

CHAPTER 3

MYTHS & REALITIES

Do the individual states and local governments retain constitutional sovereignty?

Federalism and Intergovernmental Relations



Preemption and the “Bathroom Law”

> How relevant is federalism today?

Mention the term *federalism* to the average American citizen and you are likely to get little more than a blank stare as a response. The concept of federalism was central to the Framers’ efforts to design a viable constitutional system, yet one rarely hears it mentioned in the news, let alone in general conversations about politics. Nevertheless, federalism and the related concept of *intergovernmental relations* are at the heart of almost every major controversy that arises in our constitutional system.

Consider the battle over North Carolina’s “bathroom law.”

On March 23, 2016, following a special session of the North Carolina state legislature, governor Pat McCrory signed into law “House Bill 2” (HB2), a bill addressing who could (and could not) use “single-sex multiple occupancy bathrooms and changing facilities” in public schools and public buildings. In addition, the law also prohibited any local government in North Carolina from passing ordinances designed to prevent discriminatory employment practices by businesses operating within their jurisdiction.

The bill was a major setback in the effort of the state’s lesbian, gay, bisexual, and transgender (LGBT) movement to expand civil rights protections (see Chapter 5) to members of its community. Specifically, HB2 was aimed at preventing the city of Charlotte from implementing a local ordinance passed one month earlier that prohibited

Most of the news reports about government and politics we hear on a daily basis relate to what is taking place in Washington. But most of the important business of governing actually occurs at the state and local levels and through the institutions of federalism. Pictured here is the Texas State Capitol, located in Austin.

CHAPTER OUTLINE AND FOCUS QUESTIONS

Preemption and the “Bathroom Law”

> How relevant is federalism today?

Federalism and the Evolution of a Compromise

> How has federalism changed over the past two centuries of American constitutional development?

The Actors of American Federalism

> Who are the major actors in the U.S. federal system, and what roles do they play in the federal system?



The lesbian, gay, bisexual, and transgender community has been actively pursuing changing local laws regarding access to public toilet facilities. In February 2015, twelve restrooms at San Diego's International Airport were converted to gender-neutral bathrooms, with signage indicating, "Anyone can use this restroom, regardless of gender identity or expression."

Title IX A provision of the federal government's Education Amendments Act of 1972 that prohibits discrimination on the basis of sex by "any education program or activity receiving federal financial assistance." It is enforced by the U.S. Department of Education's Office of Civil Rights.

introduced before the newly elected council in February 2016 and passed by a vote of 7–4. It included a provision supporting the right of transgender individuals to use the public facilities of their choice. That action sparked a call by opponents for action by the state legislature, and the result was HB2.

The Backlash. The passage of HB2 generated what one source called a political storm in the state, with reverberations nationwide. Within days of its passage, major corporations—some with major offices in North Carolina employing hundreds—expressed opposition to HB2 and publicly pushed for repeal. One major company that had planned to locate a regional office in the state employing four hundred (PayPal) canceled its plans. Several conferences scheduled to be held in North Carolina were moved elsewhere, and several other states prohibited "nonessential" travel to North Carolina by their employees. There were reactions as well from the sports and entertainment industry. The National Basketball Association announced it was reviewing its decision to play the 2017 All-Star game in Charlotte (it eventually moved the event to New Orleans), and the

discrimination against customers by local businesses on the basis of sexual orientation or gender identity and included specific provisions preventing discrimination against the use of public bathroom facilities by transgender customers.¹

Background to HB2

The Charlotte ordinance was the product of a debate dating back to the early 1990s regarding nondiscrimination policies and whether (and how) they should apply to the LGBT community. The issue reemerged in 2014 when the U.S. Department of Education issued a "guidance" to local school districts that received federal funding regarding provisions of the government's 1972 Education Amendments related to sex and gender discrimination, also known as **Title IX**. "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity," the document noted. "Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations."

In response, arguing that the city schools are at risk of losing federal education funds, local advocates for expanding the nondiscrimination policies of Charlotte to include sexual orientation put the issue on the city council agenda. In March 2015, by a vote of 6–5, the ordinance was defeated, but it became a major issue in the next city council election. The ordinance was rein-

National Collegiate Athletic Association noted that future decisions regarding the location of postseason tournaments would take such laws into account. And in moves that drew nationwide attention in the media, Bruce Springsteen, Ringo Starr, and other entertainers canceled engagements in the state in solidarity with the anti-HB2 forces. After canceling a sold-out tour stop in Greensboro just days before it was scheduled, Springsteen noted in a press release that “Some things are more important than a rock show, and this fight against prejudice and bigotry . . . is one of them.”²

The backlash against HB2 and related measures being considered in other states (e.g., Mississippi, Georgia, Tennessee) had some impact over the following weeks. In North Carolina, the state’s attorney general decided that his office could not and would not defend the law if it was challenged in the courts, and the governor issued an executive order clarifying the legislation’s impact on state employees and suggested that certain provisions of the law be reconsidered.

But the national government did not feel that those changes went far enough, and in early May the U.S. Department of Justice notified North Carolina that HB2 was discriminatory under federal law and sought assurances that the state officials “would not comply with or implement House Bill 2’s restriction on restroom access.” In response, on May 9 the state sued the federal government, which in turn brought legal action against the state asking the courts to stop implementation of the discriminatory provisions of HB2. In addition, the Department of Justice threatened to cut off access to millions of dollars in federal funds. A few days after the Department of Justice’s legal action against North Carolina, the U.S. Department of Education reinforced its earlier “guidance” by sending a letter to all state governments noting that they risked legal action as well as the loss of federal funds if their schools failed to comply with the requirement that “transgender students must be allowed to use rest rooms that are ‘consistent with their gender identity.’”

The Role of Preemption. The most obvious impact of HB2 is that passage of the bathroom law placed issues related to LGBT civil rights high on the national political agenda, and the controversy continued through 2016. But it also drew attention to an obscure legal concept that has played a critical role in some of the most significant controversies that have arisen under the U.S. Constitution. In matters of law, that concept—**preemption**—is defined as the act of one legal authority displacing or precluding the action of another jurisdiction.

In the case of HB2, the North Carolina legislature exercised its legal authority to “preempt” the city of Charlotte (and all other local governments in the state) from passing or implementing policies regarding nondiscrimination against members of the LGBT community. In addition, they prohibited North Carolina’s local jurisdictions from passing any laws regarding employment discrimination. All such matters, the law states, are to be subject to state law, not local law. What this law did was, in effect, put a damper on the emerging national movement to end sex-orientation discrimination through changes in local laws. Although other state legislatures had considered similar laws, North Carolina’s was the first to pass such a sweeping preemptive measure that undermined the ability of local governments to deal with issues of discrimination in their communities.

Preemption A legal concept involving the act of one legal authority displacing or precluding the action of another jurisdiction.

Similarly, the steps taken by the U.S. Department of Justice were also based on preemption. Preemption is central to the principle of national supremacy (see Chapter 2) found in Article VI of the U.S. Constitution that essentially settles any issue where the laws of states come into conflict with those of the national government by holding that national policies should prevail. Thus, a few days after the Department of Justice's suit against North Carolina, the U.S. Department of Education reinforced its earlier "guidance" by sending a letter to all fifty state governments noting that they risked legal action as well as the loss of federal funds if their schools failed to comply with the requirement that "transgender students must be allowed to use rest rooms that are 'consistent with their gender identity.'"³ This action proved to be controversial, and in October 2016 the US Supreme Court announced that it would hear a case challenging enforcement of that guidance.

Sovereignty and Self-Government

In this chapter we will focus on American federalism and intergovernmental relations, and in the process we will see how legal preemption has played—and continues to play—a major role in shaping how the United States is governed. Historically, preemption has posed a challenge to two of the most important myths about American government: the *myth of states sovereignty* and the *myth of local self-government*.

The State Sovereignty Myth. The states' sovereignty myth (also known as the "states' rights" myth) is based on a view that the Constitution should be interpreted in a way that gives priority to the laws and policies of states in those areas where it did not give explicit jurisdiction to the national government. As we will see, the argument for states' rights plays a role in controversies from the earliest days of the republic, when the focus was on the banks and slavery, to recent controversies over Obamacare (the Affordable Care Act) and environmental regulations. The myth holds that a fundamental and enduring characteristic of the American constitutional system is a division between the national and state governments in which each is capable of exercising some authority over certain matters under its jurisdiction. Although seemingly a very abstract idea, **sovereignty** was an important legal concept for the Framers. For state officials, the myth stresses their responsibility in dealing with many governmental functions close to the people, and for national officials it highlights the importance of taking into consideration the priorities and needs of state and local governments.

Local Self-Government. The myth of local self-government reflects a long-standing and fundamental belief that at the heart of American democracy is the capacity for citizens to govern themselves in all local matters. Rather than state sovereignty, this myth focuses on the idea of popular sovereignty. Alexis de Tocqueville, a French visitor to the United States in the 1830s, took special note of the strong commitment Americans had toward their local governments. "They are independent in all that concerns themselves alone," he noted about the New England towns he visited, "and among the inhabitants . . . I believe that not a

Sovereignty A concept focused on the ultimate source of authority in any political system.

man is to be found who would acknowledge that the state has any right to interfere in their town affairs. The towns of New England buy and sell, sue and are sued, augment or diminish their budgets, and no [state] administrative authority ever thinks of offering any opposition.”⁴ As we see in the section on the role of local government in the American federal system, the legal reality is quite different from the myth, but the myth of local self-government retains its hold on the general public.

Like the other myths discussed in this book, neither is inherently true nor inherently false; rather, different interests have regarded these myths as more or less true over the decades. For those who work in government, the myths can help them make sense of many of the complex relationships that emerge under the federalism arrangement.

Federalism: Evolution of a Compromise

> How has federalism changed over the past two centuries of American constitutional development?

Among all the compromises and bargains struck at the Constitutional Convention in 1787, none remain more central to the design and future of American government than those that addressed the division of powers between the states and the national government. Almost at the outset, the relationships between the states and the national government were controversial, just as they are today. What has changed over time are the issues at the center of those controversies.

As the product of compromises and bargains among the Framers, federalism had only a vague form when it was first implemented in 1789. As noted in Chapter 2, the proceedings of the convention were held behind closed doors, and the Framers had agreed that no one would discuss what took place that summer in Philadelphia—a promise most of them kept for decades. During the debates over ratification, however, many expressed their opinions about the proposed arrangement, and some did so in response to issues raised by opponents of the new government. And so, without any preconceived notions about how the attempt to mix national and state sovereignties should be worked out, the nation’s new rulers engaged in an ongoing debate from the outset.

Battles over Meaning (1790s–1860s)

At first, the debate focused on the question of which of the two levels of government should take precedence when the two were in conflict: Was the national government primary in all regards, or could states ignore the laws of Congress when they chose? Two competing answers emerged, one centered on the states and the other on the nation.⁵

Supporters of **state-centered federalism** wanted to allow the national government only limited powers. This position was first articulated by Thomas Jefferson and James Madison in 1798 as they argued that states should be able to overrule national laws if they determined that those laws violated provisions of the U.S. Constitution.⁶ Called **nullification**, this approach was rejected by the

State-centered federalism The view that the Constitution allowed the national government only limited powers and that the states could overrule national laws if they determined that those laws were in violation of the Constitution.

Nullification A legal theory espoused by advocates of state-centered federalism that asserted the right of individual states to nullify or invalidate congressional laws and federal court decisions they regarded as unconstitutional.

federal courts as early as 1809, but would later reemerge a number of times during this period when state governments would assert their right to nullify or invalidate congressional policies. For example, in the 1830s South Carolina attempted to nullify congressional tariff policies, which it regarded as unconstitutional. During the 1850s, abolitionists in several northern states attempted to nullify provision of the Fugitive Slave Act of 1850. The question of nullification was essentially settled by the Civil War.⁷

Nation-centered

federalism The view that the authority of the national government goes beyond the responsibilities listed in Article I, Section 8, of the Constitution; it is based on the necessary and proper clause and the principle of national supremacy.

Interstate commerce Trade across state lines, in contrast to intrastate (within state boundaries) trade and foreign trade.

Police powers The powers of state governments over the regulation of behavior within their borders. These police powers were used to justify state jurisdiction over economic matters.

Dual federalism The perspective on federalism that emerged after the Civil War. It viewed the national and state governments as equal but independent partners, with each responsible for distinct policy functions and each barred from interfering with the other's work.

Proponents of **nation-centered federalism** argued that the authority of the national government goes beyond the responsibilities listed in Article I, Section 8, of the Constitution. They contended that the necessary and proper clause and the principle of national supremacy give the national government additional powers to act. Alexander Hamilton was an early advocate of this view, and it was the basis for the U.S. Supreme Court's 1819 decision in *McCulloch v. Maryland* (see the discussion of that case in Chapter 2, on constitutional foundations). Five years later, in *Gibbons v. Ogden* (1824), the Supreme Court dealt another blow to the proponents of state power when it held that a New York law that established a steamboat monopoly between New York City and New Jersey was not constitutional. Only the national government, the Court ruled, could regulate "commercial intercourse"—that is, **interstate commerce**—between states.

The supporters of the state-centered approach did get some relief when, starting in the late 1830s, the Supreme Court made a number of rulings that established the existence of sovereign **police powers**, which a state could exercise as part of its duty "to advance the safety, happiness, and prosperity of its people."⁸ The existence of these police powers was used to justify state jurisdiction over economic matters.

The debate between advocates of state-centered and nation-centered federalism was also conducted on the floor of Congress. Much of it focused on the issue of slavery, and at times the heated discussions turned bitter and even violent. In one particularly notable episode in the period leading up to the Civil War, a senator from Massachusetts was beaten unconscious with a cane on the Senate floor by an angry member of the House.⁹ Ultimately, the conflict over slavery was settled on the battlefields of the Civil War. Out of that bloody confrontation between the North and the South, nation-centered federalism seemed to emerge victorious. The Civil War, it seemed, made it formally possible for the national government to claim a dominant position in the federal system. In reality, however, the story was quite different. As we will see, the myth of state sovereignty was not killed by the Civil War.

From Separation to Cooperation (1860s–1920s)

Instead of domination by the national government, what developed after the Civil War was a system of **dual federalism**, under which the national and state governments were regarded as equal partners—that is, as equally sovereign. Under dual federalism, each level of government is perceived as being responsible for distinct policy functions, and each is barred from interfering with the other's work. Thus, whereas earlier cases had established that the states could not interfere with the national government's regulation of interstate trade, post-Civil

War decisions held that the national government could not interfere with the power of the states to regulate the sale or manufacture of products or services within their own borders. Starting immediately after the Civil War, the Supreme Court declared in a series of rulings that insurance, fishing, lumbering, mining, manufacturing, building, banking, and a variety of other economic activities were not subject to federal regulation but rather could be regulated under the police powers of individual states.

The most explicit statement of dual federalism was issued in 1871, when the Court held that within the borders of each state there are “two governments, restricted in their sphere of action, but independent of each other, and supreme within their respective spheres.” Neither, the Court said, can intrude on or interfere with the other’s actions.¹⁰ Then, in *Hammer v. Dagenhart* (1918), the Court declared that those powers “not expressly delegated to the National Government are reserved” for the states.¹¹ The Court’s use of the word “expressly” was important because it is not a term found in the Constitution; in particular, it is not found in the Tenth Amendment, which addressed this very issue. In fact, when the Tenth Amendment was debated in the U.S. Congress in 1789, the inclusion of this term was voted down.¹² But the myth of state sovereignty was an important feature of the way many people were viewing federalism at the time of the *Hammer* case. Thus, the decision was an expression of dual federalism at its height.

Despite the Court’s reliance on dual federalism during this period, the formal separation between the two levels of government was breaking down in the world of practical politics. The first step in this process was **grant-in-aid programs**, through which state policies and programs were partially funded or given other support. The Morrill Act (1862) gave federal land grants to states for the purpose of establishing agricultural colleges.¹³ Later, cash grants helped

Grant-in-aid programs Federal appropriations that are given to states and localities to fund state policies and programs. The Morrill Act (1862) was the first instance of such a program.



Prior to the Civil War, disputes over federalism and slavery were taken quite seriously. Senator Charles Sumner, an ardent abolitionist from Massachusetts, was nearly caned to death on the Senate floor by Preston Brooks, a member of the U.S. House of Representatives from South Carolina. Brooks had taken exception to remarks Sumner had made about some proslavery members of Congress.

states with agricultural experiment stations, textbook programs for the blind, marine schools, forestry programs, agricultural extension services, state soldiers' homes, vocational schools, road construction, and a variety of other projects. By 1927 these grant programs were bringing state governments \$123 million in national funds annually.¹⁴

Toward Cooperation and Intergovernmental Relations (1930s–1950s)

The Great Depression of the 1930s significantly altered the relationship between Washington and the states. Demand for public services grew. At the same time, state and local governments were in an extremely tight financial situation, because tax revenues had fallen as the economy declined. The national government was expected and willing to respond. There was an explosion of new and cooperative programs in which the national and state governments shared an increasing number of functions. A new kind of relationship had emerged that recognized the interdependence of Washington and state and local governments. Called **intergovernmental relations**, or **IGR**, it is a system in which the various levels of government share functions, and each level is able to influence the others.

The emergence of IGR was an important development in the history of American federalism. It meant that the formal and highly legalistic form of federalism that had previously existed was being replaced by a more flexible and informal approach to nation–state relations. Furthermore, once interactions among various levels of government were treated as IGR rather than as federalism, the door was open for greater participation by many more actors on the federalism stage. Local and regional governments and even private and community groups could now find a role to play.

Under the new system, a variety of grant-in-aid programs were offered, which covered a wide range of policy concerns. The number and size of these programs grew dramatically during this period, increasing from \$100 million in 1930 to \$6.8 billion in 1960.¹⁵ The emergence of IGR was the foundation for this period of **cooperative federalism**. Conflict between Washington and the states diminished somewhat as public officials worried less about what level of government performed certain functions and more about their specific program responsibilities. State and national officials began to see each other as “allies, not as enemies.”¹⁶

At the heart of the system of IGR were a variety of grant-in-aid programs that financed highways, social and educational projects, and other programs. Many were **categorical, or conditional, grants-in-aid**, under which state governments received federal funding for specific purposes only if they met certain general requirements. For example, state highway departments were expected to operate in an efficient and businesslike fashion, free of corruption and undue political influence. Similar standards were applied to welfare programs. If states failed to meet those standards, federal support was withdrawn or sometimes the program was taken over. Thus, during the Depression, Washington took charge of public assistance programs in six states where officials could not meet federal

Intergovernmental relations (IGR) The style of federalism that recognizes the interdependence of Washington and state and local governments. The various levels of government share functions, and each level is able to influence the others.

Cooperative federalism A period of cooperation between state and national governments that began during the Great Depression. The national government began to take on new responsibilities, and state and local officials accepted the government as an ally, not an enemy.

Categorical, or conditional, grants-in-aid Money given to the states and localities by Congress to be used for limited purposes under specific rules.



During the 1950s and 1960s, many cities built major airports with the help of large grants provided by the federal government. However, the controversial and expensive Denver International Airport, opened in 1995 after much delay, was the first major facility to be built since the early 1970s.

requirements. And they closely watched public welfare programs in other states to ensure that they were following federal rules.

Under other federal programs, states received **formula grants** based on population, the number of eligible persons, per capita income, or some other factor. One of the largest of these grants, the Hill–Burton program, used a formula that was heavily weighted to favor states with substantial low-income populations. By 1986, more than \$3 billion in Hill–Burton funds had been used to construct and modernize health-care facilities throughout the United States.

Project grants are awarded only after submission of a specific proposal for a project or plan of action. The Housing Act of 1937 was one of the earliest and largest of these programs. Under the provisions of that act, local governments could obtain funds to build public housing. By the 1960s, there were more than 4,000 such projects, with more than half a million dwelling units. In many instances, the national government required recipient governments to provide a certain percentage of the funds needed to implement the programs. Among these **matching grants** was a program that provided aid to dependent children under the Social Security Act of 1935 and one that gave states \$9 for every dollar spent to build interstate highways.

Just as states found it to their benefit to relax their earlier insistence on asserting states' rights, cities and other local governments also became participants in the federal system during this period. As we will discuss, by the 1930s, American cities were regarded as merely subdivisions of the states. Grants or other forms of support came from state capitals, not from Washington. In 1932, for instance, only the District of Columbia (the nation's capital) received aid from the national government. By 1940, however, the situation had changed. That year, the national government handed out \$278 million in direct grants-in-aid

Formula grants Grants given to states and localities on the basis of population, the number of eligible persons, per capita income, or other factors.

Project grants Grants awarded to states and localities for a specific program or plan of action.

Matching grants Programs in which the national government requires recipient governments to provide a certain percentage of the funds needed to implement the programs.

to local governments for a variety of public housing and public works programs. In the 1950s, the national government expanded the types of projects it would support to include slum clearance, urban renewal, and airport construction. By the start of the 1960s, local governments were receiving \$592 million worth of direct grants.¹⁷

The Urban Focus (1960s–1970s)

The IGR system continued to grow during the 1960s and 1970s, and by 1980 grant-in-aid programs to state and local governments had surpassed \$85 billion. Starting in 1960, other notable changes also took place.¹⁸ For example, grant systems expanded into new policy areas. The percentage of funds devoted to highways and public assistance declined, and funding for programs in the areas of education, health care, environmental protection, worker training, housing, and community development increased significantly.

In a shift in the flow of funds, a growing number of intergovernmental programs were targeted at local, rather than state, governments. President Lyndon B. Johnson's Great Society policies included dozens of new and innovative grant programs with an urban focus. For the first time, community-based programs for feeding the urban poor, training the unemployed, and educating the children of low-income families received support. One of the major themes of these programs was to have "maximum feasible participation" by the recipient communities in the funded programs—a reflection of the local self-government myth. To highlight the importance of this initiative in the Johnson administration, many of these programs were brought under the control of the White House Office of Economic Opportunity. Another important initiative, the Model Cities Program, was designed to help cities develop projects addressing a variety of economic and social problems.¹⁹ In 1974, many of these and related programs were consolidated under community development grants. By 1985, the national government was disbursing nearly \$5 billion directly to local governments through these programs.

Until the early 1960s, Washington used federal grants simply to help states and localities perform their traditional governmental functions. State and local governments might have been asked to modify their personnel policies or their methods of bidding for contracts, but they rarely had to take on new policy responsibilities as a requirement for receiving federal funds. In contrast, the grant programs of the 1960s and 1970s were increasingly designed to involve these governments in achieving national policy objectives. States or localities that initiated new or special programs promoting national goals received substantial grants. The Model Cities Program, for example, encouraged cities to institute programs for improving the quality of life for poor and low-income groups. In other instances, Washington threatened to reduce or cut off funding to governments that failed to change their old policies or to adopt new ones that complied with national standards. It was during this period, for example, that the national government used the threat of withholding highway funds from states that did not lower their maximum speed limits to fifty-five miles per hour.²⁰

Reforming and Devolving (1970s–1990s)

Inevitably, the rapid spread of grant programs and their requirements led to problems. Local recipients criticized federal officials for administering programs without regard for the unique circumstances and dilemmas that they were facing. State officials complained that the national government ignored them in designing and implementing many new programs. Both state and local officials complained about the increasing number of strings attached to federal grants, especially policy mandates, which many recipient governments regarded as costly, irrelevant, and inappropriate. At the same time, members of Congress reacted impatiently to the poor coordination and cooperation in the massive IGR system. As a result, there was almost constant pressure to reform the grant system.

Innovations. Responding to pressures for an increased role for state and local officials, Washington took a number of steps designed to loosen its control over grant programs and to enhance state and local authority. During the early 1970s, for instance, the federal government provided funds to support the formation of local and regional **councils of governments**. These associations of local governments helped their member governments contend with such common problems as coordinating local applications for federal grants. In addition, President Johnson and his successor, Richard M. Nixon, reorganized the administration of the grant system, increasing the power of federal regional offices to ease the burdens on both state and local governments.

In two additional reform efforts, the national government introduced new funding systems designed to further reduce its control and make procedures more flexible. Most of the programs established before this time had been based on categorical, or conditional, grants, in which money given to the states and localities was to be used for limited purposes under specific rules. In the mid-1960s, however, Congress introduced **block grants**. Block grants were a way of consolidating categorical grants in a given area so that the recipients would have greater freedom in their use of funds and so that paperwork would be reduced. By 1974, seven major block grants were in existence that covered such areas as health, education, and other social services. These grants gave state and local officials more freedom in running their programs and freed them from some of the annoying mandates attached to categorical grants. Nevertheless, in financial terms, they represented only a small portion of the total amount of federal aid flowing to states and localities.

The other new form of federal aid was called **general revenue sharing**. This small but innovative grant-in-aid program had no significant conditions attached to it. State and local governments received funds according to a complex formula based on population and related factors. In the late 1970s, the program was modified considerably, and its funding was reduced. By 1988, it had disappeared from the intergovernmental system.

The Reagan Years. The late 1970s and early 1980s produced major changes in IGR. Most obvious was the reduction in federal funding to states and localities

Councils of governments

Local and regional bodies created in the early 1970s with federal funds to help solve problems such as coordinating applications for federal grants.

Block grants Money given to the states by Congress that can be used in broad areas and is not limited to specific purposes, as categorical grants are. They were introduced in the mid-1960s as a means of giving states greater freedom.

General revenue sharing

A small but innovative grant-in-aid program, used in the 1970s and 1980s, that had no significant conditions attached to it. State and local governments received funds according to a formula based on population and related factors.

through grants-in-aid. Grant money began to decline in 1979, but the most significant drops occurred during president Ronald Reagan's first years in office. It was nearly a decade before federal aid returned to its pre-Reagan administration levels.²¹

In addition to reducing federal funding, Reagan also attempted a major overhaul of the intergovernmental system. He formally proposed to Congress that many government functions be returned to the states. In exchange, the national government would assume most public welfare programs. When that strategy failed, Reagan administration officials tried to bring about changes by adjusting the way in which grant-in-aid programs were administered. These efforts had a major impact on the federal system.²² At the same time, Congress was consolidating more categorical programs into broad block grant programs. During the first half of the 1980s, Congress converted dozens of categorical programs into about a dozen block grants. Despite these efforts, however, hundreds of categorical grant programs remained on the books. By 1988—the last year of the Reagan administration—the national government was spending an estimated \$116 billion on grants-in-aid to states and localities.

There is little dispute that the Reagan administration significantly changed the direction of IGR, at least for the short term. Although the absolute amount of federal dollars going for grant-in-aid programs increased through most of the 1980s (from \$91.3 billion in fiscal year [FY] 1980 to \$121.9 billion in FY 1989), the total amount in constant-dollar terms (adjusted for inflation) declined during most of that period, actually dropping from \$168.5 billion in FY 1980 to \$148.1 billion in FY 1989 (in 1996 dollars). Only after Reagan left office did grant expenditures increase in both absolute and constant terms.²³

More important, during this period states and localities were becoming less dependent on federal dollars for carrying out their work. For example, in 1978, 26.5 cents of every dollar spent by state and local governments came from the national government. By 1990, however, only 17.9 cents of every dollar spent by states and localities could be linked to a federal grant-in-aid. As one observer put it, the Reagan years represented the years of “fend-for-yourself” federalism.²⁴

Bush and Clinton. President George H. W. Bush launched no major initiatives in the area of IGR. Nevertheless, two factors emerged that gave cause for concern. First, the combination of cutbacks in federal funding and an extended economic recession created fiscal crises in states and localities throughout the nation. Because many states and localities were required to have balanced budgets, the fiscal crises of the early 1990s had an immediate impact and could not be resolved through governmental borrowing. States from Connecticut to California were forced to take the unpopular steps of cutting budgets and/or raising taxes. However, the flow of federal grant-in-aid money to states and localities picked up once again, and by the time Bush left office, the amount had increased from \$121 billion in FY 1989 to \$193 billion in FY 1993.

A second factor shaping IGR during the early 1990s was the growing number of policy pressures and federally mandated costs that states and localities had to shoulder. The policy pressures came primarily from the White House because president George H. W. Bush made education and the “War on Drugs” program

two of his top priorities. Although Bush called for major reforms and initiatives in these specific areas, he made no request for additional federal funding for the states and localities that would have to carry out many of the policy changes he was suggesting. Thus, although he held conferences and made speeches on the need for local schools to engage in costly educational reforms, President Bush did not support funding for any major new or special programs to accomplish those objectives. Similarly, his much-touted War on Drugs required nearly \$500 million in federal funds, but most of the money was earmarked for federal law enforcement efforts and aid to foreign countries. State and local officials complained bitterly that they needed more money if they were to do their part. After all, they argued, it was the states and localities that had to deal with drug use and its consequences.

Congress was also a source of problems. Members offered and passed well-intentioned legislation requiring state and local action but failed to deal with the associated costs of the new programs. In addition to the previously passed requirements for environmental cleanup, Congress in 1990 passed the much-heralded Americans with Disabilities Act, which included provisions for greater public access to services, transportation facilities, and so forth that would require millions of dollars in additional state and local expenditures for years to come.

Known as **unfunded mandates**, these unfinanced or underfinanced burdens on states and localities became a major issue in national politics and policymaking.²⁵ By 1994, federal lawmakers had developed greater sensitivity to these burdens. The debates on legislation, such as that dealing with clean water, increasingly included consideration of those responsibilities and who should pay for them. In response, in 1995 Congress passed the Unfunded Mandates Reform Act, which required the Congressional Budget Office (CBO) (see Chapter 11, on Congress) to monitor proposals and highlight those that might generate unfunded mandates for state and local governments that exceeded a \$50 million (in 1996 dollars) threshold amount. What their annual reports show is that although many bills considered by Congress impacting states and local governments include unfunded mandates, few, if any, meet the threshold level. For example, of the 224 public laws enacted in 2014, only 16 included intergovernmental mandates, and none was estimated by the Congressional Budget Office to have costs that exceed the intergovernmental threshold.²⁶

President Bill Clinton was also sensitive to the growing demands being made on states and localities when he came into office in 1993. As governor of Arkansas for twelve years, he had developed a national reputation as an innovative leader who understood and appreciated the role of states in the federal system.²⁷ After less than two weeks in office, Clinton held a meeting with the nation's governors to hear their complaints and suggestions. Although his administration did not propose any major reforms of the intergovernmental system, Clinton did establish a policy that permitted federal officials to loosen program requirements to allow states and localities greater flexibility to innovate.

This approach of giving states and localities more room to determine the policies they were to enforce became part of a more general movement toward **devolution** in the IGR system. Devolution involved having the national government turn over more functions with greater responsibility to state and local

Unfunded mandates

Required actions imposed on lower-level governments by federal (and state) governments that are not accompanied by money to pay for the activities being mandated.

Devolution A term indicating the effort to give more functions and responsibilities to states and localities in the intergovernmental system.

governments. During the Clinton years, federal outlays for state and local grants continued to climb, even as welfare programs were reformed and other responsibilities were devolved. By FY 2001—the final budget of Clinton’s term in office—the national government was spending \$317.2 billion on grants—more than double what it had been sending to states and localities a decade earlier. As important, in constant-dollar terms (again based on 2005 dollars), the value of those grants had risen to \$354.8 billion in FY 2001 from \$210.4 billion in FY 1991.

Twenty-First-Century Challenges (2001 and Beyond?)

The growth in federal grants to states and localities has continued under the George W. Bush and Obama administrations, with events such as the attacks of September 11, 2001, the financial market collapse of 2008, and the increasingly divisive nature of U.S. politics playing critical roles in some of the increases.

Bush II. The presidency of George W. Bush began with plans not only to continue the efforts at devolution,²⁸ but also to bring about at least two major changes in IGR. One initiative was in the area of education, in which Bush received bipartisan support for passage of the No Child Left Behind initiative in 2002 that greatly expanded the federal government’s influence in the operations of local schools. No Child Left Behind was carried forward through the Obama presidency, although by 2015 it had been altered many times as criticisms mounted (see Chapter 15, online).

A second important initiative came early in his term, when Bush endorsed an effort to allow **faith-based organizations** to play a major role in the delivery of social and community services that were funded through the federal government. The idea was to remove the legal and administrative obstacles that stopped federal funding of church-related organizations, such as the Salvation Army and local African American congregations that were effectively providing social services in local communities. Bush created the high-profile White House Office of Faith-Based and Community Initiatives,²⁹ but the initiative immediately ran into opposition from those who feared that it would violate the separation of church and state (see the discussion of First Amendment rights in Chapter 4) and also from some religious leaders, who regarded it as a threat to church autonomy. Nevertheless, the Bush administration pushed ahead. By 2008, the White House enhanced that effort by requiring all federal intergovernmental grant programs to give consideration to faith-based initiatives and organizations. The effort was modified and extended to include secular neighborhood organizations by the incoming Obama administration in 2009, which maintains a White House office to oversee and promote the involvement of faith-based organizations in intergovernmental programs.³⁰

But perhaps the most significant developments in intergovernmental relationships during the Bush years were unplanned and came in response to the events of September 11, 2001. The first priority of the Bush administration’s federalism agenda became strengthening **homeland security** in the fight against terrorism. The war on terrorism has had a major impact on the policies and programs of American government. Whereas initially most attention was given to military

Faith-based organizations

Church-related social service organizations.

Homeland security

Domestic programs intended to prevent and, when necessary, deal with the consequences of terrorist attacks on U.S. soil.

responses, by the spring of 2002 attention had turned to domestic security concerns. State and local authorities played a central role in dealing with homeland security issues, from providing security at airports to making plans to guard and protect water supplies and other major public facilities. A request for billions of dollars of federal assistance to first-response agencies—that is, state and local law enforcement, emergency management, and firefighting units—was high on the list of priorities, as were plans to help improve communications and cooperation among governments at all levels.³¹

State Initiatives and the Court. In addition to White House initiatives, many changes in IGR have resulted from innovative state programs and some important U.S. Supreme Court decisions. In areas in which some states believe the federal government is not doing enough, a number of states have taken the lead with innovative policies and programs. In 2006, a bipartisan effort led by California governor Arnold Schwarzenegger led to the passage of groundbreaking laws designed to cut the state’s greenhouse gas emissions by 25 percent by 2020. That same year, a major reform of state health insurance laws in Massachusetts was being viewed by some as the model for other states—and eventually the national government. More controversially, in response to what was perceived as lax federal enforcement of national immigration laws, Arizona in 2010 passed legislation that made illegal immigration a state crime. The law immediately drew critical reactions from the Obama administration and was soon successfully challenged in the courts.³²

In the Supreme Court, starting in the late 1980s, a slim majority of the justices began to lean in the direction of a more state-centered view of federalism that took the constitutional concept of state sovereignty seriously. The influence of that majority has become increasingly evident over the years, and in 1999 the Court issued several decisions that indicated that it would play a major role in shaping the federalism of the future. The trend has continued. Within the Court, at least, the myth of state sovereignty has been taken more seriously with each passing year. This shift was reflected in a 2002 decision that overturned an effort by a federal agency (in this instance, the Federal Maritime Commission) to hear a private citizen’s complaint against a state agency (the Ports Authority of South Carolina). “Dual sovereignty is a defining feature of the Nation’s constitutional blueprint,” wrote justice Clarence Thomas in the majority opinion. “States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union ‘with their sovereignty intact.’”³³

The Obama Years. Economic and political conditions have also had major impacts on today’s federalism. In response to the economic crisis created by the collapse of financial markets in the fall of 2008, Congress passed the American Recovery and Reinvestment Act of 2009, a large “stimulus package” that contained increases in funding for many state programs as well as state and local **capital expenditures** (for road and bridge repairs, school facilities, and other **infrastructure** projects). After the 2010 election, however, most of the stimulus funding was reduced or not renewed because of political concerns over the growing deficit, leading to a downturn in federal aid (see Figures 3.1 and 3.2).³⁴

Capital expenditures In the public sector, that part of a government budget allocated to the construction or major repairs of large, fixed assets such as roads, buildings, dams, and so on.

Infrastructure In government, those basic physical and organizational structures that support the operations of a system or program. The term is typically applied to utilities such as water supply, waste disposal (sewers), electrical grids, information technology systems, and telecommunications, as well as bridges, tunnels, and other public assets.

In Billions of Constant (FY 2005) Dollars Total

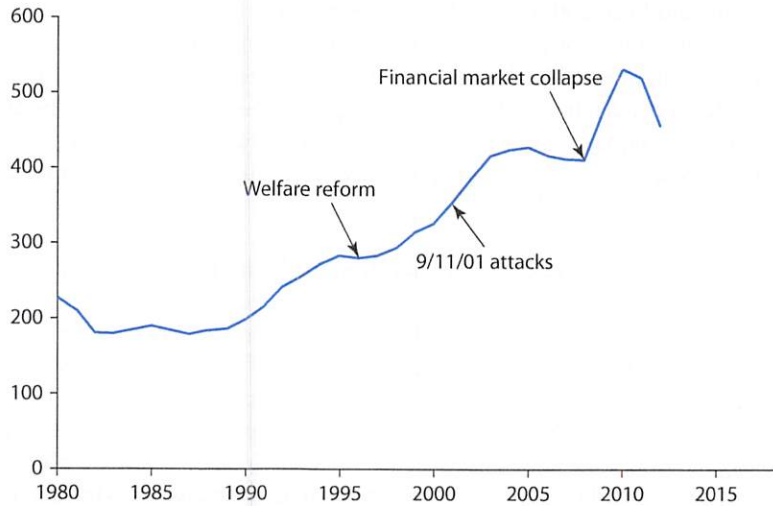
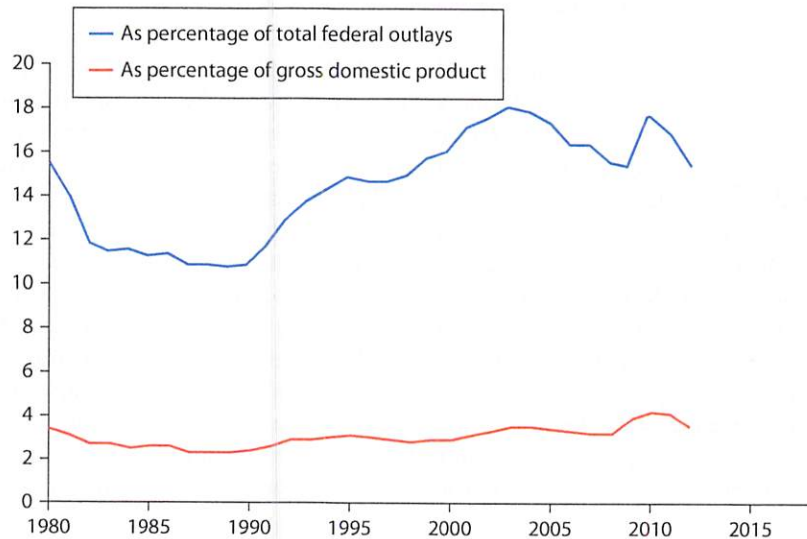


FIGURE 3.1 The Growth of Federal Grants to State and Local Governments (FY 2005 Dollars), 1980–2012.

FIGURE 3.2 The Growth of Federal Grants to State and Local Governments, as a Percentage of the Total Federal Outlays (blue) and as a Percentage of the Gross Domestic Product (red), 1980–2012.

Source: U.S. Government Printing Office, *Historical Tables, Budget of the United States Government, Fiscal Year 2015, Table 12.1—Summary Comparison of Total Outlays for Grants to State and Local Governments.*



Federalism was a key factor in the policy and political gridlock that emerged after the midterm elections of 2010 as reaction to the passage of the Patient Protection and Affordable Care Act (also known as the Affordable Care Act or Obamacare). Opponents of the law assumed control of not only the U.S. House, but also several state legislatures and other state offices, and the situation did not change even after President Obama won reelection in 2012. In addition to Obamacare, many of the most controversial issues that led to political stalemates

at the national level—for example, immigration, abortion, and climate change—were played out on the state level, where the Tea Party factions gained and solidified their majority positions in many state legislatures. Several states passed laws designed to toughen enforcement of U.S. immigration laws; others limited access to abortion by imposing new requirements for clinics and by prohibiting the procedure after twenty weeks' gestation. When states were given the option in a 2012 U.S. Supreme Court decision to opt out of sections of the nation's new health-care program, many states (nineteen by 2016) did so despite strong political pressures and financial incentives not to. The divisions that emerged on the national political scene were clearly being played out on the federalism stage.³⁵

The Actors of American Federalism

➤ Who are the major actors in the U.S. federal system, and what roles do they play in the federal system?

Although the issues surrounding federalism and IGR have long histories, they have never been as complicated as they are today. This complexity is in part caused by the very nature of modern life, but it is also a result of the number of people and institutions involved in the system. Today's federalism is an IGR system involving a cast of hundreds of agencies, thousands of political and administrative personnel, and millions of citizens who depend on government for daily public services. In short, the underlying story is that the American federal system has grown wider and deeper as interactions among the different levels of American government have increased and become more complex. Here we briefly describe the many actors who occupy the modern stage of American IGR.

The Supreme Court

Formally, the American federal system has only one national government. In practice, however, dozens of national-level actors play out daily dramas on the IGR stage. Perhaps the most important of those actors has been the federal judiciary (see Chapter 14), especially several watershed rulings of the U.S. Supreme Court. We have already seen how, in *McCulloch v. Maryland*, the Court helped establish the national government's dominant role and how the post-Civil War Court supported the notion of dual federalism.

Most students of federalism would agree that during the twentieth century court decisions tended to favor a nation-centered view of state-federal relations, and the result was to limit the role of the states as sovereign policymakers.³⁶ Instead, what emerged was the view that states and local governments were increasingly having to adapt to the requirements established in national policies.³⁷ In the late 1980s, however, several Supreme Court decisions indicated a growing willingness to give state and local governments more power to shape public policies on a wide range of issues, from abortion rights and the right to die to local campaign financing and the use of sobriety tests for drivers suspected of drunk driving. In other areas, such as civil rights, however, the Court seemed more reluctant to defer to states. Then, in a 1992 case (*New York v. United States*), the Supreme Court seemed to modify its position by holding that the national

The Supreme Court has heard a number of important cases involving states' rights in recent years, including those related to same-sex marriage. In April 2015, protestors gathered in front of the U.S. Supreme Court as it heard oral arguments on that issue.



government could not “simply compel” a state to take policy actions. Four years later, in the case of *Seminole Indian Tribe of Florida v. Florida* (1996), the Court declared unconstitutional a federal law that authorized individuals to sue state governments in federal court for violations of national laws.

Similar cases followed. In 1997, the Court overturned a law that required local law enforcement officials to implement provisions of a federal handgun control law (*Printz v. United States*). This was followed by a 1999 decision in which the state of Florida was held to be immune from lawsuits brought against it under the provisions of a federal law dealing with patent rights and false advertising. In another, the Court held that the state of Maine was not subject to federal fair labor standards legislation. In January 2000, the Court went even further, specifically exempting states from provisions of federal laws aimed at preventing age discrimination (*Kimel v. Florida Board of Regents*).

Supreme Court rulings on some of today’s “hot-button” issues such as abortion and same-sex marriage have had a federalism focus as well. For example, the Court’s 2015 decision in *Obergefell v. Hodges*, which effectively legalized same-sex marriage nationwide, was technically based on the idea that states that refused to issue marriage licenses to same-sex couples could offer no compelling reason for doing so and therefore violated the civil rights of those couples.

With these and related decisions, the Supreme Court has made it clear that it remains a significant factor in shaping both the present and the future of federalism.

Recent Decisions. Over the past five years the influence of the Court in shaping federalism was clearly in evidence in two highly controversial policy areas: health

care and same-sex marriage. In a 2012 decision upholding the constitutionality of “Obamacare” (the Affordable Care Act) (*National Federation of Independent Business v. Sebelius*), the Court declared one important exception. Relying in part on its earlier decision in *New York v. United States*, it held that the law’s mandate compelling states to expand their Medicaid programs was not valid and that the states could opt out of that part of the program. As a result, by 2016 nineteen states had refused to take advantage of the law’s offer to expand Obamacare’s coverage to residents eligible for Medicaid.

Regarding the issue of same-sex marriage, the fact that a growing number of states were legalizing it posed a number of issues related to federalism. One was whether the federal government could refuse to recognize such marriages when it came to applying federal policies. Under the Defense of Marriage Act passed in 1996, federal agencies were obligated to refuse benefits to same-sex couples, and in 2013 the Supreme Court declared in *United States v. Windsor* that the act interfered with the states’ right to define and regulate marriage and was therefore unconstitutional. Two years later, relying on the logic applied in the *Windsor* decision, the Court held in *Obergefell v. Hodges* that state laws prohibiting same-sex marriages (or the recognition of marriages performed in other states) were unconstitutional as violations of the due process and equal protection clauses of the Constitution.

The White House and the Bureaucracy

As the IGR system developed in the twentieth century, American presidents have often proposed new federal grant programs and worked to reform the inter-governmental system. Federal housing programs and similar projects to deal with local needs during the Great Depression were central to Franklin Roosevelt’s New Deal. President Eisenhower was a major supporter of an expanded federal highway program that relied on states to build and maintain the modern interstate highway system. Johnson’s Great Society agenda emphasized the Model Cities Program and other new and innovative projects. As previously noted, the administrations of both Johnson and Nixon strove to improve the coordination of federal grant programs. In the late 1970s, president Jimmy Carter issued several executive orders aimed at simplifying grant application and reporting procedures, which by then had grown very complex. A former governor, Carter also pushed for creation of the Federal Emergency Management Agency at the urging of state and local officials who sought better coordination of federal support during times of disaster.

Other White House initiatives have sought to expand the role of state and local governments in the federal system:

- Johnson called for the establishment of a “creative federalism” involving a partnership of all levels of government as well as community and private organizations.
- Nixon proposed a “new American revolution” that would give “power to the people” by turning many national domestic programs back to state and local governments.

- Reagan announced a “new federalism” that would have revamped the intergovernmental grant system over a ten-year period.
- Clinton ordered members of his administration to administer programs that allowed states to experiment with innovative ways of dealing with the nation’s health and welfare problems.³⁸

Although several important changes in the American federal system resulted from each of these presidential initiatives, none led to radical alterations in intergovernmental relationships. Instead, intermittent and incremental changes pursued by the White House in specific programs through the federal bureaucracy have had the greatest impact on the federal system.

Bureaucratic Strategies. There have been periods when the White House has attempted to make more substantial changes in the IGR system, primarily through the federal bureaucracy (see Chapter 13). After the attacks of September 11, 2001, for example, the Bush administration attempted to overhaul the emergency management and disaster assistance programs by integrating the Federal Emergency Management Agency and related state and local programs into the newly formed comprehensive National Response Plan that stressed homeland security. This approach altered (and some say undermined) ongoing state–federal relationships, and many argue that the resulting changes led to the failure of governments at all levels to deal with Hurricane Katrina in 2005. The Bush White House curtailed centralization efforts after Katrina, and by the time Hurricane Sandy struck the East Coast in 2012, the disaster response system was more effective.³⁹

Although it was not pushing any major reforms in the IGR system, the Obama administration took what one source called a “nuanced” approach,⁴⁰ making use of the many and varied tools (e.g., grants, mandates, waivers, administrative guidances) provided by the complex system to achieve its domestic policy objectives. Faced with a Congress that was reluctant to take up any White House initiative during its last two years in office, the Obama administration used its administrative authority creatively to deal with emerging issues.⁴¹

These examples reflect the fact that the IGR system relies heavily on the bureaucracies that are tasked with implementing many of the nation’s domestic policy programs (see the discussion in Policy Connection 3). Perhaps the greatest increase in the number of national-level actors on the intergovernmental stage has taken place in the bureaucracy, especially in such agencies as the U.S. departments of Homeland Security, Housing and Urban Development, Health and Human Services, Agriculture, Interior, Transportation, and Education. Some bureaucrats in these agencies determine the eligibility of state and local grant applicants and the appropriateness of their proposals. Others monitor the use of grant-in-aid funds and constantly consult with other actors in the intergovernmental system about the need to modify specific grant programs. For each of these bureaucracies, there are many state and local bureaucracies with which they interact.

Bureaucratic Dilemmas. The emergence of these intergovernmental bureaucracies has added a new dimension to U.S. government. On the one hand, the

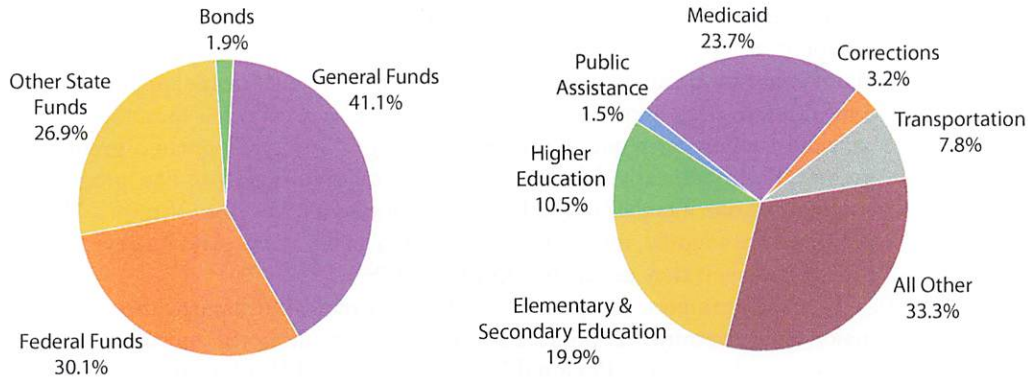


FIGURE 3.3 Total State and Federal Expenditures by Funding Source (FY 2014) A little less than one-third of state budgets is funded through federal grants, with most of the funding allocated to Medicaid, education, and transportation. *Source: National Association of State Budget Officers, State Expenditure Report, FY 2014 (Washington, DC: Author, 2015), p. 5.*

bureaucrats in these agencies are expected to disburse funds and assist state and local governmental officials in making effective use of those resources (see Figure 3.3). On the other hand, they are expected to ensure that state and local programs meet federal standards and live up to federal requirements. In other words, the growing federal bureaucracy assigned to intergovernmental programs is supposed to both facilitate the grant process and regulate state and local grant recipients. These bureaucrats are actors on the intergovernmental stage with dual, and often contradictory, roles, and they constantly find themselves facing dilemmas that must be resolved on a case-by-case basis (see Chapter 13).

Two developments are likely to shape the role of the federal bureaucracy in the federal system in the future. First is the continued trend toward devolution and program reform, especially in welfare, health care, environmental protection, and education. Although the national government is unlikely to withdraw from these areas, its role will be increasingly linked to the work of state, local, non-profit, and (sometimes) private-sector agencies. Second, the emergence of homeland security as a high priority for the national government will continue to pose issues for Washington. If federal officials are to make any headway in this area, an enhancement of the intergovernmental system will be required, with a special emphasis placed on establishing a significant role for local public services, such as law enforcement and fire protection.

Congress

Although presidents often receive credit for major policy innovations, Congress has always played a central role in the evolution of the federal system. This has been especially true in the past seventy years, during which Congress has increased its authorization of grant programs.

Some students of Congress point to strong incentives for members of the House and Senate to create and fund federal grant-in-aid programs for state and

local governments. These programs give almost every state and local government an opportunity to obtain federal funding. Therefore, members of Congress can claim credit for passing and supporting their constituents' grant applications. As a result, even fiscally conservative members of Congress often found it difficult to avoid supporting requests for new and larger intergovernmental grant programs. "Philosophically, I have not been one to jump rapidly to new programs," commented one member of the House of Representatives from Virginia. "But if programs are adopted, my district is entitled to its fair share. And I do everything I can to help—if they decide to apply for aid."⁴²

In some examples, congressional action has radically changed the way some major intergovernmental policies and problems are designed and implemented. A case in point was the **Personal Responsibility and Work Opportunity Reconciliation Act of 1996**, which significantly altered the system of assistance to the needy.⁴³ The welfare system had generated criticism from both sides of the political spectrum, and there was widespread agreement that change was required. The new law was aimed at ending the cycle of poverty and dependence that had caused concern among even the most ardent supporters of government assistance to the poor. But for those who administered the vast web of federal programs that had developed over several decades, the law represented even more important changes. For them, in many respects, the new welfare law meant an end to the IGR system as they had known it for more than half a century.

Before the passage of the reform legislation in 1996, assistance to the poor was effectively a set of federal programs administered by the states. Despite the significant role played by the states, there was an unmistakable national flavor to the welfare system. As in many other policy areas—from education to environmental protection to highway construction and maintenance—states and localities had taken on significant financial and administrative burdens but were severely limited in deciding on such matters as who was eligible for the programs or how the funds would be spent. After the 1996 reforms, which were supported by the Clinton administration, the role of the states in welfare policy was radically transformed because they took on most of the responsibility for determining the kinds of assistance programs they would administer.

States in the Federal System

Even during periods when the national government has seemed to be playing the leading role in the federalism drama, the states have remained important and active participants in the intergovernmental arena. Through all the various changes that have taken place, they have been sustained by the myth of state sovereignty and have retained significant responsibilities in the areas of education, public health, criminal justice, and the regulation of gambling and liquor. They also play major roles in enforcing environmental, safety, and health regulations. For years they have been the chief regulators of public utilities and savings banks.

Power over Local Governments. The story of HB2 that opened this chapter reflects an important but often unappreciated legal fact about states in that they empower and determine the organization of local governments.⁴⁴ Legally, local governments are created by the actions of state legislatures. Thus, theoretically,

Personal Responsibility and Work Opportunity Reconciliation Act of 1996

A major revision of the U.S. welfare system that gave states flexibility in shaping policies dealing with assistance to the poor.



POLITICS & POPULAR

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state officials acting in their constitutionally sovereign role can legally terminate them, or exercise preemptive authority as they did in the North Carolina HB2 case. In practice, however, states rarely use their “life-and-death” power over the legal existence of local governments. Examples exist of state governments taking over or shifting local governmental functions because of severe financial problems or unbridled corruption and inefficiency.⁴⁵ In the 1970s, for example, the state of New York helped New York City deal with its critical financial problems by assuming responsibility for all four-year colleges in the city’s municipal university system. In recent years, some states have taken control of inner-city school districts that were failing to perform to state standards and have assumed responsibility for the governance of entire cities as financial crises forced some into bankruptcy.⁴⁶

Innovators. States have also made their mark through creative approaches to solving public problems. Wisconsin regulated railroads and democratized the political nomination process long before such policies were adopted nationally. California led the way in developing building-construction standards to help reduce energy costs, in establishing auto-emission standards to help reduce air pollution, and more recently in taking steps to reduce the state’s contribution to greenhouse gas emissions by 25 percent by 2020. The Massachusetts approach to health-care reform became the model for the federal Affordable Care Act of 2010. Such state-initiated innovations are common in almost every major area of domestic policy, from welfare to education and insurance reform.⁴⁷ One of the strongest arguments for giving more responsibility to the states has been their ability to come up with novel and effective programs, even in the face of budgetary cuts.

Most important today, however, is the states’ pivotal role as liaison in the IGR system. As noted earlier, the national government uses state agencies to administer its grants in a wide variety of policy areas. Furthermore, local governments rely on state officials for technical assistance, as well as for financial aid. In short, state governments may be the key link—and not necessarily the weak link—in the U.S. federal system.

Changing Roles. The role of the states in the IGR system is always changing. When their influence wanes, students of American government tend to pronounce their doom. According to one prominent observer in the 1930s, the American state was “finished.” He said, “I do not predict that the states will go, but affirm that they have gone.”⁴⁸ At other times, the states have been so important that some can hardly imagine how American government could operate without them, whereas others are extremely critical of their importance.⁴⁹

What accounts for these gains and losses in power?

- The states’ authority changes dramatically as the Supreme Court shifts between strict and flexible interpretations of the Constitution. As noted previously, the current Court majority has signaled its intent to decide in favor of a state-centered view of federalism when issues come before it.
- The states’ role depends on the actual political power they can mobilize. During certain periods of American history, state officials have managed

to exercise considerable influence in Washington through their representatives in the House and Senate. At other times, state governors and legislators have carried relatively little weight either at the White House or in the halls of Congress.

- Public opinion plays a role in determining the extent of states' influence. Although state governments have always been important policymakers, the American public has not always looked to the states for solutions to its collective problems. At times, the public has depended on local governments, and more recently it has expected Washington to help. The question of public support for state government is complicated by citizens' attitudes toward their state governments, which tend to vary over time. Over the past several decades, public opinion regarding the capacity of states and localities has become more positive.⁵⁰
- The role of the states in the federal system depends on their administrative capabilities. If states lack the administrative resources and managerial talent to deliver the goods and services demanded by the public, then they cannot play a major role for long. Most observers believe that the administrative capabilities of the states have improved markedly since the 1960s. Ironically, much of that improvement has come about as a result of pressures imposed by Washington through the requirements attached to grant-in-aid programs.

Local Governments

When you think of local governments, you probably picture city halls and county courthouses occupied by small councils of elected officials and a few offices occupied by record-keeping clerks, who collect taxes and issue dog tags and automobile licenses. American local governments are much more than that, however, and their role in the IGR system is a major one.

Dillon's Rule and Preemption. The constitutional status of local governments in America's federalism system is associated with a legal concept called **Dillon's rule**. Put simply, the rule declares that local jurisdictions are legally creatures of the state and that they can only exercise those powers that the legislature authorizes them to use. Although the principle has been in place since the republic's founding, it is named for an Iowa judge who applied the rule in an otherwise obscure 1868 case involving efforts by the city of Clinton, Iowa, to negate a state statute allowing a railroad company to seize the local government's property without compensation. As might be expected, the ruling challenged the myth of local self-government that was powerful even then. In 1871, a Michigan judge, Thomas Cooley, applied a different rule, arguing that local governments had an inherent right to self-determination. In the more than 150 years since, however, Dillon's rule has been favored over the "Cooley doctrine" in almost every case where issues of local self-government and preemption have been before the courts.

Thus, under the formal provisions of the federal system established in the Constitution, all the sovereign powers of government are divided between the

Dillon's rule The legal doctrine that declares that local jurisdictions are legally creatures of the state and that they can only exercise those powers that the legislature authorizes them to use.

national government and the states. Local governments, in other words, have no formal constitutional standing except as subdivisions created by the states. Their very existence and legal authority are derived from charters granted to them under state laws. This does not mean that they are powerless or insignificant actors in the federal system, because states often give local government considerable authority. In many states, many local governments have been given considerable authority under provision of **home rule charters**, which give city governments the ability to pass laws and ordinances within their jurisdiction so long as they do not violate state constitutions.

Eminent Domain. Just how powerful these local governments can be was made clear in 2005, when the Supreme Court issued a decision upholding the authority of local governments to take private property for public purposes if they are authorized to do so. In that particular case (*Kelo v. City of New London* [125 S. Ct. 2655]), the city of New London, Connecticut, used its power of eminent domain to force private homeowners to sell their residences so that the city could give the land to a private developer who had offered to construct a hotel and conference center complex in that economically depressed city.

The power of **eminent domain**—or the right of a sovereign government to take property for public purposes for just compensation, even if the owner of that property objects—is a power that many states give to local governments in their charters so they can acquire real property needed for such public purposes as building roads and highways or constructing public facilities such as schools or a city hall. Local governments have also been given the authority to use eminent domain to clear areas of urban blight or to replace slums with public housing. In recent years, a growing number of localities have used eminent domain to promote economic development, and it was for that purpose that New London sought to take possession of those 115 residences. The homeowners took the city to court, and in a controversial 5–4 decision, the U.S. Supreme Court sided with the city. Like it or not, the Court majority ruled, local governments do possess whatever power of eminent domain their state charters grant them, and they have wide discretion in determining what is or is not a valid public purpose. Any limits on that power must come from the state, so the federal courts may not interfere.

IGR Role. Although local governments formally depend on the state for their legal authority, in practice Americans have always treated local governments as if they had separate and legitimate standing in the federal system.⁵¹ In that sense, the myth of local self-government plays an important role in the actual operations of IGR arrangements. As of the most recent census of governments in 2012, there were 90,056 local governments in the United States. This number includes county (3,031), municipal (19,519), township (16,360), and other **general-service governments** that provide a wide range of public services to those who live within their borders. It also includes 12,880 independent school districts and 38,266 other **special district governments** dealing with one or two distinctive governmental functions, such as fire protection, public transportation, or sewage treatment. Each of these local governments can participate in some way in the IGR system—and a great many do.⁵²

Home rule charters

Charters issued to some city governments giving them the ability to pass laws and ordinances within their jurisdiction so long as they do not violate state constitutions.

Eminent domain The right of a sovereign government to take property for public purposes for just compensation, even if the owner objects.

General-service

governments Local governments, such as counties, municipalities, and townships, that provide a wide range of public services to those who live within their borders.

Special district

governments Local governments that deal with one or two distinctive government functions, such as education, fire protection, public transportation, or sewage treatment.

The problems of local governments are not all alike, because those governments reflect a variety of physical, social, cultural, political, and economic conditions. Between the extremes of small, rural, sparsely populated townships and huge, densely populated metropolitan areas are cities, towns, counties, and districts of every conceivable size and shape. To understand the distinctive role played by local governments in the intergovernmental system, we must perceive their differences.

Of particular importance are the wide economic disparities among various local governments. These differences in wealth influence the way community leaders approach the intergovernmental system. For example, according to recent estimates, the per capita income in Laredo, Texas, is less than half the per capita income of Tulsa, Oklahoma, or Bremerton, Washington, and barely one-third the per capita income of residents of Naples, Florida. A city such as Laredo or Newark, New Jersey, would want more federal aid programs targeted at job training, public housing, public health, and similar needs of the urban poor. Naples's government, in contrast, would seek more federal funding for new highways, construction of new recreation facilities, and other such amenities.

Not only the economic status but also the age and ethnic background of the citizenry bear on local problems and needs. The interests and concerns of those living in Scottsdale, Arizona, where the median age is more than 45 years old, are different from those living in Laredo, Texas, where it is 27.9 years old. The people of Scottsdale would seek federal and state help in funding special programs for the elderly, whereas the citizens of Laredo would be more interested in state and federal aid for elementary and secondary school programs. Ethnic concerns can also be a factor. The existence of a very large Hispanic community in El Paso, Texas, is relevant to what that city wants from Washington. The IGR system, for instance, can offer El Paso's schools funding for bilingual education programs. Such funds might not be available if the schools had to depend on local resources.

These and other factors make it difficult to generalize about the roles played by local governmental actors on the IGR stage. Nevertheless, local officials have undoubtedly become major participants in the federal system during the post-World War II period and will remain important. They exercise much of their influence through local members of Congress, who are responsive to the needs of their constituents back home. They also exert influence through membership in intergovernmental lobbying groups, which make up an increasingly important set of actors in the federal system.

Nongovernmental Actors

Those outside the formal governmental system also have issues that they act on. Within this category are the intergovernmental lobby and the largest group of potential participants—the citizens of the United States.

Intergovernmental Lobby. The **intergovernmental lobby** includes individuals and groups that have a special interest in the policies and programs implemented through the growing IGR system (for more on interest groups, see Chapter 9). Some of these lobbyists represent private interests that hope to benefit from or

Intergovernmental lobby The many individuals and groups that have a special interest in the policies and programs implemented through the growing intergovernmental relations systems. These lobbyists represent private, consumer, and business groups.

expect to be harmed by some intergovernmental program. For example, environmental lobbyists push for effective state and local enforcement of national air-quality and water-quality standards. Other intergovernmental lobbyists support social regulations to strengthen automobile safety, consumer protection, or occupational health. Representatives of businesses seek to reduce these regulations and to weaken state and local enforcement.

Lobbyists for the poor and the disabled are also active on the federalism stage. In many instances, their goal is to ensure continued federal funding of social services, health care, and educational programs. At other times these groups seek better treatment by government agencies for groups who do not have the resources or capacity to protect themselves. The Southern Poverty Law Center, for example, has successfully filed legal actions on behalf of foreign guest workers to protect their right to “fair wages” under federal law. Disability rights organizations, in the meantime, have filed a number of class action lawsuits on behalf of individuals who have lost their benefits because of some change in state or federal policy, whereas still other nonprofit law firms have initiated court actions to end overcrowding in America’s prisons and to promote improved treatment for mental illness within those facilities. In a 2011 landmark decision, for example, the U.S. Supreme Court declared that overcrowding in California’s prisons constituted “cruel and unusual punishment” and ordered the release of 32,000 prisoners.⁵³

In recent years, a new kind of intergovernmental lobby has emerged: **public-sector interest groups** that represent the interests of elected officials and other major governmental actors involved in the IGR system. For example, the National Governors’ Association and the U.S. Conference of Mayors are two of the most active groups in Washington that lobby on domestic policy issues. The National Conference of State Legislatures, based in Denver, is one of the best sources of information on what is taking place in the intergovernmental system, and that has made them an effective participant in policy debates surrounding IGR. Still other groups—such as the National League of Cities, the National Association of Counties, and the Council of State Governments—lobby on behalf of their own governmental jurisdictions. The American Society for Public Administration and the International City and County Management Association are active representatives of the interests of public administrators and other nonelected public-sector workers.

Individual governments also hire lobbyists to represent their interests. In 1969, New York City mayor John V. Lindsay took the brash step of opening a Washington, DC, office to lobby on behalf of the Big Apple. Two decades later, New York City had eight full-time lobbyists looking after its interests in Washington. Similar offices have been opened by just about every major government in the United States.

The increase in the number of public-sector interest groups, as well as their political influence, paralleled the growth of the intergovernmental system itself during the 1960s and 1970s. In recent years, however, the reduction in federal aid for states and localities has led several of these public-sector interest groups to reconsider their priorities and roles. Many have cut back their Washington-based staffs and focused more of their attention on lobbying state legislatures or on

Public-sector interest groups A lobby that represents the interests of elected officials and other major governmental actors involved in the intergovernmental relations system. An example is the National Governors’ Association.

The U.S. Conference of Mayors is a public-sector interest group that can wield considerable influence in Washington. Here, attorney general Eric Holder addresses a session at the organization's 2013 winter conference asking the mayors to lobby Congress in support of pending gun control legislation.



providing technical assistance to their members, who must adapt to Washington's reductions in grant-in-aid funding.⁵⁴

Citizens. The largest group of potential participants in the intergovernmental system are the citizens of the United States—the intended beneficiaries of all the policies and public services of American government. Hardly an area of American domestic policy remains untouched by the IGR system, yet many Americans remain unaware of the role of IGR. Every person who drives a car on the highways, attends public schools, uses city buses, or receives emergency care at a community hospital benefits from intergovernmental programs.

Of course, the American people are more than just the beneficiaries of the many goods and services provided through the intergovernmental system. As taxpayers, citizens also pay for those programs, often indirectly. Most intergovernmental programs are paid for with general tax revenues collected by the various levels of government. However, a portion of the money comes from special trust funds established for a particular program. For instance, each time you purchase a gallon of gasoline for your car, you pay a special federal tax. That tax is deposited in the Highway Trust Fund, which is used primarily to pay for the construction and maintenance of interstate highways and other roads (see *Asked & Answered*, page 102).

Most important, the American people generate the demand for intergovernmental programs. The pressures that the public can bring to bear on the system are most evident when popular grant programs are threatened with major cuts or when a community faces a crisis that cannot be handled with local resources. Consider, for example, social service programs for the elderly or handicapped. When members of the Reagan administration suggested cutbacks in social

security in 1982, the public reacted so negatively that President Reagan felt compelled to promise never to cut those benefits.

The 2016 debate over North Carolina's HB2 discussed at the beginning of this chapter provides a more recent example. When the U.S. Department of Education issued its Title IX "guidance" to the Charlotte schools, a number of city residents who had long favored expanding LGBT rights to cover all public facilities in Charlotte pushed for the revised ordinance. That effort, in turn, sparked opposition among other residents, and the result was heated discussions at city council meetings that eventually spilled over into the city council elections. Once the ordinance passed in February 2016, citizen opposition groups formed to support state legislative action, and the result was HB2. The reaction by anti-HB2 citizens—including the heads of many business firms—was swift and vocal, leading to countermeasures by the governor's office. Similar political dramas played out at about the same time in Mississippi, Georgia, and Tennessee. As with the saga of HB2, these cases reflect the role and power of private individuals and groups in the IGR system.

When a crisis or tragedy strikes some community—when a tornado or flood devastates a small town or when buried hazardous wastes contaminate a community's soil and water supply—the call for action goes out to Washington as well as to the state capital and city hall. These are the kinds of actions that



Citizens can play an important and active role in shaping government policies, especially in the intergovernmental system when federal policies impact on local decisions. The intensity of citizen involvement was evident in 2016 when the Charlotte, NC, city council asked for public comments as it considered extending civil rights protections the members of the transgender community.

ASKED & ANSWERED

ASKED: Who is responsible for America's elaborate systems of roads and highways?

ANSWERED: Part of the answer to this question is found in the U.S. federal budget.

In early 2009, the U.S. Department of Transportation requested that the Federal Highway Administration budget for FY 2010 be set at just slightly more than \$41 billion. Most of that money came from a special trust fund that motorists paid into through a tax imposed on every gallon of gas purchased at the pump and was used to pay for the construction, repair, and maintenance of the American highway system. In addition, a special appropriation of \$26.6 billion was given to the Federal Highway Administration under the American Recovery and Reinvestment Act of 2009—also known as the Stimulus Act—which was used to fund more than 12,000 highway-related projects not covered under the regular budget.*

But despite all the federal money that goes toward the construction and maintenance of roads and highways, it is more likely that, to get a pothole fixed, you would have to call your local road department or state highway agency. In fact, almost all those federal funds—as well as billions in additional state and local funding—are spent by the states and their subdivisions.

Consider these statistics: Of the 3.9 million miles of roads and highways in the United States, about 3.1 million—a full 77.5 percent—are controlled by local governments, including cities, towns, counties, local special districts, and so forth. Another 776,000 miles are designated as state roads, and a relatively small number of miles—a little more than 120,000—are under the jurisdiction of federal agencies that operate national forests, parks, military reservations, and other federal government lands.

The Constitution does give the national government a potentially powerful source of authority over

roads and highways in Article I, Section 8, when it empowers it “to establish post offices and post roads.” From the outset, however, the national government has avoided assuming too much responsibility for the actual building or maintenance of roads. Instead, with a few minor exceptions, it left that task up to states and localities and instead focused attention on designating certain state and local routes as national “post roads” and providing some advice and support for new forms of transportation, such as canals and railroads. In the twentieth century, the national government emerged as the primary source of funds for projects at all levels of government.

The result is that today the construction and maintenance of the country's major roads and highways are intergovernmental responsibilities shared by local, state, and national governments, as well as some private companies. Privately owned and operated roads were once commonplace in the United States. In the nineteenth century, many toll roads, mostly access roads and privately financed bridges that crossed private property, were privately owned and maintained. Although at one time these were all but eliminated by the modern government-financed highway systems, today privately owned highways are making a reappearance in many states. The fourteen-mile Dulles Greenway that stretches between Leesburg, Virginia, and Dulles International Airport is one such road, as is the twenty-two-mile Camino Colombia Toll Road in Texas. Other privately funded and operated roads are now found in Florida, Colorado, and California, and several more are under construction.

Even so, the role of private roads is likely to remain minor, and to get any potholes filled, you will likely have to speak with your local government.

**For detailed information on the American Recovery and Reinvestment Act, see the unique website launched by the Obama administration to track the various expenditures under the stimulus at www.recovery.gov.*

generate intergovernmental activity regardless of concerns over the constitutional niceties of federalism. The massive mobilization of public-sector resources from all levels of government in response to the tragic events of September 11, 2001, was a case in point, and that effort received generally favorable marks. But there are also examples of terrible failures of this system, the most notable in recent years being the response to Hurricane Katrina in August 2005.

Conclusion

Before embarking on a political career that eventually led him to the governorship of Maryland, Parris Glendening was a political scientist who wrote books about federalism. What he observed as a scholar—and attempted to put into practice as an elected public official—is an approach that he calls “pragmatic federalism.” From his perspective, IGR “are constantly changing, fashioned to address current needs while emphasizing problem solving with minimal adherence to rigid doctrine.”⁵⁵

The type of federalism that Glendening and others practice on a day-to-day basis is indeed pragmatic and practical—a type of federalism quite different from the contentious interactions that marked the first years of this institution. The old form of federalism resulted in confrontation rather than cooperation. This new form of federalism took decades to evolve into a system of IGR, and most of those engaged in it find debates over such things as state sovereignty and local self-government unproductive and irrelevant.

This is not to say that there are no problems with the intergovernmental relationships that are at the heart of today’s pragmatic federalism. Depending on the issue, you will always hear people in city hall or the state capitols complaining about too much interference from the state house or Washington; and in the federal bureaucracy, the administrators of various programs feel constantly challenged by local and state officials who they feel are unwilling or unable to meet the minimal requirements established for specific programs. Those outside the system have other issues as well. Some complain about the inequities and inefficiencies that result from having national programs implemented by local and regional governments, whereas others express frustration at the one-size-fits-all mentality reflected in some federal programs.

In the day-to-day world of IGR, the myths of state sovereignty and local self-government seem irrelevant and insignificant. Nevertheless, today’s system of IGR cannot ignore its roots in the federalism bargain. The legacy of the seemingly ancient debates over sovereignty and authority lingers in the form of those powerful myths, and it manifests itself in congressional debates over health care and during times of economic and environmental crises, as well as in heated controversies such as those that emerged in North Carolina in 2016. If we are to truly make sense of and understand the institution of federalism, we must take into account both the realities of daily government operation and the myths from the past.

Key Terms

- Block grants p. 83
- Capital expenditures p. 87
- Categorical, or conditional, grants-in-aid p. 80
- Cooperative federalism p. 80
- Councils of governments p. 83
- Devolution p. 85
- Dillon's rule p. 96
- Dual federalism p. 78
- Eminent domain p. 97
- Faith-based organizations p. 86
- Formula grants p. 81
- General revenue sharing p. 83
- General-service governments p. 97
- Grant-in-aid programs p. 79
- Home rule charters p. 97
- Homeland security p. 86
- Infrastructure p. 87
- Intergovernmental lobby p. 98
- Intergovernmental relations (IGR) p. 80
- Interstate commerce p. 78
- Matching grants p. 81
- Nation-centered federalism p. 78
- Nullification p. 77
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996 p. 94
- Police powers p. 78
- Preemption p. 75
- Project grants p. 81
- Public-sector interest groups p. 99
- Sovereignty p. 76
- Special district governments p. 97
- State-centered federalism p. 77
- Title IX p. 74
- Unfunded mandates p. 85

Focus Questions Review

1. **How relevant is federalism today? >>>**
Despite its relative obscurity, federalism and IGR are critical to the operations of American government and are often at the center of many political controversies.
2. **How has federalism changed over the past two centuries of American constitutional development? >>>**
 - The evolution of the American federal system has been shaped by debates over the meaning of federalism, especially the issue of whether it was intended to be nation centered or state centered.
 - It has also been shaped by the distinctive challenges that have faced the United States during the past two centuries.
 - Out of that evolution has emerged a complex system of IGR based on a variety of grant-in-aid programs. The IGR system has been characterized by periods and episodes of conflict and cooperation.
3. **Who are the major actors in the U.S. federal system, and what roles do they play in the federal system? >>>**
 - Many different actors engage in the federal system, and all of them contribute to the complexity of the system. In addition to the major branches of the national government (the Supreme Court, the White House, and Congress) are states, local governments, the intergovernmental lobby, and the citizens of the United States—each with a role and stake in the system.

Review Questions

1. In what ways do IGR differ from federalism?
2. "Almost any issue you see on the front page of the nation's papers has something to do with federalism." Test this statement against an item in today's newspapers.



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