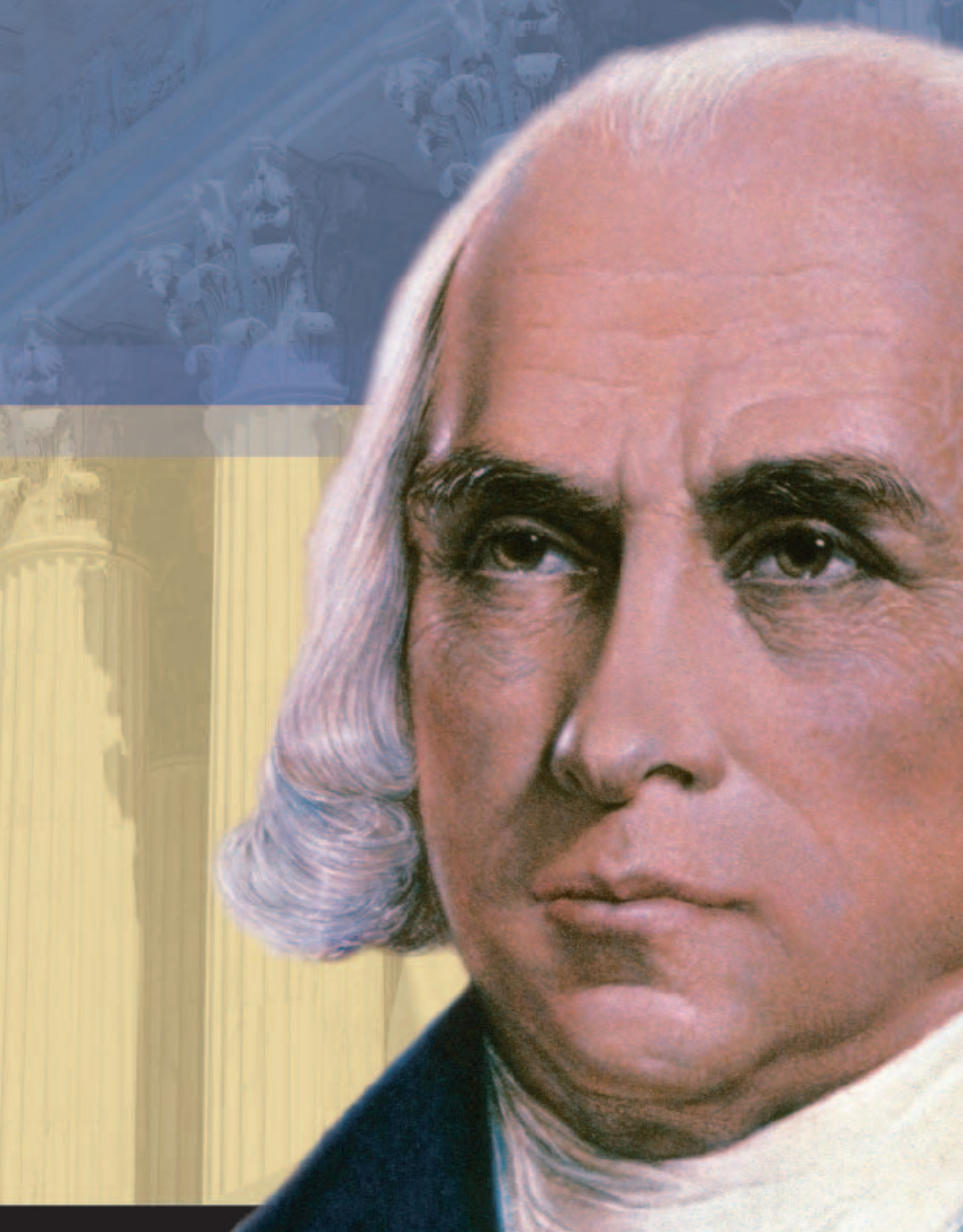
AMERICAN FEDERALISM

OUTLINE

Responding to opposition to the Massachusetts supreme court's ruling that its state constitution forbids discrimination against same-sex couples seeking to marry, President George W. Bush said "if necessary" he would "support a constitutional amendment which would honor marriage between a man and a woman." But he added that the issue was basically a state matter, not a federal one, and he would not oppose "whatever legal arrangements people want to make."[1] That disappointed some of his conservative supporters because Vermont and California already recognize "civil unions" and "domestic partnerships" that confer the same legal benefits—health, insurance, and death benefits—for gay couples as for heterosexuals.

Although the Massachusetts court's decision may be overridden by a proposed state constitutional amendment in 2006, it renewed a national debate over the U.S. Constitution's full faith and credit clause. In 1996, Congress passed and President Bill Clinton signed the Defense of Marriage Act (DOMA), which relieves states of any obligation to recognize same-sex marriages even if they are recognized in other states and stipulates that the national government only recognizes heterosexual marriages for federal benefits such as Social Security.[2] Supporters of the law argue that the Constitution gives Congress the responsibility for prescribing the manner in which states are to comply with the full faith and credit clause. But the DOMA is likely to be challenged in the courts for going beyond the power of Congress to provide states with an exemption from their constitutional obligation under the full faith and credit clause.

The Supreme Court has not addressed the issue squarely and precedents provide no clear answer. The Court has held that states must comply with other states' judicial decisions,



TIME LINE
AMERICAN FEDERALISM

1781	Articles of Confederation establish state as preeminent over federal government
1788	Constitution ratified, replacing the Articles of Confederation
1791	Bill of Rights ratified by the states
1803	Louisiana Purchase greatly expands the size of the United States
1819	*McCulloch* v. *Maryland* interprets "necessary and proper" clause broadly
1824	*Gibbons* v. *Ogden* establishes congressional control over interstate commerce
1860	South Carolina is the first state to secede from the United States
1865	Civil War ends
1877	End of Reconstruction
1916	Federal Highway Act is first large-scale cash grant to states
1965	Voting Rights Act ends racial discrimination in voting practices in the states
1972	General revenue sharing increases funds available to state
1995	Congress prohibits "unfunded mandates," costing over $50 million
1996	Welfare reform reduces restrictions on states' use of welfare funds
2004	Massachusetts become first state to allow marriage of same-sex couples

but not necessarily with their other laws or administrative decisions. In light of recent Court rulings tilting toward states' rights and, as one scholar argues, "the fact that marriage has traditionally been an almost exclusive sphere of state authority, the Court would likely maintain the noncentralized and dual nature of American domestic relations that exist today, and allow the states to decide whether to recognize same-sex marriages."[3] However, similar DOMA laws in 38 states are likely to be challenged as well,[4] in light of the ruling in *Lawrence* v. *Texas*[5] invalidating state laws criminalizing homosexual sodomy, dissenting Justice Antonin Scalia has warned that states may no longer be able to ban same-sex marriages.

The controversy over same-sex marriages underscores the continuing debate over federalism. How do states interact with each other and with the national government? What is the proper balance of power between the national government and the states on providing homeland security, combating illegal immigration, improving education, and fighting corporate corruption and environmental pollution?

Since the founding of the Republic, Americans have debated the relationship of the national government to the states.[6] In 1787, the Federalists defended the creation of a strong national government, whereas the Antifederalists warned that a strong national government would overshadow the states. More recently, Republicans have led the charge against big government, urging the return of many functions to the states—a **devolution revolution**[7]—and they have had some success, such as when President Bill Clinton agreed to turn over more responsibilities for welfare to the states.

Federalism has recently emerged as a hot topic in other countries as well. Western European countries have formed the European Union (EU), with member nations giving up considerable authority over the regulation of businesses and labor, adopting a common monetary policy and currency (the euro), the addition in 2004 of ten Central and Eastern European countries, and debates over the ratification of a Treaty Establishing a Constitution for Europe.[8]

Heightened interest in federalism also comes from demands for greater autonomy for ethnic nationalities. The Canadian federal system strains under the demands of the French-speaking province of Quebec for special status and even independence. In the United Kingdom, devolution has occurred with Scotland, Northern Ireland, and Wales gaining their own parliaments or assemblies with considerable authority and, in the case of Scotland, limited power to tax. Belgium, Italy, and Spain have been devolving powers from their central governments to regional governments.

In contrast to some countries, the United States has had a relatively peaceful experience with the shifting balances of power under federalism. Since the New Deal in the 1930s, power and responsibility have drifted from the states to the national government. Although presidents from Richard Nixon to Bill Clinton slowed the growth of the national government, it was not until the late 1990s that the Republican-controlled Congress sought major reforms that heated the debate over federalism. As with welfare reform in 1996, Congress promoted decentralization in education with the Educational Flexibility Partnership Demonstration Act of 1999, authorizing the secretary of education to grant states waivers from federal rules setting educational goals. Still, in spite of such moves toward decentralization, Congress continues to expand federal law by making such offenses as the burning of churches, carjacking, and acts of terrorism federal crimes, even though they are already state and local crimes.

After more than half a century, the Supreme Court has placed some constraints on congressional powers in the name of federalism.[9] Like Congress, however, the Court's recent record on federalism is mixed. In spite of recent rulings holding that Congress exceeded its powers and may not authorize individuals to sue states to enforce federal laws,[10] the Court nevertheless ruled that state welfare programs may not restrict benefits to new residents to what they would have received in the states from which they moved[11] and that Congress may restrict states from selling drivers' personal information.[12]

Debates over federalism resemble those over whether "the glass is half-empty or half-full."[13] People who think they can get more of what they want from the national

devolution revolution
The effort to slow the growth of the federal government by returning many functions to the states.

Supporters applaud the announcement of a ruling by the Massachusetts Supreme Judicial Court on November 18, 2003, confirming that the state constitution does not bar same-sex couples from marrying. The issue of same-sex marriage illustrates how the debate over federalism is still a vital issue in the United States today. Proponents of same-sex marriage argue that the issue should remain in the hands of the individual states, whereas opponents want the federal government to propose an amendment to the Constitution defining marriage as a union specifically between a male and a female.

government usually advocate national action. Those who view states as more responsive and accountable argue for decentralization. Although Republicans generally favor action at the state level and Democrats tend to support action by the national government, neither party is consistent in its positions on the balance of power between the national government and the states. It depends on the issue at stake.

In this chapter, we first define federalism and its advantages. We then look at the constitutional basis for our federal system and how court decisions and political developments have shaped, and continue to shape, federalism in the United States.

DEFINING FEDERALISM

Scholars argue and wars (including our own Civil War) have been fought over what federalism means. One scholar counted 267 definitions.[14]

Federalism, as we define it, is a form of government in which a constitution distributes powers between a central government and subdivisional governments—usually called states, provinces, or republics—giving to both the national government and the regional governments substantial responsibilities and powers, including the power to collect taxes and to pass and enforce laws regulating the conduct of individuals.

The mere existence of both national and state governments does not make a system federal. What is important is that a *constitution divides governmental powers between the national government and the subdivisional governments,* giving clearly defined functions to each. Neither the central nor the subdivisional government receives its powers from the other; both derive them from a common source—the Constitution. No ordinary act of legislation at either the national or the state level can change this constitutional distribution of powers. Both levels of government operate through their own agents and exercise power directly over individuals.

federalism
Constitutional arrangement whereby power is distributed between a central government and subdivisional governments, called states in the United States. The national and the subdivisional governments both exercise direct authority over individuals.

At the official opening of Scotland's parliament on July 1, 1999, Queen Elizabeth was presented with the Scottish crown. The 129-member assembly is Scotland's first parliament in nearly 300 years.

Our definition of federalism is broad enough to include competing visions of it and the range of federal systems around the world. The following are some of the leading visions of federalism.

- *Dual federalism* views the Constitution as giving a limited list of powers—primarily foreign policy and national defense—to the national government, leaving the rest to sovereign states. Each level of government is dominant within its own sphere. The Supreme Court serves as the umpire between the national government and the states in disputes over which level of government has responsibility for a particular activity. During our first hundred years, dual federalism was the favored interpretation given by the Supreme Court.
- *Cooperative federalism* stresses federalism as a system of intergovernmental relations in delivering governmental goods and services to the people and calls for cooperation among various levels of government.
- *Marble cake federalism,* a term coined by political scientist Morton Grodzins, conceives of federalism as a marble cake in which all levels of government are involved in a variety of issues and programs, rather than a layer cake, or dual federalism, with fixed divisions between layers or levels of government.[15]
- *Competitive federalism,* a term first used by political scientist Thomas R. Dye, views the national government, 50 states, and thousands of other units as competing with each other over ways to put together packages of services and taxes. Applying the analogy of the marketplace, Dye emphasizes that at the state and local levels, we have some choice about which state and city we want to "use," just as we have choices about what kind of automobile we drive.[16]
- *Permissive federalism* implies that although federalism provides "a sharing of power and authority between the national and state government, the states' share rests upon the permission and permissiveness of the national government."[17]

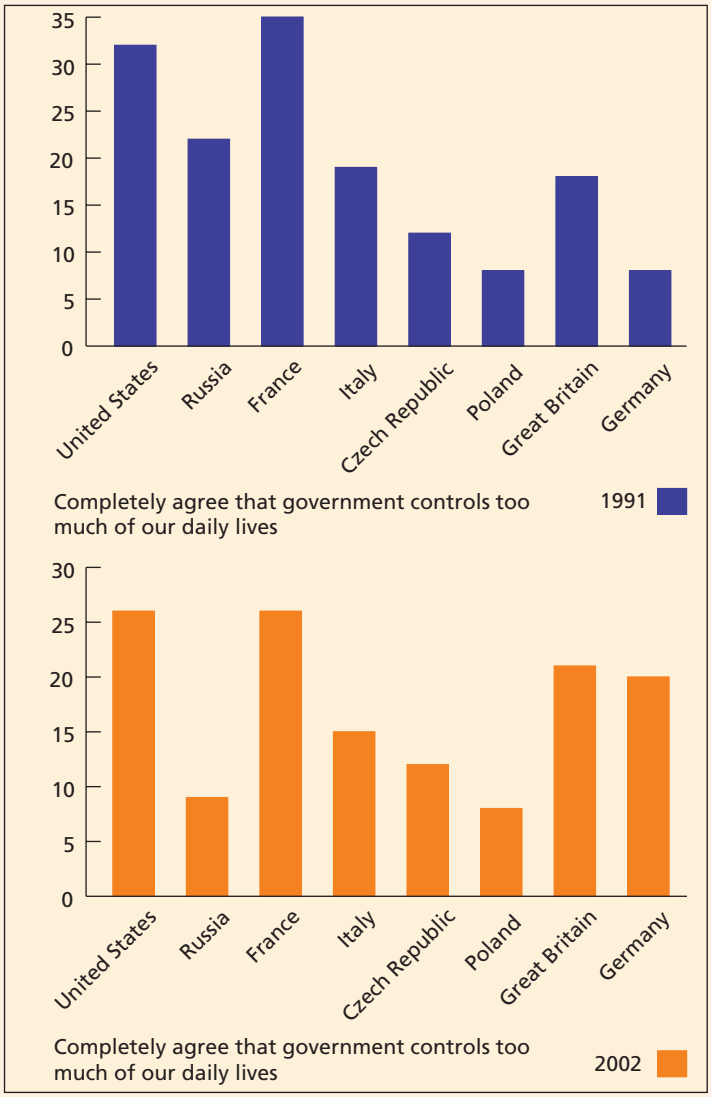
GLOBAL *Perceptions*

QUESTION: Please indicate whether you completely agree, mostly agree, mostly disagree, or completely disagree with the following statement: The government controls too much of our daily lives.

The United States has more governments (federal, state, local, school districts, and special authorities) than any other country in the world. Yet, Americans are no more likely than citizens of other western democracies to believe that government in general controls too much of their daily lives. In fact, they have become less likely to agree with the statement since the early 1990s, even though the number of U.S. governments has increased.

The Pew survey suggests that people respond more to what government does by way of regulating their daily lives than the number of governments. Thus, Russians were the most likely to say that government has become less involved in their daily lives, which reflects the change from communism to a more democratic process.

SOURCE: Pew Global Attitudes Project, 2003



SOURCE: Pew Global Attitudes Project, p. 110

- "*Our federalism,*" championed by Ronald Reagan, Justices Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas, along with Chief Justice William Rehnquist, presumes that the power of the federal government is limited in favor of the broad powers reserved to the states.

Federal nations are diverse and include Australia, Canada, Germany, Russia, and Switzerland. Although their number is not large, they "cover more than half of the land surface of the globe and include almost half of the world's population."[18] Federalism thus appears well suited for large countries with large populations, even though only 21 of the world's approximately 185 nation-states claim to be federal.

Constitutionally, the federal system of the United States consists of only the national government and the 50 states. "Cities are not," the Supreme Court reminded us, "sovereign entities." But in a practical sense, we are a nation of almost 88,000 governmental units, from the national government to the school board district. This does not make for a tidy, efficient, easy-to-understand system; yet, as we shall see, it has its virtues.

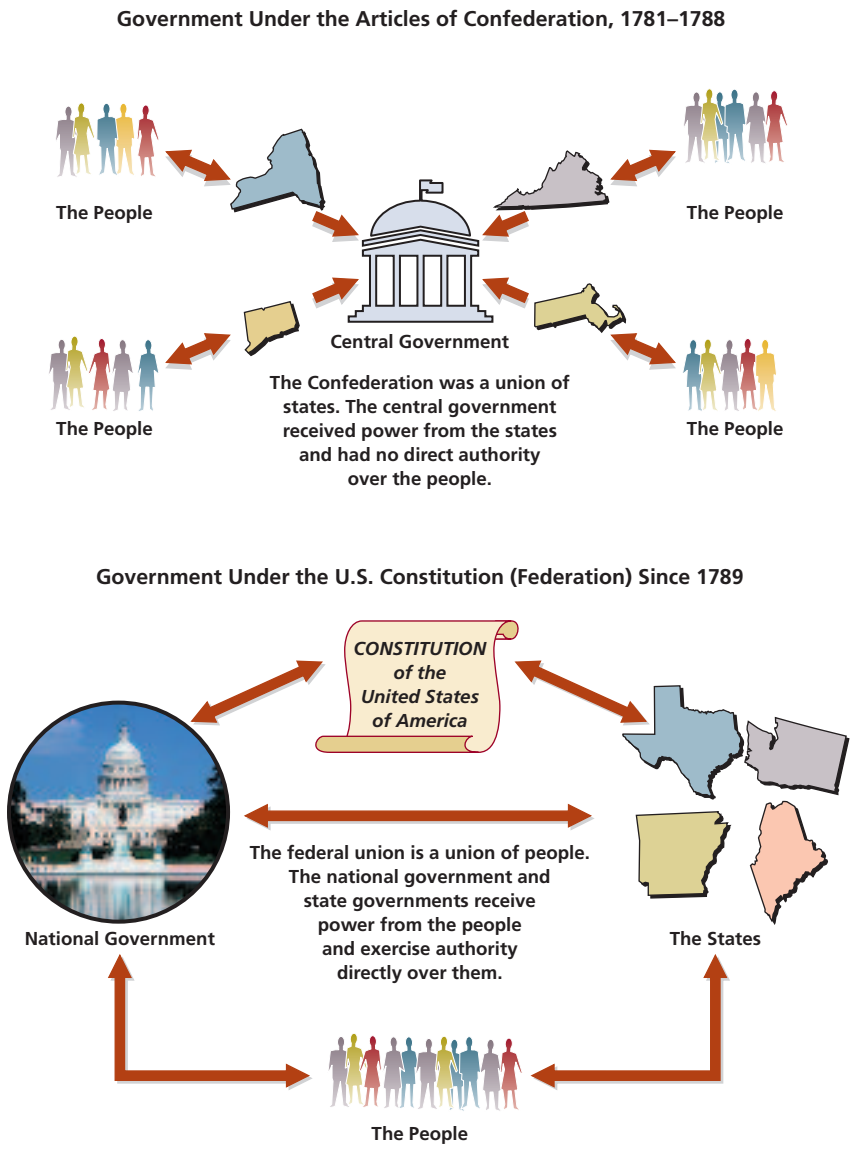


FIGURE 3–1 A Comparison of Federalism and Confederation.

Alternatives to Federalism

Among the alternatives to federalism are **unitary systems** of government, in which a constitution vests all governmental power in the central government. The central government, if it so chooses, may delegate authority to constituent units, but what it delegates it may take away. France, Israel, and the Philippines have unitary governments. In the United States, state constitutions usually create this kind of relationship between the state and its local governments.

At the other extreme from unitary governments are **confederations**, in which sovereign nations, through a constitutional compact, create a central government but carefully limit the power of the central government and do not give it the power to regulate the conduct of individuals directly. The central government makes regulations for the constituent governments, but it exists and operates only at their direction. The 13 states under the Articles of Confederation operated in this manner (see Figure 3–1), as did the southern Confederacy during the Civil War. The European Union is another example, though debates over its integration continue.[19]

Why Federalism?

In 1787, federalism was an obvious choice. Confederation had been tried but proved unsuccessful. A unitary system was out of the question because most people were too deeply attached to their state governments to permit subordination to central rule. Federalism was, and still is, thought to be ideally suited to the needs of a heterogeneous people spread over a large continent, suspicious of concentrated power, and desiring unity but not uniformity. Federalism offered, and still offers, many advantages for such a people.

FEDERALISM CHECKS THE GROWTH OF TYRANNY Although in the rest of the world, federal forms have not always been notably successful in preventing tyranny, and many unitary governments are democratic, Americans tend to associate freedom with federalism.[20] As James Madison pointed out in *The Federalist,* No. 10: If "factious leaders . . . kindle a flame within their particular states," national leaders can check the spread of the "conflagration through the other states" (*The Federalist,* No. 10, appears in the Appendix of this book). Moreover, when one political party loses control of the national government, it is still likely to hold office in a number of states. It can then regroup, develop new policies and new leaders, and continue to challenge the party in power at the national level.

Such diffusion of power creates its own problems. It makes it difficult for a national majority to carry out a program of action, and it permits those who control state governments to frustrate the policies enacted by Congress and administered by federal agencies. To the framers, these obstacles were an advantage. They feared that a single interest group might capture the national government and suppress the interests of others. Of course, the size of the nation and the many interests within it are the greatest obstacles to the formation of a single-interest majority—a point often overlooked today

unitary system
Constitutional arrangement in which power is concentrated in a central government.

confederation
Constitutional arrangement in which sovereign nations or states, by compact, create a central government but carefully limit its power and do not give it direct authority over individuals.

but emphasized by Madison in *The Federalist,* No. 10. If such a majority were to occur, having to work through a federal system would check its power.

FEDERALISM ALLOWS UNITY WITHOUT UNIFORMITY National politicians and parties do not have to iron out every difference on every issue that divides us, whether it be abortion, same-sex marriage, gun control, capital punishment, welfare financing, or assisted suicide. Instead, these issues are debated in state legislatures, county courthouses, and city halls. But this advantage of federalism is becoming less significant as many local issues become national ones and as events in one state immediately affect policy debates at the national level.

FEDERALISM ENCOURAGES EXPERIMENTATION Supreme Court Justice Louis Brandeis pointed out that state governments provide great "laboratories" for public policy experimentation; states may serve as proving grounds. If they adopt programs that fail, the negative effects are limited; if programs succeed, they can be adopted by other states and by the national government. Georgia, for example, was the first state to permit 18-year-olds to vote; Wisconsin experimented with putting welfare recipients to work; California pioneered air pollution control programs; Oregon and Hawaii created new systems for the delivery of health care. Nevada is the only state, so far, to legalize statewide gambling, but aspects of legalized casino gambling are now found in more than half the states. Not all innovations, even those considered successful, become widely adopted. Nebraska is the only state to have a unicameral legislature, although in recent years both Minnesota and California considered adopting one.

CHANGING FACE OF AMERICAN POLITICS

MINORITIES AND WOMEN ARE GAINING GROUND IN THE WORKFORCE

In the last few decades minorities and women have made significant gains in prestigious professions, especially as physcians and lawyers, but white males still dominate in certain highly visible occupations like police and firefighters.

Civil Workforce by Gender and Race—As a Percentage of Total Occupation

Occupation	Year	Men	Women	White	Black	Hispanic	Other	Total
Lawyers	1980	86%	14%	95%	3%	2%	1%	468,378
	1990	76	24	93	3	2	1	697,272
	2000	71	29	89	4	3	2	871,115
Physicians	1980	87	13	83	3	4	10	421,985
	1990	79	21	81	4	5	11	571,319
	2000	73	27	74	4	5	17	705,960
Firefighters	1980	99	1	89	6	4	1	186,867
	1990	97	3	84	9	5	2	216,914
	2000	96	4	82	8	6	3	242,395
Police Officers	1980	93	7	85	9	4	1	379,758
	1990	87	13	79	12	7	2	492,107
	2000	87	13	76	12	9	4	597,925

SOURCE: Census Bureau, 2000 Census; D'Vera Cohn and Sarah Cohen, "Minorities, Women Gain Professionally," *The Washington Post* A1 (December 30, 2003).

NUMBER OF GOVERNMENTS IN THE UNITED STATES

National	1
States	50
Counties	3,034
Municipalities	19,431
Townships or towns	16,506
School districts	13,522
Special districts	35,356
Total	87,900

SOURCE: U.S. Bureau of the Census, *Statistical Abstract of the United States,* available at http://wwwcensus.gov/prod/2003pubs/02statab/stlocgov.pdf.

FEDERALISM KEEPS GOVERNMENT CLOSER TO THE PEOPLE By providing numerous arenas for decision making, federalism involves many people and helps keep government closer to the people. Every day, thousands of Americans are busy serving on city councils, school boards, neighborhood associations, and planning commissions. Since they are close to the issues and have firsthand knowledge of what needs to be done, they may be more responsive to problems than the experts in Washington.

We should be cautious, however, about generalizing that state and local governments are necessarily closer to the people than the national government. True, more people are involved in local and state politics than in national affairs, and confidence in state governments has increased while respect for national agencies has diminished. A majority of the public often appears dissatisfied with the federal government. Yet national and international affairs are on people's minds more often than state or local politics. And fewer voters participate in state and local elections than in congressional and presidential elections.

THE CONSTITUTIONAL STRUCTURE OF AMERICAN FEDERALISM

Dividing powers and responsibilities between the national and state governments has resulted in thousands of court decisions, hundreds of books, and endless speeches to explain them—and even then the division lacks precise definition. Nonetheless, a basic understanding of how the Constitution divides these powers and responsibilities and of what obligations are imposed on each level of government is helpful (see Table 3–1).

The formal constitutional framework of our federal system may be stated relatively simply:

1. The national government has only those powers delegated to it by the Constitution (with the important exception of the inherent power over foreign affairs).
2. Within the scope of its operations, the national government is supreme.
3. The state governments have the powers not delegated to the central government, except those denied to them by the Constitution and their state constitutions.

TABLE 3–1 THE FEDERAL DIVISION OF POWERS

Powers Delegated to the National Government	*Some Powers Reserved for the States*	*Some Concurrent Powers Shared by the National and State Governments*
• Express powers stated in the Constitution	• To create a republican form of government	• To tax citizens and businesses
• Implied powers that may be inferred from the express powers	• To charter local governments	• To borrow and spend money
• Inherent powers that allow the nation to present a united front to foreign powers	• To conduct elections	• To establish courts
	• To exercise all powers not delegated to the national government or denied to the states by the Constitution	• To pass and enforce laws
		• To protect civil rights

4. Some powers are specifically denied to both the national and state governments; others are specifically denied only to the states; still others are denied to the national government but not the states.

Powers of the National Government

The Constitution, chiefly in the first three articles, delegates legislative, executive, and judicial powers to the national government. In addition to these **express powers**, such as the power to regulate interstate commerce and to appropriate funds, Congress has assumed constitutionally **implied powers**, such as the power to create banks, which are inferred from the express powers. The constitutional basis for the implied powers of Congress is the **necessary and proper clause** (Article I, Section 8, Clause 3). This clause gives Congress the right "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested . . . in the Government of the United States."

In the field of foreign affairs, the Constitution gives the national government **inherent powers**. The national government has the same authority to deal with other nations as if it were the central government in a unitary system. Such inherent powers do not depend on specific constitutional provisions. For example, the government of the United States may acquire territory by purchase or by discovery and occupation, though no specific clause in the Constitution allows such acquisition. Even if the Constitution were silent about foreign affairs—which it is not—the national government would still have the power to declare war, make treaties, and appoint and receive ambassadors.

Together, these express, implied, and inherent powers create a flexible system that allows the Supreme Court, Congress, the president, and the people to expand the central government's powers to meet the needs of a modern nation in a global economy and confronting threats of international terrorism. This expansion of central government functions rests on four constitutional pillars.

These four constitutional pillars—the *national supremacy article,* the *war power,* the *commerce clause,* and most especially, the *power to tax and spend* for the general welfare—have permitted a tremendous expansion of the functions of the national government, so much so that despite the Supreme Court's recent declaration that some national laws exceed Congress's constitutional powers, the national government has, in effect, almost full power to enact any legislation that Congress deems necessary, so long as it does not conflict with the provisions of the Constitution designed to protect individual rights and the powers of the states.

express powers
Powers specifically granted to one of the branches of the national government by the Constitution.

implied powers
Powers inferred from the express powers that allow Congress to carry out its functions.

necessary and proper clause
Clause of the Constitution (Article I, Section 8, Clause 3) setting forth the implied powers of Congress. It states that Congress, in addition to its express powers, has the right to make all laws necessary and proper for carrying out all powers vested by the Constitution in the national government.

inherent powers
The powers of the national government in the field of foreign affairs that the Supreme Court has declared do not depend on constitutional grants but rather grow out of the very existence of the national government.

THE NATIONAL SUPREMACY ARTICLE One of the most important pillars is found in Article VI of the Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." All officials, state as well as national, swear an oath to support the Constitution of the United States. States may not override national policies; this restriction also applies to local units of government, since they are agents of the states. National laws and regulations of federal agencies *preempt* the field so that conflicting state and local regulations are unenforceable.

THE WAR POWER The national government is responsible for protecting the nation from external aggression, whether from other nations or international terrorism. The government's power to protect national security includes the power to wage war. In today's world, military strength depends not only on troops in the field but also on the ability to mobilize the nation's industrial might as well as to apply scientific and technological knowledge to the tasks of defense. The national government has the power to do whatever is necessary and proper to wage war successfully. Thus the national government has the power to do almost anything not in direct conflict with constitutional guarantees.

THE POWER TO REGULATE INTERSTATE AND FOREIGN COMMERCE Congressional authority extends to all commerce that affects more than one state. Commerce includes

AN EXPANDING NATION

A great advantage of federalism—and part of the genius and flexibility of our constitutional system—has been the way in which we acquired territory and extended rights and guarantees by means of statehood, commonwealth, or territorial status, and thus grew from 13 to 50 states, plus territories.

Louisiana Purchase	1803
Florida	1819
Texas	1845
Oregon	1846
Mexican Cession	1848
Gadsden Purchase	1853
Alaska	1867
Hawaii	1898
Philippines	1898–1946
Puerto Rico	1899
Guam	1899
American Samoa	1900
Canal Zone	1904–2000
U.S. Virgin Islands	1917
Pacific Islands Trust Territory	1947

the production, buying, selling, renting, and transporting of goods, services, and properties. The **commerce clause** (Article I, Section 8, Clause 1) packs a tremendous constitutional punch; it gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." In these few words, the national government has been able to find constitutional justification for regulating a wide range of human activity, since very few aspects of our economy today affect commerce in only one state and are thus outside the scope of the national government's constitutional authority.[21]

The broad authority of Congress over interstate commerce was affirmed in the landmark ruling of *Gibbons* v. *Ogden* in 1824. There, in interpreting the commerce clause, Chief Justice John Marshall asserted national interests over those of the states and laid the basis for the subsequent growth in congressional power over commerce and activities that affect interstate commerce.

Gibbons v. *Ogden* arose from a dispute over a monopoly to operate steamboats in New York waters that was granted to Robert Livingston and Robert Fulton. They in turn licensed Aaron Ogden to exclusively operate steamboats between New York and ports in New Jersey. Ogden sued to stop Thomas Gibbons from running a competing ferry. Gibbons countered that his boats were licensed under a 1793 act of Congress governing vessels "in the coasting trade and fisheries." New York courts sided with Ogden in holding that both Congress and the states may regulate commerce, just as each has the power to tax. Congress, therefore, had not preempted New York from granting the monopoly. Gibbons appealed to the Supreme Court.

The stakes were high in *Gibbons* v. *Ogden,* for at issue was the very concept of "interstate commerce." May both Congress and the states regulate interstate commerce? And when conflicts arise between national and state regulations, which prevails?

Chief Justice Marshall asserted that national interests prevail and astutely defined "interstate commerce" as "intercourse that affects more states than one." Unlike the power of taxation, Congress's power over interstate commerce is complete and overrides conflicting state laws.[22]

Gibbons v. *Ogden* was immediately heralded for promoting a national economic common market in holding that states may not discriminate against interstate transportation and out-of-state commerce. Chief Justice Marshall's brilliant definition of "commerce" as *intercourse among the states* provided the basis clause for national regulation of an expanding range of economic activities, from the sale of lottery tickets[23] to prostitution[24] to radio and television broadcasts,[25] and telecommunications and the Internet.

The commerce clause has also been used to sustain legislation that goes beyond commercial matters. When the Supreme Court upheld the Civil Rights Act of 1964, forbidding discrimination because of race, religion, gender, or national origin in places of public accommodation, it said: "Congress's action in removing the disruptive effect which it found racial discrimination has on interstate travel is not invalidated because Congress was also legislating against what it considers to be moral wrongs."[26] Discrimination restricts the flow of interstate commerce; therefore, Congress could legislate against discrimination. Moreover, the law applies even to local places of public accommodation because local incidents of discrimination have a substantial and harmful impact on interstate commerce. The Court, however, has recently limited congressional power to address some other similar harms because it did not find a substantial connection with interstate commerce.[27]

THE POWER TO TAX AND SPEND Congress lacks constitutional authority to pass laws solely on the grounds that they will promote the general welfare, but it may raise taxes and spend money for this purpose. For example, Congress lacks the power to regulate education or agriculture directly, yet it does have the power to appropriate money to support education or to pay farm subsidies. By attaching conditions to its grants of money, Congress may thus regulate what it cannot directly control by law.

When Congress puts up the money, it determines how the money will be spent. By withholding or threatening to withhold funds, the national government can influence

commerce clause
The clause in the Constitution (Article I, Section 8, Clause 1) that gives Congress the power to regulate all business activities that cross state lines or affect more than one state or other nations.

or control state operations and regulate individual conduct. For example, Congress has stipulated that federal funds should be withdrawn from any program in which any person is denied benefits because of race, color, national origin, sex, or physical handicap. Congress also used its power of the purse to force states to raise the drinking age to 21 by tying such a condition to federal dollars for highways.

Congress frequently requires states to do certain things—for example, provide services to indigent mothers and clean up the air and water. These requirements are called **federal mandates**. Often Congress does not supply the funds required to carry out these mandates—called "unfunded mandates"—and its failure to do so has become an important issue as states face growing expenditures with limited resources. The Supreme Court has also ruled that Congress may not compel states through "unfunded mandates" to enact particular laws or require state officials to enforce federal laws, such as, requiring checks on the backgrounds of handgun purchasers.[28]

Powers of the States

The Constitution *reserves for the states all powers not granted to the national government,* subject only to the limitations of the Constitution. Powers not given exclusively to the national government by provisions of the Constitution or by judicial interpretation may be exercised concurrently by the states, as long as there is no conflict with national law. Such **concurrent powers** with the national government include the power to levy taxes and regulate commerce internal to each state.

In general, a state may levy a tax on the same item as the national government does, but a state cannot, by a tax, "unduly burden" commerce among the states, interfere with a function of the national government, complicate the operation of a national law, or abridge the terms of a treaty of the United States. Where Congress has not preempted the field, states may regulate interstate businesses, provided that these regulations do not cover matters requiring uniform national treatment or unduly burden interstate commerce.

Who decides what matters require "uniform national treatment" or what actions might place an "undue burden" on interstate commerce? Congress does, subject to final review by the Supreme Court. When Congress is silent or does not clearly state its intent, the courts—ultimately, the Supreme Court—decide if there is a conflict with the national Constitution or if there has been federal preemption by law or regulation.

Constitutional Limits and Obligations

In order to ensure that federalism works, the Constitution imposes certain restraints on both the national and the state governments. States are prohibited from:

1. Making treaties with foreign governments
2. Authorizing private persons to prey on the shipping and commerce of other nations
3. Coining money, issuing bills of credit, or making anything but gold and silver coin legal tender in payment of debts
4. Taxing imports or exports
5. Taxing foreign ships
6. Keeping troops or ships in time of peace (except the state militia, now called the National Guard)
7. Engaging in war, unless invaded or in such imminent danger as will not admit of delay

The national government, in turn, is required by the Constitution to refrain from exercising its powers, especially its powers to tax and to regulate interstate commerce, in such a way as to interfere substantially with the states' abilities to perform their responsibilities. Today, the protection states have from intrusions by the national government comes primarily from the political process because senators and

federal mandate
A requirement imposed by the federal government as a condition for the receipt of federal funds.

concurrent powers
Powers that the Constitution gives to both the national and state governments, such as the power to levy taxes.

representatives elected from the states participate in the decisions of Congress. However, the Court has held that Congress may not command states to enact laws to comply with or order state employees to enforce unfunded federal mandates; for example, as noted earlier, Congress may not require local law enforcement officials to make background checks prior to handgun sales.[29] It has also ruled that the Eleventh Amendment's guarantee of states' sovereign immunity from lawsuits forbids state employees from suing states in federal and state courts in order to force state compliance with federal employment laws.[30] Although Congress may not use those sticks, it may offer the carrot of federal funding if states comply with national policies, such as establishing a minimum drinking age.

The Constitution also requires the national government to guarantee to each state a "republican form of government." The framers used this term to distinguish a republic from a monarchy, on the one side, and from a pure, direct democracy, on the other. Congress, not the courts, enforces this guarantee and determines what is or is not a republican form of government. By permitting the congressional delegation of a state to be seated in Congress, Congress acknowledges that the state has the republican form of government guaranteed by the Constitution.

In addition, the national government is obliged by the Constitution to protect states against *domestic insurrection*. Congress has delegated to the president the authority to dispatch troops to put down such insurrections when so requested by the proper state authorities. If there are contesting state authorities, the president decides which is the proper one. The president does not have to wait, however, for a request from state authorities to send federal troops into a state to enforce federal laws.

Interstate Relations

Three clauses in the Constitution, taken from the Articles of Confederation, require states to give full faith and credit to each other's public acts, records, and judicial proceedings; to extend to each other's citizens the privileges and immunities of their own citizens; and to return persons who are fleeing from justice.

FULL FAITH AND CREDIT The **full faith and credit clause** (Article IV, Section 1), one of the more technical provisions of the Constitution, requires state courts to enforce the civil judgments of the courts of other states and accept their public records and acts as valid.[31] It does not require states to enforce the criminal laws or legislation and administrative acts of other states; in most cases, for one state to enforce the criminal laws of another would raise constitutional issues. The clause applies especially to enforcement of judicial settlements and court awards.

INTERSTATE PRIVILEGES AND IMMUNITIES Under Article IV, Section 2, states must extend to citizens of other states the privileges and immunities granted to their own citizens, including the protection of the laws, the right to engage in peaceful occupations, access to the courts, and freedom from discriminatory taxes. Because of this clause, states may not impose unreasonable residency requirements, that is, withhold rights to American citizens who have recently moved to the state and thereby have become citizens of that state. For example, a state may not set unreasonable time limits to withhold state-funded medical benefits from new citizens or to keep them from voting. How long a residency requirement may a state impose? A day seems about as long as the Supreme Court will tolerate to withhold welfare payments or medical care, 50 days or so for voting privileges, and one year for eligibility for in-state tuition for state-supported colleges and universities.

Financially independent adults who move into a state just before enrolling in a state-supported university or college may be required to prove that they have become citizens of that state and intend to remain after finishing their schooling by supplying such evidence of citizenship as tax payments, a driver's license, car registration, voter registration, and a continuous, year-round off-campus residence. Students who are financially dependent on their parents remain citizens of the state of their parents.

full faith and credit clause
Clause in the Constitution (Article IV, Section 1) requiring each state to recognize the civil judgments rendered by the courts of the other states and to accept their public records and acts as valid.

IN COMPARATIVE PERSPECTIVE

THREE DIFFERENT APPROACHES TO FEDERALISM

There is no single model for dividing authority between national and state governments or for power sharing in intergovernmental relations. The federal systems in Canada, Germany, and Switzerland are illustrative.

Canada combines a federal system with a parliamentary form of government that has authority to legislate on all matters pertaining to "peace, order, and good government." The system was established in 1867, in part to prevent conflicts similar to those between the states that led to the American Civil War. In each of the ten provinces, the lieutenant governor is appointed on the advice of the prime minister and must approve any provincial law before it goes into effect. The legislative powers of the provinces are thus checked and limited. However, the provinces retain residual powers, and unlike the U.S. Supreme Court, the Canadian judiciary has generally encouraged decentralization in recognition of its multicultural society. Thus Canadian provinces exercise greater power and the national government is weaker than in the United States. In addition, the special status claimed by French-speaking Quebec has led to intergovernmental relations that alternate between periods of centralization and decentralization.

The Federal Republic of Germany, whose Basic Laws of 1949 became the constitution with the reunification of East and West Germany in 1990, is often referred to as an example of cooperative federalism. Its 16 states, or Länder, exercise a great deal of power, far more than states do in the United States. The central government has a president and a bicameral parliament composed of an upper house, the Federal Council, and a lower house, the National Assembly, as well as an independent judiciary. The central government has exclusive authority over foreign affairs, money, immigration, and telecommunications. But the Länder retain residual powers over all other matters and have concurrent powers over civil and criminal law, along with matters related to education, health, and the public welfare. Moreover, national legislation does not become law unless approved by a majority of the Federal Council, whose members are selected by legislatures in the Länder, not by popular elections.

Switzerland established a confederation on the basis of regional governments (cantons). The cantons reflect the ethnic and linguistic differences of their German-, French-, and Italian-speaking populations. All three languages are officially recognized by the central government. But of the 22 cantons, there are 18 that are unilingual, three that are bilingual, and one that is trilingual. They exercise most lawmaking powers and are represented in the National Council, a bicameral legislature, and the Council of States. Recent constitutional reforms further entrenched a tripartite federalism by expressly recognizing the autonomy of cities and munipalities, along with that of cantons and the federal government. As a result, cities and municipalities, unlike in the United States where they are agents of the states, have constitutional status.

For more information on comparative federalism, go to the Web site of the International Political Science Association's Section on Comparative Federalism at www.iu.edu/~soeaweb/IPSA and to the site of the Forum on Federations at www.forumfed.org.

EXTRADITION In Article IV, Section 2, the Constitution asserts that when individuals charged with crimes have fled from one state to another, the state to which they have fled is to deliver them to the proper officials upon the demand of the executive authority of the state from which they fled. This process is called **extradition**. "The obvious objective of the Extradition Clause," the courts have claimed, "is that no State should become a safe haven for the fugitives from a sister State's criminal justice system."[32] Congress has supplemented this constitutional provision by making the governor of the state to which fugitives have fled responsible for returning them. Despite their constitutional obligation, governors of asylum states have on occasion refused to honor a request for extradition.

INTERSTATE COMPACTS The Constitution also requires states to settle disputes with one another without the use of force. States may carry their legal disputes to the Supreme Court, or they may negotiate **interstate compacts**. Interstate compacts often establish interstate agencies to handle problems affecting an entire region. Before most interstate compacts become effective, congressional approval is required. After a compact has been signed and approved by Congress, it becomes binding on all signatory states, and its terms are enforceable by the federal judiciary. A typical state may belong to 20 compacts dealing with such subjects as environmental protection, crime control, water rights, and higher education exchanges.[33]

extradition
Legal process whereby an alleged criminal offender is surrendered by the officials of one state to officials of the state in which the crime is alleged to have been committed.

interstate compact
An agreement among two or more states. The Constitution requires that most such agreements be approved by Congress.

YOU DECIDE

DO WE NEED A MORE RESTRICTED GOVERNMENT IN WASHINGTON?

Whereas in the 1980s President Ronald Reagan pressed to abolish the Department of Education, President George W. Bush signed into law his "No Child Left Behind" education bill, which among other things mandates annual standardized testing of elementary school children by 2005–2006. Some states objected to this legislation. In the aftermath of 9/11 and continuing threats of international terrorism, the Bush administration also increased the government's role in the area of homeland security, including the expanded use of state agencies as "first responders," and in combating illegal immigration. Yet, many states object to the increased financial costs and to the burden of having to track down and report on illegal immigrants in their communities.

Do we need federal standards or can states and localities be trusted to handle most domestic problems in their own way? If the national government sets standards, should it provide the funds but leave the details to the states? Should responsibility for education and welfare be given back to the states? Should states be forced to assume a greater role in improving education, maintaining homeland security, and reporting on illegal immigrants?

THE ROLE OF THE FEDERAL COURTS: UMPIRES OF FEDERALISM

Although the political process ultimately decides how power will be divided between the national and the state governments, the federal courts—and especially the Supreme Court—are often called on to umpire the ongoing debate about which level of government should do what, for whom, and to whom. This role for the courts was claimed in the celebrated case of *McCulloch* v. *Maryland*.

McCulloch Versus *Maryland*

In *McCulloch* v. *Maryland* (1819), the Supreme Court had the first of many chances to define the division of power between the national and state governments.[34] Congress established the Bank of the United States, but Maryland opposed any national bank and levied a $10,000 tax on any bank not incorporated within the state. James William McCulloch, the cashier of the bank, refused to pay on the grounds that a state could not tax an instrument of the national government.

Maryland was represented before the Court by some of the country's most distinguished lawyers, including Luther Martin, who had been a delegate to the Constitutional Convention. Martin said that the power to incorporate a bank was not expressly delegated to the national government in the Constitution. He maintained that the necessary and proper clause gives Congress only the power to choose those means and to pass those laws absolutely essential to the execution of its expressly granted powers. Because a bank is not absolutely necessary to the exercise of its delegated powers, he argued, Congress had no authority to establish it. As for Maryland's right to tax the bank, the power to tax is one of the powers reserved to the states; they may use it as they see fit.

The national government was represented as well by distinguished counsel, including Daniel Webster. Webster conceded that the power to create a bank is not one of the express powers of the national government. However, the power to pass laws necessary and proper to carry out Congress's express powers is specif-

There have been times throughout U.S. history when federal law has superseded state and local law. One example of this in recent history is the Voting Rights Act of 1965, which enforced the voting rights of African Americans in the South. In this photo, African American citizens in Montgomery, Alabama, are registering to vote for the very first time following a march that took place during one of the many voter registration drives of 1964 and 1965.

ically delegated to Congress. Therefore, Congress may incorporate a bank as an appropriate, convenient, and useful means of exercising the granted powers of collecting taxes, borrowing money, and caring for the property of the United States. Although the power to tax is reserved to the states, Webster argued that states cannot interfere with the operations of the national government. The Constitution leaves no room for doubt; in cases of conflict between the national and state governments, the national government is supreme.

Speaking for a unanimous Court, Chief Justice John Marshall rejected every one of Maryland's contentions. He summarized his views on the powers of the national government in these now-famous words: "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 that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Having thus established the doctrine of *implied national powers,* Marshall set forth the doctrine of **national supremacy**. No state, he said, can use its taxing powers to tax a national instrument. "The power to tax involves the power to destroy. . . . If the right of the States to tax the means employed by the general government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation."

The long-range significance of *McCulloch* v. *Maryland* in providing support for the developing forces of nationalism and a unified economy cannot be overstated. The contrary arguments in favor of the states, if they had been accepted, would have strapped the national government in a constitutional straitjacket and denied it powers needed to deal with the problems of an expanding nation.

Federal Courts and the Role of the States

The authority of federal judges to review the activities of state and local governments has expanded dramatically in recent decades because of modern judicial interpretations of the Fourteenth Amendment, which forbids states from depriving any person of life, liberty, or property without *due process of the law.* States may not deny any person the *equal protection of the laws,* including congressional legislation enacted to implement the Fourteenth Amendment. Almost every action by state and local officials is now subject to challenge before a federal judge as a violation of the Constitution or of federal law.

Preemption occurs when a federal law or regulation takes precedence over enforcement of a state or local law or regulation. State and local laws are preempted not only when they conflict directly with federal laws and regulations but also if they touch a field in which the "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[35] Examples of federal preemption include laws regulating hazardous substances, water quality, clean air standards and many civil rights acts, especially the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

Over the years, federal judges, under the leadership of the Supreme Court, have generally favored the powers of the federal government over the states. In spite of the Supreme Court's recent bias in favor of state over national authority, few would deny the Supreme Court the power to review and set aside state actions. As Justice Oliver Wendell Holmes of the Supreme Court once remarked: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[36]

The Great Debate: Centralists Versus Decentralists

From the beginning of the Republic, there has been an ongoing debate about the "proper" distribution of powers, functions, and responsibilities between the national government and the states. Did the national government have the authority to outlaw slavery in the territories? Did the states have the authority to operate racially segregated

Thinking It Through

Centralists argue that state and local officials are often less competent than national officials and tend to be concerned only with the narrow interests of their constituents. State and local governments are more apt to reflect local racial and ethnic biases as well as the biases of dominant local industries. State and local governments are also unable or unwilling to raise the taxes needed to carry out vital governmental functions.

Decentralists counter that increased urbanization has made states more responsive to the needs of communities, and they have become as sensitive to the needs of the poor and minorities as the national government. In recent years, state and local governments have also shown a greater willingness to raise taxes than the national government, and they have reformed and modernized in order to become more effective.

The great debate over which level of government best performs functions continues to rage. The Republican party started its history as the party of the National Union, while the Democrats were then the champion of states' rights, but over the past several decades, there have been changes. After winning control of Congress in the mid-1990s, Republicans led the charge against Washington, demanding the return of functions to the states. Democrats were reluctant to remove all federal standards, especially with respect to regulation of the environment and the workplace, and they generally favored providing minimum standards for programs, especially welfare and health care. More recently, President Bush and Republican leaders in Congress have pushed for expanded federal powers to counter threats to national security, to improve educational standards, and to expand Medicare coverage to include some of the costs of prescription drugs. Democrats in turn have countered that some homeland security programs do not go far enough and others go too far, that funding for education remains inadequate, and that prescription drug coverage will fall short when it takes effect in 2006.

national supremacy
Constitutional doctrine that whenever conflict occurs between the constitutionally authorized actions of the national government and those of a state or local government, the actions of the federal government prevail.

preemption
The right of a federal law or regulation to preclude enforcement of a state or local law or regulation.

schools? Could Congress regulate labor relations? Does Congress have the power to regulate the sale and use of firearms? Does Congress have the right to tell states how to clean up air and water pollution? Even today, as in the past, such debates are frequently phrased in constitutional language, with appeals to the great principles of federalism. But they are also arguments over who gets what, where, when, and how.

During the Great Depression of the 1930s, the nation debated whether Congress had the constitutional authority to enact legislation on agriculture, labor, education, housing, and welfare. Only 40 years ago, some legislators and public officials—as well as some scholars—questioned the constitutional authority of Congress to legislate against racial discrimination. The debate continues between **centralists**, who favor national action, and **decentralists**, who defend the powers of the states and favor action at the state and local levels.

THE DECENTRALIST POSITION Among Americans favoring the decentralist or **states' rights** interpretation were the Antifederalists, Thomas Jefferson, John C. Calhoun, the Supreme Court from the 1920s to 1937, and more recently, Presidents Ronald Reagan and George H.W. Bush, the Republican leaders of Congress, Chief Justice William H. Rehnquist, and Justices Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas.

Most decentralists contend that the Constitution is basically a compact among sovereign states that created the central government and gave it very limited authority. As Justice Clarence Thomas, an ardent advocate of states' rights, wrote in a dissenting opinion supporting the argument that a state has the power to impose term limits on members of Congress, "The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."[37] Thus the national government is little more than an agent of the states, and every one of its powers should be narrowly defined. Any question about whether the states have given a particular function to the central government or have reserved it for themselves should be resolved in favor of the states.

Decentralists hold that the national government should not interfere with activities reserved for the states. The Tenth Amendment, they claim, makes this clear: "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." Decentralists insist that state governments are closer to the people and reflect the people's wishes more accurately than the national government does. The national government, they add, is inherently heavy-handed and bureaucratic; to preserve our federal system and our liberties, central authority must be kept under control.

THE CENTRALIST POSITION The centralist position has been supported by Chief Justice John Marshall, Presidents Abraham Lincoln, Theodore Roosevelt, and Franklin Roosevelt, and throughout most of our history, the Supreme Court.

Centralists reject the whole idea of the Constitution as an interstate compact. Rather, they view the Constitution as a supreme law established by the people. The national government is an agent of the people, not of the states, because it was the people who drew up the Constitution and created the national government. They intended that the central government's powers should be defined by the national political process and is denied authority only when the Constitution clearly prohibits it from acting.

Centralists argue that the national government is a government of all the people, whereas each state speaks only for some of the people. Although the Tenth Amendment clearly reserves powers for the states, it does not deny the national government the authority to exercise, to the fullest extent, all of its powers. Moreover, the supremacy of the national government restricts the states, because governments representing part of the people cannot be allowed to interfere with a government representing all of them.

centralists
People who favor national action over action at the state and local levels.

decentralists
People who favor state or local action rather than national action.

states' rights
Powers expressly or implicitly reserved to the states and emphasized by decentralists.

The Supreme Court and the Role of Congress

From 1937 until the 1990s, the Supreme Court essentially removed federal courts from what had been their role of protecting states from acts of Congress. The Supreme Court broadly interpreted the commerce clause to allow Congress to do whatever Congress thought necessary and proper to promote the common good, even if the federal laws and

regulations infringed on the activities of state and local governments. The Court went so far as to tell the states that they should look to the political process to protect their interests, not to the federal courts.[38]

In the past decade, however, a bare majority of the Supreme Court has signaled that federal courts should no longer remain passive in resolving federalism issues.[39] The Court declared that a state could not impose term limits on its members of Congress, but it did so only by a 5 to 4 vote. Justice John Paul Stevens, writing for the majority, built his argument on the concept of the federal union as espoused by the great Chief Justice John Marshall, as a compact among the people, with the national government serving as the people's agent. By contrast, Justice Clarence Thomas, writing for the dissenters, espoused a view of federalism not heard from a justice of the Supreme Court since prior to the New Deal. He interpreted the Tenth Amendment as requiring the national government to justify its actions in terms of an enumerated power and granting to the states all other powers not expressly given to the national government.[40]

The Court also declared that the clause in the Constitution empowering Congress to regulate commerce with the Indian tribes did not give Congress the power to authorize federal courts to hear suits against a state brought by Indian tribes.[41] Unless states consent to such suits, they enjoy "sovereign immunity" under the Eleventh Amendment. The effect of this decision goes beyond Indian tribes. As a result, except to enforce rights stemming from the Fourteenth Amendment, which the Court explicitly acknowledged to be within Congress's power, Congress may no longer authorize individuals to bring legal actions against states in order to force their compliance with federal law in either federal or state courts.[42]

Building on those rulings, the Court continues to press ahead with its "constitutional counterrevolution"[43] in returning to an older vision of federalism not embraced since the constitutional crisis over the New Deal in the 1930s. Among other recent rulings, the Court struck down the Violence Against Women Act, which had given women who are victims of violence the right to sue their attackers for damages.[44] Congress had found that violence against women annually costs the national economy $3 billion, but the Court held that Congress exceeded its powers in enacting the law and intruded on the powers of the states.

These Supreme Court decisions—most of which split the Court 5 to 4 along ideological lines, with the conservative justices favoring states' rights—may signal a major shift in the Court's interpretation of the constitutional nature of our federal system. Chief Justice Rehnquist, joined by Justices Scalia, Thomas, O'Connor, and frequently Justice Anthony M. Kennedy, have pushed the Court back to a decentralist position. President Clinton's two appointees, Justices Ruth Bader Ginsburg and Stephen Breyer, joined by Justices David Souter and John Paul Stevens, are resisting this movement back to a states' rights interpretation of our federal system. Consequently, federalism issues are likely to come up in future Supreme Court confirmation hearings, and the outcome of presidential elections—which greatly influence who gets appointed to the Supreme Court—could well determine how these and other federalism issues will be decided.

REGULATORY FEDERALISM: GRANTS, MANDATES, AND NEW TECHNIQUES OF CONTROL

Congress authorizes programs, establishes general rules for how the programs will operate, and decides whether and how much room should be left for state or local discretion. Most important, Congress appropriates the funds for these programs and generally has deeper pockets than even the richest states. One of Congress's most potent tools for influencing policy at the state and local levels has been federal grants.

Federal grants serve four purposes, the most important of which is the fourth:

1. To supply state and local governments with revenue.
2. To establish minimum national standards for such things as highways and clean air.

PEOPLE & POLITICS *Making a Difference*

CHIEF JUSTICE WILLIAM H. REHNQUIST

When asked his career plans by his elementary school teacher, William H. Rehnquist recalls saying, "I am going to change the government."* After serving in the army during World War II, he majored in political science at Stanford University and later graduated first in his class from Stanford Law School. He then clerked for a Supreme Court justice and went into private legal practice, while becoming active in Republican politics.

As an assistant attorney general in the administration of President Richard M. Nixon, he was appointed associate justice of the Supreme Court in 1972. In his early years on the Court he emerged as a champion of federalism, limiting the power of the national government and returning power to the states. However, he could not persuade a majority to go along with his views and earned the nickname "Lone Ranger" for writing more dissenting opinions than any other justice at the time. In 1986, President Ronald Reagan elevated him to chief justice. With subsequent changes in the Court's composition, Chief Justice Rehnquist was able to command a bare majority for changing the direction of the Court and reinvigorating debates over federalism.

A major legacy of the Rehnquist Court (1986–) is how it has curbed Congress in defense of the states. Besides resurrecting the rhetoric of states' rights and the Tenth Amendment, Chief Justice Rehnquist has commanded a majority for holding that:

- Congress must make a "plain statement" of its intent to preempt state laws; otherwise the Court will defer to the states.†
- Congress's power over interstate commerce has inherent limits, and it may not compel states to enact laws in compliance with federal standards or compel them to enforce federal laws.‡
- Congress's power under the commerce clause permits it to regulate noneconomic activities but only if they "substantially affect interstate commerce."§
- Congress's power to enforce the Fourteenth Amendment's guarantee of equal protection of the law is limited to remedying violations that the Court recognizes and does not extend to creating rights.‖
- States' immunity from lawsuits, under the Eleventh Amendment, bars lawsuits against them, without their consent, in federal and state courts and by citizens of other states as well as of their own state who seek state compliance with federal laws forbidding, for example, discrimination on the basis of age or disability.¶

In short, Chief Justice Rehnquist has presided over a Court that has curbed the expansion of congressional powers and federal regulations in a renewed defense of the boundaries of federalism.

*Quoted in Craig Bradley, "William H. Rehnquist," in Clare Cushman, ed., *The Supreme Court Justices* (C.Q. Press, 1993), p. 496.
† *Gregory* v. *Ashcroft,* 501 U.S. 452 (1991).
‡ *New York* v. *United States,* 505 U.S. 144 (1992), and *Printz* v. *United States,* 521 U.S. 898 (1997).
§ *United States* v. *Lopez,* 514 U.S. 549 (1995), and *United States* v. *Morrison,* 529 U.S. 598 (2000); but see *Nevada* v. *Hibbs,* 538 U.S. 721 (2003).
‖ *City of Boerne* v. *Flores,* 521 U.S. 507 (1997), and *United States* v. *Morrison,* 529 U.S. 598 (2000).
¶ See, e.g., *Alden* v. *Maine,* 527 U.S. 706 (1998).

3. To equalize resources among the states by taking money from people with high incomes through federal taxes and spending it, through grants, in states where the poor live.
4. To attack national problems yet minimize the growth of federal agencies.

Types of Federal Grants

Three types of federal grants are currently being administered: *categorical-formula grants, project grants,* and *block grants* (sometimes called *flexible grants*). From 1972 to 1987, there was also *revenue sharing*—federal grants to state and local governments to be used at their discretion and subject only to very general conditions. But when

budget deficits soared in the second Reagan administration (1985–1989) and there was no revenue to share, revenue sharing was terminated—to the states in 1986 and to local governments in 1987.

CATEGORICAL-FORMULA GRANTS Congress appropriates funds for specific purposes, such as school lunches or the building of airports and highways. These funds are allocated by formula and are subject to detailed federal conditions, often on a matching basis; that is, the local government receiving the federal funds must put up some of its own dollars. Categorical grants, in addition, provide federal supervision to ensure that the federal dollars are spent as Congress wants. There are hundreds of grant programs, but two dozen, including Medicaid, account for more than half of total spending for categoricals.

PROJECT GRANTS Congress appropriates a certain sum, which is allocated to state and local units and sometimes to nongovernmental agencies, based on applications from those who wish to participate. Examples are grants by the National Science Foundation to universities and research institutes to support the work of scientists or grants to states and localities to support training and employment programs.

BLOCK GRANTS These are broad grants to states for prescribed activities—welfare, child care, education, social services, preventive health care, and health services—with only a few strings attached. States have great flexibility in deciding how to spend block grant dollars, but when the federal funds for any fiscal year are gone, there are no more matching federal dollars.

This maternity clinic is funded in part by federal block grants, which provide federal money to states for various services, such as health care, education, and welfare. States have great flexibility in deciding how to spend block grant dollars.

The Politics of Federal Grants

Republicans "have consistently favored fewer strings, less federal supervision, and the delegation of spending discretion to the state and local governments."[45] Democrats are generally been less supportive of broad discretionary block grants, favoring instead more detailed, federally supervised spending. The Republican-controlled Congress in the 1990s gave high priority to the creation of block grants, but it ran into trouble by trying to lump together welfare, school lunch and breakfast programs, prenatal nutrition programs, and child protection programs in one block grant.

Republicans, however, with President Clinton's support, succeeded in making a major change in federal-state relations—a devolution of responsibility for welfare from the national government to the states. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 put an end to the 61-year-old program of Aid to Families with Dependent Children (AFDC), a federal guarantee of welfare checks for all eligible mothers and children. The 1996 act substituted for AFDC a welfare block grant to each state, with caps on the amount of federal dollars that the state will receive. It also put another big federal child care program into another block grant—the Child Care and Development Block Grant (CCDBG).

Welfare block grants give states flexibility in how they provide for welfare, but no federal funds can be used to cover recipients who do not go to work within two years, and no one can receive federally supported benefits for more than five years. In order to slow down the "race to the bottom" in which states may try to make themselves "the least attractive state in which to be poor,"[46] Congress also stipulated that in order for states to receive their full share of federal dollars, they must continue to spend at least 75 percent of what they had been spending on welfare.

The battle over the appropriate level of government to control funding and to exercise principal responsibility for social programs tends to be cyclical. As one scholar of federalism explains, "Complaints about excessive federal control tend to be followed by proposals to shift more power to state and local governments. Then, when problems arise in state and local administration—and problems inevitably arise when any organization tries to administer anything—demands for closer federal supervision and tighter federal controls follow."[47]

Federal Mandates

Fewer federal dollars do not necessarily mean fewer federal controls. On the contrary, the federal government has imposed mandates on states and local governments, often without providing federal funds. State and local officials complained, and protests from state and local officials against unfunded federal mandates were effective. The Unfunded Mandates Reform Act of 1995 requires the Congressional Budget Office (CBO) and federal agencies to issue reports about the impact of unfunded mandates. The act also imposed some mild constraints on Congress itself. A congressional committee that approves any legislation containing a federal mandate must draw attention to the mandate in its report and describe its cost to state and local governments. If the committee intends any mandate to be partially unfunded, it must explain why it is appropriate for the cost to be borne by state and local governments.

Whether the Unfunded Mandates Reform Act significantly slows down federal mandates remains to be seen. So far, it has had little effect. The Americans with Disabilities Act (1990), for example, called on state and local governments to build ramps and alter curbs—renovations that are costing millions of dollars. Environmental Protection Agency regulations require states to build automobile pollution-testing stations and take other actions to reduce pollution, but without corresponding federal dollars. Still, state officials praise the law for increasing congressional awareness of unfunded mandates. It has forced members of Congress to take into account how a bill would affect state and local governments.[48]

New Techniques of Federal Control

In recent decades, Congress has used several other techniques in establishing federal regulations, including *direct orders, cross-cutting requirements, crossover sanctions,* and *total and partial preemption.*

DIRECT ORDERS In a few instances, federal regulation takes the form of direct orders that must be complied with under threat of criminal or civil sanction. An example is the Equal Employment Opportunity Act of 1972, barring job discrimination by state and local governments on the basis of race, color, religion, sex, and national origin.

CROSS-CUTTING REQUIREMENTS Federal grants may establish certain conditions that extend to all activities supported by federal funds, regardless of their source. The first and most famous of these is Title VI of the 1964 Civil Rights Act, which holds that in the use of federal funds, no person may be discriminated against on the basis of race, color, or national origin. Other laws extend these protections to persons because of gender or disability status. More than 60 cross-cutting requirements concern such matters as the environment, historic preservation, contract wage rates, access to government information, the care of experimental animals, and the treatment of human subjects in research projects.

CROSSOVER SANCTIONS These sanctions permit the use of federal money in one program to influence state and local policy in another. For example, a 1984 act reduced federal highway aid by up to 15 percent for any state that failed to adopt a minimum drinking age of 21.

TOTAL AND PARTIAL PREEMPTION Total preemption rests on the national government's power under the supremacy and commerce clauses to preempt conflicting state and local activities. Building on this constitutional authority, federal law in certain areas entirely preempts state and local governments from the field.[49] Sometimes federal law provides for partial preemption in establishing basic policies but requiring states to administer them. Some programs give states an option not to participate, but if a state chooses not to do so, the national government steps in and runs the program. Even worse from the states' point of view is *mandatory partial preemption,* in which the national government requires states to act on peril of losing other funds but provides no funds to support state action. The Clean Air Act of 1990 is an example of mandatory partial preemption; the federal government set national air quality standards and

required states to devise plans and pay for their implementation.[50] Homeland security legislation is another example of the national government providing some funds but requiring states to provide services as "first responders" that cost more than federal funds cover.

THE POLITICS OF FEDERALISM

The formal structures of our federal system have not changed much since 1787, but the political realities, especially during the past half-century, have greatly altered how federalism works. To understand these changes, we need to look at some of the trends that continue to fuel the debate about the meaning of federalism.

The Growth of Big Government

Over the past two centuries, power has accrued to the national government. "No one planned the growth, but everyone played a part in it."[51] How did this shift come about? For a variety of reasons. One is that many of our problems have become national in scope. Much that was local in 1789, in 1860, or in 1930 is now national, even global. State governments could supervise the relations between small merchants and their few employees, but only the national government can supervise relations between multinational corporations and their thousands of employees, many of which are organized in national unions.

As industrialization proceeded, powerful interests made demands on the national government. Business groups called on the government for aid in the form of tariffs, a national banking system, subsidies to railroads and the merchant marine, and uniform rules relating to the environment. Farmers learned that the national government could give more aid than the states, and they too began to demand help. By the beginning of the twentieth century, urban groups in general and organized labor in particular pressed their claims. Big business, big agriculture, and big labor all added up to big government.

The growth of the national economy and the creation of national transportation and communications networks altered people's attitudes toward the national government. Before the Civil War, the national government was viewed as a distant, even foreign, government. Today, in part because of television and the Internet, most people know more about Washington than they know about their state capitals. People are apt to know more about the president than about their governor and more about their national senators and representatives than about their state legislators or even about the local officials who run their cities and schools.

The Great Depression of the 1930s stimulated extensive national action on welfare, unemployment, and farm surpluses. World War II brought federal regulation of wages, prices, and employment, as well as national efforts to allocate resources, train personnel, and support engineering and inventions. After the war, the national government helped veterans obtain college degrees and inaugurated a vast system of support for university research. The United States became the most powerful leader of the free world, maintaining substantial military forces even in times of peace. The Great Society programs of the 1960s poured out grants-in-aid to states and localities. City dwellers who had migrated from the rural South to northern cities began to seek federal funds for—at the very least—housing, education, and mass transportation.

Although economic and social conditions created many of the pressures for expansion of the national government, so did political claims. Until federal budget deficits became a hot issue in the 1980s and early 1990s, members of Congress, presidents, federal judges, and federal administrators actively promoted federal initiatives. Even with the return of deficit spending in the 2000s, Congress appears willing to actively promote some federal programs, at least in the areas of homeland security and prescription drug coverage. True, when there is widespread conflict about what to do—how to reduce the federal deficit, adopt a national energy policy, reform Social Security, provide health care for the indigent—Congress waits for a national consensus. But when an organized constituency wants something and there is no counterpressure, Congress "responds

often to everyone, and with great vigor."[52] Once established, federal programs generate groups with vested interests in promoting, defending, and expanding them. Associations are formed and alliances are made. "In a word, the growth of government has created a constituency of, by, and for government."[53]

The politics of federalism are changing, however, and Congress is being pressured to reduce the size and scope of national programs, but at the same time to deal with the demands for homeland security. Meanwhile, the cost of entitlement programs such as Social Security and Medicare are going up because there are more older people and they are living longer. These programs have widespread public support, and to cut them is politically risky. "With all other options disappearing, it is politically tempting to finance tax cuts by turning over to the states many of the social programs . . . that have become the responsibility of the national government."[54]

The Devolution Revolution: Rhetoric Versus Reality

Recent Congresses, like their predecessors, have increased the authority of the national government in many areas. To be sure, the Republican-controlled Congress in the 1990s returned some functions, especially welfare, to the states. President Clinton also proclaimed, "The era of big government is over," though he tempered his comments by saying, "But we cannot go back to the time when our citizens were left to fend for themselves." Congress and the president came together for a major overhaul of welfare and, to a lesser degree, education. Congress also freed the states to set their own highway speed limits, changed the Safe Drinking Water Act to allow states to operate certain programs, and gave states a greater role over how federal rural development funds may be used.

In the aftermath of the attacks on the World Trade Center and the Pentagon and in confronting the continuing threats of terrorism, the role of the federal government in defending homeland security has expanded. Congress also established national criteria for state-issued drivers' licenses, forbade states from selling drivers' personal information, ended state regulation of mutual funds, nullified state laws restricting telecommunications competition, and made a host of offenses federal crimes, including carjacking and acts of terrorism. Appropriation bills pressured states to keep criminals behind bars by threatening to take grants away from states that fail to meet federal standards. Indeed, the only two major achievements of the devolution revolution remain the 1996 reform of welfare and the repeal of a national speed limit.[55] As one reporter concluded, "The 'devolution' promised by Congressional Republicans . . . has mostly fizzled. Instead of handing over authority to state and local governments, they're taking it away."[56]

THE FUTURE OF FEDERALISM

In 1933, during the Great Depression, with state governments helpless, one writer stated, "I do not predict that the states will go, but affirm that they have gone."[57] Such prophets of doom were wrong; the states are stronger than ever. During recent decades, state governments have undergone a major transformation. Most have improved their governmental structures, taken on greater roles in funding education and welfare, launched programs to help distressed cities, expanded their tax bases, and are assuming greater roles in maintaining homeland security and fighting corporate corruption. Able men and women have been attracted to the governorship. "Today, states, in formal representational, policy making, and implementation terms at least, are more representative, more responsive, more activist, and more professional in their operations than they ever have been. They face their expanded roles better equipped to assume and fulfill them."[58]

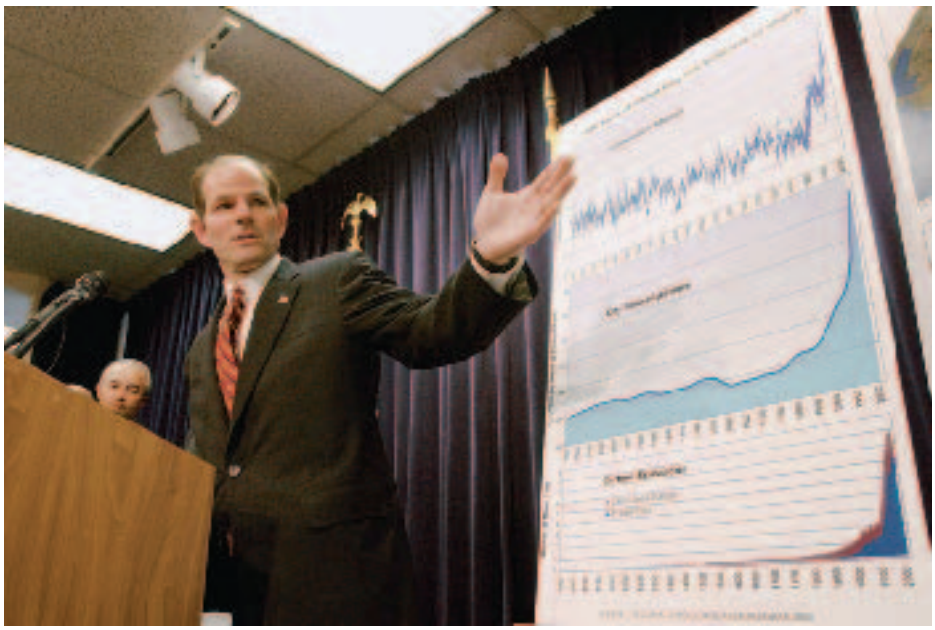
After the civil rights revolution of the 1960s, segregationists feared that national officials would work for racial integration. Thus they praised local government, emphasized the dangers of centralization, and argued that the protection of civil rights was

not a proper function of the national government. As one political scientist observed, "Federalism has a dark history to overcome. For nearly two hundred years, states' rights have been asserted to protect slavery, segregation, and discrimination."[59]

Today the politics of federalism, even with respect to civil rights, is more complicated than in the past. The national government is not necessarily more favorable to the claims of minorities than state or city governments are. Rulings on same-sex marriages and "civil unions" by state courts interpreting their state constitutions have extended more protection for these rights than has the Supreme Court's interpretation of the U.S. Constitution. Other states, however, are passing legislation that would eliminate such protections, and opponents are pressing for a constitutional amendment to bar same-sex marriages.

States are also increasingly aggressive in addressing economic and environmental matters. State attorneys general are prosecuting anticompetitive business practices, as they did in joining the suit against Microsoft and, more recently, as New York attorney general Eliot Spitzer did in suing the mutual fund industry and spammers. After the Bush administration abandoned 50 investigations into violations of the Clean Air Act and changed policy on the regulation of power plants, Spitzer and several other state attorneys general sued the Bush administration and power plant companies to force them to make pollution-control improvements.[60] Business interests have argued that conflicting state regulations unduly burden interstate commerce and have sought broader preemptive federal regulation in order to save them not only from stringent state regulations but also from the uncertainties of complying with 50 different state laws. As a lawyer representing trade groups in the food and medical devices industries observed: "One national dumb rule is better than 50 inconsistent rules of any kind."[61]

The national government is not likely to retreat to a pre-1930 posture or even a pre-1960 one. Indeed, the underlying economic and social conditions that generated the demand for federal action have been altered substantially by international terrorism, the war in Afghanistan and Iraq, and rising deficits. In addition to such traditional issues as helping people find jobs and preventing inflation and depressions—which still require national action—countless new issues have been added to the national agenda by the growth of a global economy based on the information explosion, e-commerce, advancing technologies, and combating international terrorism.



New York Attorney General Eliot Spitzer was one of several state attorneys general to sue the Bush administration and power plant companies over pollution control.

Most Americans have strong attachments to our federal system—in the abstract. They remain loyal to their states and show a growing skepticism about the national government. Yet, evidence suggests the anti-Washington sentiment "is 3,000 miles wide but only a few miles deep."[62] The fact is that Americans are pragmatists: We appear to prefer federal-state-local power sharing[63] and are prepared to use whatever level of government necessary to meet our needs and new challenges.

SUMMARY

1. A federal system is one in which the constitution divides powers between the central government and subdivisional governments—states or provinces. Alternatives to federalism are unitary systems, in which all constitutional power is vested in the central government, and confederations, which are loose compacts among sovereign states.
2. Federal systems check the growth of tyranny, allow unity without uniformity, encourage state experimentation, permit power sharing between the national government and the states, and keep government closer to the people.
3. The national government has the constitutional authority, stemming primarily from the national supremacy clause, the war powers, and its powers to regulate commerce among the states to tax and spend, to do what Congress thinks is necessary and proper to promote the general welfare and to provide for the common defense. These constitutional pillars have permitted tremendous expansion of the functions of the federal government.
4. States must give full faith and credit to each other's public acts, records, and judicial proceedings; extend to each others' citizens the privileges and immunities it gives its own; and return fugitives from justice.
5. The federal courts umpire the division of power between the national and state governments. The Marshall Court, in decisions such as *Gibbons* v. *Ogden* and *McCulloch* v. *Maryland,* asserted the power of the national government over the states and promoted a national economic common market. These decisions also reinforced the supremacy of the national government over the states.
6. Today, debates about federalism are less often about its constitutional structure than about whether action should come from the national or state and local levels. Recent Supreme Court decisions favor a decentralist position and signal shifts in the Court's interpretation of the constitutional nature of our federal system.
7. The major instruments of federal intervention in state programs have been various kinds of financial grants-in-aid, of which the most prominent are categorical-formula grants, project grants, and block grants. The national government also imposes federal mandates and controls some activities of state and local governments by other means.
8. Over the past 218 years, power has accrued to the national government, but recently Congress has been pressured to reduce the size and scope of national programs and to shift some existing programs back to the states. Although responsibility for welfare has been turned over to the states, the authority of the national government has increased in many other areas.

KEY TERMS

devolution revolution
federalism
unitary system
confederation
express powers
implied powers
necessary and proper clause
inherent powers
commerce clause
federal mandate
concurrent powers
full faith and credit clause
extradition
interstate compact
national supremacy
preemption
centralists
decentralists
states' rights

FURTHER READING

SAMUEL H. BEER, *To Make a Nation: The Rediscovery of American Federalism* (Harvard University Press, 1993).

CENTER FOR THE STUDY OF FEDERALISM, *The Federalism Report* (published quarterly by Temple University; this publication notes research, books and articles, and scholarly conferences).

CENTER FOR THE STUDY OF FEDERALISM, *Publius: The Journal of Federalism* (published quarterly by Temple University; one issue each year is an "Annual Review of the State of American Federalism"; and has a Web site at www.lafayette.edu/~publius).

TIMOTHY J. CONLAN, *From New Federalism to Devolution: Twenty-Five Years of Intergovernmental Reforms* (Brookings Institution, 1998).

DANIEL J. ELAZER AND JOHN KINCAID, *The Covenant Connection: From Federal Theology to Modern Federalism* (Lexington Books, 2000).

JOHN FEREJOHN AND BARRY WEINGAST, *The New Federalism: Can the States Be Trusted?* (Hoover Institute Press, 1998).

FRANK GOODMAN, ED., *The Supreme Court's Federalism: Real or Imagined?* (Sage, 2001).

NEIL C. MCCABE, ED., *Comparative Federalism in the Devolution Era* (Rowman & Littlefield, 2002).

FORREST MCDONALD, *States' Rights and the Union: Imperim in Imperio, 1776–1876* (Univeristy Press of Kansas, 2000).

KALYPSO NICOLAIDIS AND ROBERT HOWSE, EDS., *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001).

JOHN T. NOONAN, *Narrowing the Nation's Power: The Supreme Court Sides with the States* (University of California Press, 2002).

DAVID M. O'BRIEN, *Constitutional Law and Politics: Struggles for Power and Governmental Accountability,* 6th ed. (Norton, 2005).

LAURENCE J. O'TOOLE JR., *American Intergovernmental Relations,* 3d ed. (CQ Press, 2000).

PAUL J. POSNER, *The Politics of Unfunded Mandates: Whither Federalism?* (Georgetown University Press, 1998).

WILLIAM H. RIKER, *The Development of American Federalism* (Academic, 1987).