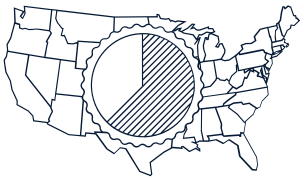

Scholar Exchange: Federalism

Briefing Document

INTRODUCTION

- What is federalism, and how does it work? Let's define federalism for everyone today, and look at how it has played out over time in America.
- Why did the founders build federalism into our constitutional system?
- How has federalism functioned over time?
- What has the Supreme Court said about federalism over time?
- What are the modern debates over federalism?

When we look for federalism in the Constitution, where can we find it?

It's in there! All over:

- Article I, Section 3 (the original Senate)
- Article I, Section 8 (the powers of Congress—especially the Commerce Clause and the Necessary and Proper Clause)
- Article I, Section 10 (limitations on the powers of the states)
- Article III (division of power between the state and federal courts)
- Article IV (Privilege and Immunities Clause and Fugitive Slave/Rendition Clause)
- Article VI (Supremacy Clause)
- 10th Amendment
- Enforcement Clauses of the Reconstruction Amendments

What is federalism?

"Federalism" is the word used to describe the Constitution's system of dividing political power between the national government and the states.

Why so many layers? What would be a benefit of having lots of layers of government? What are some of the benefits of a system of federalism?

For America's founding generation, federalism was an important way of bringing self-governance closer to the American people themselves—to the level of government closest to them. We are a country that was founded (as Lincoln said) on the promise of "government of the people, by the people, for the people," and, by breaking it up and not just having ONLY a national government, this gives a to the state governments—the governments that the founders believed were closest to the people.

Furthermore, by empowering states to shape policy in important ways, federalism permits states to shape a range of policies in ways that serve our diverse nation.

Let's break that down a bit.

This lets the people in the state that they live in—and their elected officials—write laws that that fit their community best. And these laws touch on so many issues that we care about like education and issues affecting our schools.

Over time, these diverse approaches to different issues—from education to health to safety to the environment to whether people are treated equally to how much people are paid—sometimes benefit the nation as a whole.

In 1932, Justice Louis Brandeis offered his famous vision of the states as **"laboratories of democracy."**

On this view, state governments often lead the way in trying out new laws and policies. And when those ideas work out well, they can spread to other states and even bubble up to the national level—changing the way that things work all across the nation.

So, ideas that are tested out as state laws sometimes lead to larger changes in how our country works as a whole.

A famous historical example is women's suffrage. Women began voting in Western states long before the 19th Amendment. And this experiment worked out so well that other states extended voting rights to women, as well—including (eventually) large states like New York and Michigan. (And even many states that didn't provide full suffrage still granted women partial suffrage, covering presidential elections and school boards elections.)

Finally, this experiment culminated in the 19th Amendment—banning gender discrimination in voting.

But not all national laws bubble up from the states. The same thing can happen in the opposite direction, too. By giving the national government the power to override the states in certain of areas, the Constitution permits the national government, to stop the states from doing certain things. The national government can set laws that apply to the entire nation—to everyone.

A key historical example is the national government's response to Jim Crow segregation. Beginning in the late 1800s, many Southern states set up systems of laws that discriminated against African Americans. (Jim Crow built on earlier laws in *both* the South *and* the North, which imposed restrictions on travel, gun ownership, testimony, jury duty, suffrage, etc.)

In response, the national government eventually passed new laws—like the Civil Rights Act of 1964 and the Voting Rights Act of 1965—that applied to the entire country.

The Big Idea

With the U.S. Constitution, the founding generation established a new national government. This new government was more powerful than the Articles of Confederation, but also one of limited powers. Even with a new national government, the founders preserved a central role for the states in our constitutional system. To that end, they set up a system of federalism—dividing power between the national government and the states. While future amendments

granted the national government new powers, the states retained substantial powers to promote the health, safety, and welfare of their citizens.

Hypothetical Question

Can a state impose temporary limits on the number of people that may gather in order to stop the spread of a contagious virus even if that means shutting down religious gatherings of over 100 people?
(*South Bay United Pentecostal Church v. Newson* (2020))

To begin to answer this question, we're going to first return to our nation's founding in order to understand how debates over federalism shaped American constitutional history up through the Civil War. Then, we'll consider how the Civil War and Reconstruction reshaped this system. And finally, we'll examine modern debates over federalism from the New Deal through today.

FOUNDING STORY—THE CONSTITUTIONAL CONVENTION AND PRE-CIVIL WAR DEBATES OVER FEDERALISM

Before the Constitution, the nation was governed by the Articles of Confederation. This governing document brought the states together not as a country or a family, but basically as a loose group of friends. Everyone had an equal vote and they all had to agree 100% or things could not happen (or change).

Sounds very fair, but it didn't work well at all.

This charter of government was written during the Revolutionary War. The Articles established a weak national government. Most political power remained with the states. And this should come as little surprise. Americans were waging a war against a distant empire to secure the right of self-governance.

Before the Revolution, America was ruled by a government located across the Atlantic Ocean and with no representatives from the colonies. (Of course, colonies *did* have local colonial assemblies, and many royal colonies had royal governors.)

Not surprisingly, the colonists felt like they had little say in some of the most important decisions shaping the colonies. (E.g., suspension of the Massachusetts colonial assembly in 1774, the occupation of Boston, and removing the power of local juries in favor of royal judges. These helped lead to the American Revolution.) So, they weren't eager to replace an out-of-touch, tyrannical British Empire with an out-of-touch, distant, powerful, elitist new national government.

Instead, the founders wanted to bring political power closer to the American people. The 13 states were very different from one another. And the founders wanted to make sure that the state governments had the power to shape policy decisions that responded to the diverse needs of people in different states. (After the Declaration of Independence, the states create new constitutions.)

But under the Articles, the national government was *so* weak that it couldn't even handle basic tasks of government like collecting taxes, raising troops, and keeping states from signing their own treaties with foreign powers. The states were acting more like 13 separate nations than one *United* States. Many American leaders feared—and many foreign powers hoped—that the entire nation might fall apart.

Eager to construct a national government worthy of a great nation, the founders called a convention in Philadelphia in 1787 to revise the Articles of Confederation. Of course, they would ultimately do far more than that. They would draft a new charter of government!

Led by key figures like George Washington, James Madison, James Wilson, and Gouverneur Morris, the Constitutional Convention delegates crafted a new government—one stronger than the Articles of Confederation, but still one of limited powers. Under the new Constitution, the founders granted the national government powers that it lacked under the Articles.

Federalism was at the core of this new system.

The delegates tried to strike a difficult balance. They wanted to strengthen the national government. But they also wanted to maintain the states' key role in governance—preserving their traditional powers to promote the health, safety, and welfare of their citizens (known as the state's "police powers") and making sure that the American people would not become too disconnected from the government that governed their daily lives.

Historian Jack Rakove describes the contours of the debates over federalism at the Convention well: "The existence of the states was simply a given fact of American governance, and it confronted the framers at every stage of their deliberations. In the abstract, some of the framers could imagine redrawing the boundaries of the existing states, and a few hoped to convert the states into mere provinces with few if any pretensions to sovereignty. But in practice the reconstruction of the federal Union repeatedly led the framers to accommodate their misgivings about the capacities of state government to the stubborn realities of law, politics, and history that worked to preserve the residual authority of the states—and with it the ambiguities of federalism with which later generations would continue to wrestle."

At the Convention, the delegates debated the relationship between the states (and state sovereignty) and the nation.

State Sovereignty

For defenders of state sovereignty like Luther Martin, the states came before the nation, preserving sovereign powers that the national government couldn't curb.

- Luther Martin: The Revolution "placed the 13 States in a state of nature towards each other," with these "separate sovereignties" forming a federal government to "defend the whole agst. Foreign nations" and "the lesser States agst. the ambitions of the larger."

Elbridge Gerry feared that the national government would eliminate state governments—pushing hard against James Madison's proposal to give Congress an absolute veto over state laws. (At the same time, as Rick Beeman explains, "Gerry joined Madison in ridiculing the idea that state sovereignty was somehow sacred" as a result of his experience during Shays' Rebellion in which he witnessed and ultimately feared mass uprisings and violent anarchy.)

And John Dickinson feared that some nationalist delegates wanted to "abolish altogether . . . the accidental lucky division of this country into distinct States." Later state sovereignty theorists like John C. Calhoun would build on these arguments.

National Power

For nationalists like James Wilson, the states and the nation emerged at the same time—whether by declaring independence or joining together in a national government. For Wilson, the new nation was rooted in popular sovereignty—rule by "We the People." And just as each person "purchase[s] civil liberty by the surrender of the personal sovereignty, which he enjoys in a state of nature," so the states should be willing "to purchase . . . federal liberty" with "the necessary concession of their political sovereignty."

As a result, for Wilson and other nationalists, state sovereignty was not absolute. Many of the most important issues at the Convention touched on how best to strike the right balance between the national government and the states. They were trying to strike a balance between being fair to the new national government and being fair to the state governments. But that doesn't mean that the two were equal or the same.

For instance, the delegates battled over which powers to grant the new Congress. The delegates wanted a Congress more powerful than the one created by the Articles of Confederation. But they also wanted one of limited powers—powers much more limited than the expansive police powers of the states.

Madison's Virginia Plan provided a framework for debating the scope of national power, proposing that "Congress" may "legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation . . .."

Powers of Congress

In the end, the delegates laid out Congress's new powers in Article I, Section 8.

Over time, the most important congressional powers have proven to be its powers to:

- "collect Taxes, Duties, Imposts and Excises, to pay the Debates and provide for the common Defence and general Welfare of the United States";
- "regulate Commerce with foreign Nations, and among the several States"; and
- "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, or in any Department or Officer thereof."

Relationship Between National Government and the States

Finally, the delegates also considered what sort of power the national government should hold over the states. Some delegates—like Madison and Wilson—wanted to grant the national government a veto over *all* state laws. (Gerry was a strong voice in opposition.) However, this move was viewed as far too ambitious a check on state sovereignty for most delegates.

Instead, the delegates settled on:

- Article I, Section 10, setting out a small number of specific (but important) limits on state power—for instance, bans on entering into treaties with foreign nations, coining their own money, and impairing contracts.
- And the Supremacy Clause—declaring properly enacted national laws supreme over state laws: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."

After four months of debate, the delegates finally settled on the U.S. Constitution—sending it to the states for ratification.

Ratification

In the battle over ratification, the Federalists and Anti-Federalists battled over state sovereignty, federalism, and the nature of the new government.

- In *Federalist No. 39*, Madison described the Constitution as having a "republican complexion" consistent "with the genius of the people of America." He then sought to describe which parts of the Constitution can be described as rooted in the states (the "federal" parts) and which as "national." In the end, Madison concluded that "[t]he proposed Constitution" was neither national nor federal "but a composition of both."

- Anti-Federalists feared that the new Constitution destroyed state sovereignty and consolidated all political power in the new national government (or, at least, eventually do so). For instance, Patrick Henry described the new national government as "a great consolidation of Government." Brutus #1 also attacks the threat of consolidation at length. (And Centinel and Federal Farmer, too.)

  And the Anti-Federalists argued that the delegates had done *far* more than simply correct the defects in the Articles of Confederation. They had created a powerful *new* national government that threatened the sovereignty of the states (and the liberty of their citizens). (The Anti-Federalists feared that the new Constitution would eliminate state sovereignty and leave state and local governments dependent creatures of the national government, incapable of protecting their own citizen. They thought that this would lead to a state of tyranny and despotism.)

In the end, the Constitution represented a middle path between absolute state sovereignty and the absolute consolidation of national power.

How did this new system work?

The Constitution divides power between the national government and the states.

At the national level, the government has three different branches.

- The legislative branch (Congress) makes laws.
- The executive branch (the president) makes sure that the laws are carried out.
- And the judicial branch (with the Supreme Court at the top) interprets the laws.

While the national government is one of limited powers, it *does* carry out many important *national* responsibilities, including the power to sign treaties, coin money, regulate interstate commerce, tax and spend for the common defense and the general welfare, and declare war on other nations.

At the state level, each state has its own government with its own constitution.

- Each state government is also divided into three branches of government—much like the national government.
- And the states have a number of important responsibilities.
  - The Constitution left the issue of voting—including the key decision of *who* should vote—primarily to the states.
  - Prior the Civil War, the same was true of the issue of slavery—with the delegates leaving it to the *states* to determine whether to permit slavery or whether to abolish it. (This also included laws concerning the importation of enslaved people into other states, the recognition of freedom (or not) within slaveholding states under Article IV, the transfer of slave property, etc.)
  - But even today, the states continue to shape policy in a number of important areas, including education.

Our system of federalism preserves an important role for the states so that they can establish laws and set policies that meet their state's own values and preferences—the things that its voters would like to see done.

- States vary greatly by race, income level, economies, climates, geography (urban v. suburban v. rural), histories, and political party breakdown.
- Federalism allows them to make laws that meet those values and preferences.

The founding generation reinforced this system with the **10th Amendment**: "The powers not delegated to the United States by the Constitution, nor prohibited by the states, are reserved to the states respectively, or to the people." And later amendments would empower the national government in certain areas—for instance, to protect certain civil and political rights (*e.g.*, the **Reconstruction Amendments**).

Pre-Civil War Debates Over Federalism

Battles over federalism—including the scope of the national government's power and the nature of state sovereignty—shaped many important constitutional debates in the decades between the founding and the Civil War. We can see how these debates played out by focusing on a some of the Supreme Court's landmark decisions during this pre-Civil War period.

The National Bank

One set of decisions addressed the scope of the national government's power. For instance, consider ***McCulloch v. Maryland***—perhaps the most famous Supreme Court decision during this period.

In the wake of the Panic of 1819, opposition to the National Bank of the United States grew. Of course, the constitutional dispute over the bank went back to the earliest days of the nation—when Thomas Jefferson, James Madison, and the emerging Democratic-Republican opposition argued that Alexander Hamilton's Bank Bill was unconstitutional in 1791. Those bank opponents argued that a National Bank went beyond the enumerated powers of Congress under Article I.

Even so, Chief Justice Marshall and the Supreme Court upheld the constitutionality of the National Bank in *McCulloch*.

The case arose out a Maryland law designed to impede the operation of the Second National Bank of the United States by taxing all bank notes from banks chartered outside of the state. The national Bank was the only bank operating in Maryland affected by this law. McCulloch—the president of the National Bank's Maryland Branch—refused to pay the tax.

Marshall began his opinion by explaining the principles underlying the Constitution's system of federalism: "To the formation of a league such as was the Confederation, the State sovereignties were certainly competent. But when, 'in order to form a more perfect Union,' it was deemed necessary to change this alliance into an effective Government, possessing great and sovereign powers and acting directly on the people, the necessity of referring it to the people, and of deriving its power from them, was felt and acknowledged by all. The Government of the Union then . . . is, emphatically and truly, a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

Marshall explained that while the national government was one of limited, enumerated powers, it was "supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding."

By leaving out the word "expressly," even the 10th Amendment didn't preclude the national government from relying on implied powers. (There were founders who wanted explicit language re "expressly.")

Thus, while the power to charter a bank was not an enumerated power, it flowed from other enumerated powers—for instance, the powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. Congress needed to meet the demands and needs of an expanding, vast economy (and nation).

Marshall then turned to the Necessary and Proper Clause as supporting a reading of Congress's Article I powers beyond those expressly enumerated in the Constitution. The Court also concluded that Maryland had no right to tax national institutions, noting that the "power to tax involves, necessarily, a power to destroy."

The Marshall Court also addressed the scope of the national government's power over commerce in landmark cases like ***Gibbons v. Ogden***. (Many key Marshall Court cases also addressed the division of power between state courts and the federal courts.)

Fugitive Slave Laws

Another key set of federalism decision addressed the explosive issue of slavery. The original Constitution left the issue of slavery largely to the states. Even so, some states tried to use their police powers to enact laws to block the recapture of alleged fugitive slaves. For instance, consider ***Prigg v. Pennsylvania*** (1842).

In 1826, Pennsylvania passed a law making it a felony to recapture fugitive slaves in the state. When slavecatcher Edward Prigg recaptured Margaret Morgan and her children in 1837 to be resold into slavery in

Maryland, Prigg was prosecuted under the Pennsylvania law. Prigg challenged the law, arguing that Pennsylvania's law conflicted with the Fugitive Slave Act of 1793 and the Constitution's Fugitive Slave Clause.

The Supreme Court struck down Pennsylvania's law in an opinion written by Justice Joseph Story.

Story reasoned that "under and in virtue of the constitution, the owner of a slave is clothed with entire authority, in every state of the Union, to seize and recapture his slave whenever he can do it without any breach of the peace or any illegal violence." Story added that beyond the "mere right of seizure and recapture," the Constitution placed a duty on the national government to provide a remedy, as the "National Government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution."

At the same time, the Court appeared to leave open flexibility for state officials to "exercise that authority (to enforce the Fugitive Slave Act), unless prohibited by state legislation." With this, Story believed that he had left undisturbed the police powers of the states.

Under what is known now as the "anti-commandeering" doctrine, Northern states passed "Personal Liberty" laws to ban state officials from acting to aid in the capture of fugitive slaves, allowing only national officials to operate under the Fugitive Slave Act of 1793.

However, Congress then passed the Fugitive Slave Act of 1850 (as part of the "Compromise of 1850"). This law forced not only state officials, but individual citizens, to aid in the recapture of fugitive slaves. (It also denied jury trials to alleged fugitives. Abolitionists considered this a constitutional violation. The Act set up federal commissioners to enforce it.)

Of course, the most (in)famous Supreme Court decision covering slavery was ***Dred Scott v. Sandford*** **(1857)**, which declared the Missouri Compromise (which banned slavery in the Louisiana Territory) unconstitutional and declared that African Americans couldn't be U.S. citizens.

However, it's important not to overlook another key federalism case addressing slavery on the eve of the Civil War—***Ableman v. Booth*** (1859).

An abolitionist newspaper editor was charged with aiding the escape of a fugitive slave to Canada. (He was charged under the Fugitive Slave Act—alleging that he had helped incite a mob, which attacked the jail holding Joshua Glover.) And the Wisconsin Supreme Court granted him a writ of habeas corpus to release him from federal custody and declared the Fugitive Slave Act unconstitutional.

The U.S. Supreme Court reversed in an opinion by Chief Justice Taney. Taney charged the Wisconsin Supreme court with claiming a form of "state supremacy"—ignoring the Supremacy Clause and claiming the power to issue final and conclusive judgments about the constitutionality of federal laws.

Taney established a principle now known as "dual sovereignty." Although states were sovereign within their territorial limits, that sovereignty was limited and restricted by the Constitution. The national government and the states were "separate and distinct sovereignties, acting separately and independently of each other within their respective spheres."

> Taney also explained that the federal judiciary's powers under Article III were "indispensable not merely to maintain the supremacy of laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government."
>
> Finally, Taney upheld the Fugitive Slave Act in its entirety.

And then the Civil War came . . .

HOW THE CIVIL WAR AND RECONSTRUCTION RESHAPED FEDERALISM

Following the Civil War, the Reconstruction generation amended the Constitution—adding three transformational amendments that struck a new balance between the powers of the national government and the states.

The states retained substantial powers to shape policies that promoted the health, safety, and welfare of their citizens. And immediately after the Civil War, white Southern governments used their police powers to enact the Black Codes to oppress previously enslaved people in their states. Their aim was to come as closely as possible to restoring slavery in everything but name.

At the same time, the Reconstruction Amendments gave the national government new powers in many important areas.

While the original Constitution left the issue of slavery to the states, the **13th Amendment** abolished slavery and granted Congress new powers to enforce that constitutional command.

The **14th Amendment** wrote the Declaration of Independence's promise of freedom and equality into the Constitution. While the Bill of Rights originally applied only to abuses by the national government, the 14th Amendment extended key Bill of Rights protections like free speech and religious liberty to cover state abuses. It also empowered Congress to pass laws to enforce the amendment's range of new protections, including its promise of guaranteeing equal protection of the laws to everyone. In each case, the states retained important powers, but the 14th Amendment gave the national government new power to check state laws when they violated the guarantees of freedom and equality written into the 14th Amendment.

Finally, the original Constitution left the issue of voting to the states, but the **15th Amendment** promised to ban racial discrimination in voting and gave Congress new powers to enforce that promise. This move gave the national government new powers over voting laws passed by states throughout the nation. And we would see later generations build on this example—banning gender discrimination in voting (with the 19th Amendment), ending poll taxes in national elections (with the 24th Amendment), and protecting the voting rights of those 18 and older (with the 26th Amendment).

Taken together, these amendments struck a new balance between the powers of the national government and the states.

The Reconstruction Amendments were the first set of constitutional amendments to *expand* the reach of national power—rather than *restrict* it (as, for instance, the Bill of Rights did). So, Congress has more power than before. Even so, the specific amount of power remains contested—as we continue to debate the proper balance of power between the

national government and the states—and as did the Reconstruction founders who gave us the 13th, 14th, and 15th Amendments.

Over the next half century, justices, elected officials, and movement leaders would battle over what this period of constitutional transformation meant for our nation's system of federalism. How powerful was the national government after the ratification of these new amendments? And how many of the traditional powers of the states survived?

The late 1800s featured a series of Supreme Court decisions that began to address these important questions.

The Slaughter-House Cases

For instance, take the first major Supreme Court decision interpreting the 14th Amendment—*The Slaughter-House Cases* (1873).

This case came from a suit by 400 butchers against a slaughterhouse monopoly in New Orleans. They argued that this state-created monopoly violated their 14th Amendment rights—namely, their right to make a living in their chosen profession.

The Court—in a 5-4 decision—upheld the Louisiana law and concluded that the 14th Amendment didn't radically alter the Constitution's system of federalism. The majority feared that—if read too broadly—the 14th Amendment would allow the national government to take on too many duties (and powers) that traditionally went to the states.

Justice Miller's Majority Opinion: The Reconstruction Congress didn't want the 14th Amendment to "transfer the security and protection of all . . . civil rights . . . from the states to the Federal Government" and thereby to "fetter and degrade the state governments by subjecting them to the control of Congress" and "destroy the main features of the general system of American government."

This decision limited the reach of the 14th Amendment's Privileges or Immunities Clause to the rights which owe their existence to the national government, those in the Constitution like the right to petition the government or for protection on the high seas. It doesn't reach many of the other core Bill of Rights protections that some of the Reconstruction founders like John Bingham might have envisioned.

The four dissenters argued that the majority got the 14th Amendment's purpose wrong. They thought that the Court's reading was too restrictive—limiting rights protections. For instance, Justice Noah Swayne—in dissent and in direct conflict with Justice Miller's majority opinion—says that the Reconstruction Congress *did* want to completely alter the constitutional system and transfer protection of the Bill of Rights to the national government.

In the end, with *The Slaughter-House Cases*, the traditional police powers of the states survive the ratification of the 14th Amendment, with the Court trying to strike a balance between the protection of individual rights and the states' traditional power to pass laws that promoted the healthy, safety, and welfare of their citizens.

Additional Cases

In the 1870s and 1880s, the Supreme Court—in decisions like *Cruikshank v. United States* (1876) and *The Civil Rights Cases* (1883)—continued to read the Reconstruction Amendments narrowly. In particular, these decisions undermined new constitutional protections for African Americans.

And finally, in *Plessy v. Ferguson*, the Supreme Court green-lighted Jim Crow laws by upholding a Louisiana law requiring separate train cars for African Americans and whites as a legitimate use of the state's police powers to protect the health, safety, and welfare of a state's citizens (and as *not* violating the 14th Amendment's promise of equal protection of the laws).

DEBATES OVER FEDERALISM FROM THE NEW DEAL THROUGH TODAY

Let's fast forward to FDR and the New Deal. During the New Deal, Congress enacted a range of national regulatory programs— such as Social Security—that were designed to stabilize the economy, protect workers, and promote the general welfare.

During the New Deal era:

- The Supreme Court read the Constitution in a way that granted the national government broad powers to regulate the economy under the Commerce Clause.
- The Court also agreed to uphold state laws regulating the economy—as long as they didn't conflict with congressional efforts to do the same.
- The New Deal Court's approach rejected decades of caselaw reading the Constitution as providing stricter limits on *both* the national government's *and* the states' powers over the economy—whether in the form of a stricter reading of the powers granted to Congress under the original Constitution or in the form of a vision of the 14th Amendment that imposed limits on the states' powers to burden certain economic liberties.

The *Lochner* Era

In the late 1800s and early 1900s—in a period traditionally known as the *Lochner* Era—the Court read the Constitution in a way that imposed certain limits on *both* the national government *and* the states.

For the national government, the *constitutional* question was often how broadly to read the Constitution's Commerce Clause and Necessary and Proper Clause.

For the states, the *constitutional* question was *whether* the 14th Amendment imposed any new limits on a state's ability to pass economic regulations to promote the healthy, safety, and welfare of its citizens—and, if so, *how broadly* those limits swept.

The *Lochner* decision itself—*Lochner v. New York* (1905)— struck down a New York law regulating the working conditions of bakers. In a 5-to-4 decision, the Supreme Court read the 14th Amendment as protecting economic liberty—in particular, a "freedom of contract."

To get a flavor for this era, it's worth quickly considering a couple of landmark Supreme Court decisions addressing the scope of national power.

Hammer v. Dagenhart (1918)

In 1916, Congress passed the Keating-Owen Child Labor Act—banning the shipment of goods produced by child

labor across state lines. A father of a 14-year-old boy challenged the law.

And in a 5-to-4 decision, the Supreme Court agreed with the challenger, striking down the law and concluding that the production of goods was not "commerce" and thus fell outside of the national government's express authority to regulate interstate commerce under the Commerce Clause.

The Court also concluded that the national law violated the 10th Amendment, which reserved regulation of production to the states.

The Court reasoned that the law didn't "regulate transportation among the states," but instead "aims to standardize the ages at which children may be employed in mining and manufacturing within the states." At the same time, the goods themselves were "harmless."

The Commerce Clause didn't give Congress authority to control the states in their exercise of police power over local trade and manufacturers and was not intended to "destroy the local power always existing and carefully reserved to the states" by the 10th Amendment. (A few years later, in *Bailey v. Drexel Furniture*, the Court concluded that the national government couldn't accomplish the same ends through the Taxing Power.)

ALA Schechter Poultry Corp. v. United States (1935)

(Also known as the "Sick Chickens" case.)

Enacted by Congress during the Great Depression, the National Industrial Recovery Act of 1933 gave the President power to approve "codes of fair competition." FDR approved codes establishing a 40-hour work week and a 50-cent minimum wage.

The Schechter company purchased chickens that had been shipped to New York from other states and then used the poultry for slaughter and resale within New York. They were convicted for violating FDR's wage and hour rules.

The Supreme Court struck down the regulations fixing the hours and wages of individuals employed by an interstate business because the regulated activity was only "indirectly" related to interstate commerce: "Where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power."

In the end, even the *Lochner*-Era Court upheld far more economic regulations than it struck down. Even so, the Court tried to enforce certain limits on the regulatory powers of the *both* the national government *and* the states.

The New Deal Court

The New Deal Court—beginning in 1937—turned away from this approach and read the Constitution as giving governments (*both* at the national *and* the state level) broad powers to regulate the economy.

Once the Court began to uphold New Deal laws, the Supreme Court expanded national regulatory power. Relying primarily on the Commerce Clause and the Necessary and Proper Clause to expand Congress's reach, the Court effectively brought an end of the *Lochner* Era.

The Court interpreted Article I to give Congress the power to regulate wholly intrastate economic activity that substantially affected interstate commerce. Because the scope and importance of the national economy had outpaced the vision of interstate commerce held by the founders, the power to regulate anything that affected interstate commerce amounted to the power to regulate almost everything. As a result, the national government could now regulate in areas once governed exclusively by the states.

The Court accomplished this through a series of landmark cases.

National Labor Relations Board v. Jones & Laughlin Steel (1937)

For instance, two years after the *Schechter* decision, the Supreme Court reversed course in *National Labor Relations Board v. Jones & Laughlin Steel* (1937). There, in a 5-to-4 decision, the Court upheld the National Labor Relations Act. And it rejected *Schechter*'s approach when intrastate activities had "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect the commerce from burdens and obstructions."

United States v. Darby (1941)

There, the Court overruled *Hammer v. Dagonhart* and upheld the Fair Labor Standards Act—regulating wages and hours. The Court concluded that Congress had the power to ban the shipment in interstate commerce of lumber manufactured by employees whose wages were lower than the prescribed minimum wage or whose weekly hours were greater than the prescribed maximum.

The Court also decided that Congress could reach the employment of workers in the *production* of such goods produced for interstate commerce in violation of wage and hour laws.

Famously, the Court concluded that the 10th Amendment was but "a truism" that all power is retained which has not been surrendered—with "nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution."

Wickard v. Filburn (1942)

Finally, the New Deal Revolution may have reached its zenith in *Wickard v. Filburn* (1942). There, the Court rejected a challenge to the marketing quota provisions of the Agricultural Adjustment Act of 1938.

The case involved the regulation of wheat which had been grown purely for local purposes.

The Court noted that there was "no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof." Even so, the Court upheld the law.

The Court would no longer use "production" and "indirect" to foreclose consideration of the actual effects of the activity in question on interstate commerce. Thus, whether the subject of regulation was "production,"

"consumption," or "marketing" was not important, as Congress could reach activities local in nature if they exerted a "substantial economic effect on interstate commerce."

The Civil Rights Movement

The Civil Rights Revolution also rebalanced the relationship between the national government and the states in important ways.

In the late 1800s, many states—particularly in the South—passed laws that restricted the rights of African Americans. This system of Jim Crow segregation forced African Americans to attend different schools than white Americans, drink from different water fountains, use different restrooms, travel in different train cars, and stay in different hotels—and on and on. These states also used a mix of violence, intimidation, and laws on the books—including polls taxes and literacy tests—to keep African Americans from voting. (Even though the 15th Amendment promised to end racial discrimination in voting.)

In the 1900s, many people began to protest against this type of treatment—culminating in Martin Luther King Jr., and the Civil Rights Movement. Finally, after many years, the national government heard those voices protesting, and it decided to strike at state laws that established Jim Crow segregation.

- With *Brown v. Board of Education*, the Supreme Court ruled that school segregation was unconstitutional.

- With the Civil Rights Act of 1964, Congress attacked racial discrimination in a variety of settings, including work, schools, and public settings (like restaurants and hotels). (Congress passed this law under its Article I power to regulate interstate commerce, but it can also be understood as realizing the promise of the Reconstruction Amendments.)

- And with the Voting Rights Act of 1965, Congress attacked Jim Crow laws that kept people of color from the ballot box. (Congress passed the VRA under its powers granted by the 14th and 15th Amendments.)

The Supreme Court upheld these exercises of national power in landmark cases.

Heart of Atlanta Motel v. United States (1964)

For instance, shortly after Congress passed the Civil Rights Act of 1964, the Supreme Court considered a challenge to its constitutionality—*Heart of Atlanta Motel v. United States* (1964).

There, a motel owner refused to rent rooms to African Americans, arguing that the Civil Rights Act exceeded Congress's Commerce Clause powers.

The Court—in an opinion by Justice Clark—upheld the Act. Reviewing the Act's legislative history, the Court concluded that Congress acted not only under its Commerce Clause powers, but also its powers to enforce the 14th Amendment promise of equality under the Amendment's Enforcement Clause (Section 5). Congress was clear that the key purpose behind the Act was to end **"the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."**

Evidence showed that discrimination by race burdened interstate commerce in an increasingly mobile society—having both a quantitative and qualitative effect on interstate travel by African Americans.

Congress's power under the Commerce Clause was simply a question of whether the activity sought to be regulated was commerce "which concerns more states than one" and has a "real and substantial relation to the national interest." Congress could regulate local activities that had a substantial and harmful effect on interstate commerce, including racial discrimination in motels serving travelers.

South Carolina v. Katzenbach (1965)

Similarly, shortly after Congress passed the VRA, the Supreme Court considered a challenge to its constitutionality brought by South Carolina—*South Carolina v. Katzenbach* (1965).

The Supreme Court—in an opinion authored by Chief Justice Earl Warren—rejected South Carolina's challenge and upheld the VRA as a valid exercise of Congress's power to enforce the 15th Amendment (Section II). The Court concluded that the 15th Amendment gave Congress "full and remedial powers" to ban racial discrimination in voting.

On the Court's view, the VRA was a "legitimate response" to the "insidious and pervasive evil" of the Jim Crow laws that prevented African Americans from voting since the ratification of the 15th Amendment in 1870. And when they framed and ratified the 15th Amendment, the Reconstruction generation made Congress "chiefly responsible" for enforcing its promise to ban racial discrimination in voting.

Many of the areas addressed during the civil rights era—like voting laws—were traditional areas of state responsibility, but the national government stepped in to enforce the Constitution's promise of the equal citizenship and equal political rights for all.

New Federalism

Finally, in recent decades, the Supreme Court has trimmed back a bit on the powers of the national government—often on behalf of broader state sovereignty.

After William Rehnquist became chief justice in 1986, the Court began developing what scholars call the "New Federalism." For instance, the Court's "10th Amendment" attempted to carve out a zone of state autonomy that the national government couldn't invade.

These decisions all involved action by the national government that in some way regulated or commanded state governments, such as telling states what policies they must adopt (*New York v. United States* (1992)). These decisions shielded states from national regulation in a way that private parties were not.

Printz v. United States (1997)

There, the Court considered a challenge to the Brady Handgun Violence Prevention Act, which commanded state and local law enforcement officers to conduct background checks on potential handgun purchasers and perform other related tasks.

Jay Printz and Richard Mark were chief law enforcement officers in Montana and Arizona. They argued that the Brady Act directed state law enforcement officers to participate in the administration of a federally enacted regulatory scheme.

In a 5-4 decision authored by Justice Antonin Scalia, the Court concluded that the Act violated the Constitution. The Court held that the national government cannot "commandeer" the operation of state governments by forcing states or political subdivisions to enforce a federal law. (This is known as the "anti-commandeering doctrine.") Scalia reasoned that under the principles of "dual sovereignty," states maintained residual sovereignty under the 10th Amendment.

In addition, the Supreme Court also tried to trim back on some of the broadest interpretations of the New Deal Revolution—trying to figure out a way to enforce some limits on Congress's power. These decisions continued to allow national regulation of wholly intrastate economic activity that had a substantial effect on interstate commerce, while drawing a line at the regulation of *non*-economic intrastate activity.

Lopez v. United States (1995)

Alfonzo Lopez was arrested for carrying a concealed weapon in his high school and charged under the federal Gun Free Schools Act of 1990, which banned individuals from possessing firearms in places that they knew were school zones. Lopez challenged his conviction, arguing that it was unconstitutional and exceeded Congress's Article I authority to regulate interstate commerce.

In a 5-to-4 decision, the Supreme Court struck down the law for exceeding Congress's Commerce Clause power. The Court noted that carrying a gun into schools was not an "economic activity." Therefore, it didn't qualify as the kind of private activity that Congress had authority to regulate under the Commerce Clause.

In the end, the Court used *Lopez* to push back against the broadest reach of the New Deal Revolution. (At the same time, the Court suggested creating a "jurisdictional hook" such that Congress could repair the law to make it constitutional.)

(The Rehnquist Court tested the reach of its "Federalism Revolution" in later cases like *United States v. Morrison* (2000) (striking down a part of the Violence Against Women Act as exceeding the national government's power) and *Gonzales v. Raich* (2005) (upholding federal drug laws even in the context of homegrown cannabis).

In some ways, the Roberts Court has built on the Rehnquist Court's federalism legacy.

NFIB v. Sebelius (2012)

There, the Supreme Court considered a constitutional challenge to the Affordable Care Act. Chief Justice Roberts wrote the controlling opinion in the case—joined by different justices for different parts.

First, the chief justice concluded that the Commerce Clause permits Congress only to regulate existing activity and not to compel people to purchase a product or join a market that they did not wish to join.

Second, he declared that the individual mandate could be legitimately considered a tax because it raised revenue for the national government and therefore was constitutional under Congress's taxing power.

> And finally, seven justices agreed that the Medicaid provision unconstitutionally coerced the states to accept the Medicaid expansion. At the same time, the chief justice concluded that the Medicaid expansion provision could remain in place as long as the national government didn't threaten to withdraw Medicaid funding entirely for states that didn't agree to the plan.

Even with decisions like *NFIB*, the Supreme Court still reads the Constitution as granting the national government broad powers to regulate the economy and use its spending power to promote its preferred policies in the states. (And the Court will once again hear a challenge to the Affordable Care Act's constitutionality this Term.)

FEDERALISM AND COVID-19 ERA RESTRICTIONS

We've spent a ton of time on the history of federalism. But how does it work today—and what are some of the debates over federalism in 2020?

Importantly, state responses to the coronavirus raise one of the questions at the core of federalism—how do we best balance the power of the states to protect its citizens health, safety, and welfare against the Constitution's commitment to the constitutional rights of individuals?

These challenges often set up a clear conflict between the traditional police powers of the states and individual rights secured by the Constitution.

Our hypo is based on a recent case that came before the Supreme Court—*South Bay United Pentecostal Church v. Newson*—which drew competing opinions by Chief Justice John Roberts and Justice Brett Kavanaugh.

Can a state impose temporary limits on the number of people that may gather in order to stop the spread of a contagious virus even if that means shutting down religious gatherings of over 100 people?

What happened in that case?

To slow the spread of COVID-19, the California governor issued an executive order placing temporary limits on the size of public gatherings. The order limits attendance at places of worship to a maximum of 100 attendees or a 25% of building capacity, whichever is lower. (The disease is highly contagious, and there's no known cure, treatment, or vaccine.)

Challengers called on the Supreme Court to block the enforcement of the state's order—arguing that it violates their First Amendment rights under the Free Exercise Clause. (The order may also burden/abridge their assembly rights. In each case, the 14th Amendment extended those First Amendment rights to the states.)

The key Supreme Court case is an old case called *Jacobson v. Massachusetts* (1905).

Jacobson v. Massachusetts (1905)

In *Jacobson*, Massachusetts empowered its cities to pass laws requiring their residents to get a smallpox vaccination. A city in Massachusetts (Cambridge) did so, and Jacobson challenged the Massachusetts law under the 14th Amendment.

The Supreme Court—in an opinion by John Marshall Harlan—upheld the law as a legitimate exercise of the state's police power to protect the health, safety, and welfare of its citizens. Public health officials concluded that mandatory vaccinations were needed to fight smallpox. And Massachusetts—and Cambridge—were simply following their advice. This was enough to uphold the law.

At the same time, Justice Harlan warned that "the police power of a State, whether exercised by the legislature or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression."

(In 1922, the Court also decided *Zucht v. King*, which upheld state laws requiring children to be vaccinated in order to attend public schools. Writing for a unanimous Court, Justice Brandeis held that *Jacobson* "settled that it is within the police power of a state to provide for compulsory vaccination.")

In ***South Bay United Pentecostal Church***, the Supreme Court turned away the challenge to the California order, and Chief Justice Roberts wrote an opinion concurring in this decision:

The Decision

The chief justice explained that this case—and "the precise question of when restrictions on particular activities should be lifted during the pandemic"—turns on the specific facts in each case, with different situations leading to different conclusions. In other words, it is "a dynamic and fact-intensive matter subject to reasonable disagreement."

Citing *Jacobson*, Roberts recognized the traditional police powers of the state—a state's broad powers to protect the health, safety, and welfare of its residents—and granted a state's decisions in this context broad deference.

Roberts concluded that the governor's order was consistent with the First Amendment's Free Exercise Clause. The state had placed similar restrictions on secular gatherings like lectures, concerts, and sporting events. While the order exempted other activities, those activities—like operating grocery stores, banks, and laundromats—were different because "people neither congregate in large groups nor remain in close proximity for extended periods." In short, Roberts said that he wouldn't second-guess a state's policies when "a party seeks emergency relief . . . , while local officials are actively shaping their response to changing facts on the ground."

The Dissent

But Justice Kavanaugh countered with a dissenting opinion sympathetic to the challengers' arguments.

Joined by Justices Thomas and Gorsuch. Kavanaugh would have temporarily blocked the governor's order. Kavanaugh reasoned that the governor's order violated the First Amendment—"discriminat[ing] against places

of worship in favor of comparable secular businesses." While the order places limits on the size of religious worship services, it doesn't place similar limits on "comparable secular businesses" like "factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries." Because this order discriminates against religion, California must be able to show that it meets the Court's most demanding constitutional test (strict scrutiny).

The Court acknowledged the state's "compelling interest" in combatting COVID-19 and protecting its citizen's health. However, it concluded that California failed to provide "compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap."

The Court explained that California could have worshippers follow the same social distancing and hygiene requirements as other businesses. Or it could impose the same occupancy caps on everyone. "But absent a compelling justification . . . , the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship." "[T]he Constitution imposes one key restriction" in this context: "The State may not discriminate against religion."

These dueling opinions frame the difficult constitutional issues arising from the coronavirus pandemic—and how they intersect with our system of federalism. Furthermore, even the chief justice's concurring opinion explains that the constitutional challenge may shift over time, tracking the facts on the ground.

At the height of a pandemic, the state's police powers were at their apex. However, just because a state may win at the start of a pandemic—when public health is most in doubt—doesn't mean that the state will win a similar case six months later.

Even the chief justice acknowledged that these cases must turn on a case-specific, fact-intensive analysis. (At the same time, some states *have* lost in the lower courts, including in Pennsylvania and Wisconsin.)

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