CHAPTER

3

Federalism

★

WHO GOVERNS?

1. **Where is sovereignty located in the American political system?**
2. **How is power divided between the national government and the states under the Constitution?**

★

TO WHAT ENDS?

1. **What competing values are at stake in federalism?**
2. **Who should decide what matters ought to be governed mainly or solely by national laws?**

Like most average citizens, Susette Kelo, a nurse from New London, Connecticut, was not deeply interested in politics and government. But that changed when city officials condemned her little wood-frame home with a view of the Long Island Sound estuary. City officials took it and her neighbors' houses because they wanted to redevelop the area with pricey townhouses, upscale shopping malls, and a huge hotel. Kelo sued the city all the way to the U.S. Supreme Court.

But in *Kelo v. City of New London* (2005), the justices decided, by a 5 to 4 majority, that the Constitution allows the government to seize property, not only for "public use" such as building highways, but also to "promote economic development" in a "distressed" community.

Kelo and her neighbors were outraged, not least of all by the claim that their predominantly middle-class, waterside community was "distressed." But they had lost in the nation's highest court. What more could they or their by-then growing throng of sympathizers all across the country do?

★ Why Federalism Matters

Plenty, as it turned out. Before the ink had dried on the *Kelo* opinion, public protests, Internet letter-writing campaigns, and grassroots lobbying efforts were begun. Eighteen months later, thirty-four states had tightened laws to make it much harder for local governments to seize property for economic development purposes.

Similarly, you might suppose that federal law decides the minimum wage that employers must pay to workers. But before Congress moved to raise it (from 1996 into 2007 the standard was $5.15 an hour), over a half-dozen states had a minimum wage above the federal standard (for instance, $7.15 an hour in Pennsylvania).

Okay, you might think, but what about state and local government powers in relation to big federal bureaucracies or huge federal programs? Surely the national government leads in making, administering, and funding important public policies that cost lots of money, right? The short answer is, "It all depends." The main reason is "federalism."

Federalism can be defined as a political system in which the national government shares power with local governments (state governments in the case of the United States, but other sub-national governments in the case of federal systems including Australia, India, and Switzerland).

Constitutionally, in America's federal system, state governments have a specially protected existence and the authority to make final decisions over many governmental activities. Even today, after over a century during which the government headquartered in Washington, D.C., has grown, state and local governments are not mere junior partners in deciding important public policy matters. The national government can pass,

Former Wisconsin Governor Tommy Thompson and legislators speak about federal efforts to improve local schools.

and the federal courts can uphold, laws to protect the environment, store nuclear waste, expand low-income housing, guarantee the right to an abortion, provide special services for the handicapped, or toughen public school graduation standards. But whether and how such federal laws are followed or funded often involves decisions by diverse state and local government officials, both elected and appointed.

federalism *Government authority shared by national and local governments.*

devolution *The effort to transfer responsibility for many public programs and services from the federal government to the states.*

block grants *Money from the national government that states can spend within broad guidelines determined by Washington.*

Federalism or federal-state relations may seem like an arcane or boring subject until you realize that it is behind many things that matter to many people: how much you pay in certain taxes, whether you can drive above 55 miles per hour on certain roadways, whether or where you can buy liquor, how much money gets spent on schools, whether all or most children have health insurance coverage, and much more. Federalism affects almost every aspect of crime and punishment in America (penalties for illegal drug sales vary widely from state to state, and persons convicted of murder are subject to the death penalty in some states but not in others). And, as we will see, federalism even figures in how certain civil liberties (Chapter 5) and civil rights (Chapter 6) are defined and protected (for instance, some state constitutions mention God, and some state laws specifically prohibit funding for religious schools).

Federalism matters, but how it matters has changed over time. In 1908, Woodrow Wilson observed that the relationship between the national government and the states "is the cardinal question of our constitutional system," a question that cannot be settled by "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."[1]

As you will learn in this chapter, over the last several decades, governors, mayors, and many national leaders in both parties have reasserted state and local government powers and prerogatives. Today an effort is underway to scale back the size and activities of the national government and to shift responsibility for a wide range of domestic programs from Washington to the states. The effort to give to the states the national government's functions in such areas as welfare, health care, and job training has become known as **devolution.** Many of these proposals involved giving the states **block grants**—money from the national government for programs in certain general areas that states can use at their discretion within broad guidelines set by Congress or responsible federal agencies.

But devolution is just the latest chapter in struggles over federalism's meaning and structure. Since the adoption of the Constitution in 1787, the single most persistent source of political conflict has been the relations between the national and state governments. The political conflict over slavery, for example, was intensified because some state governments condoned or supported slavery, while others took action to discourage it. The proponents and opponents of slavery were thus given territorial power centers from which to carry on the dispute. Other issues, such as the regulation of business and the provision of social welfare programs, were in large part fought out, for well over a century, in terms of "national interests" versus "states' rights." While other nations, such as Great Britain, were debating the question of whether the national government *ought* to provide old-age pensions or regulate the railroads, the United States debated a different question—whether the national government *had the right* to do these things. Even after these debates had ended—almost invariably with a decision favorable to the national government—the administration and financing of the programs that

resulted have usually involved a large role for the states.

Today the federal government's relationship with the states is still conditioned by disagreements over controversial issues like abortion and gay rights. At least on a day-to-day basis, federal-state relations depend even more on less visible intergovernmental conflicts, mostly about either levels of federal grants or so-called **mandates**—terms set by the national government that states must meet whether or not they accept federal grants.

The two big questions about federalism are (1) what, if any, difference such conflicts make in who governs and to what ends, and (2) whether federalism, all things considered, is good or bad. Before tackling these questions, it is important to master the basic concepts and understand the political history of federalism in America.

★ Governmental Structure

Federalism refers to a political system in which there are local (territorial, regional, provincial, state, or municipal) units of government, as well as a national government, that can make final decisions with respect to at least some governmental activities and whose existence is specially protected.[2] Almost every nation in the world has local units of government of some kind, if for no other reason than to decentralize the administrative burdens of governing. But these governments are not federal unless the local units exist independent of the preferences of the national government and can make decisions on at least some matters without regard to those preferences.

The United States, Canada, Australia, India, Germany, and Switzerland are federal systems, as are a few other nations. France, Great Britain, Italy, and Sweden are not: they are unitary systems, because such local governments as they possess can be altered or even abolished by the national government and cannot plausibly claim to have final authority over any significant governmental activities.

The special protection that subnational governments enjoy in a federal system derives in part from the constitution of the country but also from the habits, preferences, and dispositions of the citizens and the actual distribution of political power in society. The constitution of the former Soviet Union in theory created a federal system, as claimed by that country's full name—the Union of Soviet Socialist Republics—but for most of their history, none of these "socialist republics" were in the

POLITICALLY SPEAKING

Sovereignty, Federalism, and the Constitution

Sovereignty means supreme or ultimate political authority: A sovereign government is one that is legally and politically independent of any other government.

A **unitary system** is one in which sovereignty is wholly in the hands of the national government, so that the states and localities are dependent on its will.

A **confederation or confederal system** is one in which the states are sovereign and the national government is allowed to do only that which the states permit.

A **federal system** is one in which sovereignty is shared, so that in some matters the national government is supreme and in other matters the states are supreme.

The Founding Fathers often took *confederal* and *federal* to mean much the same thing. Rather than establishing a government in which there was a clear division of sovereign authority between the national and state governments, they saw themselves as creating a government that combined some characteristics of a unitary regime with some of a confederal one. Or, as James Madison expressed the idea in *Federalist* No. 39, the Constitution "is, in strictness, neither a national nor a federal Constitution, but a composition of both." Where sovereignty is located in this system is a matter that the Founders did not clearly answer.

In this text, a **federal regime** is defined in the simplest possible terms—as one in which local units of government have a specially protected existence and can make some final decisions over some governmental activities.

mandates *Terms set by the national government that states must meet whether or not they accept federal grants.*

slightest degree independent of the central government. Were the American Constitution the only guarantee of the independence of the American states, they would long since have become mere administrative subunits of the government in Washington. Their independence results in large measure from the commitment of Americans to the idea of local self-government and from the fact that Congress consists of people who are selected by and responsive to local constituencies.

"The basic political fact of federalism," writes David B. Truman, "is that it creates separate, self sustaining centers of power, prestige, and profit."[3] Political power is locally acquired by people whose careers depend for the most part on satisfying local interests. As a result, though the national government has come to have vast powers, it exercises many of those powers through state governments. What many of us forget when we think about "the government in Washington" is that it spends much of its money and enforces most of its rules not on citizens directly but on other, local units of government. A large part of the welfare system, all of the interstate highway system, virtually every aspect of programs to improve cities, the largest part of the effort to supply jobs to the unemployed, the entire program to clean up our water, and even much of our military manpower (in the form of the National Guard) are enterprises in which the national government does not govern so much as it seeks, by regulation, grant, plan, argument, and cajolery, to get the states to govern in accordance with nationally defined (though often vaguely defined) goals.

In France welfare, highways, education, the police, and the use of land are all matters that are directed nationally. In the United States highways and some welfare programs are largely state functions (though they make use of federal money), while education, policing, and land-use controls are primarily local (city, county, or special-district) functions.

Federalism: Good or Bad?

Sometimes, however, confusion or controversy about which government is responsible for which functions surfaces at the worst possible moment and lingers long after attempts have been made to sort it all out. Sadly, in our day, that is largely what "federalism" has meant in practice to citizens from New Orleans and the Gulf Coast region.

Before, during, and after Hurricanes Katrina and Rita struck in 2005, federal, state, and local officials could be found fighting among themselves over everything from who was supposed to maintain and repair the levees to who should lead disaster relief initiatives. In the weeks after the hurricanes hit, it had been widely reported that the main first-responders and disaster relief workers came, not from government, but from myriad religious and other charitable organizations. Not only that, but government agencies, such as the Federal Emergency Management Agency, often acted in ways that made it harder, not easier, for these volunteers and groups to deliver help when and where it was most badly needed.

Federalism needs to be viewed dispassionately through an historical lens wide enough to encompass both its worst legacies (for instance, state and local laws that once legalized racial discrimination against blacks) and its best (for instance, blacks winning mayors' offices and seats in state legislatures when no blacks were in the U.S. Senate and not many blacks had been elected to the U.S. House).

Federalism, it is fair to say, has the virtues of its vices and the vices of its virtues. To some, federalism means allowing states to block action, prevent progress, upset national plans, protect powerful local interests, and cater to the self-interest of hack politicians. Harold Laski, a British observer, described American states as "parasitic and poisonous,"[4] and William H. Riker, an American political scientist, argued that "the main effect of federalism since the Civil War has been to perpetuate racism."[5] By contrast, another political scientist, Daniel J. Elazar, argued that the "virtue of the federal system lies in its ability to develop and maintain mechanisms vital to the perpetuation of the unique combination of governmental strength, political flexibility, and individual liberty, which has been the central concern of American politics."[6]

So diametrically opposed are the Riker and Elazar views that one wonders whether they are talking about the same subject. They are, of course, but they are stressing different aspects of the same phenomenon. Whenever the opportunity to exercise political power is widely available (as among the fifty states, three thousand counties, and many thousands of municipalities in the United States), it is obvious that in different places different people will make use of that power for different purposes. There is no question that allowing states and cities to make autonomous, binding po-

litical decisions will allow some people in some places to make those decisions in ways that maintain racial segregation, protect vested interests, and facilitate corruption. It is equally true, however, that this arrangement also enables other people in other places to pass laws that attack segregation, regulate harmful economic practices, and purify politics, often long before these ideas gain national support or become national policy.

For example, in a unitary political system, such as that of France, a small but intensely motivated group could not have blocked civil rights legislation for as long as some southern senators blocked it in this country. But by the same token it would have been equally difficult for another small but intensely motivated group to block plans to operate a nuclear power plant in their neighborhood, as citizens have done in this country but not in France.

The existence of independent state and local governments means that different political groups pursuing different political purposes will come to power in different places. The smaller the political unit, the more likely it is to be dominated by a single political faction. James Madison understood this fact perfectly and used it to argue (in *Federalist* No. 10) that it would be in a large (or "extended") republic, such as the United States as a whole, that one would find the greatest opportunity for all relevant interests to be heard. When William Riker condemns federalism, he is thinking of the fact that in some places the ruling factions in cities and states have opposed granting equal rights to African Americans. When Daniel Elazar praises federalism, he is recalling that, in other states and cities, the ruling factions have taken the lead (long in advance of the federal government) in developing measures to protect the environment, extend civil rights, and improve social conditions. If you live in California, whether you like federalism depends in part on whether you like the fact that California has, independent of the federal government, cut property taxes, strictly controlled coastal land use, heavily regulated electric utilities, and increased (at one time) and decreased (at another time) its welfare rolls.

Increased Political Activity

Federalism has many effects, but its most obvious effect has been to facilitate the mobilization of political activity. Unlike Don Quixote, the average citizen does not tilt at windmills. He or she is more likely to become involved in organized political activity if he or she feels there is a reasonable chance of having a practical effect. The chances of having such an effect are greater where there are many elected officials and independent governmental bodies, each with a relatively small constituency, than where there are few elected officials, most of whom have the nation as a whole for a constituency. In short a federal system, by virtue of the decentralization of authority, lowers the cost of organized political activity; a unitary system, because of the centralization of authority, raises the cost. We may disagree about the purposes of organized political activity, but the fact of widespread organized activity can scarcely be doubted—or if it can be doubted, it is only because you have not yet read Chapters 8 and 11.

Federalism has permitted experimentation. Women were able to vote in the Wyoming Territory in 1888, long before they could do so in most states.

It is impossible to say whether the Founders, when they wrote the Constitution, planned to produce

such widespread opportunities for political participation. Unfortunately they were not very clear (at least in writing) about how the federal system was supposed to work, and thus most of the interesting questions about the jurisdiction and powers of our national and state governments had to be settled by a century and a half of protracted, often bitter, conflict.

★ The Founding

The goal of the Founders seems clear: federalism was one device whereby personal liberty was to be protected. (The separation of powers was another.) They feared that placing final political authority in any one set of hands, even in the hands of persons popularly elected, would so concentrate power as to risk tyranny. But they had seen what happened when independent states tried to form a compact, as under the Articles of Confederation; what the states put together, they could also take apart. The alliance among the states that existed from 1776 to 1787 was a confederation: that is, a system of government in which the people create state governments, which, in turn, create and operate a national government (see Figure 3.1). Since the national government in a confederation derives its powers from the states, it is dependent on their continued cooperation for its survival. By 1786 that cooperation was barely forthcoming.

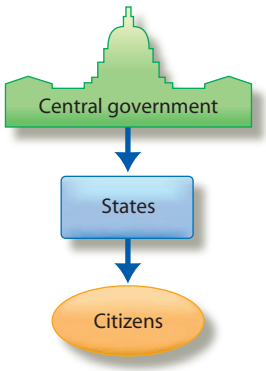
A Bold, New Plan

A federation—or a "federal republic," as the Founders called it—derives its powers directly from the people, as do the state governments. As the Founders envisioned it, both levels of government, the national and the state, would have certain powers, but neither would have supreme authority over the other. Madison, writing in *Federalist* No. 46, said that both the state and federal governments "are in fact but different agents and trustees of the people, constituted with different powers." In *Federalist* No. 28 Hamilton explained how he thought the system would work: The people could shift their support between state and federal levels of government as needed to keep the two in balance. "If their rights are invaded by either, they can make use of the other as the instrument of redress."

It was an entirely new plan, for which no historical precedent existed. Nobody came to the Philadelphia convention with a clear idea of what a federal (as opposed to a unitary or a confederal) system would look like, and there was not much discussion at Philadelphia of how the system would work in practice. Few delegates then used the word *federalism* in the sense in which we now employ it (it was originally used as a synonym for *confederation* and only later came to

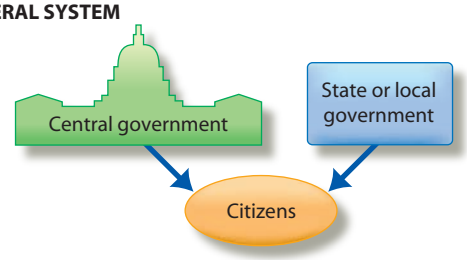
Figure 3.1 Lines of Power in Three Systems of Government

UNITARY SYSTEM



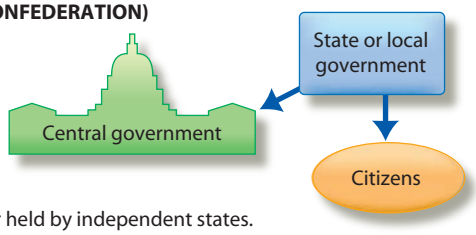
Power centralized.
State or regional governments derive authority from central government. Examples: United Kingdom, France.

FEDERAL SYSTEM



Power divided between central and state or local governments.
Both the government and constituent governments act directly upon the citizens.
Both must agree to constitutional change.
Examples: Canada, United States since adoption of Constitution.

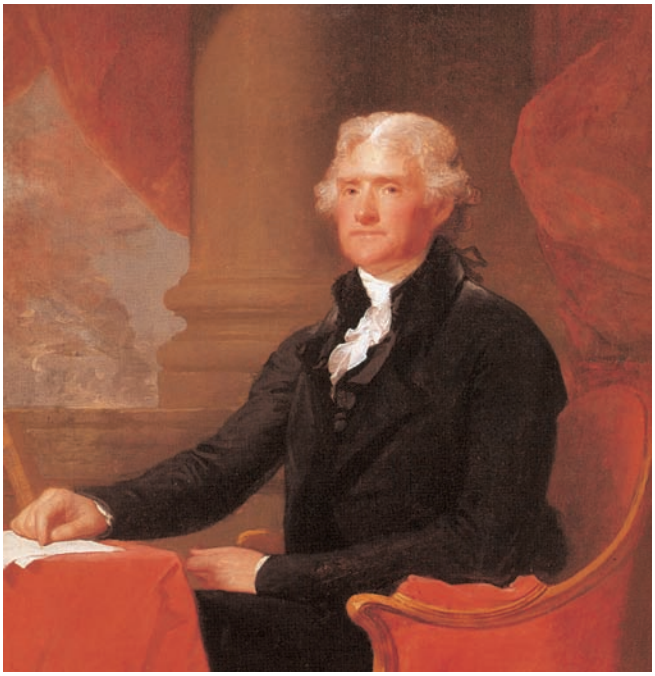
CONFEDERAL SYSTEM (or CONFEDERATION)



Power held by independent states.
Central government is a creature of the constituent governments.
Example: United States under the Articles of Confederation.

stand for something different).[7] The Constitution does not spell out the powers that the states are to have, and until the Tenth Amendment was added at the insistence of various states, there was not even a clause in it saying (as did the amendment) that "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." The Founders assumed from the outset that the federal government would have only those powers given to it by the Constitution; the Tenth Amendment was an afterthought, added to make that assumption explicit and allay fears that something else was intended.[8]

The Tenth Amendment has rarely had much practical significance, however. From time to time the Supreme Court has tried to interpret that amendment as putting certain state activities beyond the reach of the federal government, but usually the Court has later changed its mind and allowed Washington to regulate such matters as the hours that employees of a city-owned mass-transit system may work. The Court did not find that running such a transportation system was one of the powers "reserved to the states."[9] But, as we explain later in this chapter, the Court has begun to give new life to the Tenth Amendment and the doctrine of state sovereignty.



Thomas Jefferson (1743–1826) was not at the Constitutional Convention. His doubts about the new national government led him to oppose the Federalist administration of John Adams and to become an ardent champion of states' rights.

Elastic Language

The need to reconcile the competing interests of large and small states and of northern and southern states, especially as they affected the organization of Congress, was sufficiently difficult without trying to spell out exactly what relationship ought to exist between the national and state systems. For example, Congress was given the power to regulate commerce "among the several states." The Philadelphia convention would have gone on for four years rather than four months if the Founders had decided that it was necessary to describe, in clear language, how one was to tell where commerce *among* the states ended and commerce wholly *within* a single state began. The Supreme Court, as we shall see, devoted over a century to that task before giving up.

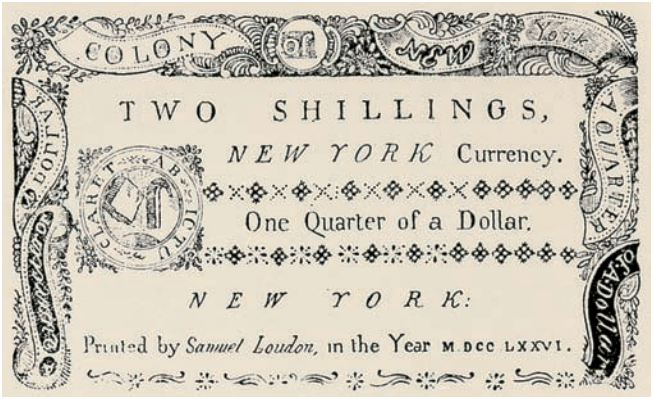
Though some clauses bearing on federal-state relations were reasonably clear (see the box on page 57), other clauses were quite vague. The Founders knew, correctly, that they could not make an exact and exhaustive list of everything the federal government was empowered to do—circumstances would change, new exigencies would arise. Thus they added the following elastic language to Article I: Congress shall have the power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The Founders themselves carried away from Philadelphia different views of what federalism meant. One view was championed by Hamilton. Since the people had created the national government, since the laws and treaties made pursuant to the Constitution were "the supreme law of the land" (Article VI), and since the most pressing needs were the development of a national economy and the conduct of foreign affairs, Hamilton thought that the national government was the superior and leading force in political affairs and that its powers ought to be broadly defined and liberally construed.

The other view, championed by Jefferson, was that the federal government, though important, was the product of an agreement among the states; and though "the people" were the ultimate sovereigns, the principal threat to their liberties was likely to come from the national government. (Madison, a strong

supporter of national supremacy at the convention, later became a champion of states' rights.) Thus the powers of the federal government should be narrowly construed and strictly limited. As Madison put it in *Federalist* No. 45, in language that probably made Hamilton wince, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

Hamilton argued for national supremacy, Jefferson for states' rights. Though their differences were greater in theory than in practice (as we shall see in Chapter 14, Jefferson while president sometimes acted in a positively Hamiltonian manner), the differing interpretations they offered of the Constitution were to shape political debate in this country until well into the 1960s.



At one time the states could issue their own paper money, such as this New York currency worth twenty-five cents in 1776. Under the Constitution this power was reserved to Congress.

★ The Debate on the Meaning of Federalism

The Civil War was fought, in part, over the issue of national supremacy versus states' rights, but it settled only one part of that argument—namely, that the national government was supreme, its sovereignty derived directly from the people, and thus the states could not lawfully secede from the Union. Virtually every other aspect of the national-supremacy issue continued to animate political and legal debate for another century.

The Supreme Court Speaks

As arbiter of what the Constitution means, the Supreme Court became the focal point of that debate. In Chapter 16 we shall see in some detail how the Court made its decisions. For now it is enough to know that during the formative years of the new Republic, the Supreme Court was led by a staunch and brilliant advocate of Hamilton's position, Chief Justice John Marshall. In a series of decisions he and the Court powerfully defended the national-supremacy view of the newly formed federal government.

"necessary and proper" clause *Section of the Constitution allowing Congress to pass all laws "necessary and proper" to its duties, and which has permitted Congress to exercise powers not specifically given to it (enumerated) by the Constitution.*

The box on page 60 lists some landmark cases in the history of federal-state relations. Perhaps the most important decision was in a case, seemingly trivial in its origins, that arose when James McCulloch, the cashier of the Baltimore branch of the Bank of the United States, which had been created by Congress, refused to pay a tax levied on that bank by the state of Maryland. He was hauled into state court and convicted of failing to pay a tax. In 1819 McCulloch appealed all the way to the Supreme Court in a case known as *McCulloch v. Maryland.* The Court, in a unanimous opinion, answered two questions in ways that expanded the powers of Congress and confirmed the supremacy of the federal government in the exercise of those powers.

The first question was whether Congress had the right to set up a bank, or any other corporation, since such a right is nowhere explicitly mentioned in the Constitution. Marshall said that, though the federal government possessed only those powers enumerated in the Constitution, the "extent"—that is, the meaning—of those powers required interpretation. Though the word *bank* is not in that document, one finds there the power to manage money: to lay and collect taxes, issue a currency, and borrow funds. To carry out these powers Congress may reasonably decide that chartering a national bank is "necessary and proper." Marshall's words were carefully chosen to endow the **"necessary and proper" clause** with the widest possible sweep:

> 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

How Things Work

The States and the Constitution

The Framers made some attempt to define the relations between the states and the federal government and how the states were to relate to one another. The following points were made in the original Constitution—before the Bill of Rights was added.

Restrictions on Powers of the States

States may not make treaties with foreign nations, coin money, issue paper currency, grant titles of nobility, pass a bill of attainder or an ex post facto law, or, without the consent of Congress, levy any taxes on imports or exports, keep troops and ships in time of peace, or enter into an agreement with another state or with a foreign power.

[Art. I, sec. 10]

Guarantees by the Federal Government to the States

The national government guarantees to every state a "republican form of government" and protection against foreign invasion and (provided the states request it) protection against domestic insurrection.

[Art. IV, sec. 4]

An existing state will not be broken up into two or more states or merged with all or part of another state without that state's consent.

[Art. IV, sec. 3]

Congress may admit new states into the Union.

[Art. IV, sec. 3]

Taxes levied by Congress must be uniform throughout the United States: they may not be levied on some states but not others.

[Art. I, sec. 8]

The Constitution may not be amended to give states unequal representation in the Senate.

[Art. V]

Rules Governing How States Deal with Each Other

"Full faith and credit" shall be given by each state to the laws, records, and court decisions of other states. (For example, a civil case settled in the courts of one state cannot be retried in the courts of another.)

[Art. IV, sec. 1]

The citizens of each state shall have the "privileges and immunities" of the citizens of every other state. (No one is quite sure what this is supposed to mean.)

[Art. IV, sec. 2]

If a person charged with a crime by one state flees to another, he or she is subjected to extradition—that is, the governor of the state that finds the fugitive is supposed to return the person to the governor of the state that wants him or her.

[Art. IV, sec. 2]

> that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.[10]

The second question was whether a federal bank could lawfully be taxed by a state. To answer it, Marshall went back to first principles. The government of the United States was not established by the states, but by the people, and thus the federal government was supreme in the exercise of those powers conferred upon it. Having already concluded that chartering a bank was within the powers of Congress, Marshall then argued that the only way for such powers to be supreme was for their use to be immune from state challenge and for the products of their use to be protected against state destruction. Since "the power to tax involves the power to destroy," and since the power to destroy a federal agency would confer upon the states supremacy over the federal government, the states may not tax any federal instrument. Hence the Maryland law was unconstitutional.

McCulloch won, and so did the federal government. Half a century later the Court decided that what was sauce for the goose was sauce for the gander. It held that just as state governments could not tax federal bonds, the federal government could not tax the interest people earn on state and municipal bonds. In 1988 the Supreme Court changed its mind and decided that Congress was now free, if it wished, to tax the interest on such state and local bonds.[11]

Municipal bonds, which for nearly a century were a tax-exempt investment protected, so their holders thought, by the Constitution, were now protected only by politics. So far Congress hasn't wanted to tax them.

Nullification

The Supreme Court can decide a case without settling the issue. The struggle over states' rights versus national supremacy continued to rage in Congress, during presidential elections, and ultimately on the battlefield. The issue came to center on the doctrine of **nullification.** When Congress passed laws (in 1798) to punish newspaper editors who published stories critical of the federal government, James Madison and Thomas Jefferson opposed the laws, suggesting (in statements known as the Virginia and Kentucky Resolutions) that the states had the right to "nullify" (that is, declare null and void) a federal law that, in the states' opinion, violated the Constitution. The laws expired before the claim of nullification could be settled in the courts.

nullification *The doctrine that a state can declare null and void a federal law that, in the state's opinion, violates the Constitution.*

dual federalism *Doctrine holding that the national government is supreme in its sphere, the states are supreme in theirs, and the two spheres should be kept separate.*

Later the doctrine of nullification was revived by John C. Calhoun of South Carolina, first in opposition to a tariff enacted by the federal government and later in opposition to federal efforts to restrict slavery. Calhoun argued that if Washington attempted to ban slavery, the states had the right to declare such acts unconstitutional and thus null and void. This time the issue was settled—by war. The northern victory in the Civil War determined once and for all that the federal union is indissoluble and that states cannot declare acts of Congress unconstitutional, a view later confirmed by the Supreme Court.[12]

Dual Federalism

After the Civil War the debate about the meaning of federalism focused on the interpretation of the commerce clause of the Constitution. Out of this debate there emerged the doctrine of **dual federalism,** which held that though the national government was supreme in its sphere, the states were equally supreme in theirs, and that these two spheres of action should and could be kept separate. Applied to commerce the concept of dual federalism implied that there were such things as *inter*state commerce, which Congress could regulate, and *intra*state commerce, which only the states could regulate, and that the Court could tell which was which.

For a long period the Court tried to decide what was interstate commerce based on the kind of business that was being conducted. Transporting things between states was obviously interstate commerce, and so subject to federal regulation. Thus federal laws affecting the interstate shipment of lottery tickets,[13] prostitutes,[14] liquor,[15] and harmful foods and drugs[16] were upheld. On the other hand, manufacturing,[17] insurance,[18] and farming[19] were in the past considered *intra*state commerce, and so only the state governments were allowed to regulate them.

Such product-based distinctions turned out to be hard to sustain. For example, if you ship a case of whiskey from Kentucky to Kansas, how long is it in interstate commerce (and thus subject to federal law), and when does it enter intrastate commerce and become subject only to state law? For a while the Court's answer was that the whiskey was in interstate commerce so long as it was in its "original package,"[20] but that only precipitated long quarrels as to what was the original package and how one is to treat things, like gas and grain, that may not be shipped in packages at all. And how could one distinguish between manufacturing and transportation when one company did both or when a single manufacturing corporation owned factories in different states? And if an insurance company sold policies to customers both inside and outside a given state, were there to be different laws regulating identical policies that happened to be purchased from the same company by persons in different states?

In time the effort to find some clear principles that distinguished interstate from intrastate commerce was pretty much abandoned. Commerce was like a stream flowing through the country, drawing to itself contributions from thousands of scattered enterprises and depositing its products in millions of individual homes. The Court began to permit the federal government to regulate almost anything that affected this stream, so that by the 1940s not only had farming

and manufacturing been redefined as part of interstate commerce,[21] but even the janitors and window washers in buildings that housed companies engaged in interstate commerce were now said to be part of that stream.[22]

Today lawyers are engaged in interstate commerce but professional baseball players are not. If your state has approved marijuana use for medical purposes, you can still be penalized under federal law even when the marijuana you consume was grown in a small pot in your backyard.[23]

State Sovereignty

It would be a mistake to think that the doctrine of dual federalism is entirely dead. Until recently Congress, provided that it had a good reason, could pass a law regulating almost any kind of economic activity anywhere in the country, and the Supreme Court would call it constitutional. But in *United States v. Lopez* (1995) the Court held that Congress had exceeded its commerce clause power by prohibiting guns in a school zone.

The Court reaffirmed the view that the commerce clause does not justify any federal action when, in May 2000, it overturned the Violence Against Women Act of 1994. This law allowed women who were the victims of a crime of violence motivated by gender to sue the guilty party in federal court. In *United States v. Morrison* the Court, in a five-to-four decision, said that attacks against women are not, and do not substantially affect, interstate commerce, and hence Congress cannot constitutionally pass such a law. Chief Justice William Rehnquist said that "the Constitution requires a distinction between what is truly national and what is truly local." The states, of course, can pass such laws, and many have.

The Court has moved to strengthen states' rights on other grounds as well. In *Printz v. United States* (1997) the Court invalidated a federal law that required local police to conduct background checks on all gun purchasers. The Court ruled that the law violated the Tenth Amendment by commanding state governments to carry out a federal regulatory program. Writing for the five-to-four majority, Justice Antonin Scalia declared, "The Federal government may neither issue directives requiring the states to address particular problems, nor command the states' officers, or those of their political subdivisions, to ad-

POLITICALLY SPEAKING

The Terms of Local Governance

Legally a **city** is a **municipal corporation or municipality** that has been chartered by a state to exercise certain defined powers and provide certain specific services. There are two kinds of charters: special-act charters and general-act charters.

A **special-act charter** applies to a certain city (for example, New York City) and lists what that city can and cannot do. A **general-act charter** applies to a number of cities that fall within a certain classification, usually based on city population. Thus in some states all cities over 100,000 population will be governed on the basis of one charter, while all cities between 50,000 and 99,999 population will be governed on the basis of a different one.

Under **Dillon's rule** the terms of these charters are to be interpreted very narrowly. This rule (named after a lawyer who wrote a book on the subject in 1911) authorizes a municipality to exercise only those powers expressly given, implied by, or essential to the accomplishment of its enumerated powers. This means, for example, that a city cannot so much as operate a peanut stand at the city zoo unless the state has specifically given the city that power by law or charter.

A **home-rule charter,** now in effect in many cities, reverses Dillon's rule and allows a city government to do anything that is not prohibited by the charter or state law. Even under a home-rule charter, however, city laws (called **ordinances**) cannot be in conflict with state laws, and the states can pass laws that preempt or interfere with what home-rule cities want to do.

There are in this country more than 87,500 local governments, only about a fifth (19,500) of which are cities or municipalities. **Counties** (3,000) are the largest territorial units between a state and a city or town. Every state but Connecticut and Rhode Island has county governments. (In Louisiana counties are called parishes, in Alaska boroughs.)

minister or enforce a Federal regulatory program. . . . Such commands are fundamentally incompatible with our constitutional system of dual sovereignty."

The Court has also given new life to the Eleventh Amendment, which protects states from lawsuits by citizens of other states or foreign nations. In 1999 the Court shielded states from suits by copyright owners who claimed infringement from state agencies and immunized states from lawsuits by people who argued that state regulations create unfair economic competition. In *Alden v. Maine* (1999) the Court held that state employees could not sue to force state compliance with federal fair-labor laws. In the Court's five-to-four majority opinion, Justice Anthony M. Kennedy stated, "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the states in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the nation." A few years later, in *Federal Maritime Commission v. South Carolina Ports Authority* (2002), the Court further expanded states' sovereign immunity from private lawsuits. Writing for the five-to-four majority, Justice Clarence Thomas declared that dual sovereignty "is a defining feature of our nation's constitutional blueprint," adding that the states "did not consent to become mere appendages of the federal government" when they ratified the Constitution.

police power *State power to enact laws promoting health, safety, and morals.*

Not all Court decisions, however, support greater state sovereignty. In 1999, for example, the Court ruled seven to two that state welfare programs may not restrict new residents to the welfare benefits they would have received in the states from which they moved. In addition, each of the Court's major prostate sovereignty decisions has been decided by a tenuous five-to-four margin. More generally, to empower states is not to disempower Congress, which, as it has done since the late 1930s, can still make federal laws on almost anything as long as it does not go too far in "commandeering" state resources or gutting states' rights.

New debates over state sovereignty call forth old truths about the constitutional basis of state and local government. In general a state can do anything that is not prohibited by the Constitution or preempted by federal policy and that is consistent with its own constitution. One generally recognized state power is the **police power,** which refers to those laws and regulations, not otherwise unconstitutional, that promote health, safety, and morals. Thus the states can enact and enforce criminal codes, require children to attend school and citizens to be vaccinated, and restrict (subject to many limitations) the availability of pornographic materials or the activities of prostitutes and drug dealers.

As a practical matter the most important activities of state and local governments involve public education, law enforcement and criminal justice, health and hospitals, roads and highways, public welfare, and control over the use of public land and water supplies. On these and many other matters, state constitutions tend to be far more detailed than the federal Constitution, and to embody a more expansive view of both governmental responsibilities and individual rights than it does. For instance, California's lengthy state constitution includes an explicit right to "privacy," specifies that "non-citizens have the same property rights as citizens," directs the state's legislature to use

Landmark Cases

Federal-State Relations

- ***McCulloch v. Maryland* (1819):** The Constitution's "necessary and proper" clause permits Congress to take actions (in this case, to create a national bank) when it is essential to a power that Congress has (in this case, managing the currency).
- ***Gibbons v. Ogden* (1824):** The Constitution's commerce clause gives the national government exclusive power to regulate interstate commerce.
- ***Wabash, St. Louis and Pacific Railroad v. Illinois* (1886):** The states may not regulate interstate commerce.
- ***United States v. Lopez* (1995):** The national government's power under the commerce clause does not permit it to regulate matters not directly related to interstate commerce (in this case, banning firearms in a school zone).

To explore these landmark cases further, visit the *American Government* web site at college.hmco.com/pic/wilsonAGIle.

"all suitable means" to support public education, and contains language governing public housing for low-income citizens. Many state constitutions contain kindred provisions. In part for this reason, state courts are now believed by some to be on the whole more progressive in their holdings on abortion rights (authorizing fewer restrictions on minors), welfare payments (permitting fewer limits on eligibility), employment discrimination (prohibiting discrimination based on sexual preference), and many other matters than federal courts generally are.

As we saw in Chapter 2, the federal Constitution is based on a republican, not a democratic, principle: laws are to be made by the representatives of citizens, not by the citizens directly. But many state constitutions open one or more of three doors to direct democracy. About half of the states provide for some form of legislation by initiative. The **initiative** allows voters to place legislative measures (and sometimes constitutional amendments) directly on the ballot by getting enough signatures (usually between 5 and 15 percent of those who voted in the last election) on a petition. About half of the states permit the **referendum,** a procedure that enables voters to reject a measure adopted by the legislature. Sometimes the state constitution specifies that certain kinds of legislation (for example, tax increases) must be subject to a referendum whether the legislature wishes it or not. The **recall** is a procedure, in effect in over twenty states, whereby voters can remove an elected official from office. If enough signatures are gathered on a petition, the official must go before voters, who can vote to leave the person in office, remove the person from office, or remove the person and replace him or her with someone else.

The existence of the states is guaranteed by the federal Constitution: no state can be divided without its consent, each state must have two representatives in the Senate (the only provision of the Constitution that may not be amended), every state is assured of a republican form of government, and the powers not granted to Congress are reserved for the states. By contrast, cities, towns, and counties enjoy no such protection; they exist at the pleasure of the states. Indeed, states have frequently abolished certain kinds of local governments, such as independent school districts.

This explains why there is no debate about city sovereignty comparable to the debate about state sovereignty. The constitutional division of power between them is settled: the state is supreme. But federal-state relations can be complicated, because the Constitution invites elected leaders to struggle over sovereignty. Which level of government has the ultimate power to decide where nuclear waste gets stored, how much welfare beneficiaries are paid, what rights prisoners enjoy, or whether supersonic jets can land at local airports? American federalism answers such questions, but on a case-by-case basis through intergovernmental politics and court decisions.

★ Federal-State Relations

Though constitutionally the federal government may be supreme, politically it must take into account the fact that the laws it passes have to be approved by members of Congress selected from, and responsive to, state and local constituencies. Thus what Washington lawfully may do is not the same thing as what it politically may wish to do.

Grants-in-Aid

The best illustration of how political realities modify legal authority can be found in federal **grants-in-aid.** The first of these programs began even before the Constitution was adopted, in the form of land grants made by the national government to the states in order to finance education. (State universities all over the country were built with the proceeds from the sale of these land grants; hence the name *land-grant colleges.*) Land grants were also made to support the building of wagon roads, canals, railroads, and flood-control projects. These measures were hotly debated in Congress (President Madison thought some were unconstitutional), even though the use to which the grants were put was left almost entirely to the states.

initiative *Process that permits voters to put legislative measures directly on the ballot.*

referendum *Procedure enabling voters to reject a measure passed by the legislature.*

recall *Procedure whereby voters can remove an elected official from office.*

grants-in-aid *Money given by the national government to the states.*

Cash grants-in-aid began almost as early. In 1808 Congress gave $200,000 to the states to pay for their militias, with the states in charge of the size, deployment, and command of these troops. However, grant-in-aid programs remained few in number

Some of the nation's greatest universities, such as the University of California at Los Angeles, began as land-grant colleges.

and small in price until the twentieth century, when scores of new ones came into being. Today, federal grants go to hundreds of programs, including such giant federal-state programs as Medicaid (see Table 3.1).

The grants-in-aid system, once under way, grew rapidly because it helped state and local officials resolve a dilemma. On the one hand they wanted access to the superior taxing power of the federal government. On the other hand prevailing constitutional interpretation, at least until the late 1930s, held that the federal government could not spend money for purposes not authorized by the Constitution. The solution was obviously to have federal money put into state hands: Washington would pay the bills; the states would run the programs.

Federal money seemed, to state officials, so attractive for four reasons. First, the money was there. Thanks to the high-tariff policies of the Republicans, in the 1880s Washington had huge budget surpluses. Second, in the 1920s, as those surpluses dwindled, Washington inaugurated the federal income tax. It automatically brought in more money as economic activity (and thus personal income) grew. Third, the federal government, unlike the states, managed the currency and could print more at will. (Technically, it borrowed this money, but it was under no obligation to pay it all back, because, as a practical matter, it had borrowed from itself.) States could not do this: if they borrowed money (and many could not), they had to pay it back, in full.

These three economic reasons for the attractiveness of federal grants were probably not as important as a fourth reason: politics. Federal money seemed to a state official to be "free" money. Governors did not have to propose, collect, or take responsibility for federal taxes. Instead, a governor could denounce the federal government for being profligate in its use of the people's money. Meanwhile he or she could claim credit for a new public works or other project funded by Washington and, until recent decades, expect little or no federal supervision in the bargain.[24]

That every state had an incentive to ask for federal money to pay for local programs meant, of course, that it would be very difficult for one state to get money for a given program without every state's getting it. The senator from Alabama who votes for the project to improve navigation on the Tombigbee will have to vote in favor of projects improving navigation on every other river in the country if the senator expects his or her Senate colleagues to support such a request. Federalism as practiced in the United States

New York police check backpacks as passengers enter a ferry when the city was on high alert in 2005.

Table 3.1 Federal Grants to State and Local Governments (Federal Fiscal Year 2006)

	Amount *($ billions)*	Share of Total
Medicaid	$192.3	42.8%
State Children's Health Program (SCHIP)	5.8	1.3%
Other health programs	12.5	2.8%
Health total	210.6	46.9%
Temporary Assistance to Needy Families (TANF)	17.4	3.9%
Housing and urban development	31.3	7.0%
Other income security	45.0	10.0%
Income security total	93.7	20.9%
Education, training, employment, and social services	60.3	13.4%
Highway aid from the Highway Trust Fund	32.6	7.3%
Other transportation aid	14.1	3.1%
Transportation total	46.7	10.4%
Community and regional development	22.3	5.0%
Other federal grants	15.6	3.5%
Total federal grant outlays	$449.3	100.0%

Source: Budget of the U.S. Government, Fiscal Year 2007, table 12.3.

means that when Washington wants to send money to one state or congressional district, it must send money to many states and districts.

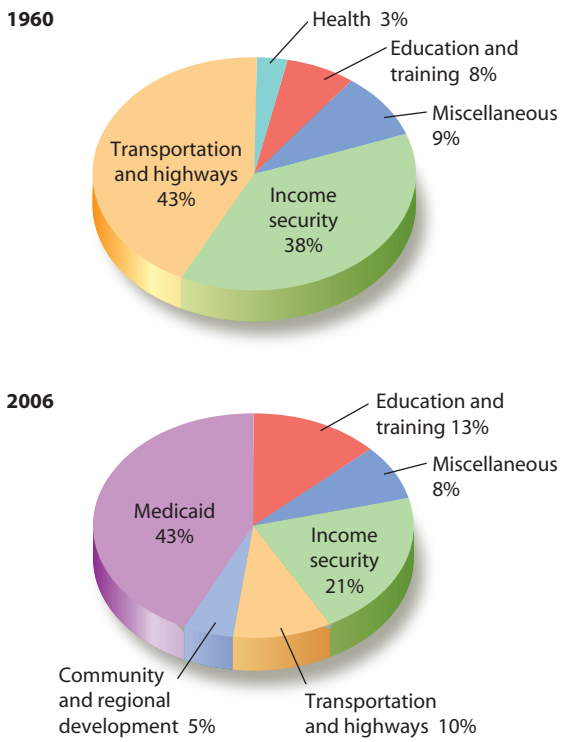
Shortly after September 11, 2001, for example, President George W. Bush and congressional leaders in both parties pledged new federal funds to increase public safety payrolls, purchase the latest equipment to detect bioterror attacks, and so on. Since then New York City and other big cities have received tens of millions of federal dollars for such purposes, but so have scores of smaller cities and towns. The grants allocated by the Department of Homeland Security were based on so-called fair-share formulas mandated by Congress, which are basically the same formulas the federal government uses to allocate certain highway and other funds among the states. These funding formulas not only spread money around but generally skew funding toward states and cities with low populations. Thus Wyoming received seven times as much federal homeland security funding per capita as New York State did, and Grand Forks County, North Dakota (population 70,000), received $1.5 million to purchase biochemical suits, a semiarmored van, decontamination tents, and other equipment to deal with weapons of mass destruction.[25]

Meeting National Needs

Until the 1960s most federal grants-in-aid were conceived by or in cooperation with the states and were designed to serve essentially state purposes. Large blocs of voters and a variety of organized interests would press for grants to help farmers, build highways, or support vocational education. During the 1960s, however, an important change occurred: the federal government began devising grant programs based less on what states were demanding and more on what federal officials perceived to be important *national* needs (see Figure 3.2.) Federal officials, not state and local ones, were the principal proponents of grant programs to aid the urban poor, combat crime, reduce pollution, and deal with drug abuse.

The rise in federal activism in setting goals and the occasional efforts, during some periods, to bypass state officials by providing money directly to cities or even local citizen groups, had at least two separate

Figure 3.2 The Changing Purpose of Federal Grants to State and Local Governments



Note: Totals may not add up to 100 percent because of rounding.
Source: Budget of the U.S. Government, Fiscal Year 2007, table 12.1.

but related effects: one effect was to increase federal grants to state and local governments, and the other was to change the purposes to which those monies were put. Whereas federal aid amounted to less than 2 percent of state general revenue in 1927, by 2006 federal aid accounted for about 30 percent of state general revenue. About 17 percent of the entire federal budget was for grants to state and local governments (about 90 percent went directly to the states). The federal government spent $1,471 per capita on grants to state and local governments.

In 1960, about 3 percent of federal grants to state and local governments were for health care. Today, however, one federal-state health care program alone, Medicaid, accounts for over 43 percent of all federal grants. And whereas in 1960 over 40 percent of all federal grants to state and local governments went to transportation (including highways), today only about 10 percent is used for that purpose (see Figure 3.2). Even in the short term, the purposes to which federal grants are put can shift; for example, after Hurricanes Katrina and Rita, federal grants for "community and regional development" spiked but were slated to return to pre-2005 levels by about 2011.

The Intergovernmental Lobby

State and local officials, both elected and appointed, began to form an important new lobby—the "intergovernmental lobby," made up of mayors, governors, superintendents of schools, state directors of public health, county highway commissioners, local police chiefs, and others who had come to count on federal funds.[26] Today, federal agencies responsible for health care, criminal justice, environmental protection, and other programs have people on staff who specialize in providing information, technical assistance, and financial support to state and local organizations, including the "Big 7": the U.S. Conference of Mayors; the National Governors Association; the National Association of Counties; the National League of Cities; the Council of State Governments; the International City/County Management Association; and the National Conference of State Legislatures. Reports by these groups and publications like *Governing* magazine are read routinely by many federal officials to keep a handle on issues and trends in state and local government.

National organizations of governors or mayors press for more federal money, but not for increased funding for any particular city or state. Thus most states, dozens of counties, and over one hundred cities have their own offices in Washington, D.C. Some are small, some share staff with other jurisdictions, but a few are quite large and boast several dozen full-time employees. Back home, state and local governments have created new positions, or redefined old ones, in response to new or changed federal funding opportunities. For example, in 2001, after the U.S. Conference of Mayors endorsed President George W. Bush's plan to increase federal funding for local community-serving organizations, over a hundred mayors hired or designated someone on their staff (such as a deputy mayor) to work with the new White House Office of Faith-Based and Community Initiatives and its centers in several federal departments.

The purpose of the intergovernmental lobby has been the same as that of any private lobby—to obtain

more federal money with fewer strings attached. For a while the cities and states did in fact get more money, but since the early 1980s their success in getting federal grants has been more checkered.

Categorical Grants Versus Revenue Sharing

The effort to loosen the strings took the form of shifting, as much as possible, the federal aid from **categorical grants** to block grants or to **revenue sharing.** A categorical grant is one for a specific purpose defined by federal law: to build an airport or a college dormitory, for example, or to make welfare payments to low-income mothers. Such grants usually require that the state or locality put up money to "match" some part of the federal grant, though the amount of matching funds can be quite small (sometimes only 10 percent or less). Governors and mayors complained about these categorical grants because their purposes were often so narrow that it was impossible for a state to adapt federal grants to local needs. A mayor seeking federal money to build parks might have discovered that the city could get money only if it launched an urban-renewal program that entailed bulldozing several blocks of housing or small businesses.

One response to this problem was to consolidate several categorical or project grant programs into a single block grant devoted to some general purpose and with fewer restrictions on its use. Block grants (sometimes called *special revenue sharing* or *broad-based aid*) began in the mid-1960s, when such a grant was created in the health field. Though many block grants were proposed between 1966 and 1980, only five were enacted. Of the three largest, one consolidated various categorical grant programs aimed at cities (Community Development Block Grants), another created a program to aid local law enforcement (Law Enforcement Assistance Act), and a third authorized new kinds of locally managed programs for the unemployed (CETA, or the Comprehensive Employment and Training Act).

Revenue sharing (sometimes called *general revenue sharing,* or GRS) was even more permissive. Adopted in 1972 with the passage of the State and Local Fiscal Assistance Act, GRS provided for the distribution of about $6 billion a year in federal funds to states and localities, with no requirement as to matching funds and freedom to spend the money on almost any governmental purpose. Distribution of the money was determined by a statistical formula that took into account population, local tax effort, and the wealth of the state in a way intended to send more money to poorer, heavily taxed states and less to richer, lightly taxed ones. In 1986 the program ended.

In theory block grants and revenue sharing were supposed to give the states and cities considerable freedom in deciding how to spend the money while helping to relieve their tax burdens. To some extent they did. However, for four reasons, neither the goal of "no strings" nor the one of fiscal relief was really attained. First, the amount of money available from block grants and revenue sharing did not grow as fast as the states had hoped nor as quickly as did the money available through categorical grants. Second, the federal government steadily increased the number of strings attached to the spending of this supposedly "unrestricted" money.

Third, block grants grew more slowly than categorical grants because of the different kinds of political coalitions supporting each. Congress and the federal bureaucracy liked categorical grants for the same reason the states disliked them—the specificity of these programs enhanced federal control over how the money was to be used. Federal officials, joined by liberal interest groups and organized labor, tended to distrust state governments. Whenever Congress wanted to address some national problem, its natural inclination was to create a categorical grant program so that it, and not the states, would decide how the money would be spent.

Fourth, even though governors and mayors like block grants and revenue sharing, these programs cover such a broad range of activities that no single interest group has a vital stake in pressing for their enlargement. Revenue sharing, for example, provided a little money to many city agencies but rarely provided all or even most of the money for any single agency. Thus no single agency acted as if the expansion of revenue sharing were a life-and-death matter. Categorical grants, on the other hand, are often a matter of life and death for many agencies—state departments of welfare, of highways, and of health, for example, are utterly dependent on federal aid. Accordingly, the administrators in charge of these programs will press strenuously for their

categorical grants
Federal grants for specific purposes, such as building an airport.

revenue sharing
Federal sharing of a fixed percentage of its revenue with the states.

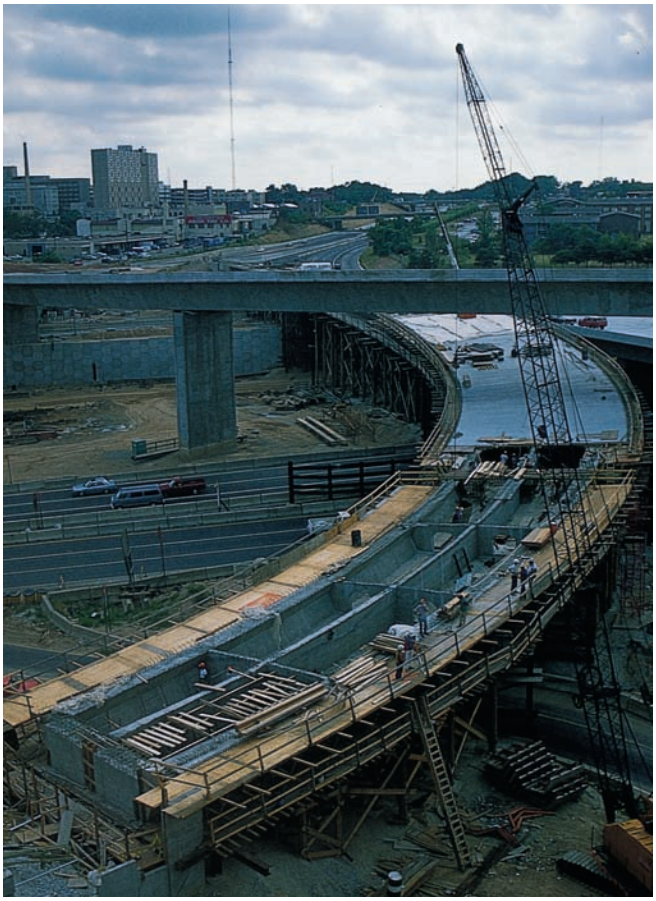
expansion. Moreover, categorical programs are supervised by special committees of Congress, and as we shall see in Chapter 13, many of these committees have an interest in seeing their programs grow.

Rivalry Among the States

The more important that federal money becomes to the states, the more likely they are to compete among themselves for the largest share of it. For a century or better the growth of the United States—in population, business, and income—was concentrated in the industrial Northeast. In recent decades, however, that growth—at least in population and employment, if not in income—has shifted to the South, Southwest, and Far West. This change has precipitated an intense debate over whether the federal government, by the way it distributes its funds and awards its contracts, is unfairly helping some regions and states at the expense of others. Journalists and politicians have dubbed the struggle as one between Snowbelt (or Frostbelt) and Sunbelt states.

Whether in fact there is anything worth arguing about is far from clear: the federal government has had great difficulty in figuring out where it ultimately spends what funds for what purposes. For example, a $1 billion defense contract may go to a company with headquarters in California, but much of the money may actually be spent in Connecticut or New York, as the prime contractor in California buys from subcontractors in the other states. It is even less clear whether federal funds actually affect the growth rate of the regions. The uncertainty about the facts has not prevented a debate about the issue, however. That debate focuses on the formulas written into federal laws by which block grants are allocated. These formulas take into account such factors as a county's or city's population, personal income in the area, and housing quality. A slight change in a formula can shift millions of dollars in grants in ways that favor either the older, declining cities of the Northeast or the newer, still-growing cities of the Southwest.

With the advent of grants based on distributional formulas (as opposed to grants for a particular project), the results of the census, taken every ten years, assume monumental importance. A city or state shown to be losing population may, as a result, forfeit millions of dollars in federal aid. Senators and representatives now have access to computers that can tell them instantly the effect on their states and districts of even minor changes in a formula by which federal aid is distributed. These formulas rely on objective measures, but the exact measure is selected with an eye to its political consequences. There is nothing wrong with this in principle, since any political system must provide some benefits for everybody if it is to stay together. Given the competition among states in a federal system, however, the struggle over allocation formulas becomes especially acute.



The federal government helps shape the character of cities by giving money to build parts of the federal highway system.

★ Federal Aid and Federal Control

So important has federal aid become for state and local governments that mayors and governors, along with others, began to fear that Washington was well

on its way to controlling other levels of government. "He who pays the piper calls the tune," they muttered. In this view the constitutional protection of state government to be found in the Tenth Amendment was in jeopardy as a result of the strings being attached to the grants-in-aid on which the states were increasingly dependent.

Block grants and revenue sharing were efforts to reverse this trend by allowing the states and localities freedom (considerable in the case of block grants; almost unlimited in the case of revenue sharing) to spend money as they wished. But as we have seen, these new devices did not in fact reverse the trend. Categorical grants—those with strings attached—continued to grow even faster.

There are two kinds of federal controls on state governmental activities. The traditional control tells the state government what it must do if it wants to get some grant money. These strings are often called **conditions of aid.** The newer form of control tells the state government what it must do, period. These rules are called **mandates.** Most mandates have little or nothing to do with federal aid—they apply to all state governments whether or not they accept grants.

Mandates

Most mandates concern civil rights and environmental protection. States may not discriminate in the operation of their programs, no matter who pays for them. Initially the antidiscrimination rules applied chiefly to distinctions based on race, sex, age, and ethnicity, but of late they have been broadened to include physical and mental disabilities as well. Various pollution control laws require the states to comply with federal standards for clean air, pure drinking water, and sewage treatment.[27]

Stated in general terms, these mandates seem reasonable enough. It is hard to imagine anyone arguing that state governments should be free to discriminate against people because of their race or national origin. In practice, however, some mandates create administrative and financial problems, especially when the mandates are written in vague language, thereby giving federal administrative agencies the power to decide for themselves what state and local governments are supposed to do.

But not all areas of public law and policy are equally affected by mandates. Federal-state disputes about who governs on such controversial matters as minors' access to abortion, same-sex marriage, and medical uses for banned narcotics make headlines. It is mandates that fuel everyday friction in federal-state relations, particularly those that Washington foists upon the states but funds inadequately or not at all. One 2006 study concluded that "the number of unfunded federal mandates is high in environmental policy, low in education policy, and moderate in health policy."[28] But why?

Some think that how much Washington spends in a given policy area is linked to how common federal mandates, funded or not, are in that same area. There is some evidence for that view. For instance, in recent years, annual federal grants to state and local governments for a policy area where unfunded mandates are pervasive—environmental protection—were about $4 billion, while federal grants for health care—an area where unfunded mandates have been less pervasive—amounted to about $200 billion. The implication is that when Washington itself spends less on something it wants done, it squeezes the states to spend more for that purpose.

Washington is more likely to grant state and local governments waivers in some areas than in others. A **waiver** is a decision by an administrative agency granting some other party permission to violate a law or administrative rule that would otherwise apply to it. Generally, for instance, education waivers have been easy for state and local governments to get, but environmental protection waivers have proven almost impossible to acquire.[29]

However, caution is in order. Often, the more one knows about federal-state relations in any given area, the harder it becomes to generalize about present-day federalism's fiscal, administrative, and regulatory character, the conditions under which "permissive federalism" prevails, or whether new laws or court decisions will considerably tighten or further loosen Washington's control over the states.

conditions of aid *Terms set by the national government that states must meet if they are to receive certain federal funds.*

mandates *Terms set by the national government that states must meet whether or not they accept federal grants.*

waiver *A decision by an administrative agency granting some other part permission to violate a law or rule that would otherwise apply to it.*

Mandates are not the only way in which the federal government imposes costs on state and local governments. Certain federal tax and regulatory policies

make it difficult or expensive for state and local governments to raise revenues, borrow funds, or privatize public functions. Other federal laws expose state and local governments to financial liability, and numerous federal court decisions and administrative regulations require state and local governments to do or not do various things, either by statute or through an implied constitutional obligation.[30]

It is clear that the federal courts have helped fuel the growth of mandates. As interpreted in this century by the U.S. Supreme Court, the Tenth Amendment provides state and local officials no protection against the march of mandates. Indeed, many of the more controversial mandates result not from congressional action but from court decisions. For example, many state prison systems have been, at one time or another, under the control of federal judges who required major changes in prison construction and management in order to meet standards the judges derived from their reading of the Constitution.

School-desegregation plans are of course the best-known example of federal mandates. Those involving busing—an unpopular policy—have typically been the result of court orders rather than of federal law or regulation.

Judges—usually, but not always, in federal courts—ordered Massachusetts to change the way it hires fire fighters, required Philadelphia to institute new procedures to handle complaints of police brutality, and altered the location in which Chicago was planning to build housing projects. Note that in most of these cases nobody in Washington was placing a mandate on a local government; rather a local citizen was using the federal courts to change a local practice.

The Supreme Court has made it much easier of late for citizens to control the behavior of local officials. A federal law, passed in the 1870s to protect newly freed slaves, makes it possible for a citizen to sue any state or local official who deprives that citizen of any "rights, privileges, or immunities secured by the Constitution and laws" of the United States. A century later the Court decided that this law permitted a citizen to sue a local official if the official deprived the citizen of *anything* to which the citizen was entitled under federal law (and not just those federal laws protecting civil rights). For example, a citizen can now use the federal courts to obtain from a state welfare office a payment to which he or she may be entitled under federal law.

Conditions of Aid

By far the most important federal restrictions on state action are the conditions attached to the grants the states receive. In theory accepting these conditions is voluntary—if you don't want the strings, don't take the money. But when the typical state depends for a quarter or more of its budget on federal grants, many of which it has received for years and on which many of its citizens depend for their livelihoods, it is not clear exactly how "voluntary" such acceptance is. During the 1960s some strings were added, the most important of which had to do with civil rights. But beginning in the 1970s the number of conditions began to proliferate and have expanded in each subsequent decade down to the present.

Some conditions are specific to particular programs, but most are not. For instance, if a state builds something with federal money, it must first conduct an environmental impact study, it must pay construction workers the "prevailing wage" in the area, it often must provide an opportunity for citizen participation in some aspects of the design or location of the project, and it must ensure that the contractors who build the project have nondiscriminatory hiring policies.

The National Guard, a state-run activity, not only sends troops to combat but hands out emergency supplies, as here in Florida after a hurricane in 2004.

The states and the federal government, not surprisingly, disagree about the costs and benefits of such rules. Members of Congress and federal officials feel they have an obligation to develop uniform national policies with respect to important matters and to prevent states and cities from misspending federal tax dollars. State officials, on the other hand, feel these national rules fail to take into account diverse local conditions, require the states to do things that the states must then pay for, and create serious inefficiencies.

What state and local officials discovered, in short, was that "free" federal money was not quite free after all. In the 1960s federal aid seemed to be entirely beneficial; what mayor or governor would not want such money? But just as local officials found it attractive to do things that another level of government then paid for, in time federal officials learned the same thing. Passing laws to meet the concerns of national constituencies—leaving the cities and states to pay the bills and manage the problems—began to seem attractive to Congress.

Because they face different demands, federal and local officials find themselves in a bargaining situation in which each side is trying to get some benefit (solving a problem, satisfying a pressure group) while passing on to the other side most of the costs (taxes, administrative problems).

The bargains struck in this process used to favor the local officials, because members of Congress were essentially servants of local interests: they were elected by local political parties, they were part of local political organizations, and they supported local autonomy. Beginning in the 1960s, however, changes in American politics that will be described in later chapters—especially the weakening of political parties, the growth of public-interest lobbies in Washington, and the increased activism of the courts—shifted the orientation of many in Congress toward favoring Washington's needs over local needs.

★ A Devolution Revolution?

In 1981 President Reagan tried to reverse this trend. He asked Congress to consolidate scores of categorical grants into just six large block grants. Congress obliged. Soon state and local governments started getting less federal money but with fewer strings attached to such grants. During the 1980s and into the early 1990s, however, many states also started spending more of their own money and replacing federal rules on programs with state ones.

With the election of Republican majorities in the House and Senate in 1994, a renewed effort was led by Congress to cut total government spending, roll back federal regulations, and shift important functions back to the states. The first key issue was welfare—that is, Aid to Families with Dependent Children (AFDC). Since 1935 there had been a federal guarantee of cash assistance to states that offered support to low-income, unmarried mothers and their children. In 1996, President Clinton signed a new federal welfare law that ended any federal guarantee of support and, subject to certain rules, turned the management of the program entirely over to the states, aided by federal block grants.

These and other Republican initiatives were part of a new effort called devolution, which aimed to pass on to the states many federal functions. It is an old idea but one that actually acquired new vitality because Congress, rather than the president, was leading the effort. Traditionally members of Congress liked voting for federal programs and categorical grants; that way members could take credit for what they were doing for particular constituencies. Under its new conservative leadership, Congress, especially the House, was looking for ways to scale back the size of the national government. President Clinton seemed to agree when, in his 1996 State of the Union address, he

A woman who heads a faith-based organization works with a jailed teenager to help him overcome his problems.

proclaimed that the era of big national government was over.

But was it over? No. By 2006, the federal government was spending about $22,000 per year per household, which, adjusted for inflation, was its highest annual per-household spending level since the Second World War. Federal revenues represented about 18 percent of gross domestic product, close to the post-1966 annual average, and inflation-adjusted federal debt totals hit new highs. Adjusted for inflation total spending by state and local governments also increased every year after 1996, as did state and local government debt.

second-order devolution *The flow of power and money from the states to local governments.*

third-order devolution *The increased role of nonprofit organizations and private groups in policy implementation.*

express preemption *A federal law or regulation that contains language explicitly displacing or superseding any contrary state or local laws.*

implied preemption *A federal law or regulation that contains language conflicting with state or local laws, that cannot be effectively implemented due to such laws, or that concerns matters in which Washington possesses exclusive constitutional powers (such as treaty-making) or "occupies the field" (like federal employment security and retirement laws).*

Devolution did not become a revolution. AFDC was ended and replaced by a block grant program called Temporary Assistance for Needy Families (TANF). But far larger federal-state programs, most notably Medicaid, were not turned into block grant programs. Moreover, both federal and state spending on most programs, including the block-granted programs, increased after 1996. Although by no means the only new or significant block grant, TANF now looked like the big exception that proved the rule. The devolution revolution was curtailed by public opinion. Today, as in 1996 and 2006, most Americans favor "shifting responsibility to the states," but not if that also means cuts in government programs that benefit most citizens (not just low-income families), uncertainty about who is eligible to receive benefits, or new hassles associated with receiving them.

Devolution seems to have resulted in more, not fewer, government rules and regulations. Research reveals that, in response to the federal effort to devolve responsibility to state and local governments, states have not only enacted new rules and regulations of their own, but also prompted Washington to issue new rules and regulations on environmental protection (especially greenhouse gas emissions) and other matters.[31]

Still, where devolution did occur, it has had some significant consequences. The devolution of welfare policy has been associated with dramatic decreases in welfare rolls. Scholars disagree about how much the drops were due to the changes in law and how much to economic conditions and other factors. Nor is it clear whether welfare-to-work programs have gotten most participants into decent jobs with adequate health benefits. But few now doubt that welfare devolution has made a measurable difference in how many people receive benefits and for how long.

Administratively, the devolution of welfare programs has triggered **second-order devolution,** a flow of power and money from the states to local governments, and **third-order devolution,** the increased role of nonprofit organizations and private groups in policy implementation. Subject to state discretion, scores of local governments are now designing and administering welfare programs (job placement, child care, and others) through for-profit firms and a wide variety of nonprofit organizations, including local religious congregations. In some big cities over a quarter of welfare-to-work programs have been administered through public-private partnerships that included various local community-based organizations as grantees.[32] By 2007, there was preliminary evidence that, at least in some states, such public-private partnerships were closer to the norm than they were only a half-decade or so earlier.[33]

Even with respect to welfare reform, however, the decade-plus push for devolution has had relatively little affect on the propensity of Congress to preempt state and local laws or regulations. **Express preemption** occurs when Congress explicitly declares in a federal statute or regulatory directive, "we hereby preempt" relevant state laws or regulations. For example, Congress has expressly preempted many state laws that prescribe environmental protection standards lower than those set by federal law, but not state laws that prescribe standards that exceed Washington's.

Implied preemption occurs when federal laws directly conflict with state laws (for example, a federal law declaring that a particular narcotic is illegal under all circumstances versus a state law declaring that it can be used under some or all circumstances); when state laws impede or risk impeding the effective implementation of a federal law (for example, state

laws giving corporations discretion over employee pension funds that cannot be followed without jeopardizing retirement benefits guaranteed by federal laws); or when federal law, as the phrase goes, "occupies the field" (for example, the federal government's immigration, naturalization, and treaty-making powers).

Sometimes the difference between express preemption, implied preemption, and no preemption can turn on a single word. One clue: when Congress uses "states shall" rather than "states may," the resulting federal law or regulation normally betokens express preemption. Even though the Republicans who led Congress for much of the period from 1994 through 2006 generally espoused conservative views favoring smaller government and devolution, they proved only slightly less prone to preempt state and local laws than their Democratic predecessors had been. Somewhat paradoxically, to ensure state and local compliance with the new federal welfare policies, they gradually multiplied statutes and directives precluding or displacing all contrary state and local laws or rules.

★ Congress and Federalism

Just as it remains to be seen whether the Supreme Court will continue to revive the doctrine of state sovereignty, so it is not yet clear whether the devolution movement will regain momentum, stall, or be reversed. But whatever the movement's fate, the United States will not become a wholly centralized nation. There remains more political and policy diversity in America than one is likely to find in any other large industrialized nation. The reason is not only that state and local governments have retained certain constitutional protections but also that members of Congress continue to think of themselves as the representatives of localities *to* Washington and not as the representatives *of* Washington to the localities. As we shall see in Chapter 13, American politics, even at the national level, remains local in its orientation.

But if this is true, why do these same members of Congress pass laws that create so many problems for, and stimulate so many complaints from, mayors and governors? One reason is that members of Congress represent different constituencies from the same localities. For example, one member of Congress from Los Angeles may think of the city as a collection of business people, homeowners, and taxpayers, while another may think of it as a group of African Americans, Hispanics, and nature lovers. If Washington wants to simply send money to Los Angeles, these two representatives could be expected to vote together. But if Washington wants to impose mandates or restrictions on the city, they might very well vote on opposite sides, each voting as his or her constituents would most likely prefer.

Another reason is that the organizations that once linked members of Congress to local groups have eroded. As we shall see in Chapter 9, the political parties, which once allowed many localities to speak with a single voice in Washington, have decayed to the point where most members of Congress now operate as free agents, judging local needs and national moods independently. In the 1960s these needs and moods seemed to require creating new grant programs; in the 1970s they seemed to require voting for new mandates; in the 1980s and 1990s they seemed to require letting the cities and states alone to experiment with new ways of meeting their needs; and today some say they require rethinking devolution before it goes "too far."

There are exceptions. In some states the parties continue to be strong, to dominate decision-making in the state legislatures, and to significantly affect the way their congressional delegations behave. Democratic members of Congress from Chicago, for example, typically have a common background in party politics and share at least some allegiance to important party leaders.

But these exceptions are becoming fewer and fewer. As a result, when somebody tries to speak "for" a city or state in Washington, that person has little claim to any real authority. The mayor of Philadelphia may favor one program, the governor of Pennsylvania may favor another, and individual local and state officials—school superintendents, the insurance commissioner, public health administrators—may favor still others. In bidding for federal aid, those parts of the state or city that are best-organized often do the best, and increasingly the best-organized groups are not the political parties but rather specialized occupational groups such as doctors or schoolteachers. If one is to ask, therefore, why a member of Congress does not listen to his or her state anymore, the answer is, "What do you mean by *the state?* Which official, which occupational group, which party leader speaks for the state?"

Finally, Americans differ in the extent to which we like federal as opposed to local decisions. When people are asked which level of government gives them

WHAT WOULD YOU DO?

MEMORANDUM

To: *Representative Sue Kettl*
From: *Grace Viola, chief of staff*
Subject: *Faith-based preemption bill*

As requested, I have researched state-funding policies. The main finding is that the state laws do hobble getting federal dollars to the relgious groups that have been doing most of the actual recovery work. The immediate question before you is whether to sign on as a co-sponsor to the bill.

Congress Debates Requiring States to Follow Feds' Lead on "Faith-Based" Hurricane Recovery Act

January 29 WASHINGTON, D.C.

Today the House begins debate on legislation requiring state governments to comply with federal laws on public funding for religious nonprofit organizations that deliver social services. In cities devastated by hurricanes, so-called faith-based organizations continue to play a major role in disaster recovery and rebuilding efforts. Federal laws already permit these groups to receive federal aid, but a recent audit found that contrary state laws were impeding their implementation. . . .

Arguments for:

1. Congress has already passed at least four laws that permit federal agencies to fund faith-based groups that deliver social services, subject to prohibitions against using any public funds for proselytizing or such.
2. The faith-based organizations functioned as first responders when the hurricanes hit, and have since supplied billions of dollars worth of manpower and materials.
3. Some legal experts say that the existing laws already preempt the contrary state ones; besides, it polls great (75 percent in favor nationally, even higher in your district).

Arguments against:

1. You have traditionally argued in favor of states' rights and the separation of church and state.
2. Praiseworthy though their civic good works have been, some of the religious groups involved in the cleanup and recovery have beliefs and tenets that seem discriminatory (a few even refuse to hire people of other faiths).
3. Expressly preempting more state laws could come back to bite us when it comes to state laws that we favor over contrary federal ones.

Your decision:

Support bill _____ Oppose bill _____

the most for their money, relatively poor citizens are likely to mention the federal government first, whereas relatively well-to-do citizens are more likely to mention local government. If we add to income other measures of social diversity—race, religion, and region—there emerge even sharper differences of opinion about which level of government works best. It is this social diversity, and the fact that it is represented not only by state and local leaders but also by members of Congress, that keeps federalism alive and makes it so important. Americans simply do not agree on enough things, or even on which level of government ought to decide on those things, to make possible a unitary system.

★ SUMMARY ★

States participate actively both in determining national policy and in administering national programs. Moreover, they reserve to themselves or the localities within them important powers over public services, such as schooling and law enforcement, and public decisions, such as land-use control, that in unitary systems are dominated by the national government.

Debates about federalism are as old as the republic itself. After the Civil War, the doctrine of dual federalism emerged, which held that though the national government was supreme in its sphere, the states were equally supreme in theirs. For most of the twentieth century, however, changes in public law and court decisions favored national over state power.

After the 1960s states became increasingly dependent on Washington to fund many activities and programs. Today, however, there is once again a lively debate about the limits of national power, how closely the federal government ought to regulate its grants to states, and the wisdom of devolving ever more federal responsibilities onto state and local governments.

Evaluating federalism is difficult. On the one hand, there is the sordid history of states' rights and legalized racism. On the other hand, there is the open opportunity for political participation afforded by today's fifty states and thousands of local governments. Naturally, federalism permits laws and policies on important public matters to vary from state to state and town to town. But how much, if at all, they should vary on given matters, and who should decide, are questions that every generation of Americans must answer anew.

RECONSIDERING WHO GOVERNS?

1. ***Where is sovereignty located in the American political system?***

   Strictly speaking, the answer is "nowhere." Sovereignty means supreme or ultimate political authority. A sovereign government is one that is legally and politically independent of any other government. No government in America, including the national government headquartered in Washington, D.C., meets that definition. In the American political system, federal and state governments share sovereignty in complicated and ever-changing ways. Both constitutional tradition (the doctrine of dual sovereignty) and everyday politicking (fights over federal grants, mandates, and conditions of aid) render the national government supreme in some matters (national defense, for example) and the states supreme in others (education, for instance).

2. ***How is power divided between the national government and the states under the Constitution?***

   Early in American history, local governments and the states had most of it. In the twentieth century, the national government gained power. In the last two decades the states have won back some of their power because of Supreme Court decisions and legislative efforts to devolve certain federal programs to the states. But the distribution of power between the national government and the states is never as simple or as settled as it may appear to be.

RECONSIDERING TO WHAT ENDS?

1. ***What competing values are at stake in federalism?***
   Basically two: equality versus participation. Federalism means that citizens living in different parts of the country will be treated differently, not only in spending programs, such as welfare, but in legal systems that assign in different places different penalties to similar offenses or that differentially enforce civil rights laws. But federalism also means that there are more opportunities for participation in making decisions—in influencing what is taught in the schools and in deciding where highways and government projects are to be built. Indeed, differences in public policy—that is, unequal treatment—are in large part the result of participation in decision-making. It is difficult, perhaps impossible, to have more of one of these values without having less of the other.

2. ***Who should decide what matters ought to be governed mainly or solely by national laws?***
   In practice, the federal courts have often been the main or final arbiters of federalism. As we shall see in Chapter 6, it was the U.S. Supreme Court that decided to outlaw state and local laws that kept children in racially segregated public schools. Constitutional amendments initiated by members of Congress have also been used to apply legally enforceable national standards to matters once left to state or local governments. Examples would include the Twenty-sixth Amendment, which gave eighteen-year-old citizens the right to vote. Not surprisingly, when state and local officials have been permitted to decide, they have usually favored national laws or standards when it served their political interests or desire for "free" money, but decried them as "intrusive" or worse when they have not.

WORLD WIDE WEB RESOURCES

State news: **www.stateline.org**
Council of State Governments: **www.csg.org**
National Governors' Association: **www.nga.org**
Supreme Court decisions:
www.findlaw.com/casecode/supreme.html

SUGGESTED READINGS

Beer, Samuel H. *To Make a Nation: The Rediscovery of American Federalism*. Cambridge: Harvard University Press, 1993. The definitive study of the philosophical bases of American federalism.

Conlan, Timothy. *From New Federalism to Devolution.* Washington, D.C.: Brookings Institution, 1998. A masterful overview of the politics of federalism from Richard Nixon to Bill Clinton.

Daniel, Ronald, Donald F. Kettl, and Howard Kureuther, eds. *On Risk and Disaster: Lessons from Hurricane Katrina.* Philadelphia: University of Pennsylvania Press, 2006. Several experts evaluate the government response.

Derthick, Martha N. *Keeping the Compound Republic.* Washington, D.C.: Brookings Institution, 2001. A masterful analysis of trends in American federalism from the Founding to the present.

Diamond, Martin. "The Federalist's View of Federalism." In *Essays in Federalism,* edited by George C.S. Benson. Claremont, Calif.: Institute for Studies in Federalism of Claremont Men's College, 1961, 21–64. A profound analysis of what the Founders meant by federalism.

Grodzins, Morton. *The American System.* Chicago: Rand McNally, 1966. Argues that American federalism has always involved extensive sharing of functions between national and state governments.

Melnick, R. Shep. *Between the Lines: Interpreting Welfare Rights.* Washington, D.C.: Brookings Institution, 1994. An examination of how trends in statutory interpretation have affected broader policy developments, including the expansion of the agenda of national government, the persistence of divided government, and the resurgence and decentralization of Congress.

Riker, William H. *Federalism: Origin, Operation, Significance.* Boston: Little, Brown, 1964. A classic explanation and critical analysis of federalism here and abroad.

Teske, Paul. *Regulation in the States*. Washington, D.C.: Brookings Institution, 2004. States have responded to devolution by adding new regulations of their own.