

# FEDERALISM

Federalism refers to a political system in which power is divided among the national government and other governmental units, such as states, counties, and municipalities in the United States. In a sense, it is the middle ground between a **unitary system** in which all power is derived from the central government, and a **cofederal system** where the states are effectively sovereign and determine what authority the central government has. Several countries in Western Europe — France, Great Britain, Italy, and Sweden — have unitary governments. The United States under the Articles of Confederation is an example of the cofederal system. As the Articles clearly stated, “Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”

## Federalism in the Constitution

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The Constitution is vague in the extreme on what the nature of the relationship is between the federal government and the states. James Madison stated the problem succinctly in *Federalist No. 45*, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those that are to remain in the State governments are numerous and indefinite.” As we noted in the previous chapter, what the states cannot do, the guidelines governing inter-state relations, and the guarantees given the states by the federal government are rather obvious; the powers that states have are not.

There are provisions in the Constitution that specifically recognize the dominance of the federal government or allow for the expansion of its power:

- **Supremacy clause:** Makes the Constitution, federal laws, and treaties the “supreme law of the land” by which state courts are bound.
- **Necessary and proper clause:** Enables Congress to pass laws needed to carry out its enumerated powers.
- **Commerce clause:** Gives Congress the power to regulate interstate commerce.
- **General welfare clause:** Enables Congress’ spending power to be used to promote the “general welfare.”

The Supreme Court has defined federal-state relations based on the following elements:

- **McCulloch v. Maryland (1819):** Congress has broad implied powers under the necessary and proper clause; states have no power to interfere with a law that Congress passes.
- **Gibbons v. Ogden (1824):** Under the commerce clause, “commerce” is defined as any “commercial intercourse” affecting two or more states. Congress used a broad interpretation of the commerce clause to prohibit discrimination in public accommodations in the

**Civil Rights Act of 1964.** The law was upheld by the Supreme Court in **Heart of Atlanta Motel v. United States (1964)**.

- **South Dakota v. Dole (1987):** The Supreme Court upheld a law that authorized the Secretary of Transportation to withhold a portion of federal highway funds from states that did not raise their minimum drinking age to 21 on the grounds that the legislation was pursuant to the general welfare clause.

The powers granted to the states are scattered throughout the Constitution. Here are some examples:

- States determine qualifications for voting (Article I, Section 2; limited thereafter by Fourteenth, Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments).
- State governors call elections to fill vacancies in the House of Representatives (Article I, Section 2).
- Senators are chosen by state legislatures (Article I, Section 3; superseded by Seventeenth Amendment).
- State governors fill vacancies in the Senate (Article I, Section 3).
- The time, place, and manner of elections determined by state legislatures (Article I, Section 4).
- State legislatures determine the method of appointing electors (Article II, Section 1).
- State legislatures can call a convention to propose amendments to the Constitution (Article V).
- State legislatures ratify amendments to the Constitution (Article V).

The Tenth Amendment sets out a large if undefined policy sphere for the states. Reserved powers include the following, for example:

- Establishing public schools including the curriculum and length of the school year
- Protecting the public health and safety, for example, police, fire, and paramedic services
- Regulating businesses that operate in the state

The boundary between the powers of the states (those given in the Constitution and the reserved powers) and those of the federal government (enumerated powers and the implied powers) is not fixed. The areas where the two overlap are called **concurrent powers**— and involve levying and collecting taxes, creating courts, borrowing money, and claiming private property for public use (eminent domain).

The relations between states are an important element of the federal system. Although states cannot enter into treaties or alliances with other countries, they can enter into agreements with each other. Such an agreement is known as an **interstate compact**, and may involve all fifty states—for example, the Interstate Compact for the Placement of Children regarding adoption across state lines—or a group of states in a region. The Colorado River Compact (1922) was an agreement among Arizona, California, Nevada, Colorado, New Mexico, Utah, and Wyoming on the use of water from the Colorado River.

The Supreme Court has original jurisdiction, which means it is the first court to hear a case, in a suit involving two states. When Arizona and California, for example, could not reach a decision on their respective allotments of water from the Colorado River, the Supreme Court resolved the issue.

There are three basic principles that govern inter-state relations under the Constitution:

- **Full faith and credit clause:** Each state is obligated to recognize the laws, public records, and court decisions of every other state. An individual cannot avoid paying damages ordered by a court in California just by moving to Texas. The obligation imposed by the full faith and credit clause is not absolute, however. In *Williams v. North Carolina* (1945), the Supreme Court ruled against “quickie” divorces where parties did not establish residence in good faith. More recently, Congress passed the Defense of Marriage Act (1996) in response to action in the Hawaiian courts relating to same-sex marriage. Under the law, states are not required to recognize such marriages.
- **Extradition:** A fugitive from justice in one state must be returned to the state where he or she committed the crime. States can go to federal courts to enforce an extradition request according to the Supreme Court in *Puerto Rico v. Branstad* (1987).
- **Privileges and immunities:** Citizens of one state must be treated the same as citizens of every other state. The provision, however, does not prevent states from imposing reasonable restrictions, such as establishing minimum residency requirements for voting or holding public office, or charging out-of-state residents higher tuition than in-state residents at state colleges and universities.

## Types of Federalism

Federalism is a fluid concept. Over the course of American history, the relationship between the federal government and the states has fluctuated depending on the issues of the times.

**Dual federalism** was the popular model throughout most of the nineteenth century and up to the Depression of the 1930s. It held that the authority of the federal government was limited to enumerated powers — those specifically granted to Congress, the president, and the courts in the Constitution. All other powers fall to the states. Proponents of dual federalism tended to ignore the elastic clause, which expanded the power of Congress to enact new laws, and played up the Tenth Amendment that focused on the authority of the states. They also maintained that the federal government and the states are each sovereign in their own sphere, and that tension always characterizes federal-state relations. Political scientists often refer to dual federalism as **layer cake federalism** to illustrate these points.

The emphasis on the Tenth Amendment in dual federalism when taken to its logical conclusion led to the theory of nullification. This extreme states’ rights position held that the states — not the people — created the federal government, and the states had the power to declare a law passed by Congress null and void if it was contrary to a very strict interpretation of the Constitution. Dual federalism provided an important context for the events leading up to the Civil War.

As the power of the federal government expanded to meet the crisis of the Depression, a new model of federalism emerged — **cooperative federalism**. As the name implies, the tension, and

indeed, antagonism between the states and federal government disappears in this model. Power is not concentrated in one level or the other, but both work together to carry out governmental functions. This is sometimes called **marble cake federalism** because the responsibilities of the federal and state governments are “mixed and mingled.” Backers of cooperative federalism take a much narrower view of the Tenth Amendment and broadly interpret the elastic clause.

While many political scientists see cooperative federalism extending through the 1960s, others see a change during the Johnson administration (1963–1969). During this period, **creative federalism** (also known as **centralized federalism**) emphasized that the federal government decided what the needs of the country were, and pressed these on the states, which were either unwilling or unable to address issues relating to race, poverty, and urban development. Officials in Washington were willing to withhold funds from the states, and, indeed, sometimes bypassed the states completely. Johnson’s Great Society, which included programs such as Head Start, the War on Poverty, and Model Cities, saw the federal government working directly with cities, counties, school districts, and even the non-profit sector to provide a broad range of social services.

Beginning in the 1970s, the pendulum swung back toward the states. **New federalism**, introduced by the Nixon Administration (1969–1973), held that it was time that power flowed from the federal government back to states and localities, which better knew what the needs of the people were. It involved two key programs:

- **General revenue sharing:** Under this program, federal dollars were given to the states based on a complicated statistical formula with few if any restrictions on how the money would be spent.
- **Special revenue sharing:** This program combined funding for various programs into a single block grant in such broad policy areas as health care, crime prevention, and community development, and again allowed the states greater freedom as to how they could use the money.

Block grants were an important element of Ronald Reagan’s effort to control the growth of the federal government. But the federal dollars available to the states declined in the 1980s and the promise of fewer restrictions did not fully materialize. States responded by raising taxes, cutting programs, privatizing services, and looking for other revenue sources to make up general budget shortfalls.

Clearly, the flow of money is the key component to federal-state relations. This is sometimes called **fiscal federalism**. Revenue sharing (now defunct) and block grants are just two elements. Most federal funding that states and municipalities get continues to come through **categorical grants**. Categorical grants are given for a very specific purpose, typically require the state to “match” the spending, and do carry numerous limitations called **conditions of aid**. The latter can include non-discriminatory hiring practices/affirmative action, environmental impact reports, and “prevailing” wage requirements. Conditions of aid can also be used to force a state to adopt a policy it might be reluctant to. During the energy crisis of the 1970s, a threat to reduce federal highway funds was used to get the state to lower the speed limit to 55 mph. Congress turned to essentially the same tactic to compel the states to raise their drinking age to 21 (see *South Dakota v. Dole*; 1987).

There are two types of categorical grants — **project grants** and **formula grants**. Project grants are made on the basis of a competitive application process. Grants for research to individual investigators, hospitals, or universities from the National Institutes of Health are project grants. As the name *formula grants* suggests, a calculation determines how the funds available through a formula grant are distributed. The formula may take into account a number of possible variables — population, percentage of the population below the poverty line, per-capita income.

One of the most contentious federal-state issues of the 1990s concerned mandates. A **mandate** is a law, regulation, or court decision that compels a state or local government to take an action under the threat of legal action or loss/reduction of federal funding. In most instances, it is not the action that is troubling, but the fact that states and municipalities have to shoulder the financial burden. Under the Americans with Disabilities Act (1990), for example, states were required to make public facilities accessible to the handicapped but Congress allocated no funds to the states for that purpose (in other words, it was an unfunded mandate). Many environmental laws include mandates as well. The problem remains controversial even though Congress passed the Unfunded Mandates Reform Act in 1995. It requires both the House and the Senate to take a closer look at bills that impose at least \$50 million in unfunded mandates, and has the Congressional Budget Office report on the fiscal impact of all bills with certain exceptions.

Local and state governments are not powerless in their dealings with Washington. In addition to congressional delegations that represent their concerns, cities and states have organized just like any other interest group to press their programs before both Congress and the executive branch. Groups such as the National Governors' Conference, the Council of State Governments, the National League of Cities and the U.S. Conference of Mayors are known as **intergovernmental lobbies** and have a long history of influencing federal policy.

## Advantages/Disadvantages of Federalism

It is clear that there is no perfect balance to be achieved in federal-state relations. Even with the attempts over the last quarter of a century to give states and localities a greater say in how federal money is used, the fact remains that it is still federal money and the federal government has a large say as to how it should be used. Many Americans may complain about how big the federal government is but it remains the dominant partner in the equation.

Political scientists point to several advantages of a federal system. It promotes democracy by giving people and groups various levels of government to press their claims, allows for policy experimentation, and allows regional interests and diversity to be heard.

### Advantages

- Federalism creates multiple layers of government, increases the possibility of political participation, and provides greater access to the political process. Not only does a person have the opportunity to vote for local as well as national officials, but he or she can become more involved in grass roots politics. During the 1950s and 1960s, for example, it was obvious to African Americans that Congress would be much more receptive to civil rights issues than state legislatures in the South.

- Federalism promotes innovation in handling complex policy questions. States and even local governments are often the laboratories of change. When healthcare reform at the national level failed under Clinton, states pioneered the idea of health insurance pools that allowed small businesses to join together to buy insurance at lower rates with better coverage. Imposing work requirements on welfare recipients also began with the states.
- The fact that there are both state and local centers of power gives regional interest groups a strong political voice on the national scene. Ranchers in the Rocky Mountain West were able to press the federal government to open more public land to private use by influencing their congressional delegations to support the so-called “Sage Brush Rebellion,” which began in the late 1970s.
- Federalism encourages diversity on a broad range of policy questions. States are free to develop their own positions on such questions as affirmative action, assisted suicide, and the death penalty. For example, the California Civil Rights Initiative, which voters approved in 1996, formally ended state and local affirmative action programs, including those affecting admissions to the state’s university system; Michigan, on the other hand, continues to take race into account at its institutions of higher learning. Texas law provides for the death penalty while Illinois has suspended executions pending a review of the criminal justice system.

## **Disadvantages**

Critics argue that federalism actually is counter-productive. They say the structure of the political system actually turns people off to politics, produces inequality, and is often a barrier to important national policies.

- Federalism leads to the fragmentation of American politics. Three levels of government and a myriad of government agencies can make the political process seem too complicated. Federalism provides so many outlets for political participation that voters become apathetic. Indeed, one of the explanations for declining voter turnout is that there are simply too many elections. The number of voters is often extremely small in school board or county commissioner elections.
- There is a basic inequity in the federal system. Some states and municipalities are wealthier than others, and this creates a disparity in the level of public services that each provides. Per-pupil spending is much lower in Mississippi than in Massachusetts, and the same is true for welfare payments.
- Strong state and local constituencies can obstruct and delay the implementation of national policy. This was clearly the case with both court decisions and legislation affecting civil rights. The desegregation of public schools did not happen “with all deliberate speed” because of strong opposition in communities as varied as Little Rock, Arkansas; Boston, Massachusetts; and Los Angeles, California.