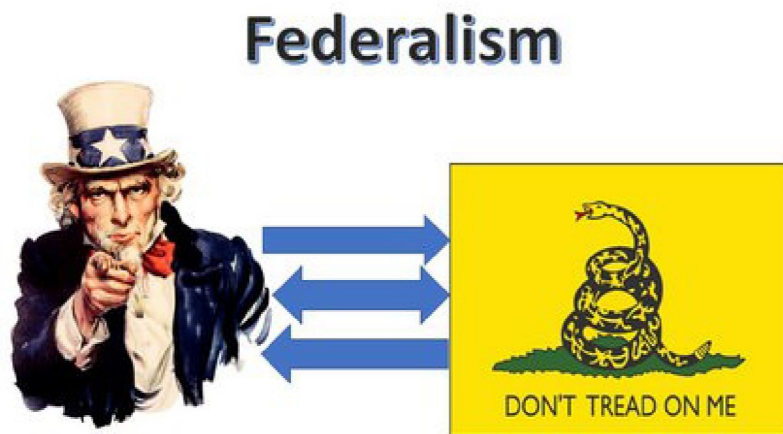


3.4 Structures and Functions of Governmental Levels

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[Figure 1]

Can Federalism also include individual liberties?

Governmental Power and Federalism

In designing the Constitutional pieces of Federalism, the Founding Fathers were faced with a difficult “balancing act.” They had to devise and implement a plan that would address the needs of the national government while preserving the rights of the states and the people to govern themselves in a way that was free from the interference of a central government.

The plan they devised would assign all powers having to do with common interests of the states (as a nation) such as national defense and control over the nation’s money to the new national government. In theory, all other powers would remain at the state and local level.

Understanding Constitutional Powers in our Federal System

This was a solution that proven practical to the needs of both the nation and the states. This is because by the time the Constitution was drafted in 1787, the United States was already on a growth spurt with people moving westward into new territories at a rapid pace.

This made it necessary for the new national government to control an ever-increasing geographic area. Since the people were so spread apart, and the modern transportation and communications systems we rely so heavily on today were not yet available, it was only practical and right to leave the bulk of governmental control at the state and local level to whatever extent was possible while still allowing the new national government to operate.

Since the framers were also walking a very delicate line of balance and diplomacy with the states, they recognized that making very specific rules and procedures and placing them into the Constitution would only hinder the ability to govern at the national and the local level. So they set about to make a set of general rules that would be briefly stated and allow both the nation and the individual states enough flexibility to meet the needs of the people while still allowing for the expansion of our new nation.



[Figure 2]

The Nation's Capitol Building in Washington, D.C.

National Powers

The Constitution went on to outline a federal system of government that would provide for a strong and cohesive national government while still protecting the rights of the states. This is why the new federal system allows some powers to stay at the national level while reserving others to the states and requiring that the national and state governments must share other powers as well.

Expressed Powers

The Constitution lists, or enumerates, powers that will be specifically given to the national government. These are generally referred to as *expressed powers* and sometimes called enumerated powers. When we examine Article I, Section 8, a list of powers are given to the legislative branch on behalf of the new national government. These include the power to issue money, collect taxes, pay governmental debts, regulate trade among the states and with other nations, declare war, and raise and maintain an army and a navy. In

other parts of the Constitution, Article II gives the president civilian authority over the armed forces in his role as “Commander in Chief.” The same Article gives the President the authority to conduct foreign relations on behalf of the United States as well. Article III gives the Judicial Branch the power to rule on constitutional issues and cases involving the U.S. government including disputes among the states. These powers cannot be exercised alone. Sometimes they may involve the use of other powers which may have been unforeseen or assumed on the part of the Founding Fathers. We call these *Implied Powers*.

Implied Powers

The national government also possesses implied powers that may not have been specifically listed in the Constitution but are assumed or implied to be present. These powers are logical extensions of the expressed powers, and their constitutional source originates from the “elastic clause” found in Article I, Section 8 of the Constitution. This clause states:

“

“[Congress can] 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.” – U.S. Constitution, Article I, Section 8

”

This clause, also called the necessary and proper clause, is generally referred to as the “elastic clause” because it has been used to stretch or extend the powers of Congress throughout history. Many policies of Congress, ranging from the interstate highway system, contemporary drug laws, and food and occupational safety laws are justified through the government’s use of implied powers. As an example, the Sixteenth Amendment gives Congress the power to collect income taxes, but the Constitution doesn’t say how taxes are to be collected or assessed. Using its implied powers, Congress was able to establish the Internal Revenue Service, or the agency that collects taxes on behalf of the federal government.

Just a few of the implied powers that Congress exercises are:

- The power to financially support public schools.
- The power to maintain the Federal Reserve Board.
- The power to prohibit discrimination in restaurants, hotels, and other public accommodations.

- The power to draft people into the armed services.
- The power to establish a minimum wage.
- The power to monitor air and water pollution.
- The power to limit the number of immigrants to the U.S.
- The power to regulate monopolies and other practices which limit competition.

Inherent Powers

The national government also has inherent powers, which are those powers that have historically been recognized as naturally belonging to all governments that operate as sovereign nations. In other words, the national government has these powers simply because ***it is*** a national government, therefore, it must have the power to conduct certain types of business. These powers include the authority to acquire new territories and to conduct foreign affairs with other nations. These are things that the United States has done since its earliest founding even though they are not specifically listed in the Constitution.



[Figure 3]

The United States flag and the Texas flag fly over the Texas Capitol building

State Powers

While the Constitution specifically lists powers that the national government has the authority to exercise, it is much more silent about state-level powers. This is because it was anticipated that if something wasn't clearly authorized for the government to do, it would most likely be a power for the states or the people. In fact, James Madison, in *Federalist Paper* No. 45, explained that the constitutional powers that had been granted to the national government were "few and defined." In contrast, the powers assumed to be given to the

states were “numerous and indefinite.” To protect the rights of the states, Madison worked his idea into the Bill of Rights in 1791.

“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.”

Tenth Amendment

The Tenth Amendment of the Constitution is considered to be the foundation of states’ rights and constitutional Federalism. This provision is often called the reserved powers clause. While the Constitution does not specifically enumerate or list reserved powers, they are considered as belonging to the states because the Constitution doesn’t delegate them to the national government and it doesn’t prohibit the states from exercising them.

State governments have depended on their reserved powers in order to regulate the health, public safety, moral behavior, and general welfare of their citizens. In fact, the states are the most responsible for the laws that most directly affect people as they go about their daily lives. As an example, it is the state that gives you the license to drive a car, that specifies what you must learn in school to receive a diploma, and regulates your daily behavior through criminal and civil laws. Among other reserved powers are the ability to regulate marriage, to form or authorize the formation of a local government, to conduct elections, and to control and regulate public schools. In addition, states have the power to regulate and license businesses that operate within their boundaries and to issue licenses to professionals like doctors, attorneys, plumbers, nurses, the person who cuts your hair, and of course, teachers.

POWERS GIVEN TO THE NATIONAL GOVERNMENT:	POWERS OF THE STATE GOVERNMENTS:
Borrow and coin money	Draw electoral district lines based on population
Levy and collect taxes	Conduct elections
Conduct foreign relations	Maintain state militias (national guards)
Raise armies, declare war and make peace	Regulate commerce within the state
Regulate interstate commerce and with foreign nations	Establish and operate state court systems
Establish post offices	Levy and collect taxes
Regulate immigration and naturalization	Ratify amendments to the Constitution of the United States
Establish and operate the federal court system	Exercise powers not specifically delegated to the national government or prohibited to the states (Tenth Amendment)
Make all laws necessary and proper to execute their national powers (“elastic clause”)	

Shared Powers

Besides their reserved powers, the states may also share powers with the national government. If the Constitution does not specifically state that power is *exclusively* given to the national government, the states may exercise that power as well. As an example, 46 states in this country levy an income tax on their citizens (right along with the federal government). This is because the power to levy and collect taxes is considered a concurrent power that can be exercised by both the states and the national government.

Besides collecting taxes, both the national and state governments may also establish courts, make and enforce laws, build roads, provide education and borrow and spend money. This system of shared powers means that citizens are subject to two levels of authority. For instance, you must follow both federal law and Texas state law at the same time.

What happens when federal and state laws come into conflict with each other? Who should win the argument? The Founding Fathers carefully considered this question and laid out their answer in Article VI of the Constitution in what is commonly referred to as the “Supremacy Clause.” This clause states that the Constitution, national laws, and national treaties form the “supreme law of the land.” It also states that judges in every state must obey the Constitution, even if it contradicts state laws. Remember, the supremacy clause establishes that national laws are supreme to state and local laws to the extent that the national government and its laws comply with the Constitution which is the supreme law of the land. This is where the role of the Supreme Court becomes so critical in our system of government, as it is the interpreter and enforcer of the Constitution in such cases.

Concurrent or Shared Powers

Limiting National and State Powers

Besides granting power to the national and state governments, the Constitution also denies certain powers to the national government and to the states. By placing such limits in the Constitution, the Founding Fathers believed they were devising a way by which both the rule of law and the principle of limited government would be integrated into our governmental system.

Limits on State Government

The Constitution was designed to keep the national government from growing too powerful. These provisions were designed to protect the people from specific injustices the colonists had experienced prior to and during the American Revolution.

To keep the states and national government from conflicting with each other, Article I, Section 10, denies specific powers to the state governments. As an example, the states are not allowed to coin their own money, tax imports and exports from other states, maintain their own armies, engage in separate wars, or enter into treaties with each other states or nations. The Founding Fathers believed these would undermine the authority of the national government and inhibit national unity.

As an example, Article I, Section 9 prohibits the government from denying a citizen the right to a trial by jury, forbids the federal government or the states from granting “titles of nobility,” denies the taxing of exports or imports between the states, forbids the passing of laws that favor one state over another, and requires Congress to approve all expenditures of money. In addition, the national government cannot exercise a power that has been reserved for the states, nor may the national government pass a law that threatens the federal system as established by Congress.

The Bill of Rights further limits the powers of the national government by prohibiting it from interfering with basic liberties such as freedom of speech, press, religion, or assembly.

Powers Denied to Both Levels

Still, other powers have been specifically denied by the Constitution to both the national and state governments. For example, neither the national government nor the states may deny people accused of crimes the right to a trial by jury or grant titles of nobility. In addition, the Constitution prohibits both the national government and the states from creating *ex post facto* laws, which are laws made “after the fact”. In other words, considering something as a crime when it wasn’t a crime at the time the offense was committed.

Defining National and State Relationships

Besides dividing governmental power, the Constitution also addresses the responsibilities that the national government and the state governments have toward each other. If this provision not been included in the Constitution, there is a great possibility that Federalism would not have succeeded because these provisions serve as “guidelines for interaction” between the national and state governments.

[Figure 5]

[Figure 7]

The Nation and the States

The Founding Fathers wanted to be sure that state governments would be Republics--democracies led by elected representatives. To achieve this, Article IV, Section 4 of the

Constitution specifically requires the national government to “guarantee to every State in the Union a Republican form of government.” This means the national government will only admit or recognize states that have representative forms of government.

The national government has the responsibility to protect the states from foreign invasion and domestic uprisings. As a recent example, the national government responded with military force when the Twin Towers and the Pentagon were attacked on September 11, 2001. After this, the national government has conducted a series of domestic and foreign operations designed to address the threat of terrorism.

Additionally, the Constitution requires that the states be treated as equals by the national government. Equal representation must be given in the Senate (two senators to each state) in order to afford the states equal representation. Also, the national government cannot tax people of one state more than another and even though the national government can admit new states, it cannot divide or allow the division of states that already exist or change their boundaries in any way.

[Figure 8]

Relationships Between The States

Each of the states is given the power to manage what happens within their borders, but the Constitution also encourages states to cooperate with each other. Can you imagine what this country would be like if each state was able to establish its own rules on who could enter or leave (as nations do)? What if the states didn't recognize each other's laws? What would it be like if you could commit a crime in one state and move to another without the ability to be returned to face a trial for the crime you committed? The Founding Fathers specifically considered these issues and wanted to prevent them from happening. While state laws are different and states are not required to enforce the criminal laws of another state, the Constitution requires states to extradite, or return someone accused of a crime in another state, in order to face trial in the state where the offense allegedly took place.

Article IV of the Constitution, also referred to as the full faith and credit clause, makes sure that extradition takes place when someone flees a state to escape punishment. It also requires that states give “full faith and credit” to the public acts, official records, and judicial proceedings of all states. For instance, if you sign a contract to buy a new car on credit in one state, you must fulfill your obligation to pay for the car regardless of which state you live in or may move to. It also means that a state driver's license is valid throughout the United States regardless of the state that issued it. More recently this provision had been the source of controversy before same-sex marriage was made legal in all states. The Constitution theoretically required states to recognize the marriage license of another state, meaning that same-sex marriages had been contested between states because some states had begun to issue marriage licenses to same-sex couples.

The Constitution also forbids states from discriminating against citizens of other states. This is done through Article IV, Section 2. It is sometimes called the privileges and immunities clause. It specifically states that citizens of each state should receive all the “privileges and immunities” of whichever state they are in. For example, if you are from Texas and are visiting or living in New York City, you will pay the same sales tax and enjoy the same police and fire protection as other New Yorkers (and vice-versa).

There are some exceptions to the privileges and immunities clause. For instance, a state does not have to offer reduced tuition to someone who attends from another state (charging “out of state tuition” to students from other states regardless of residency). Also, a state may charge its own residents less for some services that are funded by taxes such as public health facilities. A state may also limit eligibility for welfare or social services on the basis of residency.

Taking Local Governments into Account

The Constitution does not address local governments. This makes the creation and regulation of local governments a power reserved for the states. Each state includes a plan for local governance in their respective state constitutions, and the relationship between state and local government differs from state to state. States differ in how they establish and recognize local governments, so they can respond better to the needs of their respective citizens at a local level.

ISSUE FOR DEBATE: SAME-SEX MARRIAGE

Prepare a classroom debate and/or to write a paper either defending or criticizing the constitutionality of same-sex marriage from the perspective of federalism. Be sure to use information in the articles (with proper citations) in order to support and defend your position on the issue.

Same-Sex Marriage Fast Facts. CNN.com. May 23, 2015. <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/>

An Often-Overlooked Clause in the Constitution Points The Way to Same-Sex Marriage. By Jay Michaelson. The Daily Beast. <http://www.thedailybeast.com/articles/2013/04/02/an-often-overlooked-clause-in-the-constitution-points-the-way-to-same-sex-marriage.html>

Alabama's 'Dramatic Defiance' on Gay Marriage. By Connor Friedersdorf. The Atlantic Magazine. Feb. 9, 2015. <http://www.theatlantic.com/politics/archive/2015/02/forget-alabama-federalism-has-been-great-for-gay-marriage/385289/>

Overview of Same-Sex Marriage Laws. National Conference of State Legislatures. <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>

The Case Against Gay Marriage: Let My People Vote. Economist Magazine. April 21, 2015. <http://www.economist.com/blogs/democracyinamerica/2015/04/case-against-gay-marriage>

Same-Sex Marriage: <https://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages>

Same-Sex Marriage

Beginning in the 1970s, advocates fought for the right to marry to extend to all. Small gains were made one state at a time until through various state court rulings, state legislation, direct popular votes, and federal court rulings in 2015, this became a reality. Same-sex marriage that is now recognized by the law is called marriage equality.

Each state has separate marriage laws, but they must follow the federal ruling by the Supreme Court that recognizes marriage as a fundamental right that is guaranteed by both the Equal Protection Clause and the Fourteenth Amendment.



[Figure 7]

Cheyenne chiefs gather with thousands of other American Indians on the National Mall for a Native nations procession to dedicate the Smithsonian's National Museum of the American Indian, Washington, D.C., September 21, 2004

Native Americans

Article I, Section 8 grants the national government the power “to regulate commerce With the Indian Tribes.” This clause has been used to make treaties with Native American nations and to recognize those nations as sovereign tribal entities (like countries within a country).

While, in most cases, the treaties the national government made resulted in the loss of Native American land, today the sovereignty of Native American tribes is recognized by the federal government. Native Americans were not even granted full citizenship until 1924. We will learn more about the issue of Native Americans and Civil Rights in a later section.
