The Founders and Federalism

Inquire: Whose Job is it Anyway?

Overview

Federalism is a unique blend of compromise, necessity, and fear that actually divides the authority of the government into "central government powers" and "local government powers." Both governments draw their power from a social contract, rather than from one another. Each government is considered supreme in its designated domain.

Federalism as a strategy has been met with mixed success. Defining who has responsibilities and who has power in various areas is sometimes, but not always, clear. However, the idea of dividing government to weaken any individual regime and limit its capacity for abuse is brilliant.

Big Question: How do we know if it is federal power or state power?

Watch: The Beauty and Complexity of the Social Contract

A theory of government and the actual manifestation of that theory can be confusing. That is certainly true of the United States’ government. It often seems a jumbled and tangled mess. Federalism — two governments with power over the people? How does that work?

In reality, there is order in the chaos, but you almost need to drill down into what powers the federal government has, and what powers reside elsewhere, for it to make any sense.

The United States’ theory of government is based on the writings of Thomas Hobbes and John Locke. They espouse a theory that people are born with all rights and all powers.

However, when everyone exercises all those rights and powers, it leads to chaos — so, to bring security and order, man institutes a “government” through a “social contract” — a contract requiring that both sides give up something and both sides receive something.

In this social contract, the people give up rights, or powers, to the government; for example, the right to steal. The people give their right to steal to the government and in return, the government assumes the power to stop people from stealing. The people give up a right, but they receive the security of knowing that not only did they give up their right to steal but so did everyone around them. The government takes on a responsibility — to keep the people from stealing — but gains the power to perform that act. Both sides give something up; both sides gain something — it is a “contract.” In most countries, it would end there. In the United States, the founding fathers went one step further: assigning certain rights and powers to the Central or National Federal Government and some to the local state governments.
The U.S. Constitution instantiates this social contract, and in Article 1, Section 8, it specifies the powers of Congress; that is, the Constitution enumerates the rights the people gave to the federal government. The 10th Amendment then states that any rights or powers not delegated to the federal government in the Constitution are reserved to the states and/or the people.

Two governments — with separate and concurrent powers. Equals when acting in their spheres of power, both completely limited to the powers set forth for them in the social contract afforded by the Constitution. This arrangement offers more protection from abuse because neither has all the powers of the government.

What examples can you think of where the powers held by the federal government and the powers held by one or more state governments are colliding?

Read: A Clear Division of Powers… Maybe

Federalism - Defined

A federal government means that powers are divided between two governments, each operating on separate levels, each with specified (by omission or commission) powers and duties. The United States government introduced the first federal government in 1789. Since then, others have adopted federal systems: Mexico and Germany, for example. Each federal government has four common characteristics.

First, all federal systems establish two levels of government, where representatives are elected at both levels by the people. Each level is assigned different functions. The central government — in the U.S., the national or federal government — is responsible for handling matters that affect the country as a whole. For example, defending the nation against foreign threats and promoting national economic prosperity fall under the central government. Local governments — in the U.S., the state governments — are responsible for matters that lie within their regions, which include ensuring the well-being of their people by administering education, health care, public safety, and other public services. A system like this requires that different levels of government cooperate, because the institutions at each level form an interacting network.
The second characteristic common to all federal systems is a written national constitution that cannot be changed without substantial consent. In the American federal system, the 27 amendments added to the Constitution since its adoption were the result of an arduous process that required approval by two-thirds of both houses of Congress and three-fourths of the states. The main advantage of this supermajority requirement is that no changes to the Constitution can occur unless there is broad support within Congress and among states, which hopefully reflects the majority opinion of the people. The potential drawback is that numerous national amendment initiatives have failed because they cannot gather enough support among members of Congress or, in the case of the Equal Rights Amendment (ERA), the states.

Third, the constitutions of countries with federal systems formally give legislative, judicial, and executive authority to the two levels of government to ensure each level has some degree of autonomy from the other. Under the U.S. Constitution, the president assumes executive power, Congress exercises legislative powers, and the federal courts (e.g., U.S. district courts, appellate courts, and the Supreme Court) assume judicial powers. In each of the 50 states, a state constitution sets forth the formal structure of the state government and the powers of any branches.

The last and fourth commonality is that national courts commonly resolve disputes between levels and departments of government. In the United States, conflicts between states and the federal government are settled by federal courts, with the U.S. Supreme Court being the final deciding body. The resolution of such disputes can preserve the autonomy of one level of government, as illustrated recently when the Supreme Court ruled that states cannot interfere with the federal government’s actions relating to immigration.

Federalism - Purpose
In their attempt to balance order with liberty, the founders identified several reasons for creating a federalist government:

- to avoid tyranny;
- to allow greater participation in politics;
- and to use the states as "laboratories" for new ideas and programs.

As James Madison pointed out in "The Federalist, No. 10" (an essay in The Federalists Papers), if "factional leaders kindle a flame within their particular states," national leaders can check the spread of the "conflagration through the other states." So, Federalism can prevent a single person/group from being able to take control of the whole government, even if they were to take control of a state. In essence, this protects the United States from becoming a tyranny.

E lecting both state and national officials also increases the number of citizens who play an active role in their government. And if a state adopts a disastrous new policy, at least it would not be a catastrophe for everyone. On the other hand, if a state's new programs work well, other states can adopt their ideas and adjust them to their own needs.

With these purposes in mind, the Constitution grants three types of power to the national government:
1. **Expressed powers** (sometimes called enumerated or delegated powers) are specifically granted to the federal government in Article I, Section 8 of the Constitution. This includes the power to coin money, to regulate commerce, to declare war, to raise and maintain armed forces, and to establish a post office. In all, the Constitution delegates 27 powers specifically to the federal government.

2. **Implied powers** are not specifically stated in the Constitution, but may be inferred from the elastic (or necessary and proper) clause (Article I, Section 8). This provision gives Congress the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and other powers vested in the government of the United States." Differing interpretations of this clause have led to much debate throughout U.S. history. Since these powers are not explicit, the courts are often left to decide what constitutes an implied power.

3. **Inherent powers** are also not specifically listed in the Constitution, but grow out of the very existence of having a national government. On a small scale, these are things like hiring a cleaning crew for the Capitol. On a larger scale, this includes building a capitol. These powers are not explicitly expressed, and they cannot be implied from any specific expressed power, but they are necessary — inherent — for running a government.

The Constitution also identifies **reserved powers**, which are set aside for the states. Unlike delegated powers, they are not listed specifically, but are guaranteed by the 10th Amendment:

"*The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people.*"

Some traditional reserved powers include regulating trade within a state, establishing local government, and conducting elections.
Some powers of the federal and state governments overlap. These are the concurrent powers. For example, both may — and do — levy taxes, make and enforce laws, and borrow money. These concurrent powers are not granted exclusively to the national government, nor are they denied the states.

Prohibited or denied powers are those powers denied to either the national government, the state government, or both. (Article I, Section 9) For example, the national government cannot exercise its powers in such a way as to interfere with the states’ abilities to perform their responsibilities. States cannot tax imports or exports, nor can they coin money or issue bills of credit.

States also have responsibilities to one another, as explained in Article IV of the Constitution. One provision is that each state must give “full faith and credit” to the public acts, records, and civil judicial proceedings of every other state. Business contracts, then, for example, are recognized by all states, as are divorce decrees and all obligations, like child support. Further, the “privileges and immunities” clause in Article IV requires states to treat citizens of other states exactly as they would a citizen of their state – affording other states’ citizens all the “privileges and immunities” they give their citizens. Extradition, the legal process in which an accused criminal is returned to the state where the crime was committed, is also required by Article IV.

Federalism - it was a new form of government, designed to overcome the weaknesses of the Articles of Confederation by creating an effective national government yet retaining significant autonomy in the states.

Reflect

Poll: Immigration – Federal or State?

A CNN report states that the 2015 statistics on immigration indicate that 53.1% of all legal immigrants settled in just four states: California, New York, Florida, and Texas. Additionally, only two states were in double digits when it came to illegal immigration. 41 percent of all illegal immigrants settled in either Texas (16%) or California (25%). The next three highest percentages were Florida (6%) and New York and Illinois (5% each). It is clear that immigration — especially illegal immigration — is not necessarily a nationwide problem, but instead a major issue for a few states and a negligible issue for the vast majority of states.

The Constitution specifies that immigration laws and policies are the purview of the federal government, meaning that states (even those most heavily impacted) have no control over immigration policies and laws. These states bear the burden, but have no authority to control or solve immigration issues.

In your opinion, who should have control over immigration issues? Should we pass a Constitutional amendment giving states control of immigration within their borders, or should it remain as is, with the federal government making laws and policies for immigration?

- Yes, we should pass a Constitutional amendment giving control over immigration to each state within their borders.
- No, we should not pass a Constitutional amendment giving control over immigration to each state within their borders; the federal government should remain in control of immigration.
Expand: Defining The National Sphere of Federalism: 1789 - 1860

Discover

While the Constitution sketches a federal framework that aims to balance the forces of decentralized and centralized governance in general terms; it does not flesh out standard operating procedures that say precisely how the states and federal governments are to handle all policy contingencies imaginable. Therefore, officials at the state and national levels have had some room to maneuver as they operate within the Constitution’s federal design.

The first seventy (70) years of the new Republic were spent in a legal tug-of-war, both sides trying to understand their limitations. With the states and the national government at odds, the Supreme Court has often defined the nature of federalism. The most influential Chief Justice in U.S. history, Chief Justice John Marshall, was a major player in shaping American jurisprudence and the federalist system during those early years with cases such McCulloch v. Maryland and Gibbons v. Ogden.

McCulloch v. Maryland, 17 U.S. 316 (1819)

McCulloch was the first significant case to interpret the Constitution regarding state and federal powers. Maryland attempted to tax the Second National Bank in Baltimore and, under orders, the bank’s cashier, James McCulloch, refused to pay.

Two questions: was creating the bank constitutional and, if so, could a state tax it? Citing the elastic clause in Article I, Section 8, Marshall explained even though "bank" is not in the Constitution, the expressed powers to tax, issue currency, and borrow money imply the power to create a bank - deciding once and for all that the federal government does have implied powers in the Constitution as well as expressed. Marshall further stated the bank could not be taxed by a state because states “have no power, by taxation or otherwise, to retard, impede… or control” the federal government’s constitutional laws. The Constitution is the supreme law of the land as are any legitimate (Constitutional) acts of the federal government. “The power to tax is the power to destroy …” Marshall states, and the states are denied the right to control or impede a constitutional act of the national government.

Gibbons v. Ogden, 22 U.S. 1 (1824)

Defining the scope of national power was the subject of another landmark Supreme Court decision in 1824. In Gibbons v. Ogden, the court had to interpret the commerce clause of Article I, Section 8, determining whether the federal government had the sole authority to regulate the licensing of steamboats operating between New York and New Jersey.

Aaron Ogden obtained an exclusive license from New York State to operate steamboat ferries on the route - Thomas Gibbons’ license was issued by the federal government. Could Ogden stop Gibbons? Chief Justice Marshall delivered a ruling in favor of Gibbons strengthening the national government’s power. Marshall interpreted interstate commerce broadly to mean “commercial intercourse” among states, allowing Congress to regulate navigation between New York and New Jersey. As such, the federal licensing law was constitutional under the commerce clause. Therefore, McCulloch states federal law then trumped the state license-monopoly law that had granted Ogden an exclusive license. As Marshall pointed out, “the acts of New York must yield to the law of Congress.”
Nullification and the Civil War: 1830s - 1860

By the mid-1800s, controversy regarding slavery and tariffs escalated between the North and the South. States' rights became a central focus. Vice President John C. Calhoun and others believed the states could and should declare a tariff that adversely affected the state "null and void" within the state. The Nullification Crisis was resolved by compromises, but the underlying issue remained.

_Dred Scott v. Sandford_, 60 U.S. 393 (1857)

In _Dred Scott v. Sandford_, Marshall’s successor, Chief Justice Roger Taney, a southerner and a slave owner, ruled that the national government lacked the authority to ban slavery in the territories - raising a fear of slavery everywhere. This led the anti-slavery Republican party to dramatic growth - and the election of President Abraham Lincoln in 1860 … and the ultimate showdown between national and state authority - the Civil War.

Could a state secede? Would a state really secede? In 1860, the Southern states did secede over the issues of slavery and states’ rights. President Lincoln and the North objected, starting the Civil War. Since the South's defeat in 1865, states have never again claimed the right to secede.

Lesson Toolbox

Additional Resources and Readings

_McCulloch v. Maryland_
- A video covering the _McCulloch v. Maryland_ case
- https://youtu.be/bgGS0mGqlaw

The Commerce Clause
- A video covering the Gibbons v. Ogden case
- https://youtu.be/UvemEXqINIc

The Constitution, the Articles, and Federalism: Crash Course US History #8
- A Crash Course video covering the Articles of Confederation, the Constitution, and Federalism
- https://youtu.be/bO7FQsCcbD8

Federalism: Crash Course Government and Politics #4
- A Crash Course video covering Federalism in the U.S. Constitution and government
- https://youtu.be/J0gosGXsGsl

Interpretation: Necessary and Proper Clause
- An article written by two law professors discussing why the necessary and proper clause is vital to understanding Federalism

Lesson Glossary

_Federalism_: a system of government in which the same territory is controlled by two levels of government. Generally, an overarching national government is responsible for governing the issues that
affect the entire country, while the smaller subdivisions (states and cities) govern the issues of local concern.

**expressed powers:** (enumerated or delegated); powers of the federal government that are listed in the Constitution of the United States.

**implied powers:** powers of the federal government which are not explicit in the Constitution itself but are necessary and proper to execute the expressed powers; implied powers must stem from an expressed power.

**inherent powers:** powers that Congress and the president need in order to govern; although not specified in the Constitution, they are a logical part of the powers delegated to Congress and the president.

**reserved powers:** according to the 10th Amendment, 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; if a power is not mentioned anywhere in the Constitution, it is a state power.

**prohibited powers:** (denied powers); powers denied to either the national government, the state government, or both.

**full faith and credit:** states have to respect the "public acts, records, and judicial proceedings of every other state," giving the other state’s actions full faith and credit.

**extradition:** the action of returning a person accused or convicted of a crime to the state where he is wanted or has been accused.

**McCulloch v. Maryland:** the landmark decision by the United States Supreme Court in which the state of Maryland attempted to impede operation of a Second Bank of the United States branch by imposing a tax on all notes of banks not chartered in Maryland.

**immigration:** the action of coming to live permanently in a foreign country.

**Check Your Knowledge**

1. Thomas Hobbes and John Locke wrote that government is a __________ contract.
   A. free  
   B. voluntary  
   C. involuntary  
   D. social

2. In the United States Constitution, the federal (national) government is always supreme over the state (local) governments in every area of the law and government.
   A. True  
   B. False

3. Under the Constitution, the United States’ central government has three types of powers:
   A. executive, legislative, and judicial  
   B. national, local, and international  
   C. expressed, implied, and inherent  
   D. expressed, implied, and understood

**Answer Key:**

1. D  
2. B  
3. C
Citations

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