Understanding the Constitution: Exclusive and Concurrent Powers and Illegal Immigration

In the vast majority of areas where the Constitution grants powers to the federal government, the states still retain authority to act.

In this aerial view, A group of more than 1,000 immigrants walks towards a U.S. Border Patrol field processing center after they crossed the Rio Grande from Mexico in Eagle Pass, Texas, on Dec. 18, 2023. (John Moore/Getty Images)

By Rob Natelson
4/1/2024 Updated: 4/1/2024

Commentary

One reason some people fail to understand why the State of Texas can protect itself against the illegal-immigration invasion is that they lose sight of a basic part of American constitutional federalism. This is the distinction between *exclusive* powers and *concurrent* powers.

When I was teaching law-school constitutional law courses, I found that many of my students had trouble with this distinction. And when a hot topic like immigration triggers your political passions, it can be hard to think straight about any subject, especially a point of law.

Indeed, when political passions rage, even experienced lawyers and judges can become confused.

So let's do some clear thinking on the subject, proceeding step by step.

The People Granted Powers through the Constitution

Before the Constitution was ratified, the 13 "united States" were independent countries in a treaty of alliance called the Articles of Confederation. (In 18th-century English, the term "confederation" meant merely an international alliance or league.) Each state retained sovereignty, limited only by a few grants to Congress.

In ratifying the Constitution, the American people re-shuffled powers previously held by Congress and the states. The starting assumption was that any authority the Constitution did not confer elsewhere remained in the states—or, if you prefer, in the people of the respective states. There was no ambiguity on this point: The Constitution's drafters and advocates explained it repeatedly during the ratification debates of 1787–1790.

And to prevent future doubt on that point, Congress proposed and the states ratified the Ninth and Tenth Amendments.

Now, the Constitution transferred a fair amount of power away from the states and to new federal officials and to a new federal Congress. But it also assigned some new "federal functions" to state legislatures, state governors, and to non-governmental assemblies, including amendment conventions and the Electoral College. And in a few cases, the Constitution returned to the states prerogatives they formerly had conceded to the Confederation Congress. Notably, the document removed some of the restrictions the Articles had imposed on the states in waging defensive war against invasion.

The Constitution's Arrangement

Much of the Constitution's structure follows a pattern common in 18th-century agreements by which "principals" granted enumerated (listed) powers to "agents."

The Constitution identifies the grantors/principals as "We the People of the United States." Then it identifies each grantee/agent: Congress, the president, etc., and enumerates each one's powers. After that, it lists qualifications and exceptions to those powers. The most important exceptions are in Article I, Section 9 and the Bill of Rights. (This description is simplified. You can find more details in my book, "The Original Constitution: What It Actually Said and Meant.")

Of course, as I explained in an earlier Epoch Times series, the Supreme Court has (improperly) re-written some parts of the Constitution. However, the rest survives, and what follows still is true of most of the document.

Exclusive and Concurrent Powers

If the Constitution does not grant the federal government authority over a subject, then authority over that subject remains entirely in the states. This is called *exclusive state jurisdiction*. For example, only states may fix the terms of office for state officials or construct local streets.

In a few instances, the Constitution grants Congress or federal officials power to govern a subject and denies the states any role. This is called *exclusive federal jurisdiction.* Thus:

- Congress has exclusive power over the District of Columbia (Article I, Section 8, Clause 17).

- The U.S. House of Representatives has the "sole Power" of impeaching federal officials (Article I, Section 2, Clause 5) and the Senate the "sole Power" of trying them (Article I, Section 3, Clause 6).

- Besides granting the federal government wide foreign policy and financial powers, the Constitution denies the states certain *specific* foreign policy and financial powers. For example, only the federal government may make treaties with foreign nations or issue bills of credit (a kind of paper money) (Article I, Section 10, Clause 1).

In addition, the Constitution permits the states to do some things only if Congress approves. These include entering into interstate compacts and launching offensive war (Article I, Section 10, Clauses 2 and 3).

But—and this is critical to our discussion—in the vast majority of areas where the Constitution grants powers to the federal government, the states still retain authority to act. These are subjects over which federal and state governments have *concurrent jurisdiction*. They include commerce across political borders; creating and administering courts; imposing trade embargoes against foreign powers; building post roads (intercity highways); governing the militia; and taxing and borrowing.

For a state to have a concurrent power, there is no need for the Constitution to recognize it explicitly; the Ninth and Tenth Amendments are sufficient. Yet in some cases, the document does include explicit recognition. Two such cases are the state's authority to resist invasion (Article I, Section 10, Clause 3) and to control migration across state borders (Article I, Section 9, Clause 1).

In most areas of concurrent jurisdiction, the federal government can use its enumerated powers to override state actions. On the other

hand, there are some areas so central to state sovereignty that they are protected from federal intrusion. Alexander Hamilton mentioned state taxation as an illustration in "Federalist" No. 32. At the Virginia convention that ratified the Constitution, the future Chief Justice John Marshall said much the same about state use of its militia to defend against invasion. And in Printz v. United States (1997), the Supreme Court held that Congress could not "commandeer" state officials to enforce an otherwise-valid federal law.

The Mistake People Make

On such points, the Constitution and its history are quite clear. Nevertheless, promoters of centralized governance have long tried to muscle out state officials by expanding *concurrent* federal power into *exclusive* federal power.

Thus, in the 19th century, some asserted that not only did Congress have authority to regulate interstate commerce, but that its authority was exclusive, and the states had no voice in the matter. This assertion was clearly wrong: It is contradicted both by the Constitution's text and by the transcript of the 1787 convention. Yet false theories have a way of surviving when they suit the interests of those at the top. This one partly lingers on in the Supreme Court's "Dormant Commerce Clause" line of cases.

Similarly, Congress's power to "regulate Commerce with ... the Indian tribes" (Article I, Section 8, Clause 3) leaves states with a fair amount of authority over Indian affairs. Yet some commentators and jurists contend that it grants the feds exclusive power over the subject.

There are similar claims that the federal government has exclusive jurisdiction over foreign affairs, and that the states have none at all. This claim, also, is contradicted by the Constitution's text and by the records of the 1787 convention.

Confusion Over Immigration and Invasion Powers

Confusion over exclusive and concurrent jurisdiction is rife in the current illegal immigration-invasion crisis, and particularly in the litigation between Texas and the federal government. In a March 19, 2024, dissenting opinion, Justice Sonia Sotomayor claimed that the "authority to control immigration—to admit or exclude [noncitizens]—is vested solely in the Federal Government." However, this proposition is contradicted both by the Constitution's structure and by the wording of Article I, Section 9, Clause 1.

In an opinion issued on March 26, 2024, a federal appeals judge wrote that "Constitutional text, structure, and history provide strong evidence that federal statutes addressing matters such as noncitizen entry and removal are still supreme even when the State War Clause has been triggered."

Actually, however, the "strong evidence" is to the contrary: It is highly doubtful that Congress could, by statute, destroy a state by denying it the right of self-defense. In fact, the Constitution's Guarantee Clause (Article IV, Section 4) and some of the 1787–1790 debates suggest the exact opposite.

The late, great Justice Antonin Scalia was undoubtedly correct when he asserted categorically, "[T]he States have the right to protect their borders against [illegal] foreign nationals."

Views expressed in this article are opinions of the author and do not necessarily reflect the views of The Epoch Times.

Rob Natelson
Author

Robert G. Natelson, a former constitutional law professor who is senior fellow in constitutional jurisprudence at the Independence Institute in Denver, authored “The Original Constitution: What It Actually Said and Meant” (3rd ed., 2015). He is a contributor to The Heritage Foundation’s “Heritage Guide to the Constitution.”

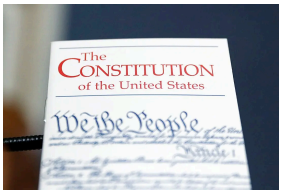
Author’s Selected Articles

The Myth That States Can’t Defend Against Illegal Immigration

Mar 27, 2024

The Constitution and Elections, Part IV: Adopting an Election-Protection Amendment

Mar 25, 2024



The Constitution and Elections, Part III: 20th Century Changes

Mar 19, 2024

RELATED TOPICS