6 Federalism

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CHAPTER 6: FEDERALISM

OUT OF MANY, ONE.
6.0 | Why Federalism?

What is federalism? Why have a federal system of government? How does the U.S. system of federalism work today? These are some of the questions that will be answered in this chapter. The chapter

- Defines federalism.
- Explains the logic of the U.S. system of federalism.
- Describes how the U.S. system of federalism works today, and
- Examines the power problem with federalism.

The general public does not think about federalism very much and therefore does not have much to say one way or another about federalism itself.¹ The average voter has stronger opinions about criminal justice policy, education, abortion, immigration, or national security policy than opinions about federalism. Federalism tends to be considered a technical matter of interest to government officials or political insiders more than the general public. Americans do, however, have strong opinions about “big government”—and opinions about big government are often directly related to federalism because “big government” is a euphemism for the federal government of “Washington.” In fact, political opinion about public policies related to crime, education, abortion, the environment, health care, and immigration is usually related to opinions about federalism because they include opinions about whether the policies should be state or national government policies.

Federalism is a two-tiered system of government in which power is divided between a national (or central) government and the subnational units (states, provinces, or regional governments). Therefore federalism is a geographic division of power. In the U.S., power is distributed between the national government and state governments. The number of states has grown from the original 13 to 50 today with the addition of Hawaii in 1959. In other countries with federal systems (e.g., Argentina, Australia, Canada, Germany, and India) the regional governments are called provinces. Constitutional federalism means that neither the national nor the state governments can abolish one another because both levels of government are the creatures of the constitution. A state such Alabama or Vermont or Wyoming is not a creature of the national government or a mere local administrative unit of the national government. In the U.S. system of federalism, both the national and state governments are sovereign political entities. Federalism is based on the concept of dual sovereignty: both the national and state governments have sovereignty. Sovereignty is defined as having the ultimate or highest authority. Is it possible to have two sovereigns with authority over the same geographic area and people? The idea of dual sovereigns does seem to conflict with the concept of sovereignty as ultimate government authority. In fact, this is the source of the power problem with federalism. The image below depicts political fighting over federalism in Australia, which is analogous to the 50 states fighting with one other in the U.S.

The power problem with federal systems of government is the need to strike the right balance of power between the state governments and the federal government. The Constitution provides for a federal system but with a few notable exceptions, such as the power to coin money and the power to regulate interstate commerce, which are exclusively federal powers, the Constitution does not specify what powers each has. As a
result, American politics has historically included debates about which level of
government should do what, and whether the federal government is getting too big.
Finding the right balance of powers is both a legal (or constitutional) matter and a
political matter. It is about law and politics. In fact, federalism is a good example of
the challenge of adapting a Constitution that is more than 200 years old to modern
times, the challenge of maintaining continuity with the federal system established by
the Constitution while accommodating major economic, political, technological,
scientific, and social changes.

Federalism is not the most common type of political system in the world. Most of the world’s approximately 190 countries have unitary systems of
government (that is one unit), not federal systems. So why does the U.S. have a
federal system? The answer to this question is provided in the very origins of the
word federalism. The word federalism comes from the Latin foedus, or covenant,
where individuals or groups agree to join a political union with a government body
to coordinate their interests and represent them. In the American political
experience, the colonists had strong attachments to their colonial governments, just
as people now have attachments to their state governments. The colonists were
wary of giving too much power to a central government. Federalism was a way for
government power to be divided between the states and a national government as
part of the system of checks and balances.

Federalism serves three main purposes. First, it is part of the system of
institutional checks and balances that was designed to control government power by
dividing it between two levels of government. Second, creates a political system
where interests can be represented in the national government. Members of
Congress represent states and districts within states. Third, federalism creates a
governance system where the states can serve as “laboratories of experimentation.”
If one or more states try a policy (e.g., education reform or health care reform) that
works, the successful policy experiment can be adopted by other states. If one state’s
policy experiment fails then the costs are limited to one state—unlike what happens
when the national government adopts a policy that fails.
6.1 | Comparing Systems of Government

One way to better understand federalism is to compare it with other types of government. There are three basic types of systems of government: unitary systems, confederal systems, and federal systems.

6.11 | Unitary Systems

A **unitary system** is, as the term suggests, a political system with one level of government. Power concentrated in one central government. The central government has sovereignty or the highest governing authority. The central government may create local or regional units to help govern but these units are “creatures” of the national or unitary government. They are created by the national government and they can be abolished by the national government—and the national government also can determine how much power the local units have because the local units do not have sovereignty.

In France, for example, the national government can abolish local governments or change their boundaries. This kind of national control over state governments does not exist in the United States, because the Constitution created a federal system where both the federal (national) government and the state governments have independent constitutional status. The Constitution provides for both a national government and state governments. The American states, however, are unitary systems. The states can create, alter, or abolish local governments such as cities, counties, school districts, port authorities, as well as the other kinds of special governments that states create.

Canada has a federal system that divides power between the federal parliament and provincial governments. Under the Constitution Act, Section 91 of the [Canadian Constitution](https://www.canada.ca/en/justice-canada/laws/constitution/91-section.html) provides for federal legislative authority and Section 92 provides for provincial powers. One difference between Canadian and U.S. federalism is that the Canadian system provides that the provincial governments have specifically delegated powers and all the national government retains all residual powers. In the U.S. the national government has specifically delegated powers and the states retain all residual powers. All federal systems have political conflicts over which level of government has power over which areas of policy. Areas of Canadian conflict include legislation with respect to regulation of the economy, taxation, and natural resources. The actual distribution of powers evolves over time. The Australian system of federalism resembles the U.S. system in terms of the division of power between the national and state governments but Australia has a parliamentary system rather than the separation of powers.

6.12 | Confederal Systems

A **confederal system** (or a confederation) is a political system where the constituent units (the states, provinces, or regional governments) are more powerful than the central (or national) government. Power is decentralized. The central government is comparatively weak, with fewer powers and governing responsibilities than the units.
The Founders decided to create a federal system rather than a unitary or confederal system because of their political experience. The Revolutionary War was fought against the British monarchy, a unitary system with power concentrated in the national government. And the first U.S. form of government, the Articles of Confederation, was a confederal system that was widely viewed as flawed because it left the national government with too little power to address the problems facing the new nation. They considered federalism a form of government that was between the extreme centralization of a unitary system and the extreme decentralization of a confederation.

### 6.2 The Articles of Confederation

The first U.S. government after the colonial era was a confederation: The Articles of Confederation. Congress adopted The Articles of Confederation in 1777 and they became effective upon ratification by the states in 1781. The following are some of the most important provisions of the Articles of Confederation.

**Articles of Confederation**

“To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-bay Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

I. The Stile of this Confederacy shall be “The United States of America.”

II. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

III. The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.”

X. [Authorizes a committee of the states to carry out the powers of Congress when Congress is in recess.]

The above language from the Articles of Confederation describes a union where most power resides with the constituent units, the states. It specifically refers to the political system as a union of states that join together in “a league of friendship.” It stipulates that each state retains its “sovereignty, freedom, and independence.” Article X authorizes a committee of the states to act for Congress when Congress is in recess. The language of
the Articles suggests that the each state that joined the Confederation remained free to decide whether to leave the Confederation. Slavery and the nature of the union, specifically whether states could leave it, were the two main causes of the Civil War.

6.21 | The Second Confederation

Eleven southern states believed that secession was one of the powers retained by the states as sovereign and independent entities in the federal system created by the Constitution. The Constitution created a federal system, but it did not define whether states could leave the union. Political divorce was not mentioned. The North argued that the union was permanent—that once a state decided to join the United States the marriage was permanent. The South argued that the states retained the power to decide to leave the union. Their view of federalism left more power in the hands of the states which were united as these United States,” a term that reflects their belief that federalism left considerable power with the states.

The Confederate States of America (1861-1865), or the Confederacy, was the government formed by eleven southern states. The United States of America (“The Union”) believed that secession was illegal and refused to recognize the Confederacy as a legal political entity. The North considered the South a region in rebellion. The end of the Civil War in the spring of 1865 began a decade-long process known as Reconstruction. This “second civil war” involved extensive efforts to exert federal control over the states of the confederacy. Political resistance against federal authority was quite strong, and the struggle for the civil rights of newly freed slaves and Black citizens continued into the 20th Century as part of the civil rights movement. Determining the appropriate balance of power between the national and state governments remains a controversial political and legal issue.

6.3 | Federalism and the Constitution

The Constitution created a federal government with more power than the national government had under the Articles of Confederation. Specific powers were delegated to the national government. Article I, Section 8 of the Constitution lists powers granted to Congress. The list of powers delegated to Congress includes the power to coin money, tax, regulate interstate commerce, and raise and support armies.

The Constitution also took some powers that had belonged to the states under the Articles of Confederation and gave them to the federal government. The states were specifically prohibited from coining money and regulating interstate commerce because the Founders—principally the Federalists—believed that the national government had to direct the nation’s economic development. Then there is the infamous Supremacy Clause, which provides that federal laws “shall be the supreme Law of the Land.” The Supremacy Clause does not prohibit states from having laws that differ from the federal laws, but it does prohibit states from passing laws that conflict with federal laws.

All other powers—those not delegated to the national government, or prohibited to the states—were to be reserved (or left with) the states or the people. These are the reserved powers. The reserved powers are dictated by the 10th Amendment: “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.” The language of the 10th
Amendment reflects the fact that there was some uncertainty about exactly which powers the Constitution delegated to a stronger national government. The Anti-Federalists worried that the new Constitution betrayed the Revolutionary War cause of fighting against a monarchy or strong central government. The Constitution did significantly increase the power of the national government. The 10th Amendment reassured the Anti-federalists that the states retained their traditional powers.

Figure 6.3: The State Powers, Federal Powers, and Shared Powers

The first U.S. government after the colonial era was a confederation: The Articles of Confederation. Congress adopted The Articles of Confederation in 1777 and they became effective upon ratification by the states in 1781. The following are some of the most issues related to federalism.

The Constitution does not define or explain federalism because the states were pre-existing units of government. The Constitution also did not define the nature of the union, whether the union was permanent or states could decide to secede. The Constitution also did not provide specifics on the actual division of power between the national and state governments. The balance of power between the national and state governments was left to be determined by politics and by subsequent generations. In fact, the balance of power between the national and state governments has historically been
determined more by politics than by the actual language of the Constitution. This is apparent in the way that federalism has been an important aspect of political events throughout the history of the United States. Federalism was a central element of the Civil War; the Civil Rights movements; the expansion of the rights of suspects and prisoners in the criminal justice system; the controversy over the right to privacy as it applies to abortion policy; and most recently, federalism has been an underlying issue involving the controversy over the definition of marriage.

6.4 | Why Federalism?

Federalism is part of the Madisonian system of institutional checks and balances. In Federalist No 51, Hamilton explained how dividing power between two levels of government in a “compound republic” checked government power:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other at the same time that each will be controlled by itself.

Hamilton was an ardent Federalist. He believed that one of the lessons of history was that threats to good public order came from a government that was too strong to hold government officials accountable and from government that was too weak to create or maintain good public order. Hamilton believed that federalism solved some of the problems of a weak national government under the Articles of Confederation, weaknesses that were exposed by Shays’ Rebellion and other domestic disturbances by creating a stronger national government. Federalists also supported a strong national government to direct economic development. In Federalist Number Nine, Hamilton wrote:

A FIRM UNION will be of the utmost moment to the peace and liberty of the States, as a barrier against domestic faction and insurrection. It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and
The critics of republican government have decried all free government as inconsistent with the order of society. The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times.

Think About It!
Do you agree with Hamilton’s analysis of the threats to freedom in Federalist No. 8, “The Consequences of Hostilities Between the States”?
http://thomas.loc.gov/home/histdox/fed_08.html

Hamilton’s call for a national government with enough power to create and maintain good public order as well as to promote economic development stands in sharp contrast with the Anti-federalists. The Anti-federalists were a loosely-organized group of individuals who advocated for what would today be called states’ rights. They believed that the powers of the national government should be limited and that the states should be the primary political unit within the American system of federalism.

6.5 | The Political Effects of Federalism

Federalism has two principal effects on government and politics. First, it creates a large number of governments. Second, complicates government and politics.

6.51 | The Surprisingly Large Number of Governments

Although federalism is a two-tiered system of government, the U.S. actually has a large number of governments: one national government; 50 state governments; and thousands of local governments.
### The Number of Governments in the United States

<table>
<thead>
<tr>
<th>Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Government</td>
<td>1</td>
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<tr>
<td>States</td>
<td>50</td>
</tr>
<tr>
<td>Counties</td>
<td>3,043</td>
</tr>
<tr>
<td>Municipalities</td>
<td>19,372</td>
</tr>
<tr>
<td>Townships or Towns</td>
<td>16,629</td>
</tr>
<tr>
<td>School districts</td>
<td>13,726</td>
</tr>
<tr>
<td>Special Districts*</td>
<td>34,683</td>
</tr>
<tr>
<td>• Mosquito Control</td>
<td></td>
</tr>
<tr>
<td>• Child Protective Services</td>
<td></td>
</tr>
<tr>
<td>• Port Authority</td>
<td></td>
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<tr>
<td>• Airport</td>
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<tr>
<td>• Beach Taxing</td>
<td></td>
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<tr>
<td>• Health Care</td>
<td></td>
</tr>
<tr>
<td>• F.I.N.D (Florida Inland Navigation District)</td>
<td></td>
</tr>
</tbody>
</table>

**TOTAL NUMBER OF GOVERNMENT UNITS:** 87,504

*Examples of Special Districts in Palm Beach County, Florida


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**Think About It! What’s in a name?**
Does it matter whether a municipality is a city or a town? Yes, it does.


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**Act on it!**
One good thing about having a large number of governments is the increased access to government. Contact a local government official and ask a question about a public policy issue of interest to you.
Federalism also complicates American government and politics. In unitary political systems, political debates focus on the substance of public policy. The debates focus on what public policy should be concerning foreign affairs, economics, crime, education, the environment, moral regulatory policy, or religion. All countries debate public policy on these controversial issues. In the U.S., federalism means that political debates are about what public policy should be and about who should be making public policy. We debate whether abortion should be legal, whether there a right to die, whether global warming exists and what public policy should be, whether the death penalty should be used for sentencing, whether organized prayer be allowed in public schools. We also debate who should make the policy—whether it should be made by the national government or state governments. Federalism makes American politics doubly complicated: we debate what policy should be and who should make it.

The distribution of power between the national and state governments has been part of many of the nation’s most important political developments: the Civil War; the Progressive Era; the Great Depression of the 1930s; and the 20th Century Civil Rights movements. Federalism also inspired the modern conservative movement beginning in the latter 1960s as a backlash against the New Deal and Great Society expansions of national government power.

Debates about federalism are debates about one aspect of the power problem: how much power to centralize in the national government and how much power to leave decentralized with the states. The Constitution does not solve the power problem in the sense that it does not specify, except for certain areas such as coining money and regulating interstate commerce, whether the national government or the state governments have power to act in an area of public policy. The federalism dimension of the power problem has been dynamic. The actual distribution of power between the national and state governments changes depending on conditions and circumstances. Crises usually result in centralization of power in the national government. Shays’ Rebellion, the Great Depression; World War II and the Cold War, and terrorist threats to national security were all crises that resulted in increased power for the national government.

6.6 | Federalism is Dynamic

The balance of power between the national and state governments is dynamic. It is always changing, with the balance sometimes tilting toward the national government and sometimes tilting toward the states. But modern federalism does not work the way the Founders intended. The Founders created a political system where most government power was left in the hands of the states and the national government’s powers were limited. It was a state-centered system. Over time, however, the powers of the national government expanded, and expanded relative to the states. The following describes the major historical changes in federalism.
6.61 | Dual Federalism

The first era of federalism is described as dual federalism. Dual federalism is a theory of federalism that describes both the federal government and the state governments as co-equal sovereigns. Each is sovereign in its respective areas of policymaking. The Supreme Court endorsed this understanding of federalism in an early case Cooley v. Board of Port Wardens (1851). The question in this case was whether a state government could require that ships entering or leaving the Philadelphia harbor hire a local pilot. The Constitution gives the national government exclusive power to regulate commerce among the states. The Philadelphia Port traffic involved more than one state, so it was interstate commerce. The Court developed the Cooley Doctrine to decide whether a matter was for local or national regulation. According to the Cooley Doctrine, subjects that are “in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to...require exclusive legislation by Congress.” Subjects that are not national and require local diversity of regulation are left to the states. The Cooley Doctrine assumes that the national and state governments have separate areas of responsibility. For example, the national government would have exclusive power over interstate commerce, national security, and foreign affairs, while the state governments would have exclusive power over schools, law enforcement, and road building.

The Cooley Doctrine still serves as a guide for determining whether the national or state governments have power to regulate, but it does not provide specific answers to questions about whether something required a single, uniform system of regulation. In fact, as both the national and state governments shared responsibility over more areas of public policy, debates about highway speed limits, legal drinking ages, educational policy, the regulation of airports, and immigration issues have challenged the idea that each level of government is supreme in its respective field.

6.62 | Cooperative Federalism

Cooperative federalism describes the national and state governments as sharing power over areas of public policy. Dual federalism is an outdated concept in the sense that there are so few areas of public policy that are exclusively either state or national, and so many areas of public policy where the federal government now acts. For example, all levels of government are involved in education, economics, transportation, crime, and environmental policy. The term intergovernmental relations is useful for understanding how modern federalism works because it captures how the national, state, and local governments interact with one another to make and administer policy.

One way to better understand the forces of change in the American political system is to examine economics. Economic changes have prompted the expansion of the federal government. The Industrial Revolution in the mid-19th Century fundamentally changed the American economy. The emergence of large national corporations created support for national government action to regulate these new centers of private power. During the Progressive Era (1890s until the World War I) the national government began to regulate industries such as the railroads, steel, banking, and mining. The federal government also passed social welfare legislation including child labor laws and
minimum wage and maximum hour laws. In fact, today the federal government redistributes resources from wealthier states to poorer states. In today’s economy, population mobility, the ability to relocate to states where the jobs are is an important economic indicator.

The PEW Research Center’s Economic Mobility Project Provides data on economic mobility in the U.S. and in the states:

6.63 | Expansion of Federal Power

One measure of big government is the increased size and influence of the national government relative to the state governments. As the country changed from a local economy to a national economy, where businesses made and sold products and services across the country, public opinion shifted toward seeing the national government as the appropriate level of government to regulate business. During the 20th Century the power of the national government continued to expand relative to the states. The modern era of the U.S. political system began in the 1930s partly in response to an economic crisis. The Great Depression created popular support for national government activism to remedy the problem of the economic depression. The trend toward centralizing power and responsibility for maintaining material prosperity has accelerated with the further development of a global economy, where businesses buy and sell in a world economy.

A second source of expansion of federal power is civil rights. The Civil War Amendments—the 13th, 14th, and 15th Amendments—expanded the federal government’s role in promoting racial equality. The Fourteenth Amendment, which was ratified in 1868, prohibits a state from denying to any person within its jurisdiction the equal protection of the laws. This Amendment was intended to protect the rights of newly freed slaves from state laws that discriminated against them on account of race. The Fourteenth Amendment gave Congress power to pass “appropriate legislation” to enforce the provisions of the Amendment. Congress used this power to pass civil rights legislation such as the Civil Rights Act of 1875 which outlawed racial discrimination in public accommodations. However, in the Civil Rights Cases (1883), the Supreme Court declared the law unconstitutional because it regulated private behavior—the decisions of owners of hotels and restaurants not to serve Black customers. According to the
Court, the Fourteenth Amendment, which was the basis for the Act, prohibited state action. The Court’s landmark ruling in *Plessy v. Ferguson* (1896) also limited the scope of federal civil rights laws by upholding state laws that required racial segregation.

The Civil Rights Movement of the 1950s and 1960s also relied on federal efforts to secure the civil rights of individuals who were the victims of discrimination. Some of these efforts relied on Congress, which passed laws such as the 1964 Civil Rights Act and the 1965 Voting Rights Act. Some of the efforts relied on the United States Supreme Court. Decisions in landmark cases such as Brown v. Board of Education (1954) made state actions supporting racial discrimination in public schools unconstitutional. In many parts of the country, the use of federal power to enforce equal protection of the laws prompted strong resistance. The constitutional argument against this use of federal power to promote equality, particularly racial equality, was the states’ rights argument.

Federalism was part of the background of the civil rights movement. The U.S. Supreme Court rulings in cases such as *Brown v. Board of Education*, in which they outlawed racial segregation in public schools, prompted a political backlash in the states, particularly in the South. The principal reason for the backlash was opposition to integration. However, there was also a strong states’ rights opposition to integration. States’ rights can be defined as a belief that a policy is the responsibility of a state government not the national or federal government. Florida was one of the southern states that cited states’ rights reasons for opposing court-ordered desegregation. In 1957, the Florida Legislature passed an Interposition Resolution in response to *Brown v. Board of Education*. Interposition is a political doctrine that a state can interpose itself between the people of the state and the federal government when the federal government exceeds its authority. The Interposition Resolution declared that the U.S. Supreme Court exceeded its power when it declared racially segregated public schools unconstitutional.

Advocates of states’ rights opposed the use of federal power to achieve greater racial equality in state politics, government, and society. George Wallace is an important political figure in the states’ rights movement. He was a precursor of the modern conservative movement’s criticism of big government, by which he meant a federal government with the power to order states to change their laws regarding race relations. He is a good example of how thinking about federalism is interwoven with thinking about civil rights in the U.S. Wallace was a forceful and articulate spokesperson for the conservative belief that the federal government’s powers were limited to those specifically enumerated. He gave impassioned campaign speeches defending states’ rights against a civil rights movement that relied heavily on “outside agitators” to bring
about change. The outsiders were the federal government in general and the courts in particular.

Think About It!
Listen to one of Governor George Wallace’s states’ rights speech against the civil rights movement:
http://www.youtube.com/watch?v=QW6ikSCDaRQ&feature=endscreen&NR=1

A third reason for the expansion of federal power is criminal justice policy. The development of a national economy made state borders less relevant for legitimate business and economic activity because goods were no longer made, marketed, and sold entirely within one state. Illegitimate businesses were also organized nationally. Organized crime, in particular, did not operate exclusively within a single state. The rise of organized crime presented a challenge to law enforcement which was historically state and local law enforcement. The rise of nationally organized criminal enterprises provided one of the justifications for the creation of the Federal Bureau of Investigation (FBI). The FBI has jurisdiction across the country, unlike local law enforcement whose jurisdiction (or legal authority) is geographically limited. Historically, criminal justice has been one of the areas of public policy reserved to the states under the U.S. system of federalism. The rise of organized crime, the war on crime, and the war on drugs made crime and policing a national political issue to be addressed by the federal government. Congress responded by passing more and more anti-crime legislation—a trend toward federalizing crime that continued throughout the 20th Century and into the 21st Century.

Think about it! Why does the U.S. have a federal law enforcement agency? The FBI tells the story of its creation and expansion in “A Brief History of the FBI.” http://www.fbi.gov/about-us/history/brief-history

A fourth reason for the expansion of federal power is national security, national defense, and foreign policy. World War II and the Cold War increased the power of the national government. Threats to national security have historically been considered the primary responsibility of the federal government. The war on terror has continued to shift power to the national government relative to the states. For instance, the federal government increasingly uses the resources and information on local governments to find and track terrorist suspects. Terrorism is often an international threat—its support networks, funding, and training involve other countries, and terrorists seek to move easily across national borders—therefore the threat of terrorism typically increases the power to the federal government.
Chapter 6: Federalism

The economy, civil rights, national security, and crime are not the only reasons for the expansion of federal power. In environmental policy, Congress has passed major legislation such as the Clean Air Act and the Clean Water Act and established bureaucratic agencies the Environmental Protection Agency to implement the new federal environmental policies. In educational policy, Congress passed the No Child Left Behind Act. The Act increased the federal government’s role in an area of public policy that was traditionally left to the states. In health care, President Obama signed the Patient Protection and Affordable Health Care Act on March 23, 2010. Twenty-eight states filed lawsuits claiming that parts of the Act, which critics called Obamacare, were unconstitutional because they exceeded the federal government’s power. The Supreme Court upheld most provisions of the Act, including the mandate that individuals buy health insurance or pay a penalty/tax, in *National Federation of Independent Business v. Sebelius* (2012), but ruled that state sovereignty protected the states from certain provisions of the law that required states to adopt certain health care policies or lose federal Medicaid funding.

6.7 | The Conservative Backlash: New Federalism

Beginning in the latter 1960s, conservatives began criticizing the expansion of the federal government and the idea of cooperative federalism. Their criticism of “big government” included calls for returning some power to the states. Their advocacy of states’ rights was intended primarily as a check on the expansion of the national government’s power in domestic affairs. The Nixon administration’s policies to support returning some powers to the states were called *New Federalism*.

The political support for New Federalism was also reflected in changes in the Supreme Court’s rulings. The Court began to limit the powers of the federal government. From 1938 until 1995, the Court did not invalidate any federal statute on the grounds that the law exceeded Congress’ power under the Interstate Commerce Clause. But in *United States v. Lopez* (1995), the Court ruled that some provisions of the Gun-Free School Zones Act, a federal law enacted in 1990 to curb gun violence, exceeded Congress’s commerce powers and infringed on the states’ reserved powers to provide safe schools. A conservative majority on the Rehnquist Court issued a number of important rulings that enforce constitutional provisions that limit congressional power in fields of public policy where the states have power to act. These rulings are based on the political conservative belief that federalism is a legal arrangement that protects the states and is part of the system of checks and balances that protects individual freedom.

The challenge is to adapt a more than 200 year old system of federalism to a modern environment that has experienced a great deal of political, economic, technological, and social change. Take, for example, economic change. The U.S. economy has changed from local to state to national and now, with globalism, international trade. How does a global economy affect the distribution of power between the national and state governments? How has the U.S. assumption of the role as the
world’s policeman, the Cold War, and the war on terror affected the distribution of power between the national and state governments? These economic and national security developments have increased federal power—an increase that sometimes, but not always, means a decrease in state powers.

Federalism is one aspect of the conservative backlash against the liberal centralization of power that occurred during the New Deal and Great Society eras. The backlash has not been inspired by opposition to big government in general. Conservatives supported big government for national security purposes, getting tough on crime, and moral regulatory purposes (e.g., sexual behavior, marriage, obscenity and indecency, and the definition of marriage). Even in economic policy, business groups with ties to conservative and Republican politics such as the U.S. Chamber of Commerce and the National Association of Manufacturers lobbied for the passage of federal laws that explicitly preempt state tort laws. Tort laws govern wrongful injury lawsuits such as product liability and medical malpractice litigation. The states traditionally had primary responsibility for tort laws as part of their reserved powers. The tort reform movement, of which the Chamber of Commerce and the National Association of Manufacturers are prominent supporters, advocates taking cases out of the state courts and into the federal courts. This is evidence that liberal and conservative attitudes toward federalism tend to be strategic rather than principled. A principled position is one that is taken regardless of whether it produces a preferred outcome. A strategic position is one that is taken because it produces a preferred outcome. Liberals tend to think that policies should be decided in the states when they think the state political systems will produce liberal policy outcomes. Conservatives tend to think that policies should be decided in the states when they think the state political systems will produce conservative policy outcomes. If a liberal (or a conservative) thinks the federal government will produce a preferred policy outcome, they are likely to think that the policy should be decided by the federal government rather than the states.

**6.71 | Immigration Policy**

Immigration is one of the issues that illustrate the potential conflict between national and state policy. Controlling undocumented immigrants is a pressing issue in some states, particularly states bordering Mexico and states with large numbers of undocumented immigrants. The key constitutional doctrine for understanding whether states have the power to act in an area or policy field is **preemption**. Federal law can preempt or trump state law. The preemption doctrine is based on the **Supremacy Clause**, Article VI of the Constitution, which provides that the Constitution, federal laws, and treaties shall be the “supreme Law of the Land.” The Supremacy Clause guarantees national union. When deciding whether a state law conflicts with a federal law the Court does a “preemption analysis” consisting of three questions. Did Congress expressly state that federal law preempted state law? Does the state law conflict with federal law? Has Congress so extensively regulated the area of policy to have “occupied the field?” If Congress has enacted a comprehensive and unified federal policy in a field, then Congress has assumed responsibility for that field and left little or no room for state action. States can experiment with health care reform, education reform, and many other reforms in other areas of public policy.
Chapter 6: Federalism

Immigration policy is a special case because it has national security implications. Illegal immigration became a political issue when some states thought the federal government was unwilling or unable to enforce immigration laws. States adopted a variety of laws that were intended to discourage illegal entry and to discourage employment of illegal immigrants or undocumented aliens. Arizona, which shares a border with Mexico, is one such state. In 2010 it passed SB1070 an immigration control law that, among things, required Arizona police officers to determine the citizenship or immigration status of a person who was lawfully detained. SB1070 served as a model for other states including Alabama, Georgia, Indiana, South Carolina, and Utah. The Arizona law was challenged on the grounds that it was preempted by federal law. In *Arizona v. U.S.* (2012), the Supreme Court upheld one provision of the law and struck down three provisions.

The stated purpose of SB1070 was to use state resources to help the federal government enforce its immigration laws. The law 1) required law enforcement officers to check the immigration status of persons who they have a “reasonable suspicion” are in the country illegally; 2) required the warrantless arrest of individuals that law enforcement official have probable cause to believe have committed a crime for which the person could be deported; 3) made it a crime to not carry immigration papers in the state; and 4) made it a crime for illegal immigrants to seek a job or to work in the state.

The Court upheld provision number one but struck down the other three. The Court explained that the federal government’s broad power over immigration and alien status is based on 1) its enumerated power in Art I, Sect. 8 cl. 4 to “establish an uniform Rule of Naturalization;” 2) its inherent sovereign power to control and conduct foreign relations; and 3) the Supremacy clause. The fact that Congress has created a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the nation limits state sovereignty to legislate in a policy field that Congress has occupied. The dissenting Justices argued that the states have their own inherent sovereignty and can legislate on immigration matters of great concern to them.

Think About It!

What should public policy regarding undocumented aliens be? Who should make the policy?
6.7 | How Do States Still Matter?

Rick Meyerowitz is an artist best known for his work for National Lampoon. This is his interpretation of U.S. political cultural geography.

6.8 | Summary

This chapter described federalism, explained the origins of the U.S. system of federalism, and described its development over time. The division of powers between the national and state governments has been controversial throughout the nation’s history. Federalism has proven to be a dynamic form of government in the sense that the actual distribution of power between the national and state governments has varied a great deal over time. The Constitution provides for a federal system but, with the notable exception of foreign affairs and interstate commerce, it does not specify exactly what each level of government has power to do. As a result, the actual balance of power between the national and state governments changes. In this sense, federalism is dynamic. The federal government’s power has increased, and it has increased relative to the state governments for a variety of reasons, including the development of a global economy. Because of the central role federalism plays in the system of checks and balances, changes in federalism
raise important questions about where to strike the right balance between state and federal power.

6.9 | Additional Resources

6.91 | Internet Resources

One valuable resource for information about the states is the PEW Center On the States which describes and analyzes state policy trends, for example. See http://www.pewcenteronthestates.org/

The Tenth Amendment Center provides a contemporary view on states’ rights: http://www.tenthamendmentcenter.com/

The Urban Institute’s publication “Assessing the New Federalism” is an informative look at the place for cities in the U.S. system of federalism: www.urban.org/center/anf/index.cfm

*Publius: The Journal of Federalism* is an academic journal dedicated to the investigation of issues related to federalism: http://publius.oxfordjournals.org/

The National Council of State Legislators provides a variety of information about state legislatures, including ideas about the relationship between the state and federal governments: www.ncsl.org/statefed/afipolicy.htm

6.92 | In the Library


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TERMS:
Federalism
Unitary system
Confederation
Delegated powers
Reserved powers
The power problem
Dual federalism
Cooley Doctrine
Cooperative federalism
States’ rights
Interposition

6.93 STUDY QUESTIONS

Why have a federal system of government?

Discuss the allocation of federal and state powers.

Explain how the allocation of federal and state powers has changed over time.

Describe four areas where federal powers have grown into areas traditionally reserved for the states.

Discuss the current state of federalism in the United States.

What role did the civil rights movement play in the expansion of federal powers?

How is federalism dynamic?

Why did the Federalists believe that a strong federal government was necessary?