

3.1c- Layer Cake Federalism

Defining Federalism

The United States encompasses many governments—over 83,000 separate units. These include municipal, county, regional, state, and federal governments as well as school districts and special districts like water and land conservation.

Federalism is a system in which two or more governments share power over the same constituents. Ultimate political authority, or sovereignty, is shared between the governments. The national government is supreme and holds powers on certain issues, and the state governments have the same sovereignty over different issues. The workings of the federal system and how national, state, and local governments relate is described as intergovernmental relations.

The concept of federalism was created when the Framers began to develop the Constitution of the United States. This form of government was derived as a compromise of power between the states and the federal government. The goal of federalism is to preserve personal liberty by separating the powers of the government so that one government or group may not dominate all powers. The Framers believed that divided power was limited power and applied this theory as they created the Constitution. This form of government is unique because instead of the national government receiving its powers from the states, or the states receiving powers from the national government, both governments derive their powers directly from the people, or constituents. It is a system of government for the people, by the people.

The Anti-Federalists were those opposed to ratifying the Constitution. They questioned the proposed power of the strong national government and pointed out the dangers of tyranny and threats to the rights and liberties that they had recently won from England. They also questioned the motives of the Founders, claiming the Constitution was class-based, ensuring the elite class held the powers of the nation. Charles Beard, in *An Economic Interpretation of the Constitution* (1913), maintains that the Constitution was designed to protect the propertied classes and that economic gain was the founding fathers' prime motivator.

James Madison, Alexander Hamilton, and John Jay wrote the "**The Federalist Papers**" as political theory in defense of the Constitution and federalism. These

documents allow us a glimpse into how the Framers felt the system would operate. In Federalist #16, Alexander Hamilton argues that the national government is necessary to keep the states in harmony. He maintains that the national government should be at least equal in power to the states.

In Federalist #17, Hamilton argues that the states will always have the allegiance of the people; that people will be loyal to the body of government closest in proximity to them. Since criminal and civil justice will be the tool of the states, the people will remain obedient to the states.

James Madison contends in Federalist #39 that the Constitution is an unbiased document, as it calls for a balance of power between the state and national governments. He goes on to argue that the states are the creators of the federal government, and that because the ratification process is achieved through the states, the states are given the ability to stand independent of the federal body. Madison believed that because the federal system is a republic, and the Constitution enumerates powers to each layer of government, the new system would be superior to any other form of government.

Dual federalism describes a certain form of federalism where the national government and state governments have distinct realms of authority that do not overlap and into which the other should not intrude. Some equality of the governments is implied, with the federal government acting as the means to link the states. Dual federalism is often described as "**layer cake federalism**," which indicates distinct layers of government, each with their own sphere of influence. The icing on the cake (the federal government) binds the layers (the states) but also separates them.

A key feature of federalism is decentralized politics. For example, elections are conducted at the state level—even national elections such as the presidential election—allowing governing power to rest in the hands of more people. Therefore, more points of access to the government exist for its constituents. Federalism also strengthens judicial power. Because power is shared between the state and national governments, inevitably there are disputes between the two that must be arbitrated by the judicial system.

Policy decisions are decentralized in a federalist government. Policies dealing with education, labor laws, and highways are just a few examples of issues that are discussed at both the national and the state level. Public policies concerning

the environment, equality, and the economy all require the centralizing power of the national government and the dispersing power of the states. While policy decisions happen at all levels, states tend to direct policies dealing with social, moral, and family topics. Most often, the states are the inventors of new policies, which stem from the needs and desires of their local constituencies.

Alternatives to federalism include unitary governments and confederations. A unitary government occurs when one centralized body is the sole governing unit. **Unitary governments** are often found in small, compact nations with homogeneous populations and few factional elements. Japan, France, and Great Britain, prior to an independent parliament and home rule for Scotland, are examples of unitary governments.

Confederations, such as the pre-Constitutional United States, are loose central governments that are dominated by the stronger state governments. Under the Articles of Confederation, the states were bound to the national government through a "friendly alliance." Confederations are rare in the world today. Switzerland calls itself a confederation, but it operates much like a federal system. Recently, growing cooperation between countries in the current European community has resulted in a confederation called the European Union. After the break up of the Soviet Union, Russian states discussed forming a confederation, but the plan did not survive due to the unrest that followed. Another example of a confederation was the Confederate States of America, which was formed by some southern states during the Civil War.

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Separation of National and State Governments

The United States federal system divides power between national and state governments, both of which govern the same constituents. The powers granted to the national government in the Constitution are called **delegated powers**. There are three types of delegated powers: **enumerated powers**, **implied powers**, and **inherent powers**. Enumerated powers, sometimes called expressed powers, are given directly by the Constitution. Examples of these powers include the power to declare war, regulate foreign and interstate

commerce, conduct foreign relations, coin money, and raise and maintain a military (Article 1, Section 8).

Implied powers are those powers that are reasonably inferred by enumerated powers. The need for these implied powers is spelled out in the "**necessary and proper**" clause of the Constitution (Article 1, Section 8, Clause 18). The clause says that Congress has the power "to 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." This clause is often referred to as the "**elastic clause**," as it can stretch to cover a wide range of supplementary powers necessary to carry out enumerated powers.

Inherent powers, although not expressly delegated by the Constitution, are powers that are intrinsically held by any national government of a sovereign state. Examples of inherent powers include the power to control immigration, the power to acquire territory, and the power to quell insurrections.

The powers granted to the state governments are **reserved powers**. These are powers that are not given to the national government, but which are not denied to the states. These reserved powers are collectively known as the "police power" of the state. Powers that are shared by both the national and state governments are **concurrent powers**. Examples include the power to tax, borrow money, and define crimes and punish criminals.

There are several powers that are denied either to national, state, or both governments. Powers that are given to the state governments may be denied to the national government, and vice versa. Examples of powers that are denied to the states are the power to coin money, make treaties, and wage war. The national government cannot make new states without the consent of the state legislature concerned, nor can they try anyone for treason without two witnesses and/or a confession.

A recurring debate concerning federalism is the question of which government's power is supreme regarding disputes between state and national governments. Article VI of the Constitution, referred to as the **supremacy clause**, states that there are three items that are the superlative law of the land: the Constitution, the laws of the national government which are not otherwise unconstitutional, and treaties, which can only be formed by the national government.

Although the supremacy clause gives the national government supreme powers, boundaries to those powers are provided in the Tenth Amendment to the Constitution. This amendment gives the states those powers that are not delegated to the national government, nor prohibited to the states. Therefore, the Tenth Amendment became the states' guarantee to rights and the source of the state governments' reserved powers. This amendment clearly defines the eighteenth century concept of dual federalism: shared power with separated spheres of influence.

Federalism in the United States has been an evolutionary process. Three key issues have determined how national and state powers are balanced: implied powers, commerce power, and the Civil War.

The concept of implied power has often been brought into question concerning national supremacy. The Supreme Court case of *McCulloch v. Maryland* (1819) was instrumental in shaping the meaning of implied powers. This landmark case addressed whether or not Congress has the power to create a national bank. The state of Maryland charged the Baltimore branch of the Bank of the United States, a bank created by Congress, a hefty tax. When James McCulloch, the head cashier of the branch, refused to pay the tax or the fees he incurred, he was taken to county court. The case finally made its way to the Supreme Court, where Chief Justice John Marshall determined that establishing a national bank is a "necessary and proper" function of the federal government, therefore establishing the concept of implied power.

One of the delegated powers of the national government is the power to regulate foreign and interstate commerce. Although seemingly straightforward, defining "commerce" and establishing the boundaries of the power of commerce control has proven to be difficult. The case of *Gibbons v. Ogden* (1824) defined commerce broadly, giving Congress the power to control practically every form of interstate commercial activity.

Differences of opinion over the issues of national supremacy and state sovereignty were fought on the battlefield, as well as in the courts. The Civil War was fought, in part, over the issue of federalism. The concept of nullification was an issue that was used to argue states' rights preceding the Civil War. The idea of nullification was created in 1798 by James Madison and Thomas Jefferson, who argued in the Virginia and Kentucky Resolutions that states had the right to declare a federal law null and void if they determined it to be unconstitutional.

Later, John C. Calhoun of South Carolina revived the concept of nullification, first in opposition to a federal tariff and later to bolster South Carolina's right to continue slavery, even after Congress' efforts to ban it. Calhoun's position was that the states had the right to declare the federal ban of slavery unconstitutional, and therefore, null and void. Subsequently, the Civil War determined once and for all that states could not declare acts of Congress unconstitutional and that the federal union cannot be dissolved.

The *Slaughterhouse Cases* (1873) solidified the concept that the states were sovereign within their borders. In these cases, the state of Louisiana granted a monopoly of slaughterhouses for the protection of public health. Slaughterhouse operators who lost their businesses claimed that they had been deprived of their property without due process in violation of the Fourteenth Amendment. This amendment forbids the states to deprive any person of life, liberty, or property without due process of law and established citizenship for African Americans. The original intent of the Fourteenth Amendment was to guarantee the freedom of former black slaves. In these cases, the Court drew a distinction between United States and state citizenship, and it was held that the amendment did not intend to deprive the state of legal jurisdiction over the civil rights of its citizens. The restraint placed by the state on the slaughterhouse operators was declared not to have deprived them of their property without due process. In this case, the states preserved their authority.

As is obvious throughout history, federalism has evolved from its creation by the Framers of the Constitution and continues to change through the political discussions and court cases of today.