

The Constitution gives certain powers exclusively to the national government. Among these *expressed, delegated, or enumerated* powers of the national government are printing money, making treaties, and declaring war. Under the Tenth Amendment to the Constitution, the states have *reserve powers*, defined broadly as any powers that the Constitution does not explicitly give to the national government or specifically deny to the states—such as establishing licensing requirements for certain professions, administering elections, and running public schools, to cite just three examples. Thus, for instance, the national government's enumerated powers include regulating interstate commerce (commerce between states), while the states' reserve powers include regulating intrastate commerce (commerce within a state).

In addition, there are some powers that the national government exercises in collaboration with state governments. Among these *concurrent powers* are laying and collecting taxes, building highways, and administering criminal justice agencies. Finally, there are some powers that neither the national government nor the states may constitutionally claim or exercise, such as granting titles of nobility and issuing bills of attainder (acts declaring a citizen guilty of a capital crime without a trial), among many others.

Under the *supremacy clause* contained in Article VI of the Constitution, most conflicts between national or federal laws, on the one side, and state laws, on the other, are to be resolved in favor of the national government. Likewise, the *necessary and proper clause*, also known as the *elastic clause*, of the Constitution (Article I, Section 8, Clause 18) gives the national government *implied powers* to implement its enumerated powers; for example, the Constitution does not explicitly provide for a cabinet in the executive branch, but appointing and maintaining a cabinet to implement the president's constitutional powers as specified in Article II is an implied power of the national government.

In the *Federalist Papers*, the Framers made the case for federalism, arguing that a system of mixed sovereignty would provide more protection of people's rights than the alternatives of a national system (one in which the national government has full sovereignty over constituent states) or a confederal government (one in which constituent states exercise sovereignty over their national government). The federal system envisioned by the Framers would be a new approach to democratic governance that would combine the best features of national and confederal systems. Although other countries, such as Canada, Germany, and India, also have a federal system of government today, the United States was the first to adopt one. As such, the United States in the eighteenth century faced the daunting task of putting federalism into practice. This complicated process continues to evolve today.

Perhaps the most contentious debates about federalism involve two questions: What powers may legitimately be considered implied powers, and what

is the proper balance between the national government's powers and the powers of the states? During the Constitutional Convention in 1787, the framers juggled the delicate task of balancing the interests of large and small states in redesigning the national government. Advocates of the Virginia Plan favored assigning seats in Congress based on a state's population, while supporters of the New Jersey Plan argued that every state should be represented equally in the national government regardless of size. The famous "Great Compromise" broke the deadlock by allocating seats in the House of Representatives based on a state's population and granting two seats in the Senate to every state.

In the first decades following the Constitution's ratification, the Supreme Court reviewed several cases about the authority of the national government and the division of power between it and the states. Two of the most famous cases are *McCulloch v. Maryland* (1819), which dealt with the national government's powers of banking, taxation, and commerce, and *Gibbons v. Ogden* (1824), which addressed interstate commerce. In both cases, the Supreme Court ruled in favor of interpreting the Constitution broadly to extend the powers of the national government. But the national government has not always prevailed in disputes over sovereignty with the states.

It would be a big mistake to assume that the Constitution's supremacy and elastic clauses, together with these early court decisions, settled matters. The nature and scope of the national government's powers, and the balance between its powers and those of the states, have been debated and litigated for two hundred years. The Civil War (1861–1865) marked the height of division in the nineteenth century between the national government and the states over federalism. In the battle over who had authority to make decisions about slavery, the national government ultimately prevailed. But, as you will see in Chapter 13, the national government did not require states to protect the civil rights of black Americans until well into the twentieth century. In this respect, states continued to exercise sovereignty in areas such as voting eligibility, and they still have primary responsibility in many vital areas, including public school education and the administration of criminal justice.

The New Deal era of the 1930s and the civil rights revolution of the 1960s both marked an expansion in the authority of the federal government. As part of President Franklin D. Roosevelt's New Deal, the federal government created economic programs for the elderly and the poor, Social Security and welfare, respectively. In the 1960s, President Lyndon B. Johnson's Great Society agenda extended access to health care to the elderly and the poor through Medicare and Medicaid, respectively. In each of these areas, the federal government assumed authority in areas that previously had been left up to the states.

The late twentieth century, however, witnessed a return of some authority to the states. Both President Richard M. Nixon and President Ronald Reagan advocated a "new federalism," in which states and individuals would regain

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some of the authority that the national government had accrued in previous decades. During the 1980 presidential campaign, for example, Reagan said he would seek to close the U.S. Department of Education in order to restore full authority over education to the individual states. As president, however, Reagan found that decreasing the size of the federal government presented numerous obstacles. Still, Reagan's statement in his first inaugural address that "government is not the solution to our problem; government is the problem" marked a new stage in federalism, one in which politicians across political parties would work to limit the federal government's authority in certain areas.

Generally speaking, the Supreme Court has gone back and forth in its post-1980 opinions concerning federal-state relations. For example, in *South Carolina v. Dole* (1987), the Court ruled that the national government could deny federal funds for highway construction to any state that failed to raise its legal drinking age to twenty-one. A decade later, in *Printz v. United States* (1997), the Court ruled that the national government could not require a state government to implement federal laws without supplying federal funds for the purpose.

Whatever the Court decides in given cases concerning federalism, debates continue over how the national government should relate to the states and local governments in such seemingly disparate areas as homeland security and social welfare programs. Many big-city mayors and public administration analysts have raised concerns about whether key parts of the national government's homeland security policies constitute an unfunded federal mandate on states and local governments. More broadly, the ongoing post-1980 *devolution* of federal power and authority to the states—policies that return policy-making responsibility in given areas mostly or entirely to the states or that give the states greater authority to make, administer, or finance given federal policies—has affected several major domestic programs.

One important example of devolution in motion is Temporary Assistance to Needy Families (TANF), which replaced the Aid to Families with Dependent Children (AFDC) program under the terms of the 1996 welfare reform package signed into law by President Bill Clinton. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 marked the first significant change in welfare since its creation in 1935. Poor families would no longer be guaranteed cash payments of assistance; instead, aid would be tied to work, either through jobs or education that would lead to employment. States would have more authority over the disbursement of welfare funds and would be able to design programs to encourage people to move from welfare into work. The change in the federal program's name signified the shift in focus.

Some analysts endorse devolution as a means of revitalizing federalism and its "laboratories of democracy," the states, which now are supposedly freer to experiment with ways of achieving given public policy goals, learn what works, and change course as necessary without undue oversight or interference from the national government. Other analysts denounce devolution for

supposedly reducing overall government spending for social welfare and other programs, and for permitting greater interstate differences in “who gets what” depending on “who lives where.” Richard P. Nathan, a public policy scholar who worked on federalism issues in the Nixon administration, offers an expert and largely dispassionate overview of the latest “new federalism” and the “devolution revolution.”

The ongoing debates over devolution, however, are merely the latest chapter in the history of debates over federalism. As political scientist Martha Derthick reminds us in this chapter, federalism challenges Americans with the fundamental question of whether they are or ought to be one, two, or many different political communities—and on what terms.

## 2.1 The Federalist No. 39 (1788)

JAMES MADISON

### INTRODUCTION

In the Federalist No. 39, James Madison justifies the “plan of government” under the Constitution, focusing on the division of power between the national government and the states. He identifies the new government as being both “national” and “federal” in character, defining “national” as “a *consolidation* of the states,” and “federal” as “a *confederacy* of former states.” The United States would be both national and federal because power would derive from the people as well as the states. By describing the various features of the new government, from the bicameral Congress to the amendment process, Madison illustrates its distinctive structure with “neither a national nor a federal Constitution, but a composition of both.”

To the People of the State of New York:

The last paper having concluded the observations which were meant to introduce a candid survey of the plan of government reported by the convention, we now proceed to the execution of that part of our undertaking.

The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination

James Madison, “The Federalist No. 39” (1788; Yale Law School Avalon Project, 1996), <http://www.yale.edu/lawweb/avalon/federal/fed39.htm>.

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