

States are the Solution

“... act like it.”¹

Why Federalism?

“People follow jobs. Jobs follow liberty.”² Liberty follows federalism, i.e. balanced, limited government.

“Federalism protects the liberty of the individual from arbitrary power,” the U.S. Supreme Court reminded us just last year, **“by denying any one government complete jurisdiction over all the concerns of public life.”** At its heart, federalism means **“[t]he independent power of the States also serves as a check on the power of the Federal Government.”**³

“Act Like It” Key Concepts:

- **Jurisdiction** – The general power of governing. Last year the U.S. Supreme Court reiterated **“this general power of governing [is] possessed by the States but not by the Federal Government.”**⁴
- **Sovereignty** - Supreme in power; possessing supreme dominion, superior to all others.⁵ In admonishing us last year to “act like it,” the High Court reminded us **“States are separate and independent sovereigns.”**⁶
- **Supremacy** – having more power, authority or status than anyone else.⁷ In recent years, the U.S. Supreme Court quoted Federalist No. 39 to clarify that States **“form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.”**⁸

Federalism is a Team Sport

The State Government will **“afford complete security against invasions of the public liberty by the national authority”** because they will **“readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty,”** Alexander Hamilton encouraged us in the “owner’s manual” for the Constitution.⁹ States **“would espouse the common cause”** against **“ambitious encroachment of the federal government”** predicting that the States would easily check federal intrusions because **“one set of representatives would be contending against thirteen sets of representatives.”**¹⁰

¹ NFIB. v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

² Veronique de Rugy, Mercatus Institute.

³ NFIB v. Sebelius.

⁴ Id.

⁵ Merriam-Webster Dictionary, “Sovereign”

⁶ NFIB v. Sebelius

⁷ Merriam-Webster Dictionary, “Supremacy”

⁸ Mack and Printz v. United States, 521 U.S. 898 (1997)

⁹ Federalist No. 28

¹⁰ Federalist No. 46

SUPREME COURT OF THE UNITED STATES

NATIONAL FEDERATION OF INDEPENDENT BUSINESS ET AL. v. SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 11–393. Argued March 26, 27, 28, 2012—Decided June 28, 2012*

Recently (June 2012), U.S. Supreme Court reiterated the inherent right, power, and duty of states and their political subdivisions to secure and defend the health, safety and welfare of their citizens even against “federal blandishments” (i.e., coaxing, cajoling, coercing). The High Court warned that states and their political subdivisions are the critical external check to out-of-control, “arbitrary interference” by the federal government and admonished them **“TO ACT LIKE IT”!**

The Federal Government ... must show that a constitutional grant of power authorizes each of its actions. The same does not apply to the States, because the Constitution is not the source of their power. ... The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution’s text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the “police power. ... Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which “in the ordinary course of affairs, concern the lives, liberties, and properties of the people” were held by governments more local and more accountable than a distant federal bureaucracy. The independent power of the States also serves as a check on the power of the Federal Government: ‘By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.’ ... In the typical case we look to the States to defend their prerogatives by adopting ‘the simple expedient of not yielding’ to federal blandishments when they do not want to embrace the federal policies as their own. The States [by and through their political subdivisions] are separate and independent sovereigns. Sometimes they have to act like it.”

THE STATES ARE SEPARATE AND INDEPENDENT SOVEREIGNS:

Sometimes they have to act like it.¹

Separate: 1. To keep apart or divide, as by an intervening barrier or space. 2. To set apart; disconnect; dissociate.²

The states are dissociated in their sovereignty from the federal government and are meant to be set apart from one another.

Independent: 1. Not influenced or controlled by others in matters of opinion. 2. Not subject to another's authority or jurisdiction; autonomous; free. 3. Not dependent or contingent upon something else for existence.³

The States are independent and autonomous jurisdictions. State jurisdiction should not be influenced by the Federal Government and is not dependent or contingent upon the Federal government.

Sovereigns: 1. Supreme in power; possessing supreme dominion. 2. Supreme; superior to all others; chief.⁴

The State is the supreme power within its boundaries and in areas of its jurisdiction.

“The Federal Government must show that a constitutional grant of power authorizes each of its actions. The same does not apply to the States, because the Constitution is not the source of their power.”⁵

- The source of the States power is directly from the people; and not the federal government.
- Powers of the Federal Government are limited to that found in Constitution.

“The states thus can and do perform many of the vital functions of modern government even though the Constitution's text does not authorize any government to do so.”

“Our cases refer to this general power of governing, possessed by the States but not by the Federal Government as the ‘police power’.”⁶

- Police Power: An authority conferred by the American constitutional system in the Tenth Amendment, U.S. Const., upon individual states, and, in turn, delegated to local governments.
- An authority conferred by the American constitutional system in the Tenth Amendment, U.S. Const., upon individual states, and, in turn, delegated to local governments, through which they are enabled to establish a special department of police; adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order, preventing a conflict of rights in the common intercourse of citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws.⁷

¹ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

² Merriam-Webster Dictionary, s.v. “Separate”

³ Merriam-Webster Dictionary, s.v. “Independent”

⁴ Merriam-Webster Dictionary, s.v. “Sovereign”

⁵ US, 3.

⁶ US, 4.

⁷ Black's Law Dictionary, s.v. “Police Power.”

“The Framers thus ensured that powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy.”⁸

- If they are held by governments more local to the people than they are not held by the Federal Government. Police power is the exercise of the sovereign right of a government to promote order, safety, security, health, morals and general welfare within constitutional limits, particularly with respect to the lives, liberties and properties of their citizens.

“The independent power of the States also serves as a check on the power of the Federal Government.”⁹

- **How:** *“By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. In the typical case we look to the States to defend their prerogatives by adopting ‘the simple expedient of not yielding’ to federal blandishments when they do not want to embrace the federal policies as their own.”*
- The Separate and independent jurisdiction of the states over the police powers within its boundaries (i.e. to exercise the sovereign right of governing to promote order, safety, security, health, morals, and general welfare) particularly to secure to its citizens their unalienable rights to life, liberty, and property; including the unalienable right of self-preservation, without such rights are merely illusory.

“The federal system rests on what might at first seem a counterintuitive insight, that ‘freedom is enhanced by the creation of two governments, not one.’ *Alden v. Maine*, 527 U.S. 706, 758, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.

Federalism has more than one dynamic. It is true that the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-a-vis one another. The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.” *Bond v. United States*, 131 S. Ct. 2355, 2364, 180 L. Ed. 2d 269 (2011)

“Congress exercises its conferred powers subject to the limitations contained in the Constitution.” *New York v. United States*, 505 U.S. 144, 156, 112 S. Ct. 2408, 2418, 120 L. Ed. 2d 120 (1992)

“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’” *Coleman v. Thompson*, 501 U.S. 722, 759, 111 S.Ct. 2546, 2570, 115 L.Ed.2d 640 (1991). *New York v. United States*, 505 U.S. 144, 181, 112 S. Ct. 2408, 2431, 120 L. Ed. 2d 120 (1992).

⁸ U.S. 4.

⁹ U.S. 4.

Jurisdiction over Federal Areas within the States, Two Volumes
Some excerpts from this report include:

*"It should be noted that lands already under the proprietorship of the United States when these general consent statutes were enacted, such as the lands of the so-called public domain, were not affected by the statutes, and **legislative jurisdiction with respect to them remained in the several States**. Curiously, therefore, **the vast areas of land which constitute the Federal public domain generally are held by the United States in a proprietorial statute only.**" Vol. I, Page 9*

*"**Proprietorial interest only.**--This term is applied to those instances wherein **the Federal Government has acquired some right or title to an area in a State but has not obtained any measure of the State's authority over the area.**" Vol. I, Page 14*

*"Effects of varying statutes.--To each of the four categories of legislative jurisdictional situations (in which the United States has (a) exclusive, (b) concurrent, (c) or partial legislative jurisdiction, or (d) a proprietorial interest only) **differing legal characteristics attach.**" Vol. I, Page 14*

*"As to the **powers reserved by the State for exercise only by itself**, administration of the area is **as though the United States had no jurisdiction whatever (i. e., proprietorial interest only)**; the reserved powers may not be exercised by the federal government, but continue to be exercised by the State." Vol. I, Page 21*

*"Proprietorial interest only.--**Where the Federal Government has no legislative jurisdiction over its land**, it holds such land in a proprietorial interest only and has the same rights in the land as does any other landowner. ... in the case where the United States acquires only a proprietorial interest **the State retains all the jurisdiction over the area which it would have if a private individual rather than the United States owned the land.**" Vol. I, Page 21-22*

*"... **agencies which consider** that only a proprietorial interest in the Federal Government, with **legislative jurisdiction left in the States, best suits the requirement of their operations.**" Vol. I, Page 33*

*"Agencies preferring a proprietorial interest only.--**The last and largest group, which desires for its properties only a proprietorial interest in the United States, with legislative jurisdiction left in the States**, includes all Federal agencies not mentioned in the two paragraphs above which occupy or supervise real property of the .*

United States" Vol. I, Page 34

"Department of the Interior.--This Department proprietorial interest only as most desirable for the great bulk of the vast areas of Federal lands under its supervision." Vol. I, Page 63

Committee Conclusions:

"With respect to the large bulk of federally owned or operated real property in the several States and outside of the District of Columbia **it is desirable that the Federal Government not receive, or retain, any measure whatever of legislative jurisdiction,** but that it hold the installations and areas in a proprietorial interest status only, with legislature jurisdictions several States;" Vol. I, Page 70

"The power to make and enforce the necessary rules and regulations for the management of Federal property does not depend, constitutionally, on the acquisition by the Federal Government of legislative jurisdiction. Indeed, several Federal agencies already enjoy authority in this respect without reference to the jurisdictional status of the lands concerned. The General Services Administration by section 2 of the act just discussed (40 U.S.C. 318a) and the Department of the Interior with respect to the national parks (16 U.S.C. 3) provide examples of this. Additionally, it may be noted that the authority which employees of the National Park Service and the Forest Service enjoy in the enforcement of rules and regulations for the protection of the national parks and national forests is similarly free from any dependence upon the jurisdictional status of the lands concerned. For this reason the Committee recommends the elimination of the requirement of section 1, of the act of June 1, 1948, as amended (40 U.S.C. 318), that the police jurisdiction of the General Services Administration special policemen be limited to areas under the concurrent or exclusive jurisdiction of the United States. It further recommends that the regulatory authority which it proposes be granted to all Federal land management agencies should not be made to depend on the acquisition of Federal jurisdiction over the lands concerned. Because of **the confusion and other adverse effects which multiplication of Federal police forces well might have on law enforcement,**" Vol. I, Page 74

Key Concept: There are reasons for a state and national government. Limits to Supremacy. States are Supreme in their sphere's.

Sovereignty:

“The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.” *Bond v. US*, 131 S.Ct. 2355, 2364 (2011)

“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.” *Printz v. United States*, 521 U.S. 898, 935, 117 S. Ct. 2365, 2384, 138 L. Ed. 2d 914 (1997)

“The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.” *Gibbons v. Ogden*, 22 U.S. 1, 195, 6 L. Ed. 23 (1824)

Tenth Amendment:

“Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's **2377 assertion that “[t]he 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.”” *Printz v. United States*, 521 U.S. 898, 919, 117 S. Ct. 2365, 2376-77, 138 L. Ed. 2d 914 (1997)

“Tenth Amendment imposes no limitations on the exercise of delegated powers but merely prohibits the exercise of powers ‘not delegated to the United States.’” *Printz v. United States*, 521 U.S. 898, 923, 117 S. Ct. 2365, 2379, 138 L. Ed. 2d 914 (1997)

“...the Tenth Amendment affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers.” *Printz v. United States*, 521 U.S. 898, 936, 117 S. Ct. 2365, 2385, 138 L. Ed. 2d 914 (1997)

“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not

conferred on Congress.” *New York v. United States*, 505 U.S. 144, 156, 112 S. Ct. 2408, 2417, 120 L. Ed. 2d 120 (1992)

Federalism:

“The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.” *Bond v. US*, 131 S.Ct. 2355, 2364 (2011)

“The Constitution does not protect **the sovereignty of States** for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, **the Constitution divides authority between federal and state governments for the protection of individuals.**” *NY v. US*, 112 S.Ct. 2408, 2431 (1992).

“This separation of the two spheres is one of the Constitution's structural protections of liberty. ‘Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, **a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.**’” *Printz v. United States*, 521 U.S. 898, 921, 117 S. Ct. 2365, 2378, 138 L. Ed. 2d 914 (1997)

Police Powers:

“The federal structure 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.” (see *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991)). *Bond v. US*, 131 S.Ct. 2355, 2364 (2011)

“The constitutional authority of Congress cannot be expanded by the “consent” of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.” *New York v. United States*, 505 U.S. 144, 188, 112 S. Ct. 2408, 2435, 120 L. Ed. 2d 120 (1992)

“The Federal Government may not compel the States to enact or administer a federal regulatory program.” *New York v. United States*, 505 U.S. 144, 188, 112 S. Ct. 2408, 2435, 120 L. Ed. 2d 120 (1992)

“...opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.” *Printz v. United States*, 521 U.S. 898, 925, 117 S. Ct. 2365, 2380, 138 L. Ed. 2d 914 (1997)