COOPERATIVE FEDERALISM: THE NEW DEAL AND THE GROWTH OF NATIONAL GOVERNMENT

THE ERA OF DUAL FEDERALISM came to an abrupt end in the 1930s. While the ratification of the Sixteenth and Seventeenth Amendments set the stage for expanded national government, the catalyst for dual federalism's demise was a series of economic events that ended in the cataclysm of the Great Depression:

- In 1921, the nation experienced a severe slump in agricultural prices.
- In 1926, the construction industry went into decline.
- In the summer of 1929, inventories of consumer goods and automobiles were at an all-time high.
- Throughout the 1920s, bank failures were common.
- On October 29, 1929, stock prices, which had risen steadily since 1926, crashed, taking with them the entire national economy.

Despite the severity of these indicators, Presidents Calvin Coolidge and Herbert Hoover took little action, believing that the national depression was an amalgamation of state economic crises that should be dealt with by state and local governments. However, by 1933, the situation could no longer be ignored.

The New Deal

Rampant unemployment (historians estimate it was as high as 40–50 percent) was the hallmark of the Great Depression. In 1933, to combat severe problems facing the nation, newly elected President Franklin D. Roosevelt (FDR) proposed a variety of innovative programs under the rubric of "the New Deal" and ushered in a new era in American politics. FDR used the full power of the office of the president as well as his highly effective communication skills to sell the American public and Congress on a whole new ideology of government. Not only were the scope and role of national government remarkably altered, but so was the relationship between each state and the national government.

The New Deal period (1933–1939) was characterized by intense government activity on the national level. It was clear to most politicians that to find national solutions to the Depression, which was affecting the citizens of every state in the union, the national government would have to exercise tremendous authority.

In the first few weeks of the legislative session after FDR's inauguration, Congress and the president acted quickly to bolster confidence in the national government. Congress passed a series of acts creating new agencies and programs proposed by the president. These new agencies, often known by their initials, created what many termed an alphabetocracy. Among the more significant programs were the Federal Housing Administration (FHA), which provided federal financing for new home construction; the Civilian Conservation Corps (CCC), a work relief program for farmers and home owners; and the Agricultural Adjustment Administration (AAA) and the National Recovery Administration (NRA), which imposed restrictions on production in agriculture and many industries.

These programs tremendously enlarged the scope of the national government. Those who feared this unprecedented use of national power quickly challenged the constitutionality of New Deal programs in court. And, at least initially, the Supreme Court often agreed with them.

Photo courtesy: AP/Wide World Photos

■ One of the hallmarks of the New Deal and FDR's presidency was the national government's new involvement of cities in the federal system. Here, New York City Mayor Fiorello La Guardia (for whom one New York airport is named) is commissioned by FDR as the director of civil defense.

Through the mid-1930s, the Supreme Court continued to rule that certain aspects of the New Deal went beyond the authority of Congress to regulate commerce. The Court's *laissez-faire,* or hands-off, attitude toward the economy was reflected in a series of decisions ruling various aspects of New Deal programs unconstitutional.

FDR and the Congress were outraged. FDR's frustration with the Court prompted him to suggest what ultimately was nicknamed his "Court-packing plan." Knowing that he could do little to change the minds of those already on the Court, FDR suggested enlarging its size from nine to thirteen justices. This would have given him the opportunity to pack the Court with a majority of justices predisposed toward the constitutional validity of the New Deal.

Even though Roosevelt was popular, the Court-packing plan was not. Congress and the public were outraged that he even suggested tampering with an institution of government. Nevertheless, the Court appeared to respond to this threat. In 1937, it reversed its series of anti–New Deal decisions, concluding that Congress (and therefore the national government) had the authority to legislate in any area so long as what was regulated affected commerce in any way. Congress then used this newly recognized power to legislate in a wide array of areas, including maximum hour and minimum wage laws, and regulation of child labor. Moreover, the Court also upheld the constitutionality of the bulk of the massive New Deal relief programs, such as the National Labor Relations Act of 1935, which authorized collective bargaining between unions and employees in *NLRB* v. *Jones and Laughlin Steel Co.* (1937);[24] the Fair Labor Standards Act of 1938, which prohibited the interstate shipment of goods made by employees earning less than the federally mandated minimum wage;[25] and the Agricultural Adjustment Act of 1938, which provided crop subsidies to farmers.[26]

Photo courtesy: Hulton Archive/Getty Images

■ This cartoon pokes fun at FDR (with his aide, Harold Ickes) and their unpopular plan to expand the size of the Supreme Court to allow FDR to add justices to undo the majority's anti–New Deal position.

The New Deal programs forced all levels of government to work cooperatively with one another. Indeed, local governments—mainly in big cities—became a third partner in the federal system, as FDR relied on big-city Democratic political machines to turn out voters to support his programs. For the first time in U.S. history, in essence, cities were embraced as equal partners in an intergovernmental system and became players in the national political arena because many in the national legislature wanted to bypass state legislatures, where urban interests usually were underrepresented significantly.

The Changing Nature of Federalism: From Layer Cake to Marble Cake

Before the Depression and the New Deal, most political scientists likened the federal system to a layer cake: each level or layer of government—national, state, and local—had clearly defined powers and responsibilities. After the New Deal, however, the nature of the federal system changed. Government now looked something like a marble cake:

> Wherever you slice through it you reveal an inseparable mixture of differently colored ingredients. . . . Vertical and diagonal lines almost obliterate the horizontal ones, and in some places there are unexpected whirls and an imperceptible merging of colors, so that it is difficult to tell where one ends and the other begins.[27]

Analyzing Visuals

DOMESTIC GRANT-IN-AID OUTLAYS, 1940–2008

The table below provides data on grants-in-aid from the national government to state and local governments between 1940 and 2008. Study the data provided in the table and answer the following critical thinking questions: If the amounts were indicated in constant dollars rather than in current dollars, would the figures change significantly? According to the table, which decades experienced a significant increase in domestic grants-in-aid in terms of total dollars, percentage of domestic programs, percentage of state and local expenditures, and percentage of the gross domestic product? How do those increases relate to the various interpretations of federalism (including cooperative federalism and new federalism)? What do you think explains the variations in grants-in-aid over time? See Analyzing Visuals: A Brief Guide for additional guidance in analyzing tables.

Federal Grants as a Percentage of Federal Outlays

Year	*Total Gross Domestic Grants-in-Aid (billions)*	*Total*	*Domestic Programs*[a]	*State and Local Expenditures*	*Product*
1940	$0.9	9.2	n/a	n/a	0.9
1950	2.3	5.3	n/a	n/a	0.8
1960	7.0	7.6	18.0	19.0	1.4
1970	24.1	12.3	23.0	24.0	2.4
1980	91.4	15.5	22.0	31.0	3.4
1990	135.3	10.8	17.0	21.0	2.4
1995	225.0	14.8	22.0	25.0	3.1
2000	284.7	15.9	22.7	n/a[b]	2.9
2005	422.4	18.0	24.6	n/a[b]	3.6
2008	482.3	17.8	n/a	n/a[b]	3.5

Note: Amounts are in current dollars. Fiscal years.

Includes off-budget outlays; all grants are on-budget.

[a] Excludes outlays for national defense and net interest.
[b] Data no longer provided by federal government in this form.

Source: Office of Management and Budget, Historical Tables, Budget of the United States Government, Fiscal Year 2004. January 2003. Accessed December 8, 2004, http://www.whitehouse.gov/omb/budget/fy2004/hist.html.

The metaphor of marble cake federalism refers to what political scientists call **cooperative federalism,** a term that describes the intertwined relationship among the national, state, and local governments that began with the New Deal. States began to take a secondary, albeit important, cooperative role in the scheme of governance, as did many cities. Nowhere is this shift in power from the states to the national government clearer than in the growth of federal grant programs that began in earnest during the New Deal. Between the New Deal and the 1990s, the tremendous growth in these programs, and in federal government spending in general, changed the nature and discussion of federalism from "How much power should the national government have?" to "How much say in the policies of the states can the national government buy?" (See Analyzing Visuals: Domestic Grant-in-Aid Outlays, 1940–2005.) During the 1970s energy crisis, the national government initially imposed a national 55 mph speed limit on the states, for example. Subsequent efforts forced states to adopt minimum-age drink restrictions in order to obtain federal transportation funds. (See Politics Now: Alcohol Policies.)

cooperative federalism
The relationship between the national and state governments that began with the New Deal.

Federal Grants and National Efforts to Influence the States

As early as 1790, Congress appropriated funds for the states to pay debts incurred during the Revolutionary War. But, it wasn't until the Civil War that Congress enacted its

Politics Now

Alcohol Policies

At the end of its 2003–2004 session, the U.S. Supreme Court agreed to take up the question of the constitutionality of state laws that prohibit or otherwise restrict the interstate shipment of wine to consumers. The wine controversy involves the scope of Congress's authority under the commerce clause versus the Twenty-First Amendment, which ended Prohibition and gave the states considerable power to regulate the sale and transportation of alcoholic beverages. As the Court said in granting review, the question was a simple one: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant commerce clause in light of Sec. 2 of the Twenty-First Amendment?"[a]

The stakes are considerable for vintners who, with the growth of e-commerce, now often get orders from potential out-of-state buyers. States are concerned about the loss of tax revenues, and wholesalers fear a loss of sales to consumers. But, this issue again puts the state and national governments potentially at odds as they often have been since the Twenty-First Amendment allowed states to regulate alcohol.

In 1982, for example, at the highly emotional urging of Mothers Against Drunk Drivers, Congress passed the Surface Transportation Act, which withheld 5 percent of federal highway funds from states that failed to pass legislation prohibiting persons under the age of twenty-one from drinking alcoholic beverages. (Eventually states were fined 10 percent.) In other words: no increased drinking age, fewer federal dollars for roads.

Later, in 1999, Congress passed more carrot and stick legislation to pressure states to adopt uniform measures to lower the blood alcohol levels that they considered legal indication of drunkenness. In 2003, Congress again acted, this time penalizing the few states that had yet to lower their limits to 0.08 by withholding 2 percent of their annual highway funds per year.

1. Should drunk driving laws be left to the states or to the national government? Is the national government's carrot and stick approach a basic violation of the principles of federalism?
2. Should states be able to regulate the sale and distribution of liquor across state lines?

[a] Tony Mauro, "Wine and Beef Cases on High Court Menu," *Legal Times* (May 25, 2004).

first true federal grant program, which allocated federal funds to the states for a specific purpose.

Most commentators believe the start of this redistribution of funds began with the Morrill Land Grant Act of 1862, which gave each state 30,000 acres of public land for each representative in Congress. Income from the sale of these lands was to be earmarked for the establishment and support of agricultural and mechanical arts colleges. Sixty-nine land-grant colleges— including Texas A&M University, the University of Georgia, and Michigan State University—were founded or significantly assisted, making this grant program the single most important piece of education legislation passed in the United States up to that time.

As we have seen, Franklin D. Roosevelt's New Deal program increased the flow of federal dollars to the states with the infusion of massive federal dollars for a variety of public works programs, including building and road construction. In the boom times of World War II, even more new federal programs were introduced. By the 1950s and 1960s, federal grant-in-aid programs were well entrenched. They often defined federal/state relationships and made the national government a major player in domestic policy. Until the 1960s, however, most federal grant programs were constructed in cooperation with the states and were designed to assist the states in the furtherance of their traditional responsibilities to protect the health, welfare, and safety of their citizens. Most of these programs were **categorical grants,** ones for which Congress appropriates funds for specific purposes. Categorical grants allocate federal dollars by a precise formula and are subject to detailed conditions imposed by the national government, often on a matching basis; that is, states must contribute money to match federal funds, although the national government may pay as much as 90 percent of the total.

categorical grant
Grant for which Congress appropriates funds for a specific purpose.

By the early 1960s, as concern about the poor and minorities rose, and as states (especially in the South) were blamed for perpetuating discrimination, those in power in the national government saw grants as a way to force states to behave in ways desired by the national government.[28] If the states would not cooperate with the national government to further its goals, it would withhold funds.

In 1964, the Democratic administration of President Lyndon B. Johnson (LBJ) launched its "Great Society" program, which included what LBJ called a "War on Poverty." The Great Society program was a broad attempt to combat poverty and discrimination. In a frenzy of activity in Washington not seen since the New Deal, federal funds were channeled to states, to local governments, and even directly to citizen action groups in an effort to alleviate social ills that the states had been unable or unwilling to remedy. There was money for urban renewal, education, and poverty programs, including Head Start and job training. The move to fund local groups directly was made by the most liberal members of Congress to bypass not only conservative state legislatures, but also conservative mayors and councils in cities such as Chicago, who were perceived as disinclined to help their poor, often African American, constituencies. Thus, these programs often pitted governors and mayors against community activists, who became key players in the distribution of federal dollars.

These new grants altered the fragile federal/state balance of power that had been at the core of many older federal grant programs. During the Johnson administration, the national government began to use federal grants as a way to further what federal (and not state) officials perceived to be national needs. Grants based on what states wanted or believed they needed began to decline, while grants based on what the national government wanted states to do to foster national goals increased dramatically. Soon, states routinely asked Washington for help. From pollution to economic development and law enforcement, creating a federal grant seemed like the perfect solution to every problem.[29]

Not all federal programs mandating state or local action came with federal money, however. And, while presidents Richard M. Nixon, Gerald Ford, and Jimmy Carter voiced their opposition to big government, their efforts to rein it in were largely unsuccessful.

NEW FEDERALISM: RETURNING POWER TO THE STATES

IN 1980, former California Governor Ronald Reagan was elected president, pledging to advance what he called a **New Federalism** and a return of power to the states. This policy set the tone for the federal/state relationship that was maintained from the 1980s until 2001. Presidents and Congresses, both Republican and Democrat, took steps to shrink the size of the federal government in favor of programs administered by state governments. President Bill Clinton lauded the demise of big government. And, on the campaign trail in 2000, George W. Bush also seemed committed to this devolution. A struggling economy and the events of 9/11, however, have led to substantial growth in the power and scope of the federal government.

New Federalism
Federal/state relationship proposed by Reagan administration during the 1980s; hallmark is returning administrative powers to the state governments.

The Reagan Revolution

The Republican Reagan Revolution had at its heart strong views about the role of states in the federal system. While many Democrats and liberal interest groups argued that grants-in-aid were an effective way to raise the level of services provided to the poor, others, including Reagan, attacked them as imposing national priorities on the states. Policy decisions were made at the national level. The states, always in search of funds, were forced to follow the priorities of the national government. States found it very

hard to resist the lure of grants, even though many were contingent on some sort of state investment of matching or proportional funds.

Shortly after taking office, Reagan proposed massive cuts in federal domestic programs and drastic income tax cuts. The Reagan administration's budget and its policies dramatically altered the relationships among federal, state, and local governments. For the first time in thirty years, federal aid to state and local governments declined.[30] Reagan persuaded Congress to consolidate many categorical grants (for specific programs that often require matching funds) into far fewer, less restrictive **block grants**—broad grants to states for specific activities such as secondary education or health services, with few strings attached. He also ended general revenue sharing, which had provided significant unrestricted funds to the states.

block grant
Broad grant with few strings attached; given to states by the federal government for specified activities, such as secondary education or health services.

By the end of the presidencies of Ronald Reagan and George Bush in 1993, most block grants fell into one of four categories: health, income security, education, or transportation. Yet, many politicians, including most state governors, urged the consolidation of even more programs into block grants. Calls to reform the welfare system, particularly to allow more latitude to the states in an effort to get back to the Hamiltonian notion of states as laboratories of experiment, seemed popular with citizens and governments alike. New Federalism had taken hold.

The Devolution Revolution

In 1992, Bill Clinton was elected president—the first Democrat in twelve years. Although Clinton was a former governor, he was more predisposed to federal programs than his Republican predecessors. In 1994, however, Republicans won a majority in both houses of Congress, and every Republican governor who sought reelection was victorious, while some popular Democratic governors, such as Ann Richards of Texas, lost (to George W. Bush). In *Federalist No. 17,* Alexander Hamilton noted that "it will always be far easier for the State government to encroach upon the national authorities than for the national government to encroach upon the State authorities." He was wrong. By 1994, many state governors and the Republican Party were rebelling against the power of the national government.

The Contract with America, proposed by then House Minority Whip Newt Gingrich (R–GA), was a campaign document signed by nearly all Republican candidates (and incumbents) seeking election to the House of Representatives in 1994. In it, Republican candidates pledged to force a national debate on the role of the national government in regard to the states. A top priority was scaling back the federal government, an effort that some commentators called the devolution revolution. Poll after poll, moreover, revealed that many Americans believed the national government had too much power (48 percent) and that they favored their states' assuming many of the powers and functions now exercised by the federal government (59 percent).[31]

Running under a clear set of priorities contained in the Contract, Republican candidates took back the House of Representatives for the first time in more than forty years. A majority of the legislative proposals based on the Contract passed the House of Representatives during the first one hundred days of the 104th Congress. However, very few of the Contract's proposals, including acts requiring a balanced budget and tax reforms, passed the Senate and became law.

unfunded mandates
National laws that direct states or local governments to comply with federal rules or regulations (such as clean air or water standards) but contain no federal funding to defray the cost of meeting these requirements.

On some issues, however, the Republicans were able to achieve their goals. For example, before 1995, **unfunded mandates,** national laws that direct state or local governments to comply with federal rules or regulations (such as clean air or water standards) but contain no federal funding to defray the cost of meeting these requirements, absorbed nearly 30 percent of some local budgets. Columbus, Ohio, for example, faced a $1 billion bill to comply with the federal Clean Water Act and the Safe Drinking Water Act. Republicans in Congress, loyal to the concerns of these governments,

secured passage of the Unfunded Mandates Reform Act of 1995. This act prevented Congress from passing costly federal programs without debate on how to fund them and addressed a primary concern for state governments.

Visual Literacy
Federalism and Regulations

Another important act passed by the Republican-controlled Congress and signed into law by President Bill Clinton was the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. This legislation replaced the existing welfare program, known as Aid to Families with Dependent Children (AFDC), with a program known as Temporary Assistance for Needy Families (TANF). TANF returned much of the administrative power for welfare programs to the states, and became a hallmark of the devolution revolution.

In the short run, these and other programs, coupled with a growing economy, produced record federal and state budget surpluses. States were in the best fiscal shape they had been in since the 1970s. According to the National Conference of State Legislatures, total state budget surpluses in 1998 exceeded $30 billion. These tax surpluses allowed many states to increase spending, while other states offered their residents steep tax cuts. Mississippi, for example, increased its per capita spending by 42.4 percent, while Alaska opted to reduce taxes by 44.2 percent.[32]

Despite these strong economic conditions, Vice President Al Gore failed to turn the success of the Clinton administration into a Gore presidency in 2000. His opponent, Texas Governor George W. Bush, campaigned on a platform of limited federal government, arguing that state and local governments should have extensive administrative powers over programs such as education and welfare.

Federalism Under the Bush Administration

On the campaign trail, President George W. Bush could not have foreseen the circumstances that would surround much of his presidency. A struggling economy, terrorist attacks on the World Trade Center and the Pentagon, and the rising costs of education and welfare produced state and federal budget deficits that would have been unimaginable only a few years before.

By 2003, many state governments faced budget shortfalls of more than $30 billion. Because state governments, unlike the federal government, are required to balance their budgets, governors and legislators struggled to make ends meet. Some states raised taxes, and others cut services, including school construction and infrastructure repairs. As illustrated in the opening vignette, however, many states made dramatic changes to counter their shrinking coffers. By 2004, thirty-two states, helped by $20 billion in emergency funds from the national government, projected surpluses.[33]

The federal government struggled with a $521 billion budget deficit of its own in 2004, with an optimistic $363 billion projected for 2005. However, most remarkable on the federal level was the tremendous expansion of the size and cost of the post-9/11 government. Bush, who campaigned on the idea of limited federal power, found himself asking Congress to create a huge new Cabinet department, the Department of Homeland Security, and federalizing thousands of airport security personnel. In addition, the No Child Left Behind Act created a host of federal requirements. These requirements have already built frustration among state and local officials, who argue that

■ Michigan Democratic Governor Jennifer Grenholm heads a state hard hit by cuts in some federal programs and the loss of jobs.
Photo courtesy: AP Photo/Jerry S. Mendoza

Join the Debate

The No Child Left Behind Act

OVERVIEW: The U.S. Constitution is silent in regard to educating American citizens. According to traditional interpretation of the Constitution, the Ninth and Tenth Amendments give the states and American people rights and powers not expressly mentioned or prohibited by the Constitution. It was the Framers' belief the federal principle would allow for and accommodate diverse opinions regarding life, liberty, and happiness—and it is the responsibility of the individual states to educate citizens accordingly. Historically, the states have assumed this task relatively free from federal interference, but over the last fifty years, declining educational attainment, coupled with the inability of the states to address this problem, has put education policy at the forefront of domestic policy debate. To correct this problem, the No Child Left Behind Act (NCLB) was signed into law in January 2002. NCLB was a controversial piece of legislation giving the national government substantial authority over state educational establishments; several years after enactment, NCLB is still controversial.

Though many educators and politicians agree on the goals set by the No Child Left Behind Act (NCLB)—higher educational standards, greater school accountability, ensuring qualified teachers, closing the gap in student achievement—NCLB is criticized by the two major political parties, even though significant congressional majorities of both parties voted for the act. Republicans complain that NCLB impermissibly allows federal intrusion into the educational rights of states, and Democrats worry that the federal government is not providing enough funding to meet NCLB's strict guidelines. Nevertheless, in practice, both parties seem to have switched ideological positions in regard to the federal government's role. Though the Republicans in 1996 advocated eliminating the Department of Education and reducing education expenditures, the Bush administration has significantly increased education funding; conversely, Democrats, who have traditionally advocated an increased federal role in education, now advocate states' rights (though with increased federal spending as well). Though it is too soon to determine the act's effectiveness, and though there is dramatic new federal involvement in education policy, NCLB is supported by a considerable majority of the American people of all demographics.

In the Information Age, it is imperative that all citizens have the requisite skills to survive and thrive in the new economy. With this in mind, what is the best way to ensure that all can realize their vision of life, liberty, and happiness? What is the best way to ensure a quality education for all Americans? Where does proper authority to educate children lie? How can the federal government determine the best way to educate children in a nation in which there are numerous ethnicities, religions, and cultures, all having differing views on what constitutes education? However, since the federal government in part funds state educational establishments, shouldn't it have a say in how its funds are spent? Since American education achievement lags behind education in other advanced modern democracies, shouldn't school systems and teachers be held accountable, and if so, what is the best way to address this problem?

Arguments for the No Child Left Behind Act

- **NCLB gives state and local school districts the flexibility to meet its requirements.** The law gives states the administering the schools, from class size to accountability testing, should be their responsibility.[34]

This trend of **preemption,** or allowing the national government to override state or local actions in certain areas, is not new. The phenomenal growth of preemption statutes, laws that allow the federal government to assume partial or full responsibility for state and local governmental functions, began in 1965 during the Johnson administration. Since then, Congress routinely used its authority under the commerce clause to preempt state laws. However, until recently, preemption statutes were generally supported by Democrats in Congress and the White House, not Republicans. The Bush

preemption
A concept derived from the Constitution's supremacy clause that allows the national government to override or preempt state or local actions in certain areas.

liberty to define standards and the means to meet and measure them. As long as NCLB guidelines are met, the states are generally free to innovate, educate, and test according to their needs.

- **NCLB is not an unfunded mandate.** The General Accounting Office has ruled that NCLB does not meet the description of an unfunded mandate as defined by the 1995 Unfunded Mandates Reform Act, primarily because state school systems have the option of accepting or rejecting NCLB funding. Federal spending accounts for only 8 percent of all educational expenditures in the United States.
- **NCLB represents federal responsiveness to the needs of parents with children in public schools.** Not only have the states failed to meet the guidelines set forth by various federal policy initiatives, but they have failed the expectations of parents as well. For example, Goals 2000 (1994) mandated a 90 percent high school graduation rate by 2000 and a number one rank in math and science for American students internationally. By 2000, the graduation rate was only 75 percent and American students ranked not first but nineteenth in math and eighteenth in science.

Arguments Against the No Child Left Behind Act

- **NCLB requirements force school districts to teach to the test.** Rather than teaching analytical and creative thinking, the testing requirements force school districts to have students cram for the exam, thus undermining the primary goal of a true education.
- **NCLB does not distinguish between disabled and non-English-speaking students and able students proficient in English.** A primary problem with NCLB is that it combines all students, regardless of their language level or other core educational proficiencies. This is an unfair burden on educators in school systems with a disproportionate number of disabled or non-English-speaking students, as NCLB's punitive sections assume an able, English-speaking student body.
- **NCLB should be considered an impermissible intrusion on the prerogatives of state educational establishments.** A primary concern of the Framers was excessive federal control over state policy. NCLB erodes the line separating federal and state authority. If school systems are not addressing the concerns of parents and educational problems, it is the proper duty of the states to address these issues.

Questions

1. Does NCLB place too many guidelines on state educational establishments? If so, what is the best way to ensure higher standards and school accountability?
2. Does NCLB give the federal government too much authority over a policy domain that has traditionally belonged to the states? Since school districts reflect local mores and attitudes, are students best educated based on local guidelines?

Selected Readings

Robert D. Barr. *Saving Our Students, Saving Our Schools: 50 Proven Strategies for Revitalizing At-Risk Students and Low Performing Schools.* Iri/Skylight Training and Publishing, 2003

Ken Goodman et al. *Saving Our Schools: The Case for Public Education.* RDR Books, 2004.

administration's use of these laws, therefore, reflects a new era in preemption. (See Join the Debate: The No Child Left Behind Act.)

The Supreme Court: A Return to States' Rights?

The role of the Supreme Court in determining the parameters of federalism cannot be underestimated. Although Congress passed sweeping New Deal legislation, it was not until the Supreme Court finally reversed itself and found those programs constitutional that any real change occurred in the federal/state relationship. From the New Deal until

TABLE 3.2 Major Federalism Cases Indicating the Supreme Court's General Devolution of Power Back to the States

Case	*Year*	*Vote*	*Issue/Question*	*Decision*
Webster v. *Reproductive Health Services*	1989	5–4	Are several state abortion restrictions constitutional?	Yes. In upholding most of the restrictions, the Court invited the states to begin to enact new state restrictions.
New York v. *Smith*	1992	6–3	Does the Low-Level Waste Act, which requires states to dispose of radioactive waste within their borders, violate the Tenth Amendment?	Yes. The section of the act that requires the states to take legal ownership of waste is unconstitutional because it forces states into the service of the federal government.
U.S. v. *Lopez*	1995	5–4	Does Congress have the authority to regulate guns within 1,000 feet of a public school?	No. Only states have this authority; no connection to commerce found.
Seminole Tribe v. *Florida*	1996	5–4	Can Congress impose a duty on the states to negotiate with Indian tribes?	No. Federal courts have no jurisdiction over an Indian tribe's suit to force a state to comply with the Indian Gaming Regulations Act, thus upholding the state's sovereign immunity (immunity from a lawsuit).
Boerne v. *Flores*	1997	5–4	Is the federal Religious Freedom Restoration Act and its application of local zoning ordinances to a church constitutional?	No. Sections of the act are beyond the power of Congress to force on the states.
Printz v. *U.S.*	1997	5–4	Can Congress temporarily require local law enforcement officials to conduct background checks on handgun purchasers?	No. Congress lacks the authority to compel state officers to execute federal laws.
Florida Prepaid v. *College Savings Bank*	1999	5–4	Can Congress change patent laws to affect state sovereign immunity?	No. Congress lacks authority under the commerce clause and the patent clause to eliminate sovereign immunity.
Alden v. *Maine*	1999	5–4	Can Congress void state immunity from lawsuit in state courts?	No. Congress lacks the authority to eliminate a state's immunity in its own courts.
U.S. v. *Morrison*	2000	5–4	Does Congress have the authority to provide a federal remedy for victims of gender-motivated violence under the commerce clause of the Fourteenth Amendment?	No. Portions of Violence Against Women Act were found unconstitutional.

You Are a Federal Judge

the 1980s, the Supreme Court's impact on the federal system was generally to expand the national government's authority at the expense of the states.

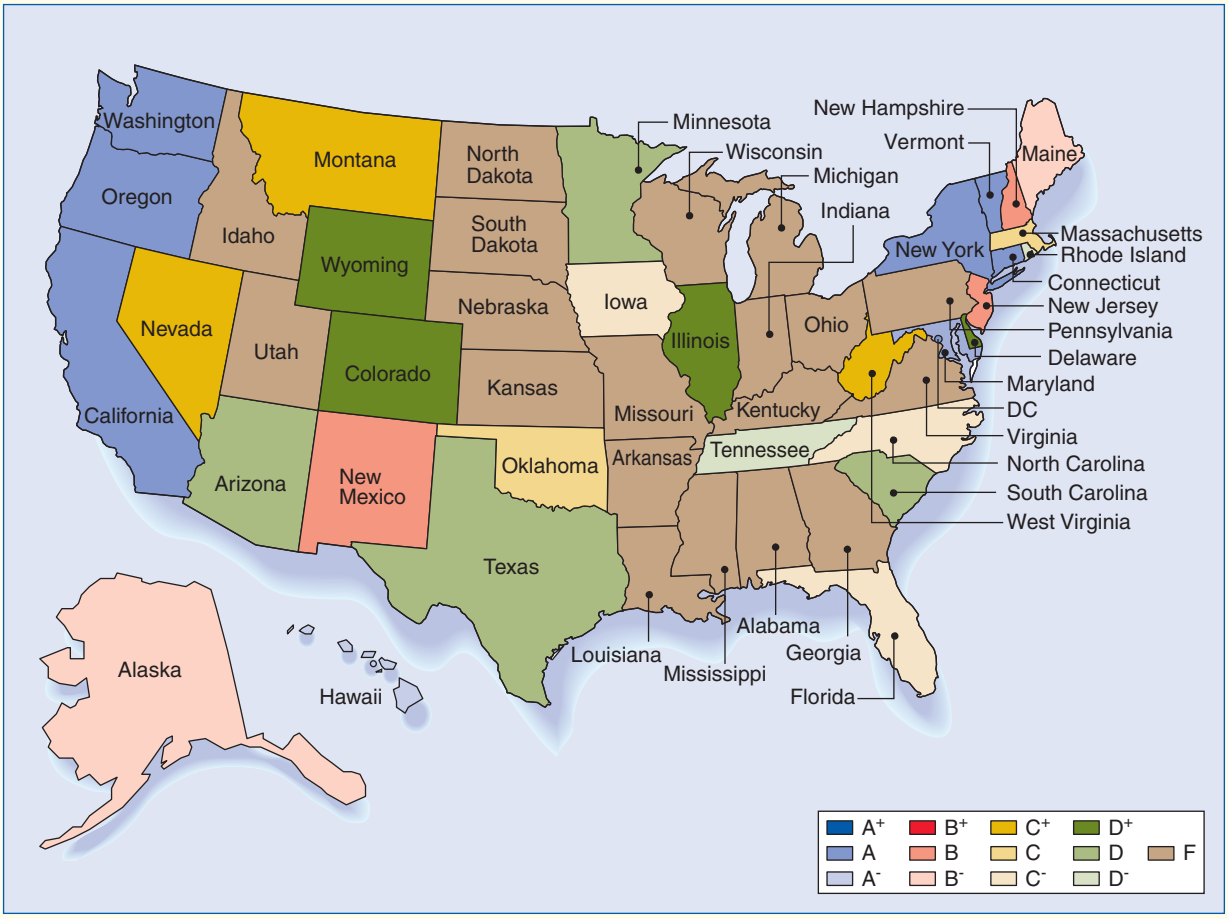
Beginning in the late 1980s, however, the Court's willingness to allow Congress to regulate in a variety of areas waned. Once Ronald Reagan was elected president, he attempted to appoint new justices committed to the notion of states rights and to rolling back federal intervention in matters that many Republicans believed properly resided within the province of the states and not Congress or the federal courts.

Mario M. Cuomo, a former Democratic New York governor, has referred to the decisions of what he called the Reagan-Bush Court as creating "a kind of new judicial federalism." According to Cuomo, this new federalism could be characterized by the Court's withdrawal of "rights and emphases previously thought to be national."[35] Illustrative of this trend are the Supreme Court's decisions in *Webster* v. *Reproductive Health Services* (1989)[36] and *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992).[37] In *Webster,* the Court first gave new latitude—and even encouragement—to the states to fashion more restrictive abortion laws, as underscored in Table 3.2. Since *Webster*, most states have enacted new restrictions on abortion, with spousal or parental con-

Analyzing Visuals

STATE-BY-STATE REPORT CARD ON ACCESS TO ABORTION

A liberal interest group, NARAL Pro-Choice America rates each state and the District of Columbia in fourteen categories related to abortion access, including bans on partial birth abortion procedures and counseling, clinic violence, the length of waiting periods, access for minors, and public funding, which it then translates into grades. NARAL gives an A only to states it evaluates as pro-choice on every issue on its agenda. After studying the map, answer the following critical thinking questions: What do the states that receive A's have in common? How might factors such as political culture, geography, and social characteristics of the population influence a state's laws concerning abortion? If a group that opposes abortion, such as the National Right to Life Committee, were to grade the states, would its ratings include the same categories or factors? Explain your answer. See Analyzing Visuals: A Brief Guide for additional guidance in analyzing maps.



Source: NARAL Pro-Choice America/NARAL Foundation, "Who Decides? A State-by-State Review of Abortion and Reproductive Rights," 2004. Accessed July 1, 2004, http://www.naral.org/yourstate/whodecides/index.cfm. Reprinted by permission.

sent, informed consent or waiting periods, or bans on late-term or partial birth abortions being the most common. (See Analyzing Visuals: State-by-State Report Card on Access to Abortion.) The Court consistently has upheld the authority of the individual states to limit a minor's access to abortion through imposition of parental consent or notification laws. And, it also consistently has declined to review most other

restrictions, including twenty-four-hour waiting period requirements. In 2000, however, a badly divided 5–4 Court struck down a Nebraska ban on partial birth abortions (as discussed in chapter 5).[38]

The addition of two justices by President Bill Clinton did little to stem the course of a Court bent on rebalancing the nature of the federal system. Since 1989, the Supreme Court has decided several major cases dealing with the nature of the federal system. Most of these have been 5–4 decisions and most have been decided against increased congressional power or in a manner to provide the states with greater authority over a variety of issues and policies. In *U.S.* v. *Lopez* (1995), for example, which involved the conviction of a student charged with carrying a concealed handgun onto school property, a five-person majority of the Court ruled that Congress lacked constitutional authority under the commerce clause to regulate guns within 1,000 feet of a school.[39] The majority concluded that local gun control in the schools was a state, not a federal, matter.

sovereign immunity
The right of a state to be free from lawsuit unless it gives permission to the suit. Under the Eleventh Amendment, all states are considered sovereign.

One year later, again a badly divided Court ruled that Congress lacked the authority to require states to negotiate with Indian tribes about gaming.[40] The U.S. Constitution specifically gives Congress the right to deal with Indian tribes, but the Court found that Florida's **sovereign immunity** protected the state from this kind of congressional directive about how to conduct its business. In 1997, the Court decided two more major cases dealing with the scope of Congress's authority to regulate in areas historically left to the province of the states: zoning and local law enforcement. In one, a majority of the Court ruled that sections of the Religious Freedom Restoration Act were unconstitutional because Congress lacked the authority to meddle in local zoning regulations, even if a church was involved.[41] Another 5–4 majority ruled that Congress lacked the authority to require local law enforcement officials to conduct background checks on handgun purchasers until the federal government was able to implement a national system.[42] In 1999, in another case involving sovereign immunity, a slim majority of the Supreme Court ruled that Congress lacked the authority to change patent laws in a manner that would negatively affect a state's right to assert its immunity from lawsuits.[43]

■ The conservative Rehnquist Court usually defers to state courts as well as judgments of the state legislatures.

Photo courtesy: © 2000 by Herblock in the Washington Post

The combined impact of all of these cases makes it clear that the Court will no longer countenance federal excursions into powers reserved to the states. As the power of Congress to legislate in a wide array of areas has been limited, the hands of the states have been strengthened.

In 2000, the Supreme Court's decision to stay a ruling of the Florida State Supreme Court ordering a manual recount of ballots surprised many observers, given the majority of the Court's reluctance over the last decade to interfere in areas historically left to the states. The Court's 5–4 decision in *Bush* v. *Gore* (2000), which followed fairly observable liberal/conservative lines, was surprising in that justices normally opposed to federal intervention in state matters found that the Florida

On Campus

Legislating Against Violence Against Women: A Casualty of the Devolution Revolution?

As originally enacted in 1994, the Violence Against Women Act (VAWA) allowed women to file civil lawsuits in federal court if they could prove that they were the victims of rape, domestic violence, or other crimes motivated by gender. VAWA was widely praised as an effective mechanism to combat domestic violence. In its first five years, $1.6 million was allocated for states and local governments to pay for a variety of programs, including a national toll-free hotline for victims of violence that averages 13,000 calls per month, funding for special police sex crime units, and civil and legal assistance for women in need of restraining orders.[a] It also provided money to promote awareness of campus rape and domestic violence and to enhance reporting of crimes such as what is often termed date rape.

Most of the early publicity surrounding VAWA stemmed from a challenge to one of its provisions. The suit brought by Christy Brzonkala was the first brought under the act's civil damages provision. While she was a student at Virginia Polytechnic Institute, Brzonkala alleged that two football players there raped her. After the university took no action against the students, she sued the school and the students. No criminal charges were ever filed in her case. The conservative federal appeals court in Richmond, Virginia—in contrast to contrary rulings in seventeen other courts—ruled that Congress had overstepped its authority because the alleged crimes were "within the exclusive purview of the states."[b] The Clinton administration and the National Organization for Women Legal Defense and Education Fund (now called Legal Momentum) appealed that decision to the Supreme Court on her behalf.

Photo courtesy: Cindy Pinkston, January 1996

Christy Brzonkala, the petitioner in U.S. v. Morrison.

In 2000, five justices of the Supreme Court, including Justice Sandra Day O'Connor, ruled that Congress had no authority under the commerce clause to provide a federal remedy to victims of gender-motivated violence, a decision viewed as greatly reining in congressional power.[c] Thus, today, students abused on campus no longer have this federal remedy as the Court devolves more power to the states.

[a] Juliet Eilperin, "Reauthorization of Domestic Violence Act Is at Risk," *Washington Post* (September 13, 2000): A6.

[b] Tony Mauro, "Court Will Review Laws of Protection," *USA Today* (September 29, 1999): 4A.

[c] *U.S.* v. *Morrison*, 529 U.S. 598 (2000).

Supreme Court, which purportedly based its decisions solely on its interpretation of Florida law, violated federal law and the U.S. Constitution.[44] Thus, the conservative, historically pro–states' rights justices in the majority used federal law to justify their decision.

During the 2002–2003 term, however, the Court took an unexpected turn in its federalism devolution revolution.[45] In a case opening states to lawsuits for alleged violations of the federal Family and Medical Leave Act (FMLA), writing for a six-person majority, Chief Justice William H. Rehnquist rejected Nevada's claim that it was immune from suit under FMLA. Rehnquist noted that the law was an appropriate exercise of Congress's power to combat sex-role stereotypes about the domestic responsibilities of female workers and "thereby dismantle persisting gender-based barriers that women faced in the workplace."[46]

ABA Participation
Is Federalism Dead and Should It Be?

SUMMARY

THE INADEQUACIES of the confederate form of government created by the Articles of Confederation led the Framers to create a federal system of government that divided power between the national and state governments, with each ultimately responsible to the people. In describing the evolution of this system throughout American history, we have made the following points:

1. **The Roots of the Federal System: Governmental Powers Under the Constitution**
   The national and state governments have both enumerated and implied powers under the Constitution. The national and state governments share some concurrent powers. Other powers are expressly denied to both governments, although the national government is ultimately declared supreme. The Constitution also lays the groundwork for the Supreme Court to be the arbiter in disagreements between states.

2. **Federalism and the Marshall Court**
   Over the years, the powers of the national government have increased tremendously at the expense of the states. Early on, the Supreme Court played a key role in defining the relationship and powers of the national government through its broad interpretations of the supremacy and commerce clauses.

3. **Dual Federalism: The Taney Court, Slavery, and the Civil War**
   For many years, dual federalism, as articulated by the Taney Court, tended to limit the national government's authority in areas such as slavery and civil rights, and was the norm in relations between the national and state governments. However, the beginnings of a departure from this view became evident with the ratification of the Sixteenth and Seventeenth Amendments in 1913.

4. **Cooperative Federalism: The New Deal and the Growth of National Government**
   The notion of a limited federal government ultimately fell by the wayside in the wake of the Great Depression and Franklin D. Roosevelt's New Deal. This growth in the size and role of the federal government escalated during the Lyndon B. Johnson administration and into the mid to late 1970s. Federal grants became popular solutions for a host of state and local problems.

5. **New Federalism: Returning Power to the States**
   After his election in 1980, Ronald Reagan tried to shrink the size and powers of the federal government through what he termed New Federalism. This trend continued through the 1990s, most notably through a campaign document known as the Contract with America. Initially, the George W. Bush administration seemed committed to this devolution, but a struggling economy and the events of 9/11 led to substantial growth in the size of the federal government.

KEY TERMS

bill of attainder, p. 101
block grant, p. 114
categorical grant, p. 112
concurrent powers, p. 100
confederation, p. 97
cooperative federalism, p. 111
dual federalism, p. 105
enumerated powers, p. 97
ex post facto law, p. 101
federal system, p. 97
full faith and credit clause, p. 101
Gibbons v. *Ogden* (1824), p. 103
implied powers, p. 98
interstate compacts, p. 102
McCulloch v. *Maryland* (1819), p. 104
necessary and proper clause, p. 98
New Federalism, p. 112
preemption, p. 116
privileges and immunities clause, p. 100
reserve (or police) powers, p. 100
Seventeenth Amendment, p. 107
Sixteenth Amendment, p. 107
sovereign immunity, p. 120
supremacy clause, p. 98
Tenth Amendment, p. 100
unfunded mandates, p. 114
unitary system, p. 97

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WEB EXPLORATIONS

For a directory of federalism links, see
http://xxx.infidels.org/~nap/index.federalism.html
For more on your state and local governments, see
http://www.statelocalgov.net/
For scholarly works on federalism, see
http://www.temple.edu/federalism and
http://www.cato.org/pubs/journal/cj14n1-7.html and
http://www.urban.org/Template.cfm?NavMenuID=24&template=/TaggedContent/ViewPublication.cfm&PublicationID=5874
For perspectives on the federal system, see
http://www.usembassy.beusa/usapolitical.htm
For more information on interstate compacts, see
http://ssl.csg.org/compactlaws/comlistlinks.html
For the full text of *McCulloch* v. *Maryland* (1819), see
http://www.landmarkcases.org/mcculloch/home.html
For the full text of *Gibbons* v. *Ogden* (1824), see
http://www.landmarkcases.org/gibbons/legacy.html
For more information on the Great Depression, see
http://newdeal.feri.org/
For more on the devolution revolution, see
http://www.brookings.edu/comm/policybriefs/pb03.htm
To analyze where your state stands relative to other states, see
http://www.taxfoundation.org/statefinance.html
For more information on state abortion restrictions, see
http://www.naral.org/
For more about local gun control initiatives, see
http://www.guncite.com/