

National Federation of Independent Business v. Sebelius,
567 U.S. 519 (2012)
The State-Federal Governing Partnership

“The questions before us must be considered against the background of these basic principles.”

The following “basic principles” of our unprecedented federative system* are quoted directly from the United States Supreme Court decision in NFIB, et al., v. SEBELIUS [June 28, 2012]:

1. In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. ...

2. The role of the Supreme Court in “[r]esolving ... controversy requires [it] to examine both the limits of the Government’s power, and [the Supreme Court’s] own limited role in policing those boundaries.

3. The Federal Government “is acknowledged by all to be one of enumerated powers.” *Ibid.* That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government’s powers.

4. The enumeration of powers is also a limitation of powers, because “[t]he enumeration presupposes something not enumerated.” *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824). The Constitution’s express conferral of some powers makes clear that it does not grant others. And the Federal Government “can exercise only the powers granted to it.” *McCulloch, supra*, at 405.

5. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

6. Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, “the Constitution is itself, in every rational sense, and to every useful purpose, a bill of rights.” *The Federalist* No. 84, p. 515 (C. Rossiter ed. 1961).

7. And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: “The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people.” U. S. Const., Amdt. 10.

8. The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See, e.g., *United States v. Comstock*, 560 U. S. ____ (2010).

9. The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act.

10. 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.

11. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the “police power.” See, e.g., *United States v. Morrison*, 529 U. S. 598–619 (2000).

12. “State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U. S. 144, 181 (1992) (internal quotation marks omitted).

13. 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.

14. 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 Federalist No. 45, at 293(J. Madison).

15. 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.” *Bond v. United States*, 564 U. S. ____, ____ (2011) (slip op., at 9–10).

16. 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.** *Massachusetts v. Mellon*, 262 U. S. 447, 482 (1923).

17. The States are separate and independent sovereigns. Sometimes they have to act like it.

Dissenting Opinion, Justice Antonin Scalia:

18. The Constitution, though it dates from the founding of the Republic, has powerful meaning and vital relevance to our own times. **The constitutional protections that this case involves are protections of structure. Structural protections—notably, the restraints imposed by federalism and separation of powers—are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril.**

* Justice Kennedy reiterated recently that the principle of federalism "was the unique contribution of the Framers to political science and political theory." It was "the insight of the Framers," Kennedy continued, "that freedom was enhanced by the creation of two governments, not one."