American Federalism in Practice

1. THE EVOLUTION OF AMERICAN FEDERALISM

Originally the boundaries between state and federal action were more strict than they are today. The federal government had its "sphere of sovereignty" (the political issues over which it had full authority) and the states had their own sphere of sovereignty, and the boundaries between the two were distinct. This system, the original understanding of American federalism, is called *Dual Sovereignty*. To some extent we still have dual sovereignty today because the states do still remain sovereign in some policy areas, but that set of policy areas has shrunk enough that it has dramatically changed the nature of the political system, so we no longer use that term to describe American federalism.

The primary area of change—which has had profound effects on the nature of American politics—has been in the interpretation of the federal government's authority to regulate interstate commerce, as found in Article 1 §8's *Interstate Commerce Clause*, which reads,

> The Congress shall have power … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Originally this was understood to mean *only* the power to regulate economic activity that crossed state lines, and not any activity that occurred solely within a state. The first proposal to build a "national road," a road funded by the federal government that crossed across multiple states (a precursor to today's interstate highway system) was greeted with skepticism about whether the federal government had that kind of authority, although the road was, ultimately, built.

This limited understanding of what interstate commerce changed in the 1930s. Beginning with the Industrial Revolution in the late 19th century, which radically re-shaped the structure of the American economy, the federal government began attempting to expand its authority to regulate general economic matters, such as creating laws setting the maximum hours in a week, preventing child labor, and a number of other types of regulation that we take for granted today. Many, although not all, of these were struck down by the Supreme Court as being beyond the federal government's

authority to regulate interstate commerce. In the 1930s, with the Great Depression crippling the American economy and state governments finding it a problem far beyond their capacity to correct, Congress, at the urging of President Franklin Delano Roosevelt, began passing more far-reaching regulations than ever before, even attempting to regulate prices and the amount of goods and crops produced. At first the Supreme Court also struck down these regulations as going beyond Congress's interstate commerce clause authority, but in 1937—in the case of *West Coast Hotel v. Parrish*, a case concerning a federal minimum wage passed by Congress—the Supreme Court changed direction and began upholding Congress's economic and business regulations.

The key to the change was not an amendment to the Constitution, but simply a *reinterpretation* of what interstate commerce means. Now, instead of just meaning business that directly crosses state lines—like shipping goods from Michigan to Ohio—interstate commerce is defined as any economic activity that has some connection to economic activity in other states or that crosses state lines. Two examples help explain the way this works.

1. *Wickard v. Filburn*

   During the Great Depression, the federal government tried to raise crop prices by limiting farmer's production. Ohio farmer Roscoe Filburn grew more wheat than the government authorized him to grow, and in consequence he was ordered to destroy the surplus and pay a fine. Filburn argued because the extra wheat was to be consumed by his family it would not enter interstate commerce, and so the federal government had no authority to regulate it. The Supreme Court ruled against Filburn, upholding the federal regulation, on the grounds that if he had not grown the extra wheat, he would have had to buy wheat to feed his family, and that if enough farmers did so, it would affect interstate commerce in wheat. This case is generally seen as the classic demonstration of just how far removed the modern interpretation of interstate commerce is from the old interpretation that it applied only to the things that actually moved across state borders.

2. *Heart of Atlanta Motel v. United States*
   In 1964 Congress passed the Civil Rights Act, one part of which banned discrimination in places of public accommodation (restaurants, hotels, motels, and similar businesses). The Heart of Atlanta Motel refused to rent rooms to African-Americans, in violation of the Civil Rights Act, and the owner sued the federal government, arguing that it did not have authority to tell him to whom he must rent rooms. The Supreme Court upheld the law, in a decision that emphasized that motel was located near tow interstate highways, and most of its customers came from out of state. Therefore, the Court said, the decision of to whom rooms must be rented clearly affected interstate commerce, even though the motel itself operated only inside the state of Georgia. This was both an important civil rights case and a case that demonstrated how Congress can use the modern interpretation of the interstate commerce to create public policy even on issues that are not primarily economic matters.

This changed conception of American federalism came to be called *cooperative federalism*, a system in which the states and the federal government cooperated to solve large-scale problems.

While most Americans accept this definition of interstate commerce, some traditionalists who favor greater limitations on federal authority still argue that the modern interpretation is illegitimate. It is, at the least, unsettling that such a momentous constitutional change can occur just by the changed vote of a single Supreme Court justice, rather than through the formal process for constitutional amendment created by the Framers of the Constitution.

Since the 1930s, only twice has the Supreme Court struck down a federal law as going beyond Congress's authority to regulate interstate commerce (although it has struck down numerous federal laws for violating citizens' constitutional rights).

1. The first was in the case of *United States v. Lopez*, in 1995, in which the Supreme Court struck down the Gun Free School Zones Act of 1990. The law made it a federal crime for an unauthorized person to carry a gun in a school zone, and Congress justified it by arguing that violence in schools negatively affected educational quality, and

poor educations affected students' economic opportunities, thereby affecting the U.S. economy. The Court ruled that this connection to interstate commerce was too tenuous, so that the law was beyond Congress's authority. After this ruling, though, Congress rewrote the law to specify that it applied if the gun had moved in interstate commerce—and since nearly all guns have moved in interstate commerce, the law now has a more constitutionally solid foundation, and is as effective as before.

2. 5 years later, in 2000, in the case *U.S. v. Morrison* the Supreme Court struck down part of the Violence Against Women Act, which had allowed women who were victims of domestic violence to sue their abusers in federal court. The motivation for the law was the belief that some state courts did not take domestic abuse allegations seriously. The constitutional justification—because Congress has only its delegated powers, and cannot regulate anything it wants to just because it seems important—was that victims of domestic violence were less likely to be economically productive. Again the Court ruled that the relationship to interstate commerce was too tenuous.

After these rulings, constitutional scholars wondered if they signaled another momentous shift in the interpretation of the Interstate Commerce Clause. Critics of excessive federal authority praised these rulings, pointing out that the Framers of the Constitution intended the federal government to be a government of limited power, having only the delegated powers enumerated in Article 1 §8, and not a government that could regulate everything it wanted to. They thought that inevitably such a government would try to regulate everything, and in so doing become tyrannical and uncontrolled, and critics of the federal government today believe that it has in fact become so. Defenders of extensive federal power criticized these rulings, and worried that the Supreme Court might start dramatically limiting federal authority. But since 2000 the Court has made no other such rulings, and for the most part the expansive interpretation of Interstate Commerce seems secure.

2. What States Can't Regulate: The Dormant Commerce Clause, Interstate Garbage, and Indian Casinos:

Although the Constitution gives the federal government authority to regulate interstate commerce, it doesn't explicitly say states cannot do so also (although Article 1 §10 does prohibit states from setting tariffs on imports from other states or countries). But in a concept called the "dormant commerce clause," we interpret the grant of authority as taking away that authority from the states. Three examples illustrate this limitation on state's regulatory authority.

1. *Gibbons v. Ogden*

   The first important Supreme Court case dealing with the issue of state attempts to regulate interstate commerce was the case of *Gibbons v. Ogden*, concerning steamship navigation in New York harbor, between New York and New Jersey. In 1808 New York granted a monopoly on the operation of steamships on all waters within the jurisdiction of the state, including in New York harbor. This meant that any goods being shipped by steamship between New Jersey and New York could not be shipped by competitors, because they would be violating New York law. But ten years later a competitor received a license from the United States government to operate between the two states, and the holder of New York's monopoly rights sued in New York to stop the competitor. The case was first hear in a New York court, but as important cases often do, worked its way up to the U.S. Supreme Court, which ruled in 1824 that authority to regulate interstate commerce had been granted to the federal government by the Constitution (ratified only 36 years before), and therefore had been taken out of the hands of the states.

2. *Trash as Interstate Commerce*

   In 1976 the U.S. Supreme Court struck down a New Jersey law that banned the importation of out-of-state garbage. With New York city on one side, and Philadelphia, Pennsylvania on the other side, New Jersey became a major destination for trash destined for the state's landfills. Not surprisingly, New Jersey didn't like being their neighbor's dumping site, and passed a ban on out-of-state trash. Philadelphia challenged the ban, and the Supreme Court struck down the New Jersey law, ruling that its purpose and effect was just

to discriminate against a legitimate item of interstate commerce, which was beyond the state's regulatory authority.

3. *Regulating Indian Tribes: Cigarettes, Fireworks and Casinos*

The Interstate Commerce also gives the federal government authority to regulate commerce with the Indian tribes within the United States. Indian tribes have an anomalous position with the United States. They are considered nations of their own and have a limited degree of sovereignty to run their own affairs, but are not fully sovereign or independent; rather they are "domestic dependent nations." Consequently, while Indian reservations are located within particular states—such as the Pine Ridge Reservation in South Dakota, or the Saginaw Chippewa Indian Tribe in Michigan—states do not have authority over them.

This limitation on state authority has had several effects on commerce. While states often apply substantial taxes to tobacco products, cigarettes sold on the reservations are not subject to the state taxes, leading many people who live in the state to drive to the reservation to buy large quantities of cigarettes and other tobacco products while avoiding the state taxes. Similarly, while states can regulate the type of fireworks sold in their own state, for the purpose of ensuring safety, they cannot control what is sold on reservations. In some states, 4th of July is a time when many people drive to a reservation to "get the good stuff," fireworks that are of greater explosive capacity than what their state allows. (Of course it is usually still illegal to actually detonate such fireworks.)

More recently, as a way to bring more money to their tribes to support education and social services for their members, many Indian tribes began opening casinos. Not too many years ago most states banned casinos, which could only be found in Nevada and New Jersey. Several states made efforts to block the Indian casinos, but quickly learned that in this matter, too, they had no authority over the Indian tribes, nor could they tax the profits from the casinos. This had a significant effect on state policies in the U.S., as a number of states that had previously banned casinos decided that if they were going to have them in their state anyway they might as

well legalize them, so they could have some from which they could benefit through tax revenues.

3. **Interstate Compacts**

Sometimes states find it valuable to work together to solve political problems that are regional; affecting multiple states—or even multiple states and part of another country—but not the whole of the U.S. However one of the limits put on states in Article 1 §10 is that they cannot make compacts with other states or countries.

> No state shall, without the consent of Congress…enter into any agreement or compact with another state, or with a foreign power

This is an important limitation on state's sovereignty, which prevents states from making their own side agreements with each other, and which prevents individual states from undermining the foreign policy of the U.S. by making individual agreements with other countries. But some issues are important enough that Congress will give its consent to an interstate compact. Two important examples are the Colorado River Compact and the Great Lakes Compact.

1. *The Colorado River Compact*: The Colorado River begins in Colorado and runs to Mexico, where it empties into the Gulf of California. As population grew in the West, demands for use of the Colorado River's water grew, and downstream states were at risk of having too little water available because of upstream usage. In 1921 Congress authorized the seven states that touched on the River or had tributary rivers that flowed into the Colorado River to develop an agreement to divide the Colorado's water amongst themselves. These states, Wyoming, Colorado, Utah, Nevada, Arizona, New Mexico and California—negotiated the contract—determining what share of the water each state was authorized to use—approved it, and received final Congressional approval the next year. (The reader should be able to recognize the problems of conflict and coordination in this issue, and how each of the states could potentially be a free rider.)

2. *The Great Lakes Compact*: The Great Lakes Compact includes 8 states and 2 Canadian provinces: Minnesota, Wisconsin, Illinois, Michigan, Indiana, Ohio, Pennsylvania, New York, Ontario and Quebec (which doesn't border any of the lakes, but does border the St. Lawrence River which carries all the Great Lakes water to the ocean). Because of the size of the Great Lakes, no one state can manage them effectively by itself, and collectively the states and provinces were worried about water use and environmental degradation of the Lakes. Because the issue involves another country, the U.S. federal government could have negotiated directly with the Canadian federal government, but the affected states and provinces became aware of the problems before the federal governments took notice, and began discussing concerns informally. The Compact began with the Great Lakes Charter in 1985, and evolved through a series of revisions to the agreement into the Great Lakes-St. Lawrence River Basin Water Resources Compact (usually shortened to Great Lakes Compact), which was approved by Congress in 2008. Without Congressional approval, the Compact could have had no legally binding power on the states. They could have all kept to their commitments individually, but without the power of law to back the agreement, individual states might attempt to free ride on the efforts of the other states, each using a little more water than they are allowed, or providing a little less environmental protection than they agreed to.

These two are not the only interstate compacts. They are just two examples (chosen because the author has a particular interest in water resources). Others include: the Atlantic States Marine Fisheries Commission, a 16 state agreement to manage and preserve the fisheries (fishing grounds and fish stock) along the Atlantic ocean and its tributary rivers; the 4 state Connecticut River Valley Flood Control Commission; the Driver License Compact, to send records of traffic violations by out-of-state drivers back to their home state (all but 5 states participate); the Gulf States Marine Fisheries Commission (Florida, Alabama, Mississippi, Louisiana, and Texas); the Pacific States Marine Fisheries (Alaska, Washington, Oregon, Idaho, and California); the Susquehanna River Basin Commission (Pennsylvania, New York and Maryland); the Washington Metropolitan

Area Transit Commission (Maryland, Virginia and Washington, D.C.); the Bi-State Development Agency (Missouri and Illinois, managing a joint transit system for St. Louis and its suburbs); and others. As you can see, many include waterways, because river and lake basins frequently include parts of multiple states, and public transportation in cases where a metropolitan area sprawls across state boundaries.

4. Areas of State Authority

Despite the Constitution's limitations on state government, and despite the federal government's greater role in state-level policy since the re-interpretation of the Interstate Commerce Clause, important areas of policymaking still remain primarily under state authority. A few important areas are discussed here:

1. *Criminal Law*: Most criminal law is state level law. Murder, rape, robbery, theft, burglary, trespassing, assault and battery, and most drug crimes, are predominantly handled by state or local police and state courts, as are nearly all moving vehicle crimes and violations. There are federal crimes, including most bank robberies (because many banks have a charter from the federal government), kidnapping (because kidnappers often take their victims across state lines), wire-fraud (because a person can be in any state, or even a foreign country, and defraud customers in multiple states), counterfeiting of U.S. currency, certain drug crimes, and any crime committed on federally owned property, or against a federal employee when acting in their role as federal employee. But despite the length of that federal crimes list (which is not a complete list), well over 90% of criminal cases involve state laws.
2. *Marriage*: The Constitution does not give the federal government authority over marriage issues, so these remain under the control of the states. Marriage laws vary across the country, with states choosing different minimum ages for marriage, differing degrees of allowable relatedness between spouses, and different waiting periods between receiving the license and getting married (between 0 and 6 days, depending on the state).

States are not entirely free in setting marriage laws. While some states once forbade interracial marriage, the Supreme Court ruled in 1967 (in *Loving V. Virginia*) that such laws violated the equal protection clause of the 14th Amendment.

> Marriage is one of the "basic civil rights of man"... To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law... Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

In recent years the issue of same-sex marriage has become a significant political and legal issue. At the time this chapter is written, some states allow same-sex marriage and some disallow it. Among those that allow it, most do so because their state supreme court read their own state constitution's equal protection clause in the same way the Supreme Court read the federal Constitution's equal protection clause in *Loving v. Virginia*, as requiring their state to give individuals freedom in their choice of whom to marry. In other states, same-sex marriage was legalized either through a vote of the state legislature or a vote of the public. At this time, many constitutional scholars expect the U.S. Supreme Court to accept a case challenging a state's ban on same-sex marriage in the next year or two, and believe it is likely that the Court will rule that the 14th Amendment's Equal Protection Clause forbids any state from banning same-sex marriage.

3. *Education*: Traditionally, states ran public universities, while Kindergarten through high-school education (K-12_n was primarily a local function, funded by local property taxes and governed by a

local school board. In the past half century, state school boards have exerted more control over what is taught in K-12 schools, and some states have shifted to using state level funding for those schools, to reduce the disparity between wealthy school districts and poorer school districts. As we will see below, the federal government has become increasingly involved in K-12 education, but its authority over this issue is very limited, and states cannot be forced to comply with federal education goals.

4. *Zoning Regulation*: Zoning is the set of regulations controlling property use. These issues almost never make national news because they are so intensely local. Zoning involves such property use issues as:

    a. What uses are allowed in a particular area: residential (single family, multi-family, or mixed), retail, industrial, agriculture, or mixed use: this matters greatly to people, because most people do not want the house next door to them to be replaced with a factory, and while some people want a purely residential neighborhood, others want to live in a neighborhood with a mixture of residential units and retail stores (including restaurants and bars).

    b. How big or small a house you can build: a house that is very much larger than others around it can change the feel of a neighborhood, which other residents might dislike; some places also limit how small a house can be in an attempt to keep up property values (and therefore, property tax revenue), because small houses are of less value and can affect the value of neighboring houses.

    c. How much setback from the property lines is required: Some places allow houses to be build immediately adjacent to each other and right up to the edge of the property lines, or near the sidewalk, while others require much larger setbacks in order to maintain a more open and spacious feel. Tastes differ among different people, and also the amount they can afford for a house—a mix of different zoning regulations for different neighborhoods can help

everyone find a neighborhood that reasonably satisfies their taste and their wallet.

d. Some places also mandate height limits on buildings, preferring to avoid giant skyscrapers. And in a unique twist, Santa Fe, New Mexico, requires all buildings in the central part of the city to have an adobe look, to preserve the city's cultural heritage and distinct—and tourist attracting—visual appeal.

This is not a complete list of areas of state authority. States and municipalities are also primarily responsible for adoption proceedings, road building and maintenance (although they do get funds from the federal government for maintaining roads designated as U.S. highways, as well as some federal grants for specific projects), firefighting, trash pickup, sewers and wastewater treatment, and assisting (or not assisting) homeless people, among other issues.

A related issue is that of policy leadership, which connects back to the concept of states as laboratories of democracy and to the importance of agenda-setting. On occasion a state will take the initiative to be a leader on a particular policy issue that is either important to a significant number of states or significant at the national level. As mentioned above, Wisconsin took the lead in experimenting with new, and potentially more effective, ways to manage welfare programs, thereby also becoming the agenda setter for an issue of national importance.

One state—California—stands out as the U.S.'s most important policy leader. For many decades now, issues that have first become prominent in California have influenced the actions of other states. Among the notable issues where California led the way is in property tax reform. As property values climbed rapidly in California, so did property taxes, because they were based on a percentage of the home's market value. People on limited incomes found themselves at risk of having to sell their homes, just to cover the property taxes. In 1978 California voters approved Proposition 13, which rolled back property taxes and limited their increase until the home was sold. Although the new system has proved problematic in many way (California municipalities cannot collect enough property taxes to fund all the programs they are required to, or that their residents want), a number of

other states followed suit, because in all states there are home owners who think their property taxes are too high.

More recently, California has been leading the way in air quality, pushing above and beyond the federal standards. This is in part because California has a tradition of pollution (particularly in Los Angeles), partly because a sizable number of California voters prioritize environmental concerns more highly than many other Americans, and partly because the state sees clean energy as an important source of future economic development. One of the most significant effects has been the state requirement that cars sold in the state produce less exhaust then the federal standards allow. Because the California car market is the largest n the U.S., and because auto makers find it more cost-effective to produce just one kind of exhaust system rather than multiple ones, the exhaust systems required to meet California standards will be installed on every automobile produced in the U.S. and sold in every state. To some extent, other state governments will be able to free ride on California's effort, because they don't need to create a similar policy. But while free riders are often despised by those who are contributing, in this case California is unconcerned, because their primary purpose was to advance their own state's interests.

5. The Full Faith and Credit Clause

Article 4 of the Constitution contains the Full Faith and Credit Clause:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

This means, for example, that a child custody order in one state normally needs to be treated as valid in another state (if one of the parents moves to that state), or that a person who has lost a lawsuit in one state cannot go to another state and their lawsuit again there.

However, the U.S. Supreme Court has long recognized a "public policy" exception to this clause, which allows a state to ignore certain areas of other states' acts, records, and judicial proceedings if they conflict with important public policy provisions. While much of this issue still remains vague and poorly developed as a matter of constitutional law, one notable area in which the public policy exception has applied is marriage. If, for example, a 15 year old living in a state with a minimum marriage age of 16 goes to

another state to get married, his or her home state does not have to recognize this marriage.

This exception has been hotly debated in the last decade or two as more and more states have allowed same-sex marriage. Some advocates of same-sex marriage argued that Full Faith and Credit required other states to accept same-sex marriages performed in any other state. Opponents of same-sex marriage worried that this might happen, but also argued—correctly—that Full Faith and Credit had never been applied to marriages before, so it ought not apply now. If, in a few years, the Supreme Court rules that states can't ban same-sex marriage, this argument will become moot, but if it rules that states can choose to ban it, then the argument may continue for a long time.

6. Regulated Federalism: How the Federal Government Bullies and Bribes the States

Bullying: Compelling State Compliance through Mandated Action

Today, cooperative federalism is less cooperative, and scholars of American politics often prefer the term *regulated federalism*. In regulated federalism the federal government sets national standards, then requires the states to change their policies to meet those standards. Under the original understanding of federalism, this type of action would have been clearly unconstitutional, but under the contemporary understanding of federalism it is generally considered acceptable in theory, while remaining contentious in practice.

As one example, the federal government has gained considerable authority over environmental protection, and therefore a number of federal environmental laws are designed to "allow" states to set up their own policies for meeting the federal standard, and if they choose not to, or if their policy is not approved by the federal government, they will be required to follow the general policy designed by the federal government. "Allow" is in quotes, because the state have no real choice to opt out of meeting the federally imposed standard; their choice is either to define their own policy for meeting that standard or accept the federal government's policy. On the other hand, even when states object to having to meet the standard, they do normally prefer the option of designing their own policy rather than having a specific policy design forced upon them.

The most conflictual issue of regulated federalism has been that of *unfunded mandates*, which occur when the federal government mandates particular actions at the state level but does not provide funding for them. This is a convenient way for Congress to create national policies while avoiding the trouble of figuring out how to pay for them. For the states, it means an extra expense which they have to figure out how to cover, which means either raising taxes or fees, or shifting money away from other state programs—either method, of course, can anger voters.

The most notable unfunded mandate issue was a 1994 federal law—the Brady Bill—requiring states to conduct background checks on all gun purchasers. The intent it to limit illegal trafficking in firearms, and to keep convicted violent criminals from purchasing guns. State anger at the unfunded mandate combined with gun-rights advocates anger over the very idea of background checks to create a highly visible national conflict. Ultimately the Supreme Court ruled that the federal government could not compel states to conduct background checks, demonstrating that even regulated federalism still imposes some limits on the federal government.

Bribing: Buying State Compliance through Grants

Another method the federal government uses to set a national agenda and coordinate the states' policies is to give them money in exchange for compliance. They do this in cases where they think they do not have constitutional authority to directly regulate, or where they think direct regulation will be too politically controversial. The general term for the money the federal government gives to the states is *grants-in-aid*.

These grants come in two general forms: categorical grants and block grants. Categorical grants are designated for a very specific purpose, limiting how states use the money. For example, a state may receive a grant to build a bridge, but it has to be the road and river crossing designated by the grant—the funds can't be shifted to non-road building purposes, other road-building opportunities, or even to the building of a bridge on a different road, or on the same road but at a different river. Block grants are less restrictive, designed for a clearly-designated general purpose, but not as limited in the specific ways the money can be used. For example, a block grant for energy efficiency—a local government might use this money to improve the energy efficiency of its own municipal buildings, or distribute it among business owners to improve their buildings' energy efficiency, or

offer it to residents in the form of rebates for adding insulation to their homes or installing newer, better insulating, windows.

For a short period of time in the 1970s, under the guise of "new federalism" (see below), the federal government experimented with revenue sharing—just giving money to the states without specifying for what programs they could use it. This approach was short-lived, however. In general, politicians don't like to give money unless they can direct it to programs they think are important. In addition, politicians often have the honor of having buildings or bridges named after them when they can take credit for legislatively providing the funds for the project, and revenue sharing limited this opportunity. (One must assume, though, that legislators are less fond of having a sewage treatment plant named after them than a beautiful bridge.)

Among the notable examples of the federal government using grants to direct state policies are the former national speed limit and the No Child Left Behind education policy.

1. *Stay Alive at 55: The National Maximum Speed Limit Law*
   For the first 70 years of the automotive era in the U.S. setting speed limits was a state and local decision. But in the 1970s, in response to concerns about reducing traffic accident fatalities and increasing oil prices, Congress passed, and President Carter signed, the National Maximum Speed Limit law, which set a single national maximum speed limit of 55 miles per hour. Because setting speed limits was traditionally a state activity, Congress did not absolutely require states to change their speed limits—instead, they made a rule that states could not receive any federal funding for road maintenance if their speed limits were set any higher. This led states to choose between 1) raising taxes to pay for road maintenance, 2) shifting money from other areas of spending and leaving those other policy areas with less funding, 3) not maintaining their roads as well, or 4) reducing their speed limits and keeping the federal funding. Given that citizens would complain about each of the others, states chose compliance as the least objectionable alternative—at least with that choice they could direct the blame to the federal government.

But for the easy government, forcing the states to change their laws and their speed limit signs was the easy part. Getting them to enforce the lower speed limits was more difficult. The speed limits were ignored by a large proportion of drivers, and not all states thought that enforcing it strictly was a good use of their limited resources. This was especially true in the western United States, where highways had less traffic, and often ran straight, with few curves. The trucking industry also opposed the law, because slower delivery time cost them more than greater fuel usage did. In 1987 Congress modified the law to allow the speed limit to rise to 65 miles per hour, and in 1995 they repealed the law altogether.

2. *The National Drinking Age*

The age at which people are allowed to drink was also a state level issue, both before the production and sale of alcohol was prohibited with the 18th Amendment in 1919, and after the 21st Amendment repealed prohibition in 1933. But in 1984, Congress passed, and President Reagan signed into law, the National Minimum Drinking Age Act, which required every state to set its minimum drinking age no lower than 21, or have their highway funding reduced by ten percent. States were again faced with the choice between raising taxes, shifting spending from other policy areas, reducing the amount of road maintenance, or accepting a law whose impact fell predominantly on people between the ages of 18 and 21—a relatively small proportion of the population, and a group that usually doesn't vote in large numbers. Despite some criticism that it is bad policy, the law remains in effect to this day, perhaps more because it affects such a small and politically unimportant segment of the population than because of any evidence of its effectiveness.

3. *No Child Left Behind, or All Children Left Behind?*

One of the most controversial of contemporary federal interventions in state-level policy is the No Child Left Behind (NCLB) education law. The law requires all states to develop a set of standardized tests that all schoolchildren in their state will take, and to demonstrate that each school's students are performing acceptably on that test—or to demonstrate improvement each year in student performance—and create a set of policy actions targeting schools that do not

improve. Although this sounds like a good approach, NCLB has a large array of critics who argue that the emphasis on standardized testing is harming K-12 education. But as with the national speed limit and national drinking age, the federal government has not directly required states to follow NCLB, but persuades them to comply by withholding supplemental education funding if they do not. Enough states dislike the law and have threatened to sacrifice the federal funding so they can opt out that the federal government has loosened the restrictions, allowing states waivers to avoid some of the law's requirements, so long as they meet certain conditions. This case demonstrates the potential weakness of the federal government's use of money as a bribe or threat to get states to go along with a national standard—the states have to see the money as worth the trouble the policy causes them, or they will opt out. And short of opting out, states that dislike the program will keep pressuring the federal government to change or repeal a policy they dislike, as with the national speed limit.

7. **Federalism as a System of Conflict and Coordination**

In a unitary state, all major policy making is done by the national government, and any regional governments must comply, as they do not have independent policy authority of their own. This makes coordinating a unified national policy easier. But in the U.S.—a federalist country, not a unitary one—we still try to coordinate important policies at the national level. It is just more difficult because instead of all the conflict—support for and opposition to particular policies—being focused in the national legislature, much of it occurs at the state level also. This gives more opportunity for people to enter the political arena, by providing at least 50 state forums in addition to the federal forum (the U.S. government), and provides both more places to push for policy (if the federal government isn't listening, talk to your state government) and more places to try to block the creation or implementation of policy (more opportunities to try to be a *veto player*). This makes the effort to coordinate national policy much messier than in a unitary political system, and means some issues will be kept off the national agenda, even though some people want them to be addressed nationally.

Federalism also creates a perpetual tug and pull between states and the federal government over control of public policy. When problems are too big for individual states to handle, they often like federal involvement, but they prefer to limit federal involvement so that it does not require much from the states themselves, *and* if the states are going to be required to undertake efforts, they prefer that the federal government let them decide how they're going to do it, rather than tell them how to do it. To oversimplify, the ideal outcome for the federal government is that they tell states what to do and how to do it while making the states pay for it (the unfunded mandate problem), while for the states the ideal outcome is that the federal government pays for it without telling them what to do.

Not all of the preferences on the division of policy authority within federalism are based on whether one is in federal or state government. Ideology plays a role, too, and while both liberals and conservatives believe in federal over state control on some issues, conservatives are more likely to support greater authority left to the states, while liberals are more likely to support greater authority in the federal government. One of the concepts emphasized for some years by conservatives was that of *new federalism*, a return of power to the state governments. The concept is particularly connected with presidents Nixon and Reagan. It was Nixon, for example, who promoted the idea of revenue sharing—giving federal revenues to the states without designating its purposes. But while many textbooks like to treat new federalism as a significant change in American federalism, even as a replacement for regulated federalism, the practical reality is that regulated federalism is still very much the current character of American federalism. Even Reagan, who touted new federalism, happily used the control of federal money to force states to adopt the national minimum drinking age, and it was the conservative Republican President George W. Bush who pushed for No Child Left Behind. New federalism—the idea that too much power has been transferred to the federal government and the country would do better to shift some of that power back to the states—is, at best, an ideological preference held by many conservatives (and possibly also by many libertarians), who occasionally manage to apply it in some particular policies (such as repealing the national minimum speed limit). Many liberals remain hostile to the concept—even though they also support state action in some areas—and due to a lack of national consensus it has never, at least yet, become the dominant approach to federalism.

The struggle, though, continues, and will for as long as ideologies conflict, and for as long as states' individual interests conflict with what Congress see as the national interest.