

2.1: Federalism

Learning Objectives

1. Define federalism.
2. Ascertain the sections of the Constitution that give Congress regulatory authority.
3. Ascertain the basis for Congress's authority to enact criminal laws.
4. Compare federal regulatory authority with state regulatory authority.
5. Compare federal criminal laws with state criminal laws.
6. Define federal supremacy.

The United States' system of government is called **federalism**. Federalism, as set forth in the U.S. Constitution, divides governmental power between the *federal government* and each of the *states*. This prevents a concentrated source of governmental power in one individual or a small group of individuals. Because of federalism, the United States has one federal legal system, and each state has its own state legal system. Thus, in the United States, a plethora of legal systems all operate harmoniously at the same time.

The Scope of Federal Law

The government's power to regulate comes from the U.S. Constitution. The *federal* government derives its authority to create law from [Article I, § 8](#), which discusses federal Congress's *exclusive* or **delegated powers**. These include the power to regulate currency and coin, establish a post office, promote science and art by regulating the rights to discoveries and writings, declare war and raise armies, conduct foreign affairs, regulate interstate and foreign commerce, and make laws necessary and proper to execute other powers expressly granted in the Constitution. Courts have interpreted the last two powers mentioned in the [Commerce Clause](#) and the [Necessary and Proper Clause](#) to be the *broadest* sources of federal regulatory authority.

To simplify and summarize precedent defining federal regulatory authority, federal laws are meant to regulate in two areas. First, federal laws regulate issues that concern the *country*, rather than just one city, county, or state. The federal government regulates foreign affairs, for example, because this affects the United States of America, not just one particular region. Second, federal laws regulate commerce, which is economic activity, that *crosses from state to state*. Some common examples are television broadcasts, the Internet, and any form of transportation such as airlines.

Federal Criminal Laws

The original intent was for the federal government to be a *limited* government, with the bulk of regulatory authority residing in the *states*. The only *crimes* Congress is specifically authorized to punish are piracies and felonies on the high seas, counterfeiting, and treason; however, case precedent has expanded the federal government's power to enact criminal laws based on the commerce clause and the necessary and proper clause. [McCulloch v. Maryland](#), 17 U.S. (4 Wheat.) 316 (1819). Still, there must be *some* connection to an issue of national character and interstate commerce, or the federal government will overstep its authority. In general, federal criminal laws target conduct that occurs on federal property or conduct involving federal employees, currency, coin, treason, national security, rights secured by the Constitution, or commerce that crosses state lines. Currently, over five hundred crimes are listed in [Part I, Title 18 of the United States Code](#), which codifies criminal laws for the federal government.



Figure 2.1.1 Diagram of Federal Laws

The Scope of State Law

The U.S. Constitution designates the states as the *primary regulatory authority*. This is clarified in the Tenth Amendment, which reads, “The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or the people.” State laws are also supposed to regulate in two areas. First, state laws regulate issues of a *local* character or concern. A state may regulate, for example, its water ownership and use because water can be scarce and is not

generally provided to other states. Second, state laws regulate issues or things that remain within a state's border. A state generally regulates, for example, the operation of a small business whose products are only sold locally and not shipped out of the state.

Federal laws are *the same* in every state, but state laws *differ* from state to state. Something that is legal in one state may be illegal in another state. This inconsistency makes our system of federalism complicated for students (and lawyers). However, with a country as large and varied as the United States, it is sensible to allow each state to choose for itself which laws will be most suitable.

State Criminal Laws

The power to enact criminal laws belongs almost *exclusively* to the states. This is because of the [Tenth Amendment](#), which vests in states a **police power** to provide for the health, safety, and welfare of state citizens. Approximately 90 percent of all criminal laws are state, rather than federal. Often, federal crimes are also state crimes and can be prosecuted and punished by both the state and federal government without violating the principle of double jeopardy.

✓ Examples 2.1.1

Diversity Among State Laws

In Nevada, prostitution is legal under certain circumstances. [N.R.S. § 201.354](#). An individual who engages in prostitution inside a licensed “house of prostitution” in Nevada is not exposed to criminal liability. However, if the *same individual* engages in prostitution in a *different state*, they may be subject to a criminal prosecution. (Prostitution will be discussed in detail in [Chapter 12](#).)

Another illustration is that the age of consent for “sexual conduct” in Ohio is 16, [Ohio Rev. Code § 2907.04\(A\)](#), while the age of consent in New York is 17, [N.Y. Penal Law § 130.05\(3\)\(a\)](#). In Ohio, some sex offenses that are based on the victim's status as a minor require evidence that the defendant had knowledge of the minor's age (e.g., “when the offender knows the other person is thirteen years of age or older but less than sixteen...”), [Ohio Rev. Code § 2907.04\(A\)](#), but no such “knowledge” requirement exists in any of Wisconsin's versions of these crimes, [Wis. Stat. §§ 948.09-948.093](#).

Federal Supremacy

Our legal system is divided up to conform to the principle of federalism, so a potential exists for conflict between federal law and state law. A federal law may make something *illegal*; a state law may insist that it is *legal*. Whenever a conflict occurs between federal and state law, courts must follow the federal law. This is called **federal supremacy**. As the [Supremacy Clause of Article VI](#) of the federal Constitution states, “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.”

✓ Example 2.1.2

In Washington and several other states, an individual may possess and use marijuana for medicinal purposes with a prescription. Washington State Medicinal Marijuana Act, [§ 69.51A RCW](#). (See all states that have legalized medical and recreational marijuana [here](#).) Federal law continues to prohibit possession and use of marijuana, and it does not distinguish between medical and recreational marijuana (however, a strictly regulated exception exists under certain circumstances for medical research). [21 U.S.C. Ch. 13 § 801 et. seq.](#)

Because of this conflict, the federal statutes may **preempt** many state laws under the Supremacy Clause, although the courts have not meaningfully addressed it. To date, the federal government has not attempted direct action to prevent state legalization efforts. However, while states continue a trend of decriminalizing marijuana, the U.S. Department of Justice has continued to reaffirm that it has the power to enforce marijuana possession/use laws in states that have legalized marijuana.¹

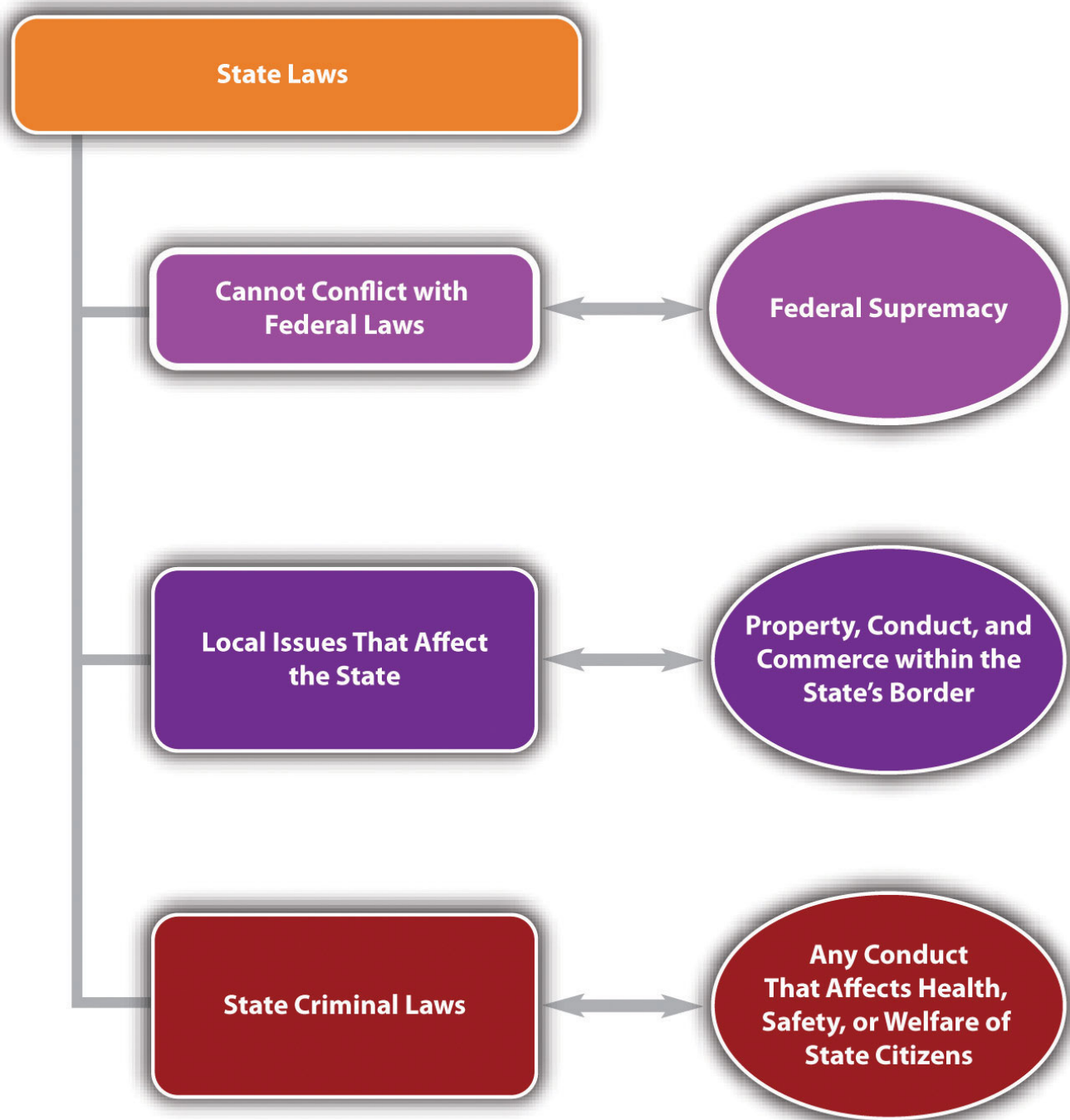


Figure 2.1.2 Diagram of State Laws

Key Takeaways

- Federalism is a system of government in which power is divided between one national, federal government and several independent state governments.
- Congress gets its regulatory authority from Article I § 8 of the federal Constitution. This includes several delegated powers, the commerce clause, and the necessary and proper clause.
 - The commerce clause gives Congress the power to regulate commerce that crosses state lines.
 - The necessary and proper clause gives Congress the power to regulate if necessary to carry out all other powers listed in the Constitution.

- The Constitution specifically authorizes Congress to punish piracies and felonies on the high seas, counterfeiting, and treason. Case precedent has also expanded the federal government's power to enact criminal laws based on the commerce clause and the necessary and proper clause.
- The federal government is intended to be limited, with the bulk of regulatory authority residing in the states. The federal government is restricted to regulating in the areas designated in Article I § 8 of the federal Constitution. The states can regulate for the health, safety, and welfare of citizens pursuant to their police power, which is set forth in the Tenth Amendment of the federal Constitution.
- Federal criminal laws criminalize conduct that occurs on federal property or involves federal employees, currency, coin, treason, national security, rights secured by the Constitution, or commerce that crosses state lines. State criminal laws make up 90 percent of all criminal laws, are designed to protect state citizens' health, safety, and welfare, and often criminalize the same conduct as federal criminal laws.
- Federal supremacy, which is set forth in the Supremacy Clause of the federal Constitution, requires courts to follow federal laws if there is a conflict between a federal and state law.

Exercises

? Exercise 2.1.1

Congress passes a law criminalizing the posting of child pornography on the Internet. Where does Congress get the authority to pass this criminal law? If a state has a criminal law criminalizing the same conduct, can both the state *and* federal government prosecute a defendant for one act of downloading child pornography?

Answer

Congress gets the authority to criminalize conduct involving the Internet from the commerce clause because the Internet includes economic activity and *crosses state lines*. Both federal and state governments can prosecute the defendant under federal and state criminal statutes for one act without violating double jeopardy.

? Exercise 2.1.2

Read [U.S. v. Morrison](#), 529 U.S. 518 (2000). Which part(s) of the Constitution did the US Supreme Court rely on when it held that 42 U.S.C. § 13981 was unconstitutional?

Answer

The U.S. Supreme Court relied on the commerce clause and the Fourteenth Amendment. Specifically, the Court ruled that gender-motivated crimes of violence are not *economic activity* and do not have a *national* effect, so the commerce clause does not support federal legislation in this area. Furthermore, the Court held that the Fourteenth Amendment due process clause is targeted at state government action, not *individual* defendants, so it is likewise inapplicable.

? Exercise 2.1.3

Read [Pennsylvania v. Nelson](#), 350 U.S. 497 (1956). Why did the US Supreme Court invalidate the Pennsylvania Sedition Act?

Answer

The U.S. Supreme Court held that the Pennsylvania Sedition Act is *superseded* by the Smith Act, [18 U.S.C. § 2385](#). Specifically, the Court referenced the supremacy of federal law on the same topic, thereby preempting the state statute.

Footnotes

1. [Sacco, Lampe & Sheikh, 2023](#). ↩

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