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# Federalism, U.S. Style

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## Introduction

The closest thing we in the United States have to what the British and Canadians call devolution is federalism: the sharing of power between the states and the federal government.

A U.S. Supreme Court decision in 2001, **Lorillard Tobacco v. Reilly** 533 U.S. 525, sheds some light on the tensions between the power of the federal government and the states. The events that led up to the Court's decision actually began several years ago when the state of Massachusetts enacted a regulation limiting the advertising of tobacco products within 1,000 feet of playgrounds, parks and schools. One might think that a state would have the authority to pass such a law, but that is not what the Supreme Court decided.

A federal law already on the books - the Cigarette Labelling and Advertising Act - prescribed health warnings that must appear on packaging and advertisements for cigarettes. The tobacco companies challenged the state law (Reilly was the Attorney General of Massachusetts), and the Supreme Court ultimately ruled that the federal act preempted the state from imposing any requirement or prohibition based on smoking and health with respect to the advertising or promotion of cigarettes.

In **Lorillard**, the Court focused on the Supremacy Clause - Article VI, clause 2 - of the U.S. Constitution, which commands that the laws of the United States are the supreme law of the land. But when we look at federal-state issues, we usually think first of the Tenth Amendment to the Constitution: "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."

Although the Tenth Amendment is probably the clearest example of federalist principles in the Constitution, it does not always constrain on federal power. Its authority is tempered by other constitutional principles, including the Commerce Clause (Art.I, Sec.8, cl.3), the Necessary and Proper Clause (Art.I, Sec.18, cl.18), and as we saw in the **Lorillard case**, the Supremacy Clause.

During the Twentieth Century the Commerce Clause became the most important source of federal power. The federal government has power to regulate commerce with foreign nations and among the various states, including the channels of commerce (such as roads and railroad tracks) the instrumentalities of commerce (such as trucks and trains), and also activities that have a substantial effect on commerce. The Necessary and Proper Clause authorises Congress to make all laws that are necessary and proper for executing Congress's constitutional powers, and also those of the executive branch, which includes the federal administrative agencies.

In this brief article I will take a quick (and concededly, cursory) tour of 200 years of the evolution of federal-state relationships in the United States, especially U.S. Supreme Court decisions interpreting the Constitution.

## Evolution of federal-state relationships in the US

### Early days and the US Constitution

The story begins in 1788. James Madison, writing in Federalist Paper Number 45, explains that a strong federal government is needed to address the historical failures of confederacies, due to lack of any real central authority. One year later the U.S. Constitution was ratified. The case of **Chisholm v. Georgia** 2 U.S. 419 was heard in 1793. Here the Supreme Court, over the complaint of the state of Georgia, held that the federal courts had jurisdiction over suits by a citizen of one state against another state. But Chisholm did not last long. In 1798 the Eleventh Amendment was ratified, thereby preventing suits against a state by citizens of other states or by foreigners.

The same year also saw the end of the Alien and Sedition Acts. President John Adams was using these two federal acts to stifle political opposition. The Sedition Act proscribed spoken or written criticism of the government, Congress, or the President. The Alien Enemies Act gave the President the power to imprison or deport aliens suspected of posing



a threat to the national government. The Virginia and Kentucky legislatures considered these acts unconstitutional and passed resolutions nullifying them. Rather than fight, Congress thought it politically expedient to let the Acts expire.

## Nineteenth century decisions and the appointment of John Marshall

In 1801, Adams appointed John Marshall Chief Justice of the U.S. Supreme Court. In 1803, the “Great Chief Justice,” as Marshall is known, wrote the decision in **Marbury v. Madison** (5 U.S. 137). The facts of **Marbury** are not of great consequence: the case centred on the refusal of a new president, Thomas Jefferson, to finalise the appointment of a federal justice of the peace to the bench. Adams, a Federalist, had made several appointments late in his term, including one for William Marbury. Jefferson assumed the Presidency before the appointment was finalised, and ordered James Madison, his Secretary of State, not to deliver the appointment. Marbury sued. What is important in this case is not the result (Marbury lost), but rather the Court’s decree that it had the power to declare laws unconstitutional: the power of judicial review rests ultimately in the hands of the Supreme Court.

We move ahead to 1816 and the case **Martin v Hunter’s Lessee** 14 U.S. 304. Here the Court still led by Marshall extended judicial review over state court judgments, and any state action that involved a question of federal law.

Three years later, in 1819, the decision in **McCulloch v Maryland** 17 U.S. 316 further expanded federal power under the authority of the Constitution’s Necessary and Proper Clause. The state of Maryland tried to tax the operations of the Second Bank of the United States, which was created in 1816 to address the fiscal crises resulting from the War of 1812. McCulloch, a cashier at the federal bank, refused to pay the tax, and the state of Maryland sued.

The Court reasoned that the Necessary and Proper Clause meant that the federal government could take whatever actions appropriate to implement its prescribed powers. Marshall wrote that when the Constitution is silent as to powers reserved to the states, the Court could assume that the federal government may exercise its authority. In affirming the constitutionality of the Second Bank of the United States, the Court endorsed a strong interpretation of federal power.

In 1824 **Gibbons v Ogden** 22 U.S. 1 was heard. The state of New York believed that it had exclusive authority to grant licences to individuals to navigate steamboats from New York to New Jersey, and granted Aaron Ogden a licence as part of the monopoly. However, Thomas Gibbons received a similar licence from Congress to operate a ferry service along the same route. The Supreme Court, still under the leadership of Marshall, held that the New York monopoly directly conflicted with Congress’s power to

regulate interstate commerce, and was therefore unconstitutional. **Gibbons** marked the beginning of the ascendancy of the Commerce Clause by extending it to intercourse between states.

We see a resurgence of state power after Marshall died in 1835, when only one year later, President Andrew Jackson and Congress let the charter of the Second Bank of the United States expire. A populist, Jackson supported a concept called dual-federalism - mutually exclusive spheres of state and federal power. Jackson believed that exempting the operations of the federal bank from state taxation violated the Tenth Amendment, which reserves non-delegated power to the state.

Move forward forty years to 1873 and the **Slaughterhouse Cases** (83 U.S. 36). The Louisiana legislature passed a law granting a corporation the exclusive right to operate slaughterhouses in three parishes for twenty-five years. Butchers in New Orleans argued that the state violated their Fourteenth Amendment rights, including the Privilege and Immunities and Due Process clauses. In holding that Louisiana *could* regulate slaughterhouses, the Court wrote that the right of butchers to engage in business was not a “privilege and immunity” protected by the Fourteenth Amendment, nor property protected by the Due Process clause. The Court drew a distinction between federal and state citizenship: the Fourteenth Amendment did not prevent the state from exercising jurisdiction over the rights of its citizens, and the privileges of state citizenship remained under the sole protection of state government.

## Early twentieth century and reassertion of federal authority

Soon after the turn of the Century, the Supreme Court decided **Lochner v New York** 198 U.S. 45. In 1905 the Court used the due process clause, under a theory of fundamental economic rights, to overturn a New York law that limited the number of hours in a baker’s working week. Although in fact this was a victory for the business sector over government regulation – in this case regulation by the state – it was a strong assertion of federal authority through the Supreme Court’s decision-making power. **Lochner** began what is called the substantive due process era, during which the Court struck down various state laws which it thought interfered with employers’ rights to contract with their employees.

## The Great Depression and Franklin D. Roosevelt

We jump over the First World War and the Roaring Twenties to the Great Depression and the Roosevelt era. FDR believed that a centralised response was needed to remedy the depression. The Supreme Court believed otherwise. During Roosevelt’s first term, the Court rejected



several New Deal programs. One such example is the 1935 case, **Schechter Poultry Corp. v. United States** 295 U.S. 495 where the Court declared the National Industrial Recovery Act of 1933 unconstitutional.

Roosevelt's solution was a court packing plan: appoint new Supreme Court justices whenever a sitting member of the Court turned seventy years of age and did not retire. Roosevelt announced his plan in a March 7, 1937 Fireside Chat. Twenty days later, the Court handed down its decision in **West Coast Hotel Co. v. Parrish** 300 U.S. 379. The Court overturned **Lochner**, and upheld a Washington state statute establishing a minimum wage for women. Some people refer to this decision as the "switch in time that saves nine," the story being that by changing his vote to support the legislation, Justice Roberts made FDR's Court Packing legislation unnecessary.

That same year the Court further expanded Congress's power to regulate commerce in **National Labor Relations Board v. Jones & Laughlin Steel Corp** 301 U.S. 57. The Jones & Laughlin Steel Company had fired ten workers who were union leaders, and then ignored an order by the National Labor Relations Board to rehire the workers. Noting that work stoppages would impact interstate commerce, the Supreme Court upheld the authority of the NLRB under the Commerce Clause. Congress, the Court wrote, has authority to enact all appropriate legislation to protect or advance interstate commerce.

Judicial endorsement of broad federal authority continued into the war years. In 1941 the Court upheld a federal minimum wage law in **United States v. Darby** 312 U.S. 100. The Court marginalized the Tenth Amendment, writing that it merely described the obvious; there was no set limit upon the enumerated powers of Congress. In overruling a case it decided twenty-two years earlier **Hammer v. Dagenhart** 247 U.S. 251 that held that Congress could not exclude the products of child labour from interstate commerce, in **Darby** the court held that prohibiting the shipment interstate of goods produced under sub-standard labour conditions was indeed within Congress's authority.

## The Lyndon B. Johnson Civil Rights era

We will skip over the Eisenhower years and jump to the Johnson Civil Rights era. In **Heart of Atlanta Hotel v. United States** 379 U.S. 241, the Court upheld the Civil Rights Act of 1964 and, in particular, provisions that prohibited racial discrimination in public places, including public accommodation. Noting that 75% of the hotel's business came from out-of-state guests, the Court concluded that its business clearly affected interstate commerce. Federal legislation, the Court wrote, would be upheld under the Commerce Clause if there was any "rational basis" that explained Congressional action.

But the liberal 1960's gave way to a more conservative America, and a more conservative Court. The end of the Twentieth Century saw a startling break with fifty years of jurisprudence, especially after Clarence Thomas replaced Thurgood Marshall on the Court in 1991. Soon afterwards, in 1992 the Court ruled in **New York v. United States** 505 U.S. 144 that the federal government may not compel or coerce the States to enact or administer a federal regulatory program, here the storage of radioactive waste.

## Resurgence of a more conservative court with the appointment of Clarence Thomas

In 1995 **United States v. Lopez** 514 U.S. 549 was heard. Here, a high school student who carried a concealed handgun into his school was charged with violating the federal Gun Free School Zones Act of 1990, which forbade possessing firearms in a school zone. The Court rejected the government's argument that possessing guns near schools was a "commercial activity" that could be regulated under the Commerce Clause. Lopez was the first case since 1936 in which the Court ruled that Congress had exceeded its power under the Commerce Clause.

**Printz v. United States** 521 U.S. 898 was another gun case, decided by the Court in 1997. The federal Brady Act authorised the Attorney General of the United States to establish a national system for checking criminal records of potential gun purchasers. During an interim period, however, state officers were to conduct the background checks. In an example of the "unfunded mandates" justification used occasionally to overturn federal legislation, the Court held that the federal government may not compel state officers either to administer or to enforce a federal regulatory scheme, especially without compensation.

If you read **Printz** you will see the heated debates among the justices about what they believe to be the appropriate balance between federal and state power. Justice Scalia resurrected Jackson's dual sovereignty approach to federal-state issues. The dissenters – Justices Stevens, Souter, Ginsburg and Breyer – believed that the federal legislation was a legitimate exercise of federal power under the Commerce Clause, the Necessary and Proper Clause, and the Supremacy Clause.

At the turn of the millennium, Congress used both the Eleventh and Fourteenth Amendments to strike down federal laws. In **Kimel v. Florida Board of Regents** 528 U.S. 62 the Court found that although Congress intended to abrogate the states' Eleventh Amendment immunity when it passed the Age Discrimination in Employment Act of 1967 (ADEA), and make states liable for violating the ADEA, such abrogation exceeded Congress' authority under section 5 of the Fourteenth Amendment. One year after **Kimel**, the Court ruled in **University of Alabama v. Garrett** 531 U.S. 356 that the Eleventh Amendment bars employees



from receiving monetary damages from state employers who violate the Americans with Disabilities Act (ADA).

Arguably the most controversial of all of these decisions was **Bush v. Gore** 521 U.S. 98, the December 2000 case where the U.S. Supreme Court stayed a decision of the Florida Supreme Court ordering a recount of presidential ballots, thereby halting the recount and handing the presidency to George Bush. The Court essentially told the Florida Supreme Court that it (Florida) could not have the final say on how it conducts its elections.

## Conclusions

In 1985, Justice O'Connor wrote in **Garcia v. San Antonio Metropolitan Transit Authority** 469 U.S. 528 of the "battle scene of federalism." In fact, the Court's decisions seem to reveal not so much a battle over

the relationship between the states and the federal government, but instead pure politics. Although the tenor of the Court swings (usually slowly) with changes in societal norms, and with the men and women who sit in the nine chairs, in the last dozen years the Court's decisions seem more transparent than ever before. When the Court disapproves of the state law, as in the **Lorillard** tobacco case, it hoists the Supremacy Clause flag. When it does not approve of the federal law, as in the **Lopez** gun free school zones case, it decrees that Congress exceeded its authority under the Commerce Clause, or as in **Kimel** and **Garrett**, points to the Eleventh Amendment.

The result-oriented decisions of the Supreme Court since the early 1990's make it difficult to predict how the Court will rule on contests between federal and state authority. Battles have been waged for more than two hundred years, and there is no end in sight. Federal-state relationships in the United States are forever changing and are, at least for the time being, unpredictable.



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