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3

Federalism

IN 2003, RECALLED THE REPUBLICAN GOVERNOR of Nevada, Kenny Guinn (pictured to the left), the state was "like a casino gambler digging into his life savings just to stay in the game."[1] Like many other states, Nevada had built up significant "rainy day funds" during the budget surplus years of the 1990s, only to see them dwindle in the early 2000s. Nevada had to use $135 million of its $136 million fund to keep its budget balanced. Other states, too, had to raid the piggy bank. Across the nation, in a failing economy, state expenses rose sharply for post–September 11, 2001, security measures and to meet increased demands for state services as unemployment went up, along with the cost of providing health care for the states' poor and aged.

States took a variety of approaches to solving their budget woes. Many enacted new taxes and fees from increased car registration rates to costs for recording deeds as home sales and refinancings skyrocketed when mortgage interest rates fell. Tuition rates and fees at many state colleges and universities rose significantly—some by as much as 25 percent! Cities and other local governments similarly looked for new ways to raise revenue, from increased parking fines to better enforcement of traffic laws, to higher fines for overdue library books.

Still, "After three years during which state revenues proved exceedingly dismal, the picture [was] notably—but cautiously—brighter at the end of fiscal 2004," found a report from the National Association of State Budget officers. But, noted its executive director, "the picture is far from rosy. If the states were patients, you could say they are out of intensive care, but they're not out of the hospital yet."[2]

The woes that many states experienced in 2000, and dramatically after 9/11, vividly illustrate the interrelated nature of the state and national governments in our federal system. In 2003, when two-thirds of the states faced serious budget shortfalls, they pressured Congress to rescue them, which

CHAPTER OUTLINE

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resulted in $20 billion in emergency aid. For states like Nevada, "The $67 million we got from Congress . . . was a nice little shot in the arm," said its budget administrator.[3]

Some of those dollars went to fund programs mandated by the national government. The federal No Child Left Behind Act creates nationwide educational priorities, for example, but it also requires states to spend billions on standardized testing.[4] The nationally mandated Medicaid program establishes health coverage for the poor, but it also requires states to spend more than 20 percent of their budgets on Medicaid.[5]

In theory, this kind of federal/state relationship, which attempts to shrink the size of the federal government and return power to state agencies, should create programs that are more tailored to the needs of citizens. Proponents of what is known as the "devolution revolution" argue that state and local governments are closer to their citizens and more able to meet the needs of the region.

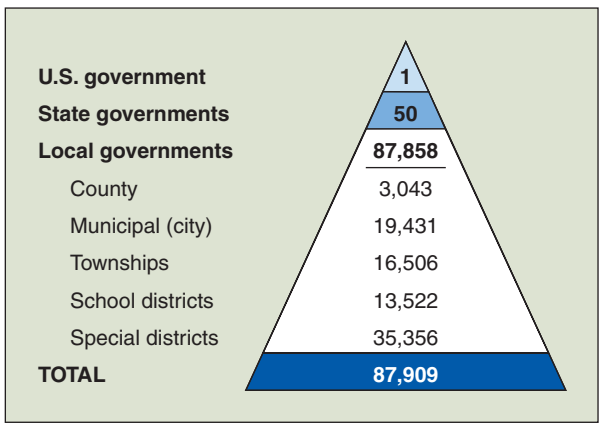
FROM ITS VERY BEGINNING, the challenge for the United States of America was to preserve the traditional independence and rights of the states while establishing an effective national government. In *Federalist No. 51,* James Madison highlighted the unique structure of governmental powers created by the Framers: "The power surrendered by the people is first divided between two distinct governments, and then . . . subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people."

The Framers, fearing tyranny, divided powers between the state and the national governments. At each level, moreover, powers were divided among executive, legislative, and judicial branches. The people are the ultimate power from which both the national government and the state governments derive their power.

Although most of the delegates to the Constitutional Convention favored a strong federal government, they knew that some compromise about the distribution of powers would be necessary. Some of the Framers wanted to continue with the confederate form of government defined in the Articles of Confederation; others wanted a more centralized system, similar to that of Great Britain. Their solution was to create the world's first federal system, in which the thirteen sovereign or independent states were bound together under one national government.

Today, the Constitution ultimately binds more than 87,000 different state and local governments, although the word "federal" never appears in that document (see Figure 3.1). The Constitution lays out the duties, obligations, and powers of the states. Throughout history, however, the system and the rules that guide it have been continually stretched, reshaped, and reinterpreted by crises, historical evolution, public expectations, and judicial interpretation. All these forces have had tremendous influence on who makes policy decisions and how these decisions get made, as is underscored in our opening vignette.

FIGURE 3.1 Number of Governments in the United States. ■



Source: U.S. Census Bureau, http://www.census.gov/govs/www/gid.html.

Issues involving the distribution of power between the national government and the states affect you on a daily basis. You do not, for example, need a passport to go from Texas to Oklahoma. There is but one national currency and a national minimum wage. But, many differences exist among the laws of the various states. The age at which you may marry is a state issue, as are laws governing divorce, child custody, and most criminal laws, including how—or if—the death penalty is implemented. Although some policies or programs are under the authority of the state or local government, others, such as air traffic regulation, are solely within the province of the national gov-

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ernment.[6] In many areas, however, the national and state governments work together cooperatively in a system of shared powers. At times, the national government cooperates with or supports programs only if the states meet certain conditions. To receive federal funds for the construction and maintenance of highways, for example, states must follow federal rules about the kinds of roads they build.

To understand the current relationship between the states and the federal government and to better grasp some of the issues that arise from this constantly changing relationship, in this chapter, we will examine the following topics:

- First, we will look at *the roots of the federal system* and *governmental powers under the Constitution* created by the Framers.
- Second, we will explore the relationship between *federalism and the Marshall Court*.
- Third, we will examine the development of *dual federalism* before and after the *Civil War.*
- Fourth, we will analyze *cooperative federalism and the growth of national government*.
- Finally, we will discuss *new federalism,* the movement toward *returning power to the states.*

THE ROOTS OF THE FEDERAL SYSTEM: GOVERNMENTAL POWERS UNDER THE CONSTITUTION

AS DISCUSSED IN CHAPTER 2, the Framers of the Constitution were the first to adopt a **federal system** of government. This system of government, where the national government and state governments derive all authority from the people, was designed to remedy many of the problems experienced by the Framers under the Articles of Confederation. Under the Articles, the United States was governed by a confederation government, where the national government derived all of its powers from the states. This led to a weak national government that was often unable to respond to even small crises, such as Shays's Rebellion.

federal system
System of government where the national government and state governments derive all authority from the people.

The new system of government also had to be different from the **unitary system** found in Great Britain, where the local and regional governments derived all their power from a strong national government. (Figure 3.2 illustrates these different forms of government.) Having been under the rule of English kings, whom they considered tyrants, the Framers feared centralizing power in one government or institution. Therefore, they made both the state and the federal government accountable to the people at large. While the governments shared some powers, such as the ability to tax, each government was supreme in some spheres, as depicted in Figure 3.3 and described in the following section.

unitary system
System of government where the local and regional governments derive all authority from a strong national government.

The federal system as conceived by the Framers has proven tremendously effective. Since the creation of the U.S. system, many other nations including Canada (1867), Mexico (1917), and Russia (1993) have adopted federal systems in their constitutions. (See Global Perspective: Federalism Around the World.)

Comparative
Comparing Federal and Unitary Systems

National Powers Under the Constitution

Chief among the exclusive powers of the national government are the authorities to coin money, conduct foreign relations, provide for an army and navy, declare war, and establish a national court system. All of these powers set out in Article I, section 8, of the Constitution are called **enumerated powers.** Article I, section 8, also contains the

enumerated powers
Seventeen specific powers granted to Congress under Article I, section 8, of the U.S. Constitution; these powers include taxation, coinage of money, regulation of commerce, and the authority to provide for a national defense.

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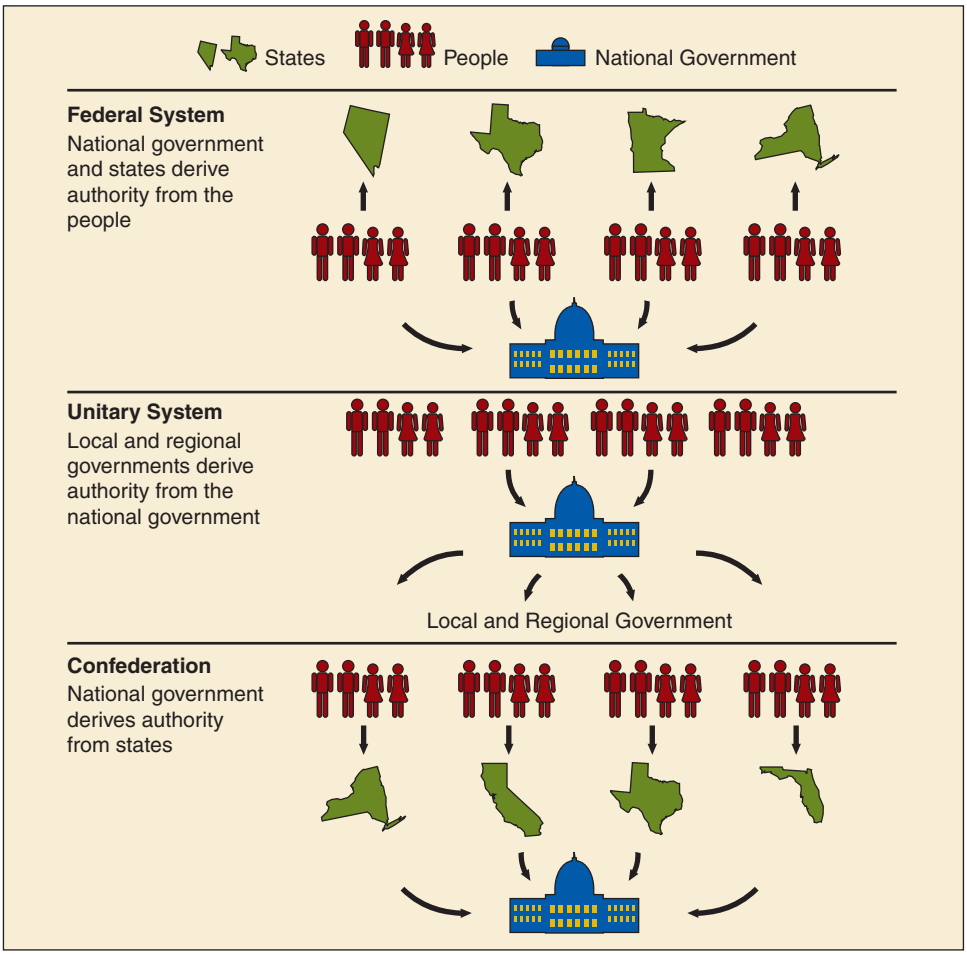

FIGURE 3.2 The Federal, Confederation, and Unitary Systems of Government
The source of governmental authority and power differs dramatically in various systems of government. ■

necessary and proper clause
The final paragraph of Article I, section 8, of the U.S. Constitution, which gives Congress the authority to pass all laws "necessary and proper" to carry out the enumerated powers specified in the Constitution; also called the elastic clause.

necessary and proper clause, which gives Congress the authority to enact any laws "necessary and proper" for carrying out any of its enumerated powers. These powers derived from enumerated powers and the necessary and proper clause are known as implied powers.

The federal government's right to tax was also clearly set out in the new Constitution. The Framers wanted to avoid the financial problems that the national government experienced under the Articles of Confederation. If the national government was to be strong, its power to raise revenue had to be unquestionable. Although the new national government had no power under the Constitution to levy a national income tax, that was changed by the passage of the Sixteenth Amendment in 1913. Eventually, as discussed later in this chapter, this new taxing power became a powerful catalyst for further expansion of the national government.

Article VI of the federal Constitution underscores the notion that the national government is to be supreme in situations of conflict between state and national law. It declares that the U.S. Constitution, the laws of the United States, and its treaties are to be "the supreme Law of the Land; and the Judges in every State shall be bound thereby."

supremacy clause
Portion of Article VI of the U.S. Constitution mandating that national law is supreme to (that is, supersedes) all other laws passed by the states or by any other subdivision of government.

In spite of this explicit language, the meaning of what is called the **supremacy clause** has been subject to continuous judicial interpretation. In 1920, for example, Missouri sought to prevent a U.S. game warden from enforcing the Migratory Bird Treaty Act of 1918, which prohibited the killing or capturing of many species of birds as they made their annual migration across the international border from Canada to

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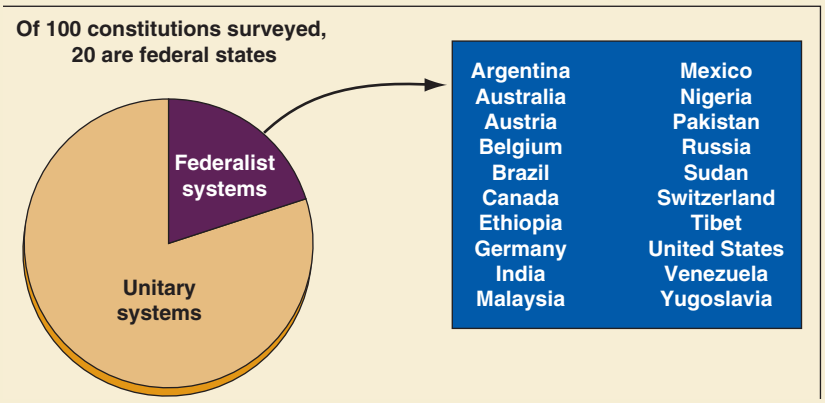
Global Perspective

FEDERALISM AROUND THE WORLD

One of the most fundamental decisions that constitutional framers must make involves choosing between a unitary and a federal framework for organizing political power. In a federal system, such as exists in the United States, political power is firmly divided between the national government and states. In India's federal system, for example, states have jurisdiction over public health, education, agriculture, forests, and fisheries. In a unitary system, all political power rests with the national government. It may delegate the power to make or implement policies to lesser governmental units such as states, provinces, or cities, but those decisions reside with the national government alone. Thus, a ministry (department) of education in a unitary system has the power to set the curriculum for all children in the country regardless of where they live. There may be a national police force and only one court system with judges appointed by the central government. Great Britain and France are the best-known unitary states. A major political controversy currently underway in France is the decision by the central government to forbid schoolchildren from wearing head coverings in school. Many Muslims residing in France see this as an affront to their culture, but French authorities view the policy as consistent with the principles of a secular state and an affirmation of the primacy of French culture.



Around the world there are far more unitary political systems than federal ones. A survey of one hundred constitutions in 2000 found that only twenty were federal states (see the figure). What is immediately obvious is that many of these states are among the world's largest states. Russia has a population of 145 million and is divided into 89 components. Brazil has a population of 177 million and has 26 states and a capital territory. Nigeria has a population of 133 million and is divided into 36 states and a capital area. India has a population of 1.05 billion and contains 25 states.

Both systems of governments have their backers. Advocates of federalism assert that it promotes and protects regional/ethnic uniqueness, allows citizens choice, brings citizens closer to their governments, and promotes experimentation. Critics of federalism and those who advocate a unitary system maintain that federalism creates a slow and cumbersome decision-making process, it denies equal treatment to all citizens, and states lack the financial resources to address many of today's problems. The United States' immediate neighbors, Canada and Mexico, are federations illustrating both sides of the debate. Quebec, a predominately French-speaking province in Canada, relies heavily upon federalism to maintain its identity. In Mexico, economic problems and the long history of one-party rule have led to increased centralization of power in the national government.

Both federal and unitary political systems around the world have begun to incorporate elements of the other in order to deal effectively with contemporary issues. Unitary systems have undertaken policies to grant subnational regions within their respective countries more autonomy. In Great Britain, this process has focused on Scotland and Wales. Spain, which has long confronted strong regional-nationalist sentiment in northern Spain from the Basques and Catalans, has moved to grant increased powers to regional governments and has given them some power over language rights, taxation policy, and other local matters, along with a regional parliament. Federal systems have moved in the opposite direction, incorporating features that promote centralization and uniformity. In Germany, for example, civil service rules are the same in all land (state) governments, and the constitution requires that there be a "unity of living standards" throughout the country.

Questions

1. Which do you think is better suited for solving problems in today's world, a unitary or federal system? Why?
2. Which aspects of the American federal system would you most recommend to a country considering rewriting their constitution? Which feature would you least recommend to them?

Source: Robert Maddex, *Constitutions of the World*, 2nd ed. (Washington, DC: Congressional Quarterly Press, 2000).

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Photo courtesy: Judy Gelles/Stock Boston, Inc.

■ Here, in an example of concurrent state and national power, birds are protected by both governments.

parts of the United States.[7] Missouri argued that the Tenth Amendment, which reserved a state's powers to legislate for the general welfare of its citizens, allowed Missouri to regulate hunting. But, the Court ruled that since the treaty was legal, it must be considered the supreme law of the land. (See also *McCulloch* v. *Maryland* [1819].)

State Powers Under the Constitution

Because states had all the power at the time the Constitution was written, the Framers felt no need, as they did for the new national government, to list and restate the powers of the states. Article I, however, allows states to set the "Times, Places, and Manner, for holding elections for senators and representatives." This article also guarantees each state two members in the Senate and prevents Congress from limiting the slave trade before 1808. Article II requires that each state appoint electors to vote for president, and Article IV contains the **privileges and immunities clause,** guaranteeing that the citizens of each state are afforded the same rights as citizens of all other states. In addition, Article IV provides each state a "Republican Form of Government," meaning one that represents the citizens of the state. It also assures that the national government will protect the states against foreign attacks and domestic rebellion.

It was not until the **Tenth Amendment,** the final part of the Bill of Rights, that the states' powers were described in greater detail: "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" (see The Living Constitution: Tenth Amendment). These powers, often called the states' **reserve** or **police powers,** include the ability to legislate for the public health, safety, and morals of their citizens. Today, the states' rights to legislate under their police powers are used as the rationale for many states' restrictions on abortion, including twenty-four-hour waiting requirements and provisions requiring minors to obtain parental consent. Police powers are also the basis for state criminal laws, the reason some states have the death penalty and others do not. So long as the U.S. Supreme Court continues to find that the death penalty does not violate the U.S. Constitution, the states may impose it, be it by lethal injection, gas chamber, or the electric chair.

privileges and immunities clause
Part of Article IV of the Constitution guaranteeing that the citizens of each state are afforded the same rights as citizens of all other states.

Tenth Amendment
The final part of the Bill of Rights that defines the basic principle of American federalism in stating: "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."

reserve (or police) powers
Powers reserved to the states by the Tenth Amendment that lie at the foundation of a state's right to legislate for the public health and welfare of its citizens.

concurrent powers
Authority possessed by both the state and national governments that may be exercised concurrently as long as that power is not exclusively within the scope of national power or in conflict with national law.

Concurrent and Denied Powers Under the Constitution

As revealed in Figure 3.3, national and state powers overlap. The area where the systems overlap represents **concurrent powers**—powers shared by the national and state governments. States already had the power to tax; the Constitution extended this power to the national government as well. Other important concurrent powers include the right to borrow money, establish courts, and make and enforce laws necessary to carry out these powers.

Article I denies certain powers to the national and state governments. In keeping with the Framers' desire to forge a national economy, states are prohibited from entering treaties, coining money, or impairing obligation of contracts. States also are prohibited from entering into compacts with other states without express congressional

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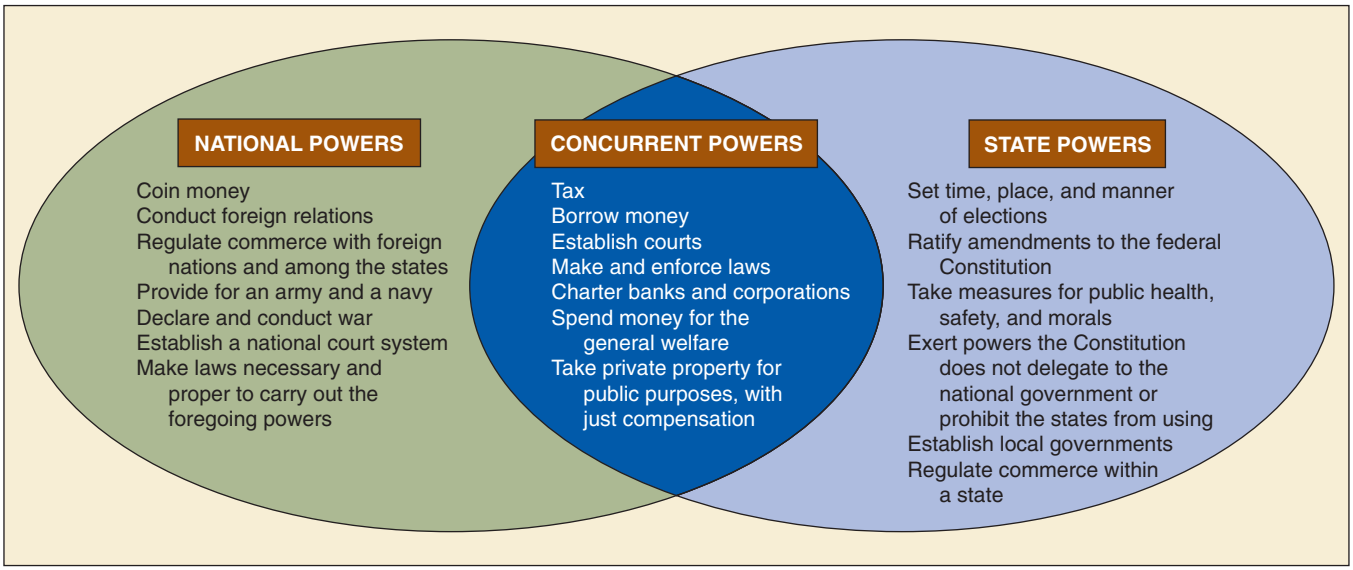
FIGURE 3.3 The Distribution of Governmental Power in the Federal System. ■



approval. In a similar vein, Congress is barred from favoring one state over another in regulating commerce, and it cannot lay duties on items exported from any state.

Both the national and state governments are denied the authority to take arbitrary actions affecting constitutional rights and liberties. Neither national nor state governments may pass a **bill of attainder,** a law declaring an act illegal without a judicial trial. The Constitution also bars the national and state governments from passing ***ex post facto* laws,** laws that make an act punishable as a crime even if the action was legal at the time it was committed. (For more on civil rights and liberties, see chapters 5 and 6.)

bill of attainder
A law declaring an act illegal without a judicial trial.

***ex post facto* law**
Law passed after the fact, thereby making previously legal activity illegal and subject to current penalty; prohibited by the U.S. Constitution.

Relations Among the States

In addition to delineating the relationship of the states with the national government, the Constitution provides a mechanism for resolving interstate disputes and facilitating relations among states. To avoid any sense of favoritism, it provides that disputes between states be settled directly by the U.S. Supreme Court under its original jurisdiction as mandated by Article III of the Constitution (see chapter 10). Moreover, Article IV requires that each state give "Full Faith and Credit…to the public Acts, Records and judicial Proceedings of every other State." The **full faith and credit clause** ensures that judicial decrees and contracts made in one state will be binding and enforceable in another, thereby facilitating trade and other commercial relationships.

full faith and credit clause
Portion of Article IV of the Constitution that ensures judicial decrees and contracts made in one state will be binding and enforceable in any other state.

In 1997, the Supreme Court ruled that the full faith and credit clause mandates that state courts always must honor the judgments of other state courts, even if to do so is against state public policy or existing state laws. Failure to do so would allow a single state to "rule the world," said Supreme Court Associate Justice Ruth Bader Ginsburg during oral argument.[8] The Violence Against Women Act, for example, specifically requires states to give full faith and credit to protective orders issued by other states.[9]

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Photo courtesy: K.M. Cannon, Nevada Appeal/AP/Wide World Photos

■ Interstate speed limits are federalism issues. The National Highway System Designation Act of 1995 allows states to set their own speed limits, reversing an earlier national law that set 55 mph as a national standard. Top state speeds now range from 55 to 75 mph.

Article IV also requires states to extradite, or return, criminals to states where they have been convicted or are to stand trial. For example, Timothy Reed, an Indian-rights activist, spent five years in New Mexico fighting extradition to Ohio.[10] In 1998, the New Mexico Supreme Court ordered him released from custody in spite of an order from the New Mexico governor ordering his extradition to Ohio. The U.S. Supreme Court found that the Supreme Court of New Mexico went beyond its authority and that Reed should be returned to Ohio.[11]

As noted above, the U.S. Constitution gives the Supreme Court the final authority to decide controversies between the states. New York and New Jersey, for example, ended up before the Supreme Court arguing over the title to Ellis Island, based on the 1834 agreement between the two states that set the boundary lines between them as the middle of the Hudson River. New York got authority over the island, where over 12 million immigrants were processed between 1892 and 1954, but New Jersey retained rights to the submerged lands on its side. Ultimately, the Supreme Court ruled that New Jersey was entitled to all of the new lands that were created when the U.S. government filled in the island's natural shoreline; New York, however, still retained title and thus bragging rights to the museum dedicated to chronicling the history of U.S. immigration.[12]

interstate compacts
Contracts between states that carry the force of law; generally now used as a tool to address multistate policy concerns.

To facilitate relations among states, Article 1, section 10, clause 3, of the U.S. Constitution sets the legal foundation for interstate cooperation in the form of **interstate compacts,** contracts between states that carry the force of law. It reads, "No State shall, without the consent of Congress . . . enter into any Agreement or Compact with

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The Living Constitution

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.

—Tenth Amendment

This amendment to the Constitution—a simple affirmation that any powers not specifically given to the national government are left to the province of the states or to the citizenry—was actually unnecessary and added nothing to the original document. During the ratification debates, however, Anti-Federalists continued to be concerned that the national government would claim powers not intended for it at the expense of the states. Still, during the debates over this amendment, both houses of Congress rejected efforts to insert the word "expressly" before the word delegated. Thus, it was clear that the amendment was not intended to be the yardstick by which to measure the powers of the national government. This was reinforced by comments made by James Madison during the debate that took place over Alexander Hamilton's efforts to establish a national bank. "Interference with the power of the States was no constitutional criterion of the power of Congress."

By the end of the New Deal, the Supreme Court had come to interpret the Tenth Amendment to allow Congress, pursuant to its authority under the commerce clause, to legislate in a wide array of areas that the states might never have foreseen when they ratified the amendment. In fact, until the 1970s, Congress's ability to legislate to regulate commerce appeared to trump any actions of the states. Since the mid-1970s, however, the Court has been very closely divided about how much authority must be reserved to the states vis-à-vis their authority to regulate commerce, especially when it involves regulation of activities of states as sovereign entities. The Court now requires Congress to attach statements of clear intention to tread on state powers. It is then up to the Court to determine if Congress has claimed powers beyond its authority under the Constitution.

another state." Before 1920, interstate compacts were largely bistate compacts that addressed boundary disputes or acted to help two states accomplish some objective.

More than 200 interstate compacts exist today. While some deal with rudimentary items such as state boundaries, others help states carry out their policy objectives, and they play an important role in helping states carry out their functions. Although several bistate compacts still exist, other compacts have as many as fifty signatories.[13] The Drivers License Compact, for example, was signed by all fifty states to facilitate nationwide recognition of licenses issued in the respective states.

States today find that interstate compacts help them maintain state control because compacts with other states allow for sharing resources, expertise, and responses that often are available more quickly than those from the federal government. The Emergency Management Assistance Compact, for example, allows states to cooperate and to share resources in the event of natural and man-made disasters. On 9/11, assistance to New

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TABLE 3.1 Compacts by the Numbers

Interstate compacts with 25 or more members	13
Least compact memberships by a state (HI & WI)	14
Most compact memberships by a state (NH & VA)	42
Average compact memberships by a state	27
Compacts developed prior to 1920	36
Compacts developed since 1920	150+
Interstate compacts currently in operation	200+

Source: John Mountjoy, "Interstate Cooperation: Interstate Compacts Make a Comeback," *Council of State Governments* (Spring 2001): Available online at http://www.csg.org.

York and Virginia came from a host of states surrounding the areas of terrorist attacks. (For more on compacts, see Table 3.1.)

Relations Within the States: Local Government

The Constitution gives local governments, including counties, municipalities, townships, and school districts, no independent standing. Thus, their authority is not granted directly by the people, but through state governments, which establish or charter administrative subdivisions to execute the duties of the state government on a smaller scale. For more information on the relationship between state and local governments, see chapter 4.

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FEDERALISM AND THE MARSHALL COURT

THE NATURE OF FEDERALISM and its allocation of power between the national government and the states have changed dramatically over the past two hundred years, and this change is largely due to the rulings of the U.S. Supreme Court. The debate continues today, too, as many Americans, frustrated with the national government's performance on a number of issues, look for a return of more power to the states. Because the distribution of power between the national and state governments is not clearly delineated in the Constitution, over the years the U.S. Supreme Court has played a major role in defining the nature of the federal system.

Timeline
Federalism and the Supreme Court

The first few years that the Supreme Court sat, it handled few major cases. As described in chapter 10, the Supreme Court was viewed as weak, and many men declined the honor of serving as a Supreme Court justice. The appointment of John Marshall as chief justice of the United States, however, changed all of this. In a series of decisions, he and his associates carved out an important role for the Court, especially in defining the nature of the federal/state relationship. Two rulings in the early 1800s, *McCulloch* v. *Maryland* (1819) and *Gibbons* v. *Ogden* (1824), had a major impact on the balance of power between the national government and the states.

McCulloch v. *Maryland* (1819)

McCulloch* v. *Maryland (1819) was the first major Supreme Court decision of the Marshall Court to define the relationship between the national and state governments. In 1816, Congress chartered the Second Bank of the United States. (The charter of the First Bank had been allowed to expire.) In 1818, the Maryland state legislature levied a tax requiring all banks not chartered by Maryland (that is, the Second Bank of the United States) to: (1) buy stamped paper from the state on which the Second Bank's notes were to be issued; (2) pay the state $15,000 a year; or, (3) go out of business. James McCulloch, the head cashier of the Baltimore branch of the Bank of the United States, refused to pay the tax, and Maryland brought suit against him. After losing in a Maryland state court, McCulloch appealed his conviction to the U.S. Supreme Court by order of the U.S. secretary of the treasury. In a unanimous opinion, the Court answered the two central questions that had been put to it: Did Congress have the authority to charter a bank? If it did, could a state tax it?

***McCulloch* v. *Maryland* (1819)**
The Supreme Court upheld the power of the national government and denied the right of a state to tax the bank. The Court's broad interpretation of the necessary and proper clause paved the way for later rulings upholding expansive federal powers.

Chief Justice John Marshall's answer to the first question—whether Congress had the right to establish a bank or another type of corporation, given that the Constitution does not explicitly mention such a power—continues to stand as the classic exposition of the doctrine of implied powers and as a reaffirmation of the propriety of a strong national government. Although the word "bank" cannot be found in the Constitution,

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the Constitution enumerates powers that give Congress the authority to levy and collect taxes, issue a currency, and borrow funds. From these enumerated powers, Marshall found, it was reasonable to imply that Congress had the power to charter a bank, which could be considered "necessary and proper" to the exercise of its aforementioned enumerated powers.

Marshall next addressed the question of whether a federal bank could be taxed by any state government. To Marshall, this was not a difficult question. The national government was dependent on the people, not the states, for its powers. In addition, Marshall noted, the Constitution specifically calls for the national law to be supreme. "The power to tax involves the power to destroy," wrote Marshall.[14] Thus, the state tax violated the supremacy clause, because individual states cannot interfere with the operations of the national government, whose laws are supreme.

The Court's decision in *McCulloch* has far-reaching consequences even today. The necessary and proper clause is used to justify federal action in many areas, including education, health, and welfare. Furthermore, had Marshall allowed the state of Maryland to tax the Second Bank, it is possible that states could have attempted to tax all federal agencies located within their boundaries, a costly proposition that could have driven the federal government into insurmountable debt.

Gibbons v. *Ogden* (1824)

Shortly after *McCulloch,* the Marshall Court had another opportunity to rule in favor of a broad interpretation of the scope of national power. ***Gibbons* v. *Ogden*** (1824) involved a dispute that arose after the New York State legislature granted to Robert Fulton the exclusive right to operate steamboats on the Hudson River. Simultaneously, Congress licensed a ship to sail on the same waters. By the time the case reached the Supreme Court, it was complicated both factually and procedurally. Suffice it to say that both New York and New Jersey wanted to control shipping on the lower Hudson River. But, *Gibbons* actually addressed one simple, very important question: what was the scope of Congress's authority under the commerce clause? The states argued that "commerce," as mentioned in Article I, should be interpreted narrowly to include only direct dealings in products. In *Gibbons,* however, the Supreme Court ruled that Congress's power to regulate interstate commerce included the power to regulate commercial activity as well, and that the commerce power had no limits except those specifically found in the Constitution. Thus, New York had no constitutional authority to grant a monopoly to a single steamboat operator, an act that interfered with interstate commerce.[15] Like the necessary and proper clause, today, the commerce clause is used to justify a great deal of federal legislation, including regulation of highways, the stock market, and even segregation.

***Gibbons* v. *Ogden* (1824)**
The Supreme Court upheld broad congressional power to regulate interstate commerce. The Court's broad interpretation of the Constitution's commerce clause paved the way for later rulings upholding expansive federal powers.

DUAL FEDERALISM: THE TANEY COURT, SLAVERY, AND THE CIVIL WAR

IN SPITE OF NATIONALIST Marshall Court decisions such as *McCulloch* and *Gibbons,* strong debate continued in the United States over national versus state power. It was under the leadership of Chief Justice Marshall's successor, Roger B. Taney (1835–1863), that the Supreme Court articulated the notions of concurrent power and **dual federalism.** Dual federalism posits that having separated and equally powerful state and national governments is the best arrangement. Adherents of this theory typically believe that the national government should not exceed its constitutionally enumerated powers, and, as stated in the Tenth Amendment, all other powers are, and should be, reserved to the states or the people.

dual federalism
The belief that having separate and equally powerful levels of government is the best arrangement.

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Dred Scott: Slavery and the Supreme Court

Dred Scott, born into slavery around 1795, became the named plaintiff in a case that was to have major ramifications on the nature of the federal system. In 1833, Scott was sold by his original owners, the Blow family, to Dr. Emerson in St. Louis, Missouri. The next year he was taken to Illinois and later to the Wisconsin Territory, returning to St. Louis in 1838.[a]

When Emerson died in 1843, Scott tried to buy his freedom. Before he could, however, he was transferred to Emerson's widow, who moved to New York, leaving Scott in the custody of his first owners, the Blows. Some of the Blows (Henry Blow later founded the anti-slavery Free Soil Party) and other abolitionists gave money to support a test case seeking Scott's freedom: They believed that his residence in Illinois and later in the Wisconsin Territory, which both prohibited slavery, made him a free man.

After many delays, the U.S. Supreme Court ruled 7–2 that Scott was not a citizen of the United States. "Slaves," said the Court, "were never thought of or spoken of except as property." Chief Justice Roger B. Taney tried to fashion a broad ruling to settle the slavery question. Writing for the majority in *Dred Scott* v. *Sandford* (1857), he concluded that Congress lacked the constitutional authority to bar slavery in the territories. The decision narrowed the scope of national power while it enhanced that of the states. Moreover, for the first time since *Marbury* v. *Madison* (1803), the Court found an act of Congress, the Missouri Compromise, unconstitutional. And, by limiting what the national government could do concerning slavery, it in all likelihood quickened the march toward the Civil War.

Photo courtesy: Missouri Historical Society

Dred Scott was given his freedom later in 1857, when the Emersons permanently returned him to the anti-slavery Blows. He died of tuberculosis one year later.

[a] Don E. Ferenbacher, "The Dred Scott Case," in John A. Garraty, ed., *Quarrels That Have Shaped the Constitution* (New York: Harper and Row, 1964), ch. 6.

Dred Scott and the Advent of Civil War

During the Taney court era, the comfortable role of the Supreme Court as the arbiter of competing national and state interests became troublesome when the justices were called upon to deal with the controversial issue of slavery. In cases such as *Dred Scott* v. *Sandford* (1857), the Court tried to manage the slavery issue by resolving questions of ownership, the status of fugitive slaves, and slavery in the new territories.[16] These cases generally were settled in favor of slavery and states' rights within the framework of dual federalism. In *Dred Scott,* for example, the Taney Court, in declaring the Missouri Compromise unconstitutional, ruled that Congress lacked the authority to ban slavery in the territories (see Roots of Government: Dred Scott: Slavery and the Supreme Court.) This decision seemed to rule out any nationally legislated solution to the slavery question, leaving the problem in the hands of the state legislatures and the people, who did not have the power to impose their will on other states.

The Civil War, Its Aftermath, and the Continuation of Dual Federalism

The Civil War (1861–1865) forever changed the nature of federalism. In the aftermath of the war, the national government grew in size and powers. It also attempted to impose its will on the state governments through the Thirteenth, Fourteenth, and Fifteenth Amendments. These three amendments, known collectively as the Civil War Amendments, prohibited slavery and granted civil and political rights (including the franchise for males) to African Americans.

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The U.S. Supreme Court, however, continued to adhere to its belief in the concept of dual federalism. Therefore, in spite of the growth of the national government's powers, the importance of the state governments' powers was not diminished until 1933, when the next major change in the federal system occurred. Generally, the Court upheld any laws passed under the states' police powers, which allow states to pass laws to protect the general welfare of their citizens. These laws included those affecting commerce, labor relations, and manufacturing. After the Court's decision in *Plessy* v. *Ferguson* (1896), in which the Court ruled that state maintenance of "separate but equal" facilities for blacks and whites was constitutional, most civil rights and voting cases also became state matters, in spite of the Civil War Amendments.[17]

The Court also developed legal doctrine in a series of cases that reinforced the national government's ability to regulate commerce. By the 1930s, these two somewhat contradictory approaches led to confusion: States, for example, could not tax gasoline used by federal vehicles,[18] and the national government could not tax the sale of motorcycles to the city police department.[19] In this period, the Court, however, did recognize the need for national control over new technological developments, such as the telegraph.[20] And, beginning in the 1880s, the Court allowed Congress to regulate many aspects of economic relationships, such as monopolies, an area of regulation formerly thought to be in the exclusive realm of the states. Passage of laws such as the Interstate Commerce Act in 1887 and the Sherman Anti-Trust Act in 1890 allowed Congress to establish itself as an important player in the growing national economy.

Despite finding that most of these federal laws were constitutional, the Supreme Court did not enlarge the scope of national power consistently. In 1895, for example, the United States filed suit against four sugar refiners, alleging that their sale would give their buyer control of 98 percent of the U.S. sugar-refining business. The Supreme Court ruled that congressional efforts to control monopolies (through passage of the Sherman Anti-Trust Act) did not give Congress the authority to prevent the sale of these sugar-refining businesses, because manufacturing was not commerce. Therefore, the companies and their actions were beyond the scope of Congress's authority to regulate.[21]

Setting the Stage for a Stronger National Government

In 1895, the U.S. Supreme Court found a congressional effort to tax personal incomes unconstitutional, although an earlier Court had found a similar tax levied during the Civil War constitutional.[22] Thus, Congress and the state legislatures were moved to ratify the **Sixteenth Amendment.** The Sixteenth Amendment gave Congress the power to levy and collect taxes on incomes without apportioning them among the states. The revenues taken in by the federal government through taxation of personal income "removed a major constraint on the federal government by giving it access to almost unlimited revenues."[23] If money is power, the income tax and the revenues it generated greatly enhanced the power of the federal government and its ability to enter policy areas where it formerly had few funds to spend.

Sixteenth Amendment
Authorized Congress to enact a national income tax.

The **Seventeenth Amendment,** ratified in 1913, similarly enhanced the power of the national government at the expense of the states. This amendment terminated the state legislatures' election of senators and put their election in the hands of the people. With senators no longer directly accountable to the state legislators who elected them, states lost their principal protectors in Congress. Coupled with the Sixteenth Amendment, this amendment paved the way for a drastic change in the relationship between national and state governments in the United States.

Seventeenth Amendment
Made senators directly elected by the people; removed their selection from state legislatures.

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