive since World War II, would simply not be possible.

The vast amount of revenue taken in by the income tax enables the federal government to entice states to carry out federal dictates. Why did all 50 states meekly pass the 55-mile-per-hour speed limit when directed to do so by Congress and President Gerald Ford in 1975? Every year, Congress provides "highway funds" for the states to build and maintain roads inside their state. Any state that refused to pass the federally dictated speed limit was told that they would have their share of the federal highway funds reduced. And because states had become so addicted to these federal grants of money, they believed they had no choice but to comply.

This is the proverbial tip of the iceberg. The truth is that about one-third, on average, of a state's revenue comes from federal grants. Under these circumstances, it is very difficult for a state's government to "stand up" to the federal government and lose a third of its revenue. Until we change this situation, states are going to continue in a role of subservience to the federal government.

Another amendment, passed on the heels of the 16th Amendment, likewise shifted the balance between the states and their federal government. The 17th Amendment was ratified on April 8, 1913, and provided that U.S. senators should be "elected by the people" of each state, rather than by their respective state legislatures, as outlined in the U.S. Constitution. The Founding Fathers, as a critical part of their plan to craft a federal system of government, provided that each state would have an equal number of senators, chosen by their respective state legislatures for six-year terms. This would give the state governments control of one-half of the legislative branch of the federal government. If a senator failed to stand up for the rights of his state, the state's legislators could vote him out when he came up for reelection. Unfortunately, with the 17th Amendment, senators have become largely glorified House members and don't protect the prerogatives of the states.

An illustration I often use to show how this change has damaged the protection of the federal system as designed by the Framers is that most, if not all, states now maintain "offices" in the nation's capital city, to "represent" the interests of their state — lobbyists for the state, in other words. Sadly, that is the role envisioned by the Founding Fathers for each state's two senators.

Federalization of Law Enforcement

The 16th and 17th Amendments were "progressive era" changes to the Constitution. The progressive movement wanted the expansion of government at all levels, particularly the federal government, in order to "improve society." Progressives were very optimistic about the role of government to correct "evils" in society by passing laws. For example, the 18th Amendment, ratified on January 16, 1919, gave Congress the power to regulate the "manufacture, sale, or transportation of intoxicating liquors" in the United States, in a bold effort to cure one of society's great social evils.

No one disputes that intoxicating beverages have caused great damage. Historically, however, its regulation was left up to each state. Nothing could be more logical than leaving such issues up to the

states in a federal system. Although the 18th Amendment was eventually repealed by the 21st Amendment nearly 14 years later, it laid the groundwork for Congress to usurp even more such powers from the states. Today, the regulation of drugs is a "federal" issue. Since the 1960s, the federal government has conducted a "drug war," reminiscent of the war on alcohol in the 1920s, with much the same result. Only with the "drug war," no constitutional amendment has authorized what the federal government has done, as was the case with the 18th Amendment. Such is the legacy of the 18th Amendment.

The 18th Amendment greatly enlarged the general police power of the U.S. government. Federal revenue agents (who have existed since before the Whiskey Rebellion during the administration of George Washington) fanned out across the country to enforce the Volstead law, which Congress had passed to implement the 18th Amendment.

Speaking of federal involvement in law enforcement, in 1908, 12 years before the 18th Amendment was enacted, the Federal Bureau of Investigation (FBI) was created at the direction of President Theodore Roosevelt, a progressive Republican, as a division within the Department of Justice — then under Attorney General Charles Joseph Bonaparte, a descendant of the brother of the infamous French dictator who had his own secret police.

Originally known as the Bureau of Investigation, and led by J. Edgar Hoover until his death in 1972, the FBI unquestionably had many great successes and did much meritorious work, especially during the dark days of the Cold War. However, it has nevertheless been instrumental in enlarging the scope of federal responsibility in the area of law enforcement. Hoover operated an efficient public-relations machine, and Congress was quite cooperative in increasing the jurisdiction of the FBI over law enforcement because of that. (For example, why should kidnapping and bank robbery be federal, rather than just state crimes?) Because of the belief of Americans in the ability of the FBI to solve crimes, many conceded more of the police power to this federal agency.

Some have the mistaken notion that even more crimes should be handled by federal authorities. Conservatives were rightly incensed when Senator Rand Paul of Kentucky, one of the most constitutionally minded members of Congress, was brutally attacked by a far-left supporter of Bernie Sanders. But many learned after this assault that an attack upon a member of Congress, even in Kentucky, was a federal crime. Why could that not be within the jurisdiction of law enforcement in Kentucky?

Some have even suggested that car-jacking should be a federal crime. Saying states cannot properly deal with car-jacking is akin to saying state law enforcement is not competent to do much of anything, except maybe hand out parking tickets.

Others argue that the federal government should have more power because states and local governments have violated the civil liberties of individual Americans. Of course state and local officials have abused their powers. That is why all government agents should be restricted by law. To paraphrase James Madison, we have government because not all men are angels, and the reason we have limits on government is because not all government officials are angels. That is true at the local, state, and federal levels.

It wasn't a state government that rounded up more than 100,000 Americans and put them in relocation camps in the early days of World War II. It wasn't a local government that conducted an experiment on

black men, leaving them to die of syphilis. In both those cases, it was the national government of the United States, not a state or local government.

What Can Be Done to Restore the Balance?

What can be done about this perversion of the federal design of the Founders?

First, we need to avoid a false solution, such as a constitutional convention under Article V of the Constitution. Some conservatives have been deceived that this could somehow be used to rein in the federal government. But we do not know who the delegates would be at any such constitutional convention. Many liberals are salivating at the thought of a national convention to enact amendments to the Constitution, which would actually decrease the power of the states in relationship to the federal government. Some have specifically speculated that an Article V convention could drastically curtail or completely eliminate the protections provided by the Second Amendment to the Constitution.

Would anyone who values the right to keep and bear arms want a constitutional convention in the atmosphere following a school shooting such as the one in Florida?

Some have suggested nullification of unconstitutional federal laws, regulations, and rulings as a much better solution to the problem of the increased power of the federal government at the expense of the states. No doubt there are some areas in which a state can frustrate federal power. Thomas Jefferson and James Madison secretly wrote the Kentucky and Virginia Resolutions asserting that states should refuse to enforce federal laws that are in violation of the Constitution.

The cases in which this can be effective are situations in which federal authorities need the cooperation of state and local officials to enforce a federal law. For example, before the Civil War, officials in Wisconsin effectively nullified the Fugitive Slave Law by refusing to cooperate with federal agents. In modern times, states and local governments can essentially nullify federal laws by refusing to enforce them, as some states are now doing with unpopular marijuana laws.

Sadly, far too often, state and local officers are often cheering on their loss of authority to the federal government, in hopes that they can obtain some federal grants. While the media and public officials have much to say about the addictive effects of opioids, little is said about how state and local governments are addicted to federal money.

The best solution is an educated electorate, which will retire its members of Congress if they refuse to do everything possible to reverse this situation. Often members of Congress condemn the overbearing attitude of the federal government, but never attempt anything that will change the situation.

What would be some constructive actions to reverse our present problem? Use the House of Representatives' power of the purse. This also stands a good chance of working because generally, compared to a Senate race, the number of people needed to change the outcome of a House race is ridiculously small. Samuel Adams said it well: "It does not take a majority to prevail … but rather an irate, tireless minority, keen on setting brushfires of freedom in the minds of men."

It won't be easy. The idea that our present situation is the way the Founders designed it, with such mistaken beliefs as that there is a "national supremacy" clause in the Constitution, is strongly ingrained in the public mind. This is why The John Birch Society, the parent organization of this magazine, is so important. Birchers use education of the electorate as their strategy and truth as their weapon. Once enough citizens understand the truth, that awakened and informed minority can set those brushfires of

freedom in the minds of other men and women to turn the ship around.

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