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# American Federalism



The relationship of the national government to the states has been the subject of intense debate since the founding.<sup>1</sup> In 1787, members of what would become the Federalist Party defended the creation of a strong national government. Their rivals, the Anti-Federalists, warned that a strong national government would overshadow the states. The debate over which level of government best represents the people continues to this day.

State governments often complain that the national government is either taking over responsibilities that belong to them under the Constitution's Tenth Amendment, which reserves to them all powers not given to the national government, or controlling too much of what they do. Yet, in policy areas such as civil rights, educational opportunities for people with disabilities, and handgun control, the states have been slow to respond, and the national government has taken steps to deal with these issues.

At the same time, states retain enormous authority under the Constitution to regulate life within their borders. Working with the local governments they create, states police the streets, fight fires, impose their own taxes, create most of the laws that govern their citizens, define the meaning of marriage, set the rules for elections and register voters, run the public schools, and administer most of the programs to help the poor, even when the money for those programs comes from the national government. This broad scope begs the question, where does the national government end and state government begin?

This question involves a host of questions that involve how far states can go in drafting their own laws and how aggressive they should be in enforcing national laws. Under Article I, for example, the Founders gave Congress the power to set the rules regarding naturalization, which is the process by which immigrants are given U.S. citizenship and the rights that go with it.

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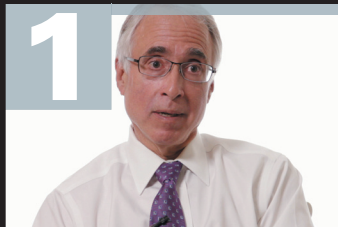


Alabama's tough immigration law requires police, schools, and hospitals to ask citizens for proof of their citizenship, even if the ones providing the proof are in grade school. One of the parents of this Alabama student is a U.S. citizen, while the other is an undocumented immigrant, meaning that one of her parents could soon be deported if the Alabama law remains in force.



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In recent years, however, many states have passed laws that challenge the national government's supremacy in setting rules covering undocumented immigrants who reside in the U.S. illegally. With the nation and most states suffering from high unemployment starting in 2008 and continuing to this day, some states have argued that undocumented immigrants are taking jobs that would go to U.S. citizens. They have passed laws that put tight restrictions on state benefits such as public education and college tuition benefits for the children of illegal immigrants. Although some of these laws have been declared unconstitutional by the national courts, states continue to try new ways of reducing illegal immigration. In 2006, 84 immigration bills were enacted by state legislatures and signed into law; by 2010, the number had climbed to 364, with further increases in 2011.<sup>2</sup>

In June 2011, for example, Alabama enacted one of the most restrictive immigration laws in the nation. Under the law, illegal immigrants are considered state criminals who are subject to arrest and possible imprisonment. Most significantly, the law requires that public schools must check the immigration status of all their students. Under the provision, school children were required to reveal the immigration status of their parents.

In revealing their own immigration status, students had little choice but to tell school administrators whether their parents were in the United States legally. Although any child born in the United States is automatically deemed a citizen under national law and the Constitution, some Alabama school children were born to illegal immigrants. As a result, many parents kept their children home on October 1 when the law took effect, and some fled the state to avoid the law.<sup>3</sup> The same law also contained a provision that required residents of mobile homes to prove their legal status before renewing their annual home registration tags.

Even as the Alabama law was going into effect, an equally tough Arizona law was moving toward the Supreme Court. After hearing arguments in April, a 5 to 3 majority declared that the national government, not the states, had the "broad, undoubted power over the subject of immigration and the status of aliens." The national laws were supreme to any state laws, rendering most of Arizona's law unconstitutional. At the same time, the Court did permit Arizona to implement its "show me your papers" provision, which gives police the authority to ask drivers for their citizenship papers when stopped for other reasons. The Court ruled that the provision was a constitutional exercise of state powers. It is still not clear how much of Alabama's law will survive further tests based on the Court's decision. For now, Alabama says it is still in force.<sup>4</sup>

In this chapter, we first define federalism and its advantages and disadvantages. We then look at the constitutional basis for our federal system and how court decisions and political developments have shaped, and continue to shape, federalism in the United States. Throughout, you should think about how you influence the issues you care about, even in your local city council or mayor's office. The Constitution clearly encourages, and even depends on, you to express your view at all levels of government, which is why action in a single state can start a process that spreads to other states or the national government.

## federalism

A constitutional arrangement in which power is distributed between a central government and states, which are sometimes called provinces in other nations. The national and states exercise direct authority over individuals.

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# Defining Federalism

**2.1** Interpret the definitions of federalism, and assess the advantages and disadvantages of the American system of federalism.

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ars have been fought over what federalism means in part because the term itself is laden with ideological interpretation.<sup>5</sup>

**Federalism**, as we define it in nonpartisan terms, is a form of government in which a constitution distributes authority and powers between a central government and smaller regional governments—usually called states or provinces—giving to both the national and the state governments substantial responsibilities and powers, including the power to collect taxes and to pass and enforce laws





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regulating the conduct of individuals. When we use the term “federalism” or “federal system,” we are referring to this system of national and state governments; when we use the term “federal government” in all other chapters of this book, we are referring to the Congress, presidency, and judiciary created under the U.S. Constitution.

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

Constitutionally, the federal system of the United States consists of only the national government and the 50 states. “Cities are not,” the Supreme Court reminded us, “sovereign entities.”<sup>6</sup> This does not make for a tidy, efficient, easy-to-understand system; yet, as we shall see, it has its virtues.

There are several different ways that power can be shared in a federal system, and political scientists have devised terms to explain these various, sometimes overlapping, kinds of federalism. At different times in the United States’ history, our system of federalism has shared power based on each of these interpretations:

- *Dual or “layer-cake” federalism* is defined as a strict separation of powers between the national and state governments in which each layer of has its own responsibilities, and reigns supreme within its constitutional realm. Dual federalism was dominant from the 1790s until the 1930s.
- *Cooperative or “marble-cake” federalism* is defined as a flexible relationship between the national and state government in which both work together on a variety of issues and programs.<sup>7</sup> Cooperative federalism was dominant from the 1930s through the 1970s.
- *Competitive federalism* is defined as a way to improve government performance by encouraging state and local governments to compete against each other for residents, businesses, investment, and national funding.<sup>8</sup> Competitive federalism has coexisted with other definitions of federalism since the 1980s.



State and local governments are responsible for policing the streets but not for enforcing federal laws. Still, they often work with national agencies such as the Federal Bureau of Investigation and the Drug Enforcement Administration. This kind of joint action is an example of cooperative federalism.





- *Permissive federalism* is defined as a strong national government that only allows, or permits the states to act when it decides to do so. Although federalism generally assumes that the national and state governments will share power, permissive federalism argues that the power to share belongs to the national government, and national government alone.<sup>9</sup> Permissive federalism has been dominant on specific issues such as civil rights since the 1960s.
- *Coercive federalism* is also defined as a strong national government that exerts tight control of the states through orders or mandates—typically without accompanying financial resources. If states want federal grants, they must follow the mandates. Coercive federalism is sometimes called centralized federalism, which focuses on the national government’s strong voice in shaping what states do. Coercive federalism has also been dominant on specific issues such as public education and the environment since the 1960s.
- *New federalism* is defined as a recent effort to reduce the national government’s power by returning, or devolving responsibilities to the states. It is sometimes characterized as part of the *devolution revolution* discussed later in this chapter. The new federalism has been seen as a modern form of dual federalism based on the Tenth Amendment, and was first introduced by President Richard Nixon in 1969.

### unitary system

A constitutional arrangement that concentrates power in a central government.

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### confederation

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

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## □ Alternatives to Federalism

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

At the other extreme from unitary governments are **confederations**, in which sovereign nations, through a constitutional compact, create a central government but carefully limit its authority and do not give it the power to regulate the conduct of individuals directly. The central government makes regulations for the constituent governments, but it exists and operates only at their direction. The 13 states under the Articles of Confederation operated in this manner, as did the southern Confederacy during the Civil War. The closest current example of an operating confederacy in the world is the European Union (EU), which is composed of 27 nations. Although the EU does bind its members to a common currency called the Euro, and does have a European Parliament and European Court of Justice and European Commission, members such as France, Germany, Italy, and Spain retain their own laws and authority. The EU may look like a confederation, but it acts more like a traditional alliance such as the United Nations, or the North Atlantic Treaty Organization.<sup>10</sup>

Even among all the nations that call themselves federations, there is no single model for dividing authority between the national and state governments. Some countries have no federal system at all, whereas others have different variations of power sharing between the national and state governments. Indeed, even the United States has varied greatly over time in its balance of national–state power.

Britain’s government, for example, is divided into three tiers: national, county, and district governments. County and district governments deliver roughly one-fifth of all government services, including education, housing, and police and fire protection. As a rule, most power is reserved for the central government on the theory that there should be “territorial justice,” which means that all citizens should be governed by the same laws and standards. In recent years, however, Great Britain has devolved substantial authority to Scotland, Wales, and Northern Ireland.





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## The Global Community

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### Global Opinion on the Role of Government

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State and local governments are on the front lines of most programs for helping the needy. They provide much of the money and/or administration for unemployment insurance for the jobless, health care clinics and hospitals for the poor, school lunch programs for hungry children, and homeless shelters. Although many U.S. citizens see poverty firsthand as volunteers for local charities such as food pantries, some have doubts about how much government should do to help poor people who cannot take care of themselves. According to the Pew Research Center's Spring 2007 Global Attitudes Survey, citizens of other nations vary greatly on the question of whether "It is the responsibility of the (state or government) to take care of very poor people who can't take care of themselves."

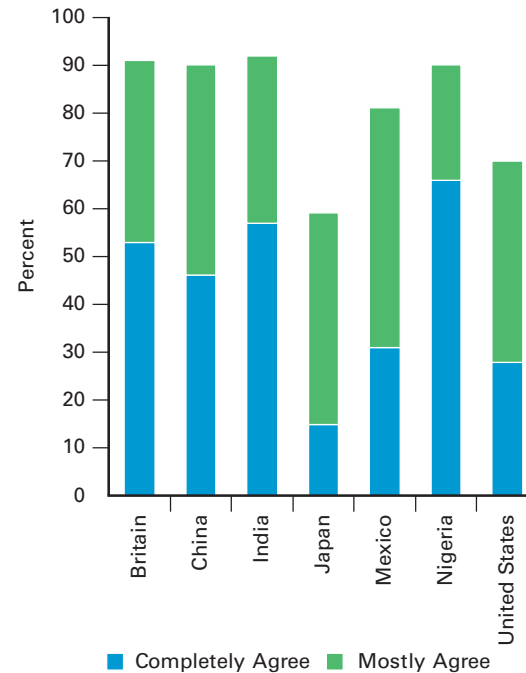
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These opinions reflect very different social and economic conditions in each country. Japan has a culture of self-reliance that puts the burden on individuals to help themselves, while Nigeria continues to suffer from some of the highest poverty rates in the world. In this regard, U.S. citizens tend to mirror the Japanese—they want government to help the less fortunate but also want the less fortunate to help themselves. As a general conclusion, citizens of wealthier nations think poor people should take advantage of the opportunities that already exist in their economies, whereas citizens of poor nations believe that government should be more aggressive in providing support.

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This does not mean wealthier nations are uncaring toward citizens in need, but it does suggest that they sometimes view poverty as the fault of the poor. In the United States, these opinions reflect the importance of equality of opportunity as a basic social value, meaning that all individuals regardless of race, gender, or circumstance have the same opportunity to participate in politics, self-government, and the economy. Most Americans want to help the less fortunate, but only when they are truly needy, not when they fail because they will not help themselves.

It is the responsibility of the government to take care of the poor.



SOURCE: Pew Research Center, *Global Views on Life Satisfaction, National Conditions, and the Global Economy: Highlights from the 2007 Pew Global Attitudes 47-Nation Survey* (Pew Research Center, 2007).

#### CRITICAL THINKING QUESTIONS

1. What are the advantages and disadvantages of having the government provide services for the poor?
2. Why might more wealthy nations be more likely to believe that individuals ought to take care of themselves and not rely on the state?
3. Which level of government might be most effective in providing services to the poor?

### Advantages of Federalism

In 1787, federalism was a compromise between centrists, who supported a strong national government, and those who favored decentralization. Confederation had proved unsuccessful. A unitary system was out of the question because most people were too deeply attached to their state governments to permit subordination to central rule. Many scholars think that federalism is ideally suited to the needs of a diverse people spread throughout a large continent, suspicious of concentrated power, and desiring unity but not uniformity. Yet, even though federalism offers a number of advantages over other forms of government, no system is perfect. Federalism offered, and still offers, both advantages and disadvantages.

**FEDERALISM CHECKS THE GROWTH OF TYRANNY** Federalism has not always prevented tyranny, even in the United States, when Southern states seceded from





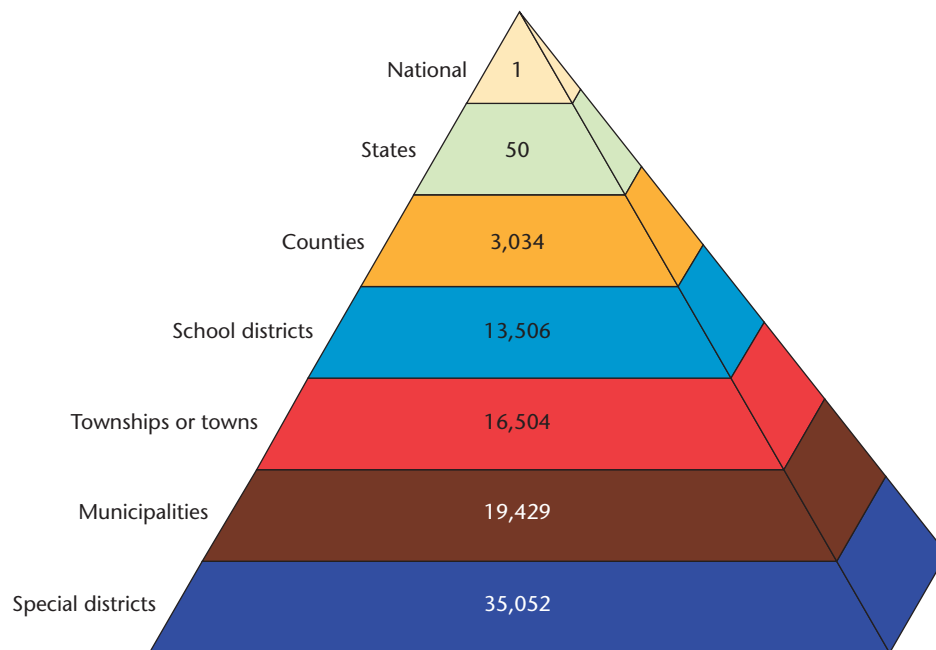
the Union rather than end slavery. Today, however, U.S. citizens tend to associate federalism with freedom.<sup>11</sup> When one political party loses control of the national government, it is still likely to hold office in a number of states and can continue to challenge the party in power at the national level. To the Framers, who feared that a single interest group might capture the national government and suppress the interests of others, this diffusion of power was an advantage. There are now nearly 90,000 governments in the United States, including one national government, 50 state governments, and thousands of county, city, and town governments, as well as school boards and special districts that provide specific functions from managing hospitals or parks to mosquito control.<sup>12</sup> (See Figure 2.1 for the number of governments in the United States.)

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**FEDERALISM ALLOWS UNITY WITHOUT UNIFORMITY** National politicians and parties do not have to iron out every difference on every issue that divides us, whether the issue is abortion, same-sex marriage, gun control, capital punishment, welfare financing, or assisted suicide. Instead, these issues are debated in state legislatures, county courthouses, and city halls. Information about state action spreads quickly from government to government, especially during periods when the national government is relatively slow to respond to pressing issues.

**FEDERALISM ENCOURAGES EXPERIMENTATION** As Justice Louis Brandeis once argued, states can be laboratories of democracy.<sup>13</sup> If they adopt programs that fail, the negative effects are limited; if programs succeed, they can be adopted by other states and by the national government. Georgia, for example, was the first state to permit 18-year-olds to vote; Wisconsin was a leader in requiring welfare recipients to work; California moved early on global warming; and Massachusetts created one of the first state programs to provide health insurance to all its citizens.

**FEDERALISM PROVIDES TRAINING AND CREATES OPPORTUNITIES FOR FUTURE NATIONAL LEADERS** Federalism provides a training ground for state



**FIGURE 2.1** NUMBER OF SEPARATE GOVERNMENTS IN THE FEDERAL SYSTEM

■ How do the levels and numbers of governments in the United States help to prevent tyranny?

SOURCE: U.S. Census Bureau, 2012 Statistical Abstract of the United States, [www.census.gov/prod/2012/tables/12s428.pdf](http://www.census.gov/prod/2012/tables/12s428.pdf).







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and local politicians to gain experience before moving to the national stage. Presidents Jimmy Carter, Ronald Reagan, Bill Clinton, and George W. Bush previously served as governor of the respective states of Georgia, California, Arkansas, and Texas. All totaled, 20 of the nation's 44 presidents served as governor at some points before winning the presidency. In addition, three former governors (Jon Huntsman, Rick Perry, and Mitt Romney) ran for the Republican Party nomination for president in 2012, and several were heavily recruited for the campaign but declined.

**FEDERALISM KEEPS GOVERNMENT CLOSER TO THE PEOPLE** By providing numerous arenas for decision making, federalism provides many opportunities for Americans to participate in the process of government and helps keep government closer to the people. Every day, thousands of U.S. adults serve on city councils, school boards, neighborhood associations, and planning commissions. Federalism also builds on the public's greater trust in government at the state and local levels. The closer the specific level of government is to the people, the more citizens trust the government.

## ❑ Disadvantages of Federalism

**DIVIDING POWER MAKES IT MUCH MORE DIFFICULT FOR GOVERNMENT TO RESPOND QUICKLY TO NATIONAL PROBLEMS** There was a great demand for stronger and more effective homeland security after the September 11, 2001, terrorist attacks, and the national government created a new Department of Homeland Security in response. However, the department quickly discovered that there would be great difficulty coordinating its efforts with 50 state governments and thousands of local governments already providing fire, police, transportation, immigration, and other governmental services.

**THE DIVISION OF POWER MAKES IT DIFFICULT FOR VOTERS TO HOLD ELECTED OFFICIALS ACCOUNTABLE** When something goes well, who should voters reward? When something goes wrong, who should they punish? When Hurricane Katrina hit New Orleans and the surrounding areas in late August 2005 (and Rita less than a month later near Houston), many thousands of people lost their homes and billions of dollars in damage was done. Who was responsible? Did the national government and agencies like the Federal Emergency Management Agency (FEMA) drop the ball on relief efforts, or was it the state or local government's responsibility? Did the mayor and/or governor fail to plan adequately for such a crisis, or should the national government have had more supplies on hand in advance?

**THE LACK OF UNIFORMITY CAN LEAD TO CONFLICT** States often disagree on issues such as health care, school reform, and crime control. In January 2008, for example, California joined 15 other states in suing the national government over a ruling issued by the national Environmental Protection Agency (EPA). For decades, the EPA had allowed California to enact tougher air quality restrictions through higher mileage standards than required by the national Clean Air Act (first enacted in 1970). The Bush administration rejected a similar request for permission to raise mileage standards in 2008, only to be reversed by the Obama administration in 2009.



## OF the People Diversity in America

### Where Americans Come From and Where They Live

The United States is a nation of immigrants who have arrived from many parts of the world. Throughout the decades, the portrait of immigrants has been changing from mostly white to mostly minority. In 2009, for example, 38.5 million Americans, or 12.5 per cent, were foreign born, consisting of 16.8 million naturalized citizens, 10 million long-term visitors, and less than 11 million undocumented immigrants. The number of unauthorized, or illegal, immigrants has fallen somewhat in recent years due to the economic recession, which has depressed employment opportunities.

Many foreign-born residents live in the nation's largest cities. The New York City-area population includes more than 3 million foreign-born residents, while Los Angeles includes another 1.5 million; Miami, slightly more than 2 million; Chicago, just under 600,000, and San Francisco, 275,000. Although inner cities host a majority of foreign-born residents, there has been recent movement of immigrants to the suburbs and some movement toward certain areas of the country such as the southwest.

The changing face of America brings great diversity in all aspects of life, from schools to farm fields and small businesses. It also enriches the quality of life through the mix of old and new cultures, and can often be a source of innovation in how the economy operates.

However, this diversity also provokes complaints about undocumented immigrants. Some groups complain that undocumented immigrants take jobs that should go to U.S. citizens, whereas others worry about the costs associated with high poverty rates.

Governments at all levels must reconcile these pros and cons with our history of welcoming immigrants from all around the world.



The Statue of Liberty symbolizes America's long tradition of welcoming immigrants to its shores.

#### QUESTIONS

1. How are foreign-born citizens from different regions of the world different from each other?
2. Why do you think foreign-born citizens tend to live in our nation's largest cities?
3. How do foreign-born citizens contribute to the nation's quality of life?

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### VARIATION IN POLICIES CREATES REDUNDANCIES, INEFFICIENCIES, AND INEQUALITIES

Labor laws, teacher certification rules, gun ownership laws, and even the licensing requirements for optometrists vary throughout the 50 states, and this is on top of many national regulations. Companies seeking to do business across state lines must learn and abide by many different sets of laws, while individuals in licensed professions must consider whether they face recertification if they choose to relocate to another state. Where national laws do not exist, it is tempting for each state to try to undercut others' regulations to get a competitive advantage in such areas as attracting new industry, regulating environmental concerns, or setting basic eligibility standards for welfare or health benefits.



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**delegated (express) powers**

Powers given explicitly to the national government and listed in the Constitution.

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**implied powers**

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

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**necessary and proper clause**

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

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**inherent powers**

The powers of the national government in foreign affairs that the Supreme Court has declared do not depend on constitutional grants but rather grow out of the national government's obligation to protect the nation from domestic and foreign threats.

# The Constitutional Structure of American Federalism

2.2

Differentiate the powers the Constitution provides to national and state governments.

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he division of powers and responsibilities between the national and state governments has resulted in thousands of court decisions, as well as hundreds of books and endless speeches to explain them—and even then the division lacks precise definition. Nonetheless, it is helpful to have a basic understanding of how the Constitution divides these powers and responsibilities and what obligations it imposes on each level of government.

The constitutional framework of our federal system is relatively simple:

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

## □ Powers of the National Government

The Constitution explicitly gives legislative, executive, and judicial powers to the national government. In addition to these **delegated or expressed powers**, such as the power to regulate interstate commerce and to appropriate funds, the national government has assumed constitutionally **implied powers**, such as the power to create banks, which are inferred from delegated powers. The constitutional basis for the implied powers of Congress is the **necessary and proper clause** (Article I, Section 8, Clause 3). This clause gives Congress the right “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested . . . in the Government of the United States.” (Powers specifically listed in the Constitution are also called **express powers** because they are listed expressly.)

In foreign affairs, the national government has **inherent powers**. The national government has the same authority to deal with other nations as if it were the central government in a unitary system. Such inherent powers do not depend on specific constitutional provisions but exist because of the creation of the national government itself. For example, the government of the United States may acquire territory by purchase or by discovery and occupation, even though no specific clause in the Constitution allows such acquisition.

The national and state governments may have their own lists of powers, but the national government relies on four constitutional pillars for its ultimate authority over the states: (1) the *supremacy clause*, (2) the *war power*, (3) the *commerce clause*, and especially (4) the *power to tax and spend* for the general welfare. All four of these pillars are discussed individually below.

Together, however, they have permitted a steady expansion of the national government's functions to the point where some states complain they have lost the power to regulate their own actions. Despite the Supreme Court's recent declaration that some national laws exceed Congress's constitutional powers, the national government has, in effect, almost full power to enact any legislation that Congress deems necessary, so long as it does not conflict with provisions of the Constitution designed to protect





individual rights and the powers of the states. In addition, Section 5 of the Fourteenth Amendment, ratified in 1868, gives Congress the power to enact legislation to remedy constitutional violations and the denial of due process or equal protection of the laws.

**THE SUPREMACY CLAUSE** The **supremacy clause** may be the most important pillar of U.S. federalism. Found in Article VI of the Constitution, the clause is simple and direct: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made...under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Under the clause, state and local governments may not ignore or create their own substitutes for national laws and regulations. Because national laws and regulations of national agencies are supreme, conflicting state and local regulations are unenforceable. States must abide by the national government’s minimum wage laws, for example, but are allowed to set the minimum wage higher if they wish.

**THE WAR POWER** The national government is responsible for protecting the nation from external aggression, whether from other nations or from international terrorism. The government’s power to maintain national security includes the power to wage war. In today’s world, military strength depends not only on the presence of troops in the field, but also on the ability to mobilize the nation’s industrial might and apply scientific and technological knowledge to the tasks of defense. As Charles Evans Hughes, who became chief justice in 1930, observed: “The power to wage war is the power to wage war successfully.”<sup>14</sup> The national government is free to create “no-fly” zones only for its military aircraft both within and across state borders, for example, and may use any airports it needs during times of war or peace.

**THE POWER TO REGULATE INTERSTATE AND FOREIGN COMMERCE**

Congressional authority extends to all commerce that affects more than one state. Commerce includes the production, buying, selling, renting, and transporting of goods, services, and properties. The **commerce clause** (Article I, Section 8, Clause 1) packs a tremendous constitutional punch; it gives Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” In these few words, the national government has found constitutional justification for regulating a wide range of human activity because few aspects of our economy today affect commerce in only one state, the requirement that would render the activity outside the scope of the national government’s constitutional authority.

The landmark ruling of *Gibbons v. Ogden* in 1824, affirmed the broad authority of Congress over interstate commerce.<sup>15</sup> The case involved a New York state license that gave Aaron Ogden the exclusive right to operate steamboats between New York and New Jersey. Using the license, Ogden asked the New York state courts to stop Thomas Gibbons from running a competing ferry. Although Gibbons countered that his boats were licensed under a 1793 act of Congress governing vessels “in the coasting trade and fisheries,” the New York courts sided with Ogden. Just as the national government and states both have the power to tax, the New York courts said they both had the power to regulate commerce.

Gibbons appealed to the Supreme Court and asked a simple question: Which government had the ultimate power to regulate interstate commerce? The Supreme Court gave an equally simple answer: The national government’s laws were supreme.

*Gibbons v. Ogden* was immediately heralded for promoting a national economic common market, in holding that states may not discriminate against interstate transportation and out-of-state commerce. The Supreme Court’s brilliant definition of “commerce” as *intercourse among the states* provided the basis for national regulation of “things in commerce”<sup>16</sup> and an expanding range of economic activities, including the sale of lottery tickets,<sup>17</sup> prostitution,<sup>18</sup> radio and television broadcasts,<sup>19</sup> and telecommunications and the Internet.

**supremacy clause**

Contained in Article IV of the Constitution, the clause gives national laws the absolute power even when states have enacted a competing law.

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**commerce clause**

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

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Though many states allow the use of medicinal marijuana, the Supreme Court decided that the national government could regulate its use in the states as a form of interstate commerce.

### **federal mandate**

A requirement the national government imposes as a condition for receiving federal funds.

### **reserve powers**

All powers not specifically delegated to the national government by the Constitution. The reserve power can be found in the Tenth Amendment to the Constitution.

### **concurrent powers**

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

**THE POWER TO TAX AND SPEND** Congress lacks constitutional authority to pass laws solely on the grounds that they will promote the general welfare, but it may raise taxes and spend money for this purpose. For example, even when the national government lacks the power to regulate education or agriculture directly, it still has the power to appropriate money to support education or to pay farm subsidies. By attaching conditions to its grants of money, the national government creates incentives that affect state action. If states want the money, they must accept the conditions.

When the national government provides the money, it can determine how the money will be spent. By withholding or threatening to withhold funds, the national government can influence or control state operations and regulate individual conduct. For example, the national government has stipulated that national funds should be withdrawn from any program in which any person is denied benefits because of race, color, national origin, sex, or physical handicap. The national government also used its “power of the purse” to force states to raise the drinking age to 21 by tying such a condition to national dollars for building and maintaining highways.

Congress frequently requires states to provide specific programs—for example, services to indigent mothers, and clean air and water. These requirements are called **federal mandates**. Often the national government does not supply the funds required to carry out “unfunded mandates” (discussed later in the chapter). Its failure to do so has become an important issue as states face growing expenditures with limited resources.

## **□ Powers of the States**

The Constitution *reserves for the states all powers not granted to the national government*, subject only to the limitations of the Constitution. Only the states have the **reserve powers** to create schools and local governments, for example. Both are powers not given exclusively to the national government by the Constitution or judicial interpretation, so that states can exercise these powers as long as they do not conflict with national law.

The national and state governments also share powers. These **concurrent powers** with the national government include the power to levy taxes and regulate commerce internal to each state.

In general, states may levy taxes on the same items the national government taxes, such as incomes, alcohol, and gasoline, but a state cannot, by a tax, “unduly burden” commerce among the states, interfere with a function of the national government, complicate the operation of a national law, or abridge the terms of a treaty of the United States. However, where the national government has not asserted its supremacy, states may regulate interstate businesses, provided these regulations do not cover matters requiring uniform national treatment or unduly burden interstate commerce.

(See Table 2.1 for the constitutional division of powers.)

Who decides which matters require “uniform national treatment” or what actions might place an “undue burden” on interstate commerce? Congress does, subject to the president’s signature and final review by the Supreme Court. When Congress is silent or does not clearly state its intent, the courts—ultimately, the Supreme Court—decide whether there is a conflict with the national Constitution or whether a state law or regulation has preempted the national government’s authority.

## **□ Constitutional Limits and Obligations**

To ensure that federalism works, the Constitution imposes restraints on both the national and the state governments. States are prohibited from doing the following:

1. Making treaties with foreign governments
2. Authorizing private citizens or organizations to interfere with the shipping and commerce of other nations
3. Coining money, issuing bills of credit, or making anything but gold and silver coins legal tender in payment of debts





**TABLE 2.1 THE CONSTITUTIONAL DIVISION OF NATIONAL AND STATE POWERS**

**Examples of Powers Delegated to the National Government**

Regulate trade and interstate commerce  
Declare war  
Create post offices  
Coin money

**Examples of Powers Reserved for State Governments**

Create local governments  
Police citizens  
Oversee primary and elementary education

**Examples of Concurrent Powers Shared by the National and State Governments**

Impose and collect taxes and fees  
Borrow and spend money  
Establish courts at their level of government  
Enact and enforce laws  
Protect civil rights  
Conduct elections  
Protect health and welfare

2.1

2.2

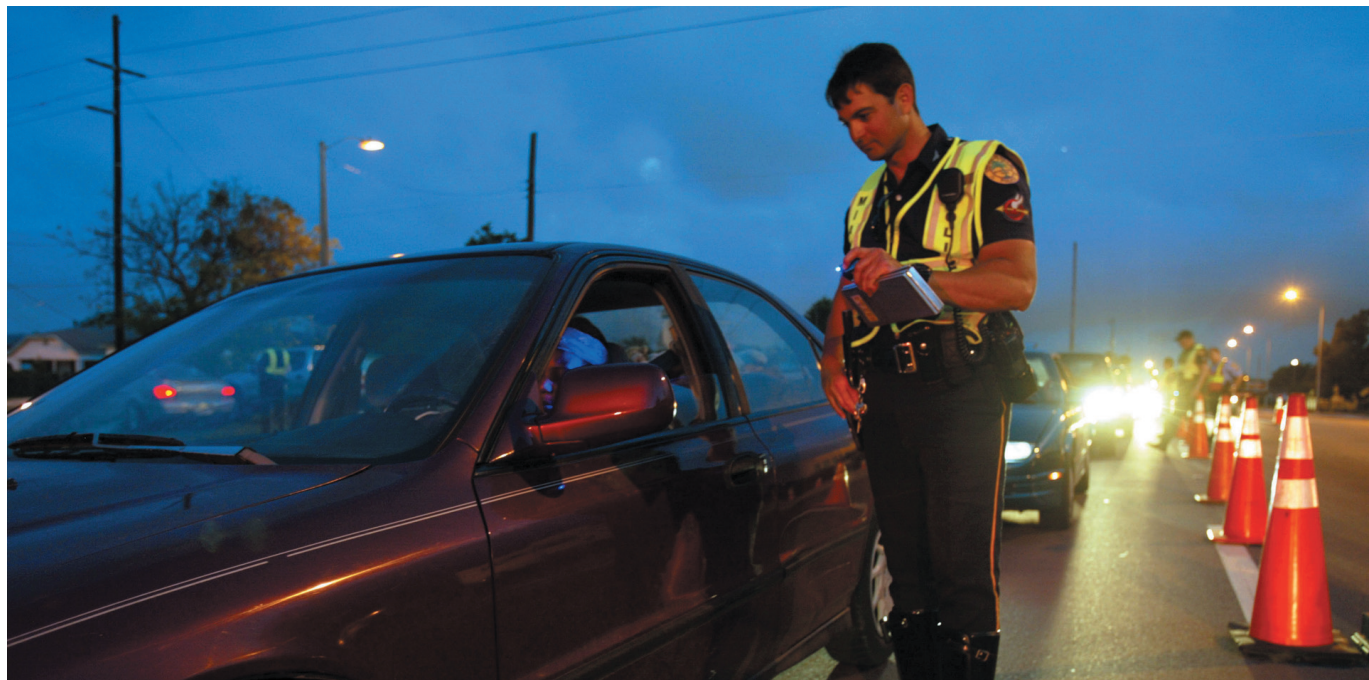
2.3

2.4

2.5

4. Taxing imports or exports
5. Taxing foreign ships
6. Keeping troops or ships of war in time of peace (except for the state militia, now called the National Guard)
7. Engaging in war

In turn, the Constitution requires the national government to refrain from exercising its powers, especially its powers to tax and to regulate interstate commerce, in such a way as to interfere substantially with the states' abilities to perform their responsibilities. But politicians, judges, and scholars disagree about whether the national political process—specifically the executive and the legislature—or the courts should ultimately define the boundaries between the powers of the national government and the states. Some argue that the states' protection from intrusions by the national government comes primarily from the political process because senators



Under national pressure and the threat that they will lose national funding if they do not act, states have raised the drinking age to 21. States are also under pressure to monitor drunk driving more aggressively. When states operate these checkpoints because they will lose national funding, the action reflects coercive federalism.





2.1

## You Will Decide

2.2

### Should Citizens Have the Right to Choose Their Time to Die?

2.3

Many Americans suffer great pain as they struggle with cancer and other diseases in the last few months of life. Although modern medicine offers a number of options for easing the pain through hospice and drug therapies, some citizens would prefer to end their lives on their own schedule through what was once mislabeled as “assisted suicide.”

2.4

This term often creates images of euthanasia by raising the specter of doctors and government making the decision about when a terminally ill patient should be given the drugs to die. In recent years, however, the term has been replaced by the concept of “end-of-life-choice.” Driven by the “death with dignity” movement, which is led by a public interest group called “Compassion and Choice” ([www.compassionandchoice.org](http://www.compassionandchoice.org)), the campaign has won voter approval in Oregon, Washington, Montana,

2.5

and Hawaii. Under current law in these states, patients, not doctors, are given the option of ending their own lives through drugs that ease them into a life-ending coma, or deep sleep, leading to death within minutes.

These states require at least two doctors to certify that a patient has only six months or less to live. With this certification in hand, the doctors are allowed to give the patient a prescription for the life-ending drugs. Having decided to end his or her life, the patient is asked two questions before taking the drugs: (1) Do you wish to end your life, and (2) Are you able to administer the drugs by your own hand? If the patient answers yes to both questions, he or she is given the drugs to act. Some patients decide to take the drugs, while others do not.

*What do you think? Should all states give their citizens the right to end their own lives?*

### Thinking It Through

These citizen-approved laws have been tested in the national courts to see whether states have the right to allow their citizens to choose their own time of death.

In a landmark 1990 decision, the Supreme Court decided that states could allow their citizens to express their desire to refuse unwanted medical treatment such as food and water at the end of their lives and to appoint someone to speak for them when they could not.\* In 1997, however, the Supreme Court ruled that the Constitution did not guarantee a right to die.\*\*

According to these rulings, the U.S. Supreme Court acknowledged a citizen’s right to take control of certain aspects of their death, but also affirmed a state legislature’s right to prohibit anyone from providing help in dying. Also under the rulings, states, not the national government, had the responsibility to pass laws either allowing or prohibiting doctor aid in ending life. Since there is no right to die in the U.S. Constitution, it is also up to state courts to uphold or reject end of life laws under their own constitutions.

The Montana Supreme Court did so on December 31, 2009, when it decided that doctors could provide end of life drugs, provided that the patient was mentally competent and clearly aware of the consequences of his or her action and was able to take the drugs without

assistance.\*\*\* On January 1, 2010, the Montana “Death with Dignity Act” went into effect.

It is not clear whether the movement toward “death with dignity” will spread to other states. Although advocates believe they have a chance in other western states where voters have the right to pass legislation under the initiative power, state legislatures in other states have been reluctant to raise the issue because it is so controversial. Some citizens define the choice as a form of suicide, and in direct violation of their religious beliefs. Other opponents argue that no one can be sure when they will die even when they have a terminal disease. The right to choose one’s time of death may be permitted under state and national constitutions, but is still a choice that citizens and their legislators must allow.

#### CRITICAL THINKING QUESTIONS

1. Why did the U.S. Supreme Court decide not to reverse state laws regulating the end of life?
2. Why would a state legislature be reluctant to pass end-of-life legislation? Which groups favor such laws and which do not?
3. Is a law needed at all on the end of life issue? Should either the national or state governments get involved in this issue?

\**Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

\*\**Vacco v. Quill*, 521 U.S. 793 (1997).

\*\*\**Baxter v. Montana*, --- P.3d ----, 2009 WL 5155363 (Mont. 2009).

and representatives elected from the states participate in congressional decisions.<sup>20</sup> Others maintain that the Supreme Court should limit the national government’s power and defend the states.<sup>21</sup>



On a case-by-case basis, the Court has held that the national government may not command states to enact laws to comply with or order state employees to enforce national laws. In *Printz v. United States*, the Court held that states were not required to conduct instant national background checks prior to selling a handgun.<sup>22</sup> Referring broadly to the concept of dual federalism discussed earlier in this chapter, the Supreme Court said that the national government could not “draft” local police to do its bidding. But as previously discussed, even if the national government cannot force states to enforce certain national laws, it can threaten to withhold its funding if states do not comply with national policies, such as lowering the minimum drinking age or speed limit.

The Constitution also obliges the national government to protect states against *domestic insurrection*. Congress has delegated to the president the authority to dispatch troops to put down such insurrections when the proper state authorities request them.

## □ Interstate Relationships

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

**FULL FAITH AND CREDIT** The **full faith and credit clause** (Article IV, Section 1), one of the more technical provisions of the Constitution, requires state courts to enforce the civil judgments of the courts of other states and accept their public records and acts as valid.<sup>23</sup> It does not require states to enforce the criminal laws or legislation and administrative acts of other states; in most cases, for one state to enforce the criminal laws of another would raise constitutional issues. The clause applies primarily to enforcing judicial settlements and court awards.

**INTERSTATE PRIVILEGES AND IMMUNITIES** Under Article IV, Section 2, individual states must give citizens of all other states the privileges and immunities they grant to their own citizens, including the protection of the laws, the right to engage in peaceful occupations, access to the courts, and freedom from discriminatory taxes. Because of this clause, states may not impose unreasonable residency requirements, that is, withhold rights to American citizens who have recently moved to the state and thereby have become citizens of that state.

**EXTRADITION** In Article IV, Section 2, the Constitution asserts that, when individuals charged with crimes have fled from one state to another, the state to which they have fled is to deliver them to the proper officials on demand of the executive authority of the state from which they fled. This process is called **extradition**. “The obvious objective of the Extradition Clause,” the courts have claimed, “is that no State should become a safe haven for the fugitives from a sister State’s criminal justice system.”<sup>24</sup> Congress has supplemented this constitutional provision by making the governor of the state to which fugitives have fled responsible for returning them.

**INTERSTATE COMPACTS** The Constitution also requires states to settle disputes with one another without the use of force. States may carry their legal disputes to the Supreme Court, or they may negotiate **interstate compacts**. Interstate compacts often establish interstate agencies to handle problems affecting an entire region. Before most interstate compacts become effective, Congress has to approve them. Then the compact becomes binding on all states that sign it, and the national judiciary can enforce its terms. A typical state may belong to 20 compacts dealing with such subjects as environmental protection, crime control, water rights, and higher education exchanges.<sup>25</sup>

### full faith and credit clause

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

2.1

### extradition

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

2.2

2.3

### interstate compact

An agreement among two or more states. Congress must approve most such agreements.

2.4

2.5