

CLS Presentation Outline: Why States Matter

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- **Intro**

- Federal law is expanding rapidly
 - Approximately 3500-4500 new federal regulations each year.
 - Harvey Silvergate estimates that the average person commits three federal felonies per day.
 - From 2001-2023, the Federal Register grew by approximately 1.8 million pages.
 - Approximately 200 pages every day
- Still, it's clear that people recognize, at least subconsciously, that states retain significant power
 - U-Haul map showing moving patterns regarding states
 - What powers do states have today? Why do States matter?

- **Federalism Refresher**

- The United States has a federal system: Almost every American is governed by both the national government (President, Congress, Supreme Court) and state government.
- **Supremacy Clause vs. Limited Power Doctrine**
 - The division of power between the States and the Federal Government can be seen as a division between a supreme, but limited in theory, role for the federal government, and broad powers for the States outside of those limited federal powers.
 - Supremacy Clause “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.”
 - Limited Power – Tenth Amendment - “The 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.”
- **Changes through time**
 - Until the 1930s, the general understanding was that the bulk of legislative power was reserved to the States. Federal authority was narrowly construed.
 - *Hammer v. Dagenhart* (1918) – Supreme Court strikes down Keating-Owen Child Labor Act, which prohibited interstate shipment of goods produced by child labor.
 - “The goods shipped are, of themselves, harmless. . . . When offered for shipment, and before transportation begins, the labor of their

production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.”

- In the 1930s and 40s, the pendulum swung hard in the other direction.
 - Seventeenth Amendment (1913) – Amended the Constitution to allow for direct election of Senators rather than election by state legislatures.
 - National Sentiment – The prosperity of the roaring 20s, which was tied in peoples’ mind to the national effort in WWI, and the subsequent Great Depression, created strong sentiment for national control, leading to ...
 - FDR’s New Deal – Massive expansion of federal government projects, particularly growth of federal executive agencies and regulation.
 - This led to the creation of the Federal Register after Texas companies were punished for not following a regulation that had not been fully promulgated at the time they were found to have violated it.
- This led to expansive readings of the Commerce Clause which gave broad power to the federal government to legislate in areas that had traditionally been thought reserved to the States
 - ***Wickard v. Filburn*** (1942) – An Ohio farmer harvested more wheat than allotted under the Agricultural Adjustment Act of 1938. He claimed the extra wheat was for his own use and therefore not subject to interstate commerce.
 - “But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.”
- [Slide] – “I’m not saying it was commerce, but it was commerce.”
- This expansive reading of the Commerce Clause led to federal legislation touching on things that had traditionally been reserved to the States, most notably in the area of civil rights.
 - ***Heart of Atlanta Motel v. U.S.* (1964)**
 - ***Katzenbach v. McClung* (1964)** - The Supreme Court upheld the Civil Rights Act of 1964, finding that racial discrimination by restaurants could significantly impact interstate commerce, even if their operations were primarily local.

- “A comparison of per capita spending by Negroes in restaurants, theaters, and like establishments indicated less spending, after discounting income differences, in areas where discrimination is widely practiced. This condition, which was especially aggravated in the South, was attributed in the testimony of the Under Secretary of Commerce to racial segregation. . . This diminutive spending springing from a refusal to serve Negroes and their total loss as customers has, regardless of the absence of direct evidence, a close connection to interstate commerce.”
- **Spending power**
 - In some areas, where Congress does not have power through the Commerce Clause or otherwise, it may still exert influence in state policies through the Spending Clause
 - ***South Dakota v. Dole*** – Holding that even though federal government could not directly regulate state drinking age, it could condition payment of certain highway funds on a state requiring persons to be 21 to drink alcohol.
 - ***NFIB v. Sebelius*** – Federal law requiring states to expand Medicaid coverage on the threat of cutting all of the State’s Medicaid funding was held to be too coercive.
- **Powers reserved to the States**
 - **General points**
 - Despite the significant power of the federal government, States still have significant power.
 - “The principle that the Constitution created a Federal Government of limited powers while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.” - *United States v. Morrison* (2000) (cleaned up).
 - “Deference to state lawmaking allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry.” *Gregory v. Ashcroft*.
 - Often referred to as the police power, states have broad authority to regulate in favor of the general welfare of their citizens.
 - The traditional formulation of the police power relates to the public health, safety, morals, and general welfare.

- Areas that are typically seen as particularly subject to control of the states include health, education, criminal law, property, and the public welfare.
- Notably, recent decisions by the Supreme Court suggest that we may see the tide turning in favor of state power.
 - *Dobbs*
 - *Loper Bright*
- **Public Health**
 - General Principles
 - One area on the forefront of the federalism dispute is health regulation.
 - “Our Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” - *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (Roberts, C.J., concurring)
 - Covid-19 served as a catalyst for battles between the States and federal government on healthcare policy
 - *Biden v. Missouri* – Holding that the federal government could impose a COVID-19 vaccination mandate in healthcare facilities participating in Medicaid and Medicare
 - *NFIB v. OSHA* – Holding that OSHA could not mandate that employers with more than 100 employees must require COVID-19 vaccination or weekly COVID-19 testing.
 - These opinions were issued on the same day.
 - Only Chief Justice Roberts and Justice Kavanaugh were in the majority of both cases.
 - Abortion
 - In 2022, the Supreme Court overruled *Roe v. Wade*, which recognized a federal constitutional right to abortions, returning the issue to the States.
 - “The States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot ‘substitute their social and economic beliefs for the judgment of legislative bodies.’ That respect for a legislature’s judgment applies even when the laws at issue concern matters of great social significance and moral substance.” *Dobbs v. Jackson Women’s Health Org.* (internal citations omitted).

- States have taken widely different stances on abortion, with some banning it except when necessary to preserve the life of the mother, while others permit it with few or no exceptions.
 - Guttmacher Institute Map
- Current battles: Transgenderism
 - The Supreme Court is currently reviewing whether bans on transgender affirmation procedures for children fall under discrimination (federal power) or public health (state power).
 - *Skrmetti v. United States*
 - Question Presented: Whether Tennessee Senate Bill 1 (SB1), which prohibits all medical treatments intended to allow “a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex” or to treat “purported discomfort or distress from a discordance between the minor’s sex and asserted identity,” Tenn. Code Ann. § 68-33-103(a)(1), violates the Equal Protection Clause of the Fourteenth Amendment.
 - In contrast, Colorado recently passed the Kelly-Loving Act, which among other things, prohibits insurance plans from denying medically necessary gender-affirming care.
- Shared responsibilities – Medicaid
 - For many states, Medicaid is the largest line item on a state budget. This is despite significant federal funding in this area.
 - States traditionally have flexibility to create pilot programs for administering Medicaid, subject to federal approval.
 - Ex. TennCare – Tennessee was the first state to implement a fully managed care program where administration was contracted out to private companies that were able to negotiate rates with providers. Prior to this every state had a fee-for-service program, creating uniform payment for Medicaid services
 - Now 48 states have implemented some form of managed care for Medicaid.
- **General Welfare**
 - **Civil Rights** – Even though the federal government has exercised significant authority in the area of civil rights and anti-discrimination, state laws can still play a significant role in civil rights
 - **Constitutional protections**

- Although the federal constitution, through the fourteenth amendment, largely sets a minimum baseline for what protections are available to individuals, states can provide greater protections than those required by the federal constitution
- Religion
 - Many of you may be familiar with state RFRA laws. Federal precedent for the free exercise of religion only requires laws to have a rational basis if they are “neutral and generally applicable” *Employment Division v. Smith* (1990).
 - In response to *Smith* (and *Boerne v. Flores*, which held that Federal RFRA was unconstitutional as applied to the States) passed State RFRAs, requiring where a government action creates a substantial burden on a person’s religious exercise, then the action must satisfy strict scrutiny.
 - 36 states either have state RFRAs or constitutional provisions that require substantial burdens on religion must satisfy strict scrutiny.
- Right to Bear Arms
 - Many states grant their residents greater freedoms to purchase and carry firearms than are required by the federal constitution.
 - Although the Supreme Court has recognized that the right to bear arms is a personal right, it has recognized that States may regulate gun ownership consistent with historical traditions and firearm regulation.
 - *District of Columbia v. Heller* (2008) – holding that the Second Amendment is a personal right not limited to state militias.
 - *New York State Rifle & Pistol Association v. Bruen* – holding that states must use objective criteria when requiring firearm permits.
 - There are currently 29 states that allow for “constitutional carry,” meaning that in general no permit is required to carry a firearm. Age limits may still apply.
 - Map from US Concealed Carry Association

- Anti-discrimination laws
 - Similarly to constitutional protections, States may have broader anti-discrimination protections than those found in federal law.
 - Employment discrimination
 - Title VII only applies to employers that have at least 15 employees. Many states have laws that allow employment discrimination claims against employers with fewer employees, and many have no minimum employees under state law.
 - State law may protect classes that are not protected under federal law
 - Housing discrimination
 - Like Title VII, the FHA only applies to certain housing.
 - Owner-occupied building with four or fewer units
 - Single Family Homes sold or rented without a broker
 - State law may apply to owners or landlords who do not meet federal requirements
 - State law may protect classes not covered by federal law
 - Public Accommodations
 - Title II of the Civil Rights Act, which covers public accommodations, is relatively narrow, covering only hotels and lodging, food-service, gas stations, and places for entertainment (like cinemas and sports arenas).
 - Many States have broader public accommodation discrimination laws that include businesses that cater to the public, or even all businesses.
- Education
 - States have significant control over education, and particularly public education.
 - Curriculum – states set learning standards, may require certain subjects or prohibit other subjects
 - Graduation requirements – states may set policies on graduation and advancement of students

- *Ex. Mississippi Miracle* – With curriculum changes and graduation requirement changes, Mississippi went from 49th in fourth-grade reading in 2013 to 21st in 2022.
 - States also may set requirements and regulations for charter and home schools
- Economic Regulation
 - States also exercise significant control over businesses and corporate structures
 - Approximately 70% of Fortune 500 companies are incorporated in Delaware
 - States also may regulate working hours, minimum wages, overtime, and labor conditions over and above the requirements of the Fair Labor Standards Act.
- Family Law
 - States generally have significant control over family relations, including marriage, divorce, and adoption.
 - There has been significant increase in federal law regulation of family law in recent years.
 - *Obergefell v. Hodges* (2015)– Supreme Court case holding that States cannot refuse to issue marriage licenses to same-sex couples.
 - Indian Child Welfare Act – establishes minimum federal standards for the removal of American Indian and Alaska Native children from their families, and sets specific requirements for state child custody proceedings, including foster care, guardianship, termination of parental rights, and adoption cases.
 - *Haaland v. Brackeen* (2023) – rejecting a challenge to the ICWA by individuals and states. The Court held that because Indian affairs were within the power of Congress, such authority overrode any state laws.
- Property Law
 - States have significant authority to define property rights.
 - Notably, even though the federal constitution protects the right to due process, the underlying property rights are often a creature of state law.
 - States may regulate the titling, ownership, and transfer of property
 - States may regulate the use of property (zoning, land use, environmental regulations)
 - But note RLUIPA – Religious Land Use and Institutionalized Persons Act

- This federal law protects religious institutions from discrimination in zoning and landmarking laws
- **Safety and Morals**
 - **Licensing**
 - As all members of the bar know, states also are in control of professional licensing
 - States may set qualifications and testing for professions
 - States also may set rules of conduct and practice and discipline professionals who fail to follow the rules
 - **Courts**
 - **Criminal Law**
 - 90% of criminal prosecutions occur in state courts
 - States may vary widely on what constitutes a crime (drugs, self-defense)
 - States also may vary on what punishments and remedies are available,
 - Death penalty
 - Registration requirements
 - Diversion and remediation
 - Civil Forfeiture
 - **Tort Law**
 - Similarly, torts claims and remedies can vary widely from state to state
 - Comparative negligence v. Contributory negligence
 - Medical malpractice and damages caps
 - Punitive damages
 - Wrongful death actions
 - Who can sue
 - What damages are recoverable
 - Anti-Slapp laws (Strategic Litigation Against Public Participation)
 - 35 states have anti-SLAPP laws
 - These laws allow a defendant to challenge and seek to dismiss lawsuits quickly when the lawsuit implicates the defendants right of free speech.
 - Interesting aside: the statute of limitation for claims under 42 U.S.C. § 1983 is based on state tort law.
- **Taxation**
 - States vary widely in how much they tax citizens for state operations.

States with Highest Tax Burdens	States with Lowest Tax Burdens
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Hawaii – 13.92%	Alaska – 4.93%
New York – 13.56%	Wyoming – 5.79%
Vermont – 11.53%	New Hampshire – 5.94%
California – 11%	Tennessee – 6.83%
Maine – 10.64%	South Dakota – 6.46%

- **Personnel and Policy**

- In addition to the powers reserved to the States, States exercise significant authority through personnel decisions
 - States have special, but not unbounded, authority in personnel decisions through the Anti-Commandeering doctrine.
 - ***Boerne v. Flores*** – Holding that RFRA is constitutional as applied to the United States, but not as applied to the States
 - ***Printz v. United States*** – Holding that the Brady Handgun Violence Prevention Act was unconstitutional because it required local law enforcement officials to conduct background checks on firearm purchasers
 - ***Murphy v. NCAA*** – Holding unconstitutional PASPA, a federal statute that prohibited state legislatures from authorizing sports gambling, violates the anti-commandeering clause
 - ***Garcia v. San Antonio Metropolitan Transit Authority*** – Holding that the Fair Labor Standards Act could be constitutionally applied to state and local government employees.
 - States also have resources and personnel to challenge federal policies and laws
 - Numerous Supreme Court cases have come through challenges by State Attorney Generals offices
 - *Massachusetts v. EPA* (2007) –
 - The Supreme Court holds that states may have standing to challenge federal laws where a private individual does not.
 - “We stress here . . . the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.”
 - *Biden v. Nebraska* – Challenging federal student loan forgiveness on grounds of harm to public corporation that processes student loans.

- **Conclusion**

- While the federal government is expanding rapidly, states still play a significant role in setting policies for their residents.
- Furthermore, in many ways, the pendulum is swinging back to state power.
 - *Dobbs* gave the power to regulate abortion back to the States.
 - *Raimondo v. Loper Bright Enterprises*, which overruled *Chevron* deference to federal agencies, made challenges to federal regulations much more viable as a means to challenge federal overreach.

Year	Federal Register Pages	Number of Rules	POTUS
1989	50,501	4,714	Bush I years
1990	49,795	4,334	
1991	57,973	4,416	
1992	57,003	4,155	
1993	61,166	4,369	Clinton years
1994	64,914	4,867	
1995	62,645	4,713	
1996	64,591	4,937	
1997	64,549	4,584	
1998	68,571	4,899	
1999	71,161	4,684	
2000	74,258	4,313	
2001	64,438	4,132	Bush II years
2002	75,606	4,167	
2003	71,269	4,148	
2004	75,675	4,101	
2005	73,870	3,943	
2006	74,937	3,718	
2007	72,090	3,595	
2008	79,435	3,830	
2009	68,598	3,503	Obama years
2010	81,405	3,573	
2011	81,247	3,807	
2012	78,961	3,708	
2013	79,311	3,659	
2014	77,687	3,554	
2015	80,260	3,410	
2016	95,894	3,853	
2017	61,308	3,281	Trump years
2018	67,225	3,368	
2019	72,436	2,964	
2020	86,356	3,038	
2021	73,771	4,429	Biden years
2022	80,756	3,168	
2023	90,402	3,018	