

## Key Concepts: Chapter 3 (Federalism)

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**Federalism** – Constitutional arrangement in which power is distributed between a central government and subdivisional governments (states in the United States).

### Some pros and cons of federalism –

#### Pros

Different levels of gov'ts allow for appropriate gov't to handle different types of problems (ex: national gov't handles defense, state gov't handles education)

Lots of opportunities for political activity. If U.S. official doesn't listen, try state or local gov't.

Encourages experimentation by states. States are "laboratories of change."

Encourages laws that are most appropriate for a given state.

Was crucial at time of founding of our nation in order to keep the states in the union.

Madison's Federal 51: it's another check against tyranny emerging in the federal gov't.

#### Cons

Can frustrate the implementation of national policies. For instance, if states are allowed to control pollution, neighboring states may be adversely affected.

All the levels can make it hard to know where to turn with a problem.

Diversity of approaches may mean inequality between citizens of different states. Ex: Welfare.

Localities may thwart fed'l directives (see, for instance, the uneven compliance with desegregation laws and court orders; response to *Obergefell v. Hodges*, which upheld right of same-sex couples to marry).

Can lead to a lack of accountability.

**Impact of federalism on policymaking** — There are multiple access points available to influence public policy due to allocation of powers between state and national governments. Division of power perhaps constrains policymaking by either state or federal governments (see Federalist 51).

### Alternatives to federalism –

**Unitary system** – Power concentrated in a central government. We do not have this and never have.

**Confederation** – Early form of our government with a weak central gov't and strong state governments. A "league of friendship" among the states.

### Some key constitutional provisions related to federalism:

**Necessary and proper clause** – (Article 1, Section 8, Clause 3) Sets forth the implied powers of Congress. It states that Congress, in addition to its express powers has the right to make all laws necessary and proper to carry out all powers the Constitution vests in the national government. *This is not an independent grant of authority*; Congress must have some enumerated power and then the N&P clause can expand the scope of that power.

**Supremacy Clause** – Article VI of the Constitution states that whenever a conflict occurs between a federal law and a state law, the federal law will preempt the state law (and thus the state law will not apply).

**Commerce clause** – Congress has the power to regulate all business activities — "commerce" — that cross state lines or affect more than one state or other nations. Important Commerce Clause cases:

*U.S. v. Lopez* (1995) – Guns in schools case. Congress passed a law making it a crime to carry a gun in an area 1,000 feet from a school. They relied on the Commerce Clause, arguing (inter alia) that guns in schools negatively affect students' ability to learn, which will make them less able to contribute to the interstate economy. The Court found there to be an insufficient connection between guns in school and interstate commerce; indirect economic consequences were insufficient to bring an action under Congress's Commerce Clause authority, and thus the statute at issue was found to be unconstitutional. This is one of a handful of more recent cases that have recognized limits on how broad the Commerce Clause power is.

*U.S. v. Morrison* (2000) — Another fairly recent case in which Congress's use of the Commerce Clause was found by the USSC to be unconstitutional. This case involved the "Violence Against Women Act," which imposed penalties on anyone convicted of committing a violent crime against a woman. The USSC found no direct economic activity in the conduct being regulated, and thus, relying on *Lopez*, found the statute an unconstitutional application of the Commerce Clause.

*Gibbons v. Ogden* (1824) – The steamboat case. USSC held that "interstate commerce" is to be defined very broadly; effectively expanded the scope of the U.S. gov't's power under the Commerce Clause.

**Katzenbach v. McLung** (1964) — The “Ollie’s Barbecue” case. Held that Congress acted within its Commerce Clause powers when it enacted the Civil Rights Act of 1964, b/c racial discrimination posed a significant burden on the interstate flow of products and interfered with blacks’ interstate travel. Thus, restaurant could not refuse to serve blacks.

**Heart of Atlanta Motel v. U.S.** (1964) — Congress applying Commerce Clause expansively to combat racial discrimination; motel owner could not exclude blacks, b/c to do so interfered with interstate commerce.

**National Federation of Businesses v. Sebelius** (2012) — The “Obamacare” decision; Congress can’t use the Commerce Clause to create a market (here, health insurance) and then regulate it.

**Full faith and credit clause** — Article 4, Section 1 of the Constitution requires each state to recognize the civil judgments rendered by the courts of the other states and to accept their public records and acts as valid. Crucial for economic activity; otherwise, just move to a new state and escape liability.

**Privileges and immunities clause** — Citizens of State A are to be treated like citizens of State B when traveling to State B. Several exceptions (like in-state tuition, ability to vote, to practice law or medicine, etc.).

**Extradition** — Legal process whereby an alleged criminal offender is surrendered by the officials of one state to officials of the state in which the crime is alleged to have been committed.

**Tenth Amendment** — It reserves powers to the states. “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.” This amendment often conflicts with the N&P clause.

**Fourteenth Amendment** — A significant limitation by the Constitution on states. It says, in relevant part, “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person ... the equal protection of the laws.”

#### **Types of powers that the federal gov’t and/or state gov’ts can exercise:**

**Express powers** — Powers the Constitution specifically grants to one of the branches of the national government. A/k/a/ **enumerated** or **delegated** powers. Congressional powers granted primarily in Art. I, Sec. 8.

**Implied powers** — Powers inferred from the express powers that allow Congress to carry out its functions. For Congress, the “Necessary & Proper” clause (a/k/a the “Elastic” clause) is the source of implied powers.

**Inherent powers** — The powers of the national government that exist b/c the gov’t is sovereign; examples include right to conduct foreign affairs, protect borders, enter into contracts, etc.

**Exclusive powers** — Powers the Constitution gives to either the state or fed’l gov’t, but not both. Example: Only the U.S. Congress can regulate interstate commerce.

**Concurrent powers** — Powers that the Constitution gives to both the national and state governments, such as the power to levy taxes.

**Reserved powers** — Powers reserved to the states, via the Tenth Amendment.

**Prohibited powers** — Powers that are denied to either the fed’l or state gov’ts. Ex: fed’l gov’t cannot tax exports; state gov’ts cannot enter into treaties.

**Police powers** — State powers to create and enforce laws regulating the health, safety, and morals of their citizens.

#### **Types of federalism —**

**Dual federalism (layer cake federalism)** — Each level of government is dominant within its own sphere. The Supreme Court serves as the umpire in disputes over which level of government has responsibility for a particular activity. Seen in the *Dred Scott* decision; approach largely discredited now.

**Cooperative federalism (marble cake federalism)** — Shared costs, federal guidelines, shared administration. Stresses federalism as a system of intergovernmental relations in delivering governmental goods and services to the people and calls for cooperation among various levels of government. In practice, states take fed’l \$\$ and accept a whole lot of strings. Federal gov’t exerting control over states through grants and loans is sometimes called “**fiscal federalism**.” The fed’l gov’t uses **grants-in-aid programs** to pay for specific projects/ programs that are administered by the states.

**Grant-in-aid** — Money given by the national gov’t to the states. Several variations, and possible conditions on a grant, are noted below.

**Block grants** — These are broad grants to states for general prescribed activities—*e.g.*, welfare, child care, education, social services—with only a few strings attached. States have greater flexibility in deciding how to spend block grant dollars. Reduces ability of federal gov’t to control how money is spent.

**Categorical grants** – Funds appropriated by Congress for a specific purpose, such as school lunches or the building of an airport. These funds are allocated and subject to detailed federal conditions, often on a matching basis; that is, the local government receiving the fed'l funds must put up some of its own \$\$.

**Formula grants** – Type of categorical grant, given according to a formula (like # of people affected).

**Project grants** – Another type of categorical grant, based on applications from those who wish to participate. Examples are grants by the National Science Foundation to universities to support the work of scientists or grants to states and localities to support training and employment programs.

**Revenue sharing** — A grant of money by the federal gov't to the states that may have no conditions on how it can be used. A way to return control over gov't spending to the states. States will have to provide their share of funds in addition.

**Cross-cutting requirements** – Condition in one grant extends to all activities paid for with fed'l \$. Example: discriminate on the basis of race in one funded activity? Lose fed'l \$ in all funded activities.

**Crossover requirement** – Using fed'l \$ in one program to influence a state or local policy in another program. Example: no transportation \$ unless you raise the minimum drinking age.

**Federal mandate** – A requirement the fed'l government imposes as a condition for receiving federal funds.

**Unfunded mandate** – A fed'l law telling a state or city to do something but providing no money with which to do it. Ex: Americans with Disabilities Act; No Child Left Behind Act.

**Devolution revolution** – The effort to slow the growth of the federal government by returning many functions to the states. Ex: welfare; much authority has been given to the states.

**Creeping categorization** – The addition of strings to a block grant such that the block grant starts to look more like a categorical grant.

**Nullification** – the “right” (*which does not exist*) of a state to declare a federal law null and void that, in the state's opinion, violates the Constitution. Ex: John Calhoun's attempt to nullify fed'l laws that banned slavery. The Civil War ended the debate about whether this right exists.

**A few important statutes with federalism implications —**

**Americans with Disabilities Act** — Makes discrimination based disabilities illegal. Employers must provide “reasonable accommodations” to employees with disabilities; the Act also imposes accessibility requirements on public buildings. This is an example of an unfunded mandate — i.e., a federal requirement to act without funds to pay for what is required.

**Clean Air Act of 1970**— Federal law requiring improvements to air quality and reductions in contaminants. States may elect to enforce compliance; in that case, the state will receive federal money to pay for the compliance efforts. It, like the Clean Water Act (see below) can cause private businesses to incur costs to comply with federal requirements (i.e., it's another unfunded mandate).

**Clean Water Act of 1972** — Federal law regulating discharge of pollutants into the waters of the U.S. Enforcement is achieved by coordinated federal-state efforts.

**No Child Left Behind Act (2002)** — Called for schools to meet annual progress benchmarks; underperforming schools could be “reconstituted” (i.e., teachers and administrators replaced). Yet another example of a federal unfunded mandate and massive expansion of federal power over K-12 public education. Proved to be a failure, given unattainable goals. Replaced by the...

...**Every Student Succeeds Act**, which allows states to determine their own standards for educational achievement, albeit subject to the fed'l gov't's approval of each state's plan.

**National Minimum Drinking Act of 1984** — Federal law that required states to raise the minimum drinking age to 21 or lose 10% of federal dollars otherwise available for the state's transportation expenses.

**Controlled Substances Act of 1970** — Classified marijuana as a “Schedule I drug,” which is the classification given to the most dangerous substances (such as LSD and heroin). Several states have legalized the recreational use of marijuana. This has created a tension between the state and federal laws. Ordinarily, the federal law would preempt the state laws (and they would in this case if the federal government enforced the federal law). However, the federal gov't has exercised “prosecutorial discretion” to enforce other crimes and appears not to be prosecuting recreational use in states where it is legal.

**Aid to Families with Dependent Children** — The “welfare to work” law; a Clinton administration law that encouraged people to get off welfare rolls and back into the work force. Under the AFDC, welfare payments are given by the fed'l gov't to the states in block grants, and then the states decide how they want to administer their welfare programs.

**A few other important federalism cases (all decisions of the John Marshall court, by the way)–**

***Martin v. Hunter's Lessee*** (1816): Federal courts can overturn State court decisions regarding a federal law. (VA tried to recover land that had been deeded to British royalty. USSC: Can't do that.)

***Fletcher v. Peck*** (1810): USSC ruled a state law unconstitutional; upheld right of private citizens to enter into binding contracts. (The "Yazoo lands" case. Corrupt Georgia politicians took land from Yazoo Indians and sold it to private citizens. Land re-sold to unwitting buyers. Later, GA tried to pass a law repealing the sales; USSC said that GA couldn't do that, b/c it interfered with Constitutional provision that says States can't pass a law impairing the obligation of a contract.)

***McCulloch v. Maryland*** (1819)– The case involving the Second National Bank of the U.S. Maryland tried to tax it out of existence and then argued that the U.S. Congress lacked authority to create a national bank. The USSC held that the creation of the bank was a necessary and proper implementation of several enumerated powers. Any state law that interfered with the exercise of a federal power is preempted.