Module 5: History and Change of Federalism

Jack Rakove: Now you might ask the question, "Has federalism always had to same meaning?" There's a decision that is sometimes used in Political Theory, Constitutional Law. Ronald Dworkin the late legal philosopher of light between a concept and a conception. We could have a general concept of federalism, but then there are many particular conceptions of how it operates. I'm a Historian. If I think about Federalism, I'd start with some initial definition of how to divide power as I said before between two levels of government. There is a whole bunch of sovereign powers, and you allocate them across levels of government. Over time, for any number of reasons, that allocation may evolve and may shift. It may shift in modest incremental ways, or it may shift in fairly radical ways. In American History for example one would want to say that the Civil War amendments, particularly the adoption of the Fourteenth Amendment, marked a radical break in the nature of American Federalism, because it gave the national government a constitutional basis for intervening in affairs within the states to protect due process, equal protection, and the privileges and immunities of citizens. We certainly say at the end of the 19th century the nature of American federalism also began to evolve because we start to get the makings of an administrative state, independent regulatory commissions were established to deal with problems that different groups of Americans felt had to be dealt with. We certainly say that the development of the use of the funding power after the adoption of the income tax, but also after the expansion of federal power in the 20th Century gave the national government a very powerful weapon to get states to pursue policies that have been agreed upon. In one way or another, whether in Congress or by different parts of the executive branch in Washington. We could have many conceptions of federalism as a historical problem. In fact, that's what you would expect would happen.

Malcolm Feeley: The single most important amendment is an amendment that was created by the Supreme Court and was not adopted as an amendment. That is the nationalization of the Bill of Rights. Remember, the Bill of Rights starts out saying Congress shall make no law, and the Bill of Rights applies only to the Congress. But the court has amended the Constitution, and applied the Bill of Rights despite the plain language that says only Congress and is silent on the state. The real amendment that speaks of this is probably the amendment that provides from the direct election of the senators.

Paul D. Moreno: Maybe the most important factor is the one that's most difficult to pinpoint because it's about ideas that people had about the state and about government in the 19th century. After the civil war especially you had a generation of American scholars. They're going to come to be called the Progressives. In new institutions, American institutions of higher education, especially the modern research university and the modern law school who are the first generation to think that the Founders' constitutional devices were outdated and no longer applied, and the facts of modern life the industrial and the urban revolutions meant that an eighteenth-century Constitution was no longer adequate to the needs of the nineteenth and twentieth centuries. The most prominent of these thinkers will be Woodrow Wilson, who wrote a study on what he called congressional government analyzing the problems of the Founders' Constitution. In 1885 he wrote the first essay on the administrative state on that the science of administration 1887. And then had a long academic career and then a political career. So, Wilson was one of the most important people bringing these mostly European and mostly continental ideas. They were associated especially with French and German originally Prussian political thought and trying to apply them to American political problems. Of course Wilson was very aware that some people will be alarmed of these European despotic institutions. Prussia was not the model of democracy and popular government. It was the model of bureaucracy. And Wilson runs to assure the American People that America could have Prussian efficiency without Prussian Autocracy. And that we can import these European ideas but Americanize them and make them fit the American situation. This got into the law schools especially through new legal theories such as Sociological Jurisprudence: The idea that the Founders' idea of natural law and natural rights, were fine for the 18th century and those circumstances, but they're no longer
adequate. Ideas like liberty and equality, liberty of contract were fine when you had a basically equal and agrarian society where you had face-to-face economic relations. But when you have giant corporations like US Steel and impoverished proletariat as we do and American industrial workforce those principles no longer apply. So, legal thought needed to grow as American society changed. Our political thought, our political institutions needed to change and adapt to changing circumstances. The analogy that Wilson drew was that the Founders' political thought was basically Newtonian. It was based upon the scientific conceit of the 18th century that Isaac Newton's physics, his mechanical view, could be applied to government. And Wilson said but today's science is. And Wilson said but today's science is Darwinian. We now understand the government isn't a machine. It's a living organism. Organisms need to be integrated not to have their powers checked and balanced against one another. They need to grow otherwise they'll die. They need to adapt to the circumstances or they'll become extinct. So, you have a new metaphor to political and legal thought.

**Alan Tarr:** Different people have different understandings of what the Constitution was meant to accomplish. They have different ways of approaching the interpretation of the document: original understanding, a more living Constitution approach. And even if the principles are agreed upon, there may be questions regarding the application of the principles to a particular situation. Let me give you an example. Congress has given the power to regulate commerce among the several states that was a relatively modest grant of power in the late 18th century because most of our commerce was not among the several states most of our commerce was purely entrusted. And now of course our economy has shifted dramatically, and it's as more commerce has become interstate the scope of the powers of Congress have increased not because the Constitution's changed but because the economy has changed.

**Sotirios A. Barber:** For a large part of our history from the late eighteen nineties until roughly 1935/1936 the federal courts were saying that Congress' basic responsibility under the Commerce Clause says Congress shall have the power to regulate commerce among the several states. States rights Federalists were saying let's interpret that narrowly, let's say that the basic responsibility of Congress under the Commerce Clause is to regulate interstate traffic: traffic that cross state lines. But if an economic transaction took place entirely within a state or if an economic practice took place entirely within a state, then that belong to the States. What that did was, for example, it gave the national government power to regulate the lengths of interstate railroad trains, the speed that they could travel, this other safety regulations of applicable to interstate railroad trains, and even the rates that they could charge was a left up to the federal government. The working conditions of the railroad workers, even though they worked on Interstate trains, they signed the labor contract within one jurisdiction: within one state that was off-limits to federal power. So, the national government could regulate some of the country's economic life, but the state government regulated other aspects of the country's economic life.

**Paul A. Moreno:** If the commerce power couldn't do it, the taxing power can do it. So, Congress took phosphorus matches, which were very dangerous especially in their manufacture and tax them out of existence and supreme court was willing to accept this. Narcotics also the first controls of narcotics in American history were fees that physicians had to pay in order to prescribe narcotics. There's nothing about raising revenue because the fees were so nominal, but it was a way of criminalizing the non-payment of these taxes. Some of them were simply interest groups that wanted to get Congress to use the taxing power to run their competitors out of business. When Oleomargarine was invented as a substitute for butter, dairy farmers got organized a petition Congress to levy prohibitive taxes on the manufacturer of oleo. They later did this to other products: filled milk and other dairy products. The dairy Lobby was very powerful in Congress. Eventually the taxing power came to be accepted as a way of regulating what would ordinarily be things that were left to the states. The biggest one of all was the so-called spending power: Congress can tax and then what does it do with the money? Especially after the 16th amendment. Especially after Congress has a large source of revenue. It's interesting because there is no spending
power per say in the Constitution. So what Congress can spend its money on seems to be without limit. And members of Congress in cahoots with members of State Legislatures came up with schemes by which the federal government would provide usually fifty percent of the funds if the states agreed to undertake some project. First, it was forest fire-prevention, then it was maternal health, road-building, and vocational education. All sorts of things where Congress would establish the basic guidelines and provide the money and the states would actually administer it. One of the things that this did was hid from public view the fact that you were building up a federal administrative state because the states were the ones doing the administration. If you look at the number of civilian employees in the federal government of the 20th century, it doesn't change all that much after the new deal because usually the federal government is getting the states to provide the personnel and to carry out these activities. These were challenged in the nineteen twenties and the supreme court upheld them saying that neither individual taxpayers nor states had standing to sue against these inducements, these blandishments, these carrots that the federal government was holding out. It was recently in 2012 for the first time the Supreme Court said that there were limits to the strings that the federal government could attach to federal subsidies to the so-called spending power in the NFIB v. Sibelius case. That opens up a new route by which some federal powers could be challenged, but it remains to be seen how that pans out.

Jonathan Turley: I'm not too sure the principles of federalism have change over time, but I do think we have changed. American citizens have changed in very significant ways they feel more detached from their government, they feel less relevant, and in some ways they no longer view themselves as a type of moving part within the government machinery. All of that bodes rather badly for a system that directed power to remain in their hands. Governmental powers a lot like the gas in a closed space if you increase the space, the gas will increase to fill it. The same is true with the federal government if you increase the space for the federal government, it will naturally fill what space you give it. It's very hard to go back. There is plenty of cases in history where people have given up powers and very few have they ever gotten them back particularly when you fixed interest in the exercise of power. So, what has changed is social, certainly to some extent, the framers never anticipated that our government would be this large in terms of federal government, but more importantly that it would play such a significant role socially. The federal government now delivers services to a degree that I think the framers would have not imagined. People have become reliant on the federal government. The result is they had federalism seems like a quaint concept. What's dangerous about that is it's a protection of individual liberty. The degree to which people become passive about the increasing power federal government, they can watch the greatest protection of their individual liberty simply dissipate. I think that's what we're seeing as we see the rise of the federal government, the rise of the administrative state.