DUAL FEDERALISM AND ITS ROLE IN THE REPUBLIC

by Donald Scarinci

On the last day of the Constitutional Convention of 1787, as the delegates were leaving Independence Hall in Philadelphia, a group of curious onlookers asked Benjamin Franklin what form of government the representatives decided upon for the new nation. "A Republic," Franklin said, "If you can keep it." Little did Franklin know that one day in the future, same-sex marriage, the Affordable Care Act, and marijuana could become some of the issues that create a problem for the state and federal governments.

Under the Constitution as ratified, the states retained their autonomy but created a federal structure to unite them on items like commerce and national defense. The states retained a strong voice in the federal government because the state legislatures appointed the United States senators, while the members of the House of Representatives were elected directly by the people in each state based upon population.

After the Civil War, and more intensively after the depression of 1893, when the Progressive Era began, various reforms altered the balance between the federal government and the states. The federal government became stronger but the state governments did not necessarily become weaker. Both governments had their sphere of authority. However, the courts needed to be relied upon more heavily to determine the nature and scope of that authority, particularly with respect to issues where the state and the federal government both have jurisdiction.

In many cases, the courts are asked to side with either states' rights or federal supremacy. The U.S. Supreme Court's recent decisions regarding same-sex marriage,[1] the Affordable Care Act,[2] and immigration[3] have all been influenced by federalism principles.

Federalism under the U.S. Constitution

In America's current federal republic, the national government shares significant power with smaller political subdivisions, such as state governments. A federal system of government has several distinct advantages. To start, it solidifies the separation of powers between the state and the federal

government. While a national government is unifying, state governments also retain authority over their citizens, with whom they enjoy a closer relationship. Accordingly, each state is empowered to address its own unique local issues.

State governments can also experiment with policies, which allows the federal government to learn from their successes and failures before adopting a nationwide policy. Examples include same-sex marriage, healthcare, and paid family leave. By initially removing the federal government from the legislative process when tackling controversial issues, federalism also allows the national government to preserve its stability on a macro level.

When drafting the U.S. Constitution, the framers were careful to divide powers between federal and state governments. As James Madison wrote in *Federalist Paper No. 45*, "the powers delegated by the proposed constitution to the federal government are few and defined" and "[t]hose which are to remain in the state governments are numerous and infinite."[4]

Article I, Section 8 of the U.S. Constitution grants certain express powers to the federal government, such as the authority to coin money and wage war.[5] The "Necessary and Proper Clause" also gives Congress the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and other powers vested in the government of the United States."[6] Meanwhile, the supremacy clause makes federal law "the supreme law of the land," which can override conflicting state laws.[7]

The Constitution also reserves powers for the states. Under the 10th Amendment, "all 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."[8]

Dual Federalism v. Cooperative Federalism

Under a strict construction federalism, also known as dual federalism, the federal government and the state governments are considered co-equals. Certain provisions of the Constitution are also interpreted very narrowly, including the 10th Amendment, the supremacy clause, the necessary and proper clause, and the commerce clause. Under this theory of federalism, the federal government has jurisdiction only if the Constitution expressly grants the authority, while the states are afforded the remaining powers.

In contrast to dual federalism, the theory of cooperative federalism blurs the line of demarcation between the powers and responsibilities of the national government and the state governments. It is often referred to as 'marble cake' federalism in comparison to dual-federalism's 'layer cake' description. Most notably, cooperative federalism allowed many of President Franklin D. Roosevelt's New Deal programs to survive constitutional scrutiny under the theory that the states and the federal government needed to work together closely to address the complex problems created by the Great Depression.[9]

The Supreme Court's Interpretation of Federalism

Over the course of U.S. history, the Supreme Court's approach to federalism has fluctuated. In the early days of the country, the Marshall Court strengthened the power of the federal government. In *McCulloch v. Maryland*, the U.S. Supreme Court held that Congress had implied and necessary powers to create a national bank under its enumerated power of taxation.[10] Chief Justice John Marshall wrote that "the government of the United States…and its laws, when made in the pursuance of the constitution, form the supreme law of the land.… [The people] did not design to make their government dependent on the States."[11]

During Roosevelt's presidency, the federal government similarly expanded its power under the commerce clause. In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, the Supreme Court upheld the National Labor Relations Act of 1935, abandoning its narrower interpretation of the commerce clause.[12] "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control," Chief Justice Charles Evans Hughes explained.[13]

Other landmark cases have favored states' rights. The most extreme example is *Dred Scott v. Sandford,* in which the Supreme Court effectively held that slavery was solely a state issue.[14] More recently, in *United States v. Lopez*, the Court limited the power of Congress under the commerce clause for the first time since the New Deal.[15] The justices struck down the Gun-Free School Zones Act of 1990, which banned possession of handguns in school zones, after concluding the federal law lacked a substantial impact on interstate commerce. In so ruling, the Supreme Court acknowledged that its prior decisions had given broad deference to congressional action under the commerce clause; however, it refused to go further. As Chief Justice William Rehnquist explained:

> The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.[16]

In the early 1990s, the Supreme Court solidified the 10th Amendment's anti-commandeering doctrine, under which Congress is prohibited from commandeering the states to enforce federal law. In *New York v. United States*, the Court agreed with the state of New York that certain provisions in the Low-Level Radioactive Waste Policy Amendments violated its sovereignty under the 10th Amendment.[17]

"While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions," Justice Sandra Day O'Connor wrote on behalf of the majority.[18]

Meanwhile, in *Prinz v. United States*, the Court struck down a provision of the Brady Handgun Violence Prevention Act that forced local law enforcement officials to conduct background checks on gun buyers.[19] "It is incontestable that the Constitution established a system of 'dual sovereignty,'" Justice Antonin Scalia wrote, adding that states "retained a residuary and inviolable sovereignty" from the federal government.[20]

The Supreme Court's Decision in *Gonzales v. Raich*

In *Gonzales v. Raich*,[21] the U.S. Supreme Court considered a lawsuit seeking to enjoin enforcement of the Controlled Substances Act (CSA), alleging that it was unconstitutional because it overstepped the federal government's authority by interfering with state-sanctioned cultivation of doctor-prescribed medical marijuana. The plaintiffs relied on two Supreme Court cases in which the Court had adopted a narrow view of federalism. In addition to *Lopez*, they also cited *U.S. v. Morrison*, in which the Court struck down the Violence Against Women Act of 1994, a federal law that made violent acts against women a federal crime, because it was not sufficiently connected to interstate commerce.[22]

Rejecting the plaintiffs' arguments, the Supreme Court upheld the CSA by a vote of 6-3. The majority rejected the argument that Congress lacked the authority to regulate medical marijuana because it was an *intra*state, legal, and non-commercial activity. In reaching its decision, the majority emphasized that the commerce clause authorizes the federal government to regulate purely local activities that are part of a "class of activities" with a substantial effect on interstate commerce.

The majority relied heavily on *Wickard v. Filburn*, in which the Court held that Congress can regulate purely intrastate activity that is not itself "commercial" (*i.e.,* not produced for sale), if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.[23]

As Justice John Paul Stevens explained:

> The similarities between this case and *Wickard* are striking. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity. In assessing the scope of Congress' Commerce Clause authority, the Court need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U. S. C. §801(5), and concerns about diversion into illicit channels, the Court has no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.[24]

Not all of the justices agreed with the majority's expansive interpretation of the commerce clause. "If Congress can regulate this under the Commerce Clause," Justice Clarence Thomas argued in his dissent, "then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers."[25]

Justice Ruth Bader Ginsburg expressly referenced the importance of federalism in her dissent, writing:

> One of federalism's chief virtues…is that it promotes innovation by allowing for the possibility that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. [citation omitted]…This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.…Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation.[26]

As it stands now, Congress is authorized to ban the cultivation and possession of marijuana under the commerce clause, while states that legalize marijuana cannot immunize their citizens from the reach of the CSA. However, under

the 10th Amendment's anti-commandeering doctrine, the federal government also cannot prevent states from deciding to ease marijuana restrictions at the local level or force them to leave the criminal prohibitions in place. Of course, a lot has changed since *Gonzales v. Raich*. More than 60 percent of Americans believe the use of marijuana should be legalized, according to a Pew Research Center survey conduction in Oct. 2017. By comparison, just 30 percent favored legalization in 2000.[27] On the other hand, Attorney General Jeff Sessions recently reasserted the federal government's authority to enforce federal drug laws "regardless of state law."[28]

Court's Upcoming Decision in New Jersey Sports Betting May Offer Guidance

The Supreme Court's upcoming decision in *Christie v. NCAA* may offer some guidance as to how the current Supreme Court will address evolving issues confronting dual federalism, such as marijuana, immigration and guns.[29] In seeking to legalize sports gambling under state law, New Jersey argued that the Professional and Amateur Sports Protection Act of 1992 (PASPA), which prohibits the states from authorizing sports wagering, is unconstitutional.[30] Citing *New York v. United States*, New Jersey argued that PASPA violates the 10th Amendment, which prohibits the federal government from "commandeering" the states to enforce federal law.

During oral argument, several justices appeared receptive to New Jersey's states' rights argument. "The citizens of the State of New Jersey are bound to obey a law that the state doesn't want but that the federal government compels the state to have," Justice Anthony Kennedy noted. "That seems like commandeering." Meanwhile, Justice Stephen Breyer commented, "This is telling the states what to do."

Path Forward for Dual Federalism

Even if the Supreme Court's decision in *NCAA v. Christie* does further clarify the states' authority under the 10th Amendment, the federal government may wish to let states do what they do best—experiment with different policies and determine what works best. As Justice Louis Brandeis wrote in *New State Ice Co. v. Liebmann*, a "State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[31] ⚖

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Endnotes

1. *Obergefell v. Hodges*, 576 US ___, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).
2. *National Federation of Independent Business v. Sebelius,* ___ U.S. ___, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).
3. *Jennings v. Rodriguez*, ___ US ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (2018).
4. The Federalist No. 45 (James Madison), available at http://avalon.law.yale.edu/18th_century/fed45.asp
5. U.S. Const. art. I, § 8.
6. U.S. Const. art. I, § 8, cl. 4.
7. U.S. Const. art. VI, cl. 2.
8. U.S. Const. amend. X.
9. John Joseph Wallis and Wallace E. Oates, *The Impact of the New Deal on American Federalism, The Defining Moment: The Great Depression and the American Economy in the Twentieth Century* (1998), available at https://www.colorado.edu/ibs/es/alston/econ8534/SectionX/Wallis_and_Oates,_The_Impact_of_the_New_Deal_on_American_Federalism.pdf.
10. *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819).
11. *Id.*
12. *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937).
13. *Id.*
14. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).
15. *United States v. Lopez*, 514 U.S. 549 (1995).
16. *Id.*
17. *New York v. United States*, 505 U.S. 144 (1992).
18. *Id.*
19. *Prinz v. United States*, 521 U.S. 898 (1997).
20. *Id.*
21. *Gonzales v. Raich*, 545 U.S. 1 (2005).
22. *U.S. v. Morrison,* 529 U.S. 598 (2000).
23. *Wickard v. Filburn,* 317 U.S. 111 (1942).
24. *Raich*, *supra*.
25. *Raich*, *supra*, (Scalia, A., dissenting).
26. *Raich*, *supra*, (Ginsburg, R., dissenting).
27. Abigail Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, Pew Research Center (Jan. 5, 2018), available at http://www.pewresearch.org/fact-tank/2018/01/05/americans-support-marijuana-legalization/.
28. U.S. Dept. of Justice. Office of the Attorney General, Memorandum for All United States Attorneys: Marijuana Enforcement (2017), *available at* https://www.justice.gov/opa/press-release/file/1022196/download.
29. *Christie v. NCAA*, 137 S. Ct. 824 (2017).
30. 28 U.S.C. §3702 (2012).
31. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).