UNITED STATES OF AMERICA

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In the United States the distribution of powers and responsibilities is better understood as a delegation of powers by the Constitution to the federal government than as a full distribution of powers between the federal government and the states. Rather than listing and separating the powers of the national and state governments, the Constitution of the United States delegates certain specified powers to the federal government and reserves all other powers, unless prohibited, to the states. This approach to the distribution of powers and responsibilities reflects the peculiar historical circumstances that led to the writing of the Constitution, the framers' overriding concern with the protection of liberty, and the state of political science at the end of the eighteenth century. It has led to an overlapping of powers and responsibilities in the actual operation of contemporary American federalism, creating unique patterns of cooperation and conflict between the national government and the states.

OVERVIEW OF THE AMERICAN FEDERATION

The American federation is composed of fifty states, a federal district (Washington, D.C.), fourteen territories (American Samoa, Guam, the Northern Marianas, Puerto Rico, the Virgin Islands of the United States, and nine small, largely uninhabited islands and atolls in the Pacific Ocean), and numerous federally recognized Indian (i.e., aboriginal) tribes on Indian reservations.

Each American state enjoys equal constitutional status. Each is equally represented in the U.S. Senate, and each has equal authority to frame its own government, enact its own laws, and create its own system of local government.

The District of Columbia (often referred to as Washington or Washington, D.C.) is subject to control by the Congress, but the latter has delegated a great deal of home rule to a locally elected mayor and council. The District of Columbia has an elected, non-voting observer in the House of Representatives but is not represented in the Senate. There have been a number of unsuccessful attempts to gain full representation for the District of Columbia in both the House of Representatives and the Senate. Since the enactment of the Twenty-Third Amendment in 1961, residents of the District of Columbia can vote for presidential and vice-presidential electors.

Relations with territories are governed by statutes and agreements. They differ from one territory to another, with the largest territories generally enjoying the most self-government. Puerto Rico, the largest territory, has rejected both independence and statehood in three referendums, apparently preferring to keep its status as a commonwealth. Puerto Rico has a non-voting observer in the House of Representatives, but residents of Puerto Rico cannot vote in presidential elections.[i]

Relations with the Indian Tribes are governed by statutes and treaties. Indians living on reservations enjoy considerable autonomy. Tribal governments are permitted to adopt constitutions, regulate their internal affairs, hold elections, and enforce their own laws. Generally, federal law prohibits the states from taxing or regulating tribes or extending judicial power over them. Off the reservation, however, individual Indians are usually subject to the same state laws as are any other state residents.

Demographic Profile

In the year 2000 the population of the United States was 285,230,516, making it the third most populous country in the world. Its landmass of 9,629,091 square kilometres ranks third (after Russia and Canada) among the countries of the world. Its per capita GDP of $36,200 also ranks third (after Bermuda and Luxembourg).

Because there is no official census of religion, one can only estimate the number of adherents to various organized religions. A majority of the population of the United States is Christian. Between 75 percent and 85 percent of the population identify themselves as Christian, about one-third Roman Catholic and two-thirds Protestant. The 160 million or so Protestants are divided into at least 220 different denominations. Estimates for the number of Jews range between 2.8 million and 5.0 million. Estimates for the number of Muslims vary considerably, but they tend to cluster around 3 million. There are close to 2 million Buddhists and 1 million Hindus. No other religion approaches 1 million adherents.

The United States is approximately 84.0 percent white (Caucasian), 12.5 percent African American, and 3.5 percent Asian. In the 2000 Census, approximately 7 million Americans identified themselves as biracial. The United States has a growing Hispanic population, estimated in 2000 at almost 13 percent. Approximately 2.5 million individuals identify themselves as Native Americans, or Indians.[ii]

There is no official language in the United States, although there is a political movement to have English declared the official language. English is by far the most widely spoken and understood language, although about 20 percent of Americans report that they speak some language other than English in their homes.

There is considerable variation in the population diversity from one region of the country to another. For example, African Americans tend to live in the South or in the larger cities of the Northeast and Great Lakes region, while most Hispanics live in California, the Southwestern states, and in Florida and Texas. Many Asian Americans live in California, Oregon, and Washington, the three American states that border on the Pacific Ocean.

THE FEDERAL CONSTITUTION IN HISTORICAL-CULTURAL CONTEXT

The United States began as thirteen separate British colonies along the Atlantic seacoast, from what is now the State of Maine to present-day Georgia. All of the colonies were founded during the seventeenth century. There was considerable self-government in the colonies, and all of them had written charters. Some had constitutions adopted by the colonists themselves. Until the 1760s the United Kingdom ruled the colonies with a loose hand, dealing with individual colonies as the need might arise.

The French and Indian Wars of 1754-63 and the changes in British policy that followed had a profound impact upon the colonies. Britain gradually developed a colonial policy and began treating the colonies as a unit rather than as individual entities. British colonial policy had a dual impact, creating both an American identity and an American interest. Ultimately, this led to a complete break with Great Britain when the Continental Congress adopted the Declaration of Independence in 1776. Plunged into a war of independence, the former colonies, now sovereign states, sought some political arrangement to coordinate their war effort. The solution was the Articles of Confederation and Perpetual Union, first proposed in 1776 but not adopted

until 1781. Taken together, the Declaration of Independence and the Articles of Confederation constitute the first American Constitution. Under the Articles of Confederation the general government did not have any power over individual citizens: it dealt only with the individual states that composed the confederation. Even at that, the Confederation operated primarily by the voluntary consent of the states, having no real authority to enforce its resolutions. Furthermore, the general government had no authority to deal with internal affairs. Its authority was confined to certain external tasks of general interest – diplomacy, war, and common defence, for example.

During the period between 1781 and 1788 the United States was a fully functioning constitutional polity. Between 1776 and 1780 eleven of the thirteen former colonies adopted republican constitutions,[iii] and the states were linked together first under the Second Continental Congress and then under the Articles of Confederation. This structure was sufficient for the successful prosecution of the War of Independence but proved inadequate to the challenges of the postwar period as all the old state rivalries and jealousies re-emerged. First, trade among the states was difficult because each state adopted protectionist legislation and issued its own currency. Second, some of the states were characterized by considerable political and economic instability so that, at least in the eyes of the political elites, property was threatened, economic development was uncertain, and liberty was in jeopardy. Third, there were real military threats to the United States. Great Britain still had troops in the United States as well as in nearby Canada, and Spain controlled navigation on the lower portion of the Mississippi River. Finally, the new United States could not be taken seriously in international affairs and was unable to secure loans or enforce its treaties.

George Washington, James Madison, Alexander Hamilton, and others called for a strengthening of the bonds of union among the states in order to address these problems. After an unsuccessful meeting in Annapolis, Maryland, in 1786, delegates from twelve of the thirteen states[iv] assembled in Philadelphia, Pennsylvania, in the summer of 1787 "to deliberate on all measures necessary to cement the union of the states and promote their permanent tranquillity and security."

The story of the American Constitutional Convention is well known[v] - large states versus small states, southern slave states versus northern free states, and, perhaps most important, advocates of a centralized (or consolidated) government versus proponents of states-rights who favoured no more than a modified version of the Articles of Confederation. The solution to all of these conflicts was the invention of modern federalism, an entirely new system of governance that was neither unitary nor confederal. The new federal government was to have only those powers delegated to it by the Constitution; all other powers, unless prohibited, were to remain with the states. Under the Articles of Confederation the central government's powers were also delegated - but by the states themselves, and they could be withdrawn by the unanimous consent of the states. This type of delegation remains the essence of confederal forms of government. However, the proposal at Philadelphia in 1787 broke new ground by protecting the central government's powers in a Constitution that could not be changed without the consent of the central representative institutions.

The new national government was to operate directly on individuals within its limited sphere of delegated powers. Consequently, the framers thought there had to be effective limits on national power in order to prevent it from exceeding its authority. For this reason the framers of the American Constitution divided power between the executive and the legislature and, within the legislature itself, between the House of Representatives and the Senate.

The original U.S. Constitution is better understood as a delegation of powers to the

national government than as a distribution of powers between the national government and the states. Under the Articles of Confederation, almost all authority remained with the thirteen sovereign states; very limited power was delegated to the weak national government. The Constitutional Convention of 1787 created a stronger and more complete national government and endowed it with more powers than the national government had under the Articles. Nevertheless, the new national government was to have only those powers granted to it by the Constitution. All others powers, unless prohibited, remained with the states, just where they had been under the Articles of Confederation and even earlier. Thus, the Constitution does not grant powers to the states.[vi] The Constitution merely delegates certain limited, albeit very important, powers to the national government and leaves all others (except where prohibited) where they were before - with the states. In fact, the Constitution recognizes this explicitly. Amendment X to the Constitution (adopted in 1791) provides: "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 delegates to the Convention approved a draft constitution in September 1787. This was submitted to special ratifying conventions in each of the states for their consideration. While some states ratified the Constitution quickly and with little debate, opposition surfaced in such crucial states as Massachusetts, New York, and Virginia. While there were numerous objections to the proposed constitution, the opposition soon focused on the lack a of bill of rights, a feature contained in most existing state constitutions. In fact, North Carolina, when first presented with the Constitution, rejected it because it did not contain a bill of rights. To counter this growing opposition, the Constitution's proponents promised to add a bill of rights as soon as the document was ratified. With this promise, the Constitution was ratified in 1788, and ten amendments – the Bill of Rights - were added to the Constitution in 1791.

CONSTITUTIONAL DISTRIBUTION OF POWERS AND RESPONSIBILITIES

The Constitution, as written and ratified, creates a system of dual federalism in which both the national government and the states are sovereign in their respective spheres of competence. Over time, as the role of the national government has expanded, the actual operation of the American federal system became more interactive and cooperative in nature.

In the early days of the American republic most governmental functions remained with the states. Daniel Elazar, in examining the actual operation of the American federal republic during its earliest years, has concluded that, "for the first two generations under the Constitution, the United States resembled a confederation almost as much as it did a federation."[vii] For at least the first fifty years of its operation, it operated in a very decentralized manner.[viii] Today, however, American federalism is much more centralized than it once was.

Powers of the Federal Government

Article I, Section 8, of the Constitution delegates eighteen specific powers to the Congress of the United States. Almost all of these powers deal with commerce, foreign affairs, or military affairs. Among the most important of these powers are (1) the power to "collect Taxes ... to pay the Debts and provide for the common Defence and general Welfare of the United States," and (2) the power to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes" – both powers that the federal government did not have under the

Articles of Confederation. In addition, the very last provision of Section 8 empowers Congress "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers." This "elastic clause" is quite different from a parallel provision in the Articles of Confederation, which provides that the states retain all power "not *expressly* delegated to the United States."[ix] The Congress is granted many other important powers by Section 8, such as exclusive authority over copyright, bankruptcy, and patents, but it has been through the broad interpretation of the power to tax and spend and the power to regulate interstate and foreign commerce that the role of the federal government has expanded so tremendously.

One continuing question is whether the powers delegated to the federal government are exclusive or concurrent. Sometimes when the Constitution delegates a power to the federal government it explicitly denies the same power to the states. For example, Article I, Section 8, Paragraph 5, gives the power to "coin money" to the federal government, and Article I, Section 10, Paragraph 1, prohibits the states from coining money. There are several examples of this sort, but, by and large, whether a delegated power is exclusive or concurrent is often ambiguous, and it has been left to the U.S. Supreme Court to decide the issue on a case-by-case basis. Even when the Court finds that a power is concurrent, it may hold that the exercise of that power by the federal government preempts the field, precluding state regulation of the same subject matter. In enacting legislation Congress sometimes states its intention to preempt the field. It may even authorize the administration to preempt a specific policy area, either in whole or in part.

State and Local Autonomy

Both the federal government and the states have a high degree of autonomy. The states write their own constitutions, usually through popularly elected constitutional conventions and usually requiring ratification by the voters at the polls. State voters, of course, elect their own public officials. There are no federally appointed "governors" within the states. With few exceptions, the states have wide latitude in structuring their governments in ways that are in keeping with their own traditions and needs.

Starting in the 1960s many states used their constitutional authority to modernize their legislative, executive, and judicial institutions. During the first half of the twentieth century many state legislatures met only every other year for a limited number of legislative days. Individual legislators were poorly paid and had little or no staff support. Since the 1960s, however, many states have provided for annual legislative sessions, increased legislative pay, and professional staff support.

Two changes, both adopted in response to popular pressure, are especially noteworthy. First, some states – especially those western states most influenced by the Progressive movement in American politics - adopted the direct initiative, a system under which voters, by collecting signatures on a petition, can place an issue directly on the ballot to be voted upon by the citizenry at the next election. If passed by the voters, the initiative becomes state law just as if it had been enacted through the normal legislative process. Thus, twenty-four states now have some system of what has come to be called direct democracy. Second, seventeen states now have term limits, under which the number of years an individual can serve in the state legislature is strictly limited, usually to eight years. Sixteen of these seventeen systems of term limits were enacted by the initiative process.

Many states have also used their constitutional authority to modernize and strengthen their executives, their governors. With the exception of that of Massachusetts, the earliest state

constitutions were wary of executive power and created very weak governors. Beginning about 1965 most states strengthened their governors in order to enable them to provide public and legislative leadership. Governors were given four-year terms, their powers of appointment were increased, and their control over the state budget was strengthened. Using their enhanced constitutional authority, state governors have become important policy leaders and have taken the initiative in formulating new programs in education, welfare, economic development, and criminal justice.

The states have also modernized their judiciaries. Historically, state court systems were a hodgepodge of structures, created and financed by both state and local governments. Many states did not have intermediate appellate courts, and state supreme courts were often overwhelmed by thousands of appeals. During the 1970s and 1980s many states streamlined the structure of their court systems, developed state-wide personnel systems for court employees, increased state funding, created administrative offices for the courts under the control of the state supreme court, and centralized rule-making authority in the state supreme court. State supreme courts were given *certiorari* jurisdiction, thus enabling them to have discretion over the cases they heard and therefore to decide only the most important cases that arose under state constitutions or state law. Many state supreme courts have been very active in protecting individual rights and liberties, often holding that their state constitutions protect rights that go beyond those protected by the U.S. Constitution. State supreme courts have the final say on the interpretation of state constitutions and state laws.[x]

The political context in which these state governmental institutions operate has also changed. Before the 1960s the legislative districts in many states were apportioned in such a way as to favour rural constituencies and to underrepresent urban and suburban ones. In 1964 the U.S. Supreme Court ruled that this sort of malapportionment violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and it held that state legislative districts had to be equal in population – the principle of one person, one vote.

Compliance with the Supreme Court's decision brought about a fundamental change in state politics. State legislative districts were redrawn to more accurately reflect urban and suburban populations, and the states were forced to address the concerns of urban and suburban voters. Reapportionment – along with the federal Voting Rights Acts, 1965 - brought a new breed of political activists into state politics. Legislators were younger and better educated, and the proportion of women, African Americans, and Hispanics increased significantly. In 2000, of the 7,424 members of the fifty state legislatures, almost 1,500 were women, 520 were African American, and 150 were Hispanic.

The second important political change since the 1960s has been the increase in competition between Republicans and Democrats (i.e., the two major and overwhelmingly dominant political parties in the U.S. political system) in many states. From the 1860s to the 1960s the political parties each had a regional base, the Democrats in the South and the Republicans in New England and the Midwest. The states of these regions were so dominated by their respective parties that candidates from the minority party had little real chance of winning elections. Demographic, economic, and political changes, however, increased party competition, so that by the year 2000 in many states either party had an almost equal chance of winning any given state-wide election. The closeness of the 2000 presidential election in Florida is a good example of this increased party competition.

In addition, the federal Voting Rights Act brought about increased voter turnout by African American and Hispanic voters. Their increased participation has led to an increase in the

number of minority candidates winning elections. For example, by 1992, 4,557 African American and 1,908 Hispanics were serving in elected city council and county offices throughout the country. Women also were elected to local offices in increasing numbers. In 1975 there were only thirty-five female mayors in America's larger cities; by 1995 that number had increased to 178.

The territorial autonomy of the states is guaranteed by Article IV, Section 3, of the U.S. Constitution, which requires the approval of both the Congress and the states involved before any state boundaries can be altered.[xi] Article V of the Constitution guarantees that the equal representation of every state in the U.S. Senate shall not be deprived without consent of the state.

The states also have substantial fiscal autonomy. They cannot tax imports or exports,[xii] or use their tax policy to place an undue burden on interstate or foreign commerce, or tax the instrumentalities of the federal government. Otherwise, they generally have great discretion in taxation. In 2003 forty-five states had general sales taxes[xiii] and forty-one had broad-based personal income taxes. Together these taxes account for approximately 70 percent of all state tax revenue. Other state taxes typically include taxes on alcoholic beverages, gasoline and tobacco, and inheritance taxes. States that produce oil, natural gas, and coal often use severance taxes (taxes on the extraction of these natural resources). Most states also generate revenue from various fees (such as for automobile registration) and from lotteries. Most states have constitutional requirements for the submission of balanced budgets. States, however, do borrow money for major capital expenditures. The states alone are responsible for repayment of these debts; the federal government has no legal responsibility to step in if a state is on the verge of default.

While there is relatively little constitutional coordination between state and federal tax policy, the states are affected by federal tax law. For example, some states tie their own income and inheritance tax rates to the federal Internal Revenue Code. In 2001 the federal government lowered both of these tax rates, causing a corresponding decrease in state tax rates and a reduction in state tax revenues. Furthermore, when Congress eliminated the deductibility of state sales taxes for federal tax purposes, the states were implicitly encouraged to rely more heavily on income taxes since state income taxes retained their deductibility.

State taxation is also affected by tax competition among the states. Because the states compete with each other for citizens and business investments, they cannot allow their total package of taxes to get too much higher than those of the other states. In 2002 state tax burdens, expressed as a percentage of personal income, ranged from a high of 13.6 percent in Maine to a low of 7.6 percent in New Hampshire.[xiv] Throughout the United States the average total burden of all state taxes was 10.2 percent. Thirty-six of the fifty states fell into the range between 9 percent and 11.9 percent.

State tax and spending policies are also influenced by a substantial federal program of grants-in-aid. By 2002 federal grants-in-aid to state and local government exceeded $350 billion distributed through more than 600 different programs. In 2003 federal grants-in-aid constituted almost 25 percent of state revenue. While federal grant-in-aid-programs reach almost all areas of public policy, including such traditionally local concerns as police protection and education, the two largest federal programs, by far, are for social welfare and health care. Under these federal programs the states merely pass through federal funds to individuals. According to the most recent estimates, more than 60 percent of federal grant-in-aid funding is dedicated for payments to individuals.[xv] Unlike other federations, almost all of the transfer funding from the U.S. federal government to the state and local governments is categorical or conditional. There are few

general or unconditional transfer programs (see further discussion below).

Congress often uses the incentive of financial aid to encourage the states to develop and administer programs that are high on the agenda of Congress. Even without federal funding, Congress and the courts can sometimes compel the states to develop and administer programs, especially in the name of civil rights. For example, recent federal legislation requires mandatory HIV testing of newborn babies, making the public streets accessible to the handicapped, and the regular testing of school children in mathematics and reading. In 1995 Congress passed the Unfunded Mandate Reform Act, which attempts to limit the power of the federal government to enact unfunded mandates of this sort. The federal government, however, has no general authority to compel the states to implement or to administer its programs.[xvi]

Local government - cities, towns, counties, and special districts – are not mentioned in the Constitution. Local government is a matter for the states. In legal theory, local government is wholly a creature of the state. Local governments' institutional structures are defined, their responsibilities are delineated, and their powers of taxation are all derived from state government. In fact, it is the state government that gives local governments the breath of life, without which they could not even exist. Whatever legal theory might say, the political reality is that U.S. cities and towns often enjoy a high degree of autonomy and independence. This is true for several reasons. First, in some cases, towns and local communities preceded state government. Connecticut, for example, was created as little more than a federation of local communities. Furthermore, local governments are well represented in state legislatures and have been able to achieve a considerable degree of independence through the legislative process. About half the states provide what is called "home rule" for local governments. For example, under Pennsylvania's constitutional provision for home rule, local government "may exercise any power or perform any function not denied by this Constitution, by its home rule charter, or by the General Assembly." Home rule provides some degree of flexibility for local governments. Finally, local governments have become participants in the complex web of intergovernmental relationships that have developed in the United States since the 1960s.

LOGIC OF THE CONSTITUTIONAL DISTRIBUTION OF POWERS AND RESPONSIBILITIES

The framers of the American Constitution were concerned with individual liberty, or what the Declaration of Independence calls "life, liberty and the pursuit of happiness." The American experience taught that liberty could be threatened both by distant, unaccountable government (the United Kingdom) on the one hand, and by local government that, while democratically elected, too often reflected majoritarian passions and short-term selfish interests, on the other hand. While democracy was a necessary condition for the protection of rights, it could itself degenerate into the tyranny of the majority. In *Federalist Number 10*, James Madison articulates the view that rights are better safeguarded in an extended republic, in which the existence and representation of many interests would encourage a more deliberative decision making in which the public good and the rights of the minor party are protected. At the same time, the framers recognized that the consolidation of power in the hands of some distant, federal government could degenerate into imperial rule, itself a threat to the public interest and individual rights. The solution was federation, in which the states would continue to be responsible for most domestic policy making. At the same time, a strong national government was necessary to deal with

national concerns, such as interstate commerce and foreign and international affairs.

The logic of this analysis suggests dual federalism, based on the dual sovereignties of the states and the national government. While some scholars argue that the United States operated in this dual manner during its early development, others suggest that there was more overlap in the actual operations of the state and federal governments than the dualistic model suggests. Whatever the merits of these historical arguments, the actual functioning of modern American federalism is clearly better characterized as cooperative. By the latter half of the twentieth century there was scarcely a policy area in which the federal government, the states, and even local government were not involved. Because federal laws are the supreme law of the land, and because of the federal government's very substantial financial resources, some argue that the federal government has become so dominant that contemporary American federalism is no longer cooperative but, rather, has become permissive, with the states exercising only those powers *permitted* to them by the federal government.[xvii] Certainly federal-state relations are more coercive than they were during the 1950s. Since the late 1960s American federalism has become characterized by considerably expanded federal power over the states, as reflected in increased federal preemption of state law and federal encroachments on state tax bases, and by the federal government compelling and pressuring states to comply with federal policies through mandates, regulations attached to grants-in-aid, and court orders.[xviii]

EVOLUTION OF THE CONSTITUTIONAL DISTRIBUTION OF POWERS AND RESPONSIBILITIES

Constitutional Amendments

The U.S. Constitution has been amended twenty-seven times. While all of these amendments have some impact upon the constitutional distribution of powers and responsibilities, some have had very substantial impact.

The Tenth Amendment, adopted in 1791, makes explicit what had been implicit in the original Constitution; namely, that all powers not delegated to the federal government by the Constitution, nor prohibited to the states, are reserved to the states. The Tenth Amendment was often used by the U.S. Supreme Court during the first third of the twentieth century to limit the reach of federal power under both the Interstate Commerce Clause and the Taxing and Spending Clause.[xix] This position was abandoned beginning in 1937 as the Court upheld President Franklin D. Roosevelt's New Deal and subsequent federal regulatory and social welfare legislation.[xx] There are a few Supreme Court decisions in the 1990s, however, in which the Supreme Court has invoked the Tenth Amendment to invalidate federal legislation.[xxi]

The Eleventh Amendment was adopted in 1798 to overturn the Supreme Court's 1793 decision in *Chisholm v. Georgia*, which had held that a state could be sued in federal court by a citizen of another state without its consent. The Eleventh Amendment reverses this holding by providing that the federal courts lack jurisdiction to decide a case "commenced ... against one of the United States by Citizens of another State." In the 1990s and early 2000s the U.S. Supreme Court cited this provision of the Eleventh Amendment to limit the authority of the federal government to empower individuals to sue a state for an alleged deprivation of rights.[xxii]

Of the three Civil War Amendments, the Fourteenth has had the most impact on the distribution of powers and responsibilities in the American federal system.[xxiii] Section 1 of the

Fourteenth Amendment (1) defines both federal and state citizenship, matters on which the original Constitution had been silent; (2) prohibits a state from making any law "which shall abridge the privileges or immunities of citizens of the United States"; (3) prohibits a state from depriving "any person of life, liberty, or property, without due process of law"; and (4) prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." Section 5 of the Amendment gives Congress "power to enforce this article by appropriate legislation." By and large the Fourteenth Amendment is concerned with protecting rights – both of individuals and of corporate entities – against state encroachment. During the latter part of the nineteenth century and the first third of the twentieth century, the U.S. Supreme Court used the Fourteenth Amendment (especially the due process clause) to protect property rights against state regulation. More recently, the Court has invoked the same due process clause to invalidate state laws and practices that it found to violate individual rights protected by the Fourteenth Amendment. The Court has been equally vigorous in using the Fourteenth Amendment's equal protection clause to protect the rights of racial minorities, women, the handicapped, linguistic minorities, resident aliens, and other groups. Furthermore, Congress has often used its authority under Section 5 of the Fourteenth Amendment, and similar provisions in the Thirteenth and Fifteenth Amendments, to enact such important civil rights laws as the Civil Rights Act, 1964, and the Voting Rights Act, 1965. The federal role in affirmative action, in school desegregation, in promoting the rights of the handicapped, and in bilingual education are all founded on Congress's authority under Section 5. The Fourteenth Amendment has brought about a fundamental change in the nature of American federalism and has added to both the federal government's powers and its responsibilities.

The Sixteenth Amendment, adopted in 1913, empowers the federal government to enact income taxes, and it has also had a substantial impact on the expansion of federal power. The federal income tax, while originally levied at a low rate and applied only to those with high incomes, has become a broad-based federal tax that generated almost $1 trillion in revenues by 2001. These revenues are used to finance a substantial program of grants-in-aid to state and local governments.

While federal grants-in-aid in some form have always been part of the American federal system, the modern system can be traced to the presidency of Republican Dwight D. Eisenhower (1953-61). Building upon a bipartisan consensus of support for cooperative federalism, the federal government established a federal-state partnership for the building of the nation's interstate highway system.[xxiv] By 1960 the national government distributed almost $7 billion in intergovernmental transfers. While the federal grant-in-aid system expanded during the 1950s, by the end of that decade, approximately 70 percent of the funds still went for four purposes: highways, aid to the aged, aid to dependent children, and employment security. Over 90 percent of the funds went to state governments.

During the 1960s the grant-in-aid system expanded tremendously, both in terms of the amount of federal funds and the number of programs. By 2000 the federal grant-in-aid system had grown to more than $350 billion distributed through more than 600 different programs. They reach almost all areas of public policy, and awards are given both to states and to local units of government, creating a vastly more complex web of intergovernmental fiscal, administrative, and political relationships than existed forty years earlier.

Other amendments have also been important. The Seventeenth Amendment (1913) provides for the direct election of U.S. senators. Presumably, this weakens the representation of the states in the Senate since, under the original Constitution, senators were appointed by their

respective state legislatures.[xxv] One notes, however, that the amendment fixed what had already become the practice in a number of states. The Eighteenth Amendment (1919) prohibits "the manufacture, sale, or transportation of intoxicating liquors," and it makes clear that both "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." The Twenty-First Amendment (1933) repeals the Eighteenth Amendment but also provides that "the transportation into any State ... of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[xxvi]

Judicial Interpretation

The U.S. Supreme Court has played a major role in the allocation of powers and responsibilities in the United States.[xxvii] In the early years of the American Republic, the U.S. Supreme Court, under the leadership of Chief Justice John Marshall, used its authority to enhance federal power. For example, in *McCulloch v. Maryland* (1819), the Court upheld the chartering of a national bank despite the fact that there was no clear authority in the U.S. Constitution for the federal government to issue bank charters. The Court maintained that the constitutional grants of authority to the federal government should be broadly interpreted and that the elastic clause of Article I, Section 8, expanded rather than restricted national power. Five years later, in *Gibbons v. Ogden*, the Court took an exceptionally broad view of Congress's power to regulate interstate commerce, maintaining that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." Furthermore, the Marshall Court sometimes used its power of judicial review to invalidate state legislation that threatened property rights.[xxviii]

Beginning in the 1880s the Supreme Court took a narrower view of federal authority, often holding that federal attempts to regulate economic affairs violated the Tenth Amendment to the Constitution by invading areas reserved to the states.[xxix] During the latter half of the nineteenth century and the first third of the twentieth century, the Court also took a narrow view of state authority to regulate economic affairs, ruling that such state regulations deprived individuals of their liberty without due process of law, a violation of the Fourteenth Amendment.[xxx]

The Court maintained its narrow view of federal and state authority during the first term of Franklin D. Roosevelt's New Deal presidency (1933-37), but with Roosevelt's overwhelming re-election victory in 1936 and the threat of his court packing plan,[xxxi] the Court again reversed course and began to uphold the exercise of federal authority under both the interstate commerce clause and the taxing and spending clause of the Constitution.[xxxii] Similarly, the Court upheld state economic regulatory legislation against challenges that it violated the due process clause of the Fourteenth Amendment.[xxxiii] On the other hand, the Court often struck down state legislation when it appeared to conflict with either federal laws or with the need for the free flow of interstate commerce.[xxxiv] In addition, the Court began to invalidate state laws and practices where they violated individual rights protected by the due process and equal protection clauses of the Fourteenth Amendment. Beginning especially in the 1950s, the Court invalidated both federal and state laws because they violated the Bill of Rights, bringing about a "revolution in rights and liberties" in the United States.[xxxv]

This dual standard of a permissive attitude towards economic regulation and a restrictive attitude towards laws that infringe upon individual rights and liberties has continued until the

present time. There are some recent decisions, however, in which the Court has held that there are limits to federal authority under the interstate commerce clause[xxxvi] and that some state economic regulatory legislation, especially in the area of environmental protection, is invalid because it constitutes a taking of private property without just compensation in violation of the Fifth Amendment (made applicable to the states by the due process clause of the Fourteenth Amendment).[xxxvii] In recent years the Court has, by and large, maintained its defence of such individual rights as freedom of speech, press, assembly, and religion. In 2003 the Court went even further, invalidating a state law against sodomy, maintaining that it was protected by a right to privacy implicit in the concept of liberty as that term is used in the Fourteenth Amendment.[xxxviii]

Finally, as discussed more fully below, the Supreme Court has, since the *Garcia* case of 1985, drawn back significantly from judicial review of federal legislation on the grounds of federalism (i.e., that it may encroach on state jurisdiction); instead, it has ruled that state interests are better protected through political institutions, particularly Congress.

Overview of Historic Trends

Several historic social and economic forces have shaped American federalism over the past 200 years: the purchase of the Louisiana Territory from France in 1803 and the subsequent opening of the American west, the Civil War, large-scale immigration during the late nineteenth and early twentieth centuries, industrialization and urbanization, the Great Depression and President Franklin Roosevelt's New Deal programs of the 1930s, the Second World War and the Cold War that followed it, technological changes, and globalization. While these events increased the role of the federal government in the American federal system, all governments – federal, state, and local – do more than they did 200 years ago. All governments are involved in making and implementing public policies in areas unknown to the American founders. In the context of American federalism, this has meant the intergovernmentalization of public policy. Increasingly, policies are not in the exclusive domain of any one government but, rather, involve actors from all planes of government. Thus, dual federalism has come to be replaced by cooperative federalism as the paradigm for understanding the actual operation of the system. While there is a general trend for the federal government to be the most important actor in many policy areas, the role and relative influence of the actors varies from one policy area to another, from one issue to another, and even from one state to another.

MAINTENANCE AND MANAGEMENT OF THE DISTRIBUTION OF POWERS AND RESPONSIBILITIES

American federalism is characterized by both cooperation and conflict. The period of the New Deal through the 1950s was the high point of cooperative federalism. The states and the federal government usually agreed on policy goals, and the states were intimately involved in the implementation of programs. With the Great Society programs of the mid-1960s federal-state relations became more conflicted. The Democratic administration of President Lyndon B. Johnson was suspicious of the states' willingness to support its anti-poverty and civil rights initiatives, and it began to channel federal funds directly to the cities and other units of local government, bypassing the states altogether. In addition, most new federal grant-in-aid programs

emphasized categorical (conditional) grants, which gave the states and cities little discretion in how the federal funds were used, compared with broad-purpose bloc grants favoured by the states. Third, the number of federal programs increased dramatically, reaching many policy areas that were traditionally the exclusive responsibilities of the states. While there have been several efforts to "reform" the federal system, especially under Presidents Richard M. Nixon and Ronald Reagan, the pattern of cooperation and conflict continues.

Cooperation and conflict are built into the division of powers and responsibilities created by the U.S. Constitution. The powers and responsibilities of the federal and state governments are concurrent and overlapping and require cooperation. At the same time, federal and state political leaders often have different priorities and perspectives, bringing about conflict in the actual exercise of power.

Since the mid-1960s there has been relatively little conflict over the substance of federal policy initiatives. Most state political leaders have come to accept the broad scope of federal authority and rarely challenge the exercise of federal power. States do not always seek to maintain their prerogatives and frequently are quite willing to accept federal policy leadership and federal funds. Conflict is much more about the manner in which federal power is exercised.

First, while most federal aid programs are in the form of narrowly focused categorical grants, the states generally prefer broad bloc grants, which give them more flexibility. Second, even when bloc grants are used, the states maintain that federal funding is inadequate. Third, since the 1980s the federal government has relied increasingly on mandates rather than on grant programs to accomplish its objectives. Fourth, the states maintain that they are not adequately represented in the formulation of federal programs and are simply assigned roles in their implementation. Finally, congressional legislation often preempts a field and precludes state action in the same policy area.

One consequence of the increased intergovernmentalization of American public policy is that it is sometimes difficult for the citizenry to know who is accountable for policy failings. State and local officials tend to blame the federal bureaucracy, while federal officials claim that state and local efforts are inadequate. Second, while one of the traditional strengths of American federalism is that local officials are accountable to local constituencies, when local programs are funded from federal sources, local officials may become more accountable to their funding providers in Washington, D.C., than to their constituents.

Conflict Management

American federalism has developed several mechanisms to manage the conflict that is characteristic of the system. These mechanisms are legal, political, and administrative. Except for the judiciary, all of these mechanisms are extraconstitutional. Some are informal while others are institutionalized.

Many American presidents have taken a substantial interest in federalism, and several have attempted to reform the federal system of grants-in-aid in response to pressures from the states. In recent years most presidents have appointed a special assistant for intergovernmental affairs and charged him or her with pursuing the president's intergovernmental agenda and with hearing issues raised by the states. Generally, however, efforts at federalism reform did not generate much interest among the citizenry, and no American president – Republican or Democrat - has let his belief in federalism stand in the way of his policy preferences.

State governors are often articulate spokespersons for state interests in the distribution of

powers and responsibilities in American federalism. Individually, governors, working with the state's congressional delegation, can have an impact on how specific federal programs are structured and implemented. In addition, at least thirty-two states have offices in Washington to lobby Congress and the executive branch when their state's vital interests are affected by pending legislation or administrative action.

Collectively, the governors are organized into the National Governors Association (NGA). The NGA's main office is in Washington, D.C., and it attempts to present a unified position on issues that affect state interests. Because of the diversity of the states, the NGA works on a consensus principle and takes stands on issues only when there is near unanimity among the governors. Also because of this diversity, the governors are organized into two partisan organizations, the Democrat Governors Association and the Republican Governors Association, and a number of regional organizations, such as the Western Governors Association, the Southern Governors Association, the Coalition of Northeastern Governors, and the Midwestern Governors Conference.

The normal process of legislation in the U.S. Congress often involves conflict and debate about the extent of federal and state powers. Nevertheless, the trend over the past fifty years has been for Congress to expand federal authority, often at the expense of the states. At the same time, individual members of both the House of Representatives and the Senate are sensitive to local interests, to supporting special projects, to devising funding formulas, and to sponsoring legislation in support of state and district needs. In addition, many individual members of Congress are responsive to the needs of state and local officials, and will often intervene with the federal bureaucracy on behalf of local interests.

Members of state legislatures are organized into the National Conference of State Legislatures (NCSL), which lobbies Congress and the federal executive on behalf of state interests. Because of the diversity of its membership, it is often difficult for the NCSL to take a united stand on issues.

While the role of the U.S. Supreme Court is especially crucial, all federal courts play an important role in resolving federal-state conflicts. While these conflicts sometimes raise constitutional issues regarding the proper exercise of federal or state authority, they are even more likely to involve questions of statutory interpretation or the legality and appropriateness of administrative procedures. In recognition of the important role of the courts in resolving federal-state conflicts, the State and Local Legal Center was created in 1983 to help prepare state attorneys for their court appearances and to submit *amicus* briefs in federalism cases.[xxxix] The states have become much more active in defending and promoting their interests through litigation and have had some significant victories in recent years.

Beginning in the 1970s state-federal judicial councils were formed in most of the states and were charged with the responsibility of maintaining continuing communication on all joint problems and of mitigating the friction between state and federal courts. While these joint councils addressed some practical problems, such as the coordination of court calendars, few exist today. The National State-Federal Council was created in 1992, but that body also lapsed into desuetude. State judges, however, continue to serve on the major committees of the federal Judicial Conference. The Federal-State Jurisdiction Committee of the Judicial Conference is especially relevant because it is primarily concerned with developing recommendations about legislation affecting state and federal jurisdiction, and it attempts to promote state-federal judicial cooperation generally.[xl]

Far more important for the resolution of federal state judicial conflict is the National

Center for State Courts (NCSC), which brings together the Council of [State] Chief Justices (CCJ), the Conference of State Court Administrators (COSCA), and other state trial and appellate judges, and which provides information to Congress and the federal judiciary on issues of concern to state judiciaries.

The U.S. Advisory Commission on Intergovernmental Relations, which had been created in 1959 to monitor federal-state relationships and to make recommendations for their improvement, had its funding eliminated from the federal budget in 1996, effectively ending its existence. According to one observer, "Clearly, the perception of a need for general purpose intergovernmental specialists had waned in Washington, D.C."[xli] Even so, however, most federal agencies responsible for administering domestic programs have institutionalized mechanisms for state and local input into their rule-making and other decision-making processes.

While American political parties focus more on winning elections than on issues, both Republicans and Democrats have, from time to time, articulated concern with the distribution of powers. The Republicans, especially in the 1980s and early 1990s, advocated a diminished federal role and the devolution of responsibilities to the states. The Democrats, while often campaigning on the basis of new federal policy initiatives, have also advocated a reform of the federal grant-in-aid system so as to give states more discretion in policy implementation. Even so, neither political party has let its interest in federalism stand in the way of its policy preferences. Both Republicans and Democrats have supported new federal programs that have the effect of diminishing state power.

The distribution of powers and responsibilities in the American federal system is affected by two types of interest groups. First, as noted already, state and local officials are organized into a variety of associations that seek to promote their interests in national policy making. The major players in this intergovernmental lobby are the "Big Seven" – the National Governors Association (NGA), the National Conference of State Legislatures (NCSL), the U.S. Conference of Mayors (which represents larger cities), the National League of Cities (which represent smaller cities), the National Association of Counties, the Council of State Governments (CSG), and the International City Managers Association (ICMA).[xlii] Given the diversity of interests they represent, while they can sometimes reach a consensus on broad principles, they tend to pursue their own interests on more detailed policy questions. Other state officials are also organized into associations that lobby in the national arena when their interests are affected. Examples include the National Association of [State] Attorneys General, the Council of Chief State School Officers, the Council of [State] Chief Justices, and the American Association of State Highway and Transportation Officials.

Other interest groups affect the distribution of powers and responsibilities through their normal lobbying activities. For example, Mothers against Drunk Driving (MADD) lobbies in both the federal and state arenas to advance its goal of reducing the practice of driving a motor vehicle while under the influence of intoxicating beverages. MADD had won several victories in state legislatures when it turned to the federal government in 1984 to get Congress to enact a law reducing federal highway funds to states unless they raised the age for the purchase of alcoholic beverages to twenty-one.[xliii] In 2003 MADD used the same strategy to lobby Congress to enact a law that would reduce a state's federal highway funds unless it adopted a 0.8 blood alcohol standard to determine intoxication.

Because American federalism is a non-centralized matrix rather than a decentralized hierarchy,[xliv] the national government has no generalized role in monitoring or supervising the states. At the same time, if a state accepts federal funds for specific programs, federal officials

may monitor the administration of the programs and hold the state accountable for how the funds are expended. In addition, if a state official violates some prohibition of the U.S. Constitution, or fails to comply with some valid federal law, then the offending state officials may be sued in federal court. Courts can order compliance and even find that a non-complying state official is in contempt of court. Finally, both state and federal officials can be (and are) indicted for violation of the criminal law. There have been many federal prosecutions and convictions of state and local officials for such crimes as bribery, corruption, and obstruction of justice.

The states have little recourse for alleged violations of the Constitution by federal officials. The principle remedy is political, although states may and do bring legal actions against federal officials. The doctrine of nullification, by which a state claimed it could nullify the operation of a federal law it believed unconstitutional, was always controversial and was thoroughly discredited by the American Civil War.

ADEQUACY AND FUTURE OF THE DISTRIBUTION OF POWERS AND RESPONSIBILITIES

Whether the actual distribution of powers and responsibilities is consistent with the design of the original Constitution is, of course, arguable. According to James Madison in Federalist No. 45, "The powers delegated ... to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects ... The powers reserved to the several States will extend to all the objects which ... concern the lives, liberties, and properties of the people, and the internal order, improvements, and prosperity of the State." The scope of federal activities has expanded tremendously, and the sharp distinction between federal and state roles suggested by Madison has become blurred. While there are some who conclude that the actual functioning of American federalism is no longer consistent with the values embedded in the original Constitution, there are others who claim that the U.S. Constitution is a living document, broad enough to be interpreted and adjusted to the needs of each generation.

To a considerable extent, contemporary American federalism depends on both strong states and a strong federal government. Every federal system is challenged by both centrifugal and centripetal forces. If either the central government or the states are weak, then the federal union is threatened by disintegration on the one hand or by excessive centralization on the other hand.

The weak American federal government was challenged by the centrifugal forces of state and regional diversity many times during the nineteenth century, culminating in the American Civil War. Buttressed by victory in the war, the subsequent constitutional amendments, westward expansion, and rapid industrialization, the federal government of the twentieth century was much stronger than was that of the nineteenth century.

Similarly, some argue that the American federal union was challenged by excessive centralization during the period between the 1930s and the 1960s. Beginning in the 1960s most states developed broad-based and relatively stable revenue systems, modernized their governmental institutions, created modern and professional administrations, and became more representative of their populations. By the 1980s the states were generally strong and representative constitutional polities with the financial and political resources necessary to play an important policy-making role within the context of American federalism.

Contemporary Issues

By way of conclusion one may note briefly that the actual distribution of powers and responsibilities in the American federal system is likely to be affected by three contemporary challenges: one constitutional, one political, and one international.

Beginning in 1937 the U.S. Supreme Court began to interpret the interstate commerce powers of Congress so broadly that its authority seemed unlimited. In fact, from 1937 through 1995, there was only a single instance in which the Court held that Congress had exceeded its delegated powers,[xlv] and even that decision was reversed nine years later.[xlvi] Furthermore, in 1985 the Court seemed to suggest that questions of the scope of federal power should be resolved through the political process rather than through constitutional litigation.[xlvii] In 1995, however, the Court invalidated the federal Gun-Free School Zones Act, 1990, as going beyond Congress's power under the interstate commerce clause.[xlviii] This decision, and a number of other decisions supporting the states, was decided by a vote of five-to-four, so whether it marks the beginning of the end of the Court's sixty-year pattern of upholding the exercise of federal authority or whether it is a temporary aberration will depend on future appointments to the Supreme Court and on political dynamics generally.

Second, until the 1960s U.S. representatives and senators were generally closely tied to their states' political parties. The decline of American political parties, however, has weakened this linkage, and members of Congress have become much more subject to the pressures of nationally organized interest groups. As a consequence, Congress is less reflective of state interests and more likely to enact legislation in response to perceived national demands, often expanding federal authority and reducing state power.

Finally, the United States is a signatory to both the North American Free Trade Agreement (NAFTA) and the World Trade Agreements (WTO), the latter including the General Agreement on Tariffs and Trade (GATT). These trade agreements are binding international obligations, which the United States must fulfill regardless of its internal political arrangements. According to one observer, "the trade pacts create a wide range of new limits and duties for state and local government."[xlix] While the impact of NAFTA and the WTO has thus far been relatively minor, these agreements carry within them a significant potential impact on the distribution of powers and responsibilities in the American federal system.

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[i] The American Electoral College system apportions electoral votes for the president and vice-president among the states. Because Puerto Rico (as well as the other territories) is not a state, it has no electoral votes.

[ii] About 800,000 Indians live on reservations, mostly in the western part of the United States. The largest Indian tribe is the Navajo, with about 250,000 members and a reservation of 17 million acres.

[iii] Connecticut and Rhode Island continued to function under their colonial charters until they replaced them with constitutions in 1818 and 1842, respectively.

[iv] Rhode Island refused to send a delegation to the convention.

[v] For a good telling of that story, see Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the*

Constiutional Convention, May-September 1787 (Boston: Little, Brown and Company, 1966).

[vi] The Constitution does, of course, empower the states to participate in the new federation by appointing presidential electors, selecting U.S. senators, conducting federal elections, and so on. In addition, the Constitution places limits on the power of the states (especially in Article I - "No State shall enter into any Treaty, Alliance, or Confederation...") and imposes new obligations on them (especially in Article IV - the rendition of fugitives from justice).

[vii] Daniel J. Elazar, "Confederation and Federal Liberty," *Publius: The Journal of Federalism* 12, 4 (Fall 1982): 13. For a similar conclusion, see Jack Rakove, "The Legacy of the Articles of Confederation," *Publius: The Journal of Federalism* 12, 4 (Fall 1982): 45-66.

[viii] See Ellis Katz, "The Development of American Federalism, 1763-1865," *The Federal Idea: A History of Federalism from the Enlightenment to 1945*, Andrea Bosco, ed. (London: Lothian Foundation Press, 1991), pp. 39-50.

[ix] Thirty-one years after the Constitution was written, Chief Justice John Marshall pointed out this difference in holding that the Constitution's "Necessary and Proper" clause leads to an expansive, rather than a restrictive, view of federal powers. See *McCulloch v. Maryland*, 17 U.S. [Wheat.] 316 (1819).

[x] The U.S. Supreme Court has been very deferential to state court interpretations of state constitutions and state laws. See, for example, *Michigan v. Long*, 463 U.S. 1032 (1983), holding that, where a state case is decided wholly on the basis of a state constitution or statute, the United Supreme Court will not review it. For interesting discussions of this "new judicial federalism," see *State Constitutions in the Federal System* (Washington: U.S. Advisory Commission on Intergovernmental Relations, 1989); and *Annals of the American Academy of Political and Social Science* 496 (March 1980).

[xi] Boundary disputes between states are settled by the U.S. Supreme Court.

[xii] "Except," according to Article I, Section 10 of the Constitution, "what may be absolutely necessary for executing its inspection Laws."

[xiii] A contemporary controversy concerns the authority to tax Internet sales. In 1998 Congress enacted the Internet Tax Freedom Act, imposing a temporary moratorium in state sales taxes on the sale of goods or services transacted electronically through the Internet. The moratorium was extended by subsequent legislation. State officials claim that this ban costs the states $13 billion in tax revenues each year, an amount that will grow as Internet sales grow.

[xiv] Excluding Alaska, which gets most of its revenue from oil royalties. The tax burden in Alaska in 2002 was 6.3 percent of personal income.

[xv] John Kincaid, "The State of U.S. Federalism, 2000-2001: Continuity in Crisis," *Publius: The Journal of Federalism* 31, 3 (Summer 2001): 1-69. See also, John Kincaid, "De Facto Devolution and Urban Defunding: The Priority of Persons Over Places," *Journal of Urban Affairs* 21, 2 (Spring 1999): 135-167.

[xvi] See *Printz v. United States*, 521 U.S. 98 (1992), invalidating a federal requirement that local officials conduct background checks on gun purchasers.

[xvii] This is the view of Michael D. Reagan and John G. Sanzone, *The New Federalism* 2nd ed. (New York: Oxford University Press, 1981).

[xviii] The term "coercive federalism" was coined by John Kincaid. See John Kincaid, "From Cooperation to Coercion in American Federalism: Housing, Fragmentation and Preemption, 1780-1992," *Journal of Law and Politics* 9 (Winter 1993): 333-433; and John Kincaid, "From Cooperative to Coercive Federalism," *Annals of the American Academy of Political and Social Science* 509 (May 1990): 139-152.

[xix] See, for example, *Carter v. Carter Coal Company,* 296 U.S. 238 (1936); and *United States v. Butler*, 297 U.S. 1 (1936).

[xx] Examples include *National Labor Relations Board v. Jones and Laughlin Steel Corporation,* 301 U.S. 1 (1937); *Steward Machine Company v. Davis*, 301 U.S. 548 (1937); *Wickard v. Filburn*, 317 U.S. 349 (1958); and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

[xxi] See, for example, *United States v. Lopez*, 514 U.S. 549 (1995).

[xxii] For an interesting analysis of this recent development, see Susan Gluck Mezey, "The U.S. Supreme Court's Federalism Jurisprudence," *Publius: The Journal of Federalism*, 30 (1-2) (Winter/Spring 2000): 21-38.

[xxiii] The Thirteenth Amendment abolishes slavery, and the Fifteenth Amendment forbids the denial of voting rights on the basis of race.

[xxiv] The federal highway program actually got its start in 1921, but it was greatly expanded during the 1950s.

[xxv] See Jay Bybee, "Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment," *Northwestern University Law Review* 91 (1977): 500. Ralph A. Rossum argues that "Post-Seventeenth Amendment federalism differs dramatically from the federalism of the framers." See his "Constitution of the United States," *Encyclopedia of American Federalism*, Joseph A. Marbach, Ellis Katz and Troy Smith, eds.

(Westport, CT: Greenwood Press, forthcoming).

[xxvi] Nevertheless, in *South Dakota v. Dole*, 483 U.S. 203 (1987), the U.S. Supreme Court held that the Twenty-First Amendment did not prohibit Congress from denying federal highway funds to states that failed to raise the minimum age for the purchase of alcoholic beverages to twenty-one.

[xxvii] For a detailed analysis of the role of the U.S. Supreme Court in the allocation of powers and responsibilities, see Ellis Katz, "The U.S. Supreme Court and the Integration of American Federalism," *Fédéralisme et Cours Suprêmes/Federalism and Supreme Courts*, Edmond Orban, ed. (Montréal: Les Presses de l'Université de Montréal, 1991), pp. 35-58.

[xxviii] Article I, Section 10, prohibits the states from passing any law "impairing the Obligation of Contracts." The Marshall Court used this provision to invalidate state legislation in several important cases, such as *Fletcher v. Peck*, 6 Cranch 87 (1810); and *Dartmouth College v. Woodward*, 17 U.S. [4 Wheaton] 518 (1819).

[xxix] See, for example, *United States v. E.C. Knight Company*, 156 U.S. 1 (1895); and *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

[xxx] The leading decision is *Lochner v. New York*, 198 U.S. 45 (1905).

[xxxi] After his re-election in 1936, Roosevelt promoted legislation that would have allowed him to appoint an additional justice to the Supreme Court for every justice that was then over seventy years of age. While Roosevelt said that this was necessary because the Court had fallen behind in its work, everyone knew that his real motive was to add additional justices who would be more sympathetic to his New Deal.

[xxxii] *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937); and *Steward Machine Company v. Davis*, 301 U.S. 548 (1937).

[xxxiii] See, for example, *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937).

[xxxiv] Decisions include *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945); *Dean Milk Company v. City of Madison*, 340 U.S. 349 (1951); and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

[xxxv] A good sourcebook for this development is Henry J. Abraham and Barbara A. Perry, *Freedom and the Court* (New York: Oxford University Press, 1994).

[xxxvi] The leading decision is *United States v. Lopez*, 514 U.S. 549 (1995).

[xxxvii] See, for example, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[xxxviii] *Lawrence v. Texas*, 123 S. Ct 2472; 156 L.Ed. 508 (2003).

[xxxix] For a discussion of the effectiveness of the State and Local Legal Center, see John Dinan, "State Government Influence in the National Policy Process," *Publius: The Journal of Federalism* 27, 2 (Spring 1997): 129-142.

[xl] The activities of these state-federal judicial councils are chronicled in the *State-Federal Judicial Observer*, published by the Federal Judicial Center in Washington, D.C.

[xli] Bruce D. McDowell, "Advisory Commission on Intergovernmental Relations in 1996: The End of an Era," *Publius: The Journal of Federalism* 27, 2 (Spring 1997): 123.

[xlii] CSG and ICMA do not lobby but are considered part of the "Big Seven."

[xliii] The law was upheld by the U.S. Supreme Court in *South Dakota v. Dole*, 483 U.S. 203 (1987) over South Dakota's challenge that the law exceeded Congress's spending power and violated the Twenty-First Amendment.

[xliv] For a discussion of the distinction between non-centralization and decentralization, see Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987).

[xlv] *National League of Cities v. Usery*, 426 U.S. 833 (1976).

[xlvi] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

[xlvii] In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), Justice Harry Blackmun, writing for the majority, commented that "we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result," suggesting that that the interests of the states are better protected by their representation in Congress than by any constitutional limits drawn by the Supreme Court.

[xlviii] *United States v. Lopez*, 514 U.S. 549 (1995).

[xlix] Conrad Weiler, "Free Trade Agreements: A New Federal Partner?" *Publius: The Journal of Federalism* 24, 3 (Summer 1994): 113-134