seekers and job openings can be matched efficiently. The second is to stabilize employment by encouraging employers to retain employees during short periods of economic downturn. The third is to minimize the economic loss of unemployment by paying benefits to persons who are unemployed.

UNEMPLOYMENT COMPENSATION is a joint federal-state program. In 1995, the federal statute imposed a tax of 6.2 percent on payrolls. That tax was reduced to less than one percent if the employer was covered by a state unemployment compensation law that met standards set out in FUCA. These standards address both substantive matters, such as what should be the conditions of eligibility for benefits, and the procedures by which benefits are to be paid.

The typical tax rates paid under state law in 1995 were lower than five percent for most employers, thus creating a substantial incentive for states to participate. An argument that this type of incentive is an unconstitutional coercion of the states by the federal government was rejected by the U.S. Supreme Court in Chas. C. Steward Machine Co. v. Davis, 301 U.S. 548, 57 S. Ct. 883, 81 L. Ed. 1279 (1937).

This federal-state sharing of responsibility has generally worked well, but it has made it necessary to work out a number of multistate agreements to handle certain administrative problems.

FEDERALISM

A principle of government that defines the relationship between the central government at the national level and its constituent units at the regional, state, or local levels. Under this principle of government, power and authority is allocated between the national and local governmental units, such that each unit is delegated a sphere of power and authority only it can exercise, while other powers must be shared.

The term federalism is derived from the Latin root foedus, which means “formal agreement or covenant.” It includes the interrelationships between the states as well as between the states and the federal government. Governance in the United States takes place at various levels and branches of government, which all take part in the decision-making process. From the U.S. Supreme Court to the smallest local government, a distribution of power allows all the entities of the system to work separately while still working together as a nation. Supreme Court justice HUGO L. BLACK wrote that federalism meant

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate State governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. (Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 [1971])

The Constitution lists the legislative powers of the federal government. The TENTH AMENDMENT protects the residual powers of 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.”

Checks and Balances

In Texas v. White, 74 U.S. (7 Wall.) 700, 19 L. Ed. 227 (1868), Justice SALMON CHASE explained the necessity for the constitutional limitations that prevent concentration of power on either the state or national level: “[T]he preservation of the States, and the maintenance
Introduction The U.S. Constitution establishes a system of federalism that allocates power, authority, and sovereignty between the federal government at the national level and its constituent units at the state and local levels. However, nowhere in the Constitution does the word federalism appear, so the term remained undefined. Nonetheless, Articles I through III expressly delegate certain powers to the three branches of the federal government, while the Tenth Amendment expressly reserves to the states those powers not delegated to the federal government. The Equal Protection and Due Process Clauses of the Fourteenth Amendment have been interpreted to make most of the Bill of Rights applicable to the states, while the Ninth Amendment preserves for “the people” those rights not enumerated in the Constitution.

So while the term federalism is nowhere to be found in the text of the U.S. Constitution, the principles underlying this theory of government are deeply embedded throughout the national charter. The Framers left it for subsequent generations of Americans to work out the details, allowing them, in effect, to provide their own definition of federalism in what best can be described as an ongoing national dialogue. Over the last 200 plus years, Americans have carried out this dialogue by speaking to each other through their state and federal institutions and by amending the Constitution as a last resort.

The most visible federal institutions participating in this national dialogue have been the U.S. Supreme Court and Congress. Typically, cases involving federalism-related issues have come before the Supreme Court after Congress has enacted a law that a state believes encroaches on its sovereignty. Until the late twentieth century, the Supreme Court leaned heavily in favor of allocating power to Congress at the expense of state sovereignty, and not surprisingly the states often took issue. But from 1993 to 2003, the jurisprudential pendulum of the Supreme Court took a very noticeable swing back in favor of States’ Rights. To understand just how pronounced this swing has been, it is important to place a spate of Supreme Court cases in historical context.

The First 200 Years of Federalism in the United States

In Chisholm v. Georgia, 2 U.S. 419, 2 Dall. 419, 1 L.Ed. 440 (U.S. 1793), the Supreme Court ruled that Article III of the federal Constitution gives the Court original jurisdiction over lawsuits between a state government and the citizens of another state, even if the state being sued does not consent. The decision generated immediate opposition from 12 states, and led to the ratification of the Eleventh Amendment, which gives states Sovereign Immunity from being sued in federal court by citizens of other states without the consent of the state being sued. Thirty-eight years later the Court again overstepped its bounds when it invalidated a Georgia state law regulating Cherokee Indian lands on the grounds that the law violated several U.S. treaties. Georgia ignored the Supreme Court’s decision, and President Andrew Jackson, an ardent states’ rights proponent, refused to deploy federal troops to enforce the Court’s order. Cherokee Nation v. Georgia, 30 U.S. 1, 5 Pet. 1, 8 L.Ed. 25 (U.S. 1831).

Allocation of power to the federal government probably reached its zenith under the Supreme Court’s expansive interpretation of congressional lawmaking power exercised pursuant to the Commerce Clause, which gives Congress authority to regulate matters affecting interstate commerce. In Gibbons v.
said that in a “democracy, the majority of citizens is capable of exercising the most cruel oppression on the minority.”

One check in the political process supported by the Constitution is provided by the Supreme Court, which is politically insulated. This check, as explained by Madison, “guarantee[s] the right of individuals, even the most obnoxious, to vote, speak and to be treated fairly and with respect and dignity.” The function of the judicial branch, then, was to preserve the liberty of the citizens and the states. The principle of federalism states that the greatest danger to liberty is the majority. These rights were decided “according to the rules of justice and the rights of the minor party, [not] by the superior force of an interested and overbearing majority” (The Federalist no. 10, p. 77). Although the Supreme Court is part of the federal government, it is separate from the legislative and executive branches, and it functions as a check on the federal and state governments.

The Constitution was influenced by two major philosophies: federalism and nationalism. The federalists believed in a noncentralized government. They supported the idea of a strong national government that shared authority and power with strong state and local governments.
Supreme Court Tilting Toward States’ Rights?
(continued)

v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (U.S. 1997), a case in which an Indian tribe filed suit against Florida to compel the state to negotiate under the federal Indian Gambling Regulatory Act, 25 U.S.C. § 2710(d)(7). The act required states to negotiate in good faith towards the creation of a compact between the tribe and the state allowing for certain gambling activities. States could be sued in federal court for violating the act and compelled by federal courts to comply with its mandates. The Supreme Court found that, while Congress intended to abrogate the states’ sovereign immunity in the statute, the “Eleventh Amendment prohibits Congress from making the states capable of being sued in federal court.”

Scholars, historians, and other commentators disagree over the long-term impact of the Court’s recent decisions that revisit the concept of federalism. New York Times Supreme Court reporter Linda Greenhouse responded to several of the federalism-related decisions by opining that “it is only a slight exaggeration to say that . . . the Court [is] a single vote shy of reinstalling the Articles of Confederation.” Joseph Biden (D-Del.) took to the Senate floor to proclaim that “the imperialist course upon which the Court has embarked constitutes a danger to our established system of government.”

Other commentators contend that these decisions are likely to have minimal lasting effect. Congress has at its disposal, these commentators argue, a variety of mechanisms by which it can blunt the effects of these rulings. For example, Congress can fund studies that will offer proof that the subject matter of proposed federal laws intimately touch upon interstate commerce, thereby defeating in advance any arguments to the contrary. In the wake of the September 11, 2001 terrorist attacks in New York City and Washington, D.C., other commentators have predicted that the pendulum of federalism would swing in the other direction to allow the federal government to more adequately address concerns over homeland security.

Amid these competing views over the Court’s direction, one thing remains certain: each year the court is asked to review an increasing number of decisions relating in one way or another to federalism. Sometimes the Court can influence the balance of power between the state and federal governments even by declining to grant certiorari. For example, in December 2002 the Court refused to intervene after the New Jersey Supreme Court allowed Democrat Frank Lautenberg to replace U.S. Senator Robert Torricelli on the fall ballot, even though the state’s legal deadline had passed. Forrester v. New Jersey Democratic Party, Inc., ___ U.S. ___, 123 S.Ct. 673, 154 L. Ed. 2d 582 (2002). By declining review, the Court allowed the state leeway in interpreting its own laws. Such “federalism” issues are bound to resurface in other cases, including one that had not yet reached the court: Attorney General John Ashcroft’s bid to prosecute doctors assisting in suicides under Oregon law. Oregon v. Ashcroft, 192 F.Supp.2d 1077 (D.Or. 2002).

FURTHER READINGS

CROSS-REFERENCES
States’ Rights.

The nationalists, or neofederalists, believed there should be a strong central government with absolute authority over the states.

When the founders were developing the Constitution, they had four goals. First, they wanted the government to be responsive to the citizens. Second, they wanted the political system to enhance, not discourage, interaction between the government and the governed. Third, they wanted the system to allow for the coexistence of political order and liberty. And finally, they wanted the system to provide a fair way of ensuring that civil justice and morality would flourish.

The Constitution as eventually ratified was labeled a bundle of compromises because it allowed for a strong central government but still conceded powers to the individual states. In The Federalist, no. 45, Madison said, “The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”

The constitutional role of the states in the federal government is determined by four factors: (1) the provisions in the federal and state constitutions that either limit or guarantee the powers of the states in relation to the federal
government; (2) the provisions in the Constitution that give the states a role in the makeup of the government; (3) the subsequent interpretation of both sets of provisions by the courts, especially the Supreme Court; and (4) the unwritten constitutional traditions that have informally evolved and have only recently been recognized by the federal or state constitutions or the courts.

Judicial Review

In the early 1990s and early 2000s, the U. S. Supreme Court continued to revisit and reshape the concept of federalism in cases pitting the powers and prerogatives of the state and federal government against each other. Perhaps the biggest changes had occurred in the judicial branch, with its power of judicial review. Judicial review allows the courts to invalidate acts of the legislative or executive branches if the courts determine that the acts are unconstitutional. The Supreme Court first exercised judicial review of national legislation in the landmark case of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). The decision, written by Chief Justice John Marshall, followed the principles of Publius in The Federalist, no. 78. The Federalist Papers were based on the principle that the Articles of Confederation were inadequate. The ideas set forth in The Federalist Papers challenged those articles and proposed a new governmental style for the Union.

Judges have five sources of guidance for interpreting the Constitution: the original intention of the founders; arguments based on the theory of the Constitution; arguments based on the Constitution's structure; arguments based on judicial precedent; and arguments based on moral, social, and political values. Across the centuries, several justices have attempted to interpret the original, often vague intention of a document written in the late 1700s. Justice Benjamin N. Cardozo said, "The great generalities of the constitution have a content and a significance that vary from age to age." Justice Joseph McKenna wrote, "Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions." (Weems v. United States, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 [1910]).

Although it may seem unlikely that a federal body would favor states' rights over federal, it is not uncommon. For example, in the 1991 case of Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640, the Supreme Court chose not to interfere with a state's jurisdiction. Roger Keith Coleman had received a death sentence, which he challenged in the Virginia state and federal courts on the basis that he was an innocent man being executed for a crime he did not commit. The case reached the U.S. Supreme Court, where the majority said, "This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." The Court ruled that because the state court's decision against Coleman was based on independent and adequate state grounds, it would not review the determination. This deference to state laws is based on the idea that states are separate sovereigns with autonomy that must be taken into consideration.

Separation of Powers and The Plain Statement Rule

Another key element of federalism is the principle of separation of powers. The Constitution's definition of separation of powers is not specific, and the Supreme Court has struggled to interpret it. Separation of powers is based on the premise that there are three branches of federal government, each with its own enumerated powers. For example, the executive branch, which includes the president, has veto power; the Senate and Congress make up the legislative branch and have the power of advice and consent over the appointment of executive and judicial officers; and the courts make up the judicial branch and have the power of judicial review.

The separation-of-powers principle has had two interpretations. The first, formalism, is rooted in the idea that the Constitution's goal was to divide the new federal government into three defined categories, each with its own set of powers. The second interpretation, functionalism, is based on the belief that the three branches of government are not clearly delineated. Functionalists believe that the goal of separation of powers is to ensure that each branch retains only as much power as is necessary for it to act as a check on the other branches.

Although the interpretations appear similar, they differ in terms of what constitutes a breach of the separation of powers. A breach under formalism would be a breach under functionalism
only if the power in question either infringed on the core function of another branch or increased another branch’s power.

In *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991), Justice Sandra Day O’Connor wrote that the Constitution establishes a system of dual sovereignty that balances the power between the states and the federal government. At the same time, however, the *Supremacy Clause* (U.S. Const. art. VI, § 2) gives the federal government “a decided advantage in this delicate balance” by guaranteeing that Congress can make the states do what it wants if it acts within its constitutional delegation of power. O’Connor also said that the Court must assume that Congress does not “exercise lightly” this “extraordinary power” to legislate, even in areas traditionally regulated by the states. The people of a state establish the structure of their government and the qualifications of those who exercise governmental authority. Such decisions are of the most “fundamental sort for a sovereign entity.”

The Court in *Gregory* also applied the plain statement rule, requiring Congress to state clearly its intent when creating laws that may interfere with state government functions. The plain statement rule, under *Gregory*, serves as a check against federal regulation of the states. This rule has two tiers of inquiry: (1) Congress must clearly intend to extend a law to the states as states, and (2) Congress must outline which state activities and functions it is targeting within the sweep of federal law.

**Conclusion**

Federalism is the oldest form of government in the United States. The timelessness of the Constitution and the strength of the arguments presented by The Federalist Papers offer a clue to its endurance: the Founders wrote the Constitution so that it would always remain open to interpretation. Federalism’s ambiguity has contributed to its longevity.

**FURTHER READINGS**


**CROSS-REFERENCES**

Constitution of the United States; Original Intent.

**FEDERALIST PAPERS**

*A collection of eighty-five essays by Alexander Hamilton (1755–1804), James Madison (1751–1836), and John Jay (1745–1829) that explain the philosophy and defend the advantages of the U.S. Constitution.*

The essays that constitute The Federalist Papers were published in various New York newspapers between October 27, 1787, and August 16, 1788, and appeared in book form in March and May 1788. They remain important statements of U.S. political and legal philosophy as well as a key source for understanding the U.S. Constitution.

The Federalist Papers originated in a contentious debate over ratification of the U.S. Constitution. After its completion by the Constitutional Convention on September 17, 1787, the Constitution required ratification by nine states before it could become effective. A group known as the Federalists favored passage of the Constitution, and the Anti-Federalists opposed it.

To secure its ratification in New York State, Federalists Hamilton, Madison, and Jay published the Federalist essays under the pseudonym Publius, a name taken from Publius Valerius Poplicola, a leading politician of the ancient Roman republic. Their purpose was to clarify and explain the provisions of the Constitution, expounding its benefits over the existing system of government under the ARTICLES OF CONFEDERATION.