High court rulings change states rights

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THE DEFINITIVE conclusion on the nature of the relationship between the federal government and the states was spelled out by James Madison in Federalist Paper No. 45:

"The powers delegated . . . 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 . . . be connected.

"The powers reserved to the several states will extend to all 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 states."

The statement was direct; the relationship between the states and the federal government was tilted toward the states. But that is not the case today as the Senate examines the nomination of Robert H. Bork, an avowed federalist, to the Supreme Court. What happened?

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The "original intent" of the founding fathers — as Attorney General Edwin Meese frequently and correctly points out — was to make the states supreme in virtually all matters concerning the lives and welfare of Americans, regardless of inconsistencies in laws and practices between states.

"The genius of the framers," said Assistant Attorney General William Bradford Reynolds, "is that they saw the national government as one which could exist only with limited powers. The inclination was not to give up very much authority.

"They came from a system of government that was oppressive and virtually all-powerful. They moved away from an overbearing and all-powerful national government."

For this reason, the Constitution forbade religious discrimination — though virtually all the states maintained state-supported religions and discriminated against all others.

The initial Bill of Rights was drafted as the price of ratification. But Stanford Law School professor Don Kaplan explained, "Everyone understood that the Bill of Rights applied only to the federal government. It was the Civil War that made this one country, and said we have rights as citizens; that all Americans are entitled to a fair trial, for example, rather than a fair trial just if you are accused of a federal offense."

The Civil War amendments extending the rights guaranteed in the Constitution to all citizens under its "equal protection" clause crystalized the debate over states rights. "Before then," explained Thomas Grey, professor of constitutional law at Stanford, "it was the states' discretion as to what the rights of their citizens would be, segregation being the most dramatic example. The equal protection clause precludes discrimination."

Not necessarily, Reynolds argued. The rights enumerated in the constitutional amendments take precedent over states rights only if Supreme Court justices, the arbiters of the Constitution, adopt an "inclusion clause" that brings state laws under the federal umbrella. Such a notion, he argues, is contrary to the intention of the founders.

It is the inclusion rule, for example, that provides the judicial rationale for modern rulings on women's rights; reapportionment on the basis of one man, one vote; federal permission for abortions; the Miranda rule and attendant protections for people accused of crimes; and the entire federal regulatory system over everything from occupational safety and minimum wages to nuclear power.

"In 1935," said Kaplan, "deputy sheriffs in Mississippi hung up a young black man and beat him with steel studded belts until he confessed to raping a white woman .... The Mississippi Supreme Court still said the confession could be used against him.

"The U.S. Supreme Court applied federal protections to overturn the conviction and free him because it was a violation of due process."

The New Deal of President Franklin Roosevelt marked the beginning of the modern era of judicial review.

It began with a reinterpretation of the commerce clause, permitting Congress to regulate more than just items shipped across state lines. In 1935 the Supreme Court ruled *against* laws setting maximum hours and minimum wages for coal miners, asserting this did not constitute interstate commerce, even if the coal would eventually be shipped out of the state where it was mined. The railroads hauling this coal could be so regulated, however, since their operations fit this constitutional definition.

This narrow ruling in a series of cases, which complied with the original intent of the Constitution's authors, threatened the structure of the New Deal and President Roosevelt's efforts to combat the Depression. He then threatened to change the court through his "court packing" plan permitting him to appoint six new judges.

The court got the hint, and radically altered its views of the Constitution, approving in 1938 — on a 5-4 vote — the validity of the National Labor Relations Act. By ruling that *virtually all* commerce affected the nation, the Supreme Court sharply changed the balance of power between the federal government and the states. And the "switch in time that saved nine", persuaded Roosevelt to drop his court packing plan.

At that point, it was clear that political realities would determine judicial interpretation of the constitutional relevancy of congressional and state acts. There was no hue and cry against this shift, since the Depression had brought the nation to its knees and virtually everyone was looking to Washington for relief. The relief often came with conditions, which effectively gave the federal government control over state and local expenditures.

To liberals, this was a matter of accepting federal responsibility for the consequences of federal largesse. To traditionalists, it was anathema to the ideals of the Constitution as envisioned by the delegates and their 18th century morality.

In the throes of the Great Depression, political reality dictated that the court stretch constitutional meanings to permit the federal government to appropriate whatever power was necessary to improve the lot of the nation in virtually all areas. President Reagan, in nominating Judge Bork for the Supreme Court, is using the same political prerogative to create a court that will halt 50 years of federal guidance of the American way of life and return it to the vagaries of local politics, passions and prejudices.

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