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# A M E R I C A N D E M O C R A C Y N O W

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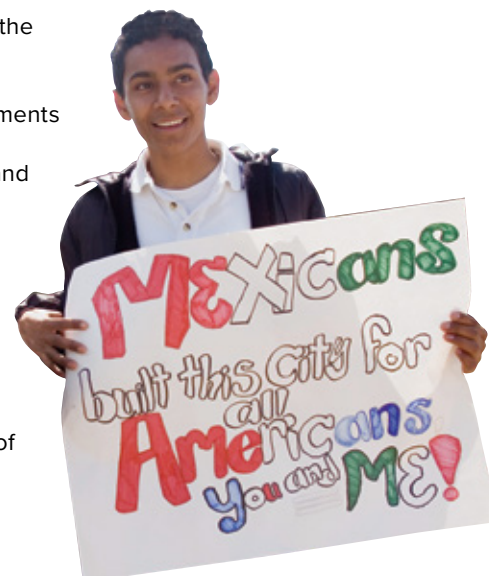
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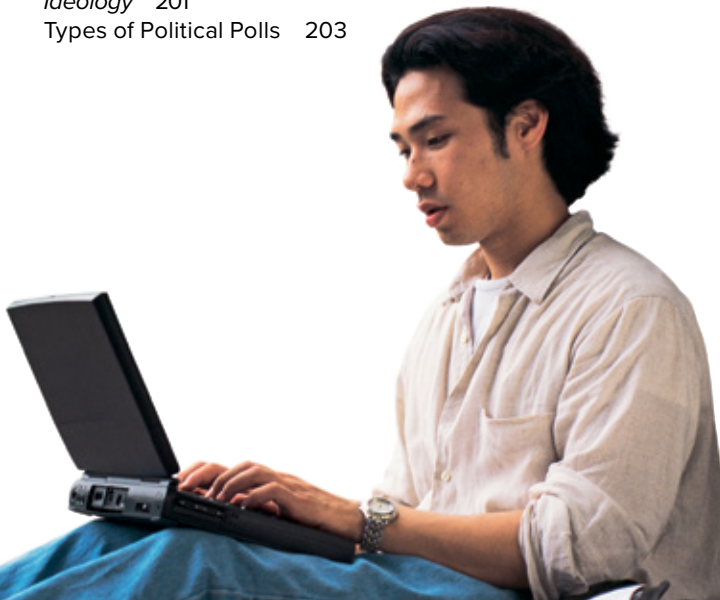
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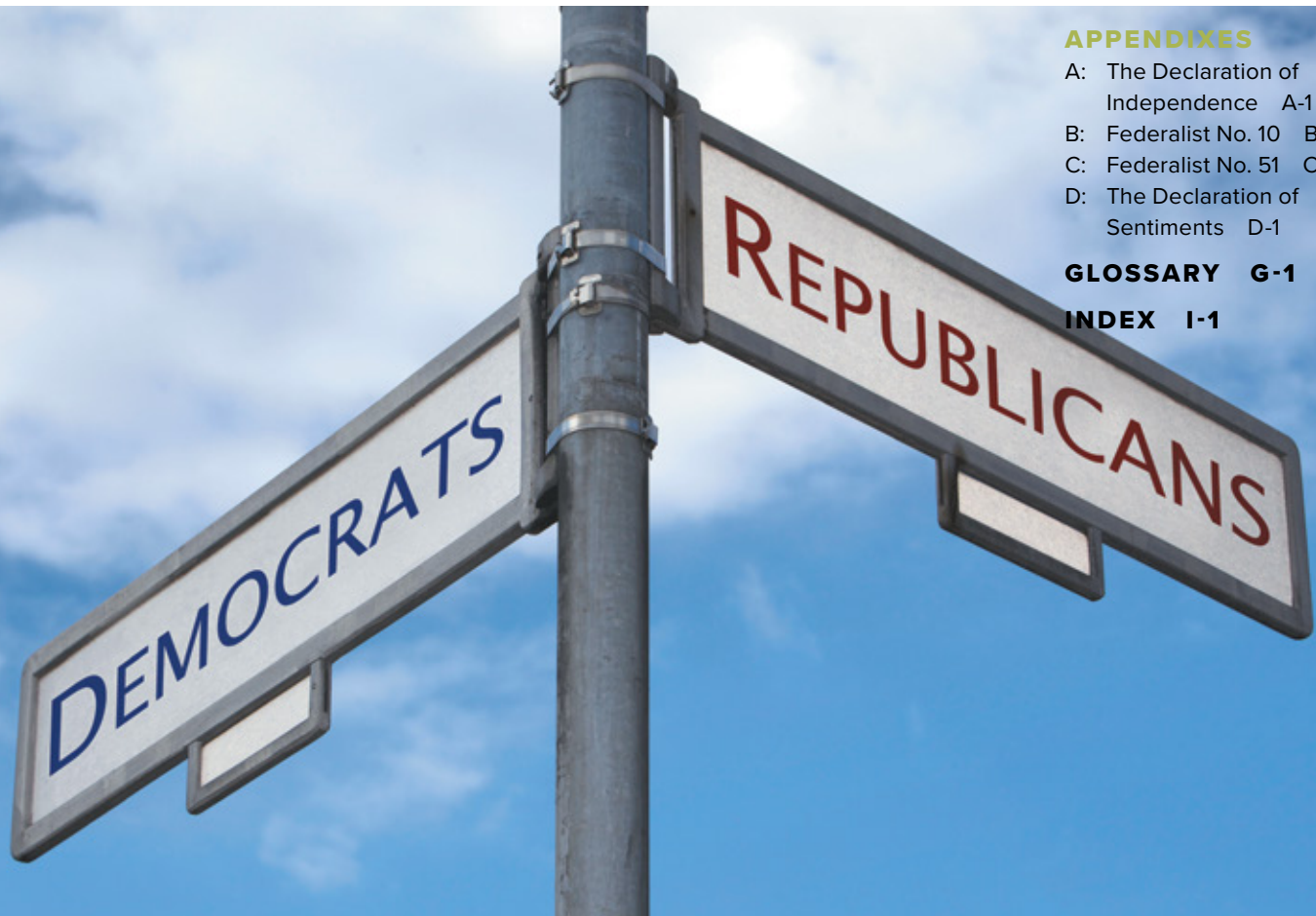
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# CHAPTER 3 Federalism



## ➡ THEN

The newly created national government and the preexisting state governments acted independently as they implemented the innovative federal system of government established in 1789.

## ➡ NOW

National, state, and local governments challenge one another regularly over the proper interpretation of the Constitution's vague and ambiguous distribution of power in the federal system of U.S. government.

## ➡ NEXT

Will Supreme Court justices continue to issue conflicting interpretations of the proper balance of power in the federal system of government?

Will state and local governments continue their policy experiments to find more effective means of addressing domestic problems?

Will the gridlock in Congress continue, fueling state and local governments to enact laws to fill national policy silences at the risk of infringing on national sovereignty?

## AP ESSENTIAL KNOWLEDGE

**PMI-1.B.1** Multiple access points for stakeholders and institutions to influence public policy flows from the separation of powers and checks and balances.

**CON-2.C.2** National policymaking is constrained by the sharing of power between and among the three branches and the state governments.

**CON-2.A.1** The exclusive and concurrent powers of the national and state governments help explain the negotiations over the balance between the two levels.

**CON-2.B.1** The interpretation of the 10th and 14th Amendments, the commerce clause, the necessary and proper clause, and other enumerated and implied powers is at the heart of the debate over the balance of power between the national and state governments.

**CON-2.B.2** The balance of power between the national and state governments has changed over time based on U.S. Supreme Court interpretation of such cases as:

- *McCulloch v. Maryland*
- *United States v. Lopez*

# AP Introduction

Chapter 3 of American Democracy covers one of the most important units in AP U.S. Government and Politics: federalism. Its importance stems from the fact that federalism dictates policymaking from multiple governments and tells us a lot about how policymaking on controversial issues has evolved over the centuries, and why our democracy is enhanced because of federalism. As you study this chapter, explore the complex and changeable relationship between the national and state governments. Notice that the lines dividing power between the national government and the states are blurry, and, in practice, the balance of powers between the two levels of government is constantly in flux. Understand that federalism does not mean separation of powers. The United States has a federal system of government where the states and national government exercise separate powers within their own spheres of authority, not between the branches of government. Recognize distinct periods of federalism that are often associated with creative (but not always precise) metaphors such as dual federalism, cooperative federalism, centralized federalism and new federalism. Finally, understand the role of the Supreme Court and Congress in the settling of disputes between the states and the national government that is central to today's discussions on public policy.

Throughout your AP government course, you will be returning to the major themes outlined in Chapter 3:

- How the major enumerated, reserved, concurrent, and implied constitutional powers affect the impact of federalism throughout time
- The importance of the Commerce Clause in expanding the role of the federal government
- The ideological divide between conservatives and liberals over their interpretation of federalism, and policymaking examples that reflect this debate

## An Overview of the U.S. Federal System

The U.S. Constitution established an innovative and unique government structure, a federal system. A **federal system** has two constitutionally recognized levels of government, each with *sovereignty*—that is, ultimate governing authority, with no legal superior—over different policy matters and geographic areas. According to the Constitution, the national government has ultimate authority over some matters, and the state governments hold ultimate authority over different matters. In addition, the national government's jurisdiction covers the entire geographic area of the nation, and each state government's jurisdiction covers the geographic area within the state's borders. The existence of two levels of government, each with ultimate authority over different matters and geographic areas—an arrangement called *dual sovereignty*—is what distinguishes the federal system of government from the two other most common systems of government worldwide, known as the unitary system and the confederal system. The American colonists' experience with a unitary system, and subsequently the early U.S. citizens' life under a confederal system (1781–1788), led to the creation of the innovative federal system.



## PREVIEW

This chapter examines the nature and evolution of the constitutional distribution of authority between the national and state governments in the U.S. federal system of government.

**FIRST**, we provide an overview of the U.S. federal system, its distinct dual sovereignty, and what it means for U.S. citizens today.

**SECOND**, we explore the details of dual sovereignty by considering the constitutional distribution of authority between the national and the state governments.

**THIRD**, we focus on the evolution of the federal system and see how the relationship between the national and state governments has evolved over time.

**FOURTH**, we survey the complex intergovernmental relations that dominate U.S. federalism now, discussing advantages and disadvantages of today's federal system.

● This symbol denotes a key **AP U.S. Government** term.

● **federal system**

A governmental structure with two levels of government in which each level has sovereignty over different policy matters and geographic areas; a system of government with dual sovereignty.



### ● unitary system

A governmental system in which one central government is *the* sovereign government and it creates other, regional governments to which it delegates some governing powers and responsibilities; however, the central government retains ultimate authority (sovereignty).

## Unitary System

Colonial Americans lived under Great Britain's unitary system of government. Today, the majority of countries in the world have unitary governments. In a **unitary system**, the central government is *the* sovereign government. It can create other governments (regional governments) and delegate governing powers and responsibilities to them. In addition, the sovereign central government in a unitary system can unilaterally take away any governing powers and responsibilities it delegated to the regional governments it created. Ultimately, the sovereign central government can even eliminate the regional governments it created.

Indeed, under Britain's unitary system of government during the American colonial period, the British Crown (the sovereign central government) created colonial governments (regional governments) and gave them authority to handle day-to-day matters such as regulating marriages, resolving business conflicts, providing for public safety, and maintaining roads. As the central government in Britain (with no representatives from the colonies) approved tax and trade policies that harmed the colonists' quality of life, growing public discourse and dissension spurred the colonists to protest. The colonists' failed attempts to influence the central government's policies eventually sparked more radical acts such as the Boston Tea Party and ultimately the colonists' declaration of independence from Great Britain.

## Confederal System

When the colonies declared their independence from Great Britain in 1776, each colony became an independent sovereign state and adopted its own constitution. As a result, no state had a legal superior; each was *the* sovereign government for its geographic area. In 1777, delegates from every state except Rhode Island met in a convention and agreed to a proposed alliance of the 13 sovereign state governments. In 1781, the 13 independent state governments ratified the Articles of Confederation, the first constitution of the United States, which created a confederal system of government.

In a **confederal system**, several independent sovereign governments (such as the first 13 state governments in the case of the United States of America) agree to cooperate on specified policy matters while each sovereign state retains ultimate authority over all other governmental matters within its borders. The cooperating sovereign state governments delegate some governing responsibilities to a central governing body. Each sovereign government selects its own representatives to the central governing body. However, in a confederal system, the sovereign state governments retain ultimate authority and can modify or even eliminate governing responsibilities they agreed to delegate to the central government.

As detailed in Chapter 2, the effectiveness of the confederal system of government created by the Articles of Confederation quickly came into question. Economic problems and domestic rebellions sparked calls to fix the defects of the confederal system. In February 1787, the national Congress (the central governing body created by the sovereign states) passed a resolution calling for a constitutional convention “for the sole and express purpose of revising the Articles of Confederation” in order to preserve the union. Clear-eyed about the failures of the unitary system they experienced as British colonies, and the confederal system, the citizens of the United States decided to experiment with a unique government system—a federal system. The federal system created by the Constitution of the United States has succeeded in strengthening and preserving the union first established by the Articles of Confederation.

## Federal System

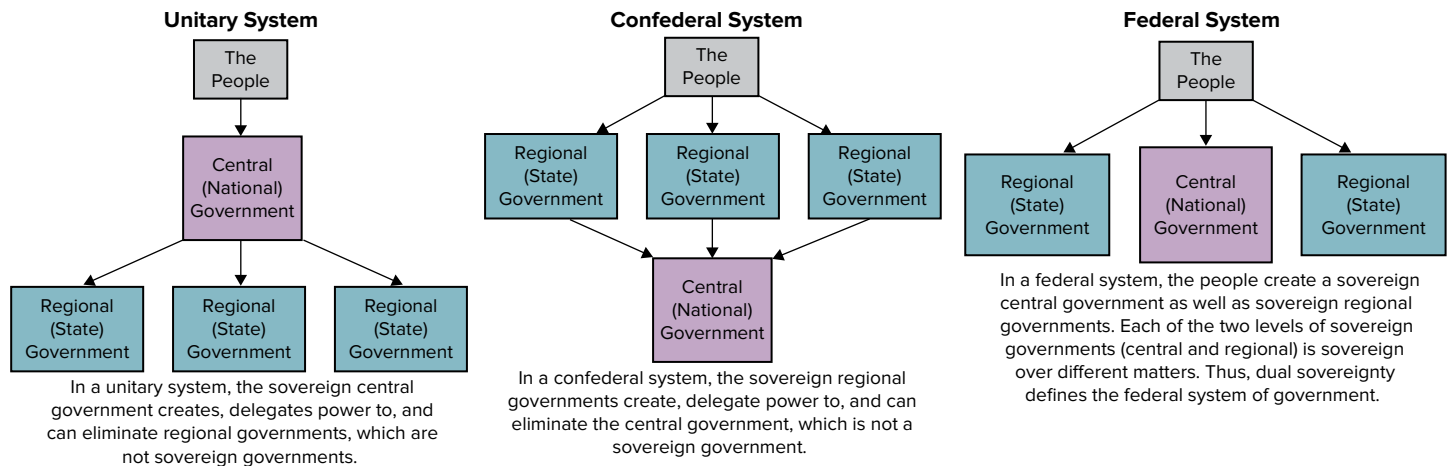
The state delegates who met in Philadelphia in 1787 drafted a new constitution that created the federal system with dual sovereignty. The Constitution's framers established dual sovereignty by detailing a new, sovereign national government for the United States and modifying the sovereignty of the existing state governments. The sovereign national government thus created has no legal superior on matters over which the Constitution gives it authority, and the sovereign state governments have no legal superior on the matters which the Constitution grants to them.

Such dual sovereignty does not exist in unitary or confederal systems, where sovereignty is held by one level of government (the central government in a unitary system and the regional governments in a confederal system). Figure 3.1 compares the three types of governing systems.

### ● confederal system

A government structure in which several independent sovereign states agree to cooperate on specified policy matters by creating a central governing body; each sovereign state retains ultimate authority over other governmental matters within its borders, so the central governing body is not a sovereign government.

**AP KEY FIGURE** **FIGURE 3.1** ■ **Three Governing Systems** What does it mean to be a sovereign government? Distinguish between the three systems of government by explaining what level, or levels, of government holds sovereignty in each system.



The federal system, as it works in the United States today, can be confusing—not only to citizens but also to government officials. The confusion is a product of at least three factors. First, vague constitutional language that distributes sovereignty between two levels of government, the national government and the state governments, fuels questions about which government is sovereign over specific matters. Second, state governments have established tens of thousands of local governments—a third level of government—delegating some governing powers and responsibilities to them, to assist the state in serving its citizens. The relationship between a state government and the local governments it creates follows the *unitary system* of government; the sovereign state government retains ultimate authority over all the matters it delegates to its local governments, can remove power and responsibilities it delegates to its local governments, and ultimately can eliminate any local government it creates. Today there are more than 89,400 local governments in the United States. (See Figure 3.2 for the number of local governments in each state.)

Adding to the confusion of the federal system is the fact that today most services and benefits citizens receive are a product of collaborative efforts by two or more governments. To serve its people, a government must have the authority to formulate and approve a plan of action, raise and spend money to finance the plan, and hire workers to put the plan into action. Therefore, all public policies have three elements: the policy *statement*, the policy *financing*, and the policy *implementation*. In the U.S. federal system today, the responsibility for these three elements of any given public policy may rest entirely with one level of government (national, state, or local), or may be shared in a collaborative effort by two or more of these levels. Political scientists label the interactions of two or more governments (national, state, and local) in their collective efforts to provide goods and services to the people they serve **intergovernmental relations (IGR)**. Today, IGR is a dominant characteristic of the U.S. federal system of government.

#### intergovernmental relations (IGR)

The interactions of two or more governments (national, state, and local) in their collective efforts to provide goods and services to the people they each serve.

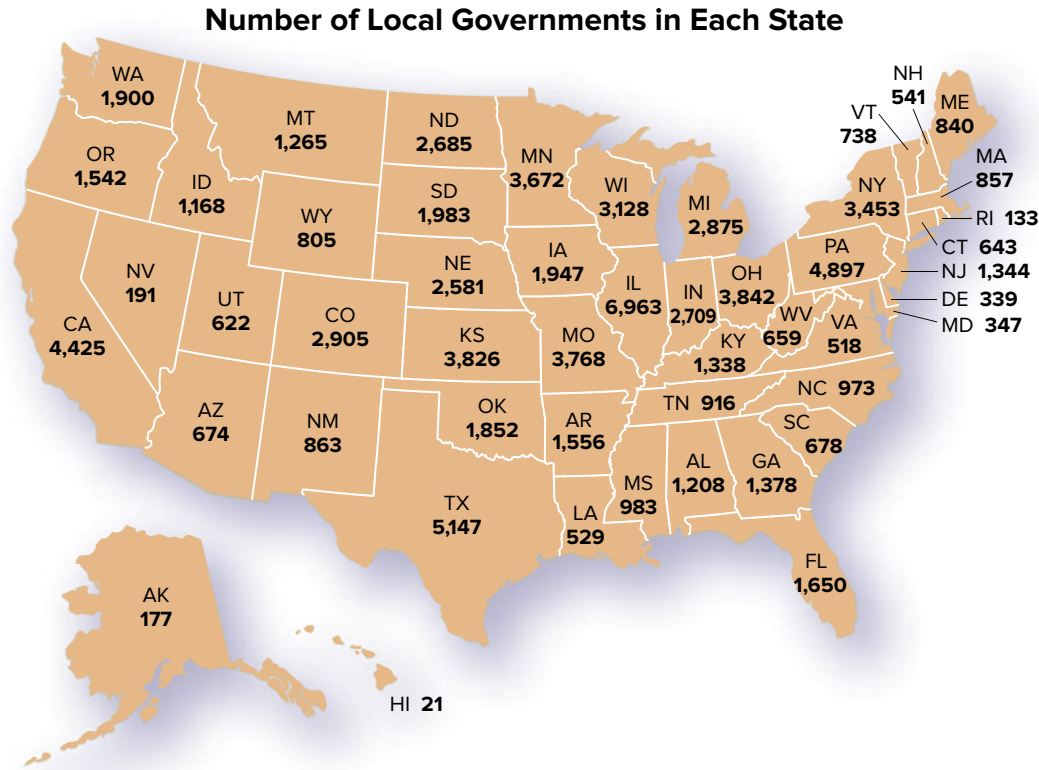
### What the Federal System Means for U.S. Citizens

For U.S. citizens, living in a federal system of government means that their legal rights and liberties and their civic responsibilities vary depending on where they live, as do the public goods and services they receive. The majority of U.S. citizens live under the jurisdiction of at least five governments: national, state, county (called *borough* in Alaska and *parish* in Louisiana), municipal or township, and school district.

Each of these governments can impose responsibilities on the people living in its jurisdiction. The most obvious responsibility is to pay taxes. These taxes can include the national personal

**FIGURE 3.2** ■ **Number of Local Governments in Each State** What might explain the range in the number of local governments that exist in the 50 states? Do the states with the largest geographic area have the largest number of local governments? Are there regional patterns? Do states with smaller populations have fewer local governments?

**SOURCE:** American Fact Finder, "Local Governments by Type and State 2012," [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG\\_2012\\_ORG02.US01&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=COG_2012_ORG02.US01&prodType=table).



income tax; state sales and personal income taxes; and county, municipal/township, and school district property taxes. Other responsibilities include complying with the laws (constitution, legislation, rules, and regulations) enacted by each government in whose jurisdiction you live. Laws vary from state to state, county to county, city to city, and school district to school district.

Each state and local government can enact laws to regulate behaviors, as long as the law does not violate rights and liberties established in the U.S. Constitution. For example, while some states have tight gun control laws, other states do not, and some local governments even require citizens to have a gun in their home.<sup>2</sup> On January 1, 2016, Hawaii became the first state to raise the legal age for the purchase of tobacco products and electronic smoking devices from 18 years to 21 years. Several cities also have increased the legal age for purchasing tobacco products to 21 years, including New York City and Cleveland, Ohio.<sup>3</sup>

Each government can also guarantee personal liberties and rights. The Constitution lists individual liberties in the Bill of Rights. In addition, every state constitution has its own bill of rights, and some local governments offer further protections to their citizens. For example, some cities and counties prohibit discrimination in employment and public accommodations based on an individual's sexual orientation, yet most states do not, nor does the national government.

Clearly, people's rights and responsibilities vary depending on where they live in the United States (as discussed further in Chapter 4). Thus, the federal system can be confusing for citizens. It can also be confusing for the many governments created to serve the people. Which government is responsible for what services and policies? Because the Constitution of the United States

is the supreme law of the land, it is to the Constitution that we must turn to answer that question. Yet constitutional language is not always clear. As we saw in Chapter 2, the framers hammered out the Constitution through intensive bargaining and compromise that produced a text that is often vague and ambiguous.

Also as discussed in Chapter 2, the U.S. Supreme Court has the authority to determine what the Constitution means and hence what is constitutional. This authority came from the Court's decision in the *Marbury v. Madison* case (1803), in which the justices established the principle of *judicial review*: the Court's authority to determine whether an action of any government operating within the United States violates the Constitution.<sup>4</sup>

Although the Supreme Court is the final interpreter of the Constitution, the Court's interpretations have changed over time. For example, it is true that dual sovereignty—and therefore a federal system—still exists in the United States today, but the courts have interpreted the Constitution in such a way that the authority of the national government has expanded significantly over the past 225-plus years. In addition, the determination of which government has ultimate authority over specific matters has become even less clear. This is because intergovernmental relations among the levels of government has evolved as they work together to meet the responsibilities that the Constitution delegates, implies, or reserves to them (in the case of the national and state governments), or the responsibilities that a state delegates to its local governments.

Later in this chapter, we consider this evolution of the U.S. federal system. Before we do, it is useful to examine the constitutional distribution of authority to the national and state governments.

## Constitutional Distribution of Authority

By distributing some authority to the national government and different authority to the state governments, the Constitution creates the dual sovereignty that defines the U.S. federal system. (The “Global Context” feature explores the distribution of authority in the federal systems of Canada and Mexico.) The Constitution lists the several matters over which the national government has ultimate authority, and it implies additional national authority. The Constitution spells out just a few matters over which the state governments have authority. The Constitution lacks detail on state authority in part because, at the time of the Constitution's drafting, the states expected to retain their authority, except for matters that, by way of the Constitution, they agreed to turn over to the newly created national government.

To fulfill their responsibilities to their citizens, both the national and the state governments have the authority to engage in basic governing functions inherent to all sovereign governments. The powers that are exercised by both the national and state governments are the first topic in this section.

### Concurrent Powers

To function, sovereign governments need basic governing powers such as the authority to make policy, raise and spend money, implement policies, and establish courts to interpret law when a conflict arises about its meaning. In the U.S. federal system, these basic governing powers are **concurrent powers** because the national government and all state governments exercise them, independently and at the same time. For example, national and state governments make their own public policies, raise their own revenues, and spend their revenues to implement their policies. In addition, the national court system resolves conflicts over the interpretation of national laws and each state has its own court system to resolve conflicts over its state laws. State governments delegate some concurrent powers to the local governments they create so that the local governments can govern. Table 3.1 lists concurrent powers of the national and the state governments.

In addition to the basic governing powers that the national and state governments hold concurrently, in the federal system, the national government and the state governments have sovereignty over different matters. We now consider the distinct sovereign powers of the national and state governments.

#### ● concurrent powers

Basic governing functions that are exercised by the national and state governments independently, and at the same time, including the power to make policy, raise revenue, implement policies, and establish courts.



## FEDERAL SYSTEMS OF NORTH AMERICA

Although the majority of countries have a unitary system of government, 40 percent of the world's population lives in the 28 countries that have federal systems. Among those 28 countries, there is a great range in how their constitutions distribute authority between the central and the regional governments. In addition, as is the case in the U.S. federal system, the language in those countries' constitutions is often not clear, and therefore, conflicts over sovereignty between the central and regional governments occur.

The three countries in North America—Canada, Mexico, and the United States—are good examples of the variety of ways authority is distributed in federal systems. All three governments' constitutions establish dual sovereignty; however, the balance of power between their central and regional governments differs significantly. In addition, in the cases of Canada and the United States, the courts have played a key role in resolving conflicts over the proper constitutional distribution of power. In Mexico, only in the past few decades have the courts become involved in solving such conflicts.

Mexico's federal system is the most centralized, with the national government dominating the 31 state governments. A federal system of government was established in the 1824 constitution and then eliminated through constitutional amendment in 1835. The 1857 constitution reestablished a federal system, and it and subsequent

constitutional reforms expanded the authority of the central government and eroded that of the states. Evidence of central government domination is the fact that national government controls revenue raising and distributes money to the states with detailed mandates. States have little discretion on how they spend the majority of the money the national government transfers to them.

Canada's federal system is the most decentralized, with its 10 provincial governments having the authority and leverage to challenge the power of the national government. The Canadian federal system, established in 1867, was initially centralized with key powers broadly delegated to the national government and provincial powers being limited and specific. However, through judicial interpretation and growth in the importance of policies controlled by the provinces (including health, welfare, and education), today it is quite decentralized.

In the case of the United States, the balance of power has also changed over time, with movement from a decentralized system (through the 1930s) to a more centralized system in recent decades. However, today the struggles between national power and states' power are ongoing and have no persistent winner.

**SOURCE:** Yemile Mizrahi, "Mexico (United Mexican States)," *Handbook of Federal Countries*, 2005, ed. Ann L. Griffiths (McGill-Queen's University Press), [www.forumfed.org/libdocs/FedCountries/FC-Mexico.pdf](http://www.forumfed.org/libdocs/FedCountries/FC-Mexico.pdf); David R. Cameron, "Canada," *Handbook of Federal Countries*, 2005, ed. Ann L. Griffiths (McGill-Queen's University Press), [www.forumfed.org/libdocs/FedCountries/FC-Canada.pdf](http://www.forumfed.org/libdocs/FedCountries/FC-Canada.pdf).

### ● enumerated powers

The powers of the national government that are listed in the Constitution.

## National Sovereignty

The Constitution distributes powers to the national government's three branches (legislative, executive, and judicial) that are (1) enumerated, or specifically listed, and (2) implied. For example, Article I of the Constitution enumerates the matters over which Congress holds the authority to make laws, including interstate and foreign commerce, the system of money, general welfare, and national defense. These matters are **enumerated powers** of the national government. The Constitution also gives Congress **implied powers**—that is, powers that are not described explicitly but that may be interpreted to be necessary to fulfill the enumerated powers. Congress specifically receives implied powers through the Constitution's **necessary and proper clause**, sometimes called the **elastic clause** because the national government uses this passage to stretch its enumerated authority. The necessary and proper clause in Article I, Section 8, of the Constitution states that Congress has the power to "make all Laws which shall be necessary and proper" for carrying out its enumerated powers.

Articles II and III of the Constitution also enumerate powers of the national government. Article II delegates to the president the responsibility to ensure the proper implementation of national laws and, with the advice and consent of the U.S. Senate, the authority to make treaties with foreign nations and to appoint foreign ambassadors. With respect to the U.S. Supreme Court and the lower federal courts, Article III enumerates jurisdiction over legal cases involving U.S. constitutional

**Concurrent Powers of National and State Governments**

**TABLE 3.1**

Make policy
Raise & spend money
Borrow money
Implement policy
Charter banks and corporations
Establish courts
Take private property for public use (eminent domain)

issues, national legislation, and treaties. The jurisdiction of the Supreme Court also extends to disagreements between two or more state governments, as well as to conflicts between citizens from different states. Figure 3.3 lists national powers enumerated in Articles I, II, and III of the Constitution.

**THE SUPREMACY CLAUSE** The country's founders obviously anticipated disagreements over the interpretation of constitutional language and prepared for them by creating the Supreme Court. The Court has mostly supported the national government when states, citizens, or interest groups have challenged Congress's use of the necessary and proper clause to take on new responsibilities beyond its enumerated powers. Unless the Supreme Court finds a national law to be outside of the enumerated or implied powers, that law is constitutional and hence the **supreme law of the land**, as defined by the supremacy clause 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, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." State and local governments are thereby obligated to comply with national laws that implement national enumerated and implied powers, as well as with treaties—including treaties with Native American nations.

**NATIONAL TREATIES WITH INDIAN NATIONS** Throughout U.S. history, the national government has signed treaties with Native American nations, which are legally considered sovereign foreign nations. As with all treaties, treaties with Native American nations are supreme law with which the national, state, and local governments must comply. The core issue in the majority of these treaties is the provision of land (reservations) on which the native peoples would resettle after non-Indians took their lands during the 18th and 19th centuries. Today, the federal government recognizes more than 550 Indian tribes. Although most Native Americans no longer live on reservations, approximately 300 reservations remain, in 34 states.<sup>5</sup>

Even though Indian reservations lie within state borders, national treaties and national laws, not state or local laws, apply to the reservation populations and lands. State and local laws, including laws having to do with taxes, crime, and the environment, are unenforceable on reservations. Moreover, Native American treaty rights to hunt, fish, and gather on reservations and on public lands supersede national, state, and local environmental regulations.<sup>6</sup>

With the exception of Native American reservations, state governments are sovereign within their state borders over matters the Constitution distributes to them. What are the matters that fall within state sovereignty?

## State Sovereignty

The Constitution specifies only a few state powers. It provides the states with a role in national politics and gives them the final say on formally amending the U.S. Constitution. One reason for the lack of constitutional specificity regarding the matters over which state governments are

# NATIONAL POWERS

Punish offenses against the laws of the nation
Lay and collect taxes for the common defense and the general welfare
Coin and regulate money
Establish courts inferior to the U.S. Supreme Court
Raise and support armies
Administer the Capitol district and military bases
Declare war
Organize, arm, and discipline state militias when called to suppress insurrections and invasions
Provide for copyrights for authors and inventors
Regulate interstate and foreign commerce
Provide, organize, and maintain armed forces
Establish standard weights and measures
Create naturalization laws
Punish the counterfeiting of money
Punish piracies and felonies on the seas
Develop roads and postal service
Admit new states to the union
Make treaties



## AP KEY FIGURE FIGURE 3.3

**Enumerated Powers of National Government** Can you locate each enumerated power in the Constitution that precedes this chapter (by Article, Section, and Clause)?

Photo: © B Christopher/Alamy Stock Photo

### ● implied powers

The powers of the national government that are not enumerated in the Constitution but that Congress claims are necessary and proper for the national government to fulfill its enumerated powers in accordance with the necessary and proper clause of the Constitution.

### ● necessary and proper clause (elastic clause)

A clause in Article I, section 8, of the Constitution that gives Congress the power to do whatever it deems necessary and constitutional to meet its enumerated obligations; the basis for the implied powers.

### supreme law of the land

The U.S. Constitution's description of its own authority, meaning that all laws made by governments within the United States must be in compliance with the Constitution.

sovereign is because, unlike the newly created national government, the state governments were already functioning when the states ratified the Constitution. Other than those responsibilities that the states agreed to delegate to the newly created national government through their ratification of the Constitution, the states expected to retain their sovereignty over all the day-to-day matters internal to their borders that they were already handling. Yet the original Constitution did not speak of this state sovereignty explicitly.

**POWERS RESERVED TO THE STATES** The Constitution’s limited attention to state authority caused concern among citizens of the early American republic. Many people feared that the new national government would meddle in matters for which states had been responsible, in that way compromising state sovereignty. Citizens were also deeply concerned about their own liberties. As described in Chapter 2, within two years of the states’ ratification of the Constitution, they ratified the Bill of Rights (1791), the first 10 amendments to the U.S. Constitution, in response to those concerns.

The Tenth Amendment asserts that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are *reserved to the States* respectively, or to the people.” This **reserved powers** clause of the Tenth Amendment acknowledged the domestic matters over which the states had exercised authority since the ratification of their own constitutions. These matters included the handling of the daily affairs of the people—laws regarding birth, death, marriage, intrastate business, commerce, crime, health, morals, and safety. The states’ reserved powers to protect the health, safety, lives, and property of their citizens are their **police powers**. It was over these domestic matters, internal to each state, that the states retained sovereignty according to the Tenth Amendment.

Figure 3.4 summarizes the constitutionally reserved powers of the states at the time of the Tenth Amendment’s ratification, as well as some of the few powers delegated to the states in the Constitution prior to ratification of the Tenth Amendment.

**POWERS DELEGATED TO THE STATES** Although the Constitution does not list all the specific powers reserved to the states, it does assign, or delegate, several powers to the states. These powers provide the states with a distinct voice in the composition and priorities of the national government. Members of Congress are elected by voters in their home states (U.S. senators) or their home districts (representatives in the U.S. House). Therefore, members of Congress are accountable to the voters in the state that elected them. State governments also have the authority to redraw the boundaries of the U.S. House districts within the state after each decennial census. In addition, each state government determines the procedure by which the state’s Electoral College electors will be selected to participate in the state’s vote for the president and vice president. Overall, state voters expect that the officials whom they elect to the national government will carefully consider their concerns when creating national policy.

In addition to establishing the various electoral procedures that give voice to state interests in the national policy-making process, the Constitution creates a formal means by which the states can ensure that the language in the Constitution is not changed in such a way that their sovereignty is threatened. Specifically, the Constitution stipulates that three-fourths of the states (through votes in either their legislatures or special conventions, as discussed in Chapter 2) must ratify amendments to the Constitution. By having the final say in whether the supreme law of the land will be changed formally through

### ● reserved powers

The matters referred to in the Tenth Amendment over which states retain sovereignty.

### police powers

The states’ reserved powers to protect the health, safety, lives, and properties of residents in a state.

## STATE POWERS



### AP KEY FIGURE FIGURE 3.4

**Constitutionally Delegated and Reserved Powers** Few of these powers are specified in the Constitution. Which of these state powers are listed (delegated) in the Constitution? Where do the other powers come from?

Photo: © Mlenny/iStock/Getty Images

the passage of amendments to the U.S. Constitution, the states can protect their constitutional powers. Indeed, they did just that when they ratified the Tenth Amendment.

## Supreme Court Interpretation of the Constitution's Distribution of Authority

Vague language in the U.S. Constitution continues to spark disputes over what are the constitutional powers of the national government versus what are the constitutional powers of the state governments. Some constitutional clauses that the Courts have had to interpret repeatedly include the *necessary and proper* powers of Congress and the powers of Congress to provide for the *general welfare* and to regulate *commerce among the several states*. In addition, the Courts are continually interpreting and reinterpreting the meaning of the *reserved powers clause* of the Tenth Amendment. The U.S. Supreme Court has the final say over what constitutional language means. In the process of resolving conflicts by distinguishing among national enumerated and implied powers and the powers reserved for the states, the Court has given meaning to the supremacy clause of the Constitution and influenced the relationships among the national and state governments.

**THE POWER TO REGULATE COMMERCE** The landmark case of *McCulloch v. Maryland* (1819) exemplifies a Supreme Court ruling that established the use of the implied powers to expand the national government's enumerated authority.<sup>7</sup> The case stemmed from Congress's establishment of a national bank, and in particular a branch of that bank located in the state of Maryland, which the Maryland state authorities tried to tax. Maryland's attorneys argued that Congress did not have the constitutional authority to establish a national bank, noting it was not among the enumerated powers. They also argued that if the Court interpreted the Constitution such that the national government did have the implied power to establish a national bank, then Maryland had the concurrent power to tax the bank. Lawyers for the national government in turn argued that the Constitution did indeed imply federal authority to establish a national bank and that Maryland's levying a tax on the bank was unconstitutional, for it impinged on the national government's ability to fulfill its constitutional responsibilities by taking some of its financial resources.

The Supreme Court decided in favor of the national government. The justices based their ruling on their interpretation of the Constitution's necessary and proper clause and the enumerated powers of Congress to "lay and collect taxes, to borrow money . . . and to regulate commerce among the several states." The Court said that, combined, these enumerated powers implied that the national government had the authority to charter a bank and to locate a branch in Maryland. Moreover, the Court found that Maryland did not have the right to tax that bank, because taxation by the state would interfere with the exercise of national authority.

In the *McCulloch* case, the Supreme Court established that the necessary and proper clause allows Congress to broadly interpret the enumerated powers of the national government. Moreover, the Court interpreted the national supremacy clause to mean that in the event of a conflict between national legislation (the law chartering the national bank) and state legislation (Maryland's tax law), the national law is supreme *as long as* it falls under the enumerated and implied powers that the Constitution distributes to the national government.

A few years later, in the case of *Gibbons v. Ogden* (1824), the Supreme Court again justified a particular national action on the basis of the implications of an enumerated power.<sup>8</sup> The *Gibbons* case was the first suit brought to the Supreme Court seeking clarification on the constitutional meaning of *commerce* in the Constitution's clause on the regulation of interstate commerce. The Court established a broad definition of commerce: "all commercial intercourse—meaning all business dealings." The conflict in this case concerned which government, New York State or the national government, had authority to regulate the operation of boats on the waterways between New York and New Jersey. The Court ruled that regulation of commerce implied regulation of navigation and that therefore the national government had authority to regulate it, not New York State.

Not until the Great Depression (1930s) did the national government begin to justify new laws by arguing that they were necessary to fulfill its enumerated power to regulate interstate commerce. After some initial conflicts, the Court has more often agreed than disagreed with

### AP KEY DOCUMENT

#### ● *McCulloch v. Maryland*

The 1819 case that established that the necessary and proper clause justifies broad understandings of enumerated powers.





> In *United States v. Lopez (1995)*, the U.S. Supreme Court ruled the national Gun-Free School Zones Act unconstitutional and affirmed that state governments have the right to establish gun-free school zones. What constitutional clauses did the Court have to interpret to resolve the *United States v. Lopez* case?

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#### AP KEY DOCUMENT

##### ● *U.S. v. Lopez*

The 1995 case that ruled the national Gun-Free School Zones Act unconstitutional and affirmed that states have the right to establish gun-free school zones.

### State-to-State Obligations: Horizontal Federalism

In Article IV, the Constitution sets forth obligations that the states have to one another and to each other's citizens. Collectively, these state-to-state obligations and the intergovernmental relationships they mandate are forms of **horizontal federalism**. For example, state governments

have the right to forge agreements with other states, known as **interstate compacts**. Congress must review and approve interstate compacts to ensure that they do not harm the states that are not party to them and the nation as a whole. States enter into cooperative agreements to provide services and benefits for one another, such as monitoring paroled inmates from other states; sharing and conserving natural resources that spill over state borders, such as water; and decreasing pollution that crosses state borders.

States also cooperate through a procedure called **extradition**, the legal process of sending individuals back to a state that accuses them of having committed a crime, and from which they have fled. The Constitution establishes a state governor's right to request the extradition of an accused criminal. Yet the courts have also supported governors' refusals to extradite individuals.

The Constitution asserts, too, that each state must guarantee the same **privileges and immunities** it provides to its citizens to all U.S. citizens, including citizens from other states who visit or move into the state. This guarantee does not prohibit states from imposing reasonable requirements before extending rights

#### National Obligations to the States

The federal government:

- must treat states equally in matters of the regulation of commerce and the imposition of taxes.
- cannot approve the creation of a new state from the property of an existing state without the consent of the legislatures of the states concerned.
- cannot change state boundaries without the consent of the states concerned.
- must guarantee a republican form of government.
- must protect states from foreign invasion.
- must, at their request, protect states against domestic violence.

TABLE 3.2

Congress's broad understanding of what its enumerated powers implied it could do through legislation. In addition to expanding its power through implications of the regulation of interstate commerce clause, Congress has also successfully used the general welfare clause to take on new matters, hence expanding its authority.

**THE POWER TO PROVIDE FOR THE GENERAL WELFARE** The national government's landmark Social Security Act of 1935 was a response to the Great Depression's devastating impact on the financial security of countless Americans. The congressional vote to establish Social Security was overwhelmingly favorable. Yet several states challenged the constitutionality of this expansive program shortly after its passage, claiming it infringed on their reserved police powers. In 1937, the Supreme Court had to decide: Was Social Security indeed a matter of general welfare for which Congress is delegated the authority to raise and spend money? Or was Social Security a matter for the state governments to address? The Court found the national policy to be constitutional—a reasonable congressional interpretation, the justices wrote, of the enumerated and implied powers of the national government.<sup>9</sup>

The Supreme Court's decisions in the *McCulloch*, *Gibbons*, and Social Security cases set the stage for the expansion of national power in domestic policy matters by combining the necessary and proper clause with such enumerated powers as the regulation of commerce and providing for the general welfare. Although throughout U.S. history, particularly since the 1930s, the Court has typically supported Congress's enactment of laws dealing with matters implied by—but not specifically enumerated in—the Constitution, Congress does not always get its way. For example, in 1995 the Supreme Court rejected the national government's claim that its Gun-Free School Zones Act of 1990 was a necessary and proper means to regulate interstate commerce. The Court found the act unconstitutional because it infringed on states' reserved police powers; state governments have authority to create gun-free school zones, and they can extend that authority to their local governments.<sup>10</sup>

In addition to establishing dual sovereignty and creating two independently operating levels of government, the Constitution enumerates some obligations that the national government has to the states. Those obligations are noted in Table 3.2.



➤ In 1921, Congress approved an interstate compact creating the Port Authority of New York and New Jersey to improve commerce and trade. The Port Authority, created to develop and modernize the New York Harbor area (covering approximately 1,500 square miles from both states) continues to build, maintain, and operate bridges, tunnels, terminals, and airports. What are some other policy matters for which interstate compacts are common?

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to visiting or new state residents. For example, states can and do charge higher tuition costs to out-of-state college students. In addition, in many states, new state residents must wait 30 days before they can register to vote. Yet no state can deny new state residents who are U.S. citizens the right to register to vote once they meet a reasonable state residency requirement.

Because of the ease of traveling between states as well as relocating from state to state, an important component of horizontal federalism stems from the full faith and credit clause of Article IV, Section 1, of the Constitution. The **full faith and credit clause** asserts that each state must recognize as legally binding (that is, valid and enforceable) the public acts, records, and judicial proceedings of every other state. For example, states must recognize the validity of out-of-state driver's licenses as well as marriage licenses entered into in other states, including those of same-sex couples.

Note that the rights and privileges guaranteed by the U.S. Constitution are the minimum rights and privileges that all governments in the United States (national, state, and local governments) must uphold. However, the U.S. Supreme Court has ruled that state and local governments can guarantee additional rights and privileges to their citizens.

## Judicial Federalism

Today, state and local governments throughout the country have passed laws (legislation and constitutional amendments) that provide their citizens with rights and privileges that the U.S. Constitution does not guarantee. For example, the Pennsylvania constitution states: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." The U.S. Constitution does not guarantee such a right. The California state constitution protects freedom of speech and expression in privately owned properties, such as shopping centers. The U.S. Constitution's guaranteed freedom of expression does not extend to privately owned properties.<sup>11</sup> In Takoma Park, Maryland, citizens as young as 16 have the right to vote in municipal elections (the voting age for state and federal elections is still 18 in Takoma Park).<sup>12</sup>

### horizontal federalism

The state-to-state relationships created by the U.S. Constitution.

### interstate compacts

Agreements between states that Congress has the authority to review and reject.

### extradition

The return of individuals accused of a crime to the state in which the crime was committed upon the request of that state's governor.

### privileges and immunities clause

The Constitution's requirement that a state extend to other states' citizens the privileges and immunities it provides for its citizens.

### ● full faith and credit clause

The constitutional clause that requires states to comply with and uphold the public acts, records, and judicial decisions of other states.

In numerous municipalities and counties across the country, laws prohibit discrimination due to a person's sexual orientation. The U.S. Constitution does not prohibit such discrimination.

Historically, state courts turned to the U.S. Constitution when deciding civil rights and liberties cases. However, beginning in the 1970s, state courts increasingly based these decisions on their own state constitutions, which guaranteed more extensive rights to their citizens than did the U.S. Constitution. For example, after the U.S. Supreme Court 1973 ruling that the equal protection clause of the Fourteenth Amendment did not require equal funding of schools in Texas,<sup>13</sup> state courts in 15 states ruled that their state constitutions required equal funding of schools in their states.<sup>14</sup> Political scientists refer to the reliance of state courts on their state constitutions as **judicial federalism**.

#### judicial federalism

State courts' use of their state constitutions to determine citizens' rights, particularly when state constitutions guarantee greater protections than does the U.S. Constitution.

The U.S. federal system can be confusing to citizens and government officials. In the U.S. federal system, governments at three levels have concurrent powers necessary to governing and serving the people. The U.S. Constitution distributes sovereignty between the national government (enumerated and ambiguous implied powers) and state governments (vague reserved powers and limited delegated powers). State governments delegate authority to the local governments they create. However, courts continue to resolve conflicts over what the concurrent, enumerated, implied, and reserved powers mean for the day-to-day operations of governments. In addition, governments at all three levels protect the rights established in the U.S. Constitution. At the same time, state and local governments often guarantee additional rights and liberties that they establish through their own laws.

To complicate matters further, over the course of U.S. history, national, state, and local governments have moved from functioning independently to meet their constitutional responsibilities to working together on many policy matters to serve their citizens better. The national, state, and local governments often collaborate in the creation, financing, and implementation of a given public policy. We now explore the evolution of our federal system from independently functioning levels of government to collective efforts of multiple governments; to a federal system replete with complicated and often confusing intergovernmental relations.

## Evolution of Intergovernmental Relations in the Federal System

In all systems of government (unitary, confederal, and federal), when there is more than one level (such as the three levels in the United States), the governments will interact. Political scientists study these interactions, or intergovernmental relations.

*Evolution* is a slow and continuous change, often from the simple to the complex. The federal system established by the Constitution has evolved from a simple system of *dual federalism* to a complex system of intergovernmental relations characterized by *conflicted federalism*.

Evolution has occurred in the relationships between the national government and the states, among state governments, and among state governments and their local governments. Our focus here is on the evolution of the intergovernmental relations between the national and state governments. We first survey four models of federalism, characterized by four different relationships between the national and the state governments, all of which continue to this day. Political scientists have identified these four models of IGR, also known as four models of federalism, as dual federalism, cooperative federalism, centralized federalism, and conflicted federalism. We then explore various means by which the national government has altered its relationships with state governments.

### Dual Federalism

Initially, the dual sovereignty of the U.S. federal system was implemented in such a way that the national and state governments acted independently of each other. The national government raised its own money and spent it on policies it created. Each state government also raised its own money and spent it on policies it created. Political scientists give the name **dual federalism** to this pattern of implementation of the federal system, whereby the national government takes care of its enumerated powers and the states independently take care of their reserved powers. From 1789 through 1932, dual federalism was the dominant pattern of national-state relations.

#### ● dual federalism

The initial model of national and state relations in which the national government takes care of its enumerated powers while the state governments independently take care of their reserved powers.



Congresses and presidents did enact some laws that states argued infringed on their powers, and the U.S. Supreme Court typically found in favor of the states in those cases. Yet, as the 1819 *McCulloch* case shows, sometimes the Supreme Court ruled in favor of the national government.

## Cooperative Federalism

A crippling economic depression that reached global proportions, the Great Depression, began in 1929. To help state governments deal with the domestic problems spawned by the economic collapse, Congress and President Franklin D. Roosevelt (1933–1945) approved numerous policies, collectively called the New Deal. **Grants-in-aid**—transfers of money from one government (the national government) to another government (state and local governments) that need not be paid back—became a main mechanism of President Roosevelt’s New Deal programs. State and local governments welcomed the national grants-in-aid, which assisted them in addressing the domestic matters that fell within their sovereignty while allowing them to make most of the specific program decisions to implement the policies. Through grants-in-aid, dual federalism was replaced by **cooperative federalism** in numerous policy matters. Collaborative intergovernmental relations was a product of cooperative federalism, which dominated national and state government relations from the New Deal era to the early 1960s.

## Centralized Federalism

By the time of Lyndon Johnson’s presidency (1963–1969), a new kind of federalism was developing. In this new form of federalism, the national government imposed its own policy preferences on state and local governments. Specifically, in **centralized federalism**, directives in national legislation, including grant-in-aid programs with ever-increasing conditions or strings attached to the money, force state and local governments to implement a particular national policy. Therefore, in centralized federalism, the national government dominates intergovernmental relations, imposing its policy preferences on state and local governments.

Presidents since Richard Nixon (1969–1974) have fought against this centralizing tendency by proposing to return policy responsibilities (policy making, policy financing, and policy implementation) to state and local governments. Presidents Nixon and Ronald Reagan (1981–1989) gave the name *new federalism* to these efforts, and today we use the term **devolution** to refer to the return of power to state and local governments.

Today, Republicans and Democrats (including presidents, members of Congress, and state and local lawmakers) broadly support devolution, but they debate *which elements of the policy* should be devolved: policy statements, policy financing, and/or policy implementation. They also butt heads over *which policies* to devolve. The legislation and court decisions that result from these debates and legal conflicts make for a complicated coexistence of dual federalism, cooperative federalism, and centralized federalism.

## Conflicted Federalism

David B. Walker, a preeminent scholar of federalism and intergovernmental relations, argues that the term **conflicted federalism** best describes the intergovernmental relations of the federal system today because conflicting elements of dual federalism, cooperative federalism, and centralized federalism are evident in domestic policies implemented by national, state, and local governments.<sup>15</sup> For some policy matters, the national and state governments operate independently of each other, and hence dual federalism is at work. For most policies, however, intergovernmental efforts are the norm. These efforts may be a means to advance state policy priorities (cooperative federalism), or they may be compelled by national legislation (centralized federalism) to advance national policy priorities.

The era of conflicted federalism has seen an increase in the number of legal challenges to national legislation that mandates state and local action and state legislation that may infringe on national sovereignty. In the various cases that the Supreme Court has heard, the justices have ruled inconsistently, sometimes upholding or even expanding state sovereignty and at other times

### grant-in-aid (intergovernmental transfer)

The transfer of money from one government to another government that does not need to be paid back.

### ● cooperative federalism

Intergovernmental relations in which the national government supports state governments’ efforts to address the domestic matters reserved to them.

### centralized federalism

Intergovernmental relations in which the national government imposes its policy preferences on state and local governments.

### ● devolution

The process whereby the national government returns policy responsibilities to state or local governments.

### conflicted federalism

Intergovernmental relations in which elements of dual federalism, cooperative federalism, and centralized federalism are evident in the domestic policies implemented by state and local governments.





➤ Today, rallies and demonstrations supporting and opposing state laws legalizing medicinal and recreational use of marijuana are common as more state governments deliberate the issue. Here demonstrators who want the federal government to allow states to legalize and regulate medicinal marijuana rally in front of the federal courthouse in Sacramento, the state capital of California. Decriminalization and legalization of marijuana raise questions about the proper balance of power in the U.S. federal system of government.

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protecting or expanding national sovereignty. For example, in 1976 the Supreme Court ruled in *National League of Cities v. Usery*<sup>16</sup> that state and local governments were not legally required to comply with the national minimum wage law—hence protecting state authority. Then nine years later, in the *Garcia v. San Antonio Transportation Authority* (1985) case,<sup>17</sup> the Court ruled that national minimum wage laws did apply to state and local government employees—thus expanding national authority. State and local governments can establish higher minimum wages for public and private employees, but they cannot have minimum wages lower than the national minimum wage.

Another policy matter that has been subject to conflicting Court decisions related to federalism is the medical use of marijuana. California's history regarding legalization of medicinal marijuana has been an up-and-down battle with the national government.

In 1996, California voters approved the Compassionate Use Act, allowing people to grow, obtain, or smoke marijuana for medical needs, with a doctor's recommendation. Then in 2001, the U.S. Supreme Court ruled that the national government could bring criminal charges against people who distributed marijuana for medical use, even in California, where the state law allowed such activity.<sup>18</sup> The Court interpreted the national supremacy clause to mean that national narcotics laws took precedence over California's law, which California argued was grounded in the reserved powers of the states.

In 2003, the U.S. Supreme Court refused to review a case challenging the California law allowing doctors to legally recommend marijuana use to their patients. As a consequence of the Court's refusal, the California law stating that doctors could *not* be charged with a crime for recommending marijuana to patients remained in effect. However, in 2005 the U.S. Supreme Court upheld the right of the national government to prosecute people who smoke the drug at the recommendation of their doctors, as well as those who grow it for medical purposes.<sup>19</sup>

Adding to the confusion over the legality of state medicinal marijuana laws, in 2009 the U.S. attorney general announced that the federal government would not prosecute individuals for dispensing marijuana or using it in compliance with state law in the states that legalized such activities. Then, in 2011, federal attorneys raided and seized property from California medical



➤ Between 1789 and the Great Depression, the model of federalism implemented in the United States was dual federalism. Dual federalism is often depicted as a slice of layer cake, with three distinct layers—three levels of government with clear distinctions among their responsibilities and powers. Today, conflicted federalism rules the day. In this model of federalism, which is depicted as a slice of marble cake with swirls of colors that flow into each other, the responsibilities and powers of the three levels of government are not clear and distinct. A confusion of conflicting intergovernmental relations dominates most domestic policies.

Chocolate cake: © D. Hurst/Alamy Images; marble cake: © FoodCollection

marijuana growers and dispensaries. In 2012, voters in Colorado and Washington approved state laws legalizing the sale and possession of small amounts of marijuana for *recreational* use, the same day that voters in Arkansas defeated a law legalizing medicinal marijuana.<sup>20</sup>

In August 2013, the U.S. Department of Justice announced that while marijuana was still illegal under federal law, it expects states that have legalized it to enforce tightly their state laws regulating its use. In addition, the department reserves the right to challenge state actions and laws as it deems necessary.<sup>21</sup> Today, although national law makes the sale, cultivation, and possession of marijuana a crime, 23 states plus Washington, D.C., have laws that legalize the sale, cultivation, and possession of marijuana for medicinal use (when prescribed by a physician), and at least four states and Washington, D.C., have legalized the sale and possession of small amounts of marijuana for recreational use. The “Thinking Critically About Democracy” feature explores the right of state governments to write laws that invalidate national laws.

How did the U.S. federal system evolve from dual federalism to today’s conflicted and quite confusing federalism? Constitutional amendments, legislation, grants-in-aid, and court interpretations of laws are all pieces of the puzzle.

## Constitutional Amendments and the Evolution of Federalism

Understanding the U.S. federal system’s evolution from dual federalism to conflicted federalism requires a brief review of several constitutional amendments that fostered changes in the relationship between the national government and state governments. Although the formal language of the Constitution that established the federal system’s dual sovereignty remains essentially as it was in 1791, three amendments—the Fourteenth, Sixteenth, and Seventeenth—have had a tremendous impact on the relationship between national and state government. The Civil War, which was a catalyst for ratification of the Fourteenth Amendment, also influenced the national-state power relationship.

**THE CIVIL WAR AND THE FOURTEENTH AMENDMENT** The military success of the northern states in the Civil War (1861–1865) meant the preservation of the union—the United States of America. The ratification of the Thirteenth Amendment (1865) brought the legal end of slavery in every state. In addition, the Fourteenth Amendment (1868), which extended the rights of citizenship to individuals who were previously enslaved, also placed certain limits and obligations on state governments.

## Can State Governments Nullify National Law?

**The Issue:** Nullification is the theory that states have the authority to invalidate national laws. In the past two decades, at least 23 states have enacted laws decriminalizing marijuana and legalizing medicinal marijuana and/or recreational marijuana use. These states are nullifying national law that criminalizes the growth, sale, possession, and use of marijuana. In addition, several state legislatures have proposed laws prohibiting their state and local law enforcement personnel from enforcing federal gun control laws that conflict with their state gun laws. Do state governments have the constitutional authority to nullify national laws, including judge-made law?

**Yes:** The Tenth Amendment allows a state to nullify a national law that exceeds the enumerated powers of the national government. If the national government enacts a law relevant to a matter that is reserved for the states, the states have the right to declare it void. One benefit of the federal system touted by the framers was that two levels of government exist to doubly protect citizens' rights and liberties. When states believe a national law or court ruling infringes on citizens' rights or liberties, states have an obligation to nullify it. In addition, the Constitution is a compact among the states. The states had to ratify it for it to go into effect. That means the states gave power to the national government and they can reclaim it.

**No:** In a federal system, neither the state governments nor the national government can nullify laws enacted by other governments because neither is sovereign over the other. Article VI of the Constitution establishes that the Constitution and national laws made in compliance with it are the supreme law of the land. All governments in the United States must comply with the supreme law of the land. Article III of the Constitution delegates

to the national judiciary the authority to resolve legal conflicts arising from the Constitution and national laws. The power of judicial review allows courts to determine if government actions, including enacted legislation, comply with the Constitution. If states believe that an action of the national government violates their constitutional authority, they can file a lawsuit against the national government.

**Other Approaches:** The proper interpretation of the enumerated powers, necessary and proper clause, the supremacy clause, and the Tenth Amendment are vital to the health of the union. If the debate over constitutionality of national or state laws gets too heated, the ultimate means of clarification is through a constitutional convention, which states can call for according to Article V of the Constitution.

### What do you think?

1. Historically, one touted benefit of our federal system is that states can act as laboratories, experimenting with public policies. Other states and the national government can adopt the "experimental" policies that are successful. Does this benefit justify nullification? Explain.
2. Do you think a constitutional convention to clarify constitutional language will resolve the perpetual conflicts over state and national authority? Explain.
3. Some people are concerned that recent growth in the number of laws among the states that contradict each other as well as national law will spark domestic upheavals. Do you share this concern? Why or why not?

The Fourteenth Amendment authorizes the national government to ensure that the state governments follow fair procedures (due process) before taking away a person's life, liberties, or pursuit of happiness and that the states guarantee all people the same rights (equal protection of the laws) to life, liberties, and the pursuit of happiness, without discrimination. In addition, the amendment guarantees the privileges and immunities of U.S. citizenship to all citizens in all states. Accordingly, since the Fourteenth Amendment's ratification, Congresses and presidents have approved national laws that direct the states to ensure due process and equal protection. This legislation includes, for example, laws mandating that all government buildings, including state and local edifices, provide access to all persons, including individuals with physical disabilities. In addition, the Supreme Court has used the Fourteenth Amendment to justify extending the Bill of Rights' limits on national government to state and local governments (under incorporation theory, which Chapter 4 considers). And in *Bush v. Gore* (2000), the Supreme Court used the amendment's equal protection clause to end a controversial Florida ballot recount in the 2000 presidential election.<sup>22</sup>

Conducting elections is a power reserved for the states. Therefore, state laws detail how citizens will cast their votes and how the state will count them to determine the winners. In the 2000 presidential election, Democratic candidate Al Gore successfully challenged, through Florida's court system, the vote count in that state. The Florida state Supreme Court interpreted Florida election law to require the state to count ballots that it initially did not count. In response, Republican candidate George W. Bush challenged the Florida Supreme Court's finding by appealing to the U.S. Supreme Court. Lawyers for candidate Bush argued that Florida's election law violated the Fourteenth Amendment's equal protection clause by not ensuring that the state would treat each person's vote equally. The U.S. Supreme Court found in favor of candidate Bush, putting an end to the vote recount called for by the Florida Supreme Court. Candidate Bush became President Bush.

**THE SIXTEENTH AMENDMENT** Passage of the Sixteenth Amendment (1913) powerfully enhanced the ability of the national government to raise money. It granted Congress the authority to collect income taxes from workers and corporations without apportioning those taxes among the states on the basis of population (which had been mandated by the Constitution before this amendment).

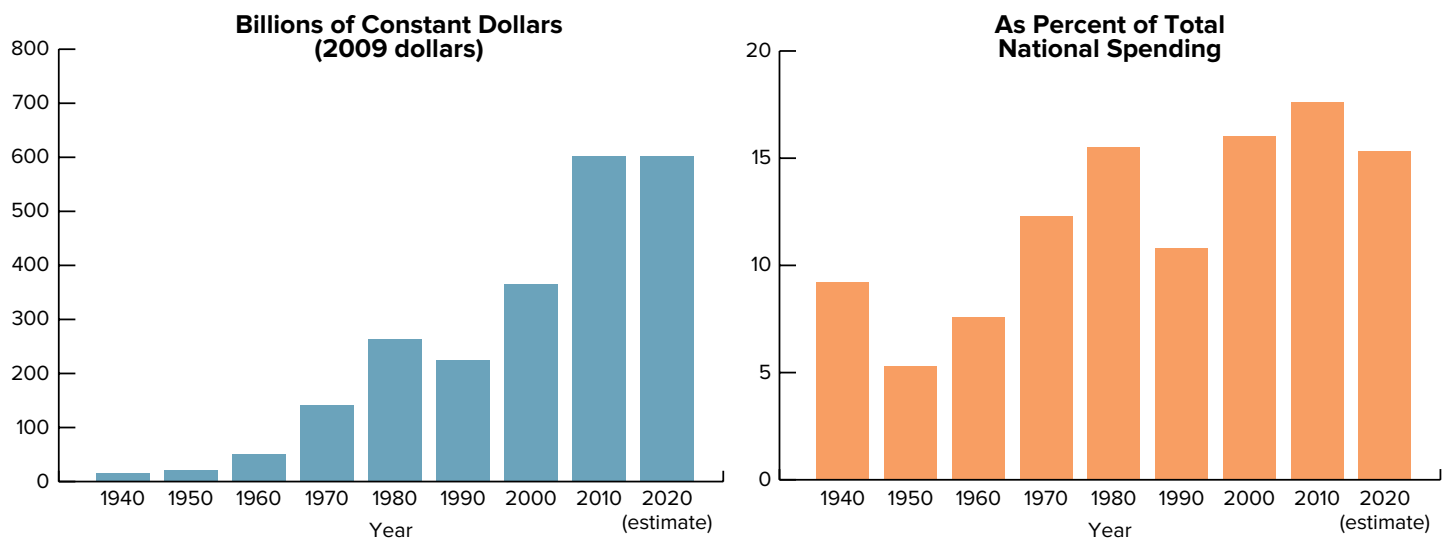
The national government uses these resources to meet its constitutional responsibilities and to assist state governments in meeting their constitutional responsibilities. Moreover, the national government also uses these resources as leverage over state and local governments, encouraging or coercing them to pursue and implement policies that the national government thinks best. Specifically, by offering state and local governments grants-in-aid, national officials have gained the power to determine many of the policies these governments approve, finance, and implement. For example, by offering grants to the states for highways, the federal government encouraged each state to establish a legal drinking age of 21 years (which we explore later in the chapter). Figure 3.5 presents historical information on the total amount of federal grants-in-aid to state and local governments as well as the percent of the total national budget spent on federal grants-in-aid since 1940.

## POLITICAL

# Inquiry

**FIGURE 3.5** **Federal Grants-in-Aid to State and Local Governments (Select Years 1940–2020)** Since the Great Depression, state and local governments have come to depend on federal grants-in-aid. These graphs present data using two measures: the total amount of grants-in-aid provided in billions of constant dollars and the value of grants-in-aid provided as a percentage of total federal government spending. Constant dollars adjust for inflation, thereby removing the effect of price changes (changes in the value of the dollar) over time. Why is it more meaningful to your understanding of the historical trends in grants-in-aid to use these two measures and not the total spending per year in current dollars (unadjusted for inflation)? How does the pattern of constant dollars spent compare with the trends in percent of the total national budget spent on grants-in-aid?

**SOURCE:** Office of Management and Budget, *Historical Tables*, "Summary Comparison of Total Outlays for Grants to State and Local Governments 1940–2020," [www.whitehouse.gov/omb/budget/Historicals..](http://www.whitehouse.gov/omb/budget/Historicals..)





**THE SEVENTEENTH AMENDMENT** Before ratification of the Seventeenth Amendment in 1913, the Constitution called for state legislatures to select U.S. senators. By that arrangement, the framers strove to ensure that Congress and the president would take the concerns of state governments into account in national policy making. Essentially, the original arrangement provided the state legislatures with lobbyists in the national policy-making process who would be accountable to the states. Once ratified, the Seventeenth Amendment shifted the election of U.S. senators to a system of popular vote by the citizens in a state.

With that change, senators were no longer directly accountable to the state legislatures, because the latter no longer selected the senators. Consequently, state governments lost their direct access to national policy makers. Some scholars of federalism and intergovernmental relations argue that this loss has decreased the influence of state governments in national policy making.<sup>23</sup>

## Tools of IGR: Grants, Mandates, and Preemption

Although the national government shared its revenue surplus with the states in the form of grants-in-aid in 1837, it did not make a habit of offering grants-in-aid until the Great Depression of the 1930s. Today, federal grants-in-aid amount to close to 17 percent of the national government's annual spending, and they pay for about 25 percent of the annual spending by state and local governments.<sup>24</sup>

The pervasiveness of intergovernmental transfers of money has led political scientists to the study of **fiscal federalism**—the intergovernmental relationships between the national government and state and local governments that grow out of the grants of money that the national government provides to state and local governments.

**CATEGORICAL GRANTS** Historically, the most common type of grant-in-aid has been the **categorical formula grant**—a grant of money from the federal government to state and local governments for a narrow purpose, as defined by the federal government. The legislation that creates such a grant includes a formula determining how much money is available to each grant recipient. The formula is typically based on factors related to the purpose of the grant, such as the number of people in the state in need of the program's benefits. Categorical grants come with strings attached—that is, rules and regulations with which the recipient government must comply.

### ● **fiscal federalism**

The relationship between the national government and state and local governments whereby the national government provides grant money to state and local governments.

### ● **categorical formula grant**

A grant-in-aid for a narrowly defined purpose, whose dollar value is based on a formula.

> In 1862, Congress enacted the Morrill Act to support higher education. The act gave states public lands that they were required to sell or use for profit, with the proceeds funding the establishment of at least one college that would teach agriculture and mechanical arts. Colleges established through this program are "land grant" colleges. The Second Morrill Act, enacted in 1890, provided annual federal grants to support land grant colleges. Although the 1890 Act prohibited racial discrimination in the admission policies of land grant colleges, it did allow states to establish race segregated colleges. Tuskegee University, a private institution, is one of 17 colleges established for African Americans in fulfillment of the Second Morrill Act.

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One typical string is a **matching funds requirement**, which obligates the government receiving the grant to spend some of its own money to match a specified percentage of the grant money provided. Matching funds requirements allow the national government to influence the budget decisions of state and local governments by forcing them to spend some of their own money on a national priority, which may or may not also be a state priority, in order to receive national funding. Medicaid, a health insurance program the national government created for low-income citizens, is jointly funded by federal and state money due to a matching funds requirement. Put into action primarily by state and local governments, this is one example of a national categorical formula grant program with strings attached.

Since the 1960s, the national government has also offered categorical project grants. Like the categorical formula grant, a **categorical project grant** covers a narrow purpose (program area), but unlike the formula grant, a project grant does not include a formula specifying how much money a recipient will receive. Instead, state and local governments interested in receiving such a grant must compete for it by writing proposals detailing what programs they wish to implement and what level of funding they need. Categorical project grants have become common in national education policy. For example, in 2014, President Obama proposed spending \$5 billion on the RESPECT categorical competitive grant program. State governments competed for this grant money to pursue reforms in all aspects of the teaching profession—from teacher preparation to teacher development, evaluation, and compensation. A categorical project grant has strings attached to it and typically offers less funding than a categorical formula grant.

**BLOCK GRANTS** Another type of formula-based intergovernmental transfer of money, the **block grant**, differs from categorical formula and categorical project grants in that the matters for which state and local governments can use the money is not narrowly defined, thus allowing state and local governments more discretion to decide how to spend the money. Whereas a categorical grant might specify that the money is to be used for a child care program, a block grant gives the recipient government more discretion to determine what program it will be used for within a broad policy area such as assistance to economically needy families with children. In 1996, the national government eliminated Aid to Families with Dependent Children (AFDC), its most well-known income assistance program to low-income families, which was a categorical formula grant program for states. It replaced AFDC with a block grant program for the states, Temporary Assistance to Needy Families (TANF).

When first introduced by the Nixon administration in the 1970s, block grants had fewer strings attached to them than did categorical grants. Today, however, the number and specificity of conditions included in block grants are increasing, which means increasing limits on state and local government discretion in policymaking and program implementation.

State and local governments have grown dependent on national financial assistance, and so grants are an essential tool of national power to direct state and local government activity. Although the states welcome federal grant money, they do not welcome the strings attached to the funds, or *mandates*.

**MANDATES** National **mandates** are statements in national laws, including the strings attached to grants-in-aid, that require state and local governments to do something specified by the national government. Many national mandates relate to ensuring citizens' constitutional rights. For example, the mandate in the Rehabilitation Act of 1973 requires all government buildings, including state government and local government buildings, to be accessible to persons with disabilities to ensure equal protection of the law. In this case, the national government enacted the law to fulfill its constitutional responsibilities and imposes it on state and local governments.

When the national government assumes the entire cost of a mandate it imposes on a state or local government, it is a *funded mandate*. However, more often than not, the national government does not cover the entire cost of its mandates. Often, it does not cover any of the cost, forcing states to pick up the bill. When the state or local government must cover all or some of the cost, it is an *unfunded mandate*. Because grants-in-aid are voluntary—that is, state and local governments can decide to accept a grant-in-aid or to reject it—state and local governments can determine whether or not they can afford to accept the grant and hence its mandate. Although state and local governments have always opposed the strings attached to grants, the attaching of mandates to grant money has come under increasing fire.

### matching funds requirement

A grant requirement that obligates the government receiving the grant to spend some of its own money to match a specified percentage of the grant money provided.

### ● categorical project grant

A grant-in-aid for a narrowly defined purpose for which governments compete with each other by proposing specific projects.

### ● block grant

A grant-in-aid for a broadly defined policy area, whose funding amount is typically based on a formula.

### ● mandates

Clauses in legislation that direct state and local governments to comply with national legislation and national standards.



➤ Although in 1987 the Supreme Court found the drinking age mandate to be constitutional because it was attached to a grant, in 2012 the Court found unconstitutional a grant mandate attached to the national Affordable Care Act of 2010. What did the Affordable Care Act mandate require of states? What model of federalism do these two divergent Court decisions support?

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In the 1923 case *Massachusetts v. Mellon*,<sup>25</sup> one of the first cases in which state governments questioned the national government's right to attach mandates to grant money, the Supreme Court found the mandates in national grants-in-aid to be constitutional, arguing that grants-in-aid are voluntary cooperative arrangements. By voluntarily accepting the national grant, the justices ruled, the state government agrees to the grant conditions. The Court's decision did not end states' challenges to grant mandates.

In 1987, South Dakota challenged a 1984 national transportation law that penalized states whose legal drinking age was lower than 21 years. The intent of the national law was to decrease "driving while intoxicated" (DWI) car accidents. States with legal drinking ages lower than 21 years would lose 10 percent of their national grant money for transportation. South Dakota argued that Congress was using grant conditions to put a law into effect that Congress could not achieve through national legislation because the law dealt with a power reserved to the states—determining the legal age for drinking alcoholic beverages.

In its decision in *South Dakota v. Dole*, the Court confirmed that the national government could not impose a national drinking age because setting a drinking age is indeed a reserved power of the states.<sup>26</sup> However, the Court found that the national government could *encourage* states to set a drinking age of 21 years by threatening to decrease their grants-in-aid for trans-

portation. Ultimately, the national policy goal of a drinking age of 21 was indeed accomplished by 1988—not through a national law but through a condition attached to national highway funds offered to state governments, funds on which the states are dependent.

In the summer of 2012, the U.S. Supreme Court ruled on the constitutionality of the Affordable Care Act of 2010 (ACA).<sup>27</sup> In its decision, the Court found unconstitutional the act's mandate requiring states that accepted Medicaid grants to extend Medicaid coverage to additional lower-income citizens. The act mandated that a state that did not expand its coverage to additional citizens would lose all its Medicaid grant money—not just forfeit the new ACA grant money available to them for coverage expansion. Therefore, although state governments "voluntarily" participate in the Medicaid program by accepting Medicaid categorical grants, this ruling appears to limit the "financial penalty" the national government can impose through a grant's mandate. As a result of the Court's ruling, states have a choice to expand Medicaid coverage or not; it is not required. Some states (particularly those with Republican governors) have decided not to expand Medicaid coverage whereas other states (particularly those with Democratic governors) have agreed to expand their coverage.

**PREEMPTION** Another means by which the national government can direct the actions of state and local governments is through preemption. **Preemption** means that a national policy supersedes a state or local policy because it deals with an enumerated or implied national power. Therefore, people must obey, and states must enforce, the national law even if the state or local government has its own law on the matter.

Preemption is common in environmental policy. Although states can enact and enforce laws with greater protections than are established in national environmental law, they cannot do less than what is called for in the national law. In late 2015, the national government's Federal Aviation Administration (FAA) began to warn state and local governments that it had enacted laws regarding the recreational use of drones and public safety, and that it, the FAA, is the top authority in regulating air space. Therefore, its new rules preempt existing state and local laws. State and local governments are complaining about the FAA's call for them to back off because they argue their rules offer better protection of safety and privacy than do the FAA rules.<sup>28</sup>

The United States' experiment with a federal system of government has lasted more than 225 years. (See the "Analyzing the Sources" feature to assess how the experiment is going.) What began as a system of government with dual sovereignty implemented through a model of dual

## preemption

The constitutionally based principle that allows a national law to supersede state or local laws.



## MADISON'S VISION OF THE U.S. FEDERAL SYSTEM COMPARED TO THE SYSTEM TODAY

In *Federalist* No. 45, James Madison argued that under the proposed Constitution, the states will retain “a very extensive portion of active sovereignty.” More specifically, he noted that the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce, with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of people, and the internal order, improvement, and prosperity of the State.

Reflecting on the variety of policies, forms of federalism, and IGR realities discussed in this chapter, address the following questions about how well today's federalism matches Madison's description of the federal system the Constitution would create.

### Evaluating the Evidence

1. From today's perspective, do you agree with Madison's assessment that the “powers delegated . . . to the federal government are few and defined”? Explain your answer.
2. Do the state governments operate independently of the national government in matters that “concern the lives, liberties, and properties of people, and the internal order, improvement, and prosperity of the State?” Explain.
3. Explain how Madison's claim that under the Constitution the states will retain “a very extensive portion of active sovereignty” can be supported today.
4. Based on the excerpt from *Federalist* No. 45, explain Madison's point of view regarding state's rights, specifically his position on what powers the state government will retain as an “active sovereignty.”

federalism has evolved into a system of government with dual sovereignty implemented through a model of conflicted federalism. Although the national government works independently on some policy matters (such as national defense and foreign policy) and state governments work independently on others (such as land use and the regulation of occupations and professions), most domestic matters are addressed through mutual efforts of at least two, if not three, levels of government, through intergovernmental relations.

## IGR: U.S. Federalism Now

Constitutional language establishing our federal system of government, with dual sovereignty, remains essentially as it was in 1791. However, what that looks like on the ground is confusing (look back at that marble cake!). National grants-in-aid, funded and unfunded mandates, and preemption combined with states' rights established in the Tenth Amendment and interstate compacts intermingle to spawn intergovernmental relations that are sometimes cooperative, other times tense, and often downright hostile. Another product of all these elements of today's federalism is wide variation in policy from state to state on numerous domestic issues, from health care to legal use of marijuana to gun control to civil rights and civil liberties.

### Federalism Policy Case Studies

In the following sections, we will explore additional policy matters that exhibit different types of intergovernmental relations, states as laboratories experimenting with innovative policies, and state policies that are polar opposites. Then, we will review some of the advantages and the disadvantages to today's federalism.



**ELEMENTARY AND SECONDARY EDUCATION POLICY** The U.S. Constitution does not mention education policy, which is a reserved power for the states. All but a few states have established school districts (a local government with a single purpose, education) to implement the state's education policy. The states delegate to these districts the power to enact education policies on matters not covered by state law, as well as to raise money by creating and collecting taxes. States and their school districts share the financing of elementary and secondary education; states provide grants-in-aid, and school districts collect property tax revenue.

Beginning with the 1965 Elementary and Secondary Education Act (ESCA), the national government began to enact pieces of legislation (with funded mandates and unfunded mandates) to ensure more equitable educational opportunities across states and their school districts, and for all children no matter their ability/disability, race, sex, ethnicity, or religion.

In 2002, President George W. Bush signed into law the No Child Left Behind Act (NCLB), a revision of the ESCA. The NCLB was a grant program that mandated testing of elementary and secondary school students to assess their proficiency in math and reading. The act established 2014 as the deadline for 100 percent of students to achieve math and reading proficiency. The NCLB delegated to state governments the responsibility to create and pay for standardized proficiency tests. States and their school districts were also responsible for creating, paying for, and implementing educational programs that would foster proficiency. School districts that failed to meet the national standards lost some national grant money.

As the 2014 deadline approached, many state and school district governments claimed the NCLB standards were unrealistic. Therefore, those governments requested and received from the national government **waivers**, which are exemptions from particular conditions normally attached to grants, from NCLB proficiency mandates.

In 2015, President Obama signed into law the Every Student Succeeds Act, a radical rewrite of NCLB and therefore the ESCA. This new legislation maintains mandatory proficiency testing, but it returns power to states and school districts to establish their own performance standards, to assess their schools, and to determine how to improve failing schools. It also prohibits the national government from imposing academic requirements and removes the threat of lost national grant money for poorly performing schools. At the law's signing ceremony, President Obama stated, "This bill makes long-overdue fixes to [NCLB], replacing the one-size-fits all approach to reform with a commitment to provide every student with a well-rounded education."<sup>29</sup> This reform devolves policy responsibilities for elementary and secondary education to states and school districts.

### waivers

Exemptions from particular conditions normally attached to grants.



> Demonstrators rallied outside the White House in November 2015, chanting "Let them in." The demonstrators were responding to governors' calls on the federal government to stop admitting Syrian refugees and several governors' statements that they would no longer provide placement in their states for Syrian refugees. What was the catalyst for the governors' efforts to ban Syrian refugees?

© Jeff Malet Photography/Newscom

**IMMIGRANT POLICIES** Immigration policy has traditionally been viewed as a responsibility of national government. However, during the past few decades, claiming that the national government has not enacted needed reforms to national immigration laws and is not implementing existing laws effectively, most state governments and numerous local governments have taken actions, including enacting laws, that affect the daily lives of immigrants.

After the 2015 terrorist attacks that killed 130 people in Paris, governors in at least 30 states requested that the national government stop accepting Syrian refugees because reports indicated that at least one of the terrorists had entered France by posing as a Syrian refugee. Governors of at least eight states claimed that they would not allow Syrian refugees to move into their states. Texas tried to prevent the location of Syrian refugees into the state by suing the national government.

Indiana governor Mike Pence was sued by the American Civil Liberties Union (ACLU) on behalf of a nonprofit organization that resettles refugees for the federal government. The ACLU argued that “decisions concerning immigration and refugee resettlement are exclusively the province of the federal government, and attempts [by states] to preempt that authority violate both equal protection and civil rights laws and intrude on authority that is exclusively federal.”<sup>30</sup> Several governors also questioned the authority of state governments to block the federal programs that relocate refugees into states.

State policies about in-state tuition for college also affect immigrants. Sixteen states have enacted legislation that offers the lower in-state college tuition to students who are immigrants without legal documentation. Typically, to receive this tuition benefit, students must have graduated from a high school in the state, must be accepted into a state college or university, and must promise to apply for legal status as soon as they are eligible to do so. At the same time, six states prohibit extending in-state college tuition rates to immigrants without documentation.<sup>31</sup>

Today, for U.S. citizens and immigrants (documented and undocumented), the federal system has positive effects and negative effects.

## Advantages and Disadvantages of Today's Federalism

When political scientists discuss the advantages and disadvantages of the federal system, what one person argues is an advantage may look like a disadvantage to another. For example, a frequently stated advantage of the federal system is the numerous access points for citizens to participate in their governments. Citizens can engage with national, state, county, municipal, and school district governments. They elect representatives to multiple governments so that they will be responsive to their needs and protect their rights.

For citizens, however, the availability of so many access points might be confusing and time consuming. Which government is the one with the legal responsibility to solve the problem you

Then

Now

Next

## Americans' Trust in Their Governments

	Then (1960s)	Now
<b>Trust in Local Governments*</b>	<b>77%</b>	<b>72%</b>
Democrats	76%	70%
Republicans	80%	81%
<b>Trust in State Governments*</b>	<b>80%</b>	<b>62%</b>
Democrats	80%	62%
Republicans	87%	73%
<b>Trust in National Government handling international problems**</b>	<b>83%</b>	<b>43%</b>
Democrats	58%	70%
Republicans	89%	27%
<b>Trust in National Government handling domestic problems**</b>	<b>77%</b>	<b>40%</b>
Democrats	55%	63%
Republicans	76%	28%

\*GALLUP: [www.gallup.com/poll/176846/americans-trust-local-government-stte.aspx](http://www.gallup.com/poll/176846/americans-trust-local-government-stte.aspx).

\*\*GALLUP: [www.gallup.com/poll/175697/trust-federal-gov-international-issues-new-low.aspx](http://www.gallup.com/poll/175697/trust-federal-gov-international-issues-new-low.aspx).

## WHAT'S NEXT?

- > Will citizens have higher expectations for their state and local governments if their trust in the national government's handling of domestic problems continues to be lower than their trust in their state and local governments?
- > Will citizens continue to trust in their state and local governments at higher levels than the national government as the state and local governments expand their involvement in highly controversial matters such as gun rights, immigrant rights, and legalization of marijuana?
- > Will the Democrats' increasing trust in the national government and Republicans' decreasing trust in the national government persist after the 2017 inauguration of the new president?

want addressed? Which elected official or government has the authority and resources to solve a specific problem? Vague constitutional language does not make these easy questions for either citizens or government officials to answer.

Moreover, each election requires citizens to research candidates running for office. Who has the time? Each year, every state has a primary election day and a general election day. On any given election day, a citizen may be asked to vote for a handful of government officials or dozens. Voters elect more than 500,000 government officials to serve them in the three levels of government. Some political scientists argue that voter turnout would be higher if there were fewer elections.

Another proclaimed advantage of the federal system is that it offers flexibility that makes for more efficient, effective, and responsive government. For example, because of their proximity, local and state governments can respond more quickly, and with a better understanding, to regional problems and needs than can the national government. In addition, what is a problem in one location may not be a problem elsewhere in the nation. Therefore, a national policy may not be appropriate. Moreover, the solution (policy) supported by citizens in one area may not be supported by citizens in a different area. One-size-fits-all national policies are not necessarily effective for all or supported by all.

Yet, some problems and needs cross state borders and affect the entire nation. As a result, we need national policies for some matters, state policies for other matters, and local policies for still others. A federal system provides for policies at all three levels of government.

However, this flexibility may lead to duplication of effort as multiple governments enact policies to address the same concern of their overlapping citizens. Duplication of effort is costly to taxpayers and inefficient. On the other hand, multiple governments enacting different policies to address the same problem allows for experimentation and innovation in the search for the best solution. Governments observing other governments' efforts to solve a problem can then adopt the policy they deem best for their citizens.

One clear disadvantage to the federal system is that it creates inequalities in services and policies; some state or local governments provide their citizens with better public services or more rights than citizens elsewhere. Today, legal rights and privileges (such as the right to legal use of marijuana or to lower in-state college tuition) depend on the state in which you live. Such inequalities may satisfy those who support state laws on given matters, but they dissatisfy those who do not support the laws and want the same rights as citizens in other states. Vague constitutional language also allows states to enact policies that may infringe on national sovereignty, and it allows the national government to enact policies that may infringe on state sovereignty. Conflicts over sovereignty can disrupt domestic tranquility (via protests and demonstrations) and lead to costly lawsuits. They may also fuel distrust and dissatisfaction with governments.

Today, we see hostility and tension between state governments and the national government over numerous issues, including immigration reform, the right to bear arms and gun control, the right to abortion, the expansion of Medicaid eligibility, and the proper implementation of the Affordable Care Act. Some observers have begun to discuss a new states' rights movement<sup>32</sup> as state governments that do not agree with a national policy enact their own laws that may conflict with national laws.

Polarization in Congress, which leads to gridlock, is fueling the states' rights movement. When Congress cannot agree on policies to solve problems, state governments step into the silence and pass their own policies. The result can be conflicting state policies and state policies that infringe on national sovereignty. Ultimately, the courts may have to resolve these conflicts.

## Conclusion

# Thinking Critically About What's Next for Federalism

Today's federalism (conflicted federalism) is not the framers' federalism (dual federalism). James Madison and other framers argued that the national government's powers were limited by the Constitution and focused on foreign affairs and defense matters, while states' powers were expansive and covered domestic issues. However, the proper distribution of authority and

balance of power between the national and state governments has always been controversial. Until recent decades, the Supreme Court's interpretations tended to favor an expansion of the national government's enumerated and implied powers into a growing number of domestic matters. However, the past few decades have witnessed inconsistency in the Court's interpretations. The Court protects and even expands national powers in some cases while protecting states' powers in other cases.

The national government has created a complex web of intergovernmental relations through its application of the Fourteenth Amendment, as well as grants-in-aid, mandates, and preemption. IGR makes it difficult to determine what governments are in charge of making policy, financing policy, and implementing policy; therefore, it can be hard to know which government can solve your particular problem.

Today, we see increasing differences among state policies enacted to address similar needs and concerns of their residents. States are experimenting to find effective policies that their citizens support. Because of years of gridlock in Congress over several policy matters that traditionally were the purview of the national government, we also are witnessing an increase in state and local laws enacted to fill in the national policy silences. Moreover, state governments are enacting laws that often seem to conflict with national laws. IGR and conflicted federalism are today's reality.

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## Summary

### 1. An Overview of the U.S. Federal System

Dual sovereignty is the defining characteristic of the United States' federal system of government. Under a federal system, the national government is sovereign over specific matters, and state governments are sovereign over different matters. For citizens, their rights, responsibilities, and public services vary and depend on in the state where they live.

### 2. Constitutional Distribution of Authority

The vagueness of the U.S. Constitution's language providing for enumerated and implied national powers, reserved state powers, concurrent powers, and national supremacy has provoked ongoing conflict between the federal government and the states over the proper distribution of sovereignty. The U.S. Supreme Court has the final word on the interpretation of the Constitution—and hence the final say on national and state sovereignty.

### 3. Evolution of Intergovernmental Relations in the Federal System

The Supreme Court's interpretations of the Constitution's distribution of authority have reinforced the ability of national officials to compel state and local governments to implement national policy preferences. Mandates, which include conditions placed on grants-in-aid, and preemption require states to assist in financing and implementing national policies. As a result, relations between the national government and the states have evolved from a simple arrangement of dual federalism to a complex system of intergovernmental relations.

### 4. IGR: U.S. Federalism Now

Today, intergovernmental relations dominate domestic policy implementation. State policies on similar matters often differ among the states, sometimes are polar opposites, and sometimes conflict with national policy and may even infringe on national sovereignty. The federal system of government offers efficiency, effectiveness, and responsiveness to citizens. At the same time, it is confusing, allows for duplication of effort and therefore wasted resources, and results in inequalities in rights, services, and benefits.

## AP Key Terms and Documents

Use the **boldfaced** terms below to focus your study of AP U.S. Government key concepts and terms in this chapter.

**block grant** 103

**categorical formula grant** 102

**categorical project grant** 103

centralized federalism 97

**concurrent powers** 89

**confederal system** 86

conflicted federalism 97

**cooperative federalism** 97

**devolution** 97

**dual federalism** 96

**enumerated powers** 90

extradition 94

**federal system** 85

**fiscal federalism** 102

**full faith and credit clause** 95

grants-in-aid 97

horizontal federalism 94

**implied powers** 90

intergovernmental relations (IGR) 87

interstate compacts 94

judicial federalism 96

**mandates** 103

matching funds

requirement 103

**McCulloch v. Maryland** 93

**necessary and proper clause (elastic clause)** 90

police powers 92

preemption 104

privileges and immunities clause 94

**reserved powers** 92

supreme law of the land 91

**unitary system** 86

**U.S. v. Lopez** 94

waivers 106

**Multiple-Choice Questions**

1. Which of the following statements accurately describes reserved powers?
  - (A) They have been used repeatedly to justify federal power over state power.
  - (B) They are granted to the states by the Tenth Amendment.
  - (C) They are considered by the Federalists to be the most important amendment.
  - (D) They demonstrate that state power is always supreme to federal power.
2. Which of the following reasons is generally cited as the reason for the nation's transitioning from "dual" to "cooperative" federalism?
  - (A) The complexity of the Great Depression and New Deal demanded closer cooperation between federal and state government.
  - (B) There was a belief that turning money over to the states as block grants would lead to greater state and local independence.
  - (C) There was a belief that a co-mingling of responsibility between federal and state government would lead to greater efficiency.
  - (D) The states as "laboratories of democracy" were seen as the natural engine on matters of national public policy.
3. Which of the following is an example of concurrent powers?
 

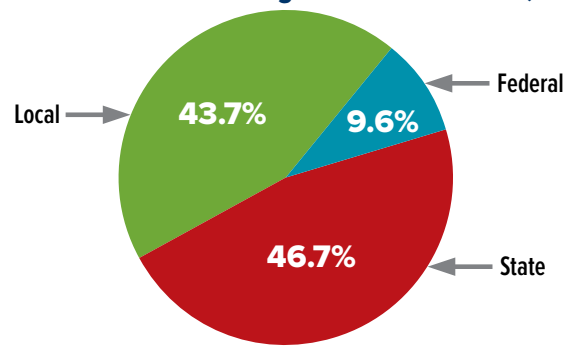
(A) regulating interstate commerce	(C) declaring war
(B) raising revenue	(D) establishing post offices
4. Which of the following best describes the impact of the Fourteenth Amendment on the relationship between state and national government?
  - (A) It expanded national government power by authorizing the national government to ensure that states follow due process before taking away a person's constitutional rights.
  - (B) It greatly enhanced the power of the national government to raise money by collecting income taxes from workers and corporations without returning any to the states.
  - (C) It expanded state sovereignty in shifting the election of U.S. senators by state governments to a system of popular vote by the citizens of a state.
  - (D) It increased cooperation between states and the national government by authorizing federal grants-in-aid to the states to meet their constitutional responsibilities.
5. Citizens living in some states pay no personal income tax while citizens living in other states pay personal income tax. This variation among the states is best explained by which of the following?
 

(A) concurrent powers	(C) a confederal system of government
(B) the full faith and credit clause	(D) the supremacy clause
6. Which of the following correctly pairs an implied or expressed power with a reserved power?

Implied or Expressed Power	Reserved Power
(A) Charter banks and corporations	Make policy
(B) Protect public health and safety	Raise and spend money
(C) Regulate foreign and interstate commerce	Conduct local, state, and national elections
(D) Establish and support public schools	Establish courts inferior to the U.S. Supreme Court

Questions 7 and 8 refer to the graph below:

Sources of Public Funding for Public Schools, 2010



Source: U.S. Census Bureau, 2010 Annual Survey of Local Government Finances—School Systems.

7. Which of the following best explains the federal government's involvement in funding public education in the U.S. as shown in the graph above?
- (A) The reserved powers clause of the Tenth Amendment
  - (B) The implied powers of the Constitution
  - (C) The supremacy clause in Article VI of the Constitution
  - (D) The full faith and credit clause of the Constitution
8. Which term best explains federal, state, and local government policies when it comes to education?
- (A) conflicted federalism
  - (B) horizontal federalism
  - (C) concurrent powers
  - (D) reserved powers

Questions 9 and 10 refer to the passage below.

*...The argument on the part of the State of Maryland is, not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it...*

*...We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.*

Marshall, Chief Justice John, Opinion of the U.S. Supreme Court. 1819. "*McCulloch v. Maryland*."<sup>33</sup>

9. Which of the following best represents the Supreme Court's logic in rendering the decision expressed in the excerpt above?
- (A) The enumerated powers of Congress took precedence over Maryland's right to tax the national bank.
  - (B) Commitments to the First Amendment outweighed Maryland's right to tax the national bank.
  - (C) The reserved powers clause of the Tenth Amendment prohibited the states from taxing the national bank.
  - (D) The precedent set in *Marbury v. Madison* gave the federal government authority over the states' reserved powers.

10. Which of the following paired answers best explains how the Supreme Court decision in the excerpt above most clearly differed from its decision in *U.S. v. Lopez* regarding conflict between state and national governments?

<i>McCulloch v. Maryland</i>	<i>U.S. v. Lopez</i>
(A) The Court established the use of concurrent powers to expand state sovereignty.	The Court overturned the <i>McCulloch</i> decision.
(B) The Court ruled in favor of the state.	The Court ruled in favor of the national government.
(C) The Court used the equal protection clause to rule in favor of the national government.	The Court used the full faith and credit clause to rule in favor of the national government.
(D) The Court ruled in favor of the national government.	The Court ruled in favor of state rights.

## Free Response Questions

### Question 1

Read and analyze the excerpt from Justice Ruth Bader Ginsburg in her concurring opinion in the case *National Federation of Independent Business v. Sebelius*. In an essay, develop an argument evaluating whether a requirement to purchase minimum health care insurance coverage is justified under the commerce clause. In your response, be sure to define the commerce clause and how it has been interpreted by the Supreme Court. Support your claim with two pieces of evidence and respond to opposing or alternative perspectives in your response.

#### Case Background

*“Unlike The Chief Justice [Roberts], however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision. . . . Our decisions thus acknowledge Congress’ authority, under the Commerce Clause, to direct the conduct of an individual today . . . because of a prophesied future transaction . . . Congress’ actions are even more rational in this case, where the future activity (the consumption of medical care) is certain to occur, the sole uncertainty being the time the activity will take place. Maintaining that the uninsured are not active in the health-care market, The Chief Justice draws an analogy to the car market. An individual “is not ‘active in the car market,’ ” The Chief Justice observes, simply because he or she may someday buy a car. . . . The analogy is inapt. The inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided when required are conditions nonexistent in other markets. That is so of the market for cars, and of the market for broccoli as well. Although an individual might buy a car or a crown of broccoli one day, there is no certainty she will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price. . . . Upholding the minimum coverage provision on the ground that all are participants or will be participants in the health-care market would therefore carry no implication that Congress may justify under the Commerce Clause a mandate to buy other products and services.”*

Justice Ruth Bader Ginsburg, Concurring Opinion, *National Federation of Independent Business v. Sebelius* (2012)



## Question 2

This question is based on the excerpt below from the Supreme Court case, *Garcia v. San Antonio Transit Authority* (1985).

### Case Background

*The Fair Labor Standards Act (FLSA) of 1938 established, among other things, a national minimum wage, and time-and-a-half pay for overtime work in certain jobs. In 1979 the Department of Labor determined that the San Antonio Metropolitan Transit Authority (SAMTA) was subject to these minimum wage and overtime requirements. SAMTA argued in federal district court, on the basis of the decision in National League of Cities v. Usery (1976), that as a provider of a “traditional” government function, it was exempt from these FLSA requirements. The federal district court agreed with SAMTA. Following this decision, Joe Garcia, a SAMTA employee, took the issue to the U.S. Supreme court, filing suit for overtime pay under the FLSA.*

### From the Majority Opinion (Blackmun):

...[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the “States as States” is one of process, rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process, rather than to dictate a “sacred province of state autonomy.”

...[W]e perceive nothing in the overtime and minimum wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.

In these cases, the status of public mass transit simply underscores the extent to which the structural protections of the Constitution insulate the States from federally imposed burdens. When Congress first subjected state mass transit systems to FLSA obligations in 1966, and...1974, it simultaneously provided extensive funding for state and local mass transit... SAMTA and its immediate predecessor have received ... over \$12 million during SAMTA's first two fiscal years alone...Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass transit systems, but has [also] provided substantial countervailing financial assistance...that may leave individual mass transit systems better off than they would have been had Congress never intervened at all...Congress' treatment of public mass transit reinforces our conviction that the national political process systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation...[Thus,] Congress' action in affording SAMTA employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause. The judgment of the District Court therefore must be reversed...

Blackmun, Justice Harry A., Majority Opinion of the U.S. Supreme Court. 1985. “*Garcia v. San Antonio Transit Authority*.”<sup>34</sup>

- (A) Identify the Court’s decision in the majority opinion.
- (B) Explain the reasoning or logic in the majority opinion.
- (C) Explain how the majority opinion’s reasoning in this case compares with the reasoning for the decision in *McCullough v. Maryland* regarding the authority of the national government.

## For Review

1. In terms of which government is sovereign, differentiate among a unitary system, a confederal system, and a federal system of government.
2. To which level of government does the Constitution distribute the enumerated powers? Implied powers? Concurrent powers? Reserved powers? Provide several examples of each power.
3. What matters fall within the scope of state sovereignty?
4. Differentiate among dual federalism, cooperative federalism, centralized federalism, and conflicted federalism.
5. How does the national government use grants-in-aid, mandates, and preemption to direct the policy of state and local governments?
6. What do we mean by intergovernmental relations? Why is the term a good description of U.S. federalism today?
7. Explain some advantages and some disadvantages for citizens of the U.S. federal system of government.

## For Critical Thinking and Discussion

1. Is the federal system of government that provides citizens with the opportunity to elect a large number of officials each year a benefit or a burden for citizens? Explain your answer.
2. Would the amount of money citizens pay for their governments through taxes and fees decrease if there were fewer governments serving them? Defend your answer.
3. Would the quality or quantity of government services decrease if there were fewer governments in the United States? Why or why not?
4. Note at least three societal problems you believe the national government can address best (more effectively and efficiently than state or local governments). Discuss why you believe the national government is best suited to address these problems. Do these problems fit in the category of enumerated national powers? Explain your answer.
5. Note at least three societal problems you believe state or local governments can address best (more effectively and efficiently than the national government). Discuss why you believe state or local governments are best suited to address these problems. Do these problems fit in the category of powers reserved to the states? Explain your answer.
6. Which of your governments (national, state, county, municipal/township, or school district) do you believe has the greatest effect on your daily life? Explain your answer.

# Supreme Court Case Activity

## *Wisconsin v. Yoder* (1972)

**Directions:** Read the case summary, the Court opinion, and the dissenting opinion. Then answer the questions that follow on a separate sheet of paper.

### CASE SUMMARY

**Families**<sup>1</sup> who were members of the Amish community were **convicted**<sup>2</sup> of breaking a Wisconsin law that required minors to attend school until they were 16. The Amish traditionally remove their children from school after 8th grade, at that time families teach their children skills needed to live a successful rural life. The lower courts found that the Amish sincerely believed that additional formal education for their children was contrary to the demands of their faith and threatened the salvation of both adults and children. The Wisconsin State Supreme Court agreed with the Yoders that Wisconsin's compulsory school-attendance law violated their rights under the Free Exercise of Religion Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment. The Supreme Court of the United States was asked to review this decision.

**Vote:** 9–0

<sup>1</sup> The respondents to this case are the parents charged by the State of Wisconsin. Jonas Yoder and Wallace Miller were members of the Old Order Amish Religion and Adin Yutzy was a member of the Conservative Amish Mennonite Church.


<sup>2</sup> For this conviction, the Green County court fined each family \$5.00.

### COURT OPINION

#### **Chief Justice Burger delivered the opinion of the Court.**

A . . . feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated in great detail by the Ordnung, or rules, of the church community. Adult baptism, which occurs in late adolescence, is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community.

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as



an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs...

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the "three R's" in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period...

There is no doubt as to the **power of a State**<sup>3</sup>, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. . . . Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children. . . .

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance...


...We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests...

...A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty

precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests...

<sup>3</sup> The Court has consistently found this power to be limited. In *Pierce v. Society of Sisters* (268 U.S. 210, 1925) they found an Oregon law requiring children to attend public school from ages 8-16 violated parents' rights to educate their children, including religious education.





Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living...

The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant — perhaps some would say static — in a period of unparalleled progress in human knowledge generally and great changes in education...


The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. . . . It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region...

Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged in this Court by the State of Wisconsin. Its position is that the State's interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice. Nor does the State undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion — indeed, as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others.

Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that "actions," even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when **religiously based**<sup>4</sup>, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus **beyond the power of the State to control**<sup>5</sup>, even under regulations of general applicability. This case, therefore, does not become easier because respondents

<sup>4</sup> Cases such as *Reynolds v. United States*, 98 U.S. 145 (1879) and *Employment Division v. Smith*, 494 U.S. 872 (1990) demonstrate this. *Reynolds* upheld a federal law forbidding bigamy even as a religious practice and *Smith* allowed employees who smoked peyote as part of sacred rites in the Native American Church to be denied employment benefits due to illegal drug use.

<sup>5</sup> In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court found a state law that required permits to solicit but was selectively applied against Jehovah Witnesses was unconstitutional.



were convicted for their "actions" in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments.


Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. *Walz v. Tax Commission*, 397 U.S. 664 (1970). The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise...

The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests...

The State, however, supports its interest in providing an additional one or two years of compulsory high school education to Amish children because of the possibility that some such children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life....

For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16. Our disposition of this case, however, in no way alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the "necessity" of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally



applicable educational requirements. It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life....

Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated. The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion.

Affirmed.

## DISSENTING OPINION

### Justice Douglas, dissenting in part.

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children...

Religion is an individual experience. It is not necessary, nor even appropriate, for every Amish child to express his views on the subject in a prosecution of a single adult. Crucial, however, are the views of the child whose parent is the subject of the suit. Frieda Yoder has in fact testified that her own religious views are opposed to high-school education. I therefore join the judgment of the Court as to respondent Jonas Yoder. But Frieda Yoder's views may not be those of Vernon Yutzy or Barbara Miller. I must dissent, therefore, as to respondents Adin Yutzy and Wallace Miller as their motion to dismiss also raised the question of their children's religious liberty.

This issue has never been squarely presented before today. Our opinions are full of talk about **the power of the parents**<sup>6</sup> over the child's education... And we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child...Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests.

These children are "persons" within the meaning of the **Bill of Rights**<sup>7</sup>. We have so held over and over again....

It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

<sup>6</sup> The Supreme Court in *Myer v. Nebraska*, 262 U.S. 390 (1923), found a state law prohibiting the teaching of children modern foreign languages (like German) to be a violation of parental rights to educate their children.

<sup>7</sup> And as such they have constitutional rights in a public school setting, such as: the freedom of expression (*Tinker v. Des Moines School District*, 393 U.S. 503 (1968); free speech to refuse to say the Pledge of Allegiance (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); and protection against unlawful search and seizure (*Safford United School District v. Redding*, 557 U.S. 364 (2009).





## PART I: MAPPING THE DECISION

1. In Justice Burger's majority opinion, he makes several assumptions regarding the plaintiffs' actions.
2. Describe Burger's assumptions regarding the State's responsibility for the education of its citizens.
3. What other factors does Burger claim must be considered when mandating education requirements?
4. Explain the basis of Yoder's claim that Wisconsin's compulsory education requirements violated their First Amendment rights.
5. Explain the Court's reasoning as to why Wisconsin believed that it could compel school attendance in this situation.

## PART II: EXPLAINING THE DECISION

6. What was the Supreme Court's ruling in *Wisconsin v. Yoder*, 1972?

## PART III: EXPLAINING DISSENTS AND CONCURRING OPINIONS

7. What was the primary point of Justice Douglas's dissent (in part)?

## PART IV: MAKING CONNECTIONS

8. Briefly explain other Supreme Court cases concerning issues presented in *Yoder*.

## PART V: CRAFTING AN ESSAY

9. Using your responses to the questions above, develop an essay describing the context of the case, explain the reasoning for the majority decision, explain the reasoning of concurring [and dissenting] Supreme Court decisions, and explain similarities and differences among related Supreme Court decisions and opinions.

## Supreme Court Case Activity

### *Wisconsin v. Yoder (1972)*

#### Extension Activities

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#### QUESTIONS FOR DISCUSSION

1. Why is it important that the Supreme Court clarifies the importance of the Amish objection to compulsory education based on *religious* grounds?
2. What is the difficulty in applying Justice Douglas' assertion that "The child, therefore, should be given an opportunity to be heard?"
3. In this case, the Court ruled that a religious sect was exempt from one section of the law. What other laws might religious groups take exception to?

#### FOR FURTHER RESEARCH

In some cities, the placement of eruv – wire or PVC piping that serves as a symbolic boundary – has resulted in legal action between municipalities and communities of observant Jews. The boundaries allow observant Jews to carry out a range of activities, including carrying keys, canes and walkers, and even children, which otherwise are forbidden on the Shabbat. Research eruvim (the plural of eruv) and determine whether the controversies surrounding the placement of eruvim constitute a challenge based on First Amendment claims.

#### Answers to Student Assignment

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#### PART I: MAPPING THE DECISION

1. **Describe Burger's assumptions regarding the State's responsibility for the education of its citizens.**

The State has a high responsibility for requiring universal education, in that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system and education prepares individuals to be self-reliant and self-sufficient participants in society.

2. **What other factors does Burger claim must be considered when mandating education requirements?**

The majority opinion claims that states must balance the responsibility of regulating education with fundamental rights and interests of individuals, including those protected by the Free Exercise clause of the First Amendment.

3. Explain the basis of Yoder's claim that Wisconsin's compulsory education requirements violated their First Amendment rights.

Amish beliefs require members of the community to make their living by farming or closely related activities. The Amish do not object to elementary education through the first eight grades because they agree that their children must have basic skills to read the Bible and to be good farmers and citizens. However, they do object to education beyond eighth grade because the values taught are at odds with Amish values and the Amish way of life. The Amish view secondary school education as an impermissible exposure of their children to a "worldly" influence that is in conflict with their beliefs. Because the traditional way of life of the Amish is not merely a matter of personal preference, or a secular consideration, but rather one of deep religious conviction, shared by an organized group, and intimately related to daily living, it is protected by the Free Exercise clause of the First Amendment.

4. Explain the Court's reasoning as to why Wisconsin believed that it could compel school attendance in this situation.

Burger reasoned that Wisconsin was asserting either that the attendance requirement does not deny free exercise, or that the state's interest in compelling school attendance overrides the First Amendment claims.

## PART II: EXPLAINING THE DECISION

5. What was the Supreme Court's ruling in *Wisconsin v. Yoder*, 1972?

The Court held in favor of the Yoders, saying that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16. Saying that the impact of the compulsory-attendance law on respondents' practice of the Amish religion was not only severe, but inescapable, because the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. Therefore, it carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

## PART III: EXPLAINING DISSENTING OPINIONS

6. What was the primary point of Justice Douglas's dissent (in part)?

Justice Douglas argued that children themselves have constitutionally protectable interests (not just their parents, who were the defendants in Yoder) under the Bill of Rights, saying "It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny."

## PART IV: MAKING CONNECTIONS

### 7. Briefly explain other Supreme Court cases concerning issues presented in *Yoder*.

Several Supreme Court cases reflect the struggle to at once protect the free exercise rights of the religious practices of the majority of Americans but refrain from facilitating the establishment of religion, while simultaneously protecting the free exercise rights of all religious practitioners. The interpretation and application of the First Amendment's Establishment Clause and Free Exercise clause can be seen in *Engel v. Vitale* (1962), which declared that school sponsorship of religious activities violates the establishment clause.

Cases showing that the activities of individuals, even though religiously grounded, are outside First Amendment protection include:

- *Reynolds v. United States*, 98 U.S. 145 (1879) which upheld a federal law forbidding bigamy even as a religious practice.
- *Employment Division v. Smith*, 494 U.S. 872 (1990) allowed for employees who smoked peyote as part of sacred rites in the Native American Church to be denied employment benefits due to illegal drug use.

Case ruling that general regulations cannot be used selectively to infringe on First Amendment Rights include:

- *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court found a state law that required permits to solicit but was selectively applied against Jehovah Witnesses was unconstitutional.
- In addition, other cases address the issue of the constitutional rights of children, brought up in Justice Douglas's dissent:
- *Tinker v. Des Moines School District*, 393 U.S. 503 (1968), freedom of expression; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), in which the Court ruled children have the right of free speech to refuse to say the Pledge of Allegiance; and protection against unlawful search and seizure (*Safford United School District v. Redding*, 557 U.S. 364 (2009)).

## PART V: CRAFTING AN ESSAY

### 8. Using your responses to the questions above, develop an essay describing the context of the case, explain the reasoning for the majority decision, explain the reasoning of concurring [and dissenting] Supreme Court decisions, and explain similarities and differences among related Supreme Court decisions and opinions.

Response Outline:

- I. The Context of *Wisconsin v. Yoder* (1972)
  - A. Wisconsin's responsibility to educate its citizens
  - B. Yoder's claim of free exercise
- II. The Court's reasoning
- III. The Court's decision
- IV. Douglas's dissent (in part)
- V. Other appropriate cases.