Reflections on Constitutional Federalism and Democratic Lawmaking

August 7, 2017
Vicki C. Jackson
Thurgood Marshall Professor of Constitutional Law, Harvard Law School

I. The arc of history in the last century: federalism as dynamic

A. Louis Brandeis and states as laboratories of experimentation

B. Misuse of "states' rights" rhetoric in anti-race equality movement

C. State legislatures reinvigorated


The Voting Right Act, 1965

D. Democratic legitimacy of state legislatures compared to Congress

II. Constitutional Principles and Doctrine

A. Valid federal law as supreme: The Supremacy Clause of Article VI ("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; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

B. Constitutional limits on state lawmaking power:

1. Limits implied from the enumeration of national power (for example, the "dormant" commerce clause)

2. Article I Section 10: prohibiting states from, for example, making treaties; enacting ex post facto or bill of attainder laws; or making compacts with other states or foreign powers without Congress’s consent

3. The Fourteenth and Fifteenth Amendments: protecting certain rights to due process, equal protection, voting, and other incorporated rights
C. The scope of national lawmaking powers: What is valid federal law?


3. Powers to enforce the 14th and 15th Amendment: The 1965 Voting Rights Act was upheld under Congress’s 15th Amendment enforcement powers. (South Carolina v. Katzenbach, 383 U.S. 301 (1966)). Federal measures must be congruent and proportional to the record of violations of rights secured by those Amendments (City of Boerne v. Flores, 521 U.S. 507 (1997); Shelby County v. Holder, 133 S. Ct. 2612 (2013))

4. Spending Power and the anti-coercion principle (NFIB v. Sebelius)

D. Preemption and the interpretation of federal law

III. The relevance of the democratic legitimacy of state legislatures in U.S. system of constitutional federalism

A. Preemption: presuming in favor of concurrent state lawmaking power?

B. Opportunities to adopt measures to reduce polarization and enhance civic culture