

3.1 Federalism: Basic Structure of Government

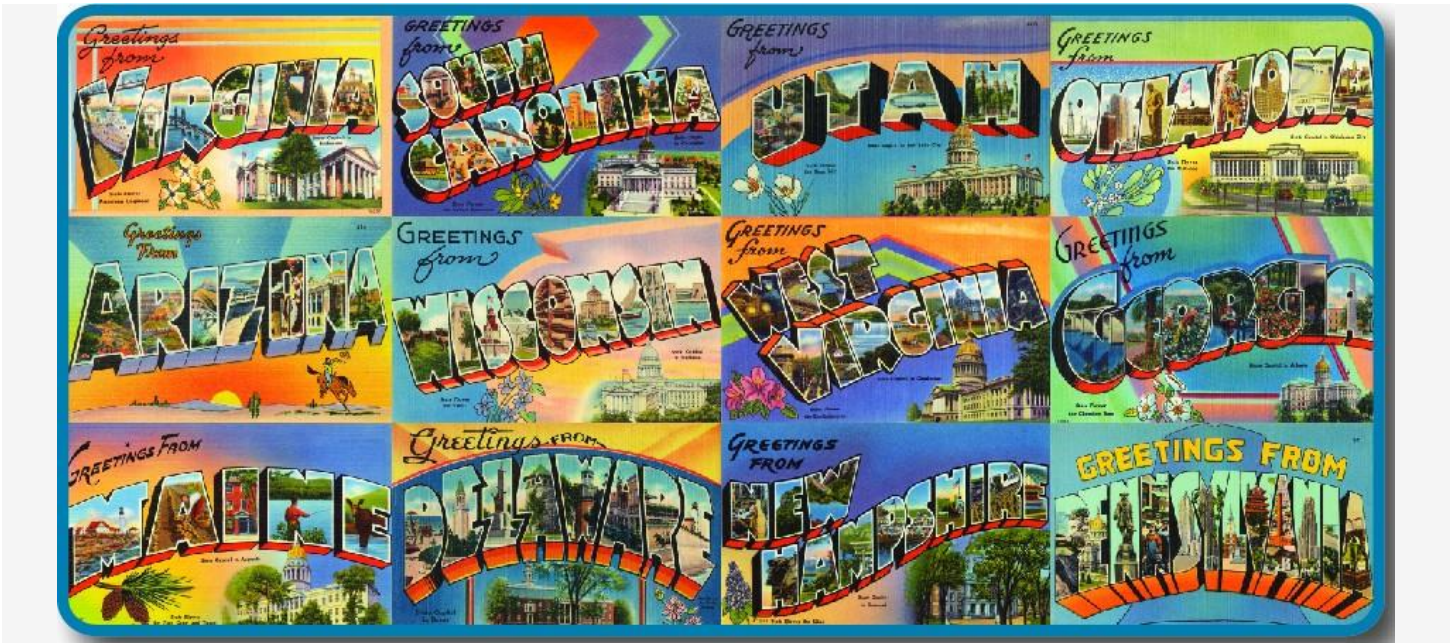


Image 3.1 Postcards of Various States

Your first encounter with differences across states may have come from a childhood experience—perhaps visiting relatives in another state or on a cross-country trip during summer vacation. The distinct postcard images of different states are symbolic of American federalism.

(Credit: OpenStax; modification of work by Boston Public Library)

Learning Objectives

- Understand the difference structures of governments, including unitary, confederation, and federal structures.
- Explain the basics of U.S. federalism.
- Discuss forces of centralization and decentralization in the U.S. federal structure

Chart 3.1 Learning Objectives on Structures of Government and the Basics of Federalism

Part of the discussion at the 1787 Constitutional Convention focused on basic governmental structures. In declaring independence in 1776, highly centralized **unitary** government under a king was clearly rejected. In sharp contrast, the first U.S. constitution, *The Articles of Confederation*, promoted a **confederation** of the states with much decentralized power concentrated at the state level and a weak central government.

As previously discussed, the *Articles* were not successful, and the 1787 Constitutional Convention convened to make changes in our governmental structure. Rather than tweaking the confederation structure, a third option was essentially invented—what we call today a **federal system** or **federalism**.

The federal design divides power between multiple levels of government—often state and national. As defined, **federalism** is an institutional arrangement creating relatively autonomous levels of government, each able to act directly on behalf of the people with granted authority.

As shown in the chart below, under a federal system, the authority is divided between the national government and state governments, with authority to act derived directly from the people. In contrast, a confederation vests power and authority in state governments with national authority delegated by the states. Under a unitary system, authority to act is concentrated with the national government alone—any authority delegated to lower levels of government is exercised at the discretion of the national government.

At the time of the 1787 convention, there were examples of both unitary governments and confederations; however, no examples of the middle option—which we now call a federal system. Among government systems today, there are examples of all three kinds of governmental structures.

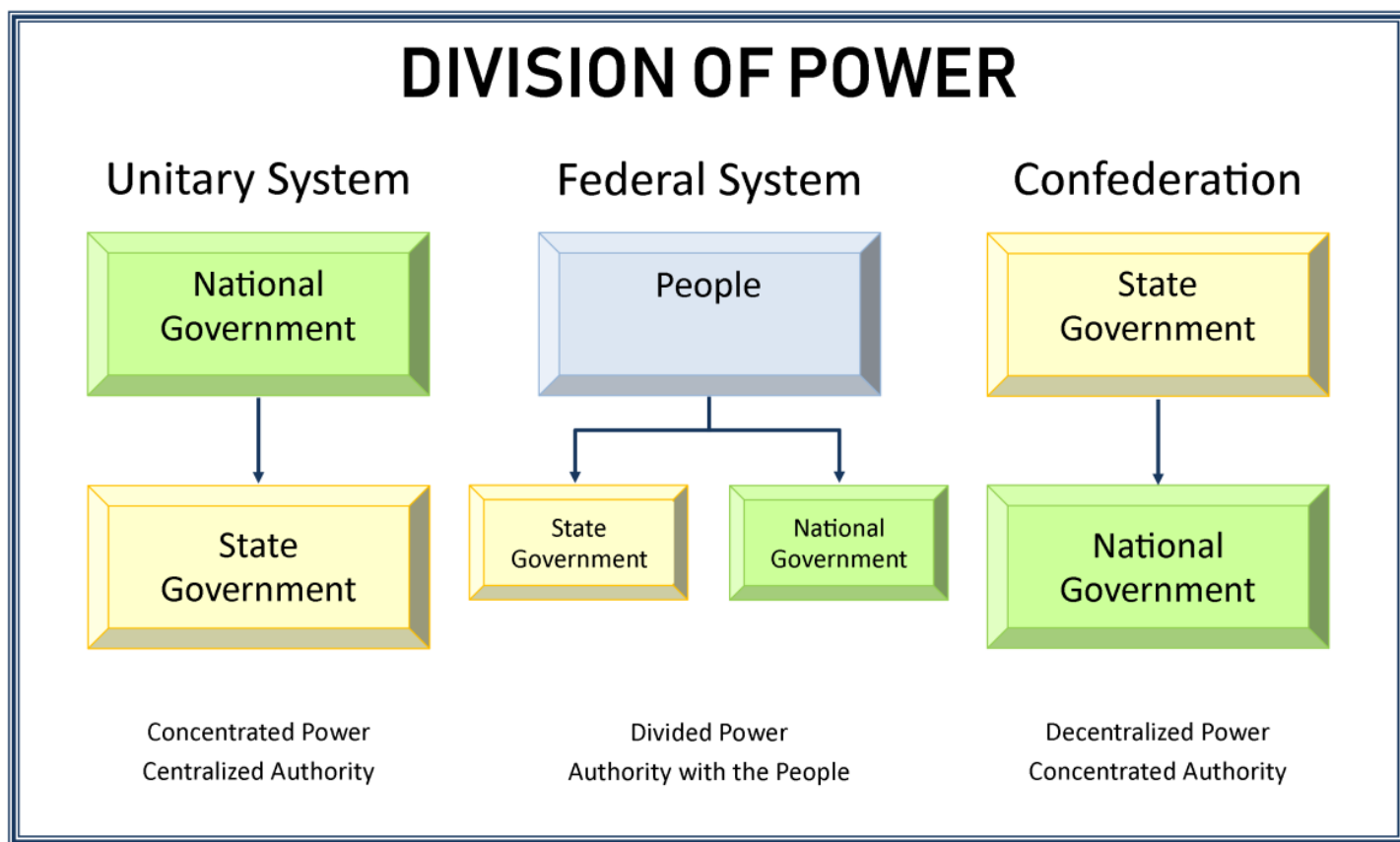


Chart 3.2 Division of Power in Three Structures of Government

3 Types of Governmental Structure/Organization

Unitary Structure	Federal Structure	Confederate Structure
Great Britain, 1787 Brunei Saudi Arabia Vatican City/Holy See Swaziland etc.	United States Mexico India Germany Brazil etc.	US under <i>Articles of Confederation</i> , 1787 Southern Confederacy, 1862 Iroquois Confederacy European Union Belgium (transitional)

Chart 3.3 Real-World Examples of Countries with Differing Structures of Government

American federalism seeks to balance **decentralization** and **centralization** forces. We see decentralization when we cross state lines and encounter different taxation levels and voting regulations. Centralization is apparent with the federal government's unique authority to print money. State border crossings may greet us with colorful billboards, but behind them lays a complex federal design that has structured relationships between states and the national government since the late 1700s.

DIVISION OF POWERS AND SEPARATION OF POWERS

A unique feature of the American governmental structure is a balance of both horizontal and vertical division of powers. As an institutional/ structural design, **federalism** is intended to both safeguard state interests while creating a strong union led by an effective centralized national government.

Federalism divides power between multiple vertical layers or levels of government—national, state, county, parish, local, special district—allowing for multiple access points for citizens. The governments, by design at the national and state levels, check and balance one another.

At each level of the U.S. federal structure, power is further divided horizontally by branches—legislative, executive, and judicial. This **separation of powers** feature makes the U.S. federal system even more distinct, since not all federal systems have such separation of powers.

Federalism: Questions to Consider

1. What are the central differences between unitary, confederation, and federal governmental structures?
2. How is power divided and how is it separated at the various levels?

1. unitary power is centralized at the top, confederate power is decentralized usually among several roughly co-equal entities/states, and federal powers are a mix with some centralized power delegated to the national government, some reserved to the states/sub-national entities and, in the United States
2. power is divided vertically between national, state, and local governments; and, power is separated between branches at the various levels—legislative, executive and judicial

Federalism: Terms to Remember

centralization—power is concentrated at one level of government such as the national level in a unitary system

confederation—highly decentralized structure of government with roughly co-equal entities/sovereign states forming an alliance for purposes such as national defense and/or other agreed purposes

decentralization—power is divided or shared between various levels of government

federal system/federalism—institutional arrangement creating relatively autonomous division of governmental powers by level, with each level of government able to act directly on behalf of the people; authority granted to act—granted by the people

separation of powers—a horizontal division of power between the executive, legislative, and judicial powers, allowing each branch of government to act as a check and balance on the other branches

unitary system—highly centralized governmental authority in which any other level of government below the national government is dependent upon the central/national government; centralized power or substantial authority is concentrated with national government

Federalism: Works Consulted

LICENSES AND ATTRIBUTIONS

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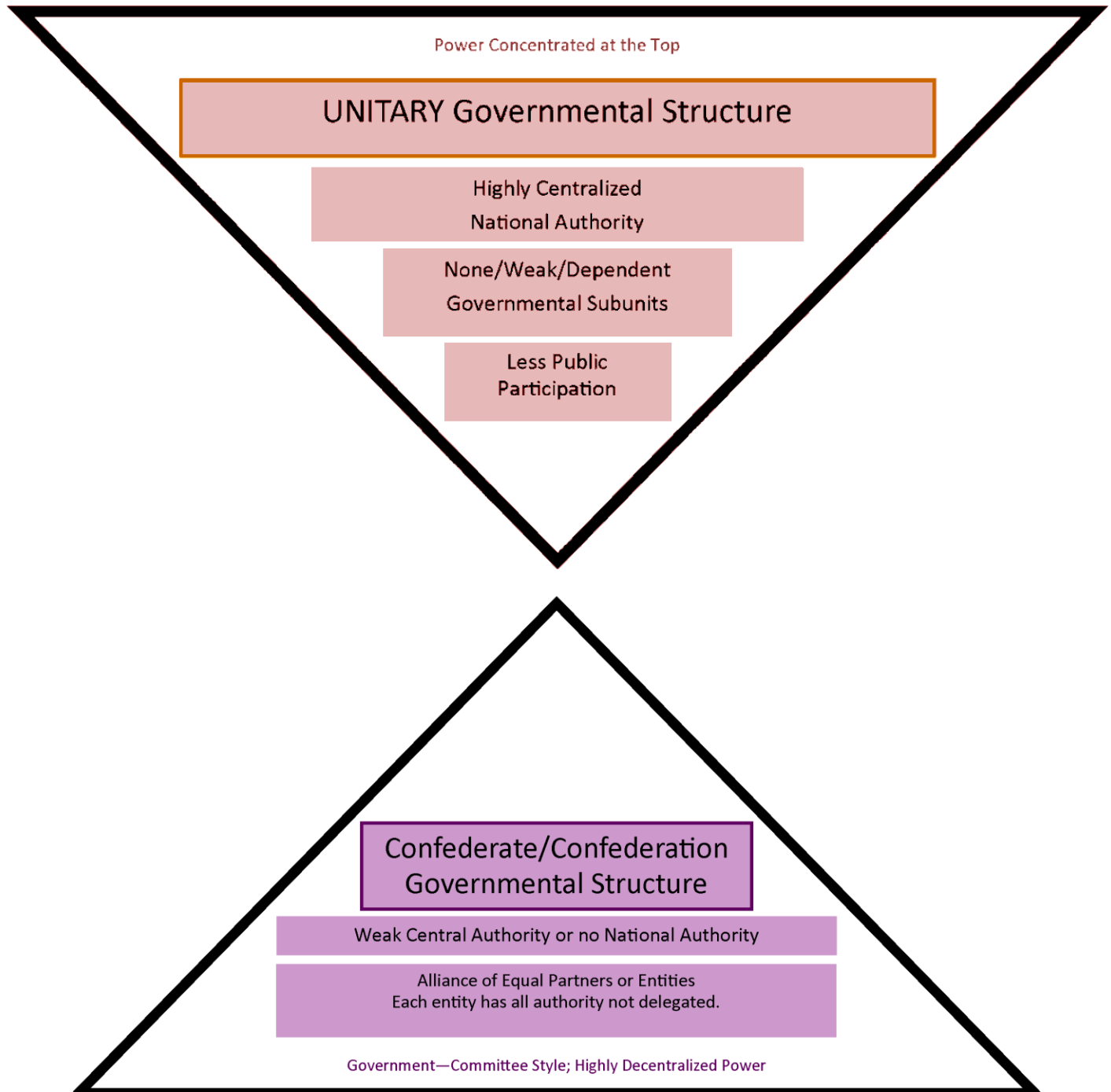
THE CONSTITUTIONAL CONVENTION OF 1787 Lesson 1: The Road to the Constitutional Convention A WE THE PEOPLE RESOURCE. **Authored by:** National Endowment for the Humanities: Lesson Plans. **Provided by:** US.gov. **Located at:** <https://kids.usa.gov/three-branches-of-government/index.shtml>. **Project:** EDSitement!. **License:** CC BY: Attribution. **License Terms:** CC By: Attribution 4.0 International

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EXAMPLES FOR FURTHER STUDY

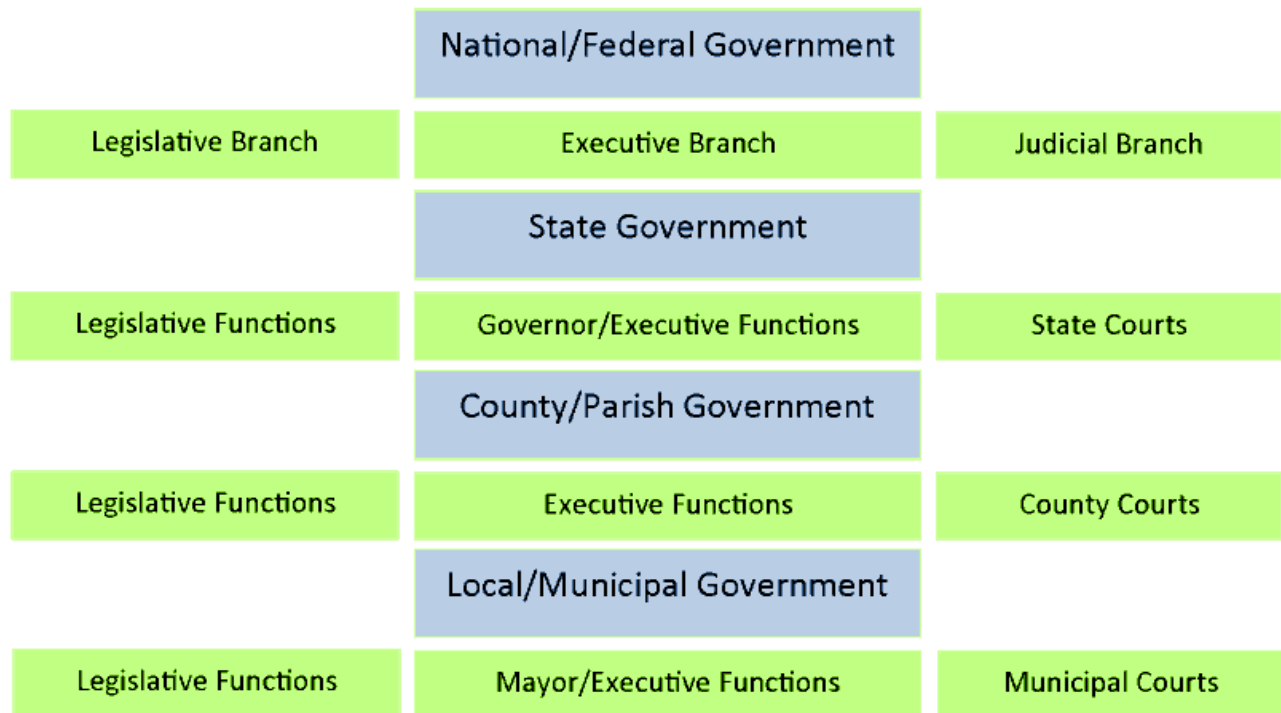
The structure of government impacts the function (day-to-day business) of government. Countries must make this important decision about which structure of government to employ before working on the details of how this organizational structure will carry out the basic functions of governing.

3 Structures of Government DIVISION OF POWER



Vertical Division of Governmental Power

U.S. Government with Federal Structure



Horizontal Separation of Power by Branch of Government;
Balanced Power with More Access Points for the People

Charts by Deborah S. Hoag, Austin Community College.

3.2 Federalism: Structural Division of Power



Image 3.2 Exterior Nighttime Photo of Austin City Hall in Austin, Texas

Austin City Hall (Credit: Victor Ovalle; Feature-Banner-Austin-City-Hall at <http://www.austintexas.gov/government>)

Learning Objectives

- Identify some of the powers and responsibilities of federal, state, and local governments.
- Examine how responsibilities differ and powers overlap.
- Discover how federalism evolved in the US.

Chart 3.4 Learning Objectives on Powers and Responsibilities of Government

The US republic divides governmental power in two general ways—vertically and horizontally. Horizontally, we share power among three branches of government—the legislature, the executive, and the judiciary. Vertically, power is divided and shared between levels of government: national and sub-national (state, parish, county, local, special district). In the United States, the term **federal government** refers to government at the *national level*.

Federalism is an institutional arrangement creating a relatively autonomous division of governmental powers by level, each level of government able to act directly on behalf of the people, with the authority to act granted by the people.^[1] What does this mean? According to William Riker, a federal system exists if two levels of government have authority over the same geographic area and people.^[2] That is, in the U.S. federal system, residents of the state of Texas have both a state government that has authority to make laws and rules that impact citizens, and Texans are also impacted by a national government with authority to make laws and rules that directly impact the residents of Texas.

Although federal systems vary by design, some characteristics are common to the United States and other systems around the world including Germany and Mexico. First, one characteristic is that all federal systems establish two levels of government, with both levels being elected by the people and each level assigned somewhat different functions. By definition, a system like this requires that different levels of government cooperate, because the institutions at each level form an interacting network. In the U.S.

federal system, all national matters are handled by the federal government. All matters at the subnational level are the responsibility of the fifty states. Under a federal system, people agree (**consent**) to cooperate usually under terms of a written constitution that defines how they will work together and hold each other accountable; the intention being to keep people in control of the government by providing numerous points of access depending on the function or issue.

Federalism (a federal structure) increases access opportunities. The second characteristic common to all federal systems is a written contract/ constitution that cannot be changed without the substantial consent of sub-national governments. In the American federal system, the twenty-seven amendments added to the *Constitution* since its adoption resulted from an arduous process requiring approval by two-thirds of both houses of Congress and three-fourths of the states. This super-majority requirement ensures no changes to the *Constitution* may occur without broad support within Congress (the people's representatives) and among states. While each level of government is somewhat independent of the others, a great deal of interaction occurs. The ability of the federal and state governments to achieve their objectives often depends on cooperation. For example, law enforcement agents at the local and state levels work to bolster the national government's efforts to ensure homeland security. Third, the constitutions of federal systems formally allocate legislative, judicial, and executive authority to the various levels of government to ensure each has some degree of autonomy from the other. Under the U.S. *Constitution*, the president assumes executive power, Congress exercises legislative powers, and the federal courts (e.g., U.S. district courts, appellate courts, and the Supreme Court) assume judicial powers. In each of the fifty states, a governor assumes executive authority, a state legislature makes laws, and state-level courts (e.g., trial courts, intermediate appellate courts, and supreme courts) possess judicial authority.

The *Constitution* contains several provisions that direct the functioning of U.S. federalism. Some delineate the scope of national and state power, while others restrict it. The remaining provisions shape relationships among the states and between the states and the federal government. The enumerated powers of the national legislature are found in Article I, Section 8. These powers define the jurisdictional boundaries within which the federal government has authority. The last clause of Article I, Section 8, commonly referred to as the **elastic clause** or the **necessary and proper clause**, enables Congress "to make all Laws which shall be necessary and proper for carrying" out its constitutional responsibilities.

While the enumerated powers define the policy areas in which the national government has authority, the elastic clause allows it to create the legal means to fulfill those responsibilities. In fact, the open-ended interpretation of this clause has enabled the national government to expand its authority beyond what is specified in the *Constitution*, a development also motivated by the expansive interpretation of the **commerce clause**, which empowers the federal government to regulate interstate economic transactions. The powers of the state governments were never listed in the original *Constitution*.

The consensus among the framers was that states would retain any powers not prohibited by the *Constitution* or delegated to the national government.^[3] However, when it came time to ratify the *Constitution*, several states requested that an amendment be added protecting the reserved powers

of the states. What these Anti-Federalists sought was further assurance that the national government's capacity to act directly, or provide direct public goods and services for people would be restricted.

Those who place an emphasis on the Tenth Amendment have been called **dual federalists**, stressing the independence of each level of government and have a narrow interpretation of the necessary and proper clause. Those who stress the interaction between the levels or the flexibility in authority of each are called **cooperative federalists** and have a broad interpretation of the necessary and proper clause.^[4]

The Tenth Amendment affirms the states' reserved powers: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Although states retain some sovereignty, the **supremacy clause** in Article VI proclaims the U.S. Constitution, national laws and treaties are "the supreme law of the land."^[5]

The enduring political debate over federalism and the proper role and scope of the national government depends on whether you place an emphasis on the **elastic clause/necessary and proper clause** of the Constitution or on the **Tenth Amendment** reserving powers to the states (not mentioned in the Constitution).

Historical Struggle for Power–Conflicts with a Federal Structure of Governing

As George Washington's secretary of the treasury from 1789 to 1795, Alexander Hamilton championed legislative efforts to create a publicly chartered bank. For Hamilton, the establishment of the Bank of the United States was fully within Congress's authority, and he hoped the bank would foster economic development, print and circulate paper money, and provide loans to the government. Although Thomas Jefferson, Washington's secretary of state, staunchly opposed Hamilton's plan on the constitutional grounds that the national government had no authority to create such an instrument, Hamilton managed to convince the reluctant president to sign the legislation.^[6]

A political showdown between Maryland and the national government emerged when James McCulloch, an agent for the Baltimore branch of the Second Bank, refused to pay a tax that Maryland had imposed on all out-of-state chartered banks. The standoff raised two constitutional questions: Did Congress have the authority to charter a national bank? Were states allowed to tax federal property? In *McCulloch v. Maryland*, Chief Justice John Marshall argued that Congress could create a national bank even though the Constitution did not expressly authorize it.^[7]

Under the necessary and proper clause of Article I, Section 8, the Supreme Court asserted that Congress could establish "all means which are appropriate" to fulfill "the legitimate ends" of the Constitution. In other words, the bank was an appropriate instrument that enabled the national government to carry out several of its enumerated powers, such as regulating interstate commerce, collecting taxes, and borrowing money.

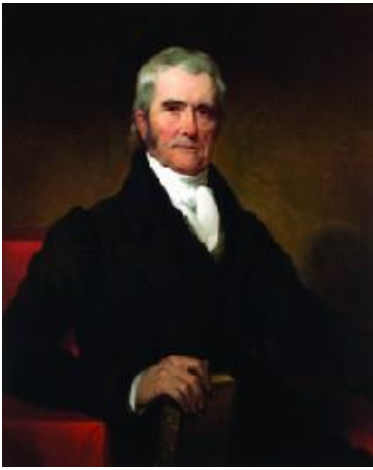


Image 3.3 Portrait of SCOTUS Chief Justice John Marshall

Chief Justice John Marshall, shown here in a portrait by Henry Inman, was responsible for establishing greater flexibilities in the exercise of national powers through the *McCulloch v. Maryland* (1819) decision. (Credit: National Archives)

This ruling established the doctrine of implied powers, granting Congress a vast source of discretionary power to achieve its constitutional responsibilities. The Supreme Court also sided with the federal government on the issue of state authority to tax federal property. Under the supremacy clause of Article VI, legitimate national laws trump conflicting state laws. As the court observed, “the government of the Union, though limited in its powers, is supreme within its sphere of action and its laws, when made in pursuance of the constitution, form the supreme law of the land.”

Maryland’s action violated national supremacy because “the power to tax is the power to destroy.” This second ruling established the principle of national supremacy, which prohibits states from meddling in the lawful

activities of the national government.

In *Gibbons v. Ogden*, the scope of national power was subjected to court interpretation of the commerce clause of Article I, Section 8; specifically, it had to determine whether the federal government had the sole authority to regulate the licensing of steamboats operating between New York and New Jersey.^[9]

Aaron Ogden, who had obtained an exclusive license from New York State to operate steamboat ferries between New York City and New Jersey, sued Thomas Gibbons, who was operating ferries along the same route under a coasting license issued by the federal government. Gibbons lost in New York state courts and appealed. Chief Justice Marshall delivered a two-part ruling in favor of Gibbons that strengthened the power of the national government. First, interstate commerce was interpreted broadly to mean “commercial intercourse” among states, thus allowing Congress to regulate navigation. Second, because the federal Licensing Act of 1793, regulating coastal commerce was a constitutional exercise of Congress’s authority under the commerce clause, federal law trumped the New York State license-monopoly law granting Ogden an exclusive steamboat operating license. Marshall pointed out, “the acts of New York must yield to the law of Congress.”^[9]

Various states railed against the nationalization of power that had been going on since the late 1700s. When President John Adams signed the Sedition Act in 1798, which made it a crime to speak openly against the government, the Kentucky and Virginia legislatures passed resolutions declaring the act null on the grounds that they retained the discretion to follow national laws. In effect, these resolutions articulated the legal reasoning underpinning the doctrine of nullification—that states had the right to reject national laws they deemed unconstitutional.^[10] A nullification crisis emerged over the tariff acts of 1828 and 1832. Nullifiers argued that high tariffs on imported goods benefited northern manufacturing interests while disadvantaging economies in the South. South Carolina passed an Ordinance of Nullification declaring both tariff acts null and void and threatened to leave the Union.

The federal government responded by enacting the Force Bill in 1833, authorizing the president’s use of military force against states challenging federal tariff laws.

In the ultimate showdown between national and state authority, *Dred Scott v. Sandford*, the Supreme Court ruled the national government lacked the authority to ban slavery in the territories.^[11] The election of President Abraham Lincoln in 1860 influenced eleven southern states to secede from the Union believing the new president would challenge the institution of slavery. What was initially a conflict to preserve the Union became a conflict to end slavery when Lincoln issued the Emancipation Proclamation in 1863, freeing all slaves in the rebellious states. The defeat of the South impacted the balance of power between the states and the national government. Congress imposed several conditions for readmitting former Confederate states into the Union; among them was ratification of the Fourteenth and Fifteenth Amendments. After the Civil War the power balance shifted toward the national government, a movement that had begun several decades before with *McCulloch v. Maryland* (1819) and *Gibbons v. Ogden* (1824).

Dual Federalism v. Cooperative Federalism: The Continuing Debate



Chart 3.5 Diagram of Layer Cake and Marble Cake Federalism

Morton Grodzins, a professor of political science at the University of Chicago, coined the expression “marble-cake federalism” in the 1950s in order to explain the evolution of federalism in the U.S. (Credit: OpenStax; Morton Grodzins)

Despite some shift in power toward the national government following the conclusion of the Civil War and passage of the Fourteenth Amendment, the late 1870s ushered in a new phase in the evolution of the U.S. federal system with a renewed emphasis on stressing distinctions between the role of the national government and the state governments. Under **dual federalism**, the states and national government exercise exclusive authority in distinctly delineated spheres of jurisdiction. Like the layers of a cake, the levels of government do not blend with one another but rather are clearly defined.

Two factors contributed to this conception of federalism. Supreme Court rulings blocked attempts by state and federal governments to step outside their jurisdictional boundaries. Further, the prevailing economic philosophy at the time loathed government interference in the process of industrial development.

The Supreme Court rulings provided an interpretation of both the 14th Amendment that blocked state and federal action and narrowed the understanding of the Commerce Clause of the U.S. Constitution.^[12]

In the late 1800s, some states attempted to regulate working conditions. For example, New York state passed the Bakeshop Act in 1897, which prohibited baker employees from working more than sixty hours in a week. In *Lochner v. New York*, the Supreme Court ruled this state regulation that capped work hours was unconstitutional on the grounds that it violated the due process clause of the 14th Amendment.^[13] In other words, the right to sell and buy labor is a “liberty of the individual” safeguarded by the Constitution, the court asserted.

The federal government also took up the issue of working conditions, but that case, *Hammer v. Dagenhart*, resulted in the same outcome as in the *Lochner* case.^[14]

Moreover, the Supreme Court ruled that the Commerce Clause could not be used to create national minimum standards for child labor working conditions. The Court stated that “The commerce clause was not intended to give to Congress a general authority to equalize such conditions.”^[15]

Morton Grodzins coined the cake analogy of federalism in the 1950s while conducting research on the evolution of American federalism. According to Grodzins the 1930s ushered in a new era of federalism he called “marble-cake federalism.”^[16] He identified that the national government, in addition to state governments, were all engaged in administering health, safety, income security, education, and welfare to state residents.

Moreover, the boundary had completely blurred between intra-state and interstate commerce as a result of broad interpretation of the commerce clause coupled with expanded use of the elastic/necessary and proper clause.

In *National Labor Relations Board (NLRB) v. Jones and Laughlin Steel*, the Supreme Court ruled the National Labor Relations Act of 1935 was constitutional, asserting that Congress can use its authority under the commerce clause to regulate both manufacturing activities and labor-management relations.^[17]

The New Deal changed the relationship Americans had with the national government. Before the Great Depression, the government offered little in terms of financial aid, social benefits, and economic rights. After the New Deal, it provided old-age pensions (Social Security), unemployment insurance, agricultural subsidies, protections for organizing in the workplace, and a variety of other public services created during Roosevelt’s administration. In the 1960s, President Lyndon Johnson’s administration expanded the national government’s role in society even more.

In fact, shared (overlapping or concurrent) powers had now become an integral part of contemporary U.S. federalism. These concurrent powers range from taxing, borrowing, making, and enforcing laws to establishing court systems.^[18]

Grodzins found through his research that federalism has often but erroneously been symbolized by a layer cake, but a more accurate image was a marble cake characterized by inseparable mingling of different colored ingredients. As colors are mixed in the marble cake, so functions are mixed in the American system.^[19] An example of cooperative federalism can be seen in the management of The Balcones Canyonlands Preserve Conservation Plan in Travis and Williamson counties in the state of Texas. The Preserve brings together national, state, county, and local governments as well as non-governmental organizations. All of these entities work together to achieve the goal of protecting endangered and threatened species, while also providing protection to habitat and green infrastructure. *See Appendix I for more interesting information, maps, and photos of this cooperative project.*

What are the various types of power in a federal structure?

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

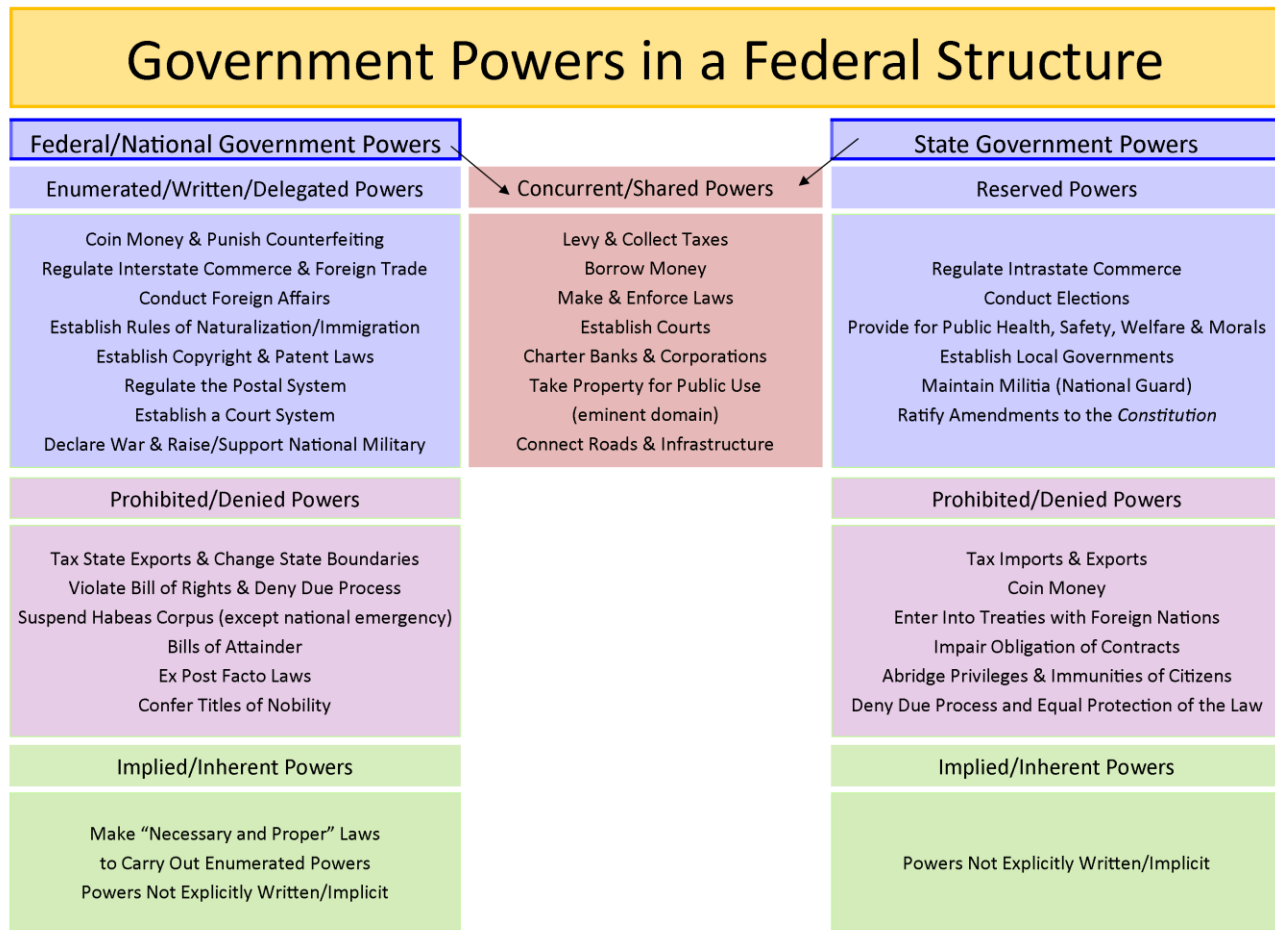


Chart 3.6 Diagram of Different Types of Power in a Federal Structure

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

Chart 3.6 provides information on the enumerated power, implied or inherent power, and also prohibited power of the federal or national level of government. Chart 3.6 also provides information on the areas of reserved powers of the states along with areas prohibited, implied and inherent. In addition, it provides information on powers shared or known as concurrent powers.

Article I, Sections 9 and 10, along with several constitutional amendments, lay out the restrictions on federal and state authority. The most important restriction Section 9 places on the national government prevents measures that cause the deprivation of personal liberty. Specifically, the government cannot suspend the **writ of habeas corpus**, which enables someone in custody to petition a judge to determine whether that person's detention is legal; pass a **bill of attainder**, a legislative action declaring someone guilty without a trial; or enact an **ex post facto law**, which criminalizes an act retroactively. The Bill of Rights affirms and expands these constitutional restrictions, ensuring that the government cannot encroach on personal freedoms.

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

Various constitutional provisions also govern state-to-state relations. Article IV, Section 1, referred to as the **full faith and credit clause** or the Comity Clause (U.S. *Constitution*, Article IV, Section 2, Clause 1) requires the states to accept court decisions, public acts, and contracts of other states. Thus, an adoption certificate or driver's license issued in one state is valid in any other state.

The **privileges and immunities clause** of Article IV asserts that states are prohibited from discriminating against out-of-staters by denying them such guarantees as access to courts, legal protection, property rights, and travel rights. The clause has not been interpreted to mean there cannot be *any* difference in the way a state treats residents and non-residents. For example, individuals cannot vote in a state in which they do not reside, tuition at state universities is higher for out-of-state residents, and in some cases individuals who have recently become residents of a state must wait a certain amount of time to be eligible for social welfare benefits.

Another constitutional provision prohibits states from establishing trade restrictions on goods produced in other states. However, a state can tax out-of-state goods sold within its borders if state-made goods are taxed at the same level.

Again, if a state law clashes with a federal law found to be within the national government's constitutional authority, the federal law is supposed to prevail. The supremacy clause does not intend to subordinate the states to the federal government; rather, it affirms that one body of laws binds the

country. In fact, all national and state government officials are bound by oath to uphold the *Constitution* regardless of the offices they hold.



Image 3.4 Photo of Marijuana Plants

Colorado's marijuana laws do not match with federal standards. (Credit: National Institute on Drug Abuse at the National Institute of Health at <https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine>)

Yet enforcement is not always that simple. In the case of marijuana use, which the federal government defines to be illegal, twenty-three states and the District of Columbia have nevertheless established medical marijuana laws, others have decriminalized its recreational use, and four states have completely legalized it.

The federal government could act in this area if it wanted to. Recent and current administrations have actively chosen to ignore the supremacy clause—using prosecutorial discretion—not holding states or individuals accountable for violating federal/national laws. For example, in addition to the legalization issue, there is the question of how to treat the money from marijuana sales, which the national government designates as drug money and regulates under laws regarding its deposit in banks.

Interesting Information

Because the marijuana plant contains chemicals that may help treat a range of illnesses and symptoms, many people argue that it should be legal for medical purposes. In fact, a growing number of states have legalized marijuana for medical use.^[1] The FDA requires carefully conducted studies (clinical trials) in hundreds to thousands of human subjects to determine the benefits and risks of a possible medication. So far, researchers have not conducted enough large-scale clinical trials that show that the benefits of the marijuana plant (as opposed to its cannabinoid ingredients) outweigh its risks in patients it is meant to treat.^[2] Decriminalization of a controlled substance like marijuana highlights the conflict between states' rights and the supremacy of national laws.

(Credit: National Institute on Drug Abuse at the NIH; "Marijuana as Medicine" April 2017; "What Is medical marijuana?")

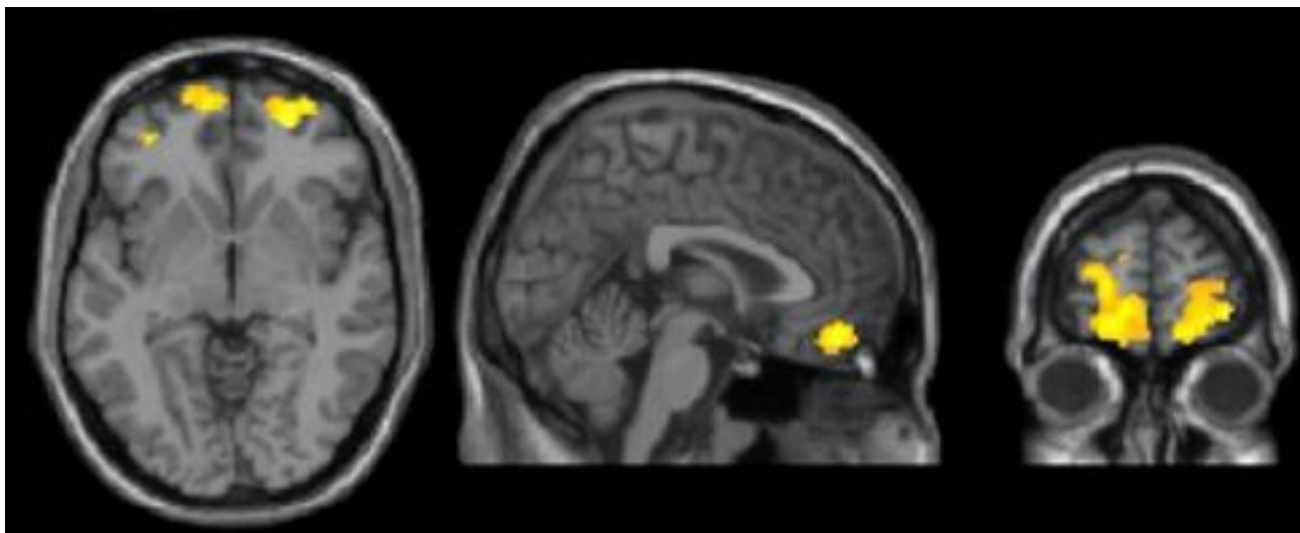


Image 3.5 Photo of Brain Scan from NIH (Credit: NIH)

Consider the Original: Tenth Amendment

The Tenth Amendment to the *United States Constitution* states:

“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.”^[17]

Chart 3.7 Text of the 10th Amendment to the U.S. Constitution

The Disputed Meaning of the 10th Amendment

Unlike other Bill of Rights provisions, the 10th Amendment focuses on *power* rather than rights. What exactly do these words mean and why has this amendment been debated since its adoption? To some, the amendment is intended to significantly restrict and limit the power of the federal or national government; while, to others, it is seen as having little real impact.^[20]

Those who minimize the Tenth Amendment read it as merely stating what former Chief Justice Harlan Stone called a “truism that all is retained which has not been surrendered.”^[21] In other words, rather than limiting the power of the federal government in any meaningful way, it simply restates what is made obvious elsewhere in the *Constitution*: the federal government has both enumerated and implied powers. The emphasis is especially placed on a broad interpretation of “implied” powers from the “necessary and proper clause” or Article I, Section 8 of the *Constitution*.^[22] The amendment is viewed as permissive of state exercise of power, rather than restrictive of federal power.

Those who argue against this perspective suggest that such an interpretation turns the entire philosophy of constitutionally limited government on its head. The 10th Amendment was added to reinforce the concept that the U.S. government had limited, not unlimited powers. From this point of view, a much narrower, restrictive interpretation of the implied powers of the “necessary and proper” clause is assumed.^[23] Advocates for this view stress the position taken by James Madison in the Federalists Paper No. 45 that the “powers” granted by the Constitution to the “federal government are few and defined,” while those granted to the states are “numerous and indefinite.”^[24] The courts have generally agreed with a broader interpretation of the necessary and proper clause, especially as it relates to the enumerated power of Congress to make laws relating to interstate commerce. In fact, use of the commerce clause of the U.S. *Constitution*, when coupled with the implied powers of the necessary and proper clause, has led to a major growth of federal power.^[25]

However, several Supreme Court rulings have restricted the scope of the national government’s power, especially under the commerce clause. For example, in *United States v. Lopez*, the court struck down the Gun-Free School Zones Act of 1990, which banned gun possession in school zones.^[26] It argued that the regulation in question did not “substantively affect interstate commerce.” The ruling ended a nearly

sixty-year period in which the court had used a broad interpretation of the commerce clause. The Lopez ruling supported a more narrow interpretation of the necessary and proper clause and quoted James Madison’s restrictive language in Federalist 45.^[27]

The courts have also agreed with restrictions to a broad interpretation of the commerce clause when the federal government appears to directly require state and local officials to do something. For example, in 1997 the Supreme Court struck down part of a federal law requiring state and local law enforcement to conduct background checks for prospective gun purchasers.^[28] In 2012 the court ruled the government could not compel states to expand the joint state-federal Medicaid program by taking away all their existing Medicaid funding if they refused.^[29]

The 10th Amendment also allows states to guarantee rights and liberties more fully or extensively than the federal government does, or to include additional rights. For example, many state constitutions guarantee the right to free public education. Several states give victims of crimes certain rights. Eighteen states include the right to hunt game and/or fish.^[30]

Some state constitutions explicitly guarantee equal rights for men and women. Some states permitted women to vote before the Nineteenth Amendment of 1920, and people aged 18–20 could vote in a few states before the Twenty-Sixth Amendment of 1971. Several states also explicitly recognize a right to privacy. A decision by the Kansas Supreme Court in 2019 stated the state constitution protected a woman’s access to abortion.^[31]

These state protections and rights do not extend the other way, however. If a Supreme Court decision interprets the U.S. *Constitution* in a way that narrows these rights, the state’s protection no longer applies. For example, if Congress decided to outlaw hunting and fishing and the Supreme Court decided this law was a valid exercise of federal power, the state constitutional provisions that protect the right to hunt and fish would effectively be meaningless.

Federalism: Questions to Consider

1. What key constitutional provisions define the scope of authority of the federal and state governments?

2. What is the main purpose of both national and state governments?

3. What are the main differences between cooperative and dual federalism?

4. What were the implications of *McCulloch v. Maryland*?

1. supremacy clause, necessary and proper/elastic clause, 9th and 10th Amendments

2. protection/security of life, liberty and property

3. cooperative = coordination of action between national and state governments; dual = exercise of exclusive authority for each level

4. a doctrine of implied powers was recognized; discretionary power not specifically written/enumerated in the *Constitution*

Terms to Remember

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

commerce clause—empowers the federal government to regulate interstate economic transactions

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

cooperative federalism—a style of federalism in which both levels of government coordinate their actions to solve national problems, lead to the blending of functions such as swirls in a marble cake

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

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

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

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

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

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

reserved powers amendment—the 10th Amendment to the *Constitution* that reserves powers to the states not delegated by the Constitution to the national government

writ of habeas corpus—a petition that enables someone in custody to petition a judge to determine whether

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3.3 Federalism: How is revenue shared?



Image 3.6 Gold Liberty Coin from the U.S. Mint

Photo from the U.S. Mint of a gold liberty coin.
(Credit: U.S. Mint from <https://www.usmint.gov/wordpress/wp-content/uploads/2017/03/2017-american-eagle-gold-tenth-ounce-proof-coin-obverse.jpg>)

Learning Objectives

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

Chart 3.8 Learning Objectives on Fiscal Federalism, Grants, and Mandates

Fiscal Federalism: How are the people's dollars distributed?

Federal, state, and local governments depend on different sources of revenue to finance their annual expenditures. Two important developments have fundamentally changed the allocation of revenue since the early 1900s. First, the ratification of the Sixteenth Amendment in 1913 authorized Congress to impose income taxes without apportioning it among the states on the basis of population, a burdensome provision that Article I, Section 9, had imposed on the national government.¹⁴ This change significantly increased the federal government's ability to raise revenue and spend it.

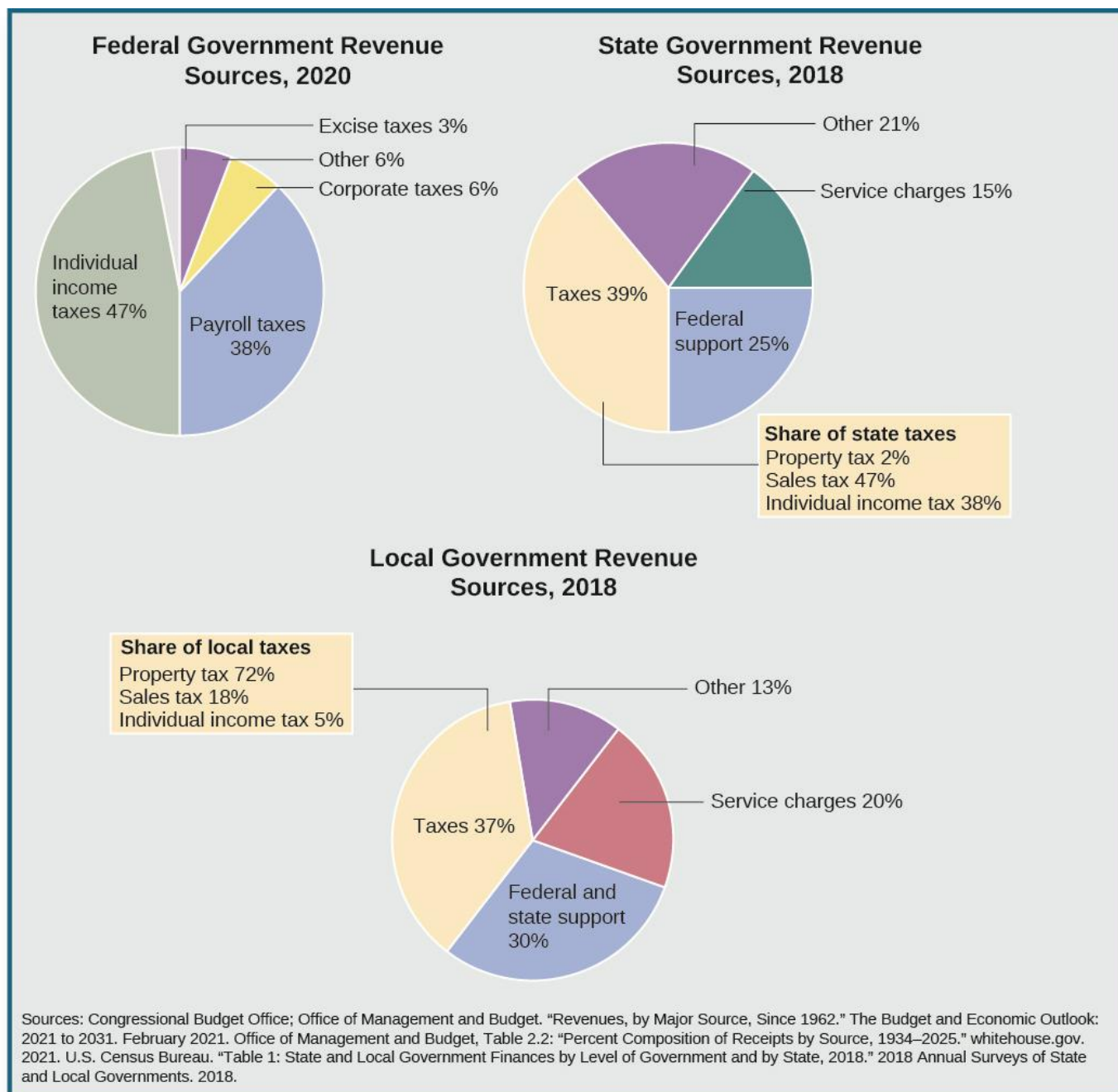


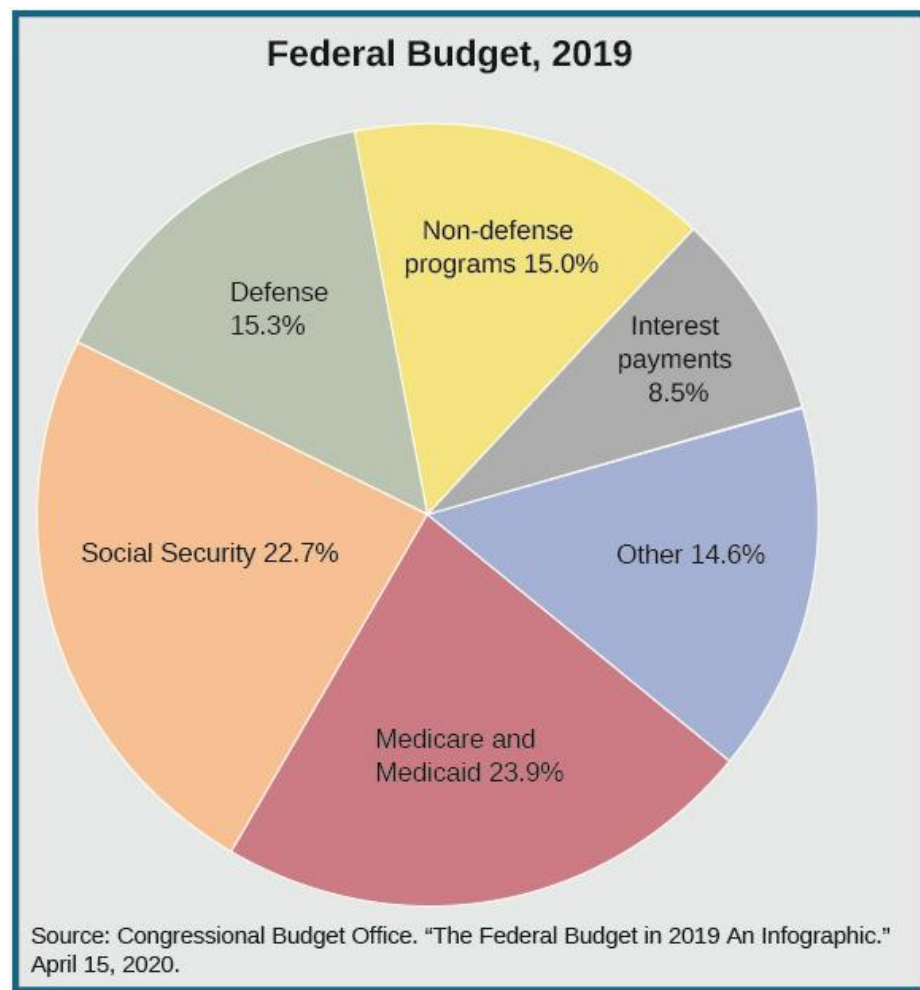
Chart 3.9 Pie Charts Comparing Federal, State and Local Spending

The second development regulates federal grants—transfers of federal money to state and local governments. These transfers, which do not have to be repaid, are designed to support the recipient governments, but also to encourage them to pursue federal policy objectives they might not otherwise adopt.

The expansion of the federal government's spending power has enabled it to transfer more grant money to lower government levels, which has accounted for an increasing share of their total revenue.^[2]

The sources of revenue for federal, state, and local governments are detailed in figure 3.9. Although the data reflect 2020 results, patterns revealed in the figure give us an idea of how governments funded their

activities in recent years. For the federal government, 47 percent of 2020 revenue came from individual income taxes and 38 percent from payroll taxes, which combine Social Security tax and Medicare tax. For state governments, based on 2018 data, 39% comes from taxes, particularly sales tax on items such as purchased food, clothing, alcohol, tobacco products, and the motor fuel gasoline tax. Fuel tax revenue is typically used to finance state transportation projects. Some states have an individual income tax as a significant revenue source, others such as Texas and Florida do not have this tax. Federal grants account for about 25% of state government revenue.



For local governments, based on 2018 data, the property tax, a levy on residential and commercial real estate, was the most important source of tax revenue, accounting for about 72 percent of the total. Federal and state grants accounted for 30 percent of local government revenue. Charges for hospital-related services, sewage and solid waste management and airport services are important sources of general revenue for local governments.

Intergovernmental grants are important sources of revenue for both state and local governments. When economic times are good, such grants help states, cities, municipalities, and school districts carry out their regular functions. However, during hard economic times, such as the Great Recession of 2007-2009 or during the COVID-19 pandemic of 2020-2021,

intergovernmental transfers provided much-needed fiscal relief as the revenue streams of state and local governments were adversely affected.

How are the revenues generated by people's tax dollars and people's fees paid for public services and licenses used by different levels of government? To gain insight on this question check Article I, Section 8, of the *Constitution*, assigning the federal government various powers allowing it to affect the nation as a whole.^[3] The 2014 federal budget demonstrates that providing for the general welfare and national

defense consumes much of the government's resources—not just its revenue, but also its administrative capacity and labor power.

Educational expenditures constitute a major category for both state and local governments. However, whereas the states spend comparatively more than local governments on university education, local governments spend even more on elementary and secondary education. Local governments allocate more funds to police protection, fire protection, housing and community development, and public utilities such as water, sewage, and electricity. While state governments allocate comparatively more funds to public welfare programs, such as health care, income support, and highways, both local and state governments spend roughly similar amounts on judicial and legal services and correctional services. The national government's ability to achieve its objectives often requires the participation and cooperation of state and local governments. Intergovernmental grants offer positive financial inducements to get states to work toward selected national goals. A **grant** is commonly likened to a “carrot” to the extent that it is designed to entice the recipient toward a specific goal. On the other hand, **unfunded mandates** impose federal requirements on state and local authorities. **Mandates** are typically backed by the threat of penalties for non-compliance and provide little to no compensation to carry out the mandated action. Thus, given its coercive nature, a mandate is commonly likened to a “stick.”

Grants

The national government has used grants to influence state actions as far back as the *Articles of Confederation* when it provided states with land grants. In the first half of the 1800s, land grants were the primary means by which the federal government supported the states.

Millions of acres of federal land were donated to support road, railroad, bridge, and canal construction projects, all of which were instrumental in piecing together a national transportation system to facilitate migration, interstate commerce, postal mail service, and movement of military people and equipment. Numerous universities and colleges across the country, such as Ohio State University and the University of Maine, are land-grant institutions because their campuses were built on land donated by the federal government. By 1900, cash grants replaced land grants as the main form of federal intergovernmental transfers and have become a central part of modern federalism.^[4]

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

Block grants come with less stringent federal administrative conditions and provide recipients more flexibility over how to spend grant funds. Examples of block grants include the Workforce Investment Act program, which provides state and local agencies money to help youths and adults obtain skill sets that

will lead to better-paying jobs, and the Surface Transportation Program, which helps state and local governments maintain and improve highways, bridges, tunnels, sidewalks, and bicycle paths.

Finally, recipients of general revenue sharing faced the least restrictions on the use of federal grants. From 1972 to 1986, when revenue sharing was abolished, upwards of \$85 billion of federal money was distributed to states, cities, counties, towns, and villages.^[5]

During the 1960s and 1970s, funding for federal grants grew significantly. Growth picked up again in the 1990s and 2000s primarily due to the increase in federal grant money going to Medicaid.

Federally funded health-care programs jumped from \$43.8 billion in 1990 to an estimated \$625 billion in 2023.^[6] Health-related grant programs such as Medicaid and the Children's Health Insurance Program (CHIP) represented more than half of total federal grant expenses.



The federal government uses grants and other tools to achieve its national policy priorities. Take a look at the [National Priorities Project](#) to find out more.

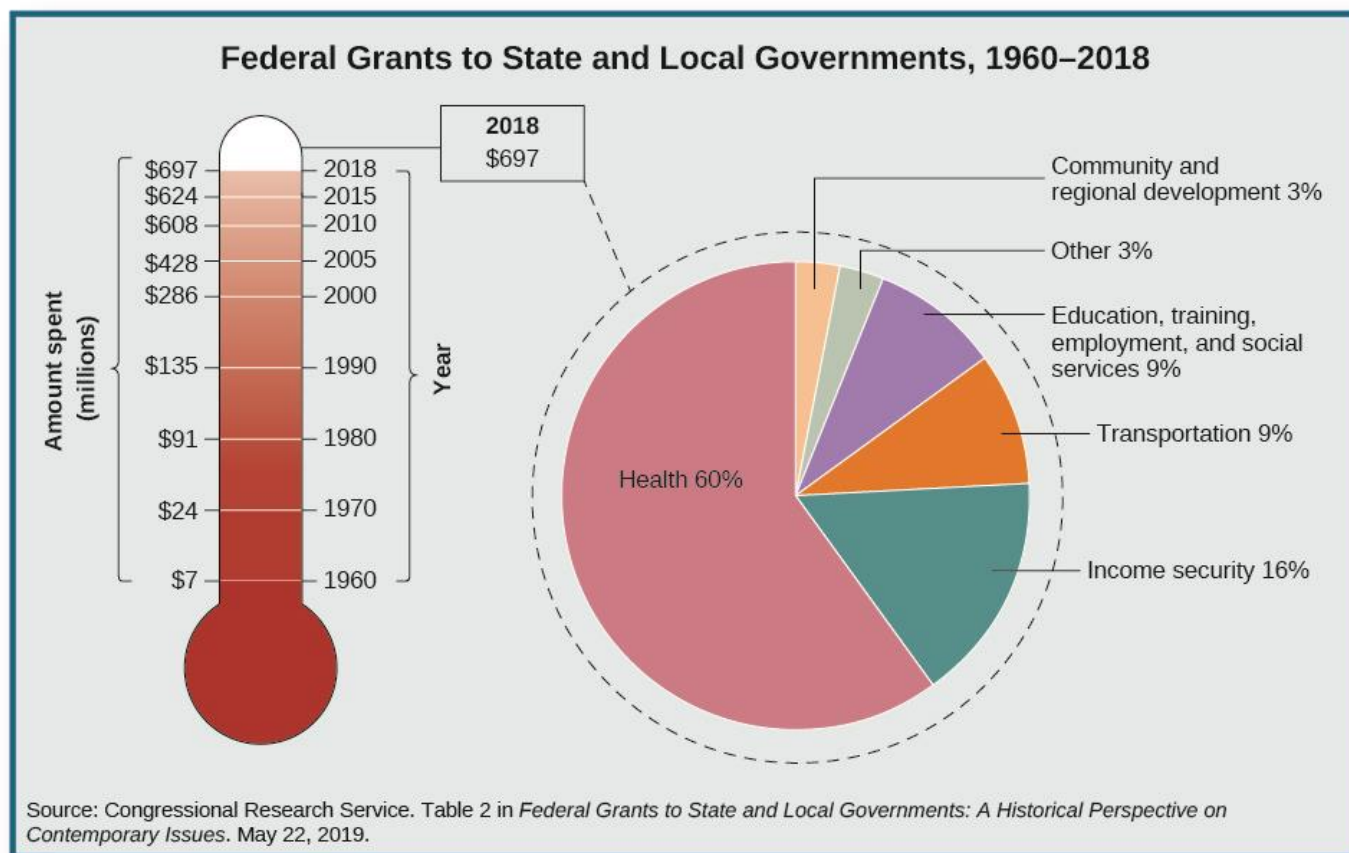


Chart 3.11 Chart Examines Federal Grant Spending with State and Local Governments

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

functional categories today. The national government favors using categorical grants to transfer funds to state and local authorities because this gives them more control and discretion in how the money is spent.

In 2019, the federal government distributed 1,274 grants, 1,253 of which were categorical, while only 21 were block grants.^[17]

In response to the terrorist attack on the United States on September 11, 2001, more than a dozen new federal grant programs relating to homeland security were created, but as of 2011, only three were block grants.

There are a couple of reasons that categorical grants are more popular than block grants despite calls to decentralize public policy.

One reason is that elected officials who sponsor these grants can take credit for their positive outcomes (e.g., clean rivers, better-performing schools, healthier children, a secure homeland) since elected officials, not state officials, formulate the administrative standards that lead to the results. Another reason is that categorical grants afford federal officials greater command over grant program performance.



Image 3.7 Photo of Poetry Award Winner Funded by Taxpayers

Henry Bienen and National Endowment for the Arts Chair Jan Chu. (Credit: <https://www.arts.gov/photos-pol>)

Block grants continue to be championed for their cost-cutting effects. The transformation of the entire welfare program known as Aid to Families with Dependent Children (AFDC) to a block grant, capping federal spending and providing state flexibility in managing the programs has been viewed as a model applicable to the very costly federal health Medicaid program.

Proposals of block-granting Medicaid go back to the 1990s and a 2014 plan advocated by then Speaker of the House Paul Ryan (R-WI). Ryan estimated that

such a reform could save the federal government upwards of \$732 billion over ten years.^[18]

The political debate between the uses of block grants versus categorical grants is an ongoing dispute between those who wish to decentralize the administration of federal grant dollars and provide states administrative flexibility and those who wish to further centralize and strengthen nation-wide uniformity of programs.

Frequently, this debate finds those on the conservative side of the ideological spectrum advocating for block grants, decentralization and cost-cutting, while liberals prefer categorical grants, national uniformity and greater federal controls.

Historically, block grant flexibility has been undermined as a result of **creeping categorization**, a process in which the national government places new administrative requirements on state and local governments or supplants block grants with new categorical grants.^[9]

Among the more common measures used to restrict block grants' programmatic flexibility are set-asides (i.e. requiring a certain share of block grant funds to be designated for a specific purpose) and cost-ceilings (i.e. placing a cap on funding for other purposes).

In other words, Washington, D. C. has been as likely to use the stick of mandates as the carrot of grants to accomplish its national agenda. As a result, there have been more instances of confrontational interactions between the states and the federal government.

Unfunded mandates are federal laws and regulations that impose obligations on state and local governments without fully compensating them for the administrative costs they incur. The federal government has used mandates increasingly since the 1960s to promote national objectives in policy areas such as the environment, civil rights, education, and homeland security. One type of mandate threatens civil and criminal penalties for state and local authorities that fail to comply with them across the board in all programs, while another provides for the suspension of federal grant money. These are commonly referred to as *crosscutting* mandates/requirements.

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

Some mandates include partial preemption regulations, whereby the federal government sets national regulatory standards but delegates the enforcement to state and local governments. For example, the Clean Air Act sets national air quality regulations but instructs states to design implementation plans to achieve such standards.^[10] The widespread use of federal mandates in the 1970s and 1980s provoked a backlash among state and local authorities, which culminated in the Unfunded Mandates Reform Act (UMRA) in 1995. The UMRA's main objective has been to restrain the national government's use of mandates by subjecting rules that impose unfunded requirements on state and local governments to greater procedural scrutiny. However, since the act's implementation, states and local authorities have obtained limited relief. A new piece of legislation aims to take this approach further. The 2015 Unfunded

Mandates and Information Transparency Act, HR 50, passed the House early in 2015 before being referred to the Senate, where it waits committee consideration.^[11]

Some leading federalism scholars have used the term **coercive federalism** to describe or label this aspect of contemporary U.S. federalism.^[12]



Image 3.8 Photo of Jeanne Clery and Photo of Memorial Plaque

The federal Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) requires colleges and universities, both public and private, participating in federal student aid programs to disclose campus safety information, and imposes certain basic requirements for handling incidents of sexual violence and emergency situations. (Credit: modification of work (a) Brenda and Pete Kohr and (b) Code Carvings.com.)

Consider the Original

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

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

Chart 3.12 List of Clery Act Provisions

THE CLERY ACT

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

An Opinion on the Issue

Sofia Orozco, Austin Community College...

The Clery Act isn't sufficient in reminding students how to keep themselves safe or to prevent crimes. No matter how many resources are used to "disclose campus crime statistics and security information," if students aren't well informed in how to protect themselves, simply disclosing the information does nothing ("Clery Act Reports" at studentaid.ed.gov). I would ask universities to convert statistical findings into actionable tips posted around campus to constantly remind students how to ensure their own safety. Jeanne Clery was raped and murdered in her own dorm room; but, maybe if she walked by a poster on her way to class everyday that highlighted sensitive spots to strike an attacker, she might have been better prepared to defend herself ("The Handbook for Campus Safety and Security Reporting" at ifap.ed.gov). The University of Chicago's annual security and fire report contains safety tips like—if a student feels they're being followed, they should "cross the street, change direction, or go to a well-lit public place where others are present" ("Annual Security and Fire Safety Report" at safety-security.uchicago.edu). The university is right to include actionable tips. All universities under the Clery Act should be required to do the same. Though tips may seem obvious, if they help one student escape a dangerous situation, the revised Clery Act would be successful.

[Used with permission 06/12/2019 from Sofia Orozco]

Chart 3.13 Student Opinion on The Clery Act



For more about the Clery Act, see <http://clerycenter.org>.

Federalism: Questions to Consider

1. What does it mean to refer to the carrot of grants and the stick of mandates?
2. Were you made aware of your campus's annual security report before you enrolled?
3. Do you think reporting about campus security is appropriately regulated at the federal level under the Clery Act? Why or why not?

1. grant money may be offered to state governments for much needed services to entice the states to comply with national mandates
2. personal answer
3. personal opinion

Terms to Remember

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

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

fiscal federalism—sharing of tax dollars, fees, etc. between levels of government; usually in the form of grants to state governments

grant—commonly likened to a “carrot” to the extent that it is designed to entice the recipient toward a specific goal

mandates—typically backed by the threat of penalties for non-compliance and offer little to no compensation to carry out mandated action

unfunded mandate—federal laws and regulations that impose obligations on state and local government without fully compensating them for the costs of implementation

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