

## Chapter 3

# American Federalism



**Figure 3.1** Your first encounter with differences across states may have come from a childhood experience—perhaps visiting relatives in another state or going on a cross-country trip with your parents during summer vacation. The distinct postcard images of different states that come to your mind are symbolic of American federalism. (credit: modification of work by Boston Public Library)

### Chapter Outline

- 3.1 The Division of Powers
- 3.2 The Evolution of American Federalism
- 3.3 Intergovernmental Relationships
- 3.4 Competitive Federalism Today
- 3.5 Advantages and Disadvantages of Federalism

### Introduction

Federalism figures prominently in the U.S. political system. Specifically, the federal design spelled out in the Constitution divides powers between two levels of government—the states and the federal government—and creates a mechanism for them to check and balance one another. As an institutional design, federalism both safeguards state interests and creates a strong union led by a capable central government.

American federalism also seeks to balance the forces of decentralization and centralization. We see decentralization when we cross state lines and encounter different taxation levels, welfare eligibility requirements, and voting regulations, to name just a few. Centralization is apparent in the fact that the federal government is the only entity permitted to print money, to challenge the legality of state laws, or to employ money grants and mandates to shape state actions. Colorful billboards with simple messages may greet us at state borders (**Figure 3.1**), but behind them lies a complex and evolving federal design that has structured relationships between states and the federal government since the late 1700s.

What specific powers and responsibilities are granted to the federal and state governments? How does our

process of government keep these separate governing entities in balance? To answer these questions and more, this chapter traces the origins, evolution, and functioning of the American system of federalism, as well as its advantages and disadvantages for citizens.

## 3.1 The Division of Powers

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### Learning Objectives

By the end of this section, you will be able to:

- Explain the concept of federalism
  - Discuss the constitutional logic of federalism
  - Identify the powers and responsibilities of federal, state, and local governments
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Modern democracies divide governmental power in two general ways; some, like the United States, use a combination of both structures. The first and more common mechanism shares power among three branches of government—the legislature, the executive, and the judiciary. The second, federalism, apportions power between two levels of government: national and subnational. In the United States, the term *federal government* refers to the government at the national level, while the term *states* means governments at the subnational level.

### FEDERALISM DEFINED AND CONTRASTED

**Federalism** is an institutional arrangement that creates two relatively autonomous levels of government, each possessing the capacity to act directly on behalf of the people with the authority granted to it by the national constitution.<sup>1</sup> Although today's federal systems vary in design, five structural characteristics are common to the United States and other federal systems around the world, including Germany and Mexico.

First, all federal systems establish two levels of government, with both levels being elected by the people and each level assigned different functions. The national government is responsible for handling matters that affect the country as a whole, for example, defending the nation against foreign threats and promoting national economic prosperity. Subnational, or state governments, are responsible for matters that lie within their regions, which include ensuring the well-being of their people by administering education, health care, public safety, and other public services. By definition, a system like this requires that different levels of government cooperate, because the institutions at each level form an interacting network. In the U.S. federal system, all national matters are handled by the federal government, which is led by the president and members of Congress, all of whom are elected by voters across the country. All matters at the subnational level are the responsibility of the fifty states, each headed by an elected governor and legislature. Thus, there is a separation of functions between the federal and state governments, and voters choose the leader at each level.<sup>2</sup>

The second characteristic common to all federal systems is a written national constitution that cannot be changed without the substantial consent of subnational governments. In the American federal system, the twenty-seven amendments added to the Constitution since its adoption were the result of an arduous process that required approval by two-thirds of both houses of Congress and three-fourths of the states. The main advantage of this supermajority requirement is that no changes to the Constitution can occur unless there is broad support within Congress and among states. The potential drawback is that numerous national amendment initiatives—such as the Equal Rights Amendment (ERA), which aims to guarantee equal rights regardless of sex—have failed because they cannot garner sufficient consent among members of Congress or, in the case of the ERA, the states.

Third, the constitutions of countries with federal systems formally allocate legislative, judicial, and executive authority to the two levels of government in such a way as to ensure each level some degree of autonomy from the other. Under the U.S. Constitution, the president assumes executive power, Congress

exercises legislative powers, and the federal courts (e.g., U.S. district courts, appellate courts, and the Supreme Court) assume judicial powers. In each of the fifty states, a governor assumes executive authority, a state legislature makes laws, and state-level courts (e.g., trial courts, intermediate appellate courts, and supreme courts) possess judicial authority.

While each level of government is somewhat independent of the others, a great deal of interaction occurs among them. In fact, the ability of the federal and state governments to achieve their objectives often depends on the cooperation of the other level of government. For example, the federal government's efforts to ensure homeland security are bolstered by the involvement of law enforcement agents working at local and state levels. On the other hand, the ability of states to provide their residents with public education and health care is enhanced by the federal government's financial assistance.

Another common characteristic of federalism around the world is that national courts commonly resolve disputes between levels and departments of government. In the United States, conflicts between states and the federal government are adjudicated by federal courts, with the U.S. Supreme Court being the final arbiter. The resolution of such disputes can preserve the autonomy of one level of government, as illustrated recently when the Supreme Court ruled that states cannot interfere with the federal government's actions relating to immigration.<sup>3</sup> In other instances, a Supreme Court ruling can erode that autonomy, as demonstrated in the 1940s when, in *United States v. Wrightwood Dairy Co.*, the Court enabled the federal government to regulate commercial activities that occurred within states, a function previously handled exclusively by the states.<sup>4</sup>

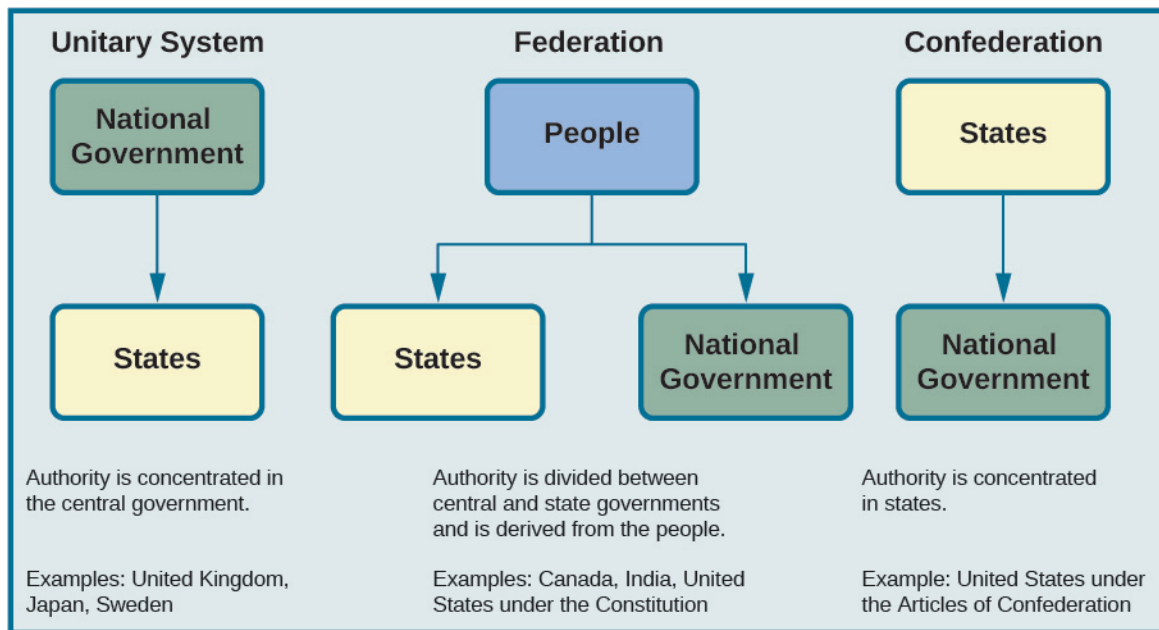
Finally, subnational governments are always represented in the upper house of the national legislature, enabling regional interests to influence national lawmaking.<sup>5</sup> In the American federal system, the U.S. Senate functions as a territorial body by representing the fifty states: Each state elects two senators to ensure equal representation regardless of state population differences. Thus, federal laws are shaped in part by state interests, which senators convey to the federal policymaking process.

### Link to Learning



The governmental design of the United States is unusual; most countries do not have a federal structure. Aside from the United States, **how many other countries** (<https://openstaxcollege.org//29fedsystems>) have a federal system?

Division of power can also occur via a unitary structure or confederation (**Figure 3.2**). In contrast to federalism, a **unitary system** makes subnational governments dependent on the national government, where significant authority is concentrated. Before the late 1990s, the United Kingdom's unitary system was centralized to the extent that the national government held the most important levers of power. Since then, power has been gradually decentralized through a process of **devolution**, leading to the creation of regional governments in Scotland, Wales, and Northern Ireland as well as the delegation of specific responsibilities to them. Other democratic countries with unitary systems, such as France, Japan, and Sweden, have followed a similar path of decentralization.



**Figure 3.2** There are three general systems of government—unitary systems, federations, and confederations—each of which allocates power differently.

In a confederation, authority is decentralized, and the central government’s ability to act depends on the consent of the subnational governments. Under the Articles of Confederation (the first constitution of the United States), states were sovereign and powerful while the national government was subordinate and weak. Because states were reluctant to give up any of their power, the national government lacked authority in the face of challenges such as servicing the war debt, ending commercial disputes among states, negotiating trade agreements with other countries, and addressing popular uprisings that were sweeping the country. As the brief American experience with confederation clearly shows, the main drawback with this system of government is that it maximizes regional self-rule at the expense of effective national governance.

## FEDERALISM AND THE CONSTITUTION

The Constitution contains several provisions that direct the functioning of U.S. federalism. Some delineate the scope of national and state power, while others restrict it. The remaining provisions shape relationships among the states and between the states and the federal government.

The enumerated powers of the national legislature are found in Article I, Section 8. These powers define the jurisdictional boundaries within which the federal government has authority. In seeking not to replay the problems that plagued the young country under the Articles of Confederation, the Constitution’s framers granted Congress specific powers that ensured its authority over national and foreign affairs. To provide for the general welfare of the populace, it can tax, borrow money, regulate interstate and foreign commerce, and protect property rights, for example. To provide for the common defense of the people, the federal government can raise and support armies and declare war. Furthermore, national integration and unity are fostered with the government’s powers over the coining of money, naturalization, postal services, and other responsibilities.

The last clause of Article I, Section 8, commonly referred to as the **elastic clause** or the *necessary and proper cause*, enables Congress “to make all Laws which shall be necessary and proper for carrying” out its constitutional responsibilities. While the enumerated powers define the policy areas in which the national government has authority, the elastic clause allows it to create the legal means to fulfill those



responsibilities. However, the open-ended construction of this clause has enabled the national government to expand its authority beyond what is specified in the Constitution, a development also motivated by the expansive interpretation of the *commerce clause*, which empowers the federal government to regulate interstate economic transactions.

The powers of the state governments were never listed in the original Constitution. The consensus among the framers was that states would retain any powers not prohibited by the Constitution or delegated to the national government.<sup>6</sup> However, when it came time to ratify the Constitution, a number of states requested that an amendment be added explicitly identifying the reserved powers of the states. What these Anti-Federalists sought was further assurance that the national government's capacity to act directly on behalf of the people would be restricted, which the first ten amendments (Bill of Rights) provided. The Tenth Amendment affirms the states' reserved powers: "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." Indeed, state constitutions had bills of rights, which the first Congress used as the source for the first ten amendments to the Constitution.

Some of the states' reserved powers are no longer exclusively within state domain, however. For example, since the 1940s, the federal government has also engaged in administering health, safety, income security, education, and welfare to state residents. The boundary between intrastate and interstate commerce has become indefinable as a result of broad interpretation of the commerce clause. Shared and overlapping powers have become an integral part of contemporary U.S. federalism. These **concurrent powers** range from taxing, borrowing, and making and enforcing laws to establishing court systems (**Figure 3.3**).<sup>7</sup>

Federal Government		State Government	
<p><b>Enumerated Powers</b></p> <ul style="list-style-type: none"> <li>Coin money</li> <li>Regulate interstate and foreign commerce</li> <li>Conduct foreign affairs</li> <li>Establish rules of naturalization</li> <li>Punish counterfeiting</li> <li>Establish copyright/patent laws</li> <li>Regulate postal system</li> <li>Establish courts inferior to Supreme Court</li> <li>Declare war</li> <li>Raise and support armies</li> <li>Make all laws "necessary and proper" to carry out responsibilities</li> </ul> <p><b>Powers Denied</b></p> <ul style="list-style-type: none"> <li>Tax state exports</li> <li>Change state boundaries</li> <li>Violate the Bill of Rights</li> </ul>	<p><b>Concurrent Powers</b></p> <ul style="list-style-type: none"> <li>Levy and collect taxes</li> <li>Borrow money</li> <li>Make and enforce laws</li> <li>Establish courts</li> <li>Charter banks and corporations</li> <li>Take property for public purpose with just compensation (eminent domain)</li> </ul>	<p><b>Reserved Powers</b></p> <ul style="list-style-type: none"> <li>Regulate intrastate commerce</li> <li>Conduct elections</li> <li>Provide for public health, safety, welfare, and morals</li> <li>Establish local governments</li> <li>Maintain militia (National Guard)</li> <li>Ratify amendments to the Constitution</li> </ul> <p><b>Powers Denied</b></p> <ul style="list-style-type: none"> <li>Tax imports and exports</li> <li>Coin money</li> <li>Enter into treaties</li> <li>Impair obligation of contracts</li> <li>Abridge the privileges or immunities of citizens or deny due process and equal protection of the laws</li> </ul>	

**Figure 3.3** Constitutional powers and responsibilities are divided between the U.S. federal and state governments. The two levels of government also share concurrent powers.

Article I, Sections 9 and 10, along with several constitutional amendments, lay out the restrictions on federal and state authority. The most important restriction Section 9 places on the national government prevents measures that cause the deprivation of personal liberty. Specifically, the government cannot suspend the **writ of habeas corpus**, which enables someone in custody to petition a judge to determine

whether that person's detention is legal; pass a **bill of attainder**, a legislative action declaring someone guilty without a trial; or enact an **ex post facto law**, which criminalizes an act retroactively. The Bill of Rights affirms and expands these constitutional restrictions, ensuring that the government cannot encroach on personal freedoms.

The states are also constrained by the Constitution. Article I, Section 10, prohibits the states from entering into treaties with other countries, coining money, and levying taxes on imports and exports. Like the federal government, the states cannot violate personal freedoms by suspending the writ of habeas corpus, passing bills of attainder, or enacting ex post facto laws. Furthermore, the Fourteenth Amendment, ratified in 1868, prohibits the states from denying citizens the rights to which they are entitled by the Constitution, due process of law, or the equal protection of the laws. Lastly, three civil rights amendments—the Fifteenth, Nineteenth, and Twenty-Sixth—prevent both the states and the federal government from abridging citizens' right to vote based on race, sex, and age. This topic remains controversial because states have not always ensured equal protection.

The supremacy clause in Article VI of the Constitution regulates relationships between the federal and state governments by declaring that the Constitution and federal law are the supreme law of the land. This means that if a state law clashes with a federal law found to be within the national government's constitutional authority, the federal law prevails. The intent of the supremacy clause is not to subordinate the states to the federal government; rather, it affirms that one body of laws binds the country. In fact, all national and state government officials are bound by oath to uphold the Constitution regardless of the offices they hold. Yet enforcement is not always that simple. In the case of marijuana use, which the federal government defines to be illegal, twenty-three states and the District of Columbia have nevertheless established medical marijuana laws, others have decriminalized its recreational use, and four states have completely legalized it. The federal government could act in this area if it wanted to. For example, in addition to the legalization issue, there is the question of how to treat the money from marijuana sales, which the national government designates as drug money and regulates under laws regarding its deposit in banks.

Various constitutional provisions govern state-to-state relations. Article IV, Section 1, referred to as the **full faith and credit clause** or the *comity clause*, requires the states to accept court decisions, public acts, and contracts of other states. Thus, an adoption certificate or driver's license issued in one state is valid in any other state. The movement for marriage equality has put the full faith and credit clause to the test in recent decades. In light of *Baehr v. Lewin*, a 1993 ruling in which the Hawaii Supreme Court asserted that the state's ban on same-sex marriage was unconstitutional, a number of states became worried that they would be required to recognize those marriage certificates.<sup>8</sup> To address this concern, Congress passed and President Clinton signed the Defense of Marriage Act (DOMA) in 1996. The law declared that "No state (or other political subdivision within the United States) need recognize a marriage between persons of the same sex, even if the marriage was concluded or recognized in another state." The law also barred federal benefits for same-sex partners.

DOMA clearly made the topic a state matter. It denoted a choice for states, which led many states to take up the policy issue of marriage equality. Scores of states considered legislation and ballot initiatives on the question. The federal courts took up the issue with zeal after the U.S. Supreme Court in *United States v. Windsor* struck down the part of DOMA that outlawed federal benefits.<sup>9</sup> That move was followed by upwards of forty federal court decisions that upheld marriage equality in particular states. In 2014, the Supreme Court decided not to hear several key case appeals from a variety of states, all of which were brought by opponents of marriage equality who had lost in the federal courts. The outcome of not hearing these cases was that federal court decisions in four states were affirmed, which, when added to other states in the same federal circuit districts, brought the total number of states permitting same-sex marriage to thirty.<sup>10</sup> Then, in 2015, the *Obergefell v. Hodges* case had a sweeping effect when the Supreme Court clearly identified a constitutional right to marriage based on the Fourteenth Amendment.<sup>11</sup>

The **privileges and immunities clause** of Article IV asserts that states are prohibited from discriminating

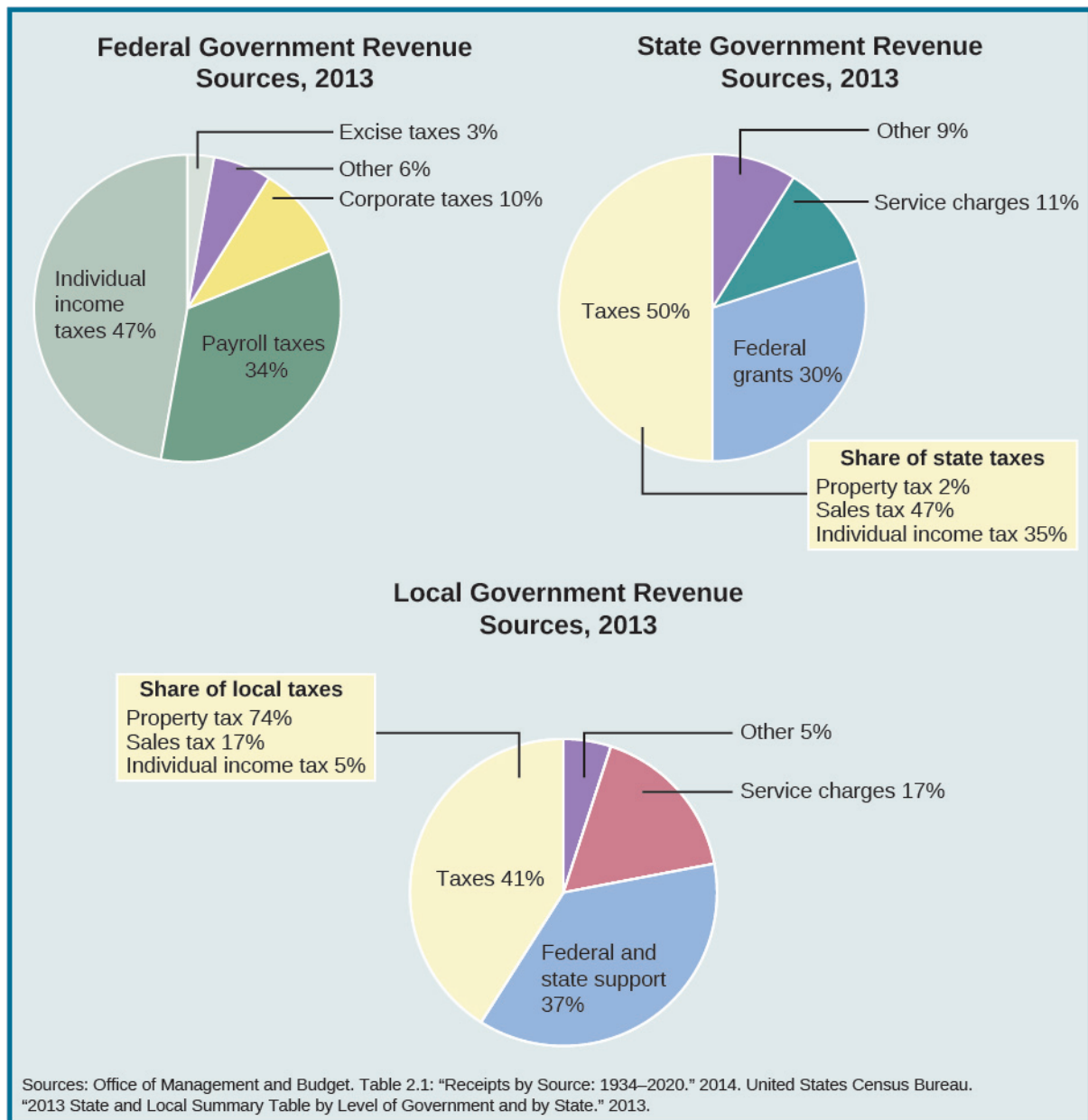
against out-of-staters by denying them such guarantees as access to courts, legal protection, property rights, and travel rights. The clause has not been interpreted to mean there cannot be *any* difference in the way a state treats residents and non-residents. For example, individuals cannot vote in a state in which they do not reside, tuition at state universities is higher for out-of-state residents, and in some cases individuals who have recently become residents of a state must wait a certain amount of time to be eligible for social welfare benefits. Another constitutional provision prohibits states from establishing trade restrictions on goods produced in other states. However, a state can tax out-of-state goods sold within its borders as long as state-made goods are taxed at the same level.

## THE DISTRIBUTION OF FINANCES

Federal, state, and local governments depend on different sources of revenue to finance their annual expenditures. In 2014, total revenue (or receipts) reached \$3.2 trillion for the federal government, \$1.7 trillion for the states, and \$1.2 trillion for local governments.<sup>12</sup> Two important developments have fundamentally changed the allocation of revenue since the early 1900s. First, the ratification of the Sixteenth Amendment in 1913 authorized Congress to impose income taxes without apportioning it among the states on the basis of population, a burdensome provision that Article I, Section 9, had imposed on the national government.<sup>13</sup> With this change, the federal government's ability to raise revenue significantly increased and so did its ability to spend.

The second development regulates federal grants, that is, transfers of federal money to state and local governments. These transfers, which do not have to be repaid, are designed to support the activities of the recipient governments, but also to encourage them to pursue federal policy objectives they might not otherwise adopt. The expansion of the federal government's spending power has enabled it to transfer more grant money to lower government levels, which has accounted for an increasing share of their total revenue.<sup>14</sup>

The sources of revenue for federal, state, and local governments are detailed in **Figure 3.4**. Although the data reflect 2013 results, the patterns we see in the figure give us a good idea of how governments have funded their activities in recent years. For the federal government, 47 percent of 2013 revenue came from individual income taxes and 34 percent from payroll taxes, which combine Social Security tax and Medicare tax.



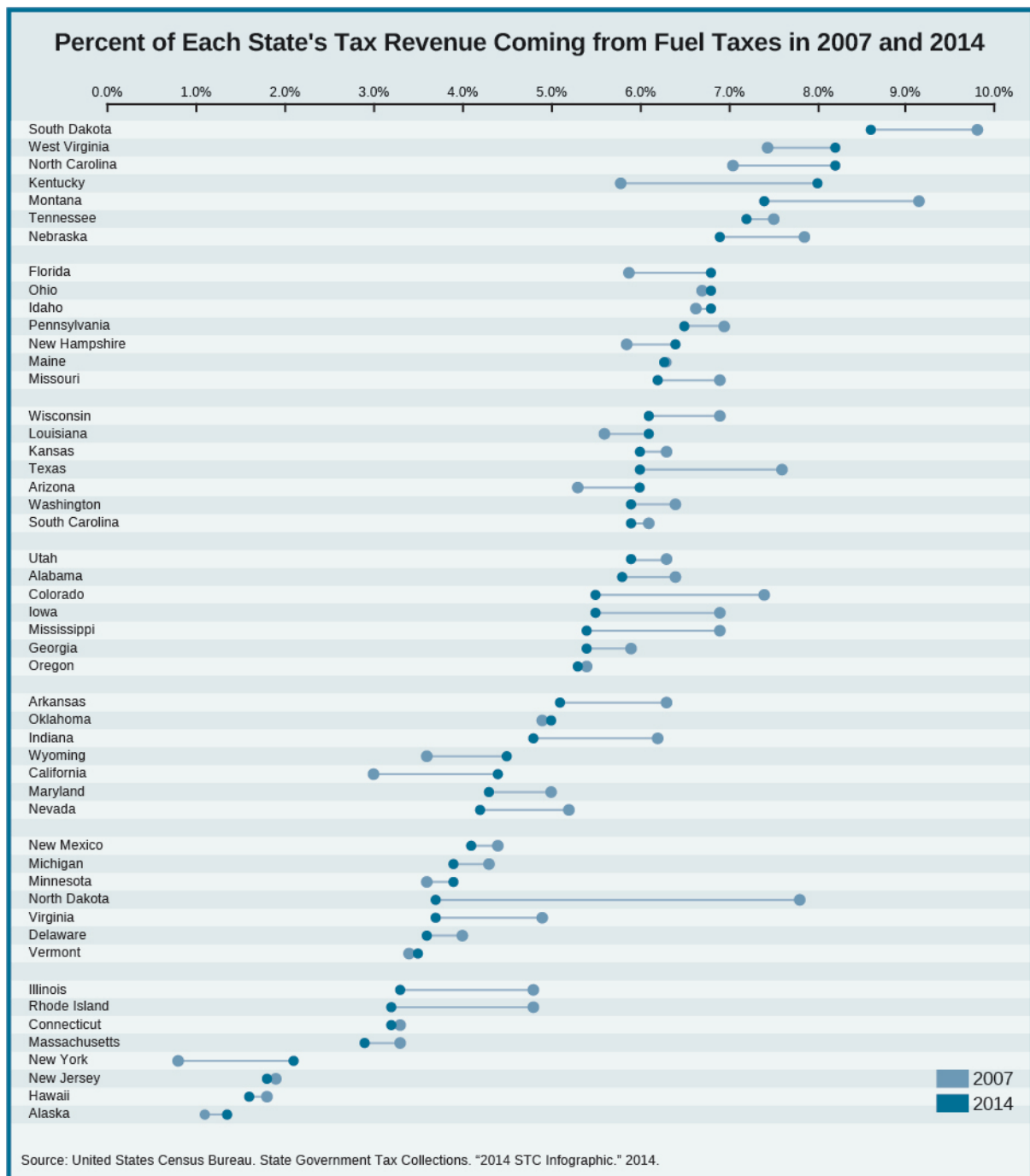
**Figure 3.4** As these charts indicate, federal, state, and local governments raise revenue from different sources.

For state governments, 50 percent of revenue came from taxes, while 30 percent consisted of federal grants. Sales tax—which includes taxes on purchased food, clothing, alcohol, amusements, insurance, motor fuels, tobacco products, and public utilities, for example—accounted for about 47 percent of total tax revenue, and individual income taxes represented roughly 35 percent. Revenue from service charges (e.g., tuition revenue from public universities and fees for hospital-related services) accounted for 11 percent.

The tax structure of states varies. Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming do not have individual income taxes. **Figure 3.5** illustrates yet another difference: Fuel tax as a percentage of total tax revenue is much higher in South Dakota and West Virginia than in Alaska and Hawaii. However, most states have done little to prevent the erosion of the fuel tax's share of their total tax revenue between 2007 and 2014 (notice that for many states the dark blue dots for 2014 are to the left of the light blue numbers for 2007). Fuel tax revenue is typically used to finance state highway transportation



projects, although some states do use it to fund non-transportation projects.



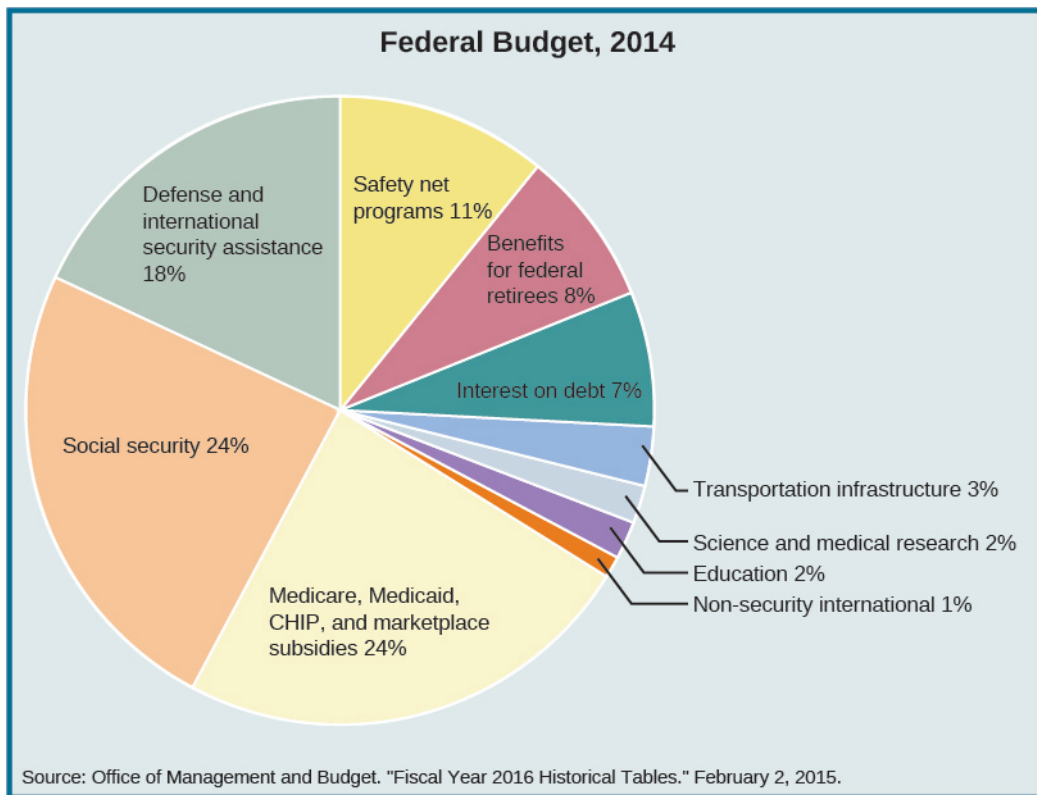
**Figure 3.5** The fuel tax as a percentage of tax revenue varies greatly across states.

The most important sources of revenue for local governments in 2013 were taxes, federal and state grants, and service charges. For local governments the property tax, a levy on residential and commercial real estate, was the most important source of tax revenue, accounting for about 74 percent of the total. Federal and state grants accounted for 37 percent of local government revenue. State grants made up 87 percent of total local grants. Charges for hospital-related services, sewage and solid-waste management, public city university tuition, and airport services are important sources of general revenue for local governments.

Intergovernmental grants are important sources of revenue for both state and local governments. When economic times are good, such grants help states, cities, municipalities, and townships carry out their regular functions. However, during hard economic times, such as the Great Recession of 2007–2009, intergovernmental transfers provide much-needed fiscal relief as the revenue streams of state and local governments dry up. During the Great Recession, tax receipts dropped as business activities slowed, consumer spending dropped, and family incomes decreased due to layoffs or work-hour reductions. To offset the adverse effects of the recession on the states and local governments, federal grants increased by roughly 33 percent during this period.<sup>15</sup>

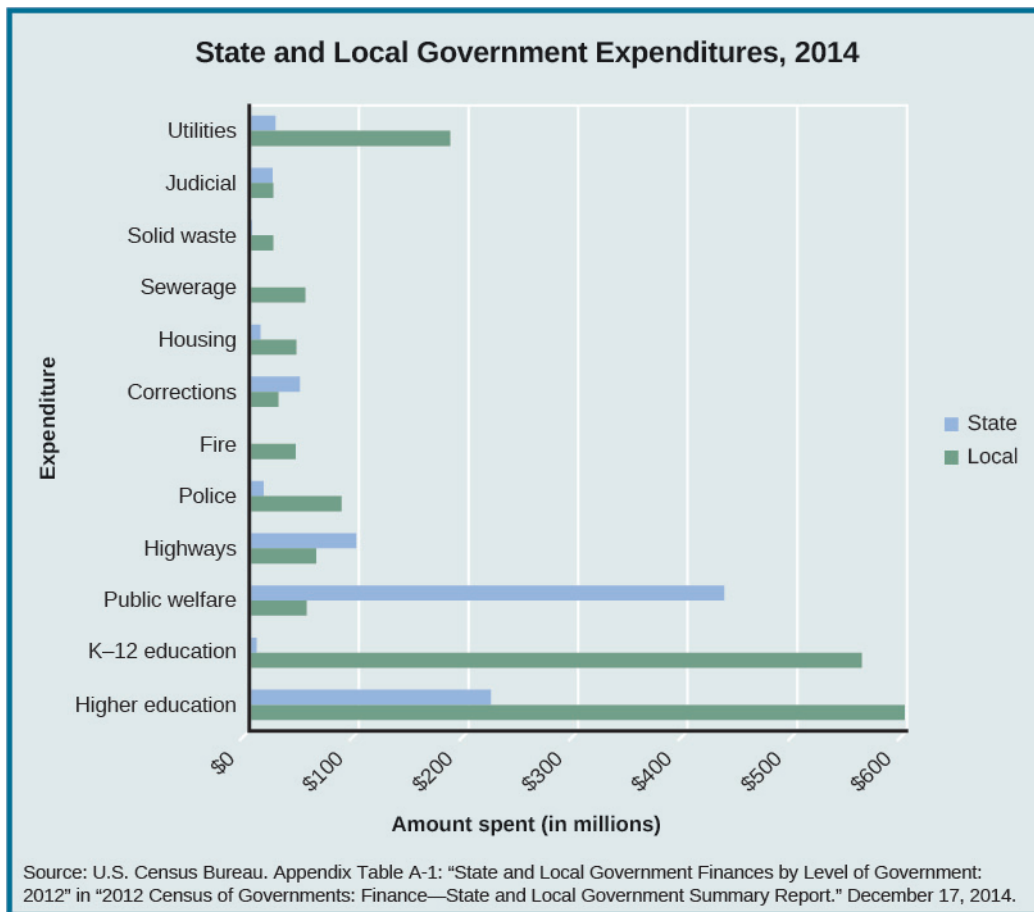
In 2009, President Obama signed the American Recovery and Reinvestment Act (ARRA), which provided immediate economic-crisis management assistance such as helping local and state economies ride out the Great Recession and shoring up the country's banking sector. A total of \$274.7 billion in grants, contracts, and loans was allocated to state and local governments under the ARRA.<sup>16</sup> The bulk of the stimulus funds apportioned to state and local governments was used to create and protect existing jobs through public works projects and to fund various public welfare programs such as unemployment insurance.<sup>17</sup>

How are the revenues generated by our tax dollars, fees we pay to use public services and obtain licenses, and monies from other sources put to use by the different levels of government? A good starting point to gain insight on this question as it relates to the federal government is Article I, Section 8, of the Constitution. Recall, for instance, that the Constitution assigns the federal government various powers that allow it to affect the nation as a whole. A look at the federal budget in 2014 (**Figure 3.6**) shows that the three largest spending categories were Social Security (24 percent of the total budget); Medicare, Medicaid, the Children's Health Insurance Program, and marketplace subsidies under the Affordable Care Act (24 percent); and defense and international security assistance (18 percent). The rest was divided among categories such as safety net programs (11 percent), including the Earned Income Tax Credit and Child Tax Credit, unemployment insurance, food stamps, and other low-income assistance programs; interest on federal debt (7 percent); benefits for federal retirees and veterans (8 percent); and transportation infrastructure (3 percent).<sup>18</sup> It is clear from the 2014 federal budget that providing for the general welfare and national defense consumes much of the government's resources—not just its revenue, but also its administrative capacity and labor power.



**Figure 3.6** Approximately two-thirds of the federal budget is spent in just three categories: Social Security, health care and health insurance programs, and defense.

**Figure 3.7** compares recent spending activities of local and state governments. Educational expenditures constitute a major category for both. However, whereas the states spend comparatively more than local governments on university education, local governments spend even more on elementary and secondary education. That said, nationwide, state funding for public higher education has declined as a percentage of university revenues; this is primarily because states have taken in lower amounts of sales taxes as internet commerce has increased. Local governments allocate more funds to police protection, fire protection, housing and community development, and public utilities such as water, sewage, and electricity. And while state governments allocate comparatively more funds to public welfare programs, such as health care, income support, and highways, both local and state governments spend roughly similar amounts on judicial and legal services and correctional services.



**Figure 3.7** This list includes some of the largest expenditure items for state and local governments.

## 3.2 The Evolution of American Federalism

### Learning Objectives

By the end of this section, you will be able to:

- Describe how federalism has evolved in the United States
- Compare different conceptions of federalism

The Constitution sketches a federal framework that aims to balance the forces of decentralized and centralized governance in general terms; it does not flesh out standard operating procedures that say precisely how the states and federal governments are to handle all policy contingencies imaginable. Therefore, officials at the state and national levels have had some room to maneuver as they operate within the Constitution's federal design. This has led to changes in the configuration of federalism over time, changes corresponding to different historical phases that capture distinct balances between state and federal authority.

### THE STRUGGLE BETWEEN NATIONAL POWER AND STATE POWER

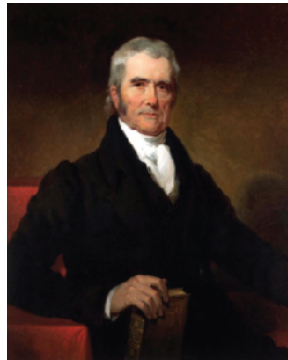
As George Washington's secretary of the treasury from 1789 to 1795, Alexander Hamilton championed legislative efforts to create a publicly chartered bank. For Hamilton, the establishment of the Bank of



the United States was fully within Congress's authority, and he hoped the bank would foster economic development, print and circulate paper money, and provide loans to the government. Although Thomas Jefferson, Washington's secretary of state, staunchly opposed Hamilton's plan on the constitutional grounds that the national government had no authority to create such an instrument, Hamilton managed to convince the reluctant president to sign the legislation.<sup>19</sup>

When the bank's charter expired in 1811, Jeffersonian Democratic-Republicans prevailed in blocking its renewal. However, the fiscal hardships that plagued the government during the War of 1812, coupled with the fragility of the country's financial system, convinced Congress and then-president James Madison to create the Second Bank of the United States in 1816. Many states rejected the Second Bank, arguing that the national government was infringing upon the states' constitutional jurisdiction.

A political showdown between Maryland and the national government emerged when James McCulloch, an agent for the Baltimore branch of the Second Bank, refused to pay a tax that Maryland had imposed on all out-of-state chartered banks. The standoff raised two constitutional questions: Did Congress have the authority to charter a national bank? Were states allowed to tax federal property? In *McCulloch v. Maryland*, Chief Justice John Marshall (**Figure 3.8**) argued that Congress could create a national bank even though the Constitution did not expressly authorize it.<sup>20</sup> Under the necessary and proper clause of Article I, Section 8, the Supreme Court asserted that Congress could establish "all means which are appropriate" to fulfill "the legitimate ends" of the Constitution. In other words, the bank was an appropriate instrument that enabled the national government to carry out several of its enumerated powers, such as regulating interstate commerce, collecting taxes, and borrowing money.



**Figure 3.8** Chief Justice John Marshall, shown here in a portrait by Henry Inman, was best known for the principle of judicial review established in *Marbury v. Madison* (1803), which reinforced the influence and independence of the judiciary branch of the U.S. government.

This ruling established the doctrine of implied powers, granting Congress a vast source of discretionary power to achieve its constitutional responsibilities. The Supreme Court also sided with the federal government on the issue of whether states could tax federal property. Under the supremacy clause of Article VI, legitimate national laws trump conflicting state laws. As the court observed, "the government of the Union, though limited in its powers, is supreme within its sphere of action and its laws, when made in pursuance of the constitution, form the supreme law of the land." Maryland's action violated national supremacy because "the power to tax is the power to destroy." This second ruling established the principle of national supremacy, which prohibits states from meddling in the lawful activities of the national government.

Defining the scope of national power was the subject of another landmark Supreme Court decision in 1824. In *Gibbons v. Ogden*, the court had to interpret the commerce clause of Article I, Section 8; specifically, it had to determine whether the federal government had the sole authority to regulate the licensing of steamboats operating between New York and New Jersey.<sup>21</sup> Aaron Ogden, who had obtained an exclusive license from New York State to operate steamboat ferries between New York City and New Jersey, sued Thomas Gibbons, who was operating ferries along the same route under a coasting license issued by

the federal government. Gibbons lost in New York state courts and appealed. Chief Justice Marshall delivered a two-part ruling in favor of Gibbons that strengthened the power of the national government. First, interstate commerce was interpreted broadly to mean “commercial intercourse” among states, thus allowing Congress to regulate navigation. Second, because the federal Licensing Act of 1793, which regulated coastal commerce, was a constitutional exercise of Congress’s authority under the commerce clause, federal law trumped the New York State license-monopoly law that had granted Ogden an exclusive steamboat operating license. As Marshall pointed out, “the acts of New York must yield to the law of Congress.”<sup>22</sup>

Various states railed against the nationalization of power that had been going on since the late 1700s. When President John Adams signed the Sedition Act in 1798, which made it a crime to speak openly against the government, the Kentucky and Virginia legislatures passed resolutions declaring the act null on the grounds that they retained the discretion to follow national laws. In effect, these resolutions articulated the legal reasoning underpinning the doctrine of **nullification**—that states had the right to reject national laws they deemed unconstitutional.<sup>23</sup>

A nullification crisis emerged in the 1830s over President Andrew Jackson’s tariff acts of 1828 and 1832. Led by John Calhoun, President Jackson’s vice president, nullifiers argued that high tariffs on imported goods benefited northern manufacturing interests while disadvantaging economies in the South. South Carolina passed an Ordinance of Nullification declaring both tariff acts null and void and threatened to leave the Union. The federal government responded by enacting the Force Bill in 1833, authorizing President Jackson to use military force against states that challenged federal tariff laws. The prospect of military action coupled with the passage of the Compromise Tariff Act of 1833 (which lowered tariffs over time) led South Carolina to back off, ending the nullification crisis.

The ultimate showdown between national and state authority came during the Civil War. Prior to the conflict, in *Dred Scott v. Sandford*, the Supreme Court ruled that the national government lacked the authority to ban slavery in the territories.<sup>24</sup> But the election of President Abraham Lincoln in 1860 led eleven southern states to secede from the United States because they believed the new president would challenge the institution of slavery. What was initially a conflict to preserve the Union became a conflict to end slavery when Lincoln issued the Emancipation Proclamation in 1863, freeing all slaves in the rebellious states. The defeat of the South had a huge impact on the balance of power between the states and the national government in two important ways. First, the Union victory put an end to the right of states to secede and to challenge legitimate national laws. Second, Congress imposed several conditions for readmitting former Confederate states into the Union; among them was ratification of the Fourteenth and Fifteenth Amendments. In sum, after the Civil War the power balance shifted toward the national government, a movement that had begun several decades before with *McCulloch v. Maryland* (1819) and *Gibbons v. Odgen* (1824).

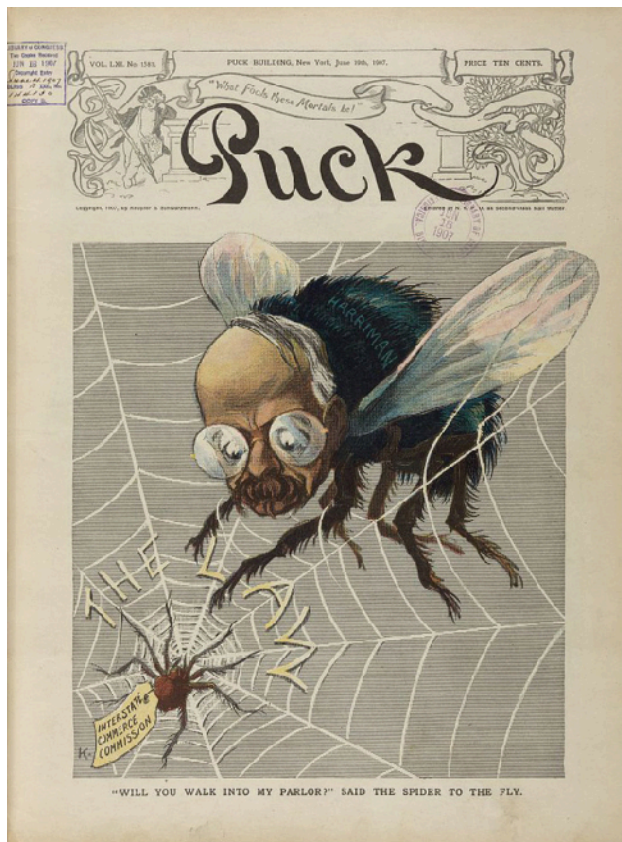
The period between 1819 and the 1860s demonstrated that the national government sought to establish its role within the newly created federal design, which in turn often provoked the states to resist as they sought to protect their interests. With the exception of the Civil War, the Supreme Court settled the power struggles between the states and national government. From a historical perspective, the national supremacy principle introduced during this period did not so much narrow the states’ scope of constitutional authority as restrict their encroachment on national powers.<sup>25</sup>

## DUAL FEDERALISM

The late 1870s ushered in a new phase in the evolution of U.S. federalism. Under **dual federalism**, the states and national government exercise exclusive authority in distinctly delineated spheres of jurisdiction. Like the layers of a cake, the levels of government do not blend with one another but rather are clearly defined. Two factors contributed to the emergence of this conception of federalism. First, several Supreme Court rulings blocked attempts by both state and federal governments to step outside their jurisdictional boundaries. Second, the prevailing economic philosophy at the time loathed government interference in

the process of industrial development.

Industrialization changed the socioeconomic landscape of the United States. One of its adverse effects was the concentration of market power. Because there was no national regulatory supervision to ensure fairness in market practices, collusive behavior among powerful firms emerged in several industries.<sup>26</sup> To curtail widespread anticompetitive practices in the railroad industry, Congress passed the Interstate Commerce Act in 1887, which created the Interstate Commerce Commission. Three years later, national regulatory capacity was broadened by the Sherman Antitrust Act of 1890, which made it illegal to monopolize or attempt to monopolize and conspire in restraining commerce (Figure 03\_02\_Commerce). In the early stages of industrial capitalism, federal regulations were focused for the most part on promoting market competition rather than on addressing the social dislocations resulting from market operations, something the government began to tackle in the 1930s.<sup>27</sup>



(a)



(b)

**Figure 3.9** *Puck*, a humor magazine published from 1871 to 1918, satirized political issues of the day such as federal attempts to regulate commerce and prevent monopolies. “Will you walk into my parlor?” said the spider to the fly” (a) by Udo Keppler depicts a spider labeled “Interstate Commerce Commission” capturing a large fly in a web labeled “The Law” while “Plague take it! Why doesn’t it stay down when I hit it?” (b), also drawn by Keppler, shows President William Howard Taft and his attorney general, George W. Wickersham, trying to beat a “Monopoly” into submission with a stick labeled “Sherman Law.”

The new federal regulatory regime was dealt a legal blow early in its existence. In 1895, in *United States v. E. C. Knight*, the Supreme Court ruled that the national government lacked the authority to regulate manufacturing.<sup>28</sup> The case came about when the government, using its regulatory power under the Sherman Act, attempted to override American Sugar’s purchase of four sugar refineries, which would give the company a commanding share of the industry. Distinguishing between commerce among states and the production of goods, the court argued that the national government’s regulatory authority applied only to commercial activities. If manufacturing activities fell within the purview of the commerce clause



of the Constitution, then “comparatively little of business operations would be left for state control,” the court argued.

In the late 1800s, some states attempted to regulate working conditions. For example, New York State passed the Bakeshop Act in 1897, which prohibited bakery employees from working more than sixty hours in a week. In *Lochner v. New York*, the Supreme Court ruled this state regulation that capped work hours unconstitutional, on the grounds that it violated the due process clause of the Fourteenth Amendment.<sup>29</sup> In other words, the right to sell and buy labor is a “liberty of the individual” safeguarded by the Constitution, the court asserted. The federal government also took up the issue of working conditions, but that case resulted in the same outcome as in the *Lochner* case.<sup>30</sup>

## COOPERATIVE FEDERALISM

The Great Depression of the 1930s brought economic hardships the nation had never witnessed before (**Figure 3.10**). Between 1929 and 1933, the national unemployment rate reached 25 percent, industrial output dropped by half, stock market assets lost more than half their value, thousands of banks went out of business, and the gross domestic product shrunk by one-quarter.<sup>31</sup> Given the magnitude of the economic depression, there was pressure on the national government to coordinate a robust national response along with the states.



**Figure 3.10** A line outside a Chicago soup kitchen in 1931, in the midst of the Great Depression. The sign above reads “Free Soup, Coffee, and Doughnuts for the Unemployed.”

**Cooperative federalism** was born of necessity and lasted well into the twentieth century as the national and state governments each found it beneficial. Under this model, both levels of government coordinated their actions to solve national problems, such as the Great Depression and the civil rights struggle of the following decades. In contrast to dual federalism, it erodes the jurisdictional boundaries between the states and national government, leading to a blending of layers as in a marble cake. The era of cooperative federalism contributed to the gradual incursion of national authority into the jurisdictional domain of the states, as well as the expansion of the national government’s power in concurrent policy areas.<sup>32</sup>

The New Deal programs President Franklin D. Roosevelt proposed as a means to tackle the Great Depression ran afoul of the dual-federalism mindset of the justices on the Supreme Court in the 1930s. The court struck down key pillars of the New Deal—the National Industrial Recovery Act and the Agricultural Adjustment Act, for example—on the grounds that the federal government was operating in matters that were within the purview of the states. The court’s obstructionist position infuriated Roosevelt, leading him in 1937 to propose a court-packing plan that would add one new justice for each one over the age



of seventy, thus allowing the president to make a maximum of six new appointments. Before Congress took action on the proposal, the Supreme Court began leaning in support of the New Deal as Chief Justice Charles Evans Hughes and Justice Owen Roberts changed their view on federalism.<sup>33</sup>

In *National Labor Relations Board (NLRB) v. Jones and Laughlin Steel*,<sup>34</sup> for instance, the Supreme Court ruled the National Labor Relations Act of 1935 constitutional, asserting that Congress can use its authority under the commerce clause to regulate both manufacturing activities and labor-management relations. The New Deal changed the relationship Americans had with the national government. Before the Great Depression, the government offered little in terms of financial aid, social benefits, and economic rights. After the New Deal, it provided old-age pensions (Social Security), unemployment insurance, agricultural subsidies, protections for organizing in the workplace, and a variety of other public services created during Roosevelt's administration.

In the 1960s, President Lyndon Johnson's administration expanded the national government's role in society even more. Medicaid (which provides medical assistance to the indigent), Medicare (which provides health insurance to the elderly and disabled), and school nutrition programs were created. The Elementary and Secondary Education Act (1965), the Higher Education Act (1965), and the Head Start preschool program (1965) were established to expand educational opportunities and equality (**Figure 3.11**). The Clean Air Act (1965), the Highway Safety Act (1966), and the Fair Packaging and Labeling Act (1966) promoted environmental and consumer protection. Finally, laws were passed to promote urban renewal, public housing development, and affordable housing. In addition to these Great Society programs, the Civil Rights Act (1964) and the Voting Rights Act (1965) gave the federal government effective tools to promote civil rights equality across the country.



**Figure 3.11** Lady Bird Johnson, the First Lady, reads to students enrolled in Head Start (a) at the Kemper School in Washington, DC, on March 19, 1966. President Obama visits a Head Start classroom (b) in Lawrence, Kansas, on January 22, 2015.

While the era of cooperative federalism witnessed a broadening of federal powers in concurrent and state policy domains, it is also the era of a deepening coordination between the states and the federal government in Washington. Nowhere is this clearer than with respect to the social welfare and social insurance programs created during the New Deal and Great Society eras, most of which are administered by both state and federal authorities and are jointly funded. The Social Security Act of 1935, which created federal subsidies for state-administered programs for the elderly; people with handicaps; dependent mothers; and children, gave state and local officials wide discretion over eligibility and benefit levels. The unemployment insurance program, also created by the Social Security Act, requires states to provide jobless benefits, but it allows them significant latitude to decide the level of tax to impose on businesses in order to fund the program as well as the duration and replacement rate of unemployment benefits. A similar multilevel division of labor governs Medicaid and Children's Health Insurance.<sup>35</sup>

Thus, the era of cooperative federalism left two lasting attributes on federalism in the United States.

First, a nationalization of politics emerged as a result of federal legislative activism aimed at addressing national problems such as marketplace inefficiencies, social and political inequality, and poverty. The nationalization process expanded the size of the federal administrative apparatus and increased the flow of federal grants to state and local authorities, which have helped offset the financial costs of maintaining a host of New Deal- and Great Society–era programs. The second lasting attribute is the flexibility that states and local authorities were given in the implementation of federal social welfare programs. One consequence of administrative flexibility, however, is that it has led to cross-state differences in the levels of benefits and coverage.<sup>36</sup>

## NEW FEDERALISM

During the administrations of Presidents Richard Nixon (1969–1974) and Ronald Reagan (1981–1989), attempts were made to reverse the process of nationalization—that is, to restore states’ prominence in policy areas into which the federal government had moved in the past. **New federalism** is premised on the idea that the decentralization of policies enhances administrative efficiency, reduces overall public spending, and improves policy outcomes. During Nixon’s administration, **general revenue sharing** programs were created that distributed funds to the state and local governments with minimal restrictions on how the money was spent. The election of Ronald Reagan heralded the advent of a “devolution revolution” in U.S. federalism, in which the president pledged to return authority to the states according to the Constitution. In the Omnibus Budget Reconciliation Act of 1981, congressional leaders together with President Reagan consolidated numerous federal grant programs related to social welfare and reformulated them in order to give state and local administrators greater discretion in using federal funds.<sup>37</sup>

However, Reagan’s track record in promoting new federalism was inconsistent. This was partly due to the fact that the president’s devolution agenda met some opposition from Democrats in Congress, moderate Republicans, and interest groups, preventing him from making further advances on that front. For example, his efforts to completely devolve Aid to Families With Dependent Children (a New Deal-era program) and food stamps (a Great Society-era program) to the states were rejected by members of Congress, who feared states would underfund both programs, and by members of the National Governors’ Association, who believed the proposal would be too costly for states. Reagan terminated general revenue sharing in 1986.<sup>38</sup>

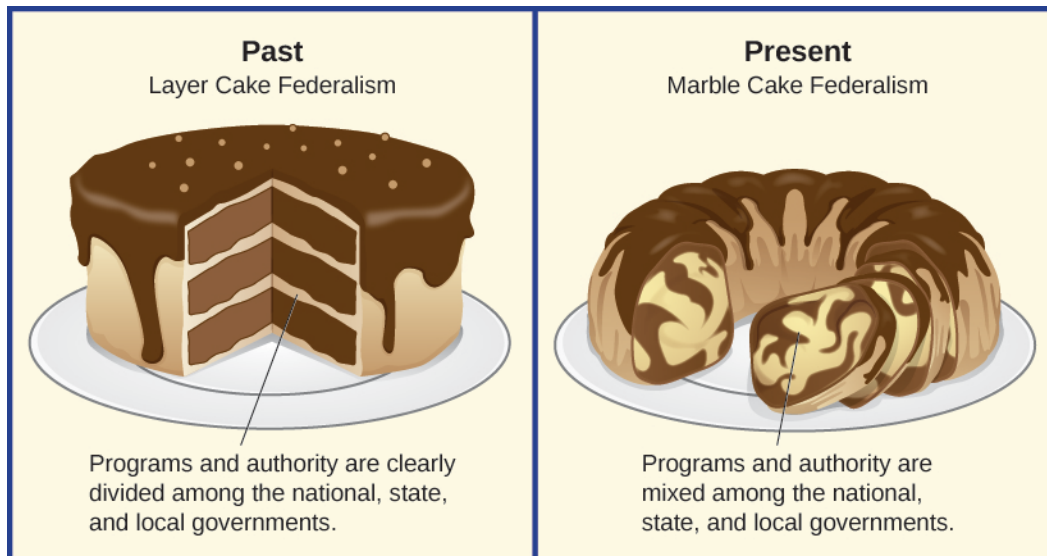
Several Supreme Court rulings also promoted new federalism by hemming in the scope of the national government’s power, especially under the commerce clause. For example, in *United States v. Lopez*, the court struck down the Gun-Free School Zones Act of 1990, which banned gun possession in school zones.<sup>39</sup> It argued that the regulation in question did not “substantively affect interstate commerce.” The ruling ended a nearly sixty-year period in which the court had used a broad interpretation of the commerce clause that by the 1960s allowed it to regulate numerous local commercial activities.<sup>40</sup>

However, many would say that the years since the 9/11 attacks have swung the pendulum back in the direction of central federal power. The creation of the Department of Homeland Security federalized disaster response power in Washington, and the Transportation Security Administration was created to federalize airport security. Broad new federal policies and mandates have also been carried out in the form of the Faith-Based Initiative and No Child Left Behind (during the George W. Bush administration) and the Affordable Care Act (during Barack Obama’s administration).

## Finding a Middle Ground

### Cooperative Federalism versus New Federalism

Morton Grodzins coined the cake analogy of federalism in the 1950s while conducting research on the evolution of American federalism. Until then most scholars had thought of federalism as a layer cake, but according to Grodzins the 1930s ushered in “marble-cake federalism” (Figure 3.12): “The American form of government is often, but erroneously, symbolized by a three-layer cake. A far more accurate image is the rainbow or marble cake, characterized by an inseparable mingling of differently colored ingredients, the colors appearing in vertical and diagonal strands and unexpected whirls. As colors are mixed in the marble cake, so functions are mixed in the American federal system.”<sup>41</sup>



**Figure 3.12** Morton Grodzins, a professor of political science at the University of Chicago, coined the expression “marble-cake federalism” in the 1950s to explain the evolution of federalism in the United States.

Cooperative federalism has several merits:

- Because state and local governments have varying fiscal capacities, the national government’s involvement in state activities such as education, health, and social welfare is necessary to ensure some degree of uniformity in the provision of public services to citizens in richer and poorer states.
- The problem of collective action, which dissuades state and local authorities from raising regulatory standards for fear they will be disadvantaged as others lower theirs, is resolved by requiring state and local authorities to meet minimum federal standards (e.g., minimum wage and air quality).
- Federal assistance is necessary to ensure state and local programs (e.g., water and air pollution controls) that generate positive externalities are maintained. For example, one state’s environmental regulations impose higher fuel prices on its residents, but the externality of the cleaner air they produce benefits neighboring states. Without the federal government’s support, this state and others like it would underfund such programs.

New federalism has advantages as well:

- Because there are economic, demographic, social, and geographical differences among states, one-size-fits-all features of federal laws are suboptimal. Decentralization accommodates the diversity that exists across states.
- By virtue of being closer to citizens, state and local authorities are better than federal agencies at discerning the public’s needs.
- Decentralized federalism fosters a marketplace of innovative policy ideas as states compete against

each other to minimize administrative costs and maximize policy output.

*Which model of federalism do you think works best for the United States? Why?*

### Link to Learning



The leading international journal devoted to the practical and theoretical study of federalism is called *Publius: The Journal of Federalism* (<https://www.openstaxcollege.org/l/29publius>). Find out where its name comes from.

## 3.3 Intergovernmental Relationships

### Learning Objectives

By the end of this section, you will be able to:

- Explain how federal intergovernmental grants have evolved over time
- Identify the types of federal intergovernmental grants
- Describe the characteristics of federal unfunded mandates

The national government's ability to achieve its objectives often requires the participation of state and local governments. Intergovernmental grants offer positive financial inducements to get states to work toward selected national goals. A grant is commonly likened to a "carrot" to the extent that it is designed to entice the recipient to do something. On the other hand, unfunded mandates impose federal requirements on state and local authorities. Mandates are typically backed by the threat of penalties for non-compliance and provide little to no compensation for the costs of implementation. Thus, given its coercive nature, a mandate is commonly likened to a "stick."

### GRANTS

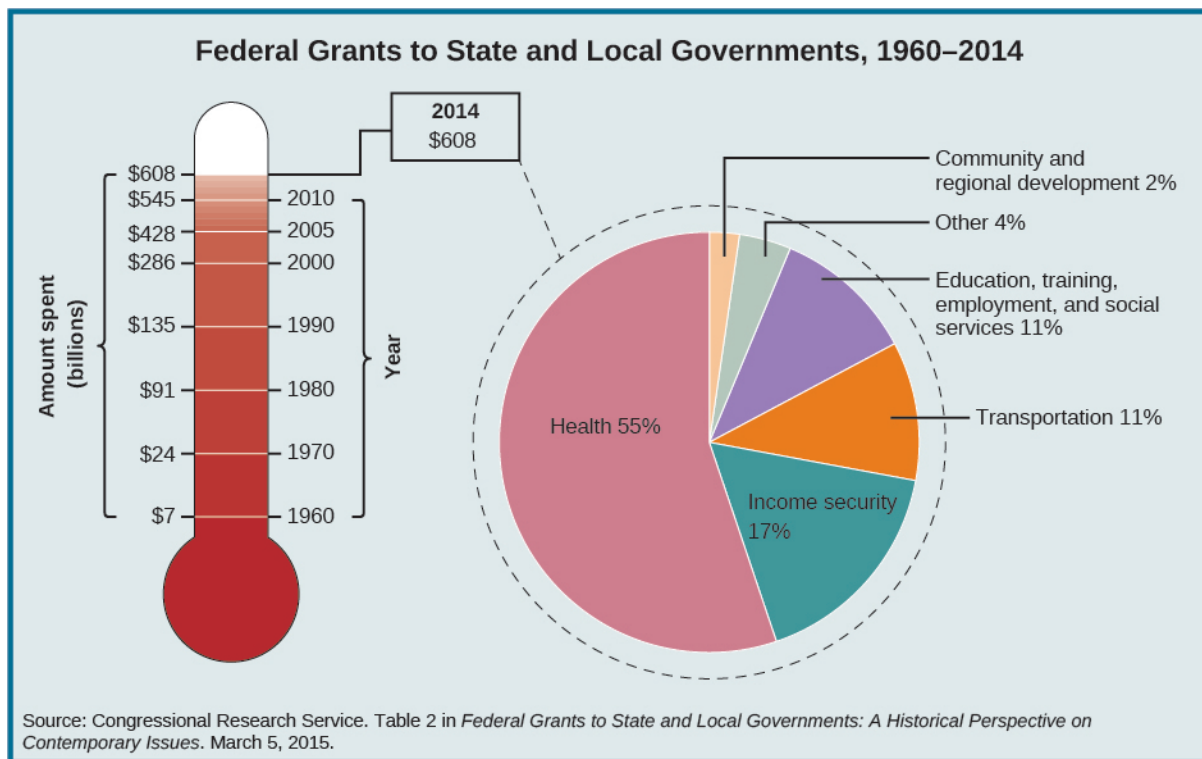
The national government has used grants to influence state actions as far back as the Articles of Confederation when it provided states with land grants. In the first half of the 1800s, land grants were the primary means by which the federal government supported the states. Millions of acres of federal land were donated to support road, railroad, bridge, and canal construction projects, all of which were instrumental in piecing together a national transportation system to facilitate migration, interstate commerce, postal mail service, and movement of military people and equipment. Numerous universities and colleges across the country, such as Ohio State University and the University of Maine, are land-grant institutions because their campuses were built on land donated by the federal government. At the turn of the twentieth century, cash grants replaced land grants as the main form of federal intergovernmental transfers and have become a central part of modern federalism.<sup>42</sup>

Federal cash grants do come with strings attached; the national government has an interest in seeing that public monies are used for policy activities that advance national objectives. **Categorical grants** are federal transfers formulated to limit recipients' discretion in the use of funds and subject them to strict administrative criteria that guide project selection, performance, and financial oversight, among other things. These grants also often require some commitment of matching funds. Medicaid and the food stamp program are examples of categorical grants. **Block grants** come with less stringent federal administrative



conditions and provide recipients more flexibility over how to spend grant funds. Examples of block grants include the Workforce Investment Act program, which provides state and local agencies money to help youths and adults obtain skill sets that will lead to better-paying jobs, and the Surface Transportation Program, which helps state and local governments maintain and improve highways, bridges, tunnels, sidewalks, and bicycle paths. Finally, recipients of general revenue sharing faced the least restrictions on the use of federal grants. From 1972 to 1986, when revenue sharing was abolished, upwards of \$85 billion of federal money was distributed to states, cities, counties, towns, and villages.<sup>43</sup>

During the 1960s and 1970s, funding for federal grants grew significantly, as the trend line shows in **Figure 3.13**. Growth picked up again in the 1990s and 2000s. The upward slope since the 1990s is primarily due to the increase in federal grant money going to Medicaid. Federally funded health-care programs jumped from \$43.8 billion in 1990 to \$320 billion in 2014.<sup>44</sup> Health-related grant programs such as Medicaid and the Children’s Health Insurance Program (CHIP) represented more than half of total federal grant expenses.



**Figure 3.13** As the thermometer shows, federal grants to state and local governments have steadily increased since the 1960s. The pie chart shows how federal grants are allocated among different functional categories today.

### Link to Learning



The federal government uses grants and other tools to achieve its national policy priorities. Take a look at the **National Priorities Project** (<https://www.openstaxcollege.org//29natpriproj>) to find out more.

The national government has greatly preferred using categorical grants to transfer funds to state and local authorities because this type of grant gives them more control and discretion in how the money is spent. In

2014, the federal government distributed 1,099 grants, 1,078 of which were categorical, while only 21 were block grants.<sup>45</sup> In response to the terrorist attack on the United States on September 11, 2001, more than a dozen new federal grant programs relating to homeland security were created, but as of 2011, only three were block grants.

There are a couple of reasons that categorical grants are more popular than block grants despite calls to decentralize public policy. One reason is that elected officials who sponsor these grants can take credit for their positive outcomes (e.g., clean rivers, better-performing schools, healthier children, a secure homeland) since elected officials, not state officials, formulate the administrative standards that lead to the results. Another reason is that categorical grants afford federal officials greater command over grant program performance. A common criticism leveled against block grants is that they lack mechanisms to hold state and local administrators accountable for outcomes, a reproach the Obama administration has made about the Community Services Block Grant program. Finally, once categorical grants have been established, vested interests in Congress and the federal bureaucracy seek to preserve them. The legislators who enact them and the federal agencies that implement them invest heavily in defending them, ensuring their continuation.<sup>46</sup>

Reagan's "devolution revolution" contributed to raising the number of block grants from six in 1981 to fourteen in 1989. Block grants increased to twenty-four in 1999 during the Clinton administration and to twenty-six during Obama's presidency, but by 2014 the total had dropped to twenty-one, accounting for 10 percent of total federal grant outlay.<sup>47</sup>

In 1994, the Republican-controlled Congress passed legislation that called for block-granting Medicaid, which would have capped federal Medicaid spending. President Clinton vetoed the legislation. However, congressional efforts to convert Aid to Families with Dependent Children (AFDC) to a block grant succeeded. The Temporary Assistance for Needy Families (TANF) block grant replaced the AFDC in 1996, marking the first time the federal government transformed an entitlement program (which guarantees individual rights to benefits) into a block grant. Under the AFDC, the federal government had reimbursed states a portion of the costs they bore for running the program without placing a ceiling on the amount. In contrast, the TANF block grant caps annual federal funding at \$16.489 billion and provides a yearly lump sum to each state, which it can use to manage its own program.

Block grants have been championed for their cost-cutting effects. By eliminating uncapped federal funding, as the TANF issue illustrates, the national government can reverse the escalating costs of federal grant programs. This point has not been lost on Speaker of the House Paul Ryan (R-WI), former chair of the House Budget Committee and the House Ways and Means Committee, who has tried multiple times but without success to convert Medicaid into a block grant, a reform he estimates could save the federal government upwards of \$732 billion over ten years.<sup>48</sup>

Another noteworthy characteristic of block grants is that their flexibility has been undermined over time as a result of **creeping categorization**, a process in which the national government places new administrative requirements on state and local governments or supplants block grants with new categorical grants.<sup>49</sup> Among the more common measures used to restrict block grants' programmatic flexibility are set-asides (i.e., requiring a certain share of grant funds to be designated for a specific purpose) and cost ceilings (i.e., placing a cap on funding other purposes).

## UNFUNDED MANDATES

**Unfunded mandates** are federal laws and regulations that impose obligations on state and local governments without fully compensating them for the administrative costs they incur. The federal government has used mandates increasingly since the 1960s to promote national objectives in policy areas such as the environment, civil rights, education, and homeland security. One type of mandate threatens civil and criminal penalties for state and local authorities that fail to comply with them across the board in all programs, while another provides for the suspension of federal grant money if the mandate is not followed. These types of mandates are commonly referred to as *crosscutting* mandates. Failure to

fully comply with crosscutting mandates can result in punishments that normally include reduction of or suspension of federal grants, prosecution of officials, fines, or some combination of these penalties. If only one requirement is not met, state or local governments may not get any money at all.

For example, Title VI of the Civil Rights Act of 1964 authorizes the federal government to withhold federal grants as well as file lawsuits against state and local officials for practicing racial discrimination. Finally, some mandates come in the form of partial preemption regulations, whereby the federal government sets national regulatory standards but delegates the enforcement to state and local governments. For example, the Clean Air Act sets air quality regulations but instructs states to design implementation plans to achieve such standards (**Figure 3.14**).<sup>50</sup>



**Figure 3.14** The Clean Air Act is an example of an unfunded mandate. The Environmental Protection Agency sets federal standards regarding air and water quality, but it is up to each state to implement plans to achieve these standards.

The widespread use of federal mandates in the 1970s and 1980s provoked a backlash among state and local authorities, which culminated in the Unfunded Mandates Reform Act (UMRA) in 1995. The UMRA's main objective has been to restrain the national government's use of mandates by subjecting rules that impose unfunded requirements on state and local governments to greater procedural scrutiny. However, since the act's implementation, states and local authorities have obtained limited relief. A new piece of legislation aims to take this approach further. The 2015 Unfunded Mandates and Information Transparency Act, HR 50, passed the House early in 2015 before being referred to the Senate, where it waits committee consideration.<sup>51</sup>

The number of mandates has continued to rise, and some have been especially costly to states and local authorities. Consider the Real ID Act of 2005, a federal law designed to beef up homeland security. The law requires driver's licenses and state-issued identification cards (DL/IDs) to contain standardized anti-fraud security features, specific data, and machine-readable technology. It also requires states to verify

the identity of everyone being reissued DL/IDs. The Department of Homeland Security announced a phased enforcement of the law in 2013, which requires individuals to present compliant DL/IDs to board commercial airlines starting in 2016. The cost to states of re-issuing DL/IDs, implementing new identity verification procedures, and redesigning DL/IDs is estimated to be \$11 billion, and the federal government stands to reimburse only a small fraction.<sup>52</sup> Compliance with the federal law has been onerous for many states; only twenty-two were in full compliance with Real ID in 2015.<sup>53</sup>

The continued use of unfunded mandates clearly contradicts new federalism's call for giving states and local governments more flexibility in carrying out national goals. The temptation to use them appears to be difficult for the federal government to resist, however, as the UMRA's poor track record illustrates. This is because mandates allow the federal government to fulfill its national priorities while passing most of the cost to the states, an especially attractive strategy for national lawmakers trying to cut federal spending.<sup>54</sup> Some leading federalism scholars have used the term *coercive federalism* to capture this aspect of contemporary U.S. federalism.<sup>55</sup> In other words, Washington has been as likely to use the stick of mandates as the carrot of grants to accomplish its national objectives. As a result, there have been more instances of confrontational interactions between the states and the federal government.

## Milestone

### The Clery Act

The Clery Act of 1990, formally the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, requires public and private colleges and universities that participate in federal student aid programs to disclose information about campus crime. The Act is named after Jeanne Clery, who in 1986 was raped and murdered by a fellow student in her Lehigh University dorm room.

The U.S. Department of Education's Clery Act Compliance Division is responsible for enforcing the 1990 Act. Specifically, to remain eligible for federal financial aid funds and avoid penalties, colleges and universities must comply with the following provisions:

- Publish an annual security report and make it available to current and prospective students and employees;
- Keep a public crime log that documents each crime on campus and is accessible to the public;
- Disclose information about incidents of criminal homicide, sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, arson, and hate crimes that occurred on or near campus;
- Issue warnings about Clery Act crimes that pose a threat to students and employees;
- Develop a campus community emergency response and notification strategy that is subject to annual testing;
- Gather and report fire data to the federal government and publish an annual fire safety report;
- Devise procedures to address reports of missing students living in on-campus housing.

For more about the Clery Act, see Clery Center for Security on Campus, <http://clerycenter.org>.

*Were you made aware of your campus's annual security report before you enrolled? Do you think reporting about campus security is appropriately regulated at the federal level under the Clery Act? Why or why not?*

## 3.4 Competitive Federalism Today

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### Learning Objectives

By the end of this section, you will be able to:

- Explain the dynamic of competitive federalism
  - Analyze some issues over which the states and federal government have contended
- 

Certain functions clearly belong to the federal government, the state governments, and local governments. National security is a federal matter, the issuance of licenses is a state matter, and garbage collection is a local matter. One aspect of competitive federalism today is that some policy issues, such as immigration and the marital rights of gays and lesbians, have been redefined as the roles that states and the federal government play in them have changed. Another aspect of competitive federalism is that interest groups seeking to change the status quo can take a policy issue up to the federal government or down to the states if they feel it is to their advantage. Interest groups have used this strategy to promote their views on such issues as abortion, gun control, and the legal drinking age.

### CONTENDING ISSUES

Immigration and marriage equality have not been the subject of much contention between states and the federal government until recent decades. Before that, it was understood that the federal government handled immigration and states determined the legality of same-sex marriage. This understanding of exclusive responsibilities has changed; today both levels of government play roles in these two policy areas.

**Immigration federalism** describes the gradual movement of states into the immigration policy domain.<sup>56</sup> Since the late 1990s, states have asserted a right to make immigration policy on the grounds that they are enforcing, not supplanting, the nation's immigration laws, and they are exercising their jurisdictional authority by restricting illegal immigrants' access to education, health care, and welfare benefits, areas that fall under the states' responsibilities. In 2005, twenty-five states had enacted a total of thirty-nine laws related to immigration; by 2014, forty-three states and Washington, DC, had passed a total of 288 immigration-related laws and resolutions.<sup>57</sup>

Arizona has been one of the states at the forefront of immigration federalism. In 2010, it passed Senate Bill 1070, which sought to make it so difficult for illegal immigrants to live in the state that they would return to their native country, a strategy referred to as "attrition by enforcement."<sup>58</sup> The federal government filed suit to block the Arizona law, contending that it conflicted with federal immigration laws. Arizona's law has also divided society, because some groups, like the Tea Party movement, have supported its tough stance against illegal immigrants, while other groups have opposed it for humanitarian and human-rights reasons (**Figure 3.15**). According to a poll of Latino voters in the state by Arizona State University researchers, 81 percent opposed this bill.<sup>59</sup>





**Figure 3.15** Tea Party members in St. Paul, Minnesota, protest amnesty and illegal immigration on November 14, 2009 (a). Following the adoption of Senate Bill 1070 in Arizona, which took a tough stance on illegal immigration, supporters of immigration reform demonstrated across the country in opposition to the bill, including in Lafayette Park (b), located across the street from the White House in Washington, DC. (credit a: modification of work by “Fibonacci Blue”/Flickr; credit b: modification of work by Nevele Otseog)

In 2012, in *Arizona v. United States*, the Supreme Court affirmed federal supremacy on immigration.<sup>60</sup> The court struck down three of the four central provisions of the Arizona law—namely, those allowing police officers to arrest an undocumented immigrant without a warrant if they had probable cause to think he or she had committed a crime that could lead to deportation, making it a crime to seek a job without proper immigration papers, and making it a crime to be in Arizona without valid immigration papers. The court upheld the “show me your papers” provision, which authorizes police officers to check the immigration status of anyone they stop or arrest who they suspect is an illegal immigrant.<sup>61</sup> However, in letting this provision stand, the court warned Arizona and other states with similar laws that they could face civil rights lawsuits if police officers applied it based on racial profiling.<sup>62</sup> All in all, Justice Anthony Kennedy’s opinion embraced an expansive view of the U.S. government’s authority to regulate immigration and aliens, describing it as broad and undoubted. That authority derived from the legislative power of Congress to “establish a uniform Rule of Naturalization,” enumerated in the Constitution.

### Link to Learning



Arizona’s Senate Bill 1070 has been the subject of heated debate. Read the **views of proponents and opponents** (<https://www.openstaxcollege.org//29azimmigbill>) of the law.

Marital rights for gays and lesbians have also significantly changed in recent years. By passing the Defense of Marriage Act (DOMA) in 1996, the federal government stepped into this policy issue. Not only did DOMA allow states to choose whether to recognize same-sex marriages, it also defined marriage as a union between a man and a woman, which meant that same-sex couples were denied various federal provisions and benefits—such as the right to file joint tax returns and receive Social Security survivor benefits. In 1997, more than half the states in the union had passed some form of legislation banning same-sex marriage. By 2006, two years after Massachusetts became the first state to recognize marriage equality, twenty-seven states had passed constitutional bans on same-sex marriage. In *United States v. Windsor*, the Supreme Court changed the dynamic established by DOMA by ruling that the federal government had no authority to

define marriage. The Court held that states possess the “historic and essential authority to define the marital relation,” and that the federal government’s involvement in this area “departs from this history and tradition of reliance on state law to define marriage.”<sup>63</sup>

### Insider Perspective

#### Edith Windsor: Icon of the Marriage Equality Movement

Edith Windsor, the plaintiff in the landmark Supreme Court case *United States v. Windsor*, has become an icon of the marriage equality movement for her successful effort to force repeal the DOMA provision that denied married same-sex couples a host of federal provisions and protections. In 2007, after having lived together since the late 1960s, Windsor and her partner Thea Spyer were married in Canada, where same-sex marriage was legal. After Spyer died in 2009, Windsor received a \$363,053 federal tax bill on the estate Spyer had left her. Because her marriage was not valid under federal law, her request for the estate-tax exemption that applies to surviving spouses was denied. With the counsel of her lawyer, Roberta Kaplan, Windsor sued the federal government and won (Figure 3.16).



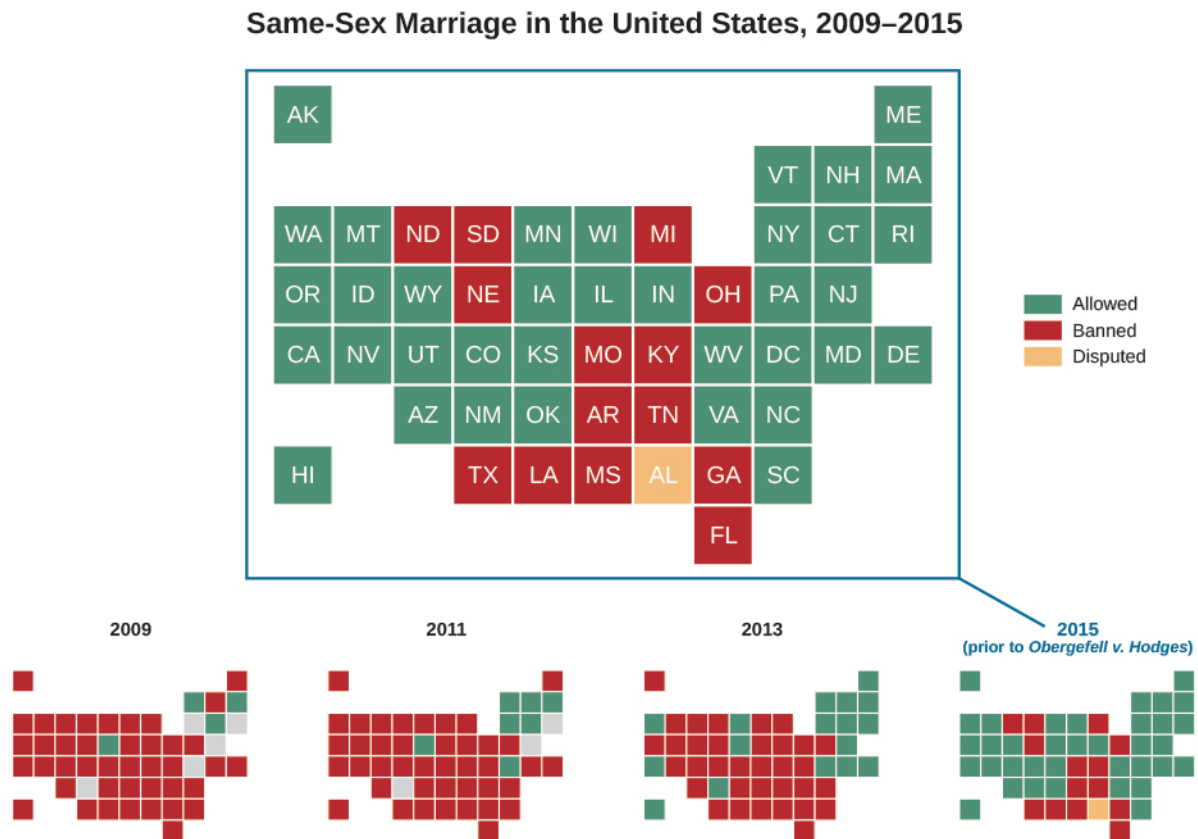
**Figure 3.16** With her client Edith Windsor looking on, attorney Roberta Kaplan speaks to the crowd at the site of the 1969 Stonewall Riots, a historic landmark in the movement for LGBT rights. (credit: “Boss Tweed” /Flickr)

Because of the *Windsor* decision, federal laws could no longer discriminate against same-sex married couples. What is more, marriage equality became a reality in a growing number of states as federal court after federal court overturned state constitutional bans on same-sex marriage. The *Windsor* case gave federal judges the moment of clarity from the U.S. Supreme Court that they needed. James Esseks, director of the American Civil Liberties Union’s (ACLU) Lesbian Gay Bisexual Transgender & AIDS Project, summarizes the significance of the case as follows: “Part of what’s gotten us to this exciting moment in American culture is not just Edie’s lawsuit but the story of her life. The love at the core of that story, as well as the injustice at its end, is part of what has moved America on this issue so profoundly.”<sup>64</sup> In the final analysis, same-sex marriage is a protected constitutional right as decided by the U.S. Supreme Court, which took up the issue again when it heard *Obergefell v. Hodges* in 2015.

*What role do you feel the story of Edith Windsor played in reframing the debate over same-sex marriage? How do you think it changed the federal government’s view of its role in legislation regarding same-sex marriage relative to the role of the states?*

Following the *Windsor* decision, the number of states that recognized same-sex marriages increased rapidly, as illustrated in Figure 3.17. In 2015, marriage equality was recognized in thirty-six states plus Washington, DC, up from seventeen in 2013. The diffusion of marriage equality across states was driven

in large part by federal district and appeals courts, which have used the rationale underpinning the *Windsor* case (i.e., laws cannot discriminate between same-sex and opposite-sex couples based on the equal protection clause of the Fourteenth Amendment) to invalidate state bans on same-sex marriage. The 2014 court decision not to hear a collection of cases from four different states essentially affirmed same-sex marriage in thirty states. And in 2015 the Supreme Court gave same-sex marriage a constitutional basis of right nationwide in *Obergefell v. Hodges*. In sum, as the immigration and marriage equality examples illustrate, constitutional disputes have arisen as states and the federal government have sought to reposition themselves on certain policy issues, disputes that the federal courts have had to sort out.



**Figure 3.17** The number of states that practiced marriage equality gradually increased between 2008 and 2015, with the fastest increase occurring between *United States v. Windsor* in 2013 and *Obergefell v. Hodges* in 2015.

## STRATEGIZING ABOUT NEW ISSUES

Mothers Against Drunk Driving (MADD) was established in 1980 by a woman whose thirteen-year-old daughter had been killed by a drunk driver. The organization lobbied state legislators to raise the drinking age and impose tougher penalties, but without success. States with lower drinking ages had an economic interest in maintaining them because they lured youths from neighboring states with restricted consumption laws. So MADD decided to redirect its lobbying efforts at Congress, hoping to find sympathetic representatives willing to take action. In 1984, the federal government passed the National Minimum Drinking Age Act (NMDAA), a crosscutting mandate that gradually reduced federal highway grant money to any state that failed to increase the legal age for alcohol purchase and possession to twenty-one. After losing a legal battle against the NMDAA, all states were in compliance by 1988.<sup>65</sup>

By creating two institutional access points—the federal and state governments—the U.S. federal system enables interest groups such as MADD to strategize about how best to achieve their policy objectives. The term **venue shopping** refers to a strategy in which interest groups select the level and branch of

government (legislature, judiciary, or executive) they calculate will be most advantageous for them.<sup>66</sup> If one institutional venue proves unreceptive to an advocacy group's policy goal, as state legislators were to MADD, the group will attempt to steer its issue to a more responsive venue.

The strategy anti-abortion advocates have used in recent years is another example of venue shopping. In their attempts to limit abortion rights in the wake of the 1973 *Roe v. Wade* Supreme Court decision making abortion legal nationwide, anti-abortion advocates initially targeted Congress in hopes of obtaining restrictive legislation.<sup>67</sup> Lack of progress at the national level prompted them to shift their focus to state legislators, where their advocacy efforts have been more successful. By 2015, for example, thirty-eight states required some form of parental involvement in a minor's decision to have an abortion, forty-six states allowed individual health-care providers to refuse to participate in abortions, and thirty-two states prohibited the use of public funds to carry out an abortion except when the woman's life is in danger or the pregnancy is the result of rape or incest. While 31 percent of U.S. women of childbearing age resided in one of the thirteen states that had passed restrictive abortion laws in 2000, by 2013, about 56 percent of such women resided in one of the twenty-seven states where abortion is restricted.<sup>68</sup>

## 3.5 Advantages and Disadvantages of Federalism

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### Learning Objectives

By the end of this section, you will be able to:

- Discuss the advantages of federalism
  - Explain the disadvantages of federalism
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The federal design of our Constitution has had a profound effect on U.S. politics. Several positive and negative attributes of federalism have manifested themselves in the U.S. political system.

### THE BENEFITS OF FEDERALISM

Among the merits of federalism are that it promotes policy innovation and political participation and accommodates diversity of opinion. On the subject of policy innovation, Supreme Court Justice Louis Brandeis observed in 1932 that "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>69</sup> What Brandeis meant was that states could harness their constitutional authority to engage in policy innovations that might eventually be diffused to other states and at the national level. For example, a number of New Deal breakthroughs, such as child labor laws, were inspired by state policies. Prior to the passage of the Nineteenth Amendment, several states had already granted women the right to vote. California has led the way in establishing standards for fuel emissions and other environmental policies (**Figure 3.18**). Recently, the health insurance exchanges run by Connecticut, Kentucky, Rhode Island, and Washington have served as models for other states seeking to improve the performance of their exchanges.<sup>70</sup>





(a)



(b)

**Figure 3.18** The California Air Resources Board was established in 1967, before passage of the federal Clean Air Act. The federal Environmental Protection Agency has adopted California emissions standards nationally, starting with the 2016 model year, and is working with California regulators to establish stricter national emissions standards going forward. (credit a: modification of work by Antti T. Nissinen; credit b: modification of work by Marcin Wichary)

Another advantage of federalism is that because our federal system creates two levels of government with the capacity to take action, failure to attain a desired policy goal at one level can be offset by successfully securing the support of elected representatives at another level. Thus, individuals, groups, and social movements are encouraged to actively participate and help shape public policy.



## Get Connected!

### Federalism and Political Office

Thinking of running for elected office? Well, you have several options. As **Table 3.1** shows, there are a total of 510,682 elected offices at the federal, state, and local levels. Elected representatives in municipal and township governments account for a little more than half the total number of elected officials in the United States. Political careers rarely start at the national level. In fact, a very small share of politicians at the subnational level transition to the national stage as representatives, senators, vice presidents, or presidents.

**Elected Officials at the Federal, State, and Local Levels**

	Number of Elective Bodies	Number of Elected Officials
<b>Federal Government</b>	1	
Executive branch		2
U.S. Senate		100
U.S. House of Representatives		435
<b>State Government</b>	50	
State legislatures		7,382
Statewide offices		1,036
State boards		1,331
<b>Local Government</b>		
County governments	3,034	58,818
Municipal governments	19,429	135,531
Town governments	16,504	126,958
School districts	13,506	95,000
Special districts	35,052	84,089
<b>Total</b>	<b>87,576</b>	<b>510,682</b>

**Table 3.1** This table lists the number of elected bodies and elected officials at the federal, state, and local levels.<sup>71</sup>

If you are interested in serving the public as an elected official, there are more opportunities to do so at the local and state levels than at the national level. As an added incentive for setting your sights at the subnational stage, consider the following. Whereas only 28 percent of U.S. adults trusted Congress in 2014, about 62 percent trusted their state governments and 72 percent had confidence in their local governments.<sup>72</sup>

*If you ran for public office, what problems would you most want to solve? What level of government would best enable you to solve them, and why?*

The system of checks and balances in our political system often prevents the federal government from imposing uniform policies across the country. As a result, states and local communities have the latitude to address policy issues based on the specific needs and interests of their citizens. The diversity of public viewpoints across states is manifested by differences in the way states handle access to abortion,

distribution of alcohol, gun control, and social welfare benefits, for example.

## THE DRAWBACKS OF FEDERALISM

Federalism also comes with drawbacks. Chief among them are economic disparities across states, **race-to-the-bottom** dynamics (i.e., states compete to attract business by lowering taxes and regulations), and the difficulty of taking action on issues of national importance.

Stark economic differences across states have a profound effect on the well-being of citizens. For example, in 2014, Maryland had the highest median household income (\$73,971), while Mississippi had the lowest (\$39,680).<sup>73</sup> There are also huge disparities in school funding across states. In 2013, New York spent \$19,818 per student for elementary and secondary education, while Utah spent \$6,555.<sup>74</sup> Furthermore, health-care access, costs, and quality vary greatly across states.<sup>75</sup> Proponents of social justice contend that federalism has tended to obstruct national efforts to effectively even out these disparities.

### Link to Learning



The National Education Association discusses the problem of inequality in the educational system of the United States. Read its **proposed solution** (<https://www.openstaxcollege.org/l/29equalityedu>) and decide whether you agree.

The economic strategy of using race-to-the-bottom tactics in order to compete with other states in attracting new business growth also carries a social cost. For example, workers' safety and pay can suffer as workplace regulations are lifted, and the reduction in payroll taxes for employers has led a number of states to end up with underfunded unemployment insurance programs.<sup>76</sup> Nineteen states have also opted not to cover more of their residents under Medicaid, as encouraged by the Patient Protection and Affordable Care Act in 2010, for fear it will raise state public spending and increase employers' cost of employee benefits, despite provisions that the federal government will pick up nearly all cost of the expansion.<sup>77</sup> More than half of these states are in the South.

The federal design of our Constitution and the system of checks and balances has jeopardized or outright blocked federal responses to important national issues. President Roosevelt's efforts to combat the scourge of the Great Depression were initially struck down by the Supreme Court. More recently, President Obama's effort to make health insurance accessible to more Americans under the Affordable Care Act immediately ran into legal challenges<sup>78</sup> from some states, but it has been supported by the Supreme Court so far. However, the federal government's ability to defend the voting rights of citizens suffered a major setback when the Supreme Court in 2013 struck down a key provision of the Voting Rights Act of 1965.<sup>79</sup> No longer are the nine states with histories of racial discrimination in their voting processes required to submit plans for changes to the federal government for approval.

## Key Terms

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**bill of attainder** a legislative action declaring someone guilty without a trial; prohibited under the Constitution

**block grant** a type of grant that comes with less stringent federal administrative conditions and provide recipients more latitude over how to spend grant funds

**categorical grant** a federal transfer formulated to limit recipients' discretion in the use of funds and subject them to strict administrative criteria

**concurrent powers** shared state and federal powers that range from taxing, borrowing, and making and enforcing laws to establishing court systems

**cooperative federalism** a style of federalism in which both levels of government coordinate their actions to solve national problems, leading to the blending of layers as in a marble cake

**creeping categorization** a process in which the national government attaches new administrative requirements to block grants or supplants them with new categorical grants

**devolution** a process in which powers from the central government in a unitary system are delegated to subnational units

**dual federalism** a style of federalism in which the states and national government exercise exclusive authority in distinctly delineated spheres of jurisdiction, creating a layer-cake view of federalism

**elastic clause** the last clause of Article I, Section 8, which enables the national government "to make all Laws which shall be necessary and proper for carrying" out all its constitutional responsibilities

**ex post facto law** a law that criminalizes an act retroactively; prohibited under the Constitution

**federalism** an institutional arrangement that creates two relatively autonomous levels of government, each possessing the capacity to act directly on the people with authority granted by the national constitution

**full faith and credit clause** found in Article IV, Section 1, of the Constitution, this clause requires states to accept court decisions, public acts, and contracts of other states; also referred to as the comity provision

**general revenue sharing** a type of federal grant that places minimal restrictions on how state and local governments spend the money

**immigration federalism** the gradual movement of states into the immigration policy domain traditionally handled by the federal government

**new federalism** a style of federalism premised on the idea that the decentralization of policies enhances administrative efficiency, reduces overall public spending, and improves outcomes

**nullification** a doctrine promoted by John Calhoun of South Carolina in the 1830s, asserting that if a state deems a federal law unconstitutional, it can nullify it within its borders

**privileges and immunities clause** found in Article IV, Section 2, of the Constitution, this clause prohibits states from discriminating against out-of-staters by denying such guarantees as access to courts, legal protection, and property and travel rights

**race-to-the-bottom** a dynamic in which states compete to attract business by lowering taxes and regulations, often to workers' detriment

**unfunded mandates** federal laws and regulations that impose obligations on state and local governments without fully compensating them for the costs of implementation

**unitary system** a centralized system of government in which the subnational government is dependent on the central government, where substantial authority is concentrated

**venue shopping** a strategy in which interest groups select the level and branch of government they calculate will be most receptive to their policy goals

**writ of habeas corpus** a petition that enables someone in custody to petition a judge to determine whether that person's detention is legal

## Summary

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### 3.1 The Division of Powers

Federalism is a system of government that creates two relatively autonomous levels of government, each possessing authority granted to them by the national constitution. Federal systems like the one in the United States are different from unitary systems, which concentrate authority in the national government, and from confederations, which concentrate authority in subnational governments.

The U.S. Constitution allocates powers to the states and federal government, structures the relationship between these two levels of government, and guides state-to-state relationships. Federal, state, and local governments rely on different sources of revenue to enable them to fulfill their public responsibilities.

### 3.2 The Evolution of American Federalism

Federalism in the United States has gone through several phases of evolution during which the relationship between the federal and state governments has varied. In the era of dual federalism, both levels of government stayed within their own jurisdictional spheres. During the era of cooperative federalism, the federal government became active in policy areas previously handled by the states. The 1970s ushered in an era of new federalism and attempts to decentralize policy management.

### 3.3 Intergovernmental Relationships

To accomplish its policy priorities, the federal government often needs to elicit the cooperation of states and local governments, using various strategies. Block and categorical grants provide money to lower government levels to subsidize the cost of implementing policy programs fashioned in part by the federal government. This strategy gives state and local authorities some degree of flexibility and discretion as they coordinate with the federal government. On the other hand, mandate compels state and local governments to abide by federal laws and regulations or face penalties.

### 3.4 Competitive Federalism Today

Some policy areas have been redefined as a result of changes in the roles that states and the federal government play in them. The constitutional disputes these changes often trigger have had to be sorted out by the Supreme Court. Contemporary federalism has also witnessed interest groups engaging in venue shopping. Aware of the multiple access points to our political system, such groups seek to access the level of government they deem will be most receptive to their policy views.

### 3.5 Advantages and Disadvantages of Federalism

The benefits of federalism are that it can encourage political participation, give states an incentive to engage in policy innovation, and accommodate diverse viewpoints across the country. The disadvantages are that it can set off a race to the bottom among states, cause cross-state economic and social disparities, and obstruct federal efforts to address national problems.