

## CHAPTER 2

### *Federalism*

This chapter begins with the views of Hamilton and Madison on the constitutional background of federalism. Anti-Federalist views are also presented briefly. *The Federalist* remains our classic expression of the theory of the Constitution. Here Hamilton and Madison argue that the new Constitution is not a threat to the states, which retain adequate power to balance the federal system. Discussed extensively is the necessary and proper clause that later becomes the basis of Chief Justice John Marshall's opinion in *McCulloch v. Maryland*. In the thirty-ninth paper of *The Federalist*, Madison advances the interesting idea that the new Constitution was both federal and national.

The selection from James Bryce's *The American Commonwealth* that discusses and evaluates the characteristics of federalism will give students an interesting historical and theoretical perspective. Federalism is not a hot topic for present-day students, and in fact is rather boring to them. After all, did not FDR's New Deal finally establish a dominant national government that was the real purpose of the Federalists whose views the Constitution embodied? But students should know the historical progression in our federal system and that the balance of national and state power was *the* central political issue for a century and a half after the adoption of the Constitution.

The chapter proceeds to the historic *McCulloch v. Maryland* (1819) case, in which Chief Justice John Marshall wrote the Court's opinion reaffirming the Constitution's supremacy clause and at the same time adopting a broad construction of the scope of congressional authority under the Article 1 enumerated powers and the necessary and proper clause. Marshall's position was derived from and supported the views of *both* Alexander Hamilton and James Madison, who advocated broad national and hence congressional power over the states in *The Federalist*. Madison, although later of the same political party as Thomas Jefferson (Democrat-Republican), did not agree with his fellow Virginian's strict constructionist view, which would have limited congressional authority. Although President Madison vetoed the first National Bank bill in 1815, in 1816 he signed into law legislation establishing a national bank that John Marshall was to review in the *McCulloch* case. The discussion of the case in the text and below in this manual illustrates that it was one of the major political controversies of the time. *McCulloch* is followed by *Gibbons v. Ogden* (1824), new to this edition. Just when Commerce Clause jurisprudence seemed to have established unqualified national power under Article I, the Court backtracked in *Lopez v. United States* (1995) and even more so in *United States v. Morrison* (2000), in which the Supreme Court reigned in congressional power under the Commerce Clause. The chapter includes an excerpt from the *Morrison* case.

The final reading by Martha Derthick sets contemporary federalism in the context of Madison's expectations at the time of the framing of the Constitution.

### **CONSTITUTIONAL BACKGROUND: NATIONAL *versus* STATE POWER**

The selections from *The Federalist* will bear out the points made previously by John Roche that federalism, which inevitably was to become an underpinning for states' rights doctrines, was at the time of the framing of the Constitution a major victory for nationalism. It was against this background that Hamilton wrote in *The Federalist* about the advantages of the new federal system that would be created by the Constitution. The debate was not between federalism and a unitary form of government, but rather between federalism and a confederation.

**Reading 6:**  
**Alexander Hamilton, *Federalist 16, 17***

In these selections Alexander Hamilton is arguing that under the new federal Constitution the national government will be able to act directly upon the citizens of the states to regulate the common concerns of the nation, which is absolutely essential to the preservation of the Union. The Articles of Confederation are far too weak to serve the nation. While arguing for the necessity of a stronger national government, Hamilton at the same time attempts to assuage the fears of many citizens of the individual states that the proposed new national government would inevitably destroy state sovereignty and subordinate the legitimate interests of the states to the national government.

**QUESTIONS FOR DISCUSSION**

1. Why, in Hamilton's view, is it illusory to worry about the Constitution establishing a national government so powerful that it could coerce the states collectively? (“Whoever considers the populousness and strength of several of these states singly at the present juncture, and looks forward to what they will become, even at the distance of half a century, will at once dismiss as idle and visionary any scheme which aims at regulating their movements by laws, to operate upon them in their collective capacities, and to be executed by a coercion applicable to them in the same capacities.”)
2. Why is it necessary for the national government to be able to pass laws that will directly affect the citizens of the states if the Union is to survive? (Only in this way can the common concerns of the nation be regulated, and the national government “must, in short, possess all the means, and have the right to resort to all the methods, of executing the powers with which it is entrusted, that are possessed and exercised by the governments of the particular states.” If the state legislatures have the power to act as intermediaries between the national government and state citizens, state evasion of national legislation would be made too easy and even encouraged.)
3. Comment upon Hamilton's statement in *Federalist 17* that “[a]llowing the utmost latitude to the love of power, which any reasonable man can require, I confess I am at a loss to discover what temptation the persons entrusted with the administration of the general [national] government could ever feel to divest the states of [their reserved powers]. . . . The regulation of the mere domestic police of a state, appears to me to hold out slender allurements to ambition. Commerce, finance, negotiation, and war, seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects, ought, in the first instance, to be lodged in the national depository.” (Note in this discussion the fact that the national government has increasingly encroached upon what were once the reserved powers of the states. The reasons for this include the increasing nationalization of issues and the inability of states to fulfill the desires of their own citizens in such reserved powers areas as education, police protection, highway construction, urban renewal, and many of the other areas in which federal grant-in-aid programs operate.)

**MULTIPLE CHOICE QUESTIONS**

1. In *Federalist 16* and *17*, Alexander Hamilton argues that:
  - a) the new national government will be a danger to the collective power of the states.
  - b) it is illusory to worry that the national government will subvert state power.
  - c) the Confederation was an adequate government in its time but now it must be replaced.
  - d) the states will retain their sovereignty under the new Constitution.

2. Hamilton suggests that the national government must be able to act directly upon citizens of the states in certain spheres because:
- a) it is necessary to keep the states in line.
  - b) the national defense requires it.
  - c) only in this way can the common concerns of the nation be regulated.
  - d) state legislatures are unrepresentative of the people.

**Reading 7:**  
*Anti-Federalist Papers No. 17*

Theme:

The Constitution will subvert state power. The Constitution gives Congress extensive enumerated powers, among which the most important are the power to tax and to raise and support armies. These and other powers, in combination with the “necessary and proper” and supremacy clauses, assure national domination over the states.

**MULTIPLE CHOICE QUESTIONS**

1. The Anti-Federalists worried that the new Constitution would:
- a) enhance state power to the detriment of the national government.
  - b) undermine state sovereignty.
  - c) establish a weak national government.
  - d) create strong political parties.
2. The Anti-Federalists felt that excessive national power would be the result of the:
- a) supremacy clause of the Constitution.
  - b) Congressional powers to tax and spend.
  - c) power of Congress to raise and support armies.
  - d) all of the above

**Reading 8:**  
**James Madison, *Federalist 44***

The necessary and proper clause of Article I that gives Congress implied powers is a critical component of national power without which the goals of the Constitution could not be achieved. While implied powers would exist by implication, the clause is important to avoid challenges to national power on the pretext that Congress lacks implied powers because of the absence of constitutional text clearly claiming such power.

Discussion

The framers wanted to ensure that national power would not only be supreme (Article VI) but also open-ended within the context of Article I’s enumerated powers. Interestingly, the nationalists (Roche definition) viewed the implied powers clause as expanding national power while the dictionary definition at the time suggested that

“necessary” and “proper” limited national power as the proponents of states’ rights argued. As with so many constitutional provisions, the lack of clear textual definitions allowed both nationalists and states’ rights advocates to vote for the new Constitution in the ratification conventions.

Of course students find debates over the necessary and proper clause arcane (if they knew what “arcane” means), but remind them when they get to selection 14, *United States v. Morrison* (2000), that the Supreme Court’s interpretation of constitutional provisions such as the necessary and proper clause continues to define national power. The Constitution remains our supreme social contract.

## MULTIPLE CHOICE QUESTIONS

1. The necessary and proper clause:
  - a) expands congressional power.
  - b) requires the Supreme Court to adopt a strict constructionist view of Article I powers.
  - c) supports presidential prerogative powers.
  - d) limits congressional power.
  
2. In *Federalist 44* Madison argues that:
  - a) the Constitution should clearly define all congressional powers.
  - b) Congress should exercise only expressly enumerated powers.
  - c) the necessary and proper clause is essential to allow implied congressional powers.
  - d) the Constitution should enumerate what congressional powers are not necessary and proper for the execution of its enumerated powers.

<b>Reading 9: James Madison, <i>Federalist 45</i></b>
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### Theme

The Constitution adds few new national powers beyond those the Articles of Confederation already contain. On balance, the powers the states retain are sufficient to protect them against unwarranted national intrusion into their sovereign domain.

Madison wrote: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”

The presidency and the Senate require state legislative action to be elected, making these powerful national institutions dependent on the states as their constituencies. Note for students that even with the direct election of Senators, the states as states continue to dominate the Senate because each state has two Senators regardless of population. Less than 15% of the electorate controls a majority of the Senate. The Electoral College continues to make presidential elections dependent on the geographical distribution of votes. Less than a handful of states determined the outcome of the 2000 presidential election and the same was the case in 2004.

## MULTIPLE CHOICE QUESTION

1. James Madison in *Federalist 45* stated that:
  - a) state governments cannot act without the support of the national government.
  - b) the state governments may be regarded as constituent and essential parts of the federal government.
  - c) the federal government will have the advantage over state governments.
  - d) state legislatures are not essential to the election of the president.

<b>Reading 10:</b> <b>James Madison, <i>Federalist 39</i></b>
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In *Federalist 39*, James Madison, like Alexander Hamilton in the previous selections, attempts to alleviate the fears of proponents of states' rights that their interests would be submerged by the new Constitution. In this paper Madison separates the national from the federal characteristics of the Constitution, the term *federal* being used to describe those powers of the new government that essentially were shared by the states or reflected state interests.

It is important to clarify for students the unusual use of the term *federal* by Madison to describe a system requiring an agreement among the states before certain actions could be taken, or where state interests are taken into account as in the representation of the states in the Senate. Madison's use of the term *federalist* is clarified when in quoting the adversaries of the proposed constitution he notes that they argued for the preservation of the *federal* form, "which regards the Union as a confederacy." *National* refers to the newly acquired power of the government to act directly upon the people, to represent them directly in the House of Representatives, and to legislate for national concerns.

## QUESTIONS FOR DISCUSSION

1. In what sense does Madison describe the process of ratification of the Constitution as a federal and not a national act? (It is a federal act because ratification requires the assent of the independent states, acting through their state-ratifying conventions, rather than the assent of the people of the states acting collectively. Madison writes that the assent and ratification of the Constitution "is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State—the authority of the people themselves. The act, therefore, establishing the Constitution will not be a *national* but a *federal* act.")
2. What are the national and federal attributes of the House and the Senate respectively, according to Madison? (Madison states that the "House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion and on the same principle as they are in the legislature of a particular State. So far the government is *national*, not *federal*. The Senate, on the other hand, will derive its powers from the States as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal*, not *national*.")
3. What are the attributes of presidential authority in terms of Madison's categories of national and federal characteristics? (The presidency is a compound institution, with both federal and national aspects. The

rather intricate argument of Madison is that the immediate election of the president by the Electoral College reflects the states acting in their individual capacities, and therefore this is a federal attribute of the presidency. But note Madison's argument that the “votes allotted to them [the states] are in a compound ratio, which considers them partly as distinct and coequal societies [and therefore reflecting a federal aspect of the system], partly as unequal members of the same society [which reflects national features].”

4. What is the distinction between the federal and national characteristics of the operation of the government? (Where the government has the authority to operate directly upon the individual citizens of the states in their individual capacities the power of the government is national, not federal. But the operation of governmental power directly upon the citizens is limited to its enumerated authority under the Constitution; therefore, the limited extent of its powers is an important federal characteristic of the Constitution.)

Madison concludes that the structures, processes, and powers of the new government created by the Constitution reflect a perfect balance between federal and national interests. The national government is given adequate powers to legislate and carry out public policy in the national interest, and at the same time the interests of the states are preserved both in the structure of the Senate and the mode of election of the president, as well as by the fact that the national powers are only those specifically enumerated as belonging to the national government by the Constitution. Although the Tenth Amendment was not part of the original Constitution, its explicit statement that powers not delegated to the national government are reserved to the states respectively, or to the people, is implied in Madison's argument in *Federalist 39*.

## MULTIPLE CHOICE QUESTIONS

1. In *Federalist 39*, James Madison argues that the new Constitution:
  - a) eliminates state sovereignty.
  - b) is both national and federal.
  - c) is primarily national.
  - d) retains the major features of the Confederation.
2. In *Federalist 39*, James Madison:
  - a) argued that the states should be able to filter national actions.
  - b) favored the ability of the national government to act directly upon the states on national concerns.
  - c) argued for a weak national government.
  - d) pointed out that because the president was directly elected, national power would be exercised in a democratically responsible manner.
3. Which of the following statements did James Madison *not* make in *Federalist 39*?
  - a) An important *national* characteristic of the Constitution is the direct election of the House of Representatives by the people.
  - b) The electoral constituency of the Senate represents an important *federal* characteristic of the Constitution.
  - c) The new Constitution carefully balances federal and national characteristics.

- d) The amendment process is wholly national in character.

**Reading 11:**  
**James Bryce, *The Merits of the Federal System***

James Bryce analyzes American federalism and lists many of its benefits. Bryce was a Scotsman who traveled the United States in the latter part of the nineteenth century, taking notes and commenting on American government and life in much the same manner as Alexis de Tocqueville had done some decades earlier.

Bryce's observations, from his classic, *The American Commonwealth*, are on par with Tocqueville's, and his discussion of federalism is a concise and thorough outline of federalism's advantages. Interestingly, while both discussed the practical advantages of the federal mechanism—local sovereignty, administrative flexibility, protections against over-centralized power—both also emphasized non-mechanistic factors that are the glue of the American system. Tocqueville praised the “good sense and practical judgment” of the American people; in this selection, Bryce emphasizes “the presence of a mass of moral and material influences stronger than any political devices.”

Bryce's work is often overlooked because of Tocqueville's popularity, but his work is as perceptive and in some cases more sophisticated than the observations of his better-known counterpart. One interesting aspect of Bryce is that he wrote in an era when national government was taking on new meaning in America. His emphasis on the enduring beauty and benefits of federalism in the post-Civil War era are particularly insightful.

**QUESTIONS FOR DISCUSSION**

1. Bryce points out that none of these political mechanisms would be successful without moral and material influences: the love of self-government and a “sense of community in blood, in language, in habits and ideas, a common pride in the national history and the national flag.” Is he right? Are these factors more important than the mechanism established under the Constitution, and are they still important? Are they still realistic assessments of the American populace? Critics of open immigration policies have decried the decline in common pride in the United States. Are critics of multicultural education correct when they argue that too much attention to disparate cultures has weakened the very moral and material influences praised so heavily by Bryce? If these factors are more important than the mechanisms Bryce outlines, and if they are weakening, should we heed the critics' warnings?

(Bryce wrote, “The student of institutions. . . is apt to overrate the effect of mechanical contrivances in politics. I admit that in America they have had one excellent result: they have formed a legal habit in the mind of the nation. . . . [T]he true value of a political contrivance [is] its power of using, fostering, and giving a legal form to those forces of sentiment and interest which it finds in being.” Millions of immigrants have entered the United States, legally and illegally, in the last thirty years. They have different languages, habits, and ideas, and their “common pride” is often challenged by allegiances to their homelands. But the key here may be what Bryce identifies as the love of self-government and local independence. These loves are not necessarily inconsistent with immigration or with multiculturalism. The fact that language and national histories may be diverse does not necessarily inhibit the sentiment at the heart of the nation's stability.)

2. Bryce notes that federalism allows local governments to experiment in legislation and administration without risking the fate of the nation as a whole. Is this kind of separation necessarily good? Does Bryce

overlook many of the costs of federalism? (Bryce points out that, as watertight holds of a ship protect the greater entity from isolated leaks, federalism protects the nation from localized social discord or economic crisis. One could argue that federalism helped keep slavery out of the northern states, but one might also argue that it protected prejudices and abuses in the South. Likewise, one could argue that federalism aided expansion, but at the cost of a relatively lawless and brutal environment in the Old West.)

3. Bryce's opinion about the states' ability to experiment without danger to the whole foreshadows Louis Brandeis' characterization of the states as "laboratories of democracy." Is this still a significant part of federalism in the late twenty-first century? Given the expansion in federal responsibilities and the growth of regulations and federal agencies, are states and localities still important players in the American governing scheme? (Certainly, efforts at the state level dealing with reform of the health care and welfare systems can be seen as this kind of experimentation. Likewise, radical efforts like those in California to limit services to immigrants and to strike down affirmative action programs, whatever may be their outcomes, are isolated to some extent from affecting the rest of the country.)
4. After noting the basic rationale behind a federal system, that of creating a unified national system while protecting the independence of the member commonwealths, Bryce makes the interesting observation that this system is well-suited to "developing a new and vast country." Is it realistic to view American expansion in terms of its relationship to federalism? Did the American governing system have a significant effect on the western territories?

(Alexis de Tocqueville had viewed expansion as almost inevitable; Bryce has a much more sophisticated understanding of how governmental forms promoted and protected the United States as it drove westward. The territories developed through loosely controlled structures of law and governmental development, growing from outposts and territories into full-fledged states. The presence of a federal system and a belief in self-government undoubtedly assisted America's expansion westward.

Bryce noted that federalism allows for many permutations in the speed and style of expansion through diverse areas, and it allows local laws and customs to prevail as necessary without being burdened by dictates from a distant capital. Elsewhere in this chapter, he wrote, "Although many blunders have been committed in the process of development, especially in the reckless contraction of debt and the wasteful disposal of the public lands, greater evils might have resulted had the creation of local institutions and the control of new communities been left to the Central government.")

## MULTIPLE CHOICE QUESTIONS

1. Bryce writes that federalism allows states and localities:
  - a) to experiment and fail without threatening the nation.
  - b) to control the dispensation of all monies involved in governing.
  - c) to join together and dominate the national government.
  - d) to prosper without worrying about a higher authority.
2. According to Bryce, federalism:
  - a) protects local authority.
  - b) protects individual freedoms.
  - c) unburdens the national government.



- d) all of the above
3. Bryce argues that expansion:
- a) was hindered by the absence of a strong central power.
  - b) benefitted from federalism's flexibility.
  - c) was a violent and lawless endeavor.
  - d) ended with the closing of the frontier.

## THE SUPREMACY OF NATIONAL LAW

The establishment of the doctrine of national supremacy by the early Federalist judiciary, coupled with the implied powers doctrine, was a keystone in constitutional development.

<p><b>Reading 12:</b> <b><i>McCulloch v. Maryland</i>, 4 Wheaton 316 (1819)</b></p>
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In *McCulloch v. Maryland*, Federalist Chief Justice John Marshall stated the doctrine of implied powers and the doctrine of supremacy of national law over conflicting state legislation. As non-controversial as this may seem today, at the time the praise for the decision by the Federalists was more than balanced by violent denunciation by a wide range of public opinion in southern and western states. In Virginia the opposition was led by Thomas Jefferson and James Madison (who then ardently supported states' rights), and Thomas Ritchie, the editor of the *Richmond Enquirer*. Commenting upon the opinion in the *Enquirer*, Ritchie wrote: "If such a spirit as breathes in this opinion is forever to preside over the judiciary, then indeed it is high time for the state to tremble . . . all their great rights may be swept away by the one. . . . If Congress can select any means which they consider convenient, useful, conducive to the execution of the specified and granted power; if the word necessary is thus to be frittered away, then we may bid adieu to the sovereignty of the states; they sink into contemptible corporations; the gulf of consolidation yawns to receive them. This doctrine is as alarming, if not more so, than any which ever came from Mr. A. Hamilton on this question of a bank or of any other question under the Constitution. . . . The people should not pass it over in silence; otherwise this opinion might prove the knell of our most important states' rights." For this quote and a discussion of the case, see Charles A. Warren, *The Supreme Court in United States History* (Boston: Little, Brown and Co., 1922, vol. 1, p. 516).

## QUESTIONS FOR DISCUSSION

1. What were the principal arguments used by Chief Justice Marshall to justify the extension of congressional power to include the power to incorporate a bank, even though the words "bank" and "incorporation" are nowhere to be found in the text of the Constitution itself? (The national legislature must have power that will enable it to "perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. . . .")
2. Once granted that Congress has the power to incorporate a bank, why did Chief Justice Marshall find that the state of Maryland could not, without violating the Constitution, tax a branch of that bank? (Because

the power to tax is the power to destroy. Laws made in pursuance of the Constitution are supreme over laws of the respective states, and cannot be controlled by them. The law of the state of Maryland taxing a branch of the National Bank is repugnant to the federal law.)

### MULTIPLE CHOICE QUESTIONS

1. *McCulloch v. Maryland* (1819) established the principle that:
  - a) Congress cannot exceed its enumerated powers.
  - b) powers can be implied from the specifically enumerated powers of Article 1.
  - c) the national government is supreme over the states in cases of conflict of laws.
  - d) b and c
  
2. Chief Justice John Marshall proclaimed in *McCulloch v. Maryland* (1819):
  - a) the power of taxation is vital to the states and may be exercised by both state and national governments.
  - b) when Congress has acted under the authority of the Constitution, states cannot pass conflicting laws.
  - c) the Constitution and the laws made in pursuance thereof are supreme, and they control the laws of the respective states, and cannot be controlled by them.
  - d) all of the above
  
3. Which of the following statements did John Marshall *not* make in *McCulloch v. Maryland* (1819)?
  - a) The Constitution and the laws made in pursuance thereof are supreme, and they control the Constitution and laws of the respective states.
  - b) The Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people.
  - c) Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.
  - d) Article 1 explicitly grants Congress the authority to incorporate a national bank; therefore congressional establishment of the national bank is constitutional.

<b>Reading 13:</b> <b><i>Gibbons v. Ogden, 9 Wheaton 1 (1824)</i></b>
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#### Ruling

Congressional authority to regulate commerce among the states is broad and extends to intrastate activities that have a direct or indirect effect on commerce. State laws that conflict with national laws passed in pursuance of the Constitution are unconstitutional.

#### Discussion

The Gibbons case is the third historic decision the early Marshall Court made, the other two being *Marbury v. Madison* (1803) and *McCulloch v. Maryland* (1819).

In *Gibbons v. Ogden* (1824), Chief Justice John Marshall continued to interpret the Constitution in line with his federalist views. Commerce, he held, was any activity that affects commerce among the states. It is an open-ended power that Congress interprets as it sees fit. His definition “loosely” interpreted the clause, but if you think about it there is simply no textual definition of commerce. Therefore, what it means is subject to interpretation, and substantive constitutional interpretation is required to fill in the details of the commerce power.

Commerce Clause interpretation began in *Gibbons v. Ogden* with Chief Justice John Marshall's expansive view of congressional commerce authority.

#### Daniel Webster's Argument for Gibbons

“The power of Congress to regulate commerce [is] complete and entire.... Nothing is more complex than commerce; and in such an age as this, no words [embrace] a wider field than commercial regulation. *Almost all the business and intercourse of life may be connected, incidentally, more or less, with commercial regulations....* It [is] in vain to look for a precise and exact definition of the powers of Congress, on several subjects. The Constitution did not undertake the task of making such exact definitions. In conferring powers, it proceeded in the way of enumeration, stating the powers conferred, one after another, in few words.” (Italics added.)

Webster concluded that the clearest motive of the framers of the Constitution was to regulate commerce. Congressional authority could not be limited by any substantive definition of commerce. “[W]here the power [as in commerce is] general, or complex in its nature, the extent of the grant must necessarily be judged of, and limited by, its object, and by the nature of the power.”

For instructors so inclined this is a great quote that embodied Marshall's opinion in *Gibbons* and what appeared to be the end point of Commerce Clause jurisprudence during the New Deal after *Schechter v. United States* (1935). Webster would have supported the Court's exercise of judicial self-restraint after *Schechter* and opposed the Court in *United States v. Lopez* (1995), and *United States v. Morrison* (2000), which is selection 14 toward the end of this chapter.

#### **MULTIPLE CHOICE QUESTION**

1. In *Gibbons v. Ogden*, Chief Justice John Marshall:
  - a) upheld state over national power.
  - b) adopted an expansive view of the commerce power.**
  - c) strictly defined the Article I powers of Congress.
  - d) stated there were no constitutional limits on the commerce power.

#### **NATIONAL POWER OVER THE STATES: A RECURRING CONSTITUTIONAL DEBATE**

**Reading 14:**  
***United States v. Morrison*, 529 U.S. 59 (2000)**

This important case examined congressional authority under the Commerce Clause, and demonstrated the Court's modern inclination toward limiting federal encroachments on state and local sovereignty. The case is an excellent

vehicle for demonstrating the history and importance of the Commerce Clause, for explaining the importance of federalism and the separation of powers, and for illustrating the Supreme Court's recent leanings. The dissents in *U.S. v. Morrison* present an opportunity to discuss the extent of judicial activism involved in the Court's recent series of federalism decisions.

### Background

Congress passed the Violence Against Women Act in 1994. The law stated that “[A]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.” Persons committing crimes of violence motivated by gender would be held liable for compensatory and punitive damages. The Act defined a crime of violence motivated by gender as “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender.”

Congress passed the act after four years of hearings, involving testimony from physicians, law professors, representatives of state law enforcement agencies, representatives of private business interests, and survivors of rape and domestic violence. The record supporting passage of the act also included 21 state task force reports and eight reports issued by Congress and its committees. Congress grounded the act in its Commerce Clause powers and in its responsibilities under the Fourteenth Amendment.

Congress's hearings and its efforts to gather evidence to support the Violence Against Women Act stood in marked contrast to the absence of such findings to support the Gun-Free School Zones Act of 1990. That law made it a federal crime “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” Congress had reasoned that guns lead to violent crimes and pose obstacles to education; since crime and education both affect interstate commerce, Congress argued, it had authority to regulate gun possession in school zones. In *U.S. v. Lopez* (1995), though, the Supreme Court ruled 5-4 that the Gun-Free School Zones Act exceeded congressional authority to regulate commerce among the states.

In overturning the gun control law, the majority was particularly concerned that Congress did not make findings that tied the possession of guns in school zones to interstate commerce. Chief Justice Rehnquist concluded, “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” The Court also reasoned that Congress' position would leave virtually no areas free from the threat of congressional interference. “The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress “[t]o regulate Commerce...among the several States....”

The supporting evidence behind the Violence Against Women Act had many observers thinking that the act would meet the test established by the Supreme Court in *Lopez*. On the other hand, *Lopez* and other decisions by the Rehnquist Court indicated the Court's turn to a more constrained interpretation of Congress's powers under the Commerce Clause. *U.S. v. Morrison*, then, provided some suspense as it came before the Court.

### The Case

In early 1995, Virginia Tech student Christy Brzonkala filed a complaint against Antonio Morrison and James Crawford, both of whom were students at Virginia Tech and members of Tech's varsity football team. Brzonkala filed the complaint under the school's Sexual Assault Policy; the facts surrounding the incident and subsequent appeals through the Virginia Tech system and later through the courts are reviewed at the beginning of the selection. By the time the case reached the Supreme Court, the Fourth Circuit Court of Appeals had heard the case en banc and ruled 7-4 that Congress lacked constitutional authority to enact the civil remedy section of 42 USC 13981, the Violence Against Women Act (*Brzonkala v. Virginia Polytechnic and State Univ.*, 169 F. 3d

820 (CA4 1999)).

### The Decision

In a 5-4 decision, the Court affirmed the Circuit Court's ruling invalidating the relevant section of the Violence Against Women Act. The majority invoked the earlier *Lopez* decision to support its ruling, and found that Congress had exceeded its constitutional authority under the Commerce Clause. (The Court refused to hear a challenge, originally brought as part of this case, to a section of the law that made it a federal crime to cross state lines to engage in domestic violence or to stalk a victim. A footnote in the full decision suggested that the direct link to interstate activity left that clause within Congress' authority).

The majority ruled that “thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature;” the Court found that gender-motivated crimes are not economic activity. The Court dismissed Congress’ extensive effort to demonstrate a connection between gender-motivated violence and commerce: “[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, ‘[S]imply because Congress may conclude that a particular activity affects interstate commerce does not necessarily make it so.’” The dissent disagrees sharply on this aspect of the majority's decision.

The Court also looked at the implications of upholding the Violence Against Women Act and found that if the act were upheld, Congress would be allowed to regulate virtually any criminal activity, usurping areas of law enforcement that have traditionally been left to states and localities. Echoing the finding in *Lopez*, the extension of this principle to areas other than criminal activity would allow Congress to regulate traditional areas of state regulation like family law, marriage, divorce, and childbearing, since the effect of these activities on the national economy is “undoubtedly significant.”

The Court also ruled that the relevant section of the act exceeded Congress's authority under Section 5 of the Fourteenth Amendment, since the section was directed not at any state nor any state actor, but at private individuals. The Court has generally found the Fourteenth Amendment to prohibit state action only; the Amendment “erects no shield against merely private conduct, however discriminatory or wrongful.” The Court suggested that the Commonwealth of Virginia, and not the federal government, is the appropriate venue for a remedy.

### The Dissents

Justice Souter's dissent, which was joined by Justices Stevens, Ginsburg, and Breyer, takes issue with the majority's dismissal of Congress' findings that gender-motivated violence affects interstate commerce. The dissent is strongly in favor of deferring to Congress, “whose institutional capacity for gathering evidence and taking testimony far exceeds ours.” The dissent argues that the role of the courts is to review congressional actions not on the basis of their soundness but simply for their rationality. The dissent argues that Congress's support for its action in the Violence Against Women Act differs from the Act at issue in *Lopez* precisely because of the assembled data.

Justice Breyer's dissent, not reproduced here, argues that the interconnectedness of the modern economy means that virtually any activity can affect commerce outside of a state, making it virtually impossible for courts to develop rules about where Congress may and may not regulate. Stevens, Souter, and Ginsburg joined this part of Breyer's dissent.

### Significance

*U.S. v. Lopez* was the first time since 1936 that the Court found an act of Congress to have exceeded congressional power over interstate commerce. By following *Lopez* with a similar ruling in *Morrison*, even in light of the body of evidence Congress gathered to support the Violence Against Women Act, the Court signaled its commitment to reining in Congress' powers under the Commerce Clause and continuing its redefinition of the practical relationships governing American federalism. The Rehnquist Court's federalism decisions have become one of its most intriguing features. See, in addition, *New York v. United States* (1992), citing the Tenth Amendment in striking parts of a federal law regulating liability for nuclear waste; *Seminole Tribe of Florida v. Florida* (1996), relying on the Eleventh Amendment to deny the federal government jurisdiction to adjudicate a case between an Indian tribe and a state; *Printz v. United States* (1997), striking part of a federal gun-control measure (Brady Act) as exceeding congressional limits imposed by the Tenth Amendment.

## QUESTIONS FOR DISCUSSION

1. Violence against women is a serious and compelling issue. Congress attempted to deal with the issue in the Violence Against Women Act. To what extent does this case indicate the difficulties of implementing policy in the American system? (Use the issue to elicit students' opinions about such measures; students will likely agree that combating violence against women is a justifiable government endeavor. Use the case to illustrate for students that addressing important social issues is not merely a matter of outlawing undesirable behavior; lawmaking must respect the Constitution, and that means it must account for and protect the interests of a variety of local, state, tribal, and national actors.)
2. Is the Court right to decide that Congress' reasoning on the relationships between violence against women and interstate commerce would allow Congress to regulate virtually all other aspects of social life on the same grounds? (*Morrison* can be used to illustrate how the Court will look at a particular rationale for a policy or regulation, and search for the deeper implications of the argument. Penalizing violence against women seems, at first glance, like an appropriate topic for Congress's attention. But the Court identifies where Congress's justification for action might lead, beyond the given case. This search for deeper implications, and the use of "worst case" scenarios, is a hallmark of the Court's decision-making process.)
3. Is there a clear line that helps courts determine when Congress has overstepped its authority? Is the text of the Constitution helpful? Are judges well-suited to make the distinction, or is defining such boundaries better left to the other branches and to bargaining between federal and non-federal interests? (The majority opinion suggests, "The Constitution requires a distinction between what is truly national and what is truly local." In a passage not included in this excerpt, Souter's dissent argued that the majority relied on an outdated and overly formalistic understanding of federalism. He wrote that questions regarding the boundaries between federal and state spheres of authority are subjects more appropriate for the political process than for resolution by the courts. Souter wrote, "Whereas today's majority takes a leaf from the book of the old judicial economists in saying that the Court should somehow draw the line to keep the federal relationship in a proper balance, Madison, Wilson, and [John] Marshall understood the Constitution very differently.")
4. Does the history of the Commerce Clause interpretation help illustrate the Court's relationship to economic and political trends and to current events? (*Morrison* can be used to demonstrate the history of the Court's very real presence in policymaking, through interpretations of the Commerce Clause. It can also be used to suggest the limits inherent in a Constitution that serves not as a detailed blueprint, but as a broad framework outlining the interaction of national institutions (here, Congress and the Supreme Court) and semi-sovereign bodies (federal, tribal, state, and local governments).)

## MULTIPLE CHOICE QUESTIONS

1. In *U.S. v. Morrison*, the Supreme Court ruled that the Violence Against Women Act:
  - a) was constitutional under the Commerce Clause.
  - b) was constitutional under the Fourteenth Amendment.
  - c) was unconstitutional, as it exceeded Congress' authority under the Commerce Clause.
  - d) was not an appropriate subject for judicial review.
2. *U.S. v. Morrison* is part of the Supreme Court's recent line of decisions that:
  - a) uphold the rights of women to seek remedies for violence at the federal level.
  - b) refuse federal protections to minorities who have been discriminated against.
  - c) limit Congress' authority in defense of principles of federalism.
  - d) *Morrison* was not a Supreme Court decision.
3. Passage of the Violence Against Women Act differed from passage of the Gun-Free School Zones Act because:
  - a) it was supported by extensive data gathered by Congress.
  - b) it was passed by a unanimous Senate.
  - c) it was passed by overriding a presidential veto.
  - d) it was supported by the Supreme Court.

## WHAT STATE ACTIONS ARE BEYOND FEDERAL REGULATION? CALIFORNIA'S MEDICAL MARIJUANA LAW

<p style="text-align: center;"><b>Reading 15:</b> <b><i>Gonzales v. Raich</i>, U.S. Supreme Court (2005)</b></p>
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### Ruling

The Constitution's Commerce Clause gives Congress the power to regulate purely local activities that are in a class of economic activities that rationally can be considered to have a substantial effect on interstate commerce. The Court will not, in reviewing Commerce Clause legislation, substitute its judgment for that of Congress, provided Congress has a rational basis for the law.

### Background

California voters, through the state's initiative process, passed a proposition in 1996 that legalized the use of marijuana for a limited class of medical conditions. The state legislature followed with the Compassionate Use Act of 1996, a law that authorized the medical use of marijuana.

The California law conflicted with the federal Controlled Substances Act, which was Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The law categorically prohibited the

cultivation, sale, and possession of marijuana. Congress cited the Commerce Clause in conjunction with the Necessary and Proper Clause as its authority to pass the law, claiming that the cultivation, distribution, and possession of marijuana were activities that rationally could be considered to have a “substantial effect” on commerce in controlled substances among the states. Since Congress could prohibit the latter, it could prohibit the former.

### Significance

This case should make students aware that federalism issues are not hypothetical. Here we have a major California law overturned by the Drug Enforcement Agency’s enforcement of the federal Controlled Substances Act that prohibits the manufacture and sale of marijuana, even the intrastate cultivation and sale of marijuana. Congress’s Commerce Clause power under *Gibbons* is plenary, and reaches into states if regulated activities indirectly affect “commerce among the states.” But the *Morrison* and *Lopez* cases discussed above seemed to restore a more conservative view of federalism by second guessing the rational basis of congressional legislation.

Note for students that here the Supreme Court overturned a state law that the people of California supported fully. The facts of the case are poignant. Students should come away realizing that the seemingly bland and dry Commerce Clause jurisprudence can have a profound political impact, as it has throughout our history.

### **MULTIPLE CHOICE QUESTIONS**

1. In *Gonzales v. Raich* (2000) the Supreme Court:
  - a) upheld the California Compassionate Use Act of 1996.
  - b) deferred to Congress.
  - c) narrowly interpreted the Commerce Clause of Article I.
  - d) overturned Congress.
  
2. In reviewing the congressional law in *Gonzales v. Raich* (2000) the Supreme Court held:
  - a) Congress can regulate local activities that have a “substantial effect” on interstate commerce.
  - b) State law regulating intrastate activities trumps federal regulation.
  - c) The California law was a legitimate exercise of the state police power to protect the health of its residents.
  - d) Congressional Commerce power is not limited.

### **MODERN FEDERALISM IN THE MADISONIAN SYSTEM**

**Reading 16:**  
**Martha Derthick, *Up-to-Date in Kansas City: Reflections on American Federalism***

### Theme

James Madison saw federalism as an important part of balanced government. Shared responsibilities between the national government and the states would prevent excessive delegation of powers to the executive by an overburdened Congress



## Overview

- By American federalism I mean an arrangement whereby the functions of government are divided between one national government and numerous sub-national ones, all resting on popular consent and written constitutions.
- American states are not creatures of the national government. State governments derive authority from their respective constituent communities
- Madison felt that Congress would be unable to deal with the vast universe of local problems and pressures. Consolidation would increase the power of the president by compelling a legislative delegation on practical grounds
- Madison expected the institutions of federalism to help control the national legislature. But parties and elections early proved more efficacious than address by the state legislatures to deter Congress from pursuing “a self-directed course.”
- In the end federalism failed to bring about the social harmony and national community Madison wanted.

## **MULTIPLE CHOICE QUESTIONS**

1. Madison saw federalism as a governmental arrangement that would:
  - a) encourage states to address Congress directly and sustain popular control of the national government.
  - b) encourage Congress to delegate power to the executive.
  - c) reduce judicial power.
  - d) increase political conflict.
2. In the end federalism:
  - a) brought about political harmony in the broad national community.
  - b) enhanced the role of courts as they were called upon to define the limits of national and state powers.
  - c) helped to transmit popular will to Congress.
  - d) was not constitutionally protected.