



Chapter 3

FEDERALISM AND AMERICAN POLITICAL DEVELOPMENT

“The proposed Constitution, so far from implying an abolition of the state governments, makes them constituent parts of the national sovereignty ... and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds ... with the idea of a federal government.**”**

ALEXANDER HAMILTON,
Federalist Number 9



IF MARIJUANA IS ILLEGAL, WHY ARE THEY SELLING IT IN CALIFORNIA?

Article VI: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land."

Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

In 1970 the Congress passed and the president signed the Controlled Substances Act (CSA). The CSA declared marijuana, first made illegal in federal law in 1937, to be a Schedule I drug with a "high potential for abuse" and no legitimate medical use. The CSA is federal law to this day; yet new claims regarding the medical benefits of marijuana led California to enact a medical marijuana law in 1996. By 2014 medical marijuana was legal in twenty states and D.C. (Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey,

New Mexico, Oregon, Rhode Island, Vermont, and Washington) and the Obama administration had instructed federal law enforcement officials not to enforce the CSA in those states. However, when the number of pot shops in California proliferated beyond apparent medical needs, federal authorities cracked down. In 2012, two states, Colorado and Washington, upped the ante when citizen referenda approved marijuana use by any citizen over 21. Can federal and state laws conflict like this and, when they do, is not federal law supposed to prevail over state law? Yes, well usually, but occasionally federalism, the topic of this chapter, is messier than we would like.

The question of the relative priority of federal versus state law plagued the Founders during the Constitutional Convention, was one of the central issues over which ratification was fought, and has surfaced time and again throughout American history. In the 1860s we fought a bloody Civil War over just this issue—national versus state authority within the federal system.

For most of American history, the claims of state officials that federal officials construed their powers too broadly and thereby infringed on the state powers protected by the Tenth Amendment were taken seriously in the federal courts. All of that changed during the "Great Depression," in 1937 to be exact. President Franklin Roosevelt moved aggressively to deal with the depression, but the Supreme Court resisted, striking down major parts of his agenda.

Focus Questions: from reading to thinking

- Q1** How did the meanings of the terms *federal* and *federalism* change over the course of the founding and early national periods?
- Q2** What powers and responsibilities did the U.S. Constitution give the national government in relation to the states and to the states in relation to the national government?
- Q3** How did the expansion and integration of the American economy shape the balance of governmental power and authority within the federal system?
- Q4** What fiscal and political forces led to the change in American federalism called "devolution"?
- Q5** Have the complexities of the twenty-first century rendered our government essentially national, or do state and local governments still have important roles to play?

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FDR responded by trying to "pack" the Court with new and more compliant members. The Court blinked, almost wholly abandoning its traditional role of limiting government regulation of the economy in favor of a focus on civil rights and liberties. The federal government initiated expansive social programs and an aggressive regulatory agenda. Only in the mid-1980s did the Court begin to challenge federal powers, but only occasionally on the basis of the Tenth Amendment.

How then can states push back against unwelcome actions by the federal government? One option is through nullification, the idea that states can render federal laws null and void within their boundaries if they believe the laws are unconstitutional—meaning touching matters beyond the scope of the Congress's enumerated powers. To understand this claim we must distinguish between formal and informal nullification. Formal nullification would involve a state government declaring an act of Congress void and the federal courts upholding that claim. The federal courts would have to declare that the federal action was an unconstitutional violation of the "reserved rights" of the states under the Tenth Amendment. The Supreme Court has done so only twice in the last half century. In the most notable case, *Printz v. U.S.*, the Court struck down a provision of the Brady Handgun Violence Protection Act for requiring state officials to conduct background checks on persons seeking to buy a handgun.

Informal nullification, as with the case of medical marijuana or the broader marijuana use approved by Colorado and Washington, is more common and is well within the American traditions of political bargaining, popular democracy, and federalism. Informal nullification occurs in a variety of ways, most involving state and public reluctance to comply with a particular federal statute. State legislatures may pass contrary laws or decline to enforce federal mandates and public opinion and action might demonstrate an unwillingness to comply. If state authorities do not challenge federal authority directly, or do so carefully, federal authorities may react to the opposition by withdrawing the act or at least limiting enforcement.

WHAT DO YOU THINK?

- On what other issues, besides medical marijuana use, do state and federal laws come into conflict?
 - How about capital punishment, gay marriage, abortion, and environmental regulation?
 - Should these be federal issues, state issues, or what?
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FEDERALISM AND AMERICAN POLITICAL DEVELOPMENT

This chapter completes our discussion of the origins of American political ideals and institutions and serves as a transition to our treatment of contemporary American politics. In this chapter we explore the origins

TABLE 3.1 Strengths and Weaknesses of Federalism

Strengths	Weaknesses
Limits concentrated national power	Leaves state power vulnerable
Encourages innovation by the states	Complex overlapping responsibilities
Encourages pluralism and citizen involvement	Lack of uniformity
National minorities may be subnational majorities	Encourages race to the bottom

of the American federal system and ask how the federal structure has affected and been affected by political development and change within the broader American society.

A federal system divides political power and responsibility between national and subnational levels of government.¹ We describe how the nature of American federalism and the balance of power within it have evolved over time to address new issues and problems in a rapidly growing, increasingly complex, national and now international environment.

The Founders knew that the structure and character of the American government would affect the path of the nation's development. That is why they were so concerned about what kind of government they were creating: national or federal. Just as the Founders used separation of powers and checks and balances to allocate and limit executive, legislative, and judicial functions within the national government, they used federalism to allocate and limit political power and responsibility between levels of government. Some among the founding and later generations always wanted more power and initiative at the national level, others always wanted less. The struggle between and among national and state actors for the power and resources to define and address the dominant issues of American political life has been and remains the drama of American federalism.

As we shall see, twenty-first-century American federalism involves a complicated array of authorities and actors. The nation now spans a continent and contains more than 320 million citizens. These citizens are served, at most recent count, by 89,527 governments within the federal system. There is, of course, only one national government. There are fifty state governments. Within the states are 3,031 county governments, 19,519 municipalities, 16,360 towns and townships, 12,880 school districts, and 38,266 special districts that deliver all manner of services.² As you read this chapter, think about the tremendous growth and change that our nation has undergone over the course of its history. From small colonies scattered along the Atlantic seaboard, the U.S. is now a global economic and military powerhouse. Is the "social contract" that the founding generation struck and wrote into the Constitution still in force today? Has that social contract changed and, if so, when? How did the Constitution adapt to permit and even facilitate the evolution of our federal political structure? How healthy is contemporary American federalism and what are the system's prospects for effective governance in the twenty-first century?

Q1 How did the meanings of the terms *federal* and *federalism* change over the course of the founding and early national periods?

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THE ORIGINAL MEANING OF FEDERALISM

Federalism is a very old idea. The word *federalism* and several closely related terms including *federal*, and *confederation* are drawn from the Latin root *foedus*, which means "treaty, compact, or covenant." The idea that people can establish lasting compacts or covenants among themselves by discussion and consent has been central to American political thought and development. Before the first Pilgrim stepped onto Plymouth Rock, the entire *Mayflower* company approved the famous *Mayflower Compact* to define the kind of society and government that they would have.

The great difficulty involved in thinking about government as resting on the ideas of compact and covenant is the obvious fragility of such an arrangement. Political scientist Samuel Beer remarked that, "Among the consequences of thinking of federal government as based on a contract was the idea of secession, 'the idea of simply breaking a disagreeable contract whenever any pretext of bad faith on the part of any other party arose.'"³

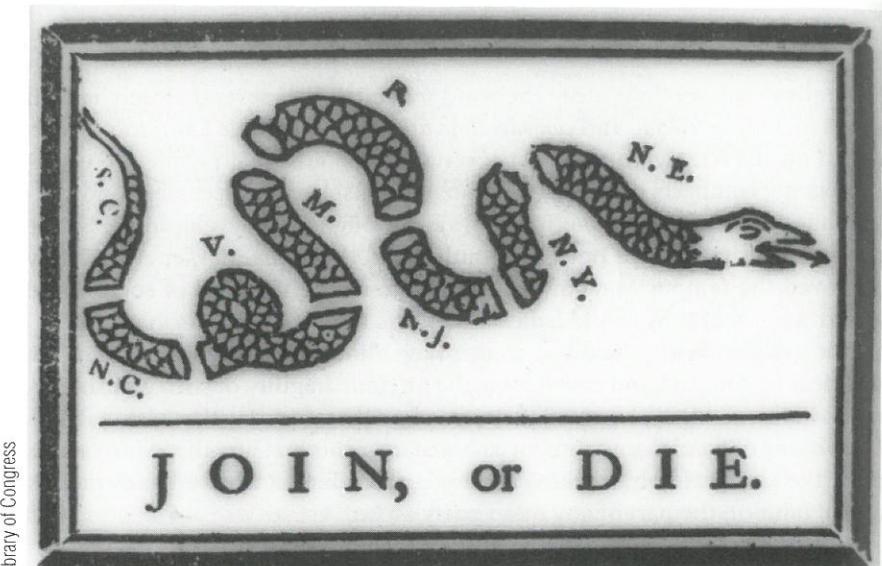
Nonetheless, the best thinking of their day told the Founders that governments over large territories had to take one of two forms. One is a consolidated or **unitary government** like the empires of the ancient world and the monarchies of Europe. These centralized states were subject to the will of one man or woman who could wield his or her power both offensively and defensively. The other is a **confederation** of smaller republics. The confederal solution left the individual republics fully sovereign, fully in control of their own domestic affairs, but pledged to coordinate their foreign affairs and to assist each other if attacked. Not surprisingly, confederations, including our own Articles of Confederation, proved to be weak and unstable in times of crisis.⁴

What made the choice between consolidation and confederation seem so stark was the idea of sovereignty—that in any political system, ultimate or final political authority must rest somewhere specific. In English history, disagreement about whether the king or Parliament was sovereign resulted in almost fifty years of civil war between 1640 and 1688. In the American case, it seemed that sovereignty had to be located either in a national government or in individual states that might then confederate together. The Articles of Confederation allocated specific modest powers to the Confederation Congress, but unambiguously left sovereignty with the individual states. Article II read: "Each state retains its sovereignty, Freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." The powerful idea that several governments might operate in the same space and in relation to the same citizens if each was limited in its authority and jurisdiction was not yet widely understood or accepted.

The Constitutional Convention of 1787 set aside familiar names (confederation) and outdated assumptions (sovereignty) and let the problem that they were trying to solve guide their thinking in new directions.⁵ Initially, James Madison and the supporters of the Virginia Plan called for a powerful national

unitary government Centralized government subject to one authority as opposed to a federal system that divides power across national and subnational (state) governments.

confederation Loose governing arrangement in which separate republics or nations join together to coordinate foreign policy and defense but retain full control over their domestic affairs.



Library of Congress

Benjamin Franklin created this image of the separated serpent to convince his fellow colonists to unite, warning them to "Join or Die."

Q2 What powers and responsibilities did the U.S. Constitution give the national government in relation to the states and to the states in relation to the national government?

government capable of overriding the states where necessary. Madison's opponents rallied behind the New Jersey Plan's demand that the national government be grounded on the sovereignty of the states. Eventually, the Convention came to understand, if only vaguely, that neither old model applied well in the new nation and that a new understanding of federalism was required.

FEDERALISM IN THE CONSTITUTION

The Founders' most fundamental insight was that the apparent choice between a consolidated national government and a loose confederation of sovereign states was false. The ideas of constitutionalism and limited government laid open the possibility that within a single territory there might be two sets of governments and two sets of public officials assigned clear and specific responsibilities and powers through written constitutions.⁶

If political power derives from the people, why should the people cede sovereignty either to a consolidated national government or to loosely confederated sovereign states? James Madison gave the classic answer to this question in Federalist Number 51 (see Appendix D). Madison explained: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each is subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people." After this double security is in place, the Federalist concluded, "Every thing beyond this, must be left to

the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped, will always take care to preserve the constitutional equilibrium between the General and the State Governments."⁷

The Constitution gives certain powers to the national government, bars the states from making policy in certain areas, offers them guarantees and assurances in other areas, and leaves still other areas open to the authority of both national and state governments. Despite Madison's assurances that the constitutional equilibrium between the national and state governments would be maintained by a watchful people, only occasionally has federalism been the target of popular tumult, as with the modern "Tea Party" movement. More commonly, the Congress, the Supreme Court, and ever-watchful state and local officials have shaped American federalism. In fact, the American political system has been involved in one of its periodic reassessments of the balance of power and authority within the federal system since the mid-1990s.⁸

Enumerated, Implied, and Inherent Powers

James Madison arrived at the Constitutional Convention determined to strengthen the national government. The Virginia Plan envisioned a national Congress with both a broad grant of legislative authority and the right to review, amend, or reject acts of the several state legislatures. This strong national federalism, in which the states would play a decidedly secondary role, was rejected in favor of a national Congress wielding specifically listed or enumerated powers. The nationalists' disappointment was assuaged somewhat by the Convention's adoption of the **supremacy clause** in Article VI. Article VI read in part: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the Constitution or laws of any State to the contrary notwithstanding." Moreover, all state officials were required to take an oath "to support this Constitution."

The enumerated powers of Congress are laid out in Article I, section 8, of the U.S. Constitution. Article I, section 8, lists seventeen enumerated powers, including the powers to tax, to regulate commerce and coinage, to declare war, and to raise armies and navies. In theory, Congress is limited to making law and policy within its areas of enumerated power. But other language in the Constitution seems to give Congress **implied powers** that go beyond its specifically enumerated powers. The closing paragraph of Article I, section 8, grants Congress the power to "make all laws which shall be necessary and proper for carrying into execution" its enumerated powers. The "necessary and proper" clause, frequently referred to as the "elastic clause," suggests that Congress has a general authority beyond and in addition to its enumerated powers.

If the enumerated powers are fairly specific, and implied powers are somewhat broader but still must be a means to achieve enumerated purposes, the idea of inherent powers is only loosely related to specific constitutional provisions. Both Congress and the Supreme Court have accepted the idea, especially

supremacy clause Article VI of the U.S. Constitution declares that the acts of the national government within its areas of legitimate authority will be supreme over the state constitutions and laws.

implied powers Congressional powers not specifically mentioned among the enumerated powers, but which are reasonable and necessary to accomplish an enumerated end or activity.

inherent powers Powers argued to accrue to all sovereign nations, whether or not specified in the Constitution, allowing executives to take all actions required to defend the nation and protect its interests.

concurrent powers Powers, such as the power to tax, that are available to both levels of the federal system and may be exercised by both in relation to the same body of citizens.

relating to the president and foreign affairs, that nationhood entails the right and necessity, without reference to specific language in the Constitution, to deal with other nations from a footing equal to theirs. In fact, these **inherent powers** of nationhood were what the Declaration of Independence referred to when it announced to the world: "That these United Colonies are, and of Right ought to be Free and Independent States; that . . . they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."

One example of presidential initiative, taken in threatening circumstances, but with no narrow constitutional authorization, will suffice to clarify the nature of inherent powers. Early in 1861 President Lincoln took several steps in the immediate wake of the secession of the southern states, including calling up additional troops and spending substantial sums of money, even though Congress was not in session and had not previously authorized these actions. When critics complained Lincoln simply asked, "Was it possible to lose the nation and yet preserve the Constitution?" Lincoln assumed that the answer was "no" and that his actions required no further justification.

Concurrent Powers

The idea of **concurrent powers** is central to the Founders' conception of a complex republic in which national and state governments exercise dual sovereignty. Dual sovereignty suggests that in some fields, such as the power to tax and borrow, to regulate commerce, to establish courts, and to build roads and highways, the national and state governments have concurrent powers. Both levels of the federal system are authorized to act in these and similar areas of law and policy. Your tax bill is a good example of a concurrent power. In all but seven states citizens must fill out income tax returns for both the national and state levels (and sometimes the local level, too).

Powers Denied to the National Government

Article I, section 9, of the Constitution denied certain powers to the national government. Congress was forbidden to suspend normal legal processes except in cases of rebellion or grave public danger, to favor the commerce or ports of one state over another, to expend money unless lawfully appropriated, and to grant titles of nobility. Other limitations on national power have been added to the Constitution by amendment, but students should notice that this is a brief paragraph.

Powers Reserved to the States

In a course on American government, like this one, students often miss, even in the federalism chapter, how important the states are and have always been. The fundamental logic of American federalism is that the states possess complete power over matters not delegated to the national government and not

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denied them by the U.S. Constitution or by their own state constitutions. As Madison explained in Federalist Number 39, the jurisdiction of the Congress "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."⁹ Nonetheless, widespread concern that the new national government might encroach upon the powers of the states and the rights of their citizens led many to demand that protections be added to the Constitution itself. The first Congress initiated a process that led to adoption of ten amendments to the Constitution—the Bill of Rights—in 1791. The Tenth Amendment reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

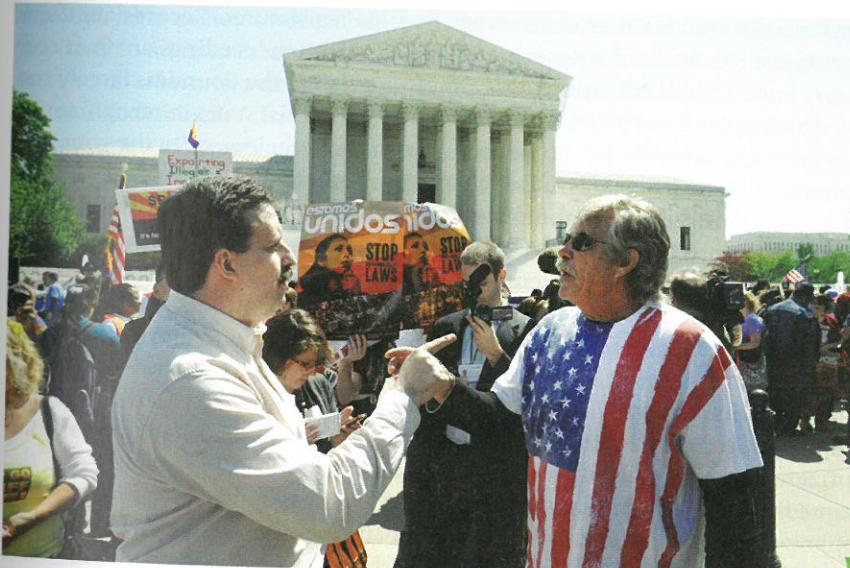
Joseph Zimmerman has usefully divided the reserved powers of the states into three categories: "the police power, provision of services to citizens, . . . and creation and control of local governments."¹⁰ The "police power" covers regulation of individual and corporate activities in order to protect and enhance public health, welfare, safety, morals, and convenience. States also provide services such as police and fire protection, road construction, and education. Finally, local governments are created and regulated by the states.

reserved powers The Tenth Amendment to the U.S. Constitution declares that powers not explicitly granted to the national government are reserved to the states or to the people.

Powers Denied to State Governments

The Founders wanted to be very sure that the problems experienced under the Articles of Confederation, where individual states had antagonized dangerous foreign powers and tried to create economic advantages for their own citizens

Olivier Douberg, Abaca Press



Demonstrators on both sides of Arizona's strict illegal immigration law debated the provisions outside the U.S. Supreme Court. At issue was whether federal authority over immigration policy preempted state authority.

to the detriment of citizens of other states, were not repeated. Article I, section 10, of the U.S. Constitution forbids the states to enter into treaties or alliances either with each other or with foreign powers, to keep their own armies or navies, or to engage in war unless actually invaded. Foreign and military policy belongs to the national government. States are also forbidden to coin their own money, impair contracts, or tax imports or exports.

Federal Obligations to the States

The U.S. Constitution makes a series of explicit promises to the states. Most of these are found in Article IV, sections 3 and 4, and in Article V. The states are promised that their boundaries and their equal representation in the Senate will not be changed without their consent and that their republican governments will be protected from invasion and, at their request, from domestic violence.

Relations among the States

Article IV, sections 1 and 2, of the U.S. Constitution deal with interstate relations. Provisions require the states to respect each other's civil acts, deal fairly with each other's citizens, and return suspected criminals who flee from one state into another.

Full Faith and Credit. Article IV, section 1, of the U.S. Constitution requires that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Stated most directly, "public acts are the civil statutes enacted by the state legislatures. Records are documents such as deeds, mortgages, and wills. Judicial proceedings are final civil court proceedings."¹¹ Through this simple provision, the Founders largely succeeded in creating a national legal system requiring the states to recognize and respect each other's legal acts and findings. Nonetheless, over the course of American history, social issues such as religious toleration, slavery, and, most recently, the decision by some states to permit gay marriage, have strained reciprocity and cooperation between the states.

Privileges and Immunities. Article IV, section 2, of the U.S. Constitution declares that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The classic statement of the reasoning behind the privileges and immunities language was delivered by the Supreme Court in the 1869 case of *Paul v. Virginia*. The Court explained that citizens visiting, working, or conducting business in other states have "the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures them the equal protection of the laws."

Extradition. Article IV, section 2, provides for a legal process called **extradition**: "A person charged in any state with treason, felony, or other crime,

Paul v. Virginia (1869) This decision declared that the privileges and immunities clause of the U.S. Constitution guarantees citizens visiting, working, or conducting business in another state the same freedoms and legal protections that would be afforded to citizens of that state.

extradition Provision of Article IV, section 2, of the U.S. Constitution providing that persons accused of a crime in one state fleeing into another state shall be returned to the state in which the crime was committed.

Article I, section 10, prohibits states from making treaties or alliances with foreign powers, maintaining their own armies and navies, or coin money. It also forbids states to interfere in the affairs of other states. Most of the original Constitution's provisions in Article V. The states are represented in the Senate will be retained. American governments will be able to deal with domestic violence.

Article I, section 9, prohibits states from interfering with interstate relations, dealing with foreign acts, or dealing with fugitives who flee from one state to another.

The Constitution requires public acts, records, and documents to be directly "public." Public records are documents that are final civil judgments and are largely used to recognize and reward the course of justice, and, most often, have strained the limits of the Constitution.

The U.S. Constitution grants all privileges and immunities of the realm to the states it delivered by the compact. It explained that states have "the right to acquire and to secure them the right to call for the extraterritorial jurisdiction over other crimes, and to be tried by their own courts."

who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the Crime."

Fundamentally, the Constitution left the states in charge of their own internal police and gave the national government responsibility for military and foreign policy. Yet, the Constitution also sought to lower trade and regulatory barriers among the several state economies to create a national economy, an American free trade zone, that would stretch from Maine to Georgia and from the Atlantic coast to the farthest edge of western settlement. Not surprisingly, the boundary line between the national government's supremacy within its areas of constitutional responsibility and the states' reserve powers has been fuzzy, contested, and shifting over the course of American history. In fact, it is fair to say that the principal point of tension in thinking about American federalism is how to balance federal power, grounded in the elastic clause and the supremacy clause, and the powers reserved to the individual states by the Tenth Amendment. As we shall see, these tensions arose early and remain with us today.¹²

DUAL FEDERALISM AND ITS CHALLENGERS

The view of American federalism that held sway from the founding period through the first third of the twentieth century was dual federalism. Dual federalism, often referred to as layer-cake federalism, sees the nation and the several states as sovereign within their areas of constitutional responsibility, but with little policy overlap between them. During the nation's early history and, to a lesser extent, throughout the nation's history, dual federalism had two challengers, one a nation-centered federalism and the other a state-centered federalism.¹³ The national vision of federalism was championed by a long series of American statesmen including Alexander Hamilton, Chief Justice John Marshall, Senator Henry Clay, and President Abraham Lincoln. The fundamental idea was that the nation preexisted the states and in fact called the states into existence in June of 1776 when the Continental Congress instructed the colonies to sever ties to England.

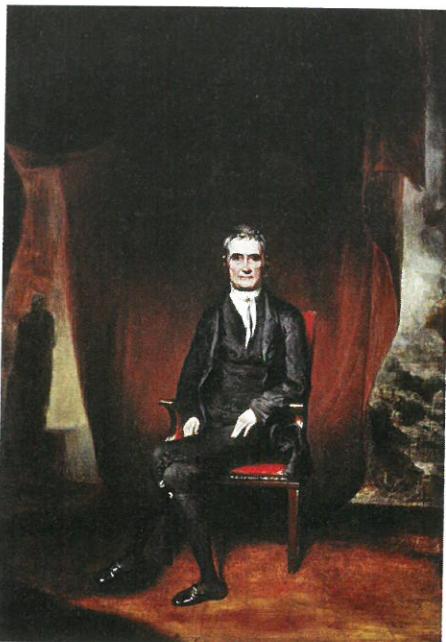
A second set of American statesmen took a different view. Thomas Jefferson, John C. Calhoun, the South's great antebellum political theorist, and President Jefferson Davis of the Confederate States of America all believed that the states preexisted the nation and created it by compact among themselves. On this state-centered vision of federalism, the original parties to the compact, that is, the individual states, could secede from the Union if the national government violated the compact by encroaching upon the sovereign prerogatives of the states. Short of secession, states could nullify, or declare unenforceable, federal laws they believed fell outside Congress's Article II, section 8, enumerated powers.

The nation-centered and state-centered visions of federalism fought on even terms through the early decades of the country's history. However, as the

dual federalism Nineteenth-century view of federalism envisioning a federal system in which the two levels were sovereign in fairly distinct areas of responsibility with little overlap or sharing of authority.

Q3 How did the expansion and integration of the American economy shape the balance of governmental power and authority within the federal system?

The Granger Collection, New York



John Marshall, Chief Justice of the U.S. Supreme Court from 1801 to 1835, established the judiciary as a co-equal branch of the national government.

Marbury v. Madison (1803)

Chief Justice John Marshall derived the power of judicial review from the Constitution by reasoning that the document was supreme and therefore the Court should invalidate legislative acts that run counter to it.

McCulloch v. Maryland

(1819) The Court announced an expansive reading of the "necessary and proper" clause, holding that Congress's Article I, section 8, enumerated powers imply unspecified but appropriate powers to carry them out.

Gibbons v. Ogden (1824) This decision employed an expansive reading of the commerce clause, the doctrine of the "continuous journey," to allow Congress to regulate commercial activity if any element of it crossed a state boundary.

industrial economy of New England outstripped the agrarian economy of the South during the 1840s and 1850s, state-centered federalism became increasingly isolated and strident. When Abraham Lincoln was elected president in 1860, the South seceded and two visions of American federalism faced off on the battlefields of the Civil War.¹⁴

Chief Justice John Marshall and National Federalism. As early as 1791, a federal court declared a Rhode Island state law unconstitutional, and in 1803 Chief Justice John Marshall, in the famous case of *Marbury v. Madison*, declared a section of an act of Congress, the Judiciary Act of 1789, to be unconstitutional. The broad result of the *Marbury* decision was to establish the Supreme Court as the final arbiter of what is and is not constitutional, and, hence, of the meaning, shape, and boundaries of American federalism.

The importance of the Supreme Court's role as arbiter of the meaning of the Constitution was highlighted by the Court's 1819 ruling in *McCulloch v. Maryland*. The issue in *McCulloch*, whether Congress could legitimately charter a bank, permitted the Court to interpret the powers of Congress broadly and to limit state interference with them. No power to establish a bank appeared among the enumerated powers of Congress, so opponents of the bank, arguing from the state-centered or compact vision of federalism, denied that Congress had the power to create a bank at all. Chief Justice Marshall, writing from the nation-centered vision, rested the right of the Congress to establish and administer a bank on the "necessary and proper" clause. Marshall noted that Congress's enumerated powers include the power "to coin money" and "regulate the value thereof." He argued that the bank was an "appropriate," though perhaps not an "indispensable," means to this end. Marshall's classic interpretation of the "necessary and proper" clause makes this point as follows: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate which are plainly adapted to the end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." This expansive interpretation of national power came at the expense of the Tenth Amendment "reserved powers" of the states.

A third decision completed Chief Justice Marshall's attempt to embed the nation-centered vision of federalism in the Constitution. The 1824 case of *Gibbons v. Ogden* dealt with the regulation of interstate commerce, that is, commerce conducted across state lines. While the court's interpretation of the commerce clause may seem arcane, even boring, it has been absolutely central to the expansion of congressional power from Chief Justice John Marshall's day to our own day. In fact, the broad interpretation of Congress's commerce power, just as much as the necessary and proper clause, has fueled and legitimated the expansion of national power in our federal system.

The issue in *Gibbons* was whether a steamship company operating in a single state was in interstate commerce and subject to the regulatory powers of the Congress. Advocates of the state-centered vision said no. Marshall, writing for the majority, held that the Congress's power to regulate interstate commerce applies to navigation, even in a single state, if any of the passengers or goods being carried on the steamship are engaged in a "continuous journey" that finds or will find them in interstate commerce. Clearly, this is a very expansive ruling because it is almost inconceivable that not a single person or piece of cargo on such a steamship had been or would later be in interstate commerce. These decisions laid the foundation for the triumph of national federalism, though it would be another century before the structure was fully built. In the meantime, Marshall's opponents would have their century-long day in the sun.

Chief Justice Roger Taney and the States. Upon John Marshall's death in 1835, President Andrew Jackson named Roger B. Taney to be the new chief justice, an office he held until 1863. Chief Justice Taney was a strong advocate of state-centered federalism and of a limited national government. A stronger advocate still was South Carolina Senator John C. Calhoun. Senator Calhoun, convinced that the South was threatened by an overbearing northern majority, proposed "the doctrine of the concurrent majority," whereby each major region would have the right to veto national laws that threatened their fundamental interests. If the South was denied such security, Calhoun argued that the sovereign states could nullify illegitimate national laws and, as a last resort, secede from the Union. These ideas are occasionally still heard.

Chief Justice Taney's most infamous opinion was *Dred Scott v. Sandford* in 1857. Taney held that Congress had no right to prohibit a slave owner from taking his property, even his human property, into any state in the Union, even a free state, and holding that slave as property. The next year, in the Illinois Senate election of 1858, Senator Stephen A. Douglas argued that the deep American commitment to "popular sovereignty" meant that the citizens of individual states should be able to vote for or against slavery. Douglas's opponent, then a little-known former congressman named Abraham Lincoln, argued for the right of the national government to limit slavery to those states where it currently existed. Lincoln lost.

The strong arguments by Taney and Douglas in favor of an expansive view of states' rights and the state-centered federalism helped set the stage for the Civil War. Northern opinion mobilized against the expansion of slavery and Lincoln rode that mobilization to the

Struggling Toward Democracy

In a letter to William B. Giles on December 6, 1825, Thomas Jefferson wrote, "I see, as you do, and with the deepest affliction, the rapid strides with which the federal branch of our government is advancing toward the usurpation of all the rights reserved to the States."

What do you think?

- In what areas, if any, do you think the states' ability to govern is being threatened by the federal government?
- Does the increased size of the country now compared to the founding make the role of the federal government more or less important?



The Granger Collection, New York

Roger Taney, author of the Dred Scott decision, is often seen as the Supreme Court's most infamous Chief Justice.

concurrent majority South Carolina Senator John C. Calhoun's idea for restoring balance between the North and South by giving each region the right to reject national legislation thought harmful to the region.

Dred Scott v. Sandford

(1857) The Court declared that African Americans, whether free or slave, were not citizens of the U.S. Moreover, slaves were property and could be carried into any state in the union, even a free state, and held as property.

cooperative federalism Mid-twentieth-century view of federalism in which national, state, and local governments share responsibilities for virtually all functions.

presidency in the election of 1860. The South seceded, the North resisted, and America went to war with itself over the nature of its federal Union.

FROM DUAL FEDERALISM TO COOPERATIVE FEDERALISM

Although the idea of the Constitution as a compact from which states might secede was a casualty of the Civil War, the idea of states' rights—a large and secure place for the states in the federal system—certainly was not. Congress did little to regulate state and local affairs until the Great Depression seemed to demand change in the broad character and basic structure of American federalism. After the 1930s American federalism was better described as cooperative federalism than as dual federalism.

The defining aspects of cooperative federalism, or marble-cake federalism as it is often called to highlight the sharing or mixing of national and state responsibility, have been nicely described by political scientist David Walker. Walker made two key points that distinguish cooperative federalism from dual federalism. In cooperative federalism, national, state, and local officials share "responsibilities for virtually all functions," and these "officials are not adversaries. They are colleagues."¹⁵ Over time, however, concern about the national government's dominance of the federal system, usually by attaching mandates to federal funds provided to states and communities, has become a growing concern.

The Industrialization and Urbanization of America

Social change in America between the elections of Abraham Lincoln in 1860 and Franklin Roosevelt in 1932 was massive. During this period, the nation went from one mostly of small towns and isolated farms to one of burgeoning cities and large-scale industry. More important, the nation was bound ever more tightly into a web of commerce and communication that seemed to demand tending above the levels of states and communities. As the web of commerce expanded over the course of the nineteenth century and into the twentieth century, debate raged over the reach of congressional power channeled through the Constitution's commerce clause.

Consider two related developments: the rise of railroads and the telegraph. Prior to the arrival of railroads and the telegraph, businesses were local or at most regional. The size of a business was determined by the distance over which finished products could be distributed efficiently by wagon, barge, or boat. After the telegraph made it possible to order and advertise over long distances and railroads made it possible to deliver products quickly over long distances, businesses expanded rapidly. By the last decades of the nineteenth century, huge monopolies or trusts in basic service and product lines like banking, railroads, communications, steel, oil, and sugar dominated the nation's business landscape.

Pro & Con



The Continuing Relevance of States' Rights

The language of the U.S. Constitution is ambiguous about the relative power of the national and state governments. Although Article VI suggests national supremacy ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land"), the powers granted to Congress are enumerated rather than general. Moreover, the Tenth Amendment, adopted as part of the Bill of Rights in 1791, reads: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people."

Prior to the Civil War most discussions of the rights of the states in the new Union revolved around the ideas of nullification and secession. Nullification was the idea that a state could suspend within its borders the operation of an act of the national government with which it disagreed. Secession was the idea that a state might actually withdraw from the Union if it disagreed deeply with the general pattern of policy activity of the federal government.

Although the Civil War destroyed both nullification and secession as practical ideas within the American political system, the broader idea of states' rights retained its importance. Some now believe that the fights against the racism and poverty of the 1960s and 1970s, important though they were at the time, left behind programs that no longer work and a federal government too large and intrusive for the needs of the twenty-first century. Therefore, many, mostly conservatives, believe that federal money and

authority should be transferred back to the states, closer to the problems that need to be solved and to the people in the best position to know how to solve them.

Some others, mostly liberals, worry that the old states' rights arguments for the virtues of local control will once again be used by powerful local majorities to ignore the needs of weaker local minorities and that, as in the past, the most vulnerable (women, blacks, gays) will be among the first to suffer. The modern opponents of states' rights claim that fairness and justice require that national standards be set and maintained, not just in the obvious area of equal rights for minorities and women, but also in such diverse areas as health, welfare, and education. Absent such standards, they believe, some states will do much less than others to assist their neediest citizens.

On the other hand, it is mostly liberals who cheer the movement of some states to provide the rights of marriage to gay people. Conservatives talk of a constitutional amendment to forbid gay marriage in the states. Although there are principled reasons to stand for states' rights or national uniformity, there is also a long national tradition that the party that dominates Washington is comfortable with uniformity while the opposition party looks for partial victories in friendly states.¹⁶

What do you think?

- What are the pros and cons of allowing each state to decide how they want to go on critical issues like gay marriage, legalization of marijuana, abortion, guns, prayer in schools, and other hotly debated issues?
- Why might liberals or conservatives have conflicting views of state-federal powers depending on the policy issue?

PRO

- State differences are real
- Problems should be addressed close to home
- States' rights no longer about secession

CON

- Natural standards for justice are critical
- Many problems require national coordination
- Local minorities are still vulnerable

nullification The claim prominent in the first half of the nineteenth century that states have the right to nullify or reject national acts that they believe to be beyond national constitutional authority.

secession The claim that states have the right to withdraw from the Union.

U.S. v. E.C. Knight (1895) The Court held that Congress's power to regulate interstate commerce extended only to transportation of goods across state lines, not to manufacturing or production.

How could states, let alone localities, control and regulate a railroad that stretched across half a dozen states, or a steel, sugar, or tobacco trust that did business in every state in the Union? They simply could not. Yet, the Supreme Court declared in *U.S. v. E.C. Knight* (1895) that Congress's power to regulate interstate commerce did not reach manufacturing or production, only the transportation of goods across state lines. Hence, as the twentieth century dawned, the nation's largest businesses were beyond the reach of congressional and state regulation and control.

Knowing that changes are needed is not the same thing as knowing what changes are needed, much less knowing how to get political agreement to adopt and implement a particular set of changes. President Theodore Roosevelt threatened "trust busting" to encourage large private sector actors to accept more federal oversight. Future president Woodrow Wilson, still president of Princeton in 1908, urged a broader dynamic view of federalism. His *Constitutional Government in the United States* argued that the principles and institutions of government must adapt to serve an evolving society: "The question of the relation of the States to the federal government is a cardinal question of our constitutional system. . . . It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."¹⁷ Although the Progressive Era administrations of Theodore Roosevelt and Woodrow Wilson did establish a beachhead for the regulatory authority of government, the Roaring 20s saw a return to *laissez faire*. Not until Franklin Roosevelt rose to confront the Great Depression of the 1930s did the balance of American federalism begin a decisive shift of responsibility and authority to the national level.

In the early years of the twentieth century, state and local governments accounted for about 70 percent of total government spending in the United States, whereas the federal government accounted for about 30 percent (see Figure 3.1). However, in 1913, President Wilson proposed and the Congress passed the federal income tax. This meant that the national government could, for the first time in American history, raise large amounts of money by taxing the annual incomes of citizens and residents. As the national government moved to address each major crisis of the first two-thirds of the twentieth century, its share of spending rose markedly. When each crisis passed, the federal share of total spending fell back toward, but never all the way to, precrisis levels. Since the mid-1960s, the federal government has accounted for about 65 percent of all government expenditures while state and local governments have accounted for the remaining 35 percent. Federal spending in 2009 jumped up to 68 percent in response to stimulus spending to combat the recession and has remained there since.

The Great Depression

Nothing made the fact that the American economy had become an integrated whole more clear than its collapse in late October 1929. "The Crash," in which

FIGURE 3.1 Percent of Government Expenditures by Level of Government, 1902–2012



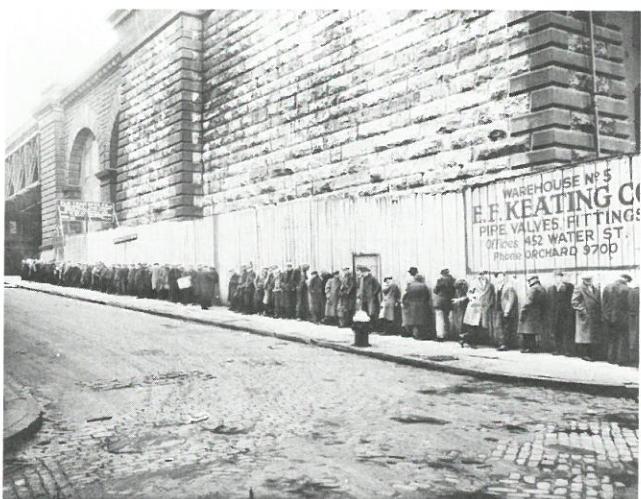
Source: *Historical Statistics of the United States, Colonial Times to 1957* (Washington, D.C.: U.S. Department of Commerce, 1960), 711, Series Y254–257, and 726, Series Y536–546. Post-1960 figures come from *Budget of the United States Government, Fiscal Year 2014, Historical Tables* (Washington, D.C.: Government Printing Office, 2014), Table 15.2, 350–351.

the stock market lost almost a quarter of its value in two days of panic trading, began a decade of deep economic depression and persistent unemployment. Just as the depression eased, World War II erupted.

The 1930s and 1940s were a period of national emergency. By the time Franklin Roosevelt assumed office early in 1933, the country had already been mired in depression for more than three years. The Depression was a national, even worldwide, economic collapse. The economy had declined by 40 percent from its 1929 high, and fully one-third of the workforce was unemployed. State and local governments were overwhelmed by the needs of their citizens. Roosevelt's dramatic response, known as the "New Deal" and initiated during his "first hundred days" in office, included "an extraordinary assumption of federal authority over the nation's economy and a major expansion of its commerce and taxing powers."¹⁸ The Supreme Court, still committed to maintaining as much of the logic and operation of "dual federalism" as possible, declared virtually all of it unconstitutional.

Roosevelt threatened to ask the Congress to expand the size of the Supreme Court so that he could "pack" it with new members more favorably disposed to his vision of an activist role for the federal government. The Supreme Court

The Granger Collection, New York



The poor and unemployed wait for a free meal—Christmas dinner—at the Municipal Lodging House in New York in 1931.

Wickard v. Filburn (1942) The Court rejected the narrow reading of the commerce power in *U.S. v. E.C. Knight* to return to the broader reading in *Gibbons v. Ogden* by which Congress could regulate virtually all commercial activity.

Roosevelt's program for rejuvenating agricultural prices, the Agricultural Adjustment Act (AAA), regulated the acreage that farmers could plant. Roscoe Filburn was authorized to plant 11 acres of wheat on his Ohio farm. He planted 23 acres, arguing that the wheat from only 11 acres would be sold and the other 12 would feed livestock. The Supreme Court, for decades a staunch defender of free markets and of a limited role for Congress in economic regulation, held that feeding the excess wheat to his own animals meant that he did not have to buy that wheat in the open market and that tiny effect on "interstate commerce" was enough to bring him under the purview of Congress's legitimate constitutional authority.¹⁹ The balance between national and state authority within American federalism had shifted dramatically to the national level.

World War II drove the federal share of total government spending to 90 percent by 1944. When the war ended in 1945, the United States remained engaged in international politics, aiding in the rebuilding of the European and Japanese economies and constructing a military alliance to confront Soviet expansionism. Although the federal share of total government spending fell below 60 percent in 1950, the Korean War of the early 1950s drove it back up toward 70 percent. It has ranged between 60 and 70 percent for the past half century. Moreover, consolidation of political authority at the national level involved domestic policy as much as it did foreign and national security policy.

THE RISE OF FISCAL FEDERALISM

For most of American history, the limited congressional authority outlined in Article I, section 8, of the Constitution was understood to forbid national control of broad policy areas including education, health care, income and

blinked. Some members changed their votes, a few retired, and Roosevelt soon had a Supreme Court that would bless a vastly expanded role for the federal government. By June of 1935, the Court had approved several key economic programs including the National Labor Relations Act, the Railway Labor Act, the Farm Mortgage Act, and the Social Security Act. These decisions amounted to the end of "dual federalism" and the beginning of a period in which the national government would have the broad power to set and regulate economic activity in the states. The proportion of total government spending accounted for by the national government rose from 28 percent in 1927 to 50 percent in 1936.

Wickard v. Filburn shows how far the Supreme Court had moved by 1942.

ers changed their Roosevelt soon had would bless a vastly federal government. Court had approved programs including Relations Act, the Term Mortgage Act, act. These decisions "dual federalism" period in which would have the regulate economic proportion of total accounted for by the from 28 percent in shows how far the moved by 1942. the Agricultural could plant. Roscoe farm. He planted sold and the other staunch defender regulation, held he did not have interstate com- congress's legitimate state authority national level. spent to states remained European and confront Soviet spending fell above it back up for the past half national level security policy.

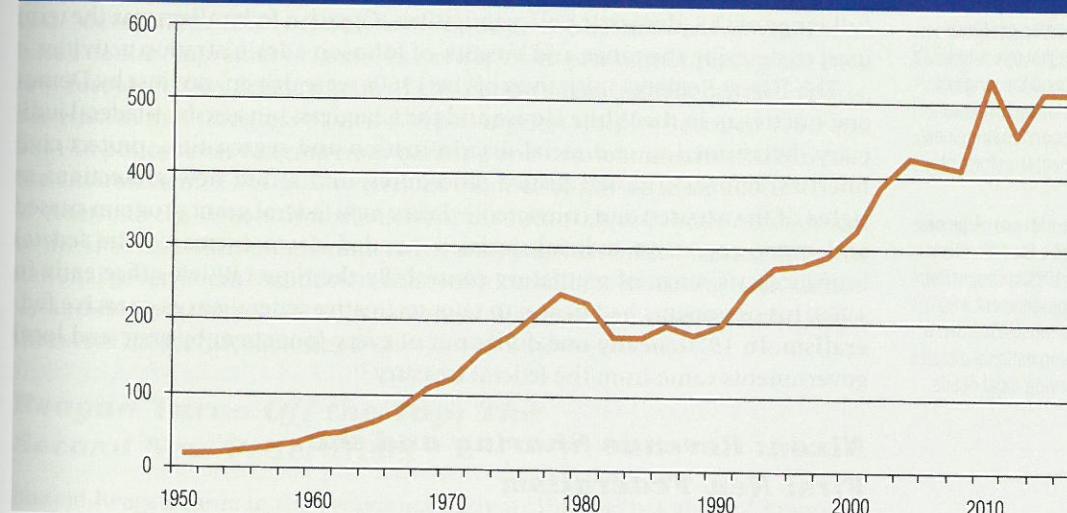
retirement security, and much more. Slowly, beginning with Theodore Roosevelt's "Square Deal" and picking up speed with Franklin Roosevelt's "New Deal," federal authorities highlighted the first clause of Article I, section 8, permitting Congress to "lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare of the United States." Especially during the "Great Depression," need in the nation's states and communities seemed to call for an activist federal government.

The reach of the national government within the structure of American federalism continued to expand during the 1960s and early 1970s. John Kennedy was elected president in 1960 on the promise to "get the country moving again" after the calm of the Eisenhower years. The fuel that would power this new movement was federal money. The favored device for delivering federal funds to states and localities was the **categorical grant**. Each categorical grant program offered state and local governments opportunities to receive federal funds if they would engage in a certain narrow activity and if they would do so in compliance with detailed federal mandates on eligibility, program design, service delivery, and reporting.

Only five categorical grant programs were in place in 1900 and only fifteen by 1930. Fifteen more were added during FDR's first two terms as president, but major transfers of funds from the national government to state and local governments did not begin until after World War II. Figure 3.2 shows that federal expenditures for grants to state and local governments rose dramatically and continuously from 1950 through the late 1970s.

categorical grant A program making federal funds available to states and communities for a specific, often narrow, purpose and usually requiring a distinct application, implementation, and reporting procedure.

FIGURE 3.2 Federal Outlays for Grants to State and Local Governments, 1950–2016, in Billions of 2005 Constant Dollars



Source: *Budget of the United States Government, Fiscal Year 2014, Historical Tables* (Washington, D.C.: Government Printing Office, 2014), Table 12.1, 257–258. The numbers for 2013 to 2016 are official estimates from the same table.

Federal expenditures in constant 2005 dollars rose from more than \$20 billion in 1950 to \$236.1 billion in 1978. President Carter and the Congress reduced spending on grants to state and local governments modestly in 1979 and 1980, before the new Reagan administration slashed them by more than 20 percent in the early 1980s and then held them at that level through the remainder of the decade. Not until the early 1990s did federal grants to state and local governments begin to increase as part of the Clinton administration's aggressively domestic focus. Republican congressional majorities first elected in 1994 supported the devolution of federal authority to the states, but the Clinton administration resisted and then the Bush administration's homeland security initiatives dramatically increased federal transfers to state and local governments between 2002 and 2005 before they leveled off.

But national emergencies—whether they take the form of external threats, like World War II or 9/11, or economic catastrophes, like the Great Depression of the 1930s or the Great Recession of 2008 and 2009—invariably call out for concerted national action. Not surprisingly, then, the Obama economic stimulus program, passed just one month into the new administration, pumped tens of billions of new dollars into the states. Republican gains in the 2010 House elections led to initial cuts, but the struggling economy seemed to call for more stimulus. Obama administration projections, reflected in Figure 3.2, suggest a leveling off of federal transfers to the states, but skepticism is warranted.

LBJ: Creative Federalism and Grants-in-Aid

By the time John Kennedy entered the White House in early 1961, 132 categorical grant programs were in operation. During the five years that Lyndon Johnson was president, he and his overwhelmingly Democratic Congresses passed more than two hundred new categorical grant programs covering the full range of U.S. domestic policy initiatives. **Creative federalism** was the term used to describe the range and breadth of Johnson administration activities.

The "Great Society" initiatives of the 1960s were driven, not just by Democratic activism in the White House and the Congress, but also by a federal judiciary determined to end racial discrimination and segregation, protect civil liberties, reform criminal justice procedures, and afford new protections to rights of the accused and convicted.²⁰ Every new federal grant program passed and every expansive judicial decision handed down increased the federal bureaucracy's range of regulatory control. By the time LBJ left office early in 1969, his opponents had begun to refer to creative federalism as **coercive federalism**. In 1970, nearly one dollar out of every four spent by state and local governments came from the federal treasury.²¹

Nixon: Revenue Sharing and the First New Federalism

Republican President Richard Nixon's "New Federalism" was intended to enhance the discretion of the states in deciding how best to use the financial

creative federalism 1960s view of federalism that refers to LBJ's willingness to expand the range of federal programs to support state and local activities and to bring new, even nongovernmental, actors into the process.

coercive federalism A pejorative term to describe the federalism of the 1960s and 1970s, suggesting that the national government was using its financial muscle to coerce states into following national dictates as opposed to serving local needs.

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resources they received from the national government. President Nixon undertook two major federalism initiatives. The first, called **special revenue sharing (SRS)** or **block grants**, bundled related sets of categorical grants into a single SRS or block grant program. States and localities were permitted to decide how to allocate the money across the eligible program activities. The second Nixon initiative, called **general revenue sharing (GRS)**, provided \$30.2 billion to the fifty states and approximately thirty-eight thousand local governments over a five-year period. Unlike categorical grants or even block grants, general revenue sharing funds had few strings attached. States could set their own priorities.

Nixon's New Federalism was purchased from the Democratic Congress at a high price. Congress exacted from President Nixon both increased expenditures and expanded regulation of state and local governments in other areas including civil rights, consumer protection, workplace safety, and environmental affairs. As a result, the late 1960s and early 1970s witnessed the greatest expansion of federal regulation of state and local governments in American history. Conservatives in Congress became increasingly concerned about the expense of federal mandates and regulations while many state and local officials complained about the complexity of application, administration, and reporting requirements. By the late 1970s, Democratic President Jimmy Carter began to trim federal transfers to state and local governments.

Not surprisingly, the rapid rise in federal spending and of federal transfers to the states over the past half century and more has sharpened the long-running conflict between nation-centered and state-centered federalism. In the 1960s and 1970s especially, the federal government used its financial resources to encourage state and local governments to follow their lead. In other policy areas, the federal government displaced state and local authorities altogether.

The modern version of the long-running historical battle between national federalism and states rights federalism is the battle between "preemption" and "devolution." **Preemption** is the power of the national government, based on the "supremacy clause" in Article VI, to preempt or push aside state law. Joseph F. Zimmerman, one of the nation's leading federalism experts, has written that Congress passed 678 preemption statutes between 1790 and 2011 in policy areas ranging from banking and commerce to health care and the environment.²² Fully 70 percent of them were passed after 1970.

Alternatively, **devolution** stems from the idea that the Tenth Amendment to the U.S. Constitution guarantees the states against undue intrusion by the national government. Supporters of devolution call for returning both authority and financial resources to the states so that they can deal with the issues that seem most critical to them.

Reagan Turns Off the Tap: The Second New Federalism

Ronald Reagan came to the presidency early in 1981 with a view of American federalism unlike that of any president since Herbert Hoover. Reagan's first inaugural address declared his "intention to curb the size and influence of the

special revenue sharing The Nixon administration developed block grants that bundled related categorical grants into a single grant to enhance state and local discretion over how the money was spent.

block grants Federal funds made available to states and communities in which they have discretion over how the money is spent within the broad substantive area covered by the block grant.

general revenue sharing Program enacted in 1974, discontinued in 1986, that provided basically unrestricted federal funds to states and localities to support activities that they judged to be of highest priority.

preemption The Article VI declaration that national statutes are "the supreme law of the land" allows Congress to preempt or displace state authority in areas where they choose to legislate.

devolution The return of political authority from the national government to the states beginning in the 1970s and continuing today.

Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or the people."

The Reagan administration concluded that the national and state governments were doing too much and would do less only if they had less money. The Economic Recovery Tax Act (ERTA) of 1981 reduced the individual income tax rates by 25 percent over three years and reduced corporate income tax rates. The top bracket for individual income taxes was reduced from 70 percent to 50 percent in 1981 and reduced again by the Tax Reform Act of 1986 to 28 percent. Although tax rates were adjusted marginally upward during the late 1980s, federal revenue losses were massive.

Moreover, huge annual budget deficits put very heavy pressure on domestic spending in general and on transfer payments to state and local governments in particular. Strikingly, states were dropped from general revenue sharing in 1980 and the program was allowed to lapse in 1986. "[R]eal outlays to state and local governments fell by 33 percent between 1980 and 1987."²³ State and local governments were left to decide whether to pick up the slack or take the heat for program cuts.

Virtually all state and local governments, unlike the national government, are required, either constitutionally or by law, to balance their budgets each year. Declining federal support to states and communities makes them particularly vulnerable to economic downturns. When an economic downturn takes hold and revenues decline, the federal government can run a budget deficit but the states have to cut spending and, hence, programs and people feel it.

The Process of "Devolution" in Contemporary Federalism

Q4 What fiscal and political forces led to the change in American federalism called "devolution"?

Since 1980, only the first President Bush and Barack Obama were not governors before becoming president. Ronald Reagan, Bill Clinton, and the second President Bush all served as governors and all thought they knew how the national government should relate to the states. Ronald Reagan thought government, national, as well as state and local, was too big, too intrusive, and too expensive. He cut taxes at the national level and cut revenue transfers to the states so that government's role in American life would shrink.

Bill Clinton thought that government had an important role to play in American life, but that many problems were better addressed by people in their states and communities. He sought to redirect both financial resources and programmatic responsibilities to the states. After 1994, President Clinton's desire to produce a balanced budget joined with the Republican Congress's desire to shift primary responsibility for social welfare policy in the United States from the national to the state level to produce a dramatic overhaul of federal relations. In key policy areas like welfare, health care, job training, and transportation, Congress and the president rolled dozens of separate grant programs into a few large block grants. Each block grant gave the states

distinction between powers reserved to the States

al and state governments had less money. The individual income tax rate income tax rates, from 70 percent to 50 percent from 1986 to 28 percent, in the late 1980s, fed-

ressure on domestic local governments for revenue sharing in fiscal outlays to states in 1987.²³ State and the slack or take the

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Joe Heller / Green Bay Press-Gazette

greater flexibility in deciding how to spend the money allocated to them. However, the block grants often included only about 70 percent of what the federal government spent on the same programs when it administered them.

President George W. Bush accelerated the process of moving financial resources and policy responsibility to the states, especially in the areas of education, health care, homeland security, and electoral reforms. However, like Reagan, Bush also cut taxes, and the resulting budget deficits put new pressure on federal support for the states.²⁴

Just as momentously, in a series of narrow 5–4 judicial decisions, beginning with *U.S. v. Lopez* (1995) and extending through *U.S. v. Morrison* (2000), the Supreme Court moved to limit the ability of the president and Congress to use the commerce clause to push states in directions that they did not wish to go. In *Lopez*, the Court decided that the national government's prohibition on guns near schools was too loosely connected to regulating commerce to be justified. Similarly, in *Morrison*, the Court held that the 1994 Violence Against Women Act was unconstitutional because its impact on commerce was too remote to displace the rights of the states to legislate as they see fit in this area. *Lopez* and *Morrison* were the first cases in more than 70 years, since *Wickard v. Filburn* in 1942, in which the Court struck down an attempt by Congress to regulate some realm of public activity under the commerce clause.

However, constitutional interpretation rarely goes in a straight line. In the 2005 case of *Gonzales v. Raich*, the Supreme Court upheld Congress's power under the commerce clause to make marijuana possession illegal. The Court declared that regulating possession and use of marijuana fell "squarely within Congress's commerce power." The Court's conservatives, led by then-Chief Justice Rehnquist, then-Justice O'Connor, and Justice Thomas, were

U.S. v. Lopez (1995) The Court found that Congress's desire to forbid carrying handguns near schools was too loosely related to its power to regulate interstate commerce to stand. The police powers of the states cover such matters.

U.S. v. Morrison (2000) Citing *U.S. v. Lopez*, the Court found that the Violence Against Women Act was too loosely related to Congress's power to regulate interstate commerce to stand.

LET'S COMPARE



The Prevalence of Federal Systems in the World

Although the number of democratic nations in the world has grown dramatically over the past two hundred years, the number of federal systems is small and has grown slowly. Although all the nations that employ federal systems are democratic, it is certainly not the case that all democratic systems are federal. In fact, only about a dozen nations employ federal systems, and they have little in common except the fact

that they are all democratic and most are reasonably well-off by world standards.

The countries that have chosen to employ federal systems vary in geographical size, population, wealth, and ethnic and religious diversity. Most frequently, federal systems are chosen by the political leaders of countries who believe that some of the efficiency of centralization should be sacrificed to local and regional autonomy. In the United States, the claim is often made that federalism leads to bold experimentation and problem solving in the “laboratories of democracy” that are the fifty states.

Nation	Population	Area (Sq Km)	GDP Per Capita	Ethnic Diversity	Religious Diversity
Argentina	42,610,981	2,780,400	18,400	Low	Low
Australia	22,622,501	7,686,850	43,300	Low	Medium
Austria	8,221,646	83,870	43,100	Low	Low
Brazil	201,009,622	8,511,965	12,100	Medium	Low
Canada	34,568,211	9,984,670	43,400	Medium	Medium
Germany	81,147,265	357,021	39,700	Low	Medium
India	1,220,800,359	3,287,590	3,900	Medium	High
Malaysia	29,628,392	329,750	17,200	Medium	High
Mexico	116,220,947	1,972,550	15,600	Low	Low
Russia	142,500,482	17,075,200	18,900	Low	Low
Switzerland	7,996,026	41,290	46,200	Medium	Medium
United States	316,668,567	9,826,630	50,700	Medium	Medium

Source: Central Intelligence Agency, *The World Factbook*, 2014 (Washington, D.C.: U.S. Government Printing Office, 2014).

dismayed. Justice Thomas argued that “if Congress can regulate this under the Commerce Clause, then it can regulate virtually anything, and the federal government is no longer one of limited and enumerated powers.”²⁵

A far larger battle broke out in 2010. The Obama health care program, passed in early 2010, was quickly challenged by twenty-six mostly Republican Attorneys General as an abuse of the commerce clause and an unconstitutional intrusion into the policy domain of the states.

Most close observers thought that there was at least an even chance that the Supreme Court would strike down all or most of Obamacare. Chief Justice

John Roberts, writing for a divided court, surprised almost everyone, especially conservatives, by upholding most of Obamacare, not on commerce clause grounds, but under the federal government's power to tax. He did, however, acknowledge the role of the states in the federal system by holding that the national government could not pressure the states into expanding Medicaid as part of health care reform.

Another line of cases decided since 1995 has strengthened the sovereign immunity of states against being sued in their own courts or the federal courts by state government employees or citizens.²⁶ Moreover, the findings limit the ability of Congress and the president to make federal law binding on state governments. So far, federal laws concerning worker rights, patent protection, and age discrimination have been struck down as they apply to state governments. In 2006, the U.S. Supreme Court rejected U.S. Attorney General John Ashcroft's attempt to intervene in opposition to an Oregon assisted-suicide law. The court noted that general regulation of medical practice traditionally had been a state responsibility. Nonetheless, the stark fact is that over the course of the twentieth century, the weight and focus of government in the United States shifted from the state and local levels to the national level.

Struggling Toward Democracy

State governments receive more than one-third of their general revenue directly from the federal government. State officials claim that strings attached to the federal funds limit their ability to confront state and local problems as they think best.

What do you think?

- When the federal government sends money to the states, do they have the right to define how it can be used or not?
- Should the federal government withdraw its funding if states fail to comply?

THE FUTURE OF AMERICAN FEDERALISM

Federalism has been a part of American constitutionalism since several Puritan communities founded the New England Confederation in 1643. After more than 350 years of experience with federalism, one might think our commitment to it would be secure. It is not. Some still wonder whether American federalism has been compromised, perhaps irreparably, by American political development and, more recently, by the globalization of the world communication, finance, and trade structures. They support the devolution of recent decades and call for more. Others believe that globalization of commerce, the serious threat of global warming, international terrorism, and the pandemic threats of Aids and bird flu require more national authority, not less.

Clearly, American political development—the progressive integration of our social, economic, and moral lives—has caused massive political change over the last 130 years or so. Hurricane Katrina highlighted the need to strengthen the abilities of local, state, and national forces to coordinate their efforts in dealing with natural disasters. Man-made disasters may confront us with worse in the future and our federal system must be prepared to respond.²⁷

Social networks must be tended. Consider the nation's transportation infrastructure. There is a sense in which initially it builds itself. Footpaths may not need to be managed, but roads are community projects. As a result, from the earliest days, New England villages elected town officers to monitor, improve,

Q5 Have the complexities of the twenty-first century rendered our government essentially national, or do state and local governments still have important roles to play?

and extend roads and trails as growth and new settlements required. Highway systems, to say nothing of air traffic control systems, require management and integration above the level of towns, cities, and even states. Fundamentally, as societies and their economies grow and mature, more and more of their activities occur nationally and internationally.

For example, the North American Free Trade Agreement (NAFTA) signed by Canada, the United States, and Mexico in 1993 both permits free trade throughout North America and limits each nation's ability to manage its own internal trade and national labor markets. Similarly, the General Agreement on Tariffs and Trade (GATT), the worldwide trade agreement approved by virtually every nation in the world in 1994, restricts each nation's ability to protect and nurture its particular national industries. Finally, instantaneous satellite and Internet communications allow twenty-four-hour-a-day trading in every nation's stocks, bonds, and currencies. This makes each nation's financial markets much less subject to national control and management than they once were. These developments pose great challenges to American federalism. Once again, the resilience of the American federal system will be tested.²⁸

Chapter Summary

Federalism is a system of government that divides political power and responsibility between national and subnational levels of government. Initially, the distribution of political power described in the Constitution seemed to indicate that the national government would be responsible for dealing with foreign and military affairs and for economic coordination between the states and with foreign powers. The states would retain the power to deal with domestic affairs. The rights and liberties of the people would remain unfettered in broad areas where power had not been granted to either the national or subnational level of government.

However, as the nation grew in size and complexity, many issues that had once seemed appropriate for state or local resolution, such as building and tending a transportation system, seemed to require support and coordination from the national level. As problems seemed to move within the federal system, power within the federal system had to be redistributed or realigned. After the founding there were two historical eras during which power was redistributed dramatically upward within the American federal system: the Civil War era of the 1860s and the Depression era of the 1930s.

Both the 1860s and the 1930s marked distinctive phases in the integration of the American economy and society. In the two decades before the Civil War and the two after, a national structure of communication and transportation was developed. Railroads and telegraph not only permitted goods and information to move nationally, but also permitted the businesses and corporations that produced these goods and information to become national entities. By the final decade of the nineteenth century, it had become clear that

TABLE 3.2 The Evolution of American Federalism

Stages	Events
National Federalism	John Marshall appointed Chief Justice (1800) <i>Marbury v. Madison</i> establishes judicial review (1803) <i>McCulloch v. Maryland</i> defines “necessary and proper” (1819) <i>Gibbons v. Ogden</i> defines “interstate commerce” broadly (1824)
State Federalism	Roger B. Taney appointed Chief Justice (1835) <i>Dred Scott v. Sandford</i> lets states define property (1857) U.S. Civil War (1861–65)
Dual Federalism	<i>U.S. v. E.C. Knight</i> limits federal commerce power (1895) <i>Plessy v. Ferguson</i> limits federal citizenship rights (1896)
Cooperative Federalism	19th Amendment approves federal income tax (1913) FDR’s New Deal (1935) <i>Wickard v. Filburn</i> expands federal commerce power (1941) LBJ’s Great Society (1965) Nixon’s Special Revenue Sharing (1972) Nixon’s General Revenue Sharing (1974)
Devolution	Reagan’s tax reform (1981) Clinton’s welfare reform (1997) <i>U.S. v. Morrison</i> limits federal commerce power (2000) Obamacare approved; Medicaid expansion made discretionary (2012)

corporations dominating key sectors of an integrated national economy could be effectively regulated only from the national level. By the time FDR assumed the presidency in March of 1933, most Americans had become convinced by their experience with the Depression that federal regulation of the economy needed to be enhanced.

FDR’s “New Deal” and LBJ’s “Great Society” initiatives involved the federal government in almost every area of policymaking. Many of these areas, including education, job training, health care, and welfare, had traditionally been the exclusive responsibilities of state and local governments. Initially, states and localities were too eager to receive the federal funds to worry much about the rules and regulations that accompanied them. However, the rules and regulations that seemed reasonable when there were thirty categorical grant programs in the 1930s seemed unreasonable as the number of such programs passed four hundred in the 1960s, and by 1970 nearly one dollar in every four spent by state and local governments came as a transfer from the federal government. The complexity of applying for, administering,

and reporting on all of these grants worked a hardship on state and local governments.

By the late 1980s and early 1990s the problems of fiscal federalism and of American federalism in general had been redefined. Ronald Reagan thought that government at all levels of the federal system was too big, demanding, and expensive. Reagan sought to scale back governments at all levels by denying them funds. Although Bill Clinton sought to restore federal assistance to states and localities, he and the Republican Congress that he faced through most of his administration agreed that federal responsibilities as well as funds should be devolved to the states where possible.

In the latter half of the 1990s, Congress moved to reconstitute the federal system by repackaging dozens of social programs into block grants, cutting the funds allocated to them by up to 30 percent, and returning primary responsibility for them to the states. This policy reversal, called "devolution," in which President Bush joined enthusiastically, was the largest reallocation of authority within the federal system since LBJ's "Great Society" and perhaps since FDR's "New Deal." Nonetheless, it was reversed, at least temporarily, when the "Great Recession" of 2008–2009 strained state budgets and the Obama Administration offered help as part of its stimulus strategy. Today, the federal government supplies more than one in every three dollars spent by state and local governments.²⁹ The struggle within the American federal system for authority and resources is unending.

Key Terms

block grants	79	inherent powers	66
categorical grant	77	<i>Marbury v. Madison</i>	70
coercive federalism	78	<i>McCulloch v. Maryland</i>	70
concurrent majority	72	nullification	74
concurrent powers	66	<i>Paul v. Virginia</i>	68
confederation	63	preemption	79
cooperative federalism	72	reserved powers	67
creative federalism	78	secession	74
devolution	79	special revenue sharing	79
<i>Dred Scott v. Sandford</i>	72	supremacy clause	65
dual federalism	69	unitary government	63
extradition	68	<i>U.S. v. E.C. Knight</i>	74
general revenue sharing	79	<i>U.S. v. Lopez</i>	81
<i>Gibbons v. Ogden</i>	70	<i>U.S. v. Morrison</i>	81
implied powers	65	<i>Wickard v. Filburn</i>	76