

# An Introduction to Federalism and State Constitutions<sup>1</sup>

All Americans are bound together under the shared ideals outlined in the Declaration of Independence and the U.S. Constitution. In 1776, and again in 1787, the country's founders came together to give birth to a new nation on behalf of "We the People." So enduring are these two documents that many Americans carry them around in their pockets -- symbolic reminders of the nation's promise to "secure the Blessings of Liberty to ourselves and our Posterity", and practical references for America's ongoing constitutional debates.

But a fundamental principle enshrined in these two texts is the idea that "We the People" are, in fact, several people. Bound together in the new Union, the country's founders recognized that Americans also were active members of smaller political associations; especially, of states. Americans not only came together as a nation to solve problems, they also worked alongside neighbors and nearby towns to overcome obstacles and improve their lives in the several states. In ratifying the U.S. Constitution, Americans chose to remain members of two communities -- one local, one national -- with the belief that such a framework, novel in the modern world, would allow the United States to thrive as a unique experiment in self-government.

Working in tandem with the U.S. Constitution, state constitutions... give citizens a choice in how they want to solve problems.

## Why States, and Why Federalism?

Today, as in revolutionary times, state constitutions are the primary means of structuring and limiting state governments – which are, in the end, where the majority of governance takes place, from schools to law enforcement to fixing potholes. Such active state government reflects the American system of federalism, in which power is divided between the states and the federal government. This complicated structure was conceived by Enlightenment philosophers and adapted by America's framers to ensure political liberty and thereby better secure the rights invoked in the Declaration of Independence. Broadly stated, American federalism means that most political activity takes place at the state level of government, where there is more likely to be a consensus, and so varying government policies will both be more responsive to and better reflect the values of the country's diverse communities – rather than feel like policy imposed from afar. The federal government, for its part, is assigned to take care of matters that the states would be unable to manage on their own, such as foreign and national economic policy and a productive flow of commerce among the states and Indian peoples.

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<sup>1</sup> Adapted from Sean Beienburg and Nicholas Jacobs, "An Introduction to Federalism and the Arizona Constitution", Arizona Constitution Project, at <https://cptl.asu.edu/az-constitution-introduction> (or [azconstitution.org](http://azconstitution.org))

As a historical matter, state constitutions preceded not only the U.S. Constitution but, in some cases, the Declaration of Independence. In the months before the Declaration's release, the Second Continental Congress instructed the states to prepare for governance apart from Britain, including new constitutions to replace their colonial charters.

Some states merely lightly modified their colonial charters, for example, by giving power to the new state legislature to select the governor rather than royal appointment. Others, however, took the revolutionary opportunity to experiment with self-government in much bolder ways. Pennsylvania initially instituted frequent elections for a unicameral legislature, ended property requirements for voting, and virtually abolished the "kingly" office of governor. In that spirit of revolution and popular sovereignty, Massachusetts's 1780 constitution not only prohibited Harvard professors from holding legislative office – more importantly, it laid out rigorous procedures for seeking the people's approval. In addition to a detailed plan for amendment in which the people of the towns themselves recommended changes for the whole state to consider, the proposed constitution, itself drafted by a democratically selected convention, was initially distributed to town meetings for approval. This set a modern standard for popular ratification of constitutions. These early state constitutions varied widely, reflecting each state's unique history and political culture, just as the later constitutions do.

As made explicit in the Ninth and Tenth Amendments to the U.S. Constitution, American federalism preserves this diversity by establishing a presumption of power against federal authority. Any proposed federal action must be justified by a constitutionally enumerated power—that is, one specifically granted to the federal government -- or derived from some other piece of constitutional text.

In the same spirit of federalism, the U.S. Constitution preserved the presumption of power for state authority. States (and the local governments they create) are presumed to have authority to govern on behalf of the public good of the citizens – specifically, the health, welfare, safety, and morals of the people – unless forbidden to act by the federal text. (In constitutional law, this presumption of state power is known as the “police power”). Consequently, while the U.S. federal government has much more power than any single state in the Union, its scope of authority is limited. Conversely, state governments have broad authority to act; and for most of American history, citizens have first turned towards their state governments to solve political problems.

Because of that broad authority, citizens must deliberately choose to rescind powers from their state governments. State constitutions, and especially state bills of rights are the principal ways in which communities limit state government and protect citizens' individual rights, carefully specifying what states can and cannot do. This is why state constitutions are much longer than the U.S. federal constitution.

These bills of rights not only structure the modern-day politics of each state, but the history of state bills of rights also influenced the development of the federal Bill of Rights—even down to the debate over having one at all. Successful ratification of the Constitution had hinged on

assuaging fears that it created too strong a central government. As a result, the federal Bill of Rights initially restricted only the federal government, not the states.

The original Constitution nonetheless had a limited, implicit bill of rights in the form of Article I, section 10, which explicitly restricted the states from a variety of activities, especially those which threatened private property or entailed conducting foreign policy. Moreover, it forbade states from passing laws inconsistent with those passed by Congress pursuant to the Constitution. Otherwise, however, and consistent with the doctrine of federalism and the preservation of the states' pre-existing police powers, the states largely were left to their own domestic affairs.

The experience of slavery and its aftermath, however, showed that states required additional restrictions to ensure the protection of basic rights and civil liberties. After the Civil War, many states enacted "black codes" by which freed slaves were prohibited from exercising the same contractual and economic freedoms and opportunities enjoyed by whites, in addition to the states' denial of what we think of as fundamental constitutional rights.

The Fourteenth Amendment aimed to correct these injustices. This amendment guaranteed citizenship to black Americans (overturning the 1857 Dred Scott decision), constitutionalized the Civil Rights Act of 1866 and its effort to ban black codes, and ensured the equal protection of the laws. Its drafters also envisioned, via the amendment's "privileges and immunities" clause, that the fundamental rights of United States citizenship, especially the Bill of Rights, would now also bind the states, not just the federal government.

Yet due to a complicated set of historical contingencies, the U.S. Supreme Court did not begin to apply the Bill of Rights to the states until the twentieth century, in a process which came to be called "incorporation." In the 1925 case *Gitlow v. New York*, the Supreme Court claimed authority to review state laws that prohibited the publication of seditious materials. While it ultimately upheld New York's conviction, in reviewing the case, it applied First Amendment free speech protections to the states through the Fourteenth Amendment. More recently, in 2010, the Supreme Court applied Second Amendment restrictions on the federal government to state governments, limiting how states can restrict the ownership of firearms, and in 2019 it applied the Eighth Amendment's prohibition of excessive fines to state criminal justice systems.

The Fourteenth Amendment did not aim to eliminate the American system of federalism, but it did insist on a basic floor of rights that the states must honor. The height of that floor quickly became, and has since remained, a source of intense debate.

### **Why State Constitutions?**

As the Supreme Court has continued to guarantee these fundamental rights against states, interest in state constitutions has faded. Even a quick read reveals that state constitutions contain many clauses that are duplicated in the federal text, such as freedom of speech. Prior to incorporation of the federal Bill of Rights against the states, this duplication in state constitutions was necessary if citizens wished to prohibit state action. Now, the relevance of state constitutions is not as obvious and indeed is sometimes questioned.

Nonetheless the federal Constitution's rights create a floor or minimum standard for individual rights, not a ceiling; citizens remain perfectly free to further constrain their states through their own state constitutions. Indeed citizens may be surprised that much of what prohibits state government action is found not in the federal Constitution, but rather in their state's basic law.

For example, unlike the text of the federal Constitution, the Arizona Constitution is far clearer in describing what constitutes an establishment of religion and thus specifically prohibiting certain entanglements between church and state. Similarly, the Arizona Constitution's provision on bearing arms is an unambiguous and explicit guarantee of an individual right, thus avoiding much of the debate surrounding the Second Amendment to the U.S. Constitution on government's ability to restrict personal ownership of weapons.

Similarly, where the U.S. Supreme Court has concluded the federal Constitution leaves state governments discretion to act, state constitutions allow citizens to remove that discretion and instead guarantee the individual rights demanded by their citizens.

Thus in the 2005 case of *Kelo v. New London*, the Supreme Court held that the federal Constitution's eminent domain provision allowed the compensated but involuntary transfer of land from a citizen to a developer if it would result in the net benefit of a larger tax base for a community. The opinion was widely criticized, with some arguing the opinion, while consistent with recent precedents, did not faithfully apply the original meaning of the Constitution. Others believed the result was unjust and biased against the poor, to favor corporations.

In response to this decision the citizens of Arizona, like in many states, insisted that increasing tax revenue did not count as a "public use" of the kind necessary to forcibly purchase property from citizens. Many states amended their constitutions to explicitly hold this; Arizona's citizens instead used the initiative process provided by our constitution to make a similar change to our laws. As they have done for over 100 years, citizens made a choice in how they wished to govern themselves, and they turned to the state constitution to make that choice.

State constitutions are easier to amend than the super-majoritarian process in Article V of the U.S. Constitution; in some cases, significantly so. A state constitution thus can better reflect the views of its political community—both by representing a more local perspective and by being more easily modified to institutionalize those values. By contrast, the federal model requires broad consensus in order to prevent narrow majorities from imposing their will on the nation as a whole.

By allowing more responsive policy change and experimentation yet simultaneously limiting their scope within a single state, constitutional federalism fosters innovative policy and dynamic government. In fact, constitutional federalism may offer citizens the best way to find compromise in our current era of bitter polarization and dissatisfaction with governing institutions. By protecting fundamental rights, while offering citizens another and smaller venue in which to debate their differences, American federalism offers renewed possibilities to govern in the face of intense political disagreement.