

1. Federalism: a constitutional bond.

Back to 1787, James Madison, one of the Founding Fathers, wrote in a letter to Thomas Jefferson that “Divide et impera, the reprobated axiom of tyranny, is under certain qualifications, the only policy, by which a republic can be administered on just principles”. In fact, seeking to develop the Confederation initially established with thirteen states, the 17th September 1787 US Constitution settled a federation organized upon a two level power division which ensured a harmony among the states’ specific interests. Willing to treat those states’ independence concerns tactfully, the Constitution instituted a federal power limited to specific fields such as the overseas trade, the defense, the foreign policy and the interstate commerce.

2. Federalism: powers allocation technique.

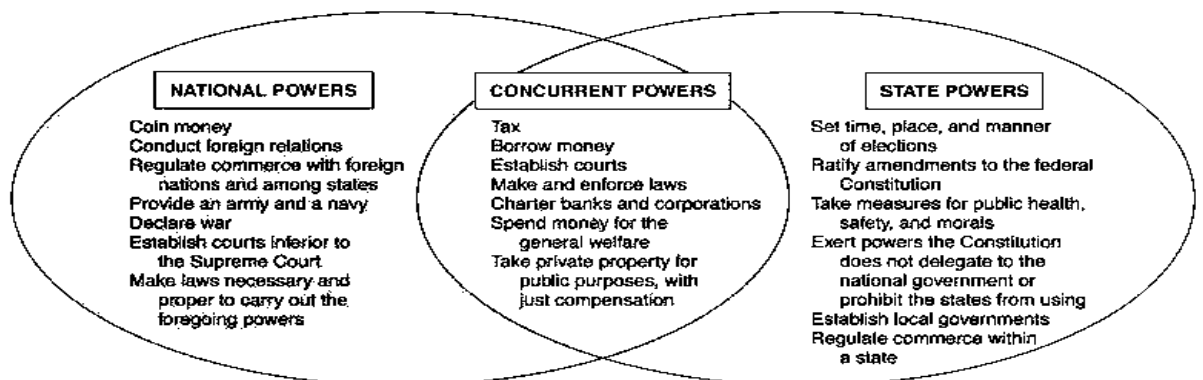
The 1787 Constitution sets a bipolar power division, assigning duties to the Congress and granting residual competences to the states.

The Central Government’s delegated powers are divided into three categories:

3. Expressed powers (art. I, Section 8), also called enumerated powers. The most important power delegation pursuant to those powers, in time of peace, and notwithstanding the 14th Amendment due process and equal protection clause, is without any doubt the Commerce Clause. It lists in seventeen paragraphs many important powers of Congress.
4. Implied powers (art. I, section 8, Clause 18) which can be inferred from the expressed powers. Mainly, the Legislature’s implied powers flow from the Necessary and Proper Clause. It grants Congress the power “to make all laws which shall be necessary and proper for carrying into execution [the expressed powers]”. They are NOT specifically delegated in the Constitution, but are understood to be necessary or allowed.
5. Inherent powers, recognized as essential parts of sovereignty - such as the power to regulate immigration and conduct foreign affairs.

Pursuant to the tenth amendment to the Constitution, the States benefit from residual powers, also referred to as reserved powers. In fact, the Constitution states that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people”.

Eventually, the shared powers called a more specific analyze which must weight the action’s pertinence and the opportunity of the Central or State level, with regard to the matters’ at stake.



In order to organize the power's allocation, the Constitution established two principles:

- The article I sections 9 & 10 "Denied powers" lists powers that are specifically NOT allowed to either the federal or state governments. In other words, there are powers that could, under no circumstances, be exercised by the central government in the place of the states (for instance, « no preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another »), or by the states in the place of the central government (such as enter into a treaty).
- Pursuant to the article IV Supremacy Clause, everyone must follow federal law in the face of conflicting state law.

3. US Federalism : a political instrument.

Outlining sometimes conservative sometimes liberal tendencies, the powers allocation significantly evolved during these past years. The US Supreme Court, as the Constitution's interpreter, played a major role in the definition and the clarification of the federal system. Besides, depending on the more or less broad interpretation of the Congress' powers, the US federalism history can be categorized into 4 main periods of time:

a. Federalism under Marshall Court.

The Supreme Court, under Chief Justice Marshall (1801-1835), advocating a federal strength, introduced a federal powers extension through the development of the implied powers doctrine and the interpretation of the Commerce clause.

- **McCulloch V. Maryland** (1819): proceeding to an extensive application of the Necessary and Proper Clause, the Court held that the government is free to use the means considered by the former as necessary to achieve the goals assigned by the Constitution, within the sole limits that the Constitution sets. The Court reaffirmed the principle of superiority of the federal level vis-à-vis the lower level.
- **Gibbons v. Ogden** (1824): the Court held a broad interpretation of the Commerce Clause, and thus of the Congressional powers. The judges declared the New York Law as unconstitutional insofar as it infringed on the congressional power to rule the interstate Commerce. Defining what the power to regulate is, the Court stated that it is "the power to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, [other than are prescribed in the Constitution]".

The Commerce Clause more or less broad interpretation interferes with the congressional powers, even more than the implied powers doctrine.

b. Dual Federalism.

Despite Chief Justice Marshall's strong push for the federal government, the court of his successor, Roger B. Taney (1836-1864), decided cases that favored equally strong national and state governments calling a new form of federalism: "Dual Federalism". Without denying the central power, the basic philosophy during this time was that national and state governments are separate but equal branches of government which are split into their own spheres and supreme in their respective sphere. Thus, unlike under Marshall's Court, the U.S. Government ought to be limited to its enumerated powers and to have a limited set of constitutional purposes. Back to this time, the relationship between nation and states is best summed up as tension rather than cooperation.

The Dred Scott Case (**Scott v. Sandford**, 1857) increased the power of the states by ruling that Congress had no authority to prohibit slavery in federal territories.

Taney's dual federalism supported a major role to the states and to the federal states' citizenship. Nevertheless, it cannot be denied that he intended to stick the "unfortunate race" to an inferior order.

c. Cooperative Federalism.

The Great Depression marked an abrupt end to Dual Federalism and a major shift to a strong national government. In fact, such a crisis called for important and centralized actions and states were seeking large scale federal assistance including and especially emergency economic measures and employment. Even if the cooperative federalism implied that national, state and local governments interact cooperatively and collectively, the central power mastered the whole system.

The formerly distinct division of responsibilities between state and national government had been described as a "layer cake," but, with the lines of duty blurred, American federalism was likened to a "marble cake."

It is worth noting the Supreme Court's adhesion to a power recentralization, especially through a broad application of the Commerce Clause. In the case *Wickard v. Filburn*, the Court held that the Commerce Clause, pursuant to which Congress is in charge of regulating interstate commerce, is not limited to the sole commercial interstate transits, but can also deal with internal operations which could interfere on the national market.

d. New Federalism.

New Federalism, which is characterized by a gradual return of power to the states, was initiated by President Ronald Reagan (1981-1989) in the early 1980's. While national authorities freed the state government in their policy conduct (for instance, they were allowed to spend the money granted by the federal government, at their own discretion), the Supreme Court was being strict in the congressional powers' delimitation.

- **United States v. Lopez** (1995) : The Supreme Court held that while Congress had broad lawmaking authority under the Commerce Clause, it was not unlimited, and did not apply to something as far from commerce as carrying handguns, especially when there was no evidence that carrying them affected the economy on a massive scale.
- **United States v. Morrison** (2000): The Violence Against Women Act of 1994 is held unconstitutional as exceeding congressional power under the Commerce Clause.

After the terrorist attacks of September 11, 2001, New Federalism ended as the national government provided emergency aid, a trend that continued during the ensuing natural disasters, such as Hurricane Katrina.

Within more common fields, especially the medical regulation, the Supreme Court seems to be still fluctuant:

- **Gonzales v. Raich** (2005): under the Commerce Clause of the United States Constitution, which allows the United States Congress "To regulate Commerce ... among the several States," Congress may ban the use of cannabis even where states approve its use for medicinal purposes.
- **Gonzales v. Oregon** (2006): The Controlled Substances Act does not empower the Attorney General of the United States to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under state law permitting the procedure.