

3 Federalism



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Learning Outcomes

After reading this chapter, you should be able to:

- LO 3-1 Explain what federalism means, how federalism differs from other systems of government, and why it exists in the United States.
- LO 3-2 Indicate how the Constitution divides governing powers in our federal system.
- LO 3-3 Summarize the evolution of federal-state relationships in the United States over time.
- LO 3-4 Describe developments in federalism in recent years.
- LO 3-5 Explain what is meant by the term *fiscal federalism*.

America at Odds

Should Recreational Cannabis Be Legal?



Miss Nuchwara Tongrit/
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The history of cannabis, or marijuana, in America is long and varied. Before the 1920s, cannabis was either not regulated or lightly regulated throughout the United States. By the mid-1930s, however, weed was illegal almost everywhere. Current national law is based on the Controlled Substances Act of 1970, which lists marijuana as a “Schedule I” substance with no medical use and a high potential for abuse.

Times have changed, and so have state laws. According to a Gallup poll, a majority of Americans now favor legalizing cannabis. As of 2020, the drug remained fully illegal in only two states: Idaho and South Dakota. One state—Nebraska—has simply decriminalized it. That means Nebraska does not treat

simple possession as a criminal offense. Fourteen states have legalized varieties of medical marijuana that won’t easily get someone stoned. Another twenty-one states have legalized “psychoactive” medical marijuana. (More states may have followed suit by the time you read this.) Fifteen have both medical marijuana and decriminalization laws. Finally, eleven states and the District of Colombia have legalized recreational cannabis. The states are Alaska, Washington, Oregon, California, Nevada, Colorado, Illinois, Michigan, Massachusetts, Vermont, and Maine. With our federal system, though, the national government can still arrest individuals for possession and use of marijuana everywhere.

Legalize Cannabis at Our Peril

Opponents of cannabis legalization say that if you like the huge expense of alcohol and tobacco abuse, then you will love the costs of legal cannabis. Use of alcohol and tobacco is common—65 percent of Americans use alcohol and 30 percent use tobacco. If we were to add legalized cannabis to that list, how many people would abuse the drug? More than do so now, surely.

Just as long-term use of alcohol and tobacco affects the body and the brain, so, too, does long-term cannabis use. The results are memory loss, reduced ability to concentrate, and poor coordination. Long-term abuse from an early age yields diminished attention spans and reduced ability for abstract reasoning. Adolescents face the greatest risk if we legalize cannabis.

A final point: Legalization advocates claim that legal weed will cut crime rates. Yet most drug-related violence and gang activity are not due to cannabis. Violence most commonly follows the production and sale of cocaine, heroin, and methamphetamines. Do we want to legalize these?

The Benefits Outweigh the Costs

Those in favor of cannabis legalization point out the obvious: In a typical year, 40 to 50 million Americans use cannabis recreationally at least once. If we were to repeal current federal legislation and let the states do as they wish, we would relieve our overworked police, courts, and prisons. Arresting hundreds of thousands of people each year for cannabis use is simply a waste of resources. Those who are arrested, even if they do not serve time in prison, will have a police record for life, reducing their chances for employment.

Tobacco smokers die an average of seven years before nonsmokers. Thousands of people die from alcohol poisoning each year, but it is essentially impossible to die of a weed overdose. Cannabis users are not as aggressive as those who are intoxicated with alcohol. In fact, a third of those arrested for crimes were drunk when they broke the law. What sense does it make to ban cannabis when these legal drugs are so much more dangerous?

Where do you stand?

1. Instead of legalizing cannabis, would it make sense to ban alcoholic beverages? Why or why not?
2. What benefits might states gain if they legalize the recreational use of cannabis?

Explore this issue online:

- John Hawkins argues against cannabis legalization on the conservative Townhall blog. Find the article by searching for “hawkins marijuana.”
- Renee Jacques makes the case for legalization on the Huffington Post site. Search for “cannabis should be legal everywhere.”

Introduction

Clearly, those who work for the national government would like the states to cooperate fully in the implementation of national policies. At the same time, those who work in state government don't like to be told what to do by the national government, especially when the implementation of a national policy is costly for the states. (Sometimes, this attitude can lead to conflicts, such as the one described in the chapter-opening *America at Odds* feature.) Finally, those who work in local governments would like to run their affairs with the least amount of interference from both their state governments and the national government.

Such conflicts arise because our government is based on the principle of **federalism**, which means that government powers are shared by the national government and the states. When the founders of this nation opted for federalism, they created a practical and flexible form of government capable of enduring for centuries. At the same time, however, they planted the seeds for future conflict between the states and the national government over how government powers should be shared. As you will read in this chapter—and throughout this book—many of today's most pressing issues have to do with which level of government should exercise certain powers.

Federalism and its Alternatives

LO 3-1 Explain what federalism means, how federalism differs from other systems of government, and why it exists in the United States.

There are various ways of ordering relations between central governments and local units. Federalism is one of these ways. Learning about federalism and how it differs from other forms of government is important to understanding the American political system.

What Is Federalism?

Nowhere in the Constitution does the word *federalism* appear. This is understandable, given that the modern concept of federalism was an invention of

federalism A system of shared sovereignty between two levels of government—one national and one subnational—occupying the same geographic region.

the founders. Ever since the Federalists and the Anti-Federalists argued more than two hundred years ago about what form of government we should have, hundreds of

definitions of federalism have been offered. Basically, government powers in a *federal system* are divided between a central government and regional, or subnational, governments.

Defining Federalism Although the definition given here seems straightforward, its application certainly is not. After all, almost all nations—even the most repressive totalitarian regimes—have some kind of subnational governmental units. Thus, the existence of national and subnational governmental units by itself does not make a system federal. *For a system to be truly federal, the powers of both the national units and the subnational units must be specified and limited.*

Under true federalism, individuals are governed by two separate governmental authorities (national and state authorities) whose expressly designated powers cannot be altered without changing the fundamental nature of the system—for example, by amending a written constitution. Table 3.1 lists some of the countries that have a federal system of government.¹

U.S. Federalism in Practice Federalism in theory is one thing—federalism in practice is another. As you will read shortly, the Constitution sets forth

Table 3.1 Countries That Have A Federal System Today
What influence might the example of the United States have had on the adoption of federal systems in other countries?

Country	Population (in Millions)
Argentina	44.9
Australia	25.7
Austria	8.9
Brazil	211.6
Canada	38.0
Ethiopia	98.7
Germany	83.1
India	1,362.7
Malaysia	32.8
Mexico	127.8
Nigeria	206.1
Pakistan	220.9
Switzerland	8.6
United States	329.8

Source: Official estimates by governments of the listed nations or by the United Nations. Numbers are for 2020 except Argentina, Ethiopia, Germany, and Switzerland, 2019.

specific powers that can be exercised by the national government and provides that the national government has the implied power to undertake actions necessary to carry out its expressly designated powers. All other powers are “reserved” to the states. The broad language of the Constitution, though, has left much room for debate over the specific nature and scope of state and national powers. Thus, the actual workings of our federal form of government have depended, to a great extent, on the historical application of the broad principles outlined in the Constitution.

To further complicate matters, the term *federal government*, as it is used today, refers to the national, or central, government. When people talk of the federal government, they mean the national government based in Washington, D.C. They are not referring to the federal *system* of government, which is made up of both the national government and the state governments.

Alternatives to Federalism

Perhaps an easier way to define federalism is to discuss what it is *not*. A majority of the nations in the world today have a **unitary system** of government. In such a system, the constitution vests all powers in the national government. If the national government so chooses, it can delegate some activities to subnational units. In a unitary system, any subnational government is a “creature of the national government.” The governments of Britain, France, Israel, Japan, and the Philippines are examples of unitary systems.

In the United States, because the Constitution does not mention local governments (cities and counties), we say that city and county governmental units are “creatures of state government.” That means that state governments can—and do—both give powers to and take powers from local governments. The individual American states, in other words, are also unitary systems.

The Articles of Confederation created a confederal system, a second alternative to federalism. In a **confederal system**, the national government exists and operates only at the direction of the subnational governments. Few true confederal systems are in existence today, although some people contend that the European Union (EU)—a group of twenty-seven European nations that has established many common institutions—qualifies as such a system. (In 2016, Britain voted to leave the EU, effective January 31, 2020.)

Federalism—An Optimal Choice for the United States?

The Articles of Confederation failed because they did not allow for a sufficiently strong central government. The framers of the Constitution, however, were also fearful of tyranny and a too-powerful central government. The outcome had to be a compromise: a federal system.

Advantages of Federalism The appeal of federalism was that it retained state powers and local traditions while establishing a strong national government capable of handling common problems, such as national defense. A federal form of government also furthered the goal of creating a division of powers (to be discussed shortly). There are other reasons why the founders opted for a federal system, and a federal structure of government continues to offer many advantages for U.S. citizens.

Advantage: Size. One of the reasons a federal form of government is well suited to the United States is our country’s large size. Even when the United States consisted of only thirteen states, its geographic area was larger than that of England or France. In those days, travel was slow and communication was difficult, so people in outlying areas were isolated. The news of any particular political decision could take several weeks to reach everyone. Therefore, even if the framers of the Constitution had wanted a more centralized system (which most of them did not), such a system would have been unworkable.

Look at Figure 3.1. As you can see, to a great extent the practical business of governing this country takes place in state and local governmental units. Indeed, the most common type of governmental unit in the United States is the *special district*—an independent unit of government that is separate from general-purpose local governments such as counties, cities, and townships. Special districts enjoy substantial administrative and financial independence.

A special district is generally concerned with a specific issue such as solid waste disposal, mass transportation, or fire protection. Often, the jurisdiction of special districts

unitary system A

centralized governmental system in which local or subdivisional governments exercise only those powers given to them by the central government.

confederal system

A league of independent sovereign states, joined together by a central government that has only limited powers over them.

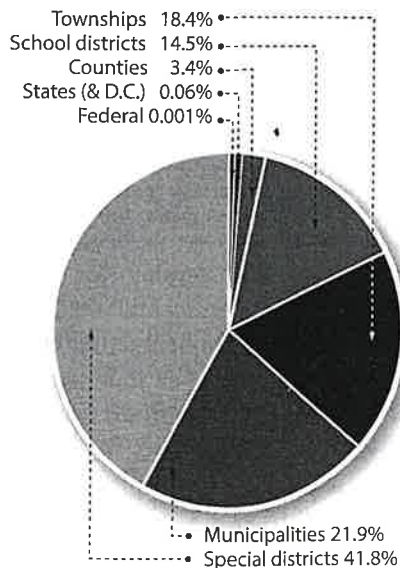
Figure 3.1 Governmental Units In The United States Today

How could the number of governments in the United States create problems for voters?

THE NUMBER OF GOVERNMENTS IN THE UNITED STATES TODAY

Government	Number
Federal government	1
State governments and District of Columbia	51
Local governments	
Counties	3,031
Municipalities (mainly cities or towns)	19,495
Townships (less extensive powers)	16,253
Special districts (water, sewer, and so on)	38,542
School districts	12,754
Subtotal local governments	90,075
Total	90,127

PERCENTAGE OF ALL GOVERNMENTS IN THE UNITED STATES TODAY



Source: U.S. Census Bureau, Census of Governments, 2017.

Advantage: Experimentation. The existence of numerous government subunits in the United States also makes it possible to experiment with innovative policies and programs at the state or local level. Many observers, including Supreme Court justice Louis Brandeis (1856–1941), have emphasized that in a federal system, state governments can act as “laboratories” for public-policy experimentation. For example, many states have adopted minimum-wage laws that establish a higher minimum wage than the one set by national legislation. State governments also have a wide variety of policies on how or whether state employees can form labor unions.

Depending on the outcome of a specific experiment, other states may (or may not) implement similar programs. State innovations can also serve as models for federal programs. For instance, California was a pioneer in air-pollution control. Many of that state’s regulations were later adapted by other states and eventually by the federal government.

Advantage: Subcultures. We have always been a nation of different political subcultures. The Pilgrims who founded New England were different from the settlers who established the agricultural society of the South. Both of these groups were different from those who populated the Middle Atlantic states. The groups that founded New England had a religious focus, while those who populated the Middle Atlantic states were more business oriented. Those who settled in the South were more individualistic than the other groups. That is, they were less inclined to act as a collective and more inclined to act independently of each other. A federal system of government allows the political and cultural interests of regional groups to be reflected in the laws governing those groups. By far the most important of these regional interests was slavery. Federalism allowed northern states to ban the institution, while southern states maintained it.

As we noted earlier, nations other than the United States have benefited from the principle of federalism. One of them is Canada. Because federalism permits the expression of varying regional cultures, Canadian federalism naturally differs from the American version, as you will discover in this chapter’s *The Rest of the World* feature.

Some Drawbacks to Federalism Federalism offers many advantages, but it also has some drawbacks. Consider that although federalism in many ways promotes greater self-rule, or democracy, some scholars point out that local self-rule may not always be in society’s best interests. These observers argue that the

crosses the boundaries of other governmental units, such as cities or counties. Compared to other local governments, special districts tend to have fewer restrictions as to how much debt they can incur and so are created to finance large building projects.



The Rest of the World

Canadian Versus American Federalism

By land area, Canada is the second-largest country in the world. Physically, the country seems designed for a federal system of government. And indeed, Canada has a federal system similar in some ways to that of the United States—but it also has some big differences. When the 1867 Constitution Act created modern Canada, the United States had just concluded the Civil War. Canada's founders blamed that war on the weakness of the U.S. central government. Therefore, the Canadian Constitution gave far more power to the central government than did the U.S. Constitution.

The Powers of Lower-Level Governments

Our lower levels of government are called states, whereas in Canada they are called provinces. Right there, the powers of the central government are emphasized. The word state implies sovereignty. A *province*, however, is never sovereign and is typically set up for the convenience of the central government.

In the United States, the powers of the national government are limited

to those listed in the Constitution. In the Canadian Constitution, it is the powers of the provinces that are limited by a list. The Tenth Amendment to the U.S. Constitution reserves residual powers to the states or to the people. In Canada, residual powers rest with the national government. Under the 1867 Canadian Constitution, the central government could veto any provincial legislation. No such clause appears in the U.S. Constitution.

The Provinces Gain Strength

Over time, the powers of the U.S. federal government grew at the expense of the states. The opposite happened in Canada. By the end of the nineteenth century, the Canadian government in practice had abandoned the power to veto provincial legislation. The Great Depression of the 1930s strengthened the national government in the United States. In Canada, it strengthened the provinces.

Two Languages

Another striking difference between Canada and the United States is that

Canada has two national languages. A majority of Canadians speak English, but most of the population of Québec speak French. The Parti Québécois (PQ), which wants Québec to be a separate country, gained power in that province in 1976 and 1994. Both times, it held referendums on whether Québec should demand "sovereignty-association," a euphemism for independence. In 1995, the PQ almost obtained a majority vote for its position. The PQ returned to power in 2012 but without enough votes to hold another referendum. In 2014, it was defeated by the Liberal Party. Nevertheless, the possibility exists that Canada could actually break apart someday.

► Critical Analysis

The Canadian Constitution is based on the principles of "peace, order, and good government." Contrast that phrase with the words in the Declaration of Independence—"life, liberty, and the pursuit of happiness." How do the statements differ?

smaller the political unit, the higher the probability that it will be dominated by a single political group, which may or may not be concerned with the welfare of many of the local unit's citizens. For example, entrenched segregationist politicians in southern states denied African Americans their civil rights and voting rights for decades. Consider also that during the COVID-19 pandemic, many governors acted quite differently with respect to their responses for their states' citizens.

Powerful state and local interests can impede national plans. State and local interests often diverge

from those of the national government. For example, the health care reforms adopted by the national government in 2010 sought to expand the number of poor persons eligible for Medicaid. As of 2020, however, fourteen states still refused to participate in the expansion program, even though the national government initially picked up 90 percent of the cost. Finding acceptable solutions to such conflicts has not always been easy. Indeed, as will be discussed shortly, in the 1860s, war—not politics—decided the outcome of a struggle over states' rights.

division of powers A basic principle of federalism established by the U.S. Constitution, by which powers are divided between the national and state governments.

expressed powers Constitutional or statutory powers that are expressly provided for by the U.S. Constitution; also called enumerated powers.

implied powers The powers of the federal government that are implied by the expressed powers in the Constitution, particularly in Article I, Section 8.

Federalism has other drawbacks as well. One of them is the lack of uniformity of state laws, which can complicate business transactions that cross state borders. Another problem is the difficulty of coordinating government policies at the national, state, and local levels. Additionally, the simultaneous regulation of business by all levels of government creates red tape that imposes substantial costs on the business community.

In a federal system, there is always the danger that national power will be expanded at the expense of the states. President Ronald Reagan (1981–89) once said, “The Founding Fathers saw the federalist system as constructed something like a masonry wall. The States are the bricks, the national government is the mortar. . . . Unfortunately, over the years, many people have increasingly come to believe that Washington is the whole wall.”²

Critical Thinking

- The national government imposed a uniform highway speed limit on the entire country from 1974 until its repeal in 1995. Why should we leave speed limits to the states—or why should they be a federal responsibility?

The Constitutional Division of Powers

LO 3-2 Indicate how the Constitution divides governing powers in our federal system.

The founders created a federal form of government by dividing sovereign powers into powers that could be exercised by the national government and powers that were reserved to the states. Although there is no systematic explanation of this **division of powers**, the original Constitution, along with its amendments, provides statements on what the national and state governments can (and cannot) do.

The Powers of the National Government

The Constitution delegates certain powers to the national government. It also prohibits the national government from exercising certain powers.

Powers Delegated to the National Government The national government possesses three types of powers: expressed, implied, and inherent.

Expressed Powers. Article I, Section 8, of the Constitution expressly enumerates twenty-seven powers that Congress may exercise. Two of these **expressed powers**, or *enumerated powers*, are the power to coin money and the power to regulate interstate commerce. Constitutional amendments have provided for other expressed powers. For example, the Sixteenth Amendment, added in 1913, gives Congress the power to impose a federal income tax.

One power expressly granted to the national government is the right to regulate commerce not only among the states, but also “with the Indian Tribes.” As a result, relations between Native American tribal governments and the rest of the country have always been a national responsibility. A further consequence is that state governments face significant limits on their authority over American Indian reservations within their borders.

Implied Powers. The constitutional basis for the **implied powers** of the national government is found in Article I, Section 8, Clause 18, often called the



Image 3.1 These Native American children live on a reservation. Which level of government has responsibility for Indian affairs?

Education Images/Universal Images Group/Getty Images

necessary and proper clause. This clause states that Congress has the power to make “all Laws which shall be necessary and proper for carrying into Execution the foregoing [expressed] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” The necessary and proper clause is often referred to as the *elastic clause* because it gives elasticity to our constitutional system.

An example of an implied power is the power to print paper currency, such as dollar bills. The Constitution says only that Congress has the power to “coin money,” presumably in the form of gold or silver coins. Congress also has the expressed power to borrow, however, and on that basis it eventually issued paper currency that represented sums owed by the government.³

Inherent Powers. The national government also enjoys certain **inherent powers**—powers that governments must have simply to ensure the nation’s integrity and survival as a political unit. For example, any national government must have the inherent ability to make treaties, regulate immigration, acquire territory, wage war, and make peace. While some inherent powers are also enumerated in the Constitution, such as the powers to wage war and make treaties, others are not. For example, the Constitution does not speak of regulating immigration or acquiring new territory. Although the national government’s inherent powers are few, they are important.

Federal Lands. One inherent power is older than the Constitution itself—the power to own land. The United States collectively owned various western lands under the Articles of Confederation. The Northwest Territory, which included the modern states of Illinois, Indiana, Michigan, Ohio, Wisconsin, and part of Minnesota, joined United States’ lands together with lands given up by New York and Virginia. The Northwest Territory was organized during the ratification of the Constitution. Indeed, establishing the territory as the collective property of the entire Union was necessary to secure support for ratification in several states, including Maryland.

The United States then sold land to new settlers—land sales were a major source of national government income throughout much of the 1800s. To

this day, the national government owns most of the acres in most far western states, a fact that annoys many Westerners.

Powers Prohibited to the National Government The Constitution expressly prohibits the national government from undertaking certain actions, such as imposing taxes on exports and from passing laws restraining certain liberties, such as the freedom of speech or religion. Most of these prohibited powers are listed in Article I, Section 9, and in the first eight amendments to the Constitution. Additionally, the national government is implicitly prohibited from exercising certain powers. For example, most authorities believe that the federal government does not have the power to create a national public school system because such power is not included among those that are expressed and implied.

**“This country’s planted thick with laws
from coast to coast . . . and if you cut
them down . . . d’you really think you
could stand upright in the winds that
would blow then?”**

~ Robert Bolt, *A Man For All Seasons*

The Powers of the States

The Tenth Amendment to the Constitution asserts that powers that are not delegated to the national government by the Constitution nor prohibited to the states “are reserved to the States respectively, or to the people.” The Tenth Amendment thus gives numerous powers to the states, including the power to regulate commerce within their borders and the power to maintain a state militia.

Police Powers In principle, each state has the ability to regulate its internal affairs and to enact whatever laws are necessary to protect the health, safety, welfare, and morals of its people. These powers of the states are called **police powers**. The establishment of public

necessary and proper clause Article I, Section 8, Clause 18, of the Constitution, which gives Congress the power to make all laws “necessary and proper” for the federal government to carry out its responsibilities; also called the elastic clause.

Inherent powers The powers of the national government that, although not always expressly granted by the Constitution, are necessary to ensure the nation’s integrity and survival as a political unit.

police powers The powers of a government body that enable it to create laws for the protection of the health, safety, welfare, and morals of the people. In the United States, most police powers are reserved to the states.

schools and the regulation of marriage and divorce have traditionally been considered to be entirely within the purview of state and local governments. During the coronavirus pandemic, states made their own decisions about quarantining their citizens and utilizing contact tracing for individuals who had been infected by the disease.

Because the Tenth Amendment does not specify what powers are reserved to the states, these powers have been defined differently at different times in our history. In periods of widespread support for increased regulation by the national government, the Tenth Amendment tends to recede into the background. When the tide of support turns, the Tenth Amendment is resurrected to justify arguments supporting increased states' rights (see, for example, the discussion of the new federalism later in this chapter). Because the United States Supreme Court is the ultimate arbiter of the Constitution, the outcome of disputes over the extent of state powers often rests with the Court.

Powers Prohibited to the States Article I, Section 10, denies certain powers to state governments, such as the power to tax goods that are transported across state lines. States are also prohibited from entering into treaties with other countries. In addition, the Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments prohibit certain state actions. (The complete text of these amendments is included in Appendix B.)

The fact remains that, under the Constitution, the states have considerable scope for action under their police powers. Some have argued that state-level laws and regulations can be more burdensome than national legislation. This chapter's *Perception vs. Reality* feature reports on that concern.

Interstate Relations

The Constitution also contains provisions on interstate relations. The states have constant commercial and social interactions among themselves, and these interactions often do not directly involve the national government. The

relationships among the states in our federal system of government are sometimes referred to as *horizontal federalism*.

The Full Faith and Credit Clause The Constitution's full faith and credit clause requires each state to honor every other state's public acts, records, and judicial proceedings. This constitutional mandate posed a problem in the years from 2004 to 2015, when same-sex marriage was legal in some—but not all—of the states. Already in 1996, members of Congress feared that one or more states might recognize such marriages. If a gay couple was legally married in one state, would all the others be forced to recognize the marriage? To prevent this result, Congress passed the Defense of Marriage Act (DOMA), which provided that no state was required to treat a relationship between persons of the same sex as a marriage, even if the relationship was considered a marriage in another state. A second part of the law barred the national government from recognizing same-sex marriages in states that legalized them. The constitutionality of both parts of the law was subject to debate.

United States v. Windsor. The Supreme Court never took up the question of whether DOMA violated the full faith and credit clause. In 2013, however, in



Image 3.2 Supporters of same-sex marriage celebrate at the United States Supreme Court after it legalized same-sex marriage in all fifty states in June 2015. *Why has same-sex marriage been an issue for our federal system?*



Perception vs. Reality

The Best Government Is Local Government

Our government has certainly grown in size since World War II. Many Americans complain about “big government.” Taxes are too high. Regulations take away our freedom. The “government” in question is the one in Washington, D.C.

The Perception

Big government is the problem, and big government means the national government. Government closest to the people governs best. Therefore, state and local governments should have more power, and the federal government should have less.

The Reality

In recent years, more and more commentators have begun arguing that regulations imposed by state and local governments are even more costly than the ones imposed by the feds. Consider housing policies. The zoning regulations that control housing construction are almost entirely local. Typically, zoning restricts development to ensure low population densities in our major urban

areas. City dwellers want to keep out new high-rises. Suburbanites want to stop the construction of town houses and apartment buildings. As a result, cities with highly productive industries, such as Boston, New York, Los Angeles, San Francisco, and Seattle, don’t have enough housing for all the people who would like to live there.

The law of supply and demand takes its course: The cost of the housing that does exist rises astronomically. Americans willing to move in search of economic opportunity are priced out. Instead, they go to places where the cost of housing is tolerable—places such as Houston, which has no zoning code. *But jobs don't pay as well in Houston as they do in San Francisco.* The national cost of excessive residential zoning, therefore, may run into hundreds of billions of dollars.

As another example, look at state (and sometimes local) occupational licensing requirements. Of course, it’s generally agreed that not everyone who wants to should be a surgeon or a lawyer. We need to be sure that

people who handle matters of life and death know what they are doing.

But do we really need to license interior designers, as is done in Florida? Do barbers really have to be licensed? Should dental hygienists be required to work for dentists, who then get a cut of their income? Some 25 percent of American workers need a state-issued license to do their jobs legally.

Excessive licensing not only makes the services we buy more expensive, but also restricts job opportunities. These restrictions simply serve the interests of those already in particular trades by reducing the number of competitors.

Blog On

New York Magazine columnist Jonathan Chait is best known for his aggressive criticism of conservatives. In “The Worst Governments in America Are Local,” however, he takes on both political parties. Find this article by searching on “chait worst governments.”

United States v. Windsor, the Court did find that the second part of the law, which banned national recognition of such marriages, was unconstitutional.⁴ The *Windsor* case was, in a way, a vindication of states’ rights—the national government could not interfere with state decisions on whether to recognize same-sex marriage.

Obergefell v. Hodges. By 2015, thirty-seven states and the District of Columbia permitted same-sex marriage. In June of that year, in *Obergefell v. Hodges*, the Supreme Court found laws against same-sex marriage to be unconstitutional throughout the

entire United States.⁵ With that ruling, the question of whether DOMA violated the full faith and credit clause became irrelevant.

Interstate Compacts Horizontal federalism also includes agreements, known as *interstate compacts*, among two or more states to regulate the use or protection of certain resources, such as water or oil and gas. California and Nevada, for example, have formed an interstate compact to regulate the use and protection of Lake Tahoe, which lies on the border between those states. In some circumstances, interstate compacts require the approval of the

national government. This approval is necessary if a compact affects “the balance of power between the states and the federal government,”⁶ or between the states making the compact and other states. When the U.S. Congress approves a compact, it becomes federal law.

Concurrent Powers

concurrent powers

Powers held by both the federal and the state governments in a federal system.

Concurrent powers can be exercised by both the state governments and the federal government. Generally, a state’s concurrent powers apply

only within the geographic area of the state and do not include functions that the Constitution delegates exclusively to the national government, such as the coinage of money and the negotiation of treaties.

An example of a concurrent power is the power to tax. Both the states and the national government have the power to impose income taxes—and a variety of other taxes. States, however, are prohibited from imposing tariffs (taxes on imported goods), and, as noted, the federal government may not tax articles exported by any state.

Figures 3.2 and 3.3 summarize the powers granted and denied by the Constitution, respectively, and list other concurrent powers.

Figure 3.2 Powers Granted by the Constitution

The Constitution grants certain powers to the national government and certain powers to the state governments. Some powers, called *concurrent powers*, can be exercised at either the national or the state level, but generally the states can exercise these powers only within their own borders. *There are limits on what states can do using their police powers. Give some examples of actions that would not be allowed.*

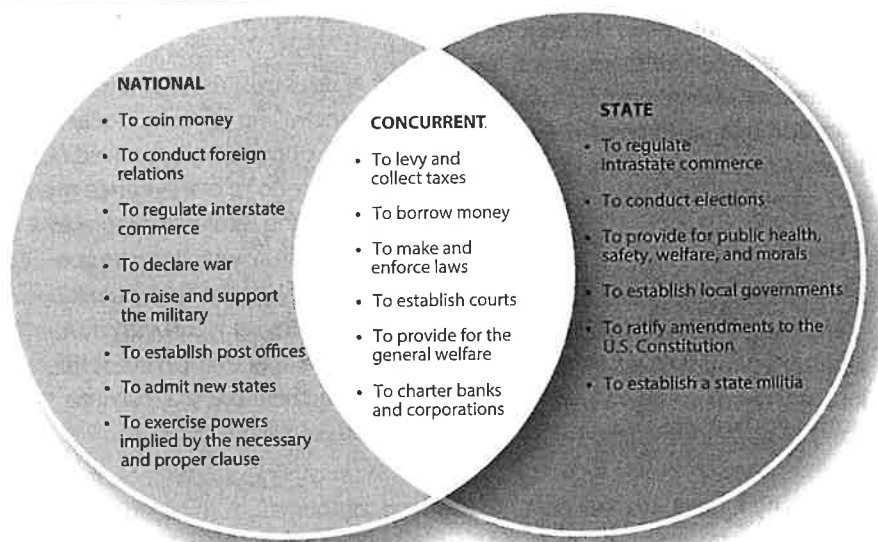
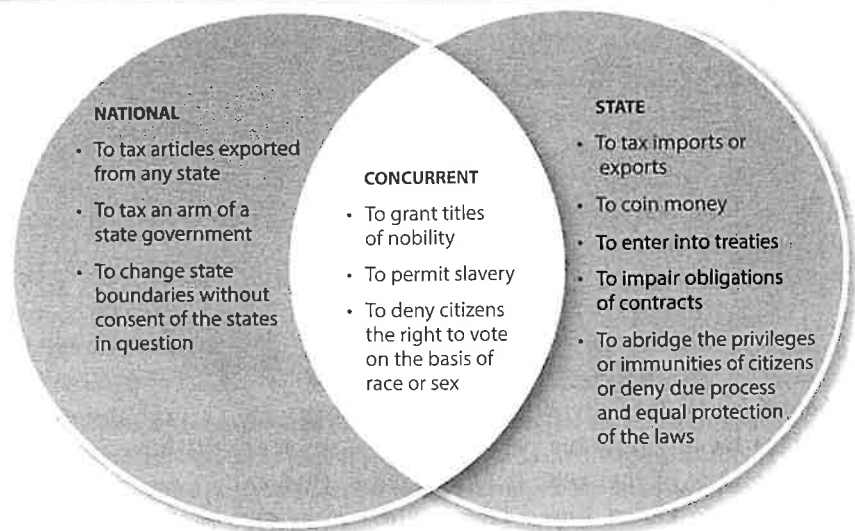


Figure 3.3 Powers Denied by the Constitution

The Constitution denies certain powers to the national government and denies certain powers to the state governments. *What would happen if the states had the right to coin their own money?*



The Supremacy Clause

The Constitution makes it clear that the federal government holds ultimate power. Article VI, Clause 2, known as the **supremacy clause**, states that the U.S. Constitution and the laws of the federal government “shall be the supreme Law of the Land.” In other words, states cannot use their reserved or concurrent powers to counter national policies. Whenever state or local officers, such as judges or sheriffs, take office, they become bound by an oath to support the U.S. Constitution. National government power always takes precedence over any conflicting state action.⁷

Critical Thinking

- Under current court rulings, it is very difficult for states to collect taxes on goods that their citizens buy through the Internet. National legislation, however, could make such tax collection more feasible. Should Congress pass such legislation? Why or why not?

The Struggle For Supremacy

LO 3-3 Summarize the evolution of federal-state relationships in the United States over time.

Much of the political and legal history of the United States has involved conflicts between the supremacy of the national government and the desire of the states to preserve their sovereignty. The most extreme example of this conflict was the Civil War in the 1860s. Through the years, because of the Civil War and several important Supreme Court decisions, the national government has increased its power.

Early United States Supreme Court Decisions

Two Supreme Court cases, both of which were decided in the early 1800s, played a key role in establishing the constitutional foundations for the supremacy of the national government. Both decisions were issued while John Marshall was chief justice of the Supreme Court. In his thirty-four years as chief justice (1801–35), Marshall did much to establish the prestige and the independence of the Court.

In *Marbury v. Madison*, Marshall clearly enunciated the principle of *judicial review*, under which the courts can determine that laws or executive actions are unconstitutional.⁸ Judicial review has since become an important part of the checks and balances in the

American system of government. William Marbury was appointed a judge by President John Adams, a member of the Federalist Party, when Adams was about to leave office. The incoming president, Thomas Jefferson, was leader of the rival Republican Party. Adams sought to pack the judiciary, thus preventing Jefferson from filling judicial posts. James Madison, now secretary of state under Jefferson, refused to issue Marbury’s appointment. Marbury sued. Marshall’s court found Marbury’s suit to be unconstitutional on a technicality, thus resolving a troublesome issue. Under Marshall’s leadership, the Supreme Court also established, through the following cases, the superiority of federal authority under the Constitution.

***McCulloch v. Maryland* (1819)** The issue in *McCulloch v. Maryland*, a case decided in 1819, involved both the necessary and proper clause and the supremacy clause.⁹ When the state of Maryland imposed a tax on the Baltimore branch of the Second Bank of the United States, the branch’s chief cashier, James McCulloch, declined to pay the tax. The state court ruled that McCulloch had to pay it, and the national government appealed to the United States Supreme Court.

The Necessary and Proper Clause. The case involved much more than a question of taxes. At issue was whether Congress had the authority under the Constitution’s necessary and proper clause to charter and contribute capital to the Second Bank of the United States. A second constitutional issue was also involved: If the bank was constitutional, could a state tax it? In other words, was a state action that conflicted with a national government action invalid under the supremacy clause?

Chief Justice Marshall pointed out that no provision in the Constitution grants the national government the *expressed* power to form a national bank. Nevertheless, if establishing such a bank helps the national government exercise its expressed powers, then the authority to do so could be implied. Marshall also said that the necessary and proper clause included “all means that are appropriate” to carry out “the legitimate ends” of the Constitution.

The Doctrine of National Supremacy. Having established this doctrine of implied powers, Marshall then answered the other important

supremacy clause

Article VI, Clause 2, of the Constitution, which makes the Constitution and federal laws superior to all conflicting state and local laws.

constitutional question before the Court and established the doctrine of *national supremacy*. Marshall declared that no state could use its taxing power to tax an arm of the national government. If it could, the Constitution's declaration that the Constitution "shall be the supreme Law of the Land" would be empty rhetoric without meaning. From that day on, Marshall's decision became the basis for strengthening the national government's power.

Gibbons v. Ogden (1824) Article I, Section 8, of the Constitution gives Congress the power to regulate commerce "among the several States." But the framers of the Constitution did not define the word *commerce*. At issue in *Gibbons v. Ogden* was how the *commerce clause* should be defined and whether the national government had the exclusive power to regulate commerce involving more than one state.¹⁰

The New York legislature had given Robert Livingston and Robert Fulton the exclusive right to operate steamboats in New York waters, and Livingston and Fulton licensed Aaron Ogden to operate a ferry between New York and New Jersey. Thomas Gibbons, who had a license from the U.S. government to operate boats in interstate waters, decided to compete with Ogden, but he did so without New York's permission. Ogden sued Gibbons in the New York state courts and won. Gibbons appealed.

In ruling on the case, Chief Justice Marshall defined *commerce* as including all business dealings, including steamboat travel. Marshall also stated that the power to regulate interstate commerce was an *exclusive* national power and had no limitations other than those specifically found in the Constitution. Since this 1824 decision, the national government has used the *commerce clause* repeatedly to justify its regulation of almost all areas of economic activity.

The Civil War—The Ultimate Supremacy Battle

The great issue that provoked the Civil War (1861–65) was the future of slavery. Because people in different sections of the country had radically different beliefs about slavery, the slavery issue took the form of a dispute over states' rights versus national supremacy. The war brought to a bloody climax the ideological debate that had been outlined by the Federalist and Anti-Federalist factions even before the Constitution was ratified.

secession The act of formally withdrawing from membership in an alliance; the withdrawal of a state from the federal Union.

A Shift to States' Rights As just discussed, the Supreme Court headed by John Marshall interpreted the commerce clause in such a way as to increase the power of the national government at the expense of state powers. By the late 1820s, however, a shift back to states' rights had begun, and the question of the regulation of commerce became one of the major issues in federal-state relations. When the national government, in 1828 and 1832, passed laws imposing tariffs (taxes) on goods imported into the United States, southern states objected, believing that such taxes were against their interests.

One southern state, South Carolina, attempted to *nullify* the tariffs, or to make them void. South Carolina claimed that in conflicts between state governments and the national government, the states should have the ultimate authority to determine the welfare of their citizens. President Andrew Jackson was prepared to use force to uphold national law, but Congress reduced the tariffs. The crisis passed temporarily.

States' Rights, Slavery, and Secession The defense of slavery and the promotion of states' rights were both important in the South's decision in favor of **secession**—withdrawal from the Union—in 1860 and 1861. Indeed, the two concepts were commingled in the minds of Southerners of that era. Which of these two was the more important remains a matter of controversy even today. Modern defenders of states' rights and those who distrust governmental authority often present southern secession as entirely a matter of states' rights. Liberals and those who champion the rights of African Americans see slavery as the sole cause of the crisis.



Courtesy of the Supreme Court of the United States Washington, DC

Image 3.3 John Marshall, Chief Justice Of The United States Supreme Court (1801–35). *How did Marshall strengthen the national government?*

"We here highly resolve that . . . this nation . . . shall have a new birth of freedom; and that government of the people, by the people, for the people, shall not perish from the earth."

~ Abraham Lincoln, Gettysburg Address, 1863

To understand this dispute more fully, it is worth recognizing that "states' rights," by itself, is a relatively abstract concept. It gains meaning only when you answer the question: "The rights of the states to do *what*?" The declarations of secession issued by the southern states left no doubt that the defense of slavery was the reason they were leaving the Union.

When the South was defeated in the war, the idea that a state has a right to secede from the Union was defeated also. Although the Civil War occurred because of the South's desire for increased states' rights, the result was just the opposite—an increase in the political power of the national government. The "Civil War amendments" to the Constitution—the Thirteenth, Fourteenth, and Fifteenth Amendments—gave the national government the power to enforce significant new rights. These included the power to

- ▶ abolish laws that allowed slavery,
- ▶ ensure that states would guarantee all persons "due process of law" and "the equal protection of the laws," and
- ▶ require states to recognize the right of African Americans to vote.

Dual Federalism— From the Civil War to the 1930s

Scholars have devised various models to describe the relationship between the states and the national government at different times in our history. These models are useful in describing the evolution of federalism after the Civil War.

The model of **dual federalism** assumes that the states and the national government are more or less equals, with each level of government having separate and distinct functions and responsibilities. The states exercise sovereign powers over certain matters, and the national government exercises sovereign powers over others.

For much of our nation's history, this model of federalism prevailed. After the expansion of national authority during the Civil War, the courts again tended to support the states' rights to exercise police powers and tended to strictly limit the powers of the federal government under the commerce clause. In 1918, for example, the Supreme Court ruled unconstitutional a 1916 federal law excluding from interstate commerce the products created through the use of child labor. The law was held unconstitutional because it attempted to regulate a local problem.¹¹ The era of dual federalism came to an end in the 1930s, when the United States was in the depths of the greatest economic depression it had ever experienced.

Cooperative Federalism and the Growth of the National Government

The model of **cooperative federalism**, as the term implies, involves cooperation by all branches of government. This model views the national and state governments as complementary parts of a single governmental mechanism, the purpose of which is to solve the problems facing the entire United States. For example, federal law enforcement agencies, such as the Federal Bureau of Investigation, lend technical expertise to solve local crimes, and local officials cooperate with federal agencies.

Roosevelt's New Deal Cooperative federalism grew out of the desire to solve the pressing national problems caused by the Great Depression, which began in 1929. In an attempt to bring the United States out of the Depression, President Franklin D. Roosevelt (1933–45) launched his **New Deal**, which involved many government regulation, spending, and public-assistance programs. Roosevelt's New Deal legislation not only ushered in an era of cooperative federalism, which has more or less continued until the present day, but it also marked the real beginning of an era of national supremacy.

dual federalism A system of government in which the federal and the state governments maintain diverse but sovereign powers.

cooperative federalism A model of federalism in which the states and the federal government cooperate in solving problems.

New Deal The policies ushered in by the Roosevelt administration in 1933 in an attempt to bring the United States out of the Great Depression.



Image 3.4 President Franklin D. Roosevelt proposed many new federal programs during the Great Depression. *How did our conception of federalism change during his presidency?*

Before the period of cooperative federalism could be truly established, it was necessary to obtain the concurrence of the United States Supreme Court. As mentioned, in the early part of the twentieth century, the Court held a very restrictive view of what the federal government could do under the commerce clause. In the 1930s, the Court ruled again and again that various economic measures were unconstitutional.

In 1937, Roosevelt threatened to “pack” the Court with up to six new members who presumably would be more favorable to federal action. This move was widely considered to be an assault on the Constitution, and Congress refused to support it. Later that year, however, Roosevelt had the opportunity—for the first time since taking office—to appoint a new member of the Supreme Court. Hugo Black, the new justice, tipped the balance on the Court. After 1937, the Court ceased its attempts to limit the scope of the commerce clause.

Cooperative Federalism and the “Great Society” The 1960s and 1970s saw an even greater expansion of the national government’s role in domestic policy. The Great Society legislation of President Lyndon B. Johnson (1963–

69) created Medicaid, Medicare, the Job Corps, Operation Head Start, and other programs. The Civil Rights Act of 1964 prohibited discrimination

picket-fence federalism A model of federalism in which specific policies and programs are administered by all levels of government: national, state, and local.

in public accommodations, employment, and other areas on the basis of race, color, national origin, religion, or gender. In the 1970s, national laws protecting consumers, employees, and the environment imposed further regulations on the economy. Today, few activities are beyond the reach of the regulatory arm of the national government.

The massive social programs undertaken in the 1960s and 1970s also resulted in greater involvement by state and local governments. The national government simply could not implement those programs alone. For example, Head Start, a program that provides preschool services to children of low-income families, is administered by local nonprofit organizations and school systems, although it is funded by federal grants.

The model in which every level of government is involved in implementing a policy is sometimes referred to as **picket-fence federalism**. In this model, the policy area is the vertical picket on the fence, while the levels of government are the horizontal support boards.

Cornerstones of Cooperative Federalism

The regulatory powers that the national government enjoys today rest on constitutional cornerstones laid by the Supreme Court decisions discussed at the beginning of this section. The commerce clause and the doctrine of federal preemption have been crucial.

The Commerce Clause. From 1937 on, the Supreme Court consistently upheld Congress’s power to regulate domestic policy under the commerce clause. Even activities that occur entirely within a state were rarely considered to be outside the regulatory power of the national government. For example, in 1942 the Supreme Court held that wheat production by an individual farmer intended wholly for consumption on his own farm was subject to federal regulation. The Court reasoned that the home consumption of wheat reduced the demand for wheat and thus could have an effect on interstate commerce.¹²

In 1980, the Supreme Court acknowledged that the commerce clause had “long been interpreted to extend beyond activities actually in interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially affect interstate commerce.”¹³ Today, Congress can regulate almost any kind of economic activity, no matter where it occurs. In recent years, though, the Supreme Court has, for the first time since the 1930s, occasionally curbed Congress’s regulatory powers under the commerce clause. You will read more about this development shortly.

Federal Preemption. John Marshall's validation of the supremacy clause of the Constitution has also had significant consequences for federalism. One important effect of the supremacy clause today is that the clause allows for federal **preemption** of certain areas in which the national government and the states have concurrent powers. When Congress chooses to act exclusively in an area in which the states and the national government have concurrent powers, Congress is said to have *preempted* the area. In such cases, the courts have held that a valid federal law or regulation takes precedence over a conflicting state or local law or regulation covering the same general activity.

Critical Thinking

- Although marijuana is illegal under national law, as of 2020 eleven states had moved to legalize and tax it. Should the federal government take a hands-off approach or crack down on these states? In either case, why?

Federalism Today

LO 3–4 Describe developments in federalism in recent years.

By the 1970s, some Americans had begun to question whether the national government had acquired too many powers. Had the national government gotten too big? Had it become, in fact, a threat to the power of the states and the liberties of the people? Should steps be taken to reduce the regulatory power and scope of the national government? Since that time, the model of federalism has evolved in ways that reflect these and other concerns.

The New Federalism— More Power to the States

Starting in the 1970s, several administrations attempted to revitalize the doctrine of dual federalism, which they renamed the “new federalism.” The **new federalism** involved a shift from *nation-centered* federalism to *state-centered* federalism. One of the major goals of the new federalism was to return to the states certain powers that had been exercised by the national government since the 1930s. The term **devolution**—the transfer of powers to political subunits—is often used to describe this process.

Although a product of conservative thought and initiated by Republicans, the devolutionary goals of

the new federalism were also espoused by Democrats during the Clinton administration (1993–2001). An example of the new federalism is the welfare reform legislation passed by Congress in 1996, which gave the states more authority over public-assistance programs.

The Supreme Court and the New Federalism

During the late 1900s and the early 2000s, the Supreme Court played a significant role in furthering the cause of states' rights. A variety of decisions either limited the power of the federal government or enhanced the power of the states.

In a landmark 1995 decision, *United States v. Lopez*, the Supreme Court held, for the first time in sixty years, that Congress had exceeded its constitutional authority under the commerce clause.¹⁴ The Court concluded that the Gun-Free School Zones Act of 1990, which banned the possession of guns within one thousand feet of any school, was unconstitutional because it attempted to regulate an area that had “nothing to do with commerce.”

In a 1997 decision, the Court struck down portions of the Brady Handgun Violence Prevention Act of 1993, which obligated state and local law enforcement officers to do background checks on prospective handgun buyers until a national instant-check system could be implemented. The Court stated that Congress lacked the power to “dragoon” state employees into federal service through an unfunded **federal mandate** of this kind.¹⁵

In 2000, the Court invalidated a key provision of the federal Violence Against Women Act of 1994, which allowed women to sue in federal court when they were victims of gender-motivated violence, such as rape. The Court upheld a federal appellate court's ruling that the commerce clause did not justify national regulation of noneconomic, criminal conduct.¹⁶

preemption A doctrine rooted in the supremacy clause of the Constitution that provides that national laws or regulations governing a certain area take precedence over conflicting state laws or regulations governing that same area.

new federalism A plan to limit the federal government's role in regulating state governments and to give the states increased power in deciding how they should spend government revenues.

devolution The surrender or transfer of powers to local authorities by a central government.

federal mandate A requirement in federal legislation that pressures states and municipalities to comply with certain rules.



Image 3.5 A marijuana grower in Colorado sprays the plants with neem oil, an organic method of combating spider mites and mildew. Colorado is one of eleven states to legalize recreational marijuana. *How might the national government respond to legalization?*

The Shifting Boundary between Federal and State Authority

Clearly, the boundary between federal and state authority has been shifting. Notably, issues relating to the federal structure of our government, which at one time were not at the forefront of the political arena, have in recent years been the subject of heated debate among Americans and their leaders. The federal government and the states seem to be in a constant tug-of-war over federal regulations, federal programs, and federal demands on the states.

The Politics of Federalism The Republican Party is often viewed as the champion of states' rights. Certainly, the party has claimed such a role. For example, when the Republicans took control of both chambers of Congress in 1995, they promised devolution—which, as already noted, refers to a shifting of power from the national level to the individual states. Smaller central government and state-centered federalism have long been regarded as the twin pillars of Republican ideology. In contrast, Democrats usually have sought greater centralization of power in Washington, D.C.

Since the Clinton administration, however, there have been times when the party tables seem to have turned. As mentioned earlier, it was under Clinton that welfare reform legislation giving more responsibility to the states—a goal that had been endorsed by the Republicans for some time—became a reality. Conversely, the

No Child Left Behind Act of 2001, passed at the request of Republican president George W. Bush, gave the federal government a much greater role in education and educational funding than ever before. Finally, the Bush administration made repeated attempts to block California's medical-marijuana initiative and Oregon's physician-assisted suicide law.

The Supreme Court Weighs In Again

In the last several years, the Supreme Court has again issued rulings that have affected the shape of our federal system. Sometimes, that has meant restricting states' rights, as in a case on unions formed by state government employees. More often, the

Court has extended the rights of the states, as it did in its opinion on health care reform.

Health Care Reform. In 2012, The Court issued a major ruling concerning the constitutionality of the Affordable Care Act, popularly known as Obamacare. In this case, *National Federation of Independent Business v. Sebelius*, the Court upheld most of the law. Two of Chief Justice John Roberts's arguments, however, set limits on the powers of the national government.¹⁷

Writing the majority opinion, Roberts contended that the federal government cannot, under the commerce clause of the Constitution, *require* individuals to purchase something—in this case, health care insurance. The government can encourage such behavior through the tax code, however, which is what the Affordable Care Act did. Roberts also stated that the national government cannot force the states to expand Medicaid by threatening to take away all of their Medicaid funds if they do not. Roberts argued that cutting the states off completely would do too much damage to their budgets. This portion of the ruling was widely and incorrectly seen as setting a new precedent, as we explain in this chapter's *Join the Debate* feature.

Although Obamacare survived the decision, the case did appear to demonstrate that the Court was more willing to challenge the national government on its use of the commerce clause than at any time since 1937. Indeed, four of the nine justices advocated positions on the commerce clause that, in terms of recent legal understanding, were almost revolutionary.



Join The Debate

Should "Sanctuary Cities" Be Allowed?

About 10 million people currently live in the United States without legal authorization to be here.

(A few years ago, the number was as high as 11 million.) These people are termed *unauthorized immigrants* by the Department of Homeland Security. About half are from Mexico. How to respond to this population has been a major political issue for years. Should they all be deported—or given a path to citizenship?

Some jurisdictions have taken steps to make deportation more difficult. A *sanctuary city* is one in which local law enforcement does not cooperate with federal deportation efforts. Often, this simply means not asking persons about their immigration status when they come in contact with police. Some local governments also refuse to cooperate with federal immigration agencies altogether.

More than 500 city, county, and state governments have some kind of sanctuary policy. About half of the nation's population lives in such jurisdictions. The existence of such policies raises three questions: (1) Are sanctuary cities a good idea, (2) are they even legal, and (3) should the national government penalize local governments that have sanctuary policies? Americans disagree over these questions.

The National Government Should Crack Down on Sanctuary Cities

Those who would penalize sanctuary cities claim that such policies serve only to protect lawbreakers. The very fact that people are in this country illegally means that they have violated our immigration laws. Also, some unauthorized immigrants have committed other crimes. True, immigration law is the responsibility of the national government. The United States Supreme Court has ruled, in an Arizona case, that states can't impose immigration laws that are tougher than federal laws. Why should they be allowed to have laws that are looser?

Setting immigration law is a federal matter, and therefore local authorities should cooperate with the national government in carrying it out. If localities will not cooperate, they should lose federal funds. If sanctuary policies are banned, we will be able to expel more dangerous criminals from this country.

Our Constitution Protects Sanctuary Cities

Defenders of sanctuary policies argue that they make cities safer because they encourage unauthorized immigrants to cooperate with the police—without having to worry that doing

so could lead to deportation. Serious criminals can still be deported.

Further, the national government cannot make local officials enforce national laws. It is up to the feds to enforce their own laws. Washington does have the power to persuade state and local governments by offering or withholding grants, but its power to *coerce* is limited. In 1987, the Supreme Court held that the federal government could pressure states to raise the age for buying alcohol by threatening to withhold 5 to 10 percent of their highway funds. Anything much beyond that would be unconstitutional.¹⁸ It should not, therefore, have been a surprise when, in its ruling on Obamacare, the Court found that withholding *all* of a state's Medicaid funding would be unacceptable. A move to defund sanctuary cities would surely be thrown out by the courts.

► Critical Analysis

In *McCulloch v. Maryland*, the Court ruled that a state cannot tax an arm of the national government. If the federal government requires local police to devote time and effort to enforcing a national law, is that the same as taxing a state government? Why or why not?

State Government Employee Unions. A 2018 case showed how far the Supreme Court was willing to go in placing limits on state governments. The case involved labor unions formed by state and local government employees. Unions are financed by membership dues. In some states, private-sector unions can negotiate contracts with employers under which all employees must join the union and pay dues. As

an alternative arrangement, employees who do not wish to join the union can pay a reduced fee to cover the costs of collective bargaining and representation. Until 2018, government employee unions in some states could also collect such representation fees. In that year, however, the Court ruled that representation fees were a violation of the free-speech clause of the First Amendment to the Constitution.¹⁹

Traditionally, a contract between a union and a branch of government was seen as an economic relationship between two parties. The Court, however, found that contract negotiations were really an attempt to persuade a state or local government to adopt a political policy. Because contract negotiations are a political activity, money used to fund them is effectively a form of speech. Collecting funds from non-members would violate “the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.” Liberals objected strongly to the principle that money could be treated as speech. Conservatives cheered the verdict as a blow against organized labor.



Joshua Lott/AFP/Getty Images

Image 3.6 A Syrian refugee, center, arrives at O'Hare Airport in Chicago in February 2017. Earlier, she and her family had been banned from entry into the United States due to an executive order by President Donald Trump. *Do we have an obligation to take in migrants whose lives are threatened in their home countries?*

Attempts by the States to Restrict

Access to Abortion. A Louisiana law favored by right-to-life activists required all physicians performing abortions to have admitting privileges at a hospital within 30 miles of the clinic. Hospitals, however, are under no obligation to grant admitting privileges to anyone. Catholic hospitals in particular will not grant such privileges to physicians who perform abortions. Hospitals also expect that such physicians will admit many patients, yet abortion complications rarely lead to hospitalization. In past rulings, the Court found that such requirements were an undue burden on women seeking abortions.

In an earlier case dealing with a Texas law, the Court ruled that such requirements were unconstitutional. The Louisiana law was almost identical to the one in Texas. Since the Texas ruling, the Court had become more conservative. Still, the Court ruled against Louisiana—not on the merits of the case, but to remind appellate courts that they were not allowed to violate Supreme Court precedents.²⁰

Federalism and the COVID-19 Pandemic

The COVID-19 pandemic in 2020 also raised questions about the respective roles of the state and national governments. On March 13, 2020, President Trump declared a national emergency due to the outbreak. Such a declaration, however, did not give the national government additional powers over the states or civil society in general. Rather, a state of emergency

merely granted the executive additional powers over the federal government itself, unlocking funds previously dedicated to other purposes and allowing federal employees to be transferred to new tasks.

The most dramatic exercises of government authority—the shelter-in-place or lockdown orders—were issued by state governors using emergency powers available to them under state laws. California was the first state to act. On March 19, Governor Gavin Newsom directed all residents to stay at home except for trips to obtain necessities or to engage in essential work. Businesses deemed nonessential were closed. In short order, 43 states and the District of Columbia had such orders in effect. By the end of May, however, only thirteen orders were still fully in place, and the remaining states were discussing how and when they could reopen.

The States Exercise Their Police Power. The state-level closures were a classic example of the exercise of *police power*, as described earlier in this chapter. All states have laws allowing the state government to take radical measures in a public health emergency such as a pandemic. The president of the United States has no lockdown authority, and it is doubtful that Congress even has the constitutional power to grant such authority to the president. The federal government can control who enters the country, and Trump banned entry from most nations. It could ban air travel—an unnecessary

step in March and April given that almost no one was willing to fly. Under current laws, however, universal quarantines can only be proclaimed by the states.

The one great power of the national government is the ability to spend without worrying where to find the funds. Congress indeed voted huge amounts for pandemic relief. The most expensive of the measures cost a full \$2 trillion. Given the collapse in national economic activity, even these sums were barely enough. State governments have no such ability to borrow freely, and most soon found themselves in serious financial difficulties.

The Issue of National Authority. Still, the federal government could have possibly done more than it did to coordinate state efforts. Indeed, given the national government's long history of attempting to accumulate power at the expense of the states, Trump's refusal to engage in national planning and coordination was criticized. Trump aided New York Governor Cuomo by providing a hospital ship in New York City as well as new ventilators (although most of the them were never used). He provided federal funds for the creation of a vaccine, on which many companies worked through the spring, summer, and fall of 2020.

In addition, the states found themselves bidding against each other—and against the national government—to purchase needed materials. In some cases, the federal government actually seized supplies already purchased by state governments. The Republican governor of Maryland ordered 500,000 testing kits from South Korea, put them under guard by the state police, and then hid them in an undisclosed location so that the federal government could not find them.

Critical Thinking

- What kinds of state actions are Republicans likely to defend against federal authority when Democrats are in power? What kinds of state actions would Democrats favor when Republicans are in charge?

The Fiscal Side of Federalism

LO 3–5 Explain what is meant by the term *fiscal federalism*.

Since the advent of cooperative federalism in the 1930s, the national government and the states have worked hand in hand to implement programs mandated by the national government. Whenever Congress passes a law that preempts a certain area, the states are, of course, obligated to comply with the requirements of that law.

“Taxes, after all, are the dues that we pay for the privilege of membership in an organized society.”

~ Franklin D. Roosevelt Thirty-Second President Of The United States 1933–45

As already noted, a requirement that a state provide a service or undertake some activity to meet standards specified by a federal law is called a *federal mandate*. Many federal mandates concern civil rights or environmental protection. Recent federal mandates require the states to provide persons with disabilities access to public buildings, sidewalks, and other areas; to establish minimum water-purity and air-purity standards; and to extend Medicaid coverage to all children in poverty.

To help the states pay for some of the costs associated with implementing national policies, the national government gives back some of the tax dollars it collects to the states in the form of grants. As you will see, the states have come to depend on grants as an important source of revenue. When taxes are collected by one level of government (typically the national government) and spent by another level (typically state or local governments), we call the process **fiscal federalism**.

Federal Grants

Even before the Constitution was adopted, the national government granted lands to the states to finance education. Using the proceeds from the sale of these lands, the states were able to establish elementary schools and, later, *land-grant colleges*. Cash grants started in 1808, when Congress gave funds to the states to pay for the state militias. Federal grants were also made available for other purposes, such as building roads and railroads.

Only in the twentieth century, though, did federal grants become an important source of funds to the states. The major growth began in the 1960s, when the dollar amount of grants quadrupled to help pay for the Great Society programs of the Johnson administration. Grants became available for education, pollution control, conservation, recreation, highway construction and maintenance, and other purposes. There are two basic types of federal grants: categorical grants and block grants.

fiscal federalism The allocation of taxes collected by one level of government (typically the national government) to another level (typically state or local governments).

Categorical Grants A **categorical grant** is targeted for a specific purpose as defined by federal law. The federal government defines hundreds of categories of state and local spending. Categorical grants give the national government control over how states use the funds by imposing certain conditions. For example, a categorical grant may require that the funds be used for the purpose of repairing interstate highways and that the projects cannot pay below the local prevailing wage. Depending on the project, the government might require that an environmental impact statement be prepared.

Block Grants A **block grant** is given for a broad area, such as criminal justice or mental-health programs. The term *block grant* was coined in 1966 to describe a series of programs initiated by President Johnson, although a number of federal grants issued earlier in our history shared some of the characteristics of modern block grants.

A block grant gives the states more discretion over how the funds will be spent. Nonetheless, the federal government can exercise some control over state decision making through these grants by using **cross-cutting requirements**, or requirements that apply to all federal grants. Title VI of the 1964 Civil Rights Act, for example, bars racial discrimination in the use of all federal funds, regardless of their source.

Federal Grants and State Budgets

Currently, about one-fifth of state and local revenue comes from the national government. In fiscal year 2020, the federal government transferred about \$710 billion to state and local governments—more than half a trillion dollars. By far, the largest transfer was for Medicaid, the health care program for the poor. It totaled \$447 billion. The federal government provided the states with about \$64 billion for education. Highway grants ran about \$47 billion. These sums do not include any extra transfers due to the COVID-19 pandemic.

categorical grant A federal grant targeted for a specific purpose as defined by federal law.

block grant A federal grant given to a state for a broad area, such as criminal justice or mental-health programs.

cross-cutting requirements Requirements that apply to all federal grants.

When the media discuss state and local budgets, they typically refer just to the general fund budgets, which are largely supported by state and local taxes. But, in fact, state and local taxes support only slightly more than half of state and local spending. Federal funds aren't listed in general fund budgets. Further, almost one-quarter of state and local spending goes to fee-for-service operations, in which governments charge for the services they provide. This spending applies to

- ▶ functions such as water supplies, sewers, and other public utilities;
- ▶ fees charged by government-owned hospitals;
- ▶ airport fees; and
- ▶ college tuition.

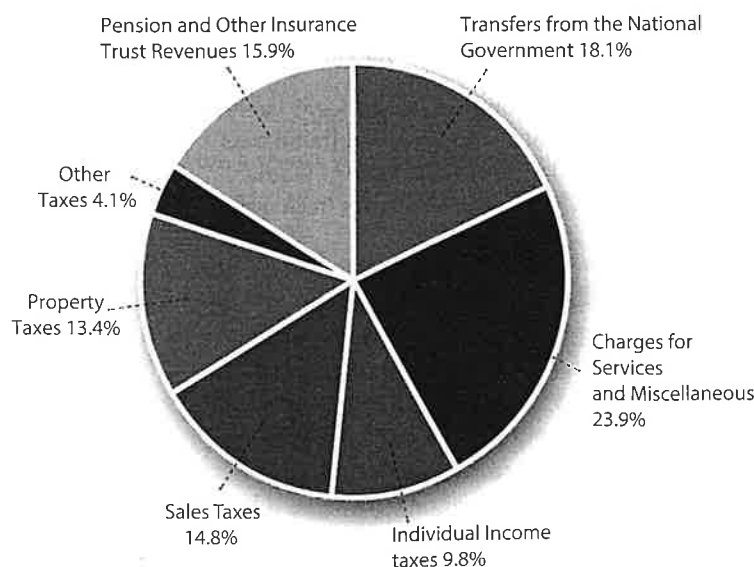
Typically, these operations are also excluded from general fund budgets. Additional sums not included in the general fund are insurance contributions, including those collected to pay for state employee pensions and unemployment insurance. Figure 3.4 summarizes state and local revenue sources.

Federalism and Economic Cycles

Unlike the federal government, state governments are supposed to balance their budgets. A practical result is that when a major recession occurs, the states are faced with severe budget problems. Because state

Figure 3.4 State and Local Government Revenue Sources

Do the sizes of any of these pie slices surprise you? If so, which ones?



Source: U.S. Census Bureau, *Annual Survey of State and Local Government Finances*, 2017.

citizens are earning and spending less, state income and sales taxes fall. During a recession, state governments may be forced either to reduce spending and lay off staff—or to raise taxes. Either choice may make the recession worse. State spending patterns tend to make economic booms more energetic and busts more painful—in a word, they are *procyclical*.

The federal government has no difficulty in spending more on welfare, unemployment compensation, and Medicaid during a recession. Also, the federal government often cuts tax rates in a recession to spur the economy. It makes up the difference by going further into debt. In a recession, the actions of the federal government are normally *anticyclical*.

One method of dealing with the procyclical nature of state spending is to increase federal grants to the states during a recession. Such grants were included in the February 2009 stimulus legislation championed by President Obama following the onset of the Great Recession. By the middle of 2010, however, the grants had largely dried up. From 2010 through 2012, the states laid off a substantial number of employees. In the wake of the COVID-19 pandemic, the question of how much support the federal government should provide to the states became a major issue dividing Republicans and Democrats.

Using Federal Grants to Control the States

Grants of funds to the states from the national government are one way that the Tenth Amendment to the U.S. Constitution can be bridged. Remember that the Tenth Amendment reserves all powers not delegated to the national government to the states and to the people. You might well wonder, then, how the federal government has been able to exercise control over matters that traditionally have been under the authority of state governments. The answer involves the giving or withholding of federal grant dollars.

For example, in 1984 the national government forced the states to raise the minimum drinking age to twenty-one by threatening to withhold federal highway funds from states that did not comply. Still, Supreme Court rulings on the minimum drinking age and the Affordable Care Act, described earlier in this chapter, place some limits on the ability of the federal government to coerce the states.

The education reforms embodied in the No Child Left Behind Act relied on federal funding for their implementation as well. The states received block grants for educational purposes and, in return, had to meet federally imposed standards for testing and accountability. In time, No Child Left Behind proved



Monkey Business Images/Shutterstock.com

Image 3.7 An elementary school teacher helps his students. Under the federal 2015 Every Student Succeeds Act, states are designing tests to determine whether schools are doing an adequate job of teaching their students. **Are such tests desirable? Why or why not?**

to be unpopular. Conservatives disliked the degree of national control imposed by the act. Teachers complained that too much class time was devoted to “teaching to the test.” Also, some of the national standards were impossibly strict. As a result, the Obama administration was able to gain substantial leverage over the states by waiving the harshest requirements in exchange for state concessions. In December 2015, No Child Left Behind was replaced by the Every Student Succeeds Act. The new legislation lets states create their own evaluation systems and standards.

The Cost of Federal Mandates

In some areas, the federal government can order states to comply with federal authority outright. An example is that states must grant persons “the equal protection of the laws,” as provided by the Fourteenth Amendment to the Constitution. In addition, when federal laws require the states to implement certain programs, the states usually find that they must comply—but compliance with federal mandates can be costly. The cost of compliance has been estimated at \$29 billion annually, but some believe the true figure to be much higher. Although Congress passed legislation in 1995 to curb the use of unfunded federal mandates, that legislation was more rhetoric than reality.

Even when funding is provided, it may be insufficient, resulting in an *underfunded* federal mandate. As mentioned earlier, for example, states receive block grants for educational purposes in return for meeting standards imposed by the national government. Critics argue that the national government does not supply the states with enough funds to implement these programs properly.

Competitive Federalism

The debate over federalism is sometimes reduced to a debate over taxes. Which level of government will raise taxes to pay for government programs, and which will cut services to avoid raising taxes?

The Right to Move How states answer that question gives citizens an option: They can move to a state with fewer services and lower taxes, or to a state with more services but higher taxes. Political scientist Thomas R. Dye calls this model of federalism **competitive federalism**.²¹ State and local governments compete for businesses and citizens. If the state of Ohio offers tax advantages for locating a factory there, for example, a business may be more likely to build its factory in Ohio, thereby providing more jobs for Ohio residents.

If Ohio has very strict environmental regulations, however, that same business may choose not to build there, no matter how beneficial the tax advantages, because complying with the regulations would be costly. Although Ohio citizens lose the opportunity for more jobs, they may enjoy better air and water quality than citizens of the state where the new factory is ultimately built.

competitive federalism A model of federalism in which state and local governments compete for businesses and citizens, who in effect "vote with their feet" by moving to jurisdictions that offer a competitive advantage.

Advantages and Disadvantages of Competition

Some observers consider such competition an advantage: Americans have several variables to consider when they choose a state in which to live. Others consider it a disadvantage: a state that offers more social services or lower taxes may experience an increase in population as people "vote with their feet" to take advantage of that state's laws. The resulting population increases can overwhelm the state's resources and force it to cut social services or raise taxes. Regulations that make it easier to build new housing may also draw in new residents. Recent studies suggest that much of the difference in population growth rates among states in recent decades may be due to differences in the cost of housing.

It appears likely, then, that the debate over how our federal system functions, as well as the battle for control between the states and the federal government, will continue. The Supreme Court, which has played umpire in this battle, is also likely to continue issuing rulings that influence the balance of power.

Critical Thinking

- What kinds of factors might cause you to consider moving to a different state? Are any of these factors under the control of state governments? Local governments?

America at Odds

Federalism

The topic of federalism raises one of the most enduring disputes in American history—the relative power of the national government versus that of state governments. Americans have been at odds over the strength of the central government since well before the American Revolution. The issue of centralization versus decentralization has taken a number of specific forms:

- *Is it right for the national government to use its financial strength to pressure states into taking actions such as raising the drinking age by threatening to withhold subsidies—or are such pressures an abuse of the federal system?*
- *Should the national government let some states get away with legalizing recreational marijuana—or should it crack down on these states?*
- *Should the commerce clause be interpreted broadly, granting the federal government much power to regulate the economy—or should it be interpreted as narrowly as possible to keep the government from interfering with the rights of business owners?*
- *Should the federal government have a role in setting national policies for public education—or should that be left entirely to the states?*
- *Should the federal government continue to provide national systems for funding health care—or should that, too, be left to the states or to the private sector?*

Test Yourself

Fill-In

LO 3-1

1. The advantages of a federal system of government in the United States include _____.

LO 3-2

2. The constitutional basis for the implied powers of the national government is the _____ clause.
3. The Constitution's _____ clause requires each state to honor every other state's public acts, records, and judicial proceedings.

LO 3-3

4. In *McCulloch v. Maryland*, a case decided in 1819, the United States Supreme Court established the doctrines of _____.
5. Cooperative federalism grew out of the need to solve the pressing problems caused by _____.

LO 3-4

6. The relationship of national, state, and local levels of government in implementing massive social programs in the 1960s and 1970s is often referred to as _____ federalism.
7. A _____ is a requirement in federal legislation that pressures states and municipalities to comply with certain rules.
8. When tax revenue collected by one level of government is passed on to another level, we call this _____.

LO 3-5

9. The national government effectively pressured the states to raise the minimum drinking age to twenty-one by _____.
10. In 2015, the Every Student Succeeds Act replaced the earlier _____ Act, which according to many people had given the national government too much control over education.

Multiple Choice

LO 3-1

11. In a unitary system,
 - a. subdivisional governments exercise only those powers given to them by the central government.
 - b. sovereign states are joined together by a central government that has only limited powers over them.
 - c. there are no local or subdivisional governments.
12. There are _____ governmental units in the United States today.
 - a. 51
 - b. nearly 3,000
 - c. almost 90,000

LO 3-2

13. Article I, Section 8, of the U.S. Constitution enumerates twenty-seven powers that Congress may exercise. Two of these _____ powers are the power to coin money and the power to regulate interstate commerce.
 - a. concurrent
 - b. expressed
 - c. inherent
14. The relationships among the states in our federal system of government are sometimes referred to as _____ federalism.
 - a. picket-fence
 - b. cooperative
 - c. horizontal

LO 3-3

15. The era of _____ federalism came to an end in the 1930s.
 - a. dual
 - b. new
 - c. competitive

LO 3-4

16. The welfare reform legislation passed by Congress in 1996 is an example of _____ federalism.
 - a. dual
 - b. cooperative
 - c. new

LO 3-5

17. Block grants
 - a. are targeted for specific purposes by law.
 - b. are federal grants given to a state for broad areas, such as criminal justice or mental-health programs.
 - c. give the states less discretion than categorical grants over how funds will be spent.