Federalism and the Separation of Powers

The great achievement of American politics in the eighteenth century was the fashioning of an effective constitutional structure of political institutions. Although it is an imperfect and continuously evolving work in progress, this structure of law and political practice has served its people well for more than two centuries by managing conflict, providing inducements for bargaining and cooperation, and facilitating collective action. It has had at least one major failure: the cruel practice of slavery, which ended only after a destructive civil war. But the basic configuration of institutions first formulated in Philadelphia in 1787 survives that tragedy and has otherwise stood the test of time.

Two of America's most important institutional features are federalism and the separation of powers. Federalism seeks to limit government by dividing it into two levels, national and state, each with sufficient independence to compete with the other, thereby restraining the power of both. The separation of powers seeks to limit the power of the national government by dividing government against itself—by giving the legislative, executive, and judicial branches separate functions, thus forcing them to share power.

In Chapter 1 we observed that institutions organize political life. Institutions, however, take many forms and can choreograph collective action in a variety of ways. One important way in which political institutions vary is the manner in which they distribute decision-making power, agenda-setting power, and veto power. The institutions established by authoritarian regimes are usually designed to concentrate power in the hands of a small group of leaders who determine what will be considered, make the final decisions, and seek to block the actions of others. In democratic states, in contrast, political institutions are usually designed to allow a variety of groups to participate in decision-making and provide at least a measure of agenda and veto power to a number of actors.

In the United States, the framers of the Constitution created institutions that would widely disperse involvement in decision-making, including agenda-setting power and veto power. Federalism assigns agenda-setting power, decision-making power, and veto powers to the federal government and to each of the 50 states. The separation of powers gives several federal institutions a degree of control over the agenda, the power to affect decisions, and the ability to block the actions of others. The framers feared that concentrating power in a small number of hands would threaten citizens' liberties, and they were surely correct. Yet, although the constitutional dispersion of power among federal institutions and between the federal government and the states may well protect our liberties, it often seems to make it impossible to get anything done collectively. This lack of decisiveness sometimes appears to negate the most important reason for building institutions in the first place.

Since the adoption of the Constitution, ambitious politicians have developed a variety of strategies for overcoming the many impediments to policy change that inevitably arise in our federal system of separated powers. Most commonly, those seeking to promote a new program may try to find ways of dispersing the program's benefits so that other politicians controlling institutional veto powers will be persuaded that it is in their interest to go along. Thus, federalism and the separation of powers have given rise to the federal pork barrel.
barred, to the defense subcontracting system, and to grants-in-aid and other forms of policy that reflect the dispersion of decision, agenda, and veto powers. For example, if the executive branch hopes to win congressional support for a new weapons system, it generally sees to it that portions of the new system are subcontracted to firms in as many congressional districts as possible. In this way, dispersion of benefits helps to overcome the separation of powers between the executive and legislative branches. Similarly, as we see below, federal officials often secure state cooperation with national programs by offering them funding, called grants-in-aid, in exchange for their compliance. These programs help to overcome the limitations of federalism. Thus, consistent with our discussion of the five principles of politics in Chapter 1, America’s public policies are shaped by the institutional arrangements through which individual efforts must flow.

However, institutions are not carved in stone. Once created, they are subject to revision and modification as competing forces seek new decision rules that will give them an advantage, and as the leaders of institutions seek to strengthen their own power and expand their own jurisdictions at the expense of other institutions. In recent decades, the presidency has increased in power relative to Congress, and the federal government has grown in jurisdiction relative to the states. Nevertheless, these two core institutional features, federalism and the separation of powers, remain at the heart of the American system of government. Let us examine these features and assess their consequences for American government.

### WHO DOES WHAT? FEDERALISM AND INSTITUTIONAL JURISDICTIONS

**Federalism** can be defined as the division of powers and functions between the national government and the state governments. Federalism limits national and state power by creating two levels of government—the national government and the state governments, each with a large measure of sovereignty and thus the ability to restrain the power of the other. As we saw in Chapter 2, the states existed as individual colonies before independence, and for nearly 13 years they were virtually autonomous units under the Articles of Confederation. In effect, the states had retained too much power relative to the national government, a problem that led directly to the Annapolis Convention in 1786 and to the Constitutional Convention in 1787. Under the Articles, the disorder within states was beyond the reach of the national government (see Shay’s Rebellion, discussed in Chapter 2), and conflicts of interest between states were not insurmountable. For example, states were making their own trade agreements with foreign countries and companies, which could then play off one state against another for special advantages. Some states adopted trade tariffs and further barriers to foreign commerce that were contrary to the interests

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The Powers of State Governments. One way in which the framers sought to preserve a strong role for the states was through the Tenth Amendment to the Constitution. The Tenth Amendment preserves a decision rule, or general principle governing decisions, stating that the powers the Constitution does not delegate to the national government or deny to the states are "reserved to the States respectively, or to the People." The Antifederalists, who feared that a strong central government would encroach on individual liberty, repeatedly pressed for such an amendment as a way of limiting national power. Federalists agreed to the amendment because they did not think it would do much harm. In 14 states (as of October 2013), individuals of the same sex may marry. A number of other states, though, have passed "defense of marriage acts" that define marriage as a union only between a man and a woman. Eager to show its disapproval of same-sex marriage, Congress passed the federal Defense of Marriage Act (DOMA) in 1996, declaring that states will not have to recognize a same-sex marriage legally contracted in another state. DOMA also barred same-sex couples from receiving federal health, retirement, and other benefits available to heterosexual couples. In June 2013, the Supreme Court invalidated this section of the law; ruling that it states where same-sex marriage is legal, same-sex married couples are entitled to federal benefits. The case was decided on equal protection grounds (to be discussed in Chapter 5). The ruling, however, is also likely to compel states to recognize same-sex marriages performed in other states.

privileges and immunities

The provision in Article IV, Section 2, of the Constitution requiring that each state normally honors the public acts and judicial decisions that take place in another state.

current powers

The authority possessed by both state and national governments, such as the power to levy taxes.

This clause also regulates criminal justice among the states by requiring states to return fugitives to the states from which they have fled. Thus in 1952, when an inmate escaped from an Alabama prison and sought to avoid being returned to the Grand Island on the grounds that he was being subjected to "cruel and unusual punishment" there, the Supreme Court ruled that he must be returned, according to Article IV, Section 2. This example highlights the difference between the obligations among states and those among different countries. Recently France refused to return an American fugitive because he might be subject to the death penalty, which does not exist in France. The Constitution clearly forbids states from doing something similar.

**Limitations on the States.** Although most of the truly coercive powers of government are reserved to the states, the Constitution does impose some significant limitations. As discussed in the previous section, states cannot discriminate against citizens of other states, and states must extradite alleged criminals to the state with jurisdiction. Another potential limit on states is in a clause in Article I, Section 10, that provides that "no State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." Compacts are a way for two or more states to reach a legally binding agreement about how to solve a problem that crosses state lines. In the early years of the Republic, states turned to settle border disputes. Today with the support of the federal government, they are used for a wide range of issues but are especially important in regulating the distribution of river water, addressing environmental concerns, and operating transportation systems that cross state lines. A well-known contemporary example is the Port of New York Authority (now the Port Authority of New York and New Jersey), a compact formed between New York and New Jersey in 1921. Without it, such public works as the bridge connecting Brooklyn and Staten Island, the bridges connecting New Jersey and Staten Island, the Lincoln Tunnel, the George Washington Bridge, and the expansion and integration of the three major airports could not have been financed or completed.

The federal government has occasionally blocked a proposed interstate compact, thus limiting state action in certain spheres. In 1939, for example, President Franklin Delano Roosevelt vetoed a bill that would have granted consent in advance to states to enter into compacts relating to fishing in the Atlantic Ocean. Roosevelt considered the advance authorization to be too vague. In 2001, Congress refused to allow the renewal of a compact among the several

12 New England states that regulated milk prices. The New England compact has been opposed by Midwestern dairy farmers. More often than it prohibits compacts, however, Congress attaches conditions to its approval of proposed interstate compacts. For example, when it approved the compact among Virginia, Maryland, and the District of Columbia establishing the Washington Metropolitan Transit Authority in 1969, Congress set a number of conditions including requiring the publication of specified data and information by the Authority.

**Local Government and the Constitution.** Local government, including counties, cities, and towns, occupies a peculiar but very important place in the American system. In fact, the status of American local government is probably unique in world experience. First, it must be pointed out that local government has no status in the American Constitution. State legislatures created local governments, and state constitutions and laws permit local governments to take on some of the responsibilities of the state governments. Most states amended their own constitutions to give their larger cities home rule—a guarantee of noninterference in various areas of local affairs. But local governments enjoy no such recognition in the Constitution. Local governments have always been more convenient to the states.

Local governments became administratively important in the early years of the Republic because the states possessed little "administrative capability. They relied on local governments—cities and counties—to implement the laws of the state. Local government was an alternative to a statewide bureaucracy. Today, local governments and state bureaucracies both compete and cooperate with one another. Take, for example, the relationship between state and county police forces, which usually involve a mix of collegiality and rivalry.

The **Slow Growth of the National Government's Power.** Before the 1930s, America's federal system could have been characterized as one of *dual federalism*, a two-layered system—national and state—in which the states and their local principalities did most of the governing. That is, the jurisdiction of the states was greater than that of the federal government. We refer to it as the traditional system precisely because almost nothing about our pattern of government changed during two-thirds of our history. That is of...
course, with the exception of the four years of the Civil War, after which we returned to the traditional system. But there was more to dual federalism than merely the existence of two tiers. The two tiers were functionally quite different from each other. There have been debates in every generation over how to divide responsibilities between the two tiers. As we have seen in this chapter, the Constitution allocated specific powers to the national government and reserved all the rest to the states. That left a lot of room for interpretation, however, because of the final, “elastic” clause of Article 1, Section 8. The three formal words necessary and proper amounted to an invitation to struggle over the distribution of powers between national and state governments. We confront this struggle throughout the book. However, the most remarkable aspect of the history of American federalism is that federalism remained dual for nearly two-thirds of that history, with the national government remaining steadfastly within a “strict construction” of Article 1, Section 8.

The Supreme Court has at times acted as arbiter in the debate over the distribution of powers between national and state governments. The first and most important case favoring national power was *McCulloch v. Maryland.* The issue was whether Congress had the power to charter a bank, in particular the Bank of the United States (created by Congress in 1791 over Thomas Jefferson’s constitutional objections), because no express power to create banks was found in Article 1, Section 8. Chief Justice John Marshall, speaking for the Supreme Court, answered that such power could be “implied” from the other specific powers in Article 1, Section 8, specifically the commerce clause, plus the final clause enabling Congress “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” Thus the Court created the potential for significant increases in national governmental power by creating a decision rule that favored the national government over the states. Essentially, Marshall’s ruling said that if a goal was allowed in the Constitution as a state power, Congress could act. A second question of national power also arose in *McCulloch v. Maryland*—the question of whether Maryland’s attempt to tax the bank was constitutional. Once again Marshall and the Supreme Court took the side of the national government, arguing that a legislature representing all the people (Congress) could not be taxed out of business by a state legislature (Maryland) representing only a small portion of the American people. This opinion was accompanied by Marshall’s immortal dictum that “the power to tax is the power to destroy.”

It was also in this case that the Supreme Court recognized and reinforced the supremacy clause: whenever a state law conflicts with a federal law, the state law should be deemed invalid because “the Laws of the United States . . . shall be the supreme Law of the Land.” (The concept of federal supremacy was introduced in Chapter 2 and will come up again in Chapter 9.)

This nationalistic interpretation of the Constitution was reinforced by another major case, that of *Gibbons v. Ogden* in 1824. The important but relatively narrow issue was whether the state of New York could grant a monopoly to Robert Fulton’s steamboat company to operate an exclusive service between New York and New Jersey. Aaron Ogden had secured his license from Fulton’s company, whereas Thomas Gibbons, a former partner of Ogden’s, had secured a competing license from the U.S. government. Chief Justice Marshall argued that Gibbons could not be kept from competing, because “the state of New York did not have the power to grant this monopoly, affecting other states’ interests. At issue was the commerce clause in Article 1, Section 8 of the Constitution, which delegates to Congress the power “to regulate Commerce with foreign nations, and among the several States and with Indian tribes” [emphasis added]. In his decision, Marshall insisted that the definition of the commerce clause was “comprehensive” but added that the comprehensiveness was limited “to that commerce which concerns more states than one.” This opinion gave rise to what later came to be called “interstate commerce.”

Despite the Supreme Court’s expansive reading of national power in the early years of the Republic, between the 1820s and the 1930s federal power grew slowly if at all. During the Jacksonian period, a states’ rights coalition developed in the Congress. Among the most important members of this coalition were state party leaders who often had themselves appointed to the Senate where they zealously guarded the powers of the states they ruled. Of course, the senators and members of the House from the southern states had a particular reason to support states’ rights. So long as the states were powerful and the federal government weak, the South’s “peculiar institution” of slavery could not be threatened.

Aside from the interruption of the Civil War, the states’ rights coalition dominated Congress, affecting presidential nominations—a matter also controlled by the state party leaders—and influenced judicial appointments, which required senatorial acquiescence, as well. Indeed, the Supreme Court turned sharply away from the nationalistic jurisprudence of John Marshall in favor of a states’ rights interpretation of the Constitution. One area in which this interpretation was particularly noticeable was in cases concerning the commerce clause. For many years, any effort by the federal government to regulate commerce in such areas as fraud, the production of impure goods, the use of child labor, or the existence of dangerous working conditions or long hours was declared unconstitutional by the Supreme Court as a violation of the concept of interstate commerce.11

11 Gibbons v. Ogden, 9 Wheaton 1 (1824).
Barrel into the twentieth century, most other efforts by Congress to regulate commerce were blocked by the Supreme Court's interpretation of federalism, with the concept of interstate commerce as the primary barrier. For example, in the 1918 case of *Hammer v. Dagenhart*, the Supreme Court struck down a statute prohibiting the interstate shipment of goods manufactured with the use of child labor. Congress had been careful to avoid outlawing the production of such goods, which took place within states and only prohibited their interstate shipments. The Court, however, declared that the intent of Congress had been to outlaw the manufacture of the products in question and declared that the statutory language was merely a ruse.

After his election in 1932, President Franklin Delano Roosevelt was eager to expand the power of the national government. His "New Deal" depended on governmental power to regulate the economy and to intervene in every facet of American society. Roosevelt's efforts provoked sharp conflicts between the president and the federal judiciary. After making a host of new judicial appointments and threatening to expand the size of the Supreme Court, Roosevelt was able to bond the judiciary to his will. Beginning in the late 1930s, the Supreme Court issued a series of decisions converting the commerce clause from a barrier to a source of national power.

Among the most important of these cases was *National Labor Relations Board v. Jones & Laughlin Steel Corporation*. At issue was the National Labor Relations Act, which addressed the Wagner Act, which had prohibited corporations from interfering with the efforts of employees to organize into unions, to bargain collectively over wages and working conditions, and to go on strike and engage in picketing. The newly formed National Labor Relations Board (NLRB) had ordered Jones & Laughlin to reinstate workers fired because of their union activities. The appeal reached the Supreme Court because the steel company had made a constitutional issue over the fact that its manufacturing activities were local and therefore beyond the jurisdiction of the Supreme Court. The Court rejected the argument, declaring that a large corporation with subsidiaries and suppliers in many states was inherently involved in interstate commerce and hence subject to congressional regulation. In other decisions, the Court upheld minimum wage laws, the Social Security Act and, in the case of *Wickard v. Filburn*, federal rules controlling how much of any given commodity local farmers might grow.

After 1937, the Supreme Court threw out the old distinction between interstate and intrastate commerce. The Court began to refuse even to review appeals challenging acts of Congress that protected the rights of employees to organize and engage in collective bargaining, replaced the amount of farmland in cultivation, extended low-interest credit to small businesses and farmers, and restricted the activities of corporations dealing in the stock market, as well as many other laws that contributed to the construction of the "regulatory state" and the "welfare state."

### Cooperative Federalism and Grants-in-Aid: Institutions Shape Policies

Roosevelt was able to overcome judicial resistance to expansive New Deal programs. Congress, however, forced him to recognize the continuing importance of the states by creating a number of programs in such a way as to encourage the states to pursue nationally set goals while leaving them some leeway to administer programs according to local values and needs.

If the traditional system of two sovereigns performing highly different functions can be called dual federalism, the system that prevailed after the 1930s could be called cooperative federalism, which generally refers to supportive relations, sometimes partnerships, between the national government and the state and local governments. It comes in the form of federal subsidization of special state and local activities; these subsidies are called grants-in-aid. In *Loughlin*, the Court struck down a statute prohibiting rate discrimination by a railroad; in *Wickard*, the Court declared that the intent of Congress had been to outlaw the manufacture of the products in question in 1942. In response, Congress passed the Interstate Commerce Act of 1887, creating the Interstate Commerce Commission (ICC), the first federal regulatory agency.

Cooperative federalism and grants-in-aid are important forms of federal influence. (Another form of federal influence, the "cooperative federalism," which generally refers to supportive relations, sometimes partnerships, between the national government and the state and local governments, would not exist without the federal grant-in-aid, the grant-in-aid is also an important form of federal influence. (Another form of federal influence, the mandate, is covered in the next section.) Thus, the shift from dual federalism to cooperative federalism was a subtle but important institutional change. The system of a dual federalism left decision, agenda, and veto power in the realm of domestic policy firmly in the hands of the states. The system of cooperative federalism that emerged in the 1930s gave the federal government far greater control over the domestic political agenda. Under the regime of dual federalism, for example, corporations mainly concerned themselves with state regulation of their business. Most firms hardly even bothered to lobby in Washington. With the emergence of cooperative federalism and a greater federal role in the nation's economy, hardly any firm could afford not to lobby in Washington. A grant-in-aid is really a kind of bribe, or a "carrot," whereby Congress appropriates money for state and local government with the condition that the money be spent for a particular purpose as defined by Congress. Congress uses grants-in-aid because it does not have the political or constitutional power to command local governments to do its bidding. Federalism gives the states the power to veto many national government efforts. For example, some states have threatened to opt out of the federal No Child Left Behind education law and thus veto it in their own jurisdictions. When you can't command, a monetary inducement becomes a viable alternative. For instance, the nationwide speed limit of 55 miles per hour was not imposed on drivers by an act of Congress. Instead, Congress bribed the state legislatures by threatening to withdraw the federal highway grants-in-aid if the states did not set that speed limit. In the early 1990s, Congress began to ease up on the states, permitting them, under...
certain conditions, to go back to the 65-mile-per-hour (or higher) limit without losing their highway grants. The grant-in-aid is one more example of the fact that institutions shape policies. America's constitutional system gives the states de facto vetoes over many potential national government programs. As a result, the central government has learned to craft policies likely to elicit the states' cooperation.

This approach came to be applied to cities as well. Congress set national goals, such as public housing and assistance to the unemployed, and provided grants-in-aid to meet them. World War II temporarily stopped the distribution of these grants. But after the war, Congress resumed the provision of grants for urban development and school lunches. The value of such categorical grants-in-aid increased from $2.3 billion in 1950 to over $450 billion in 2008 (Figure 3.1).

Sometimes Congress requires the state or local government to match the national contribution dollar for dollar, but for some programs, such as the interstate highway system, the congressional grant-in-aid provides a significant percentage of the cost.

For the most part, the categorical grants created before the 1960s simply helped the states perform their traditional functions, such as educating and providing fire protection and law enforcement. In contrast to the older formula grants, which used a formula (composed of such elements as need and state and local capacities) to distribute funds, the new project grants made funding available on a competitive basis. Federal agencies would give grants to the proposals they judged to be the best. In this way, the national government acquired substantial control over which state and local governments got money, how much they got, and how they spent it.

The political scientist Morton J. Goldstein characterized the shift to post-New Deal cooperative federalism as a move from "layer cake federalism" to "marble cake federalism," in which the line distinguishing intergovernmental cooperation and sharing has blurred, making it difficult to say where the national government ends and the state and local governments begin. Figure 3.2 demonstrates the basis of the marble cake idea. In the late 1970s, federal aid contributed 25 to 30 percent of the operating budget of all the state and local governments in the country (Figure 3.3). In 2010, federal aid accounted for more than 35 percent of state and local budgets. This increase was temporary, resulting from the Obama administration's $787 billion stimulus package designed to help state and local governments weather the 2008–10 recession. Briefly, however, federal aid became the single largest source of state revenue, exceeding sales and property tax revenues for the first time in U.S. history.

**Regulated Federalism and National Standards**

Developments from the 1960s to the present have moved well beyond cooperative federalism to what might be called regulated federalism. Regulated federalism is an important new decision role, enhancing the national government's policy control. In the 1960s, however, the national role expanded, and the number of categorical grants increased dramatically. For example, during the 89th Congress (1965–66) alone, the number of categorical grant-in-aid programs grew from 221 to 379. The grants authorized during the 1960s addressed national purposes much more strongly than did earlier grants. Central to that national purpose was the need to provide opportunities to the poor.

Many of the categorical grants enacted during the 1960s were project grants, which require state and local governments to submit proposals to federal agencies. In contrast to the older formula grants, which used a formula (composed of such elements as need and state and local capacities) to distribute funds, the new project grants made funding available on a competitive basis. Federal agencies would give grants to the proposals they judged to be the best. In this way, the national government acquired substantial control over which state and local governments got money, how much they got, and how they spent it.

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power. In some areas, the national government actually regulates the states by threatening to withhold grant money unless state and local governments conform to national standards. The most notable instances of this kind of regulated federalism are in the areas of civil rights, poverty programs, and environmental protection. This focus reflects a general shift in federal regulation away from the oversight and control of strictly economic activities toward “social regulation”—intervention on behalf of individual rights and liberties, environmental protection, workplace safety, and so on. In these instances, the national government provides grant-in-aid financing but sets conditions the states must meet to keep the grants (see again Figure 3.2). The national government refers to these policies as “molding national standards.” Important examples include the Asbestos Hazard Emergency Act of 1986, which requires school districts to inspect for asbestos hazards and remove them from school buildings when necessary, and the Americans with Disabilities Act of 1990, which requires all state and local governments to promote access for the disabled to all government buildings. The net effect of these national standards is that state and local policies are

**Figure 3.2**

FOUR VIEWS OF FEDERALISM

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<th>DUAL FEDERALISM</th>
<th>COOPERATIVE FEDERALISM</th>
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<td>Revenue sharing</td>
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<td>Marble Cake</td>
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**REGULATED FEDERALISM**

National government mandates the recipe; state governments pay for and administer them.

**NEW FEDERALISM**

State governments provide the recipe; national government provides the ingredients.

National government determines policies; state governments pay for and administer them.

State governments have more flexibility to make policy and administer programs.

**Grants-in-aid as percentage of gross domestic product**

**Grants-in-aid as percentage of state/local budget**

**Figure 3.3**

THE RISE, DECLINE, AND RECOVERY OF FEDERAL AID

**ANALYZING THE EVIDENCE**

The extent to which state and local governments rely upon federal funding has varied a great deal over time. What difference does it make if the states are fiscally dependent upon the federal government?
in 1995 was an act to limit unfunded mandates: the Unfunded Mandates Reform Act (UMRA). UMRA was considered a triumph of lobbying efforts by state and local governments, and it was "hailed as both symbol and substance of a renewed congressional commitment to federalism." Under this law, any mandate with an uncompensated state and local cost estimated at greater than $50 million a year, as determined by the Congressional Budget Office, can be stopped by a point of order raised on the House or Senate floor. This so-called stop, look, and listen requirement forced Congress to take positive action to own up to a mandate and its potential costs.

The effect of UMRA has not been revolutionary. UMRA does not prevent members of Congress from passing unfunded mandates; it only makes them think twice before they do so. Moreover, the act exempts several areas from coverage. And states must still enforce antidiscrimination laws and meet other requirements in order to receive federal assistance. On the other hand, UMRA is a serious effort to move the federal-state relationship a bit further toward the state side.

**New Federalism and the National-State Tug-of-War**

Federalism in the United States can be understood in part as a tug-of-war between those seeking more uniform national standards and those seeking more room for variability from state to state. Presidents Richard Nixon and Ronald Reagan called their efforts to reverse the trend toward national standards and reestablish traditional policy making and implementation the "new federalism." They helped craft national policies whose purpose was to return more discretion to the states. Examples of these policies include Nixon's revenue sharing and Reagan's block grants, which consolidated a number of categorical grants into one larger category, leaving the state (or local) government more discretion to decide how to use the money.

President Barack Obama, on the other hand, seemed to believe firmly in regulating federalism. In 2009, Obama proposed a record-shattering $3 trillion national budget that included hundreds of millions of dollars in grants to the states for public works and infrastructural improvements as part of his plan to stimulate the nation's faltering economy. Obama told the state governors that he would be watching to see that they spent the money wisely and in a manner consistent with the federal government's purposes. Once again, the national government seemed to view the states as administrative arms more than independent laboratories.

This same idea seemed manifest in the Obama administration's new health care reform law. Under the law, every state is required to establish an insurance exchange where individuals in need of health insurance can shop for the best rate. The law also required states to expand their Medicaid programs, adding as many as 15 million Americans to the Medicaid rolls. A number of states were concerned that the costs of the new program would fall on their already strained budgets, and 12 state attorneys general sued for violating an act that states cannot be sued for violating an act before the Civil War.

The **Supreme Court as Referee.** The courts establish the decision rules that determine the relationship between federal and state power. For much of the nineteenth century, federal power remained limited. The Tenth Amendment was used to bolster arguments about states' rights, which is the extreme version claimed that the states did not have to submit to national laws when they believed the national government had exceeded its authority. Arguments in favor of states' rights were voiced less often after the Civil War. But the Supreme Court continued to use the Tenth Amendment to strike down laws that it thought exceeded national power, including the Civil Rights Act passed in 1875.

In the early twenty-first century, however, the Tenth Amendment appeared to lose its force. Reformers began to press for national regulations to limit the power of large corporations and to preserve the health and welfare of citizens. The Supreme Court approved some of these laws, but it struck down others, including a law combating child labor. The Court stated that the law violated the Tenth Amendment because only states should have the power to regulate conditions of employment. By the late 1930s, however, the Supreme Court had approved such an expansion of federal power that the Tenth Amendment appeared irrelevant. In fact, in 1941, Justice Harlan Fiske Stone declared that the Tenth Amendment "was simply a "truism," that it had no real meaning.

Recent years have seen a revival of interest in the Tenth Amendment and important Supreme Court decisions limiting federal power. Much of the renewed interest stems from conservatives who believe that a strong federal government encroaches on individual liberties and so power should be returned to the states through the process of devolution. In 1996, the Republican presidential candidate, Bob Dole, carried a copy of the Tenth Amendment with him to read at rallies. Around the same time, the Eleventh Amendment concept of state sovereign immunity was revived by the Court. This legal doctrine holds that states are immune from lawsuits by private individuals or groups claiming that the state violated a statute enacted by Congress.

The Supreme Court's ruling in *United States v. Lopez* in 1995 fueled further interest in the Tenth Amendment. In that case, the Court, stating that Congress had exceeded its authority under the commerce clause, struck down a federal law that barred handguns near schools. It was the first time since the New Deal that the Court had limited congressional powers in this way. The Court further limited the power of the federal government over the states in a 1996 ruling based that the program's mandates violate the Tenth Amendment. Following conflicting rulings in the lower federal courts, the Supreme Court considered the issue in 2012 and upheld major provisions of the legislation, although the Court ruled that the federal government cannot require that Medicaid rolls be expanded. The Analyzing the Evidence unit on the next page looks at how health care policy varies across the states.

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24 United States v. Darby, 311 U.S. 100 (1941).
Health Care Policy and the States

Responsibility for health care policy and poverty relief is entangled in the 2010 Patient Protection and Affordable Care Act (ACA), an attempt by Congress to standardize access to health care nationally, as well as to contain costs. The primary federalism question in the ACA is what level of government, state or federal, should set Medicaid eligibility criteria. Medicaid is a program to provide health care coverage to the poor and is jointly financed by the federal and state governments. The statute set Medicaid eligibility requirements, prescribing an income threshold below which a resident is ineligible to receive Medicaid-funded benefits. States set widely varying thresholds for Medicaid eligibility. The ACA addresses this variation by prescribing a federal minimum income threshold.

The first map below shows the 2013 Medicaid eligibility thresholds for working parents of Medicaid-eligible children. In almost all states, limited-income adults without dependent children are not eligible for Medicaid benefits. The thresholds are expressed as a percentage of the federal poverty level (FPL), which in 2013 was $23,560 for a family of four. A Minnesota family could earn up to $50,633 (215% of FPL) and the parents would still qualify for Medicaid benefits, while the same family living in Texas would be ineligible if they earned more than $28,886 (25% of FPL). The second map shows the percentage of limited-income adults who lacked health insurance in each state in 2011.

Medicaid Eligibility Thresholds and Percentage Uninsured*

When public policy is decentralized in a federal system, not only can states set policy according to their own preferences and capacity, as demonstrated by the variation in Medicaid eligibility, but states may innovate to improve policy. For example, in 2006 Massachusetts enacted a law that required residents to obtain insurance but subsidized or offered free coverage for the poor. In the graph below, we see the proportion of non-elderly Massachusetts adult population without health insurance compared with the proportion of non-elderly adults without health insurance nationwide. Although Massachusetts already had a far lower rate of uninsured than the national average, the introduction of health policy reform further reduced the percentage of uninsured at a time when the national average was increasing.

The ACA is modeled on the Massachusetts plan. Two aspects have been politically controversial: the requirement that all individuals obtain insurance and the standardization of Medicaid eligibility to 133% of FPL, or $13,232 for a family of four (2013). If states comply with the ACA prescription, access to Medicaid benefits will expand considerably, including extending coverage to all limited-income adults regardless of whether they have dependent children, a population that currently lacks access to Medicaid. However, it does so by centralizing authority; reducing the states' control over health care policy and poverty relief.

Although the federal government will pay the lion's share of the costs of the expanded Medicare coverage through at least 2022, many states were unhappy with the dictum from the central government, and 26 states joined lawsuits to challenge Congress's authority. In 2012 the Supreme Court ruled that states cannot be required to conform their Medicaid eligibility thresholds to the national minimum. As of June 2013, 21 states have indicated that they will not raise their Medicaid eligibility thresholds to meet the ACA minimum. Ultimately, the fate of health care responsibility will rest with the American public, as they grow to accept or reject the arguments made on both sides.¹

Percentage of Population without Health Insurance**


on the Eleventh Amendment. That ruling prevented Seminole Indians from suing the state of Florida in federal court. A 1988 law had given Indian tribes the right to sue a state in federal court if the state did not negotiate in good faith issues related to gambling casinos on tribal land. The Supreme Court's ruling appeared to signal a much broader limitation on national power by raising new questions about whether individuals can sue a state if it fails to uphold federal law.27

Another significant decision involving the relationship between the federal government and state governments was the 1997 case of Printz v. United States, in which the Court struck down a key provision of the Brady bill, enacted by Congress in 1993 to regulate gun sales. Under the terms of the act, state and local law enforcement officers were required to conduct background checks on prospective gun purchasers. The Court held that the federal government cannot require states to administer or enforce federal regulatory programs.28 Because the states bear administrative responsibility for a variety of other federal programs, this decision could have far-reaching consequences. Finally, in another major ruling from the 1996-97 term, in City of Boerne v. Flores, the Court ruled that Congress had gone too far in transferring the power of the states to enact regulations they deemed necessary for the protection of public health, safety, or welfare (see Chapter 4).29

The Court continued its trend toward a much more restricted federal government. This trend continued with the 2006 Gonzales v. Oregon case. The Gonzales case involved Oregon's physician-assisted suicide law, which permitted doctors to prescribe lethal doses of medication for terminally ill patients who requested help ending their lives. In 2001, then U.S. attorney general John Ashcroft issued an order declaring that any physician involved in such a procedure would be prosecuted for violating the federal Controlled Substances Act. The state of Oregon went to court to stop this order. In its decision, the Court ruled that the federal government could not override state laws determining how drugs should be used as long as the drugs were not prohibited by federal law.30

In 2012, however, the Court gave a signal that it would once again undermine the importance of national power in the nation-state tug-of-war. In addition to the "Obamacare" decision cited earlier, the Supreme Court struck down portions of an Arizona immigration law, declaring that immigration was a federal, not a state, matter.31 And in its 2013 decision in the case of Arizona v. Inter Tribal Council of Arizona, Inc., the Supreme Court struck down an Arizona law requiring individuals to show documentation of citizenship when registering to vote. The Court ruled that this requirement was preempted by the federal National Voter Registration Act requiring states to use the official federal voter registration form.32

Of course, shifting interpretations of the Constitution often reflect underlying struggles for political power and nowhere is this more true than in the realm of federalism. Generally speaking, those political forces that control the national government advocate a jurisprudence of nationalism. Those uncertain of their ability to retain control of the commanding heights of Capitol Hill and the White House but more sure of their hold on at least some state governments respect for state power and remind Americans of the wisdom of the Tenth Amendment. Thus, the Marshall Court reflected the nationalist spirit of America's founders. Marshall's successor, Chief Justice Roger Taney, gave us the most extreme denationalizing period, virtually inventing the concept of states' rights, as slavery and its expansion were endangering the Union. Franklin Delano Roosevelt created a court that would advance his efforts to strengthen the powers of the federal government. In recent decades, Republicans, who control a majority of the states, have expressed respect for states' rights while Democrats, with more power at the national level, have sought to increase the power of the federal government. This is reflected in the fact that the Burger Court (1969-96) and the Rehnquist Court (1986-2005) were more sympathetic to the powers of the states, whereas the Roberts Court (2005-present) has generally supported national power. How different institutional forms will influence decision, agenda, and veto power is a matter of political principle—and political interest.

THE SEPARATION OF POWERS

As we noted at the beginning of this chapter, the separation of powers gives different federal institutions the ability to influence the nation's agenda, to affect decisionmaking, and to prevent the other institutions from taking action—broadening agenda, decision, and veto power. This arrangement may be cumbersome, but the Constitution's framers saw it as an essential means of protecting liberty.

In his discussion of the separation of powers, James Madison quoted the originator of the idea, the French political thinker Baron de Montesquieu: "There can be no liberty where the legislative and executive powers are united in the same person or where they are both in the same hands."33