

Federal Law Review

The U.S. Constitution is a compact among the states that divides authority between the federal and state governments. As James Madison wrote in Federalist Paper #45:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

But who should be the final arbiter of this division of powers, and when or whether federal entities overstep the “few and defined” powers they are delegated?

Key Points

The states must review the constitutionality of federal action. Said Thomas Jefferson:

The several states composing the United States of America are not united on the principle of unlimited submission to their general government; but by a compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a general government for special purposes [and] delegated to that government certain definite powers and whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force. To this compact each state acceded as a state, and is an integral party, its co-states forming, as to itself, the other party. The government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution the measure of its powers.” (Emphasis added.)

It is thus the states’ responsibility to guard the powers reserved to them and to constantly monitor federal acts to ensure the federal government does not act beyond its constitutional authority.

Utah created a standing legislative subcommittee to review the constitutionality of federal action. In 2011, Utah lawmakers created a Federalism Subcommittee within the legislative Constitutional Defense Council. The subcommittee’s role is to review the constitutionality of any federal action that might “impact a power or a right reserved to the state or its citizens by the United States Constitution, Amendment IX or X; or expand or grant a power to the United States government beyond the limited, enumerated powers granted by the United States Constitution.”¹

If the subcommittee determines a federal action exceeds the constitutional authority granted by the states, the subcommittee may pursue information regarding the action from a federal agency or a member of the state’s congressional delegation. Additionally, the Subcommittee may:

¹Utah Legislature, 2011 General Session, House Bill 76, Second Substitute.

²Ibid.

Give written notice of the evaluation to the federal governmental entity responsible for adopting or administering the federal law; and request a response by a specific date to the evaluation from the federal governmental entity; and request a meeting, conducted in person or by electronic means, with the federal governmental entity and a council member, a representative from another state, or a United States Senator or Representative elected from the state to discuss the evaluation of federal law and any possible remedy.

The Federalism Subcommittee may recommend to the governor that the governor call a special session of the Legislature to give the Legislature an opportunity to respond to the subcommittee's evaluation of a federal law.

The Federalism Subcommittee chair may coordinate the evaluation of and response to federal law with another state.²

Recommendations

Pass legislation to systematically evaluate and respond to federal actions. Nevada lawmakers should follow the lead of their Utah counterparts and act in concert with policymakers from other states to evaluate the constitutionality of all meaningful federal action.

Powers of the United States Congress, Enumerated under Article I, Section 8 of the U.S. Constitution

- Lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts, and excises shall be uniform throughout the United States
- Borrow money on the credit of the United States
- Regulate commerce with foreign nations, among the several states, and with the Indian tribes
- Establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States
- Coin money, regulate the value of coin money and of foreign coin, and fix the standard of weights and measures
- Provide for the punishment of counterfeiting the securities and current coin of the United States
- Establish post offices and post roads
- Promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries
- Constitute tribunals inferior to the supreme court
- Define and punish piracies and felonies committed on the high seas and offences against the law of nations
- Declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water
- Raise and support armies, but no appropriation of money to that use shall be for a longer term than two years
- Provide and maintain a navy
- Rules for the government and regulation of the land and naval forces
- Provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions
- Provide for organizing, arming, and disciplining the militia, and for governing the part of the militia that may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress
- Exercise exclusive legislation in all cases whatsoever, over such district, which may not exceed 10 miles square, as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the place shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings
- Make all laws which shall be necessary and proper for carrying into execution the powers listed in this section, and all other powers vested by the United States Constitution in the government of the United States, or in any department or officer of the United States