

Federalism a political system in which both a state government and a national government make final decisions with respect to at least some governmental activities and whose existence is specially protected; both local and national forms of government have their own sovereign powers and some powers that overlap, thus making the two share authority.

While the US Constitution clearly limited national powers, the 10<sup>th</sup> Amendment was added as a further protection.

- ↳ Still, certain Constitutional loopholes have allowed for the expansion of the powers of the federal government:
  - ↳ The Necessary and Proper Clause (Elastic Clause; Article 1, Section 8, Clause 18)
    - ↳ Allows the national government to do anything “necessary and proper” to exercise its powers that are enumerated in the Constitution.
    - ↳ Federalist Paper nr.44: Madison argues that the purpose the Necessary and Proper Clause was to simply give the Congress the ability needed to fulfill its duties described in Article I, Section 8
      - ↳ “No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.”
    - ↳ Federalist Paper nr.33: Hamilton argues that the clause simply empowers Congress to do what it is empowered to do under Article 1, Section 8. In fact, he implies that the section may be meaningless.
      - ↳ “It is expressly to execute these powers that the clause authorizes the national legislature to pass all necessary and proper laws. If there is any thing exceptionable, it must be sought for in the specific powers upon which this general declaration is predicated.”
  - ↳ The Interstate Commerce Clause (Art.1, Sec.8, Cla.3)
    - ↳ The national government has the power to regulate anything involved with interstate commerce.

## American Federalism

### The Founding

- ↳ To the Founders, federalism seemed the perfect way to protect personal liberty, since concentrating all power into one hand (even one popularly elected hand) might prove to be tyrannical; while working under a confederation, or an alliance of states where the state governments are more powerful than the national governments, could prevent progress.
- ↳ The Founders envisioned federalism as a system in which both national/state governments would have certain powers, but neither would have supreme authority over the other.
- ↳ It wasn't until the 10<sup>th</sup> Amendment that states actually received power.
  - ↳ In that amendment, all power not given to the national government is given to the states.
    - ↳ On the other hand, it seems that the national government has usually retained these “other powers” anyway, despite what is said, due to support from the courts.
    - ↳ The language used to describe national/state government relationships was vague, and it was later left up to the courts to interpret it.

### Philosophical Criticism of Federalism:

- ↳ Thomas Jefferson believed that “the people” were the ultimate sovereigns, and since the Constitution was a result of agreement among the states, the states were supreme over the national gov't.
- ↳ What will prevent it from turning into a unitary system of gov't?
  - ↳ In which the national government can abolish local governments at will and have the final say in all important government matters. (France, Sweden, England and Italy)
- ↳ Federalism works in principle due to people
  - ↳ But in the Soviet Union, which technically has a federalist government, the Kremlin controlled the “states”
- ↳ It blocks progress (ie, gridlock) & protects powerful local interests
- ↳ States are “parasitic and poisonous” (Laski)
- ↳ It supports the perpetuation of racism (Riker)
- ↳ Small political units tend to be dominated by single political faction
- ↳ The Necessary and Proper Clause would allow Congress to run uncontrolled over the rights of both the states and individuals.
  - ↳ “This government is to possess absolute and uncontrollable power ... with respect to every object to which it extends, for by the last clause of section 8<sup>th</sup>, article 1<sup>st</sup>, it is declared “that the Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States.” A power to make all laws, which shall be necessary and proper; for carrying into execution, all powers vested by the constitution in the government of the United States, or any department or officer thereof, is a power very comprehensive and definite, and may be exercised in such manner as entirely to abolish the state legislatures.” October 1787

### Philosophical Support for Federalism:

- ↳ Philosophy: limit the national government by creating a second layer of state government in opposition to it
- ↳ Strength and flexibility fosters individual liberty (Elazar)
- ↳ Diversity! Different political groups with different political purposes come to power in different places
- ↳ Increased political activity
  - ↳ The number of political contact points for the average citizen are greatly increased and the cost of participation is greatly reduced (running for local office is less expensive than national office).
  - ↳ Political organizing is less expensive at the local level.
- ↳ Federalism tends to preserve liberties
- ↳ Neither level (state and national) of government could rule the other; people's support would shift as it appeased such was happening
- ↳ According to James Madison, since there are so many diverse interests, only a large government (like the US) can adequately have the maximum number of sides to be heard, as opposed to small nations, where not as many interests could be known and argued. In Federalist No. 46, Madison argued that state and national governments were simply different agents and trustees of the people, who held the ultimate power.
- ↳ In Federalist No. 28, Alexander Hamilton explained that, in federalism, people would shift their support between national and state governments to keep the two in balance.
  - ↳ Actually, this was a new vision in which no one really knew how it would work

### Mixed view:

- ↳ Americans have traditionally supported Federalism – they are strong supporters of local government. Still, someone who wants to see quick government policy changes (very often liberal or “progressive” in nature) might likely support a more unitary system.
- ↳ James Madison was an early Federalist, but later in life moved more toward the Jeffersonian perspective; Jefferson, an early anti-federalist, as president shifted slightly toward the federalist position.

## Federalist #10 (James Madison)

- ↳ Federalism, including a strong national government somewhat removed from the people, was desirable to control the problem of factions. Minority rights would actually be protected by competition for power, different groups coming to power at different times and at different levels of government. Dominant majorities would be hard to achieve.

“Devolution” – powers that have become Federal in nature, but are devolving back to the states over time (“New Federalism”)

## American Federalism

### SIGNIFICANT SUPREME COURT CASES

#### Regulatory Federalism

##### ↳ Commerce Clause (Article 1, Section 8, Clause 3)

- ↳ States that Congress has the ability to regulate commerce “among the several states”

#### McCulloch v. Maryland (1819)

- ↳ Chief Justice Marshall (who suffered in the Valley Forge because of a decentralized taxing and spending system under the Articles of Confederation) argued that a central bank was necessary for national security (as a means of paying soldiers).
- ↳ In addition, Congress can use the Necessary and Proper Clause to establish a national bank because Article 1, Section 8 includes the right to lay and collect taxes, borrow money and regulate commerce.
- ↳ Thus is born an expansion of Congressional power.

#### Gibbons v. Ogden (1824)

- ↳ In a case over which layer of government can grant steamboat monopolies, the court ruled that article I, section 8 means that in cases which involve commerce between the states (ie “interstate commerce”) the federal power is supreme. (The feds thus have the power to improve commerce through subsidies, land grants, building roads...)
- ↳ But when the Congress wanted to regulate local economic conditions (minimum wages, right to organize unions, ban child labor) it was restricted because the factories, workers and often the goods did not cross state lines.

#### N.L.R.B. v. Jones & Laughlin Steel Co. (1937)

- ↳ The Court upheld the constitutionality of the National Labor Relations Act, which guaranteed the right of workers to organize into unions at their place of work and enter into collective bargaining with their employers.
- ↳ Significant because it represented the first of many victories for FDR, who called for a broad reading of the Constitution to justify a generous expansion of federal involvement in the economy.
- ↳ Signaled an abandonment of traditional efforts to gauge the interstate nature of the commerce in question and held instead that Congress could regulate virtually any intrastate activity that remotely affected interstate commerce. It is a major shift in reading the Commerce Clause.

#### Cooperative Federalism

##### ↳ General Welfare (or Spending) Clause (Art. 1, Sec. 8, Cla. 1)

- ↳ As the federal government began to send increasingly large amounts of money to the states after the New Deal, the Congress began adding strings to that money.
- ↳ Funded and unfunded mandates, grants-in-aid, etc.

#### US v Butler (1937)

- ↳ Held that the only limit to the commerce clause was that the strings attached to the money somehow satisfy the “general welfare” requirement of the clause.
- ↳ “The General Welfare clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.”

#### Helvering v Davis (1937)

- ↳ Rules that it is up to Congress to determine what “general welfare” means (in reference to the Butler case of 1937).

#### Heart of Atlanta Motel v. US (1964)

- ↳ The Court held that Congress could ban racial discrimination in a privately owned motel under the commerce clause because many of its clients were from out of state and the hotel was near two major interstate highways.

#### US v Lopez (1995)

- ↳ Expanded on the line of reasoning contained in Gregory v. Ashcroft and NY v. US by holding that the Gun-Free School Zones Act of 1990 represented an unconstitutional federal intrusion within a field traditionally regulated at the state or local level.
- ↳ More important, the Court provided a strict reading of “interstate commerce” and noted that the issue at hand - regulation of handguns within school zones - could not be considered commerce in any sense, and therefore was beyond the reach of the Commerce Clause.
- ↳ It stopped short of overruling previous Court decisions which had allowed for such a loose interpretation of the clause.

#### The Rehnquist Court begins to limit use of the Commerce Clause

#### Printz v. United States (1997).

- ↳ The Court ruled in Printz that the Brady Handgun Violence Prevention Act of 1993 (background checks prior to gun purchases) was unconstitutional because it commanded state and local officials to carry out a federal regulatory program.

#### US v Morrison (2000)

- ↳ The Court struck down portions of the Violence Against Women Act, saying they exceeded the commerce clause

#### Gonzales v. Raich (2005)

- ↳ Says federal drug laws can still apply to medical marijuana users even if that use is legal under state law; in other words, federal drug laws now trump state drug laws.
- ↳ The court stated “Congress’ power to regulate purely activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce is firmly established.”

#### Gonzales v Oregon (2006)

- ↳ The court ruled that Congress intended the Controlled Substances Act to prevent doctors only from engaging in drug dealing, not to define acceptable medical practice.
- ↳ The case emerged after Oregon enacted the Death with Dignity Act, which authorized physician-assisted suicide. Attorney General John Ashcroft declared years later that physician-assisted suicide violated the Controlled Substances Act of 1970. Ashcroft threatened to revoke the medical licenses of physicians who took part in the practice.
- ↳ Message: Medical marijuana can be prosecuted by the federal government even if legalized by the states

Questions for Discussion:

1. How has the system of federalism as we know lived up to the expectations of the framers? (Federal v. Confederal)
  2. Is Federalism good or bad?
  3. How has the elastic clause effected the balance of power between the states and the national government? Is it good or bad for this type of federal systems? What does it tell us about the framers?
  4. What has been the impact of the Court's decision in *McCulloch v Maryland* and *Gibbons v Ogden*?
  5. What does the 10<sup>th</sup> Amendment say about Federalism? What has happened to the application of the 10<sup>th</sup> Amendment in recent years?
  6. How has devolution impacted the federal - state relationship? (Shift in entitlement programs to state responsibility)
  7. What do the Supreme Court cases suggest about the shift of power between Federalist and anti-Federalist poles?
- To what extent does Federalism and Pluralism compete with or compliment one another?