Federalism

in and out, prior warnings cannot protect the listener from unexpected program content.

Although the Court had previously held that content regulations of the broadcast medium warranted less First Amendment scrutiny than other mediums, *Pacifica* extended the rationale for this lower level of constitutional protection. In *Red Lion*, spectrum scarcity justified broadcast regulation, but in *Pacifica*, pervasiveness and accessibility to children provided the justification. Yet Justice Stevens’s opinion was extremely narrow in scope. It did not justify a complete ban on broadcast indecency, only a ban during times when children were likely to be in the audience. Furthermore, the opinion was confined to the broadcast medium.


BIBLIOGRAPHY


Patrick M. Garry

FEDERALISM

Federalism is one of the two fundamental organizational principles of the U.S. Constitution. While the other basic organizational principle, separation of powers, involves the distribution of powers within the national government, federalism defines the distribution of powers between the national government and the states. Federalism was undoubtedly a central concern of the framers and ratifiers of the Constitution, but today there is a wide array of opinions about its importance. These range from the claim that federalism is the single most important protection for freedom to the insistence that modern interest in federalism is irrational. From early in U.S. history, various questions about the nature of the federal system have occupied the attention of the Supreme Court. The Court’s understanding of the principle of federalism has, of course, varied from era to era. In general, it has not imposed significant lasting constraints on the growth of national power, but the Court has also fairly consistently acknowledged the importance of states in the constitutional scheme.

THE AMERICAN CONCEPT OF FEDERALISM

The concept of federalism embodied in the Constitution was a major intellectual innovation. Prior to the Constitutional Convention in 1787, the standard understanding had been that sovereignty could reside only in one person or institution because ultimate authority cannot be shared. American federalism, in contrast, locates some form of sovereign status in two levels of government: the states and the national government. The usual (and somewhat simplistic) formulation is that both of these levels of government are supreme within their separate spheres of authority. At the same time that both state and national governments have elements of sovereign status, their authority is thought to be derivative of yet a third locus of sovereignty: the people themselves. James Madison (1751–1836) called this mixed government. What the new Constitution “mixed” was the model of consolidated government (where supreme authority would rest within a single national government) and the model of confederation (where that authority would rest within the states). Elements of both of these opposite ideas would be incorporated into the new system.

This ingenious and complex scheme is manifest throughout the Constitution. To begin with, the proposed Constitution was submitted for ratification to conventions organized within each state and by its own terms became effective when “the people,” as represented by nine of those
Federalism

conventions, consented. Under Article V, amendments must be approved by three-fourths of the state legislatures or conventions held by the states. The American Constitution is thus an expression of national sovereignty that, paradoxically, grows out of state institutions.

What is true of the Constitution is also true of national laws enacted and executed pursuant to it. Under Article VI these laws, like the Constitution itself, are “the supreme law of the land . . . anything in the Constitution or laws of any state to the contrary notwithstanding.” However, the constitutional processes that produce these national laws are designed to reflect state interests and are partially dependent on the activities of state governments. The Senate, of course, gives equal representation to each state (and under Article V no state may be deprived of this equality without its consent). Originally, members of the Senate were to be chosen by each state’s legislature, and subsequently, under Amendment XVII, senators are chosen by the people of “each state” with voting qualifications determined largely by the state legislature. The House of Representatives is weighted by population, except that every state is guaranteed at least one representative. Under Article I, Section 2, each state exercises significant control over the qualifications of those who vote for membership in the House. Moreover, under Article I, Section 4, state legislatures have initial authority, subject to congressional oversight, to control how and when elections to both the House and Senate are to be held. Finally, the election of the president is also state-based. Under Article II, presidential electors are selected “in such manner as the [state] legislature . . . may direct,” and these electors meet to cast their ballots “in their respective states.”

The role of the states in the federal system is, needless to say, not limited to participation in the national political process. While the Constitution and the laws enacted under it are supreme, they were never intended to control all aspects of governance. Indeed, Article I enumerates the subjects about which Congress may legislate, and Amendment X states that “the powers not delegated to the United States . . . nor prohibited by it to the states, are reserved to the states respectively, or to the people.” Thus, states, while constrained by the Constitution in a range of important ways, are expected to exercise the governmental authority to regulate at least some aspects of the lives of their inhabitants. And, under Article IV, these normal governmental functions are to be carried out by states whose territorial and political integrity are to be protected by the national government.

THE PURPOSES OF FEDERALISM

The Constitution of 1787 was written in reaction to the deficiencies of the Articles of Confederation, and thus it was designed to increase the power of the central government in important respects. The new national government was to have, among other attributes, a strong executive, a judiciary with potentially wide jurisdiction, and the power to tax and to regulate. It is, therefore, easy to see why the Constitution did not establish another confederation. But why did it not establish a consolidated government? What is the purpose of the “mixed” system of multiple and partial sovereigns that James Madison described? This more puzzling aspect of American federalism has been praised as an essential protection against tyranny and disparaged as a pointless barrier to enlightened progress.

Initial Justifications

One accurate but limited view is that states retained some degree of sovereign status for the simple reason that they existed prior to the Constitution of 1787 and were able to extract concessions as the price of ratification of the new Constitution. That is, the states were given a significant role in the new federal system because they were able to demand it. Taken to the extreme, this explanation implies that, because federalism was only a reflection of political realities, it serves no purpose other than to perpetuate those realities. While few fully endorse this position, aspects of it can be discerned here and there. As long ago as 1819, Chief Justice John Marshall alluded to raw power relationships when he declared that the reservation in the Tenth Amendment of unenumerated powers to the states had been intended only to quiet “excessive jealousies.”

The debates over ratification of the proposed Constitution certainly identified important advantages in a federal system. Proponents of the new system, for example, sometimes claimed that limiting national power was essential to preserving freedom. The national government, it was said, could not restrict freedom of speech or establish a national religion because the regulation of speech and religion were not included among the enumerated powers in Article I. Opponents doubted that the enumeration of powers would prevent such abuses, in part because they feared the expansive potential in Article I, Section 8, which authorized Congress “to make all laws necessary and proper for carrying into execution the foregoing powers.” Notice that in this disagreement both sides appeared to believe that the national government should have only limited powers.

The Constitution was ratified after important proponents like James Madison gave assurances that amendments would be proposed protecting certain rights and making explicit that powers not delegated to the national government were reserved to the states and the people. These assurances, of course, led to the first ten amendments. But in the meanwhile, proponents of the new system argued that even without a Bill of Rights a federal system would offer its own protections against overreaching by the national government. Their argument began with the observation that state and local governments would
have natural advantages in retaining the loyalty of their citizens. These governments would serve specific and tangible needs; they could also rely on the sentimental ties that grow from familiarity and proximity. Armed with support from their citizens, state governments would—proponents asserted—organize resistance to any abuses by the national government. The argument went so far as to envision armed conflict with state militias confronting the nation’s army (a possibility that did not seem entirely improbable at the time, given the relatively small size of the national army). The states, in short, would serve the purpose of enforcing the Constitution, a role that today is largely carried out by the Supreme Court. The natural competition and conflict of a federal system would, that is, force the national government to respect constitutional limitations on its power. Rugged and unruly relationships, which were made possible by a system of multiple, partial sovereigns, would prevent tyranny.

From time to time, state power has, in fact, confronted alleged abuses by the national government. In notable instances involving, first, slavery and, later, opposition to school desegregation, this resistance has produced regrettable consequences. Indeed, as far back as the ratification debates, it has been understood that local, relatively homogeneous jurisdictions carry certain special risks of oppression by stable majorities against minority interests. Nevertheless, states have on occasion resisted oppressive national policies, including the Sedition Act (1798–1801) and the Fugitive Slave Laws (1793–1864). In any event, only a few modern theorists take seriously any significant role for the states in constitutional enforcement. Nevertheless, to a surprising degree states and local governments continue to attempt to check national power in areas as disparate as abortion, immigration, church/state relations, and unfunded federal mandates.

**Modern Justifications** Modern justifications for federalism are varied. One common justification is that there is value in having at least some kind of public decisions made relatively close to where people live. Dispersion of authority creates multiple opportunities for political participation and allows for a sense of control. In fact, there are intriguing indications that highly satisfying associational life in local communities may be made possible by federated structures because those structures help to reduce isolation and to invigorate social relationships. In any event, it is also said that in a federal system policies can be fine-tuned to accommodate local conditions and preferences. Moreover, the multiplicity of policies allows for experimentation at a relatively low level of risk. Variety also gives seriously aggrieved residents the opportunity to move to a jurisdiction that has policies they find more acceptable.

These justifications do not go unchallenged. One reply is that all or most of the asserted benefits require some degree of decentralization but not the kind of system of multiple, partial sovereigns contemplated in the American federal system. A second is that a variety of jurisdictions makes it difficult to institute beneficial programs across the nation as a whole. And the cost of a variety of policies is that the people in some jurisdictions will inevitably suffer, whether from substandard schools or welfare programs or roads. A third reply is that many of the benefits attributed to federalism are in fact produced not by state governments but by local governments, where political participation is more personal and immediate.

**Continuing Necessity** No matter how one assesses the relative weights of the arguments for and against federalism, the system has shown surprising resilience. The pressures in favor of a unitary national government have been potent. These include the military defeat of the southern states during the Civil War (1861–1865) (not to mention the delegitimization of states’ rights caused by the association between that doctrine and both slavery and racial segregation), the psychological and political changes induced by two world wars and a prolonged cold war, dramatic changes in infrastructure and technology, and the successful provision of many human-service programs to citizens by the national government. Given these changes, the original arguments in favor of state authority seem profoundly unrealistic under modern conditions. For instance, primary citizen loyalty is no longer directed at state and local governments. Moreover, these closer governments no longer have anything like a monopoly on power over issues of immediate concern to everyday life.

These pressures toward centralization have greatly reduced the relative power of states in the constitutional structure. This change is reflected in a number of constitutional amendments. Amendment XVII, for instance, eliminates the role of state legislatures in the election of senators. Several amendments (including XIV, XV, XIX, XXIV, and XXVI), either explicitly or by interpretation, greatly reduce state authority over voting. The change is also reflected in the enormous size of the American military and in the vast proliferation of federal spending and regulatory programs that touch nearly every aspect of life, from romantic relationships in the workplace to the safety of medicines. And even the states’ role in amending the Constitution has been displaced to a degree by the willingness of the Supreme Court to interpret that document in light of current conditions and understandings.

Given these trends, it is notable that the United States, while heavily centralized, has so far avoided the extreme abuses that are thought to be possible with a truly unified state. In fact, despite the prestige and power of the central government, state and local governments continue to exist, to perform important governmental functions, and to operate as constituent parts of the national political...
The scope of federal judicial power over states was soon tested again. In 1810 the Court invalidated a state statute on the ground that it violated the constitutional prohibition against the impairment of contracts. In itself this decision was simply an implementation of the supremacy of the federal Constitution over state laws, but the broader principle that federal courts can set aside state laws found to be inconsistent with the Constitution has turned out to have very significant federalism implications in modern times.

A few years later came an important decision called Martin v. Hunter’s Lessee, 14 U.S. 304 (1816), authored by Justice Story. Here the question was whether the U.S. Supreme Court could require a Virginia court of appeals to change its legal judgment. The language of the Constitution does not explicitly immunize the decisions of state courts from review by the Supreme Court, but Virginia argued that a state court could hardly be thought a part of a sovereign government if it could be ordered to change its judgment by a court of a different government. The Court’s determination that state courts are subject to its appellate power has remained the law ever since. Appeals of the legal decisions of the highest courts of the states to the U.S. Supreme Court are a routine and accepted part of the federal system.

_M’Culloch v. Maryland_ The most famous decision of this early period involved the relationship between national legislative power and the states. This was _M’Culloch v. Maryland_, 17 U.S. 316 (1819), the case in which Chief Justice Marshall referred to the “excessive jealousies” that the Tenth Amendment was meant to calm. As indicated above, one of these jealousies was the fear that the _necessary and proper clause_ would permit so broad a range of implied powers that the principle of enumerated national powers would be obliterated. In _M’Culloch_, the Court held that Congress could charter a bank despite the fact that a provision authorizing this same power had been voted down at the Constitutional Convention. Since no such enumerated power existed, Marshall’s opinion found the power to be implied under the _necessary and proper clause_.

_M’Culloch_ is a landmark decision in part because of Marshall’s brilliant and audacious argument that implied powers are necessary if they are “useful” or even “convenient” to achieving an objective sought under a delegated power. Marshall insisted that this “figurative sense” for the word was not only demanded by common usage but also necessary in construing a document “intended to endure for ages to come.” Thus _M’Culloch_ established the influential idea that federal courts should give considerable deference to congressional judgments about what powers are implied under what skeptics had once called the _sweeping clause_.

A second part of _M’Culloch_ held that Maryland’s taxation of the notes issued by the federally charted bank...
violated the supremacy of national law. Presumably, if Congress had thought it necessary, it could have immunized the bank notes from state taxation. Consequently, despite Marshall’s assertion that “the power to tax involves the power to destroy,” the danger to national supremacy must be understood in a more abstract or theoretical sense. At base, Marshall seems to have been influenced by the old idea that there can be only one sovereign (or ultimate) power in government. If the state of Maryland were permitted to tax the bank notes, a federal program would have been subjected to two sovereign powers. As the chief justice wrote in an expansive passage, “the states have no power, by taxation or otherwise, to ... in any manner control the operations of ... laws enacted by Congress.”

This position is in some tension with the Madisonian idea of mixed government and its corollary, multiple sovereigns. That Marshall was attracted to the older idea of exclusionary sovereignty is confirmed in Gibbons v. Ogden, 22 U.S. 1 (1824). This case arose because a state statute had granted a monopoly to operate steamboats in New York waters while a federal statute licensed others to operate ships in “the coastal trade.” After deciding that control over the movement of such ships was within Congress’s power to regulate commerce among the states, the Court went on to say that the delegation of this power to Congress was inconsistent with the retention by the states of any concurrent power to regulate interstate commerce. Marshall went so far as to express sympathy for the argument that the delegation of power to regulate commerce itself “excludes” state power to regulate the objects potentially subject to this national power. The profoundly nationalistic implications of this proposal were never fully accepted by subsequent courts, but limited versions of the idea have had a continuing affect on judicial decisions.

**JUDICIAL RETRENCHMENT: THE MIDDLE PERIOD**

The strongly nationalistic direction of the Court during the nation’s first decades soon significantly abated. Five years after Gibbons v. Ogden, Chief Justice Marshall himself wrote an opinion that appeared to open the way for states to regulate objects potentially subject to the national power over commerce. In 1836 Roger Taney, who had drafted President Andrew Jackson’s message vetoing the rechartering of the Bank of the United States, was appointed chief justice. By 1847 he had issued an opinion forcefully affirming the power of states to regulate in areas subject to Congress’s power over commerce. In Cooley v. Board of Wardens, 53 U.S. 299 (1851), the Court adopted this position with the proviso that state regulation is inconsistent with the federal commerce power when there is some special need for national uniformity.

In Barron v. Baltimore, 32 U.S. 243 (1833), the Court reaffirmed a general understanding that the Bill of Rights constituted a limitation on the national government, not state governments. Thus, determinations about whether and how to protect important rights, such as freedom of religion and speech, continued to be made within the states themselves, at least insofar as the behavior of the national government was not involved. This allocation of authority was put in doubt with the ratification of the Fourteenth Amendment in 1868. This amendment created protections for “the privileges and immunities of citizens of the United States,” and also prohibited “any state” from depriving any person of “life, liberty, or property, without due process of law.” These provisions had the potential to alter existing federal/state relations fundamentally. If the privileges and liberties referred to had been interpreted to include those rights that had long been protected by the first eight amendments, state power would have been limited by the same rights that restricted the power of the national government.

The Court rejected the possibility that the privileges and immunities clause protected individuals from “the legislative power of [their] own state” in the Slaughter-House Cases, 83 U.S. 36 (1873). The justices denied that it was the purpose of this clause “to transfer the ... protection of ... civil rights ... from the states to the federal government.” A contrary result would have “radically change[d] the whole theory of the relations of the state and federal governments” by dramatically expanding the power of Congress over the states and by constituting the Court as “a perpetual censor upon all legislation of the states.”

As soon as 1908, however, the Court was entertaining the possibility that some of the rights in the Bill of Rights might be protected against state governments by the due process clause of the Fourteenth Amendment. By 1925 it was assuming that the right to free speech was “incorporated” into the due process clause. Moreover, during the last decades of the nineteenth century and first decades of the twentieth, the Court also acted as a “censor” over some state legislative policies, especially labor policies, by treating the due process clause as a general requirement that states have an adequate justification for restricting an individual’s liberty. Also, early in the century the Court greatly reduced the practical importance of the immunity of states from suits in federal courts by holding that the Eleventh Amendment does not prevent such suits against state officials.

Despite these expansions of federal judicial power over the states, the full implications of which would not become apparent until the modern era, the Supreme Court remained an important obstacle to the expansion of congressional power until 1937. In a series of decisions, it invalidated major components of the New Deal by narrowly defining many of the powers enumerated in Article I, including the commerce power and the power to tax and spend. A major consideration in these cases was the preservation of powers assumed to be reserved to the
states under the Tenth Amendment. Thus the Court differentiated between the regulation of the movement of goods among the states (on the one hand) and (on the other) the regulation of activities, like mining and manufacturing and farming, thought to be internal to the states and therefore subject to state control. With their emphasis on the limited nature of the enumerated powers of the central government and their focus on protecting state sovereignty over reserved powers, these decisions embody a doctrine called dual federalism.

JUDICIAL NATIONALISM WITH RESERVATIONS: THE MODERN ERA

Beginning with *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court began to abandon virtually all the limitations on congressional power that it had constructed earlier. The Court approved national regulation of industrial production, lumbering, and agriculture on the ground that such conditions had a “substantial impact” on interstate commerce. In *Katzenbach v. McClung*, 379 U.S. 294 (1964), this reasoning was extended to a federal prohibition against racial discrimination in restaurants that purchased food from out of state. Despite the explosive growth of federal regulation during this period, between 1937 and 1995 the Court did not invalidate any statute as being outside the commerce power. In both political and academic circles, it became the conventional wisdom that, because in the aggregate all activities have an impact on commerce, the commerce power had become, in effect, a general power to regulate. Other congressional powers, including the power to enforce the Fourteenth Amendment and to tax and spend, were also broadened.

During this same period, the power of federal courts to supervise and control state and local governments grew dramatically. After about 1940, the Court gradually declared almost all of the Bill of Rights to be “incorporated” in the due process clause of the Fourteenth Amendment and thus applicable against state and local governments. Moreover, the Court greatly expanded the protections of other constitutional provisions, and, beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965), increasingly found an array of implied rights to be protected by the due process clause. Consequently, during the second half of the century, federal courts undertook the supervision of state and local policies on education, family life, religious observances, voting, prison conditions, abortion, public welfare, and many other areas. This supervision came to include the imposition of both monetary damages and detailed injunctive orders against municipalities as well as against state officials.

Reemphasizing State Roles Perhaps reacting to the massive growth of national power for which it was partially responsible, late in the century the Court began to reemphasize the role of the states in the federal system and, to a degree, even to revive the doctrine of dual federalism. This new direction had three basic components.

First, in 1995 came *United States v. Lopez*, 514 U.S. 549, in which the Court held that it was beyond the commerce power for Congress to prohibit the possession of firearms near schools. The justices did not exactly deny that violence within schools might have consequences that could undermine productivity and thus have an impact on commerce. Rather, they argued that such consequences are so indirect and speculative that to permit congressional regulation of guns in schools would in principle be to permit Congress to regulate any activity, a result inconsistent with the principle of enumerated powers. *Lopez* was followed by *United States v. Morrison*, 529 U.S. 598 (2000), which invalidated a statute creating a federal damage remedy for gender-motivated violence against women. *Morrison* clarified *Lopez* by emphasizing that the expansive post-1937 commerce clause principles still applied to federal regulation of commercial activities like restaurants. *Morrison* also demonstrated, at least with respect to noncommercial activities like personal battery, that the Court was willing to disregard congressional findings of a significant effect on commerce.

The second aspect of the Court’s new direction involved cases on the immunity of states from suits under the Eleventh Amendment. In 1996 it held that the commerce power does not authorize Congress to subject states to suits in federal court. In 1999 the Court extended state immunity to certain federal suits brought in state courts. Later it declared that state immunity also applied to suits brought under federal statutes enforcing the Fourteenth Amendment. In explaining the need for state immunity from suit, the justices emphasized that states are “joint participants in the governance of the Union” and that they must “retain the dignity . . . of sovereignty.”

The third component consisted of decisions that established the principle that under its commerce power Congress may not “commandeer” state governments to carry out federal programs. Although in 1985 the Court had declared that in exercising the commerce power Congress could in general regulate states along with private citizens, in *New York v. United States*, 505 U.S. 144 (1992), it decreed that federalism prohibits Congress from mandating action by state legislatures. In *Printz v. United States*, 521 U.S. 898 (1997), this principle was expanded to prevent Congress from requiring state and local law enforcement from doing background checks as a part of a federal program regulating the sale of firearms. These two decisions emphasized that the role of the states in the federal system requires that political accountability for national policies be clear and that independent state governments are important in resisting the kind of tyranny that can result from excessive centralization of power.
The modern decisions reaffirming the importance of state sovereignty are important intellectually and symbolically. They help to maintain public appreciation for a system of multiple and partial sovereigns in an era when consolidation seems natural and desirable to many. However, these decisions do not prevent a determined Congress from nationalizing its policy preferences. The commerce clause cases, for example, can often be evaded by predicing the national regulation on the movement of a commercial good in interstate commerce. Both the state immunity cases and the rule against commandeering state governments can be evaded by purchasing state consent through the power to condition federal expenditures. Other tactics for achieving national objectives are readily available.

Moreover, history suggests that it may be a challenge for the Court itself to maintain the kinds of abstract distinctions upon which its recent federalism decisions rest. For example, the contrast between a noncommercial activity and a commercial activity is the type of distinction that in the past the Court has been unable to sustain either as a conceptual or as a practical matter. It is for such reasons that during most of its history the Court has expressed appreciation for federalism while providing only limited and temporary resistance against the political and social forces driving centralization.

SEE ALSO Anti-Federalist/Federalist Ratification Debate; Constitutional Interpretation; Constitutionalism; Constitutional Theory; Constitution of the United States; Dual Federalism; Great Compromise; Marshall Court; Rehnquist Court

BIBLIOGRAPHY

Carey, George W., and James McClellan, eds. 2001 (1787–1788). The Federalist No. 17 (Alexander Hamilton), No. 39 (James Madison), No. 44 (James Madison), and No. 46 (James Madison). Indianapolis, IN: Liberty Fund.

Robert F. Nagel

FEDERALIST ERA

SEE Jay Court; Madison, James; Marshall Court.

FEDERALIST PAPERS

The Federalist (1787–1788) was one of the books that Thomas Jefferson listed as essential for students studying law and government at the then new University of Virginia, taking its place alongside Jefferson’s own Declaration of Independence (1776) and works such as John Locke’s Second Treatise (1690) and Sir Edward Coke’s The First Institute of the Laws of England (1552–1664). And while Alexander Hamilton (c. 1755–1804), James Madison (1751–1836), and John Jay (1745–1829), writing under the pen name Publius, did not write a legal treatise, The Federalist Papers, as they have come to be known, have long been turned to as an essential commentary on the Constitution by the U.S. Supreme Court. Yet The Federalist Papers offer insight into the very nature of American constitutionalism in a manner that runs far beyond a law book for judges. In offering a broad-ranging defense and analysis of the Constitution, The Federalist Papers rarely speak to what we would now call