

CHAPTER 3 FEDERALISM

Narrative Lecture Outline

Federalism is one of the ways that the Framers attempted to keep government closer to the people and under control. It was a limit imposed on government. It also allowed citizens to have multiple routes for participation and influence and thus was considered “democratic.” The diversity under federalism allows for states to act as “laboratories.” For example, welfare reform started out as a state policy in Wisconsin and other states. What worked was adopted at the federal level and what did not was discarded.

However, one might be able to argue that the theory of federalism, however laudable, has had several serious drawbacks:

- It is incredibly expensive.
- It is inefficient (duplication of services, etc.). —BUT inefficiency has its pluses. ...the government that is bogged down arguing amongst itself cannot burden the populace with more laws! Some argue that gridlock was the intent of the Founding Fathers!
- It is unfair. (One example: Mississippi and Alabama rank extremely low in all rankings of public schools. Is it fair that kids in Minnesota get a better education than kids in Alabama do?)
- It allows lobbyists, as well as citizens, multiple access points and influence—thus allowing special interests to gain sway in policy.
- The theory is great, but in practice, all power seems to gravitate in one direction—the center. Some argue that for all practical purposes we really have a fairly decentralized unitary system especially after the “federal blackmail” on drinking ages, seatbelt laws, etc. in which state highway funds and grants were threatened if states did not comply with federal wishes.

I often present these pros and cons and ask my students if they can think of others. We then discuss the merits of the federal system, whether we actually have federalism, and if so whether it works as the Framers intended.

The political rallying cry of “smaller government” has been trendy for decades. Presidents, candidates for public office, and members of Congress have complained mightily about the ever-increasing size of government. September 11, 2001 coupled with the economic downturn that has followed it seems to have changed the direction of the bandwagon. The Transportation Security Agency, the Office of Homeland Security, national law enforcement agencies, intelligence bureaus, and more have all been enlarged in response to the crises. It is too early to tell if this is a trend that will last or merely another “blip” on the radar screen that will quickly pass.

In order to give us a preliminary idea of what the state of federalism is in the United States, let's look at its roots, the history of shared powers between the state and federal governments, and some controversies related to those powers . **The Origins of the Federal System: Governmental Powers Under the Constitution**

The Framers worked to create a political system that was halfway between the failed confederation of the Articles of Confederation and the tyrannical unitary system of Great Britain. They established a system known as federalism, though that word does not appear anywhere in the Constitution. Federalism is based on the sovereignty of the people who delegate power to both the central and state governments. Such a system of shared powers had never before been tried. The national government and the state governments were to have certain powers in common, their own sets of officials, and each government was to be supreme in some spheres. Since both levels of government would be ultimately responsible to the people, the electorate could shift their allegiance between levels of government, thus ensuring that no one level of government would become too powerful. It was a vertical separation of powers to establish a limitation on the power of government.

Federalism: a political system in which power is divided and shared between the national/central government and the states (subnational units) in order to limit the power of government (NOTE: local governments are creatures of the state and not part of the federal bargain).

The three major arguments for federalism are the:

- prevention of tyranny
- provision for increased participation in politics
- the use of the states as testing grounds or laboratories for new policies and programs

However, the Framers remembered the bickering and fighting among the states under the Articles and added Article VI to the new Constitution. This is often called the Supremacy Clause and allowed that in situations of conflict between state and national law, "the laws of the United States, and its treaties are to be the supreme Law of the Land." Seems pretty direct, doesn't it? Well, the Supremacy Clause has been and continues to be interpreted by the courts in a variety of ways.

National Powers under the Constitution

The distribution of powers in the federal system consists of several parts: exclusive powers, shared powers, denied powers, enumerated powers, and implied powers. Since the Framers were acting in reaction to their bad previous experiences, they offered an extensive list of powers for the newly created federal government to prevent the problems that had been inherent in the Articles.

The enumerated powers of the central government are listed in Article I, section 8:

Exclusive powers to central government

- lay and collect taxes, duties, and imposts
- provide for the common defense and general welfare of the United States
- borrow money on the credit of the United States
- regulate commerce with foreign nations, and among the states, and with Indian tribes
- establish a uniform rule of naturalization and uniform laws on bankruptcy
- coin money and regulate the value thereof
- punish counterfeiters
- establish post offices and post roads
- award copyrights and patents
- establish courts inferior to the Supreme Court
- punish piracy, and felonies on the high seas, and offences against the laws of nations
- declare war
- raise and support armies but with no appropriation of money to that use for longer than two years
- provide and maintain a Navy
- make rules to regulate land and naval forces
- call the militia to suppress insurrections and rebellions
- rule what became the District of Columbia

Implied Powers of the central government

- make all laws which shall be necessary and proper for carrying into execution the foregoing powers

The necessary and proper clause has often been used to expand the powers of the national government as we shall see later.

State Powers under the Constitution

State powers, given the climate of the time, were taken for granted. They were not thought to need such an enumeration. This may have turned out to be a mistake, because in our ahistorical society many people assume that the Framers intended the federal government to be more powerful than the states because their list of powers is longer. That is definitely not true!

The states are granted some powers in this section of the Constitution. They are:

- to determine the times, places, and manners for holding elections for senators and representatives (section 4)

State's rights exist elsewhere in the Constitution. In Article II, states have the right to appoint electors to vote for president. Article IV contains the "privileges and immunities" clause is a guarantee that citizens in all states have the same rights. But most of their powers come from the Tenth Amendment that says: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

reserved to the States respectively, or to the people." These are often referred to as reserve or police powers. The states also receive the following guarantees in the Constitution:

- Article I guarantees each state two members in the U.S. Senate and at least one representative in the House
- Article I guarantees that slavery will not be prohibited prior to 1808
- Article IV guarantees a republican form of government
- Article IV guarantees that the central government will protect them against foreign attacks and domestic rebellion

Concurrent and Denied Powers under the Constitution

States also have some powers that they share with the central government called concurrent powers such as the right to tax, borrow money, establish courts, and make and enforce laws.

Article I, section 9, lays out powers denied to the central government. The central government may not:

- prohibit slavery before 1808
- suspend Habeas Corpus except in cases of rebellion or invasion
- pass bills of attainder and ex post facto laws
- pass direct taxes unless in proportion to census enumeration
- lay tax or duty on items exported from any state
- give preference to ports of one state over another
- appropriations must be made in order to spend money and the receipts and expenditures must be published from time to time
- grant titles of nobility
- no person holding an office of trust shall accept presents, titles, etc from a king, prince, or foreign state

Article I, section 10, lays out the powers denied to the states. States may not:

- enter into treaties, alliances, or confederations
- grant letters of Marque and Reprisal (these have to do with privateering or legalized piracy)
- coin money
- emit bills of credit
- make any thing but gold and silver coin a tender in payment of debt (they are not allowed to make alternate money)
- pass bills of attainder (legislatively condemning someone of a crime)
- pass ex post facto laws
- impair the obligation of contract
- grant titles of nobility
- lay imposts or duties unless explicitly allowed by Congress
- keep troops or ships of war
- enter into compacts or agreements with other states or foreign powers
- engage in war

Relations among the States

The Constitution was designed to make America more united—in other words to improve relations among the states and encourage unity. The Framers wanted a single country, not 13 squabbling semi-countries. One way the Constitution provides for better relations among the states is by designating the Supreme Court arbiter of state disputes. Under the Court's original jurisdiction, disputes between the states are argued in and decided by the Court.

Article IV requires states to give "full faith and credit" to each others' laws. This ensures that judicial decrees and contracts made in one state are legal and binding in other states. States are also required to extradite criminals if asked by another state. It also requires states to extradite criminals to other states for trial. (This is an interesting place to start a discussion about civil unions/gay marriage/same sex marriage)

In addition, Article I, section 10, states that Congress must consent to any interstate compact. Today, there are more than 200 such compacts including the Driver's License Compact that ensures all states recognize licenses issued in other states.

Relations within States: Local Government

Local government, though NOT a part of federalism, is important. Counties, municipalities, townships, and school districts have no constitutional standing but are creatures of the states.

Federalism and the Marshall Court

Federalism had never been tried before the Framers invented it. Like most experiments, it does not always fulfill your dreams, meet your expectations, or look as you envision it. Plus, since the Constitution is basically a series of compromises, it is a vague document. The positive aspect of that vagueness is it is flexible and stands the test of time. It evolves and changes. Many people also say that is the negative aspect as well. (These folks are ideologically descended from the Anti-Federalists and oppose any evolution toward a stronger central government.)

Anyway, the allocation of powers in our federal system has changed dramatically over the years. A major player in the redefinition of federalism is the Supreme Court in its role as interpreter of constitutional meaning.

Early Pronouncements on Federalism *McCulloch v. Maryland* (1819)

AKA the national bank case. *McCulloch* was the first major decision by the Supreme Court under Chief Justice John Marshall about the relationship between the states and the national government.

In 1816, Congress chartered the Second Bank of the United States. In 1818, the Maryland state legislature (controlled by the Democratic-Republicans, heirs of Anti-Federalists) levied a tax on the Bank of the U.S. and other banks not chartered by the state of Maryland. James *McCulloch*, the head cashier of the Baltimore branch of the Bank of the U.S. refused to pay the tax and the state of Maryland brought suit. *McCulloch* lost in a Maryland court and appealed to the

U.S. Supreme Court.

In a unanimous opinion, the Supreme Court said that the U.S. Congress had legitimate authority to establish the Bank of the United States. Though the power to charter banks is not enumerated in the Constitution, but the Congress does have the powers to coin money, borrow funds, collect taxes, and from these enumerated powers it is reasonable to imply that Congress had the power to charter a bank since a bank could be “necessary and proper” to execute the listed powers. Marshall and the Court also ruled that the state could not tax a federal entity since the "power to tax is the power to destroy," and therefore would violate the Supremacy Clause. This ruling greatly enlarged the powers of the national government.

Gibbons v. Ogden (1824)

Shortly after *McCulloch*, the Marshall Court got another opportunity to rule in favor of a broad interpretation of the scope of national power. *Gibbons* has to do with steamship navigation on the Hudson River and whether New York could grant a monopoly concession on such navigation. Not only does the Hudson River form part of the border between New York and New Jersey—with citizens of both states wanting the right control shipping on the Hudson—but at the same time as New York awarded a monopoly to Robert Fulton, the U.S. Congress licensed a ship to sail on the Hudson. A lawsuit resulted. The main constitutional question in *Gibbons* was about the scope of Congress' authority under the Commerce Clause. In *Gibbons*, the Court ruled that interstate commerce includes more than simply direct dealings in products. It also includes other commercial activities. New York was found to be interfering in interstate commerce by granting a monopoly on the Hudson and lost the suit.

Dual Federalism: The Taney Court, Slavery and the Civil War

The Marshall Court was quite nationalist, however, the debate over the proper distribution of power under federalism continued to rage. Roger B. Taney became Chief Justice after Marshall, and he had a different notion about federalism. The Court began to articulate the idea of concurrent powers and the idea of dual federalism in which separate but equally powerful levels of government is preferable, and the national government should not exceed its enumerated powers.

Dred Scott, the Question of Slavery, and the Civil War

The Taney Court is best remembered for the *Dred Scott* decision. Scott had lived with his master in Illinois and Wisconsin, both free states. After the death of his owner, he sued based on a Missouri law that stated "once free, always free." The first trial ended in mistrial due to hearsay, but the court ordered him freed at the second trial. It took several years for the case to be heard the second time during which Scott's wages were held in escrow awaiting a verdict. John Sanford, the brother and agent of the owner of Scott, filed an appeal with the Missouri Supreme Court. Slavery had become an intensely partisan issue and passions had flared—the Missouri Supreme Court ruled Scott remained a slave. The case was taken to federal court and on to the U.S. Supreme Court. In a 7-2 decision, the Court argued that Scott was not a U.S. citizen and therefore not entitled to sue in federal court. The case was dismissed and Scott remained a slave. Taney further wrote that Congress had no power to abolish slavery in the territories and slaves were private property protected by the Constitution. The Missouri Compromise of 1820 was therefore invalid.

The decision in the Dred Scott case strengthened states' rights and invalidated a federal law greatly altering the balance of state/national relations. This ruling was vastly different than the rulings of the nationalist Marshall Court. The decision also heightened tensions and helped to bring about the Civil War.

Crises and wars always seem to increase the powers of the national government vis-à-vis the states. The Civil War (1861-1865) definitely followed that logic. The size of the federal government increased dramatically. For the first time the national government paid out pensions and disability payments. However, dual federalism remained the Supreme Court's framework for federalism even after the adoption of the Thirteenth, Fourteenth, and Fifteenth amendments.

Setting the Stage for a Stronger National Government

The Constitution, as originally written, made no provision for a national income tax. However, when the United States entered World War I, the government recognized that it desperately needed a new method of funding for the war effort. The result was the Sixteenth Amendment that gave Congress the power to levy and collect taxes. This was a substantial increase in federal powers.

The Seventeenth Amendment also increased federal powers. It removed the right to appoint senators from state legislators and put it in the hands of the electorate. States rights were no longer as vociferously protected as they once were in the Senate.

Cooperative Federalism: The New Deal and the Growth of National Government

Dual federalism finally ended in the 1930s. The Great Depression virtually thrust power into the hands of the national government, and with the New Deal the national government accepted and exercised that power. FDR treated the Depression almost like a war. He mobilized new bureaucracies and ushered in new ideas about the roles of government.

The Supreme Court, through the mid-1930s, rejected many of Roosevelt's plans to combat the Depression. The Court argued that national solutions overstepped the national government's constitutional powers and that solutions were best left to the states (a true expression of dual federalism). FDR was angry and proposed changing the composition of the Court—called by his opponents a “court-packing plan”—by raising the number of justices to 13 from 9. He would thus get to appoint four new judges giving the New Deal a Supreme Court majority. The Court seemed to respond to the threat, and in 1937 began to reverse itself by using a greatly expanded view of federal powers through the Commerce Clause.

States and the national government cooperated together in implementing the New Deal. In addition, a third federal partner was drafted: cities. Cities became big players in the New Deal, particularly the big cities controlled by Democratic machines that supported FDR.

The Changing Nature of Federalism

Prior to the 1930s, many scholars used the analogy of a layer cake to describe federalism. Each layer had clearly defined powers and responsibilities. After the New Deal, the analogy of a marble cake seemed more appropriate because the lines of authority were much more mixed. This marble cake federalism is often called cooperative federalism and has a much more powerful national government. States have a cooperative role, as did many cities.

Federal Grants and National Efforts to Influence the States

The first real federal grant was the Morrill Land Grant Act of 1862 that gave each state 30,000 acres of public lands for each representative of Congress. The income from the sale of these lands was to be earmarked for the creation and support of agricultural and mechanical arts colleges (land-grant colleges like Texas A&M, Michigan State University, Iowa State University, Florida A&M, and many others).

The New Deal unleashed floods of federal grant monies for public works projects such as building and road construction. Grants made it easy for the national government to impose its agenda on the states. If the states wanted the money, they had to do what the feds wanted them to! Grants flourished during WWII and after as well. The national government became and remains a major player in domestic policy.

The civil rights era had a profound impact on the distribution of powers between the national and state governments. Most of the blatant discrimination based on race was occurring at the state level. Federal programs began to withhold funds from discriminatory programs and states, and of course later on the federal government intervened with National Guard troops and the Federal Election Commission to guarantee equal treatment.

In 1964, Lyndon Johnson introduced his “War on Poverty,” which was part of his “Great Society” program. In an effort to eradicate poverty, huge amounts of federal money went to the states, local governments, and citizen action groups. This undermined the traditional powers of the state governments and increased the role of localities and citizen groups. The states became more and more dependent on federal funds and on the “strings” that came with those funds.

New Federalism: Returning Power to the States

Ronald Reagan was elected on a pledge to return power to the states. Federal aid to state and local governments declined for the first time in decades. The Reagan administration preferred to give block grants to states for specified activities. Block grants designated a broad area of responsibility such as education and left most decisions and implementation up to the states thus reversing the trend, during the era of creative federalism, of federal mandates. Declining funds and changing rules—coupled with intense competition for federal money—led state and local governments, as well as school systems, cities, police departments, and so on, to hire lobbyists to advance their interests. This became known as the intergovernmental lobby.

The Devolution Revolution

Despite changes under Reagan, the national government still had far more power than the states. Republicans and many state governors began to campaign heavily against national power and for more states' rights.

One method by which the national government has taken powers from the states is the power of preemption. This is based on the Supremacy Clause and basically allows the national government to override, or preempt, state and local actions in some areas. This began in 1965 under LBJ and since then Congress has routinely passed preemption laws.

One such law is special education. Congress passed a law requiring states to provide special education—however, they passed no appropriation to go with the law. This is an “unfunded mandate”—an order to the states to provide a service by the national government without federal money to pay for that service. Such highhandedness by Congress has led to numerous calls for the devolution of power back to the states. Mandates are laws that direct states or local governments to comply with federal rules and regulations such as clean air laws and disabled access to mass transit. Prior to 1995, unfunded mandates made up as much as 30 percent of a local budget. In 1995, Congress passed a law forbidding additional unfunded mandates.

Many states were quite disgruntled with the system of federal grants-in-aid and unfunded mandates, and by 1996, Republicans controlled a large number of governorships. These factors have reinvigorated the debate about the proper distribution of powers in our federal system. Public opinion also had shifted. During the 1930s and 1940s, Americans were in favor of additional powers for the national government. The 1960s seemed to prove that the federal government was more fair and just than the governments of many states. However, by the 1980s and 1990s, public opinion shifted and people began to think that the national government was too big, too strong, and too distant to understand their concerns.

As always, the Supreme Court played a role in this new evolution of the federal bargain. Traditionally, education has been the purview of the states. That tradition was shattered with the Supreme Court ruling in *Brown v. Board of Education of Topeka Kansas* (1954). The *Brown* ruling ended state-mandated segregation in public schools— it ordered the end of such segregation with all due speed, though the actual result has been less than spectacular. Since then courts have played an important role in monitoring state and local efforts to tear down segregation.

Elections also have been a state function, but in 1964, the Supreme Court began to limit the states' ability to determine the nature of congressional redistricting. In 1966, the Court invalidated the poll tax; and in 1995, the Court struck down state-imposed term limits on members of Congress.

The Commerce Clause has been widely used as a justification for additional national powers. Until 1995, the Court generally ruled in favor of the national government's wide interpretation of the Commerce Clause. That seems to be changing. In *U.S. v. Lopez* (1995), the Court ruled that Congress can not legislate gun-free zones on school property. That is a state concern.

Federalism under the Bush Administration

Not long into George W. Bush's first term, the United States was attacked on 11 September 2001. The economy struggled, education costs were rising, welfare costs were going up and we entered wars in both Afghanistan and Iraq. These events combined led to increasing state and federal budget deficits. By 2003, state budget deficits were over \$30 billion. States are required by their constitutions to balance their budgets, so this was a huge struggle to cover such shortfalls. The states managed to cover the deficits through budget cuts and increased taxes but the federal government did not. The federal budget deficit in 2005 was \$427 billion. The sources of this deficit ranged from the 2001 Bush tax cuts to the war in Iraq and Hurricanes Katrina and Rita. Bush also found that he needed to increase the size of the national government to deal with the war on terrorism and this also increased the size of the deficit. He created the new cabinet Department of Homeland Security and the Transportation Security Administration. In addition his education reform, called "No Child Left Behind," created a host of federal requirements and state costs. NCLB is also an example of preemption, the idea that the national government can override/preempt state action.

The Supreme Court: A Return to States' Rights?

The Supreme Court is a very powerful influence on the balance of shared powers in the American federal system. From the New Deal until the 1980s, the SC generally expanded national power and restricted state power in their rulings. However, since that time the basic trend has reversed. The current Court does not seem to rule in favor of additional federal powers at the expense of state powers. However, the Court and its justices are not always consistent. In the 2000 presidential elections, a lawsuit was brought to the Florida courts about whether and how to recount ballots. It was appealed to the U.S. Supreme Court, and normally states' rights justices voted in favor of federal power and normally federalizing justices voted in favor of the state court...due in large part to partisan preferences over the electoral outcome. So preference for federal law, in this case, led to the election of George W. Bush, a man who will appoint more justices in favor of states' rights.

How did this change come about? Well, it began with the presidency of Ronald Reagan who used states' rights as one of his litmus tests for the federal bench and appointments to the Supreme Court. Among the cases that have illuminated the Court's swing from federal toward states' rights are *Webster v. Reproductive Health Services* (1989) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). Both cases were about abortion (as stated before) and both restrict federal powers while enhancing the role of the states.

The fact that Bill Clinton appointed two of the sitting justices has not changed the trend. Most of the decisions since 1989 have been 5-4 majorities in favor of states' rights. For example, *U.S. v. Lopez* (1995) said Congress lacked authority under the Commerce Clause to regulate guns within 1,000 feet of a school. Local gun control was ruled a state matter, not a federal one. In *U.S. Term Limits v. Thornton* (1995), however, reined in state powers by ruling that a state law restricting the terms of federal members of Congress was unconstitutional but term limits for state offices were constitutional. The following year, the Court ruled that states, not Congress, had the right to negotiate over gaming with Indian tribes on the basis of the sovereign immunity of states. This was a major change since the Constitution specifically gives Congress and the federal government the right to deal with the Indian tribes.

During the 2002-2003 term, the Court seemed to change course. A six-person majority, with the Chief Justice himself writing the opinion, rejected the claim that the state of Nevada was immune from suit under the Family and Medical Leave Act (FMLA). Rehnquist argued that the FMLA was an appropriate exercise of Congressional power and against the state claim to the contrary.

The addition of two new justices, Chief Justice John G. Roberts, Jr. and Samuel A. Alito, Jr. in 2005, both nominated by George W. Bush and confirmed by the Senate, might continue the migration towards more states' rights. The Roberts' Courts first federalism ruling limited the national government's ability to block Oregon's assisted suicide law.