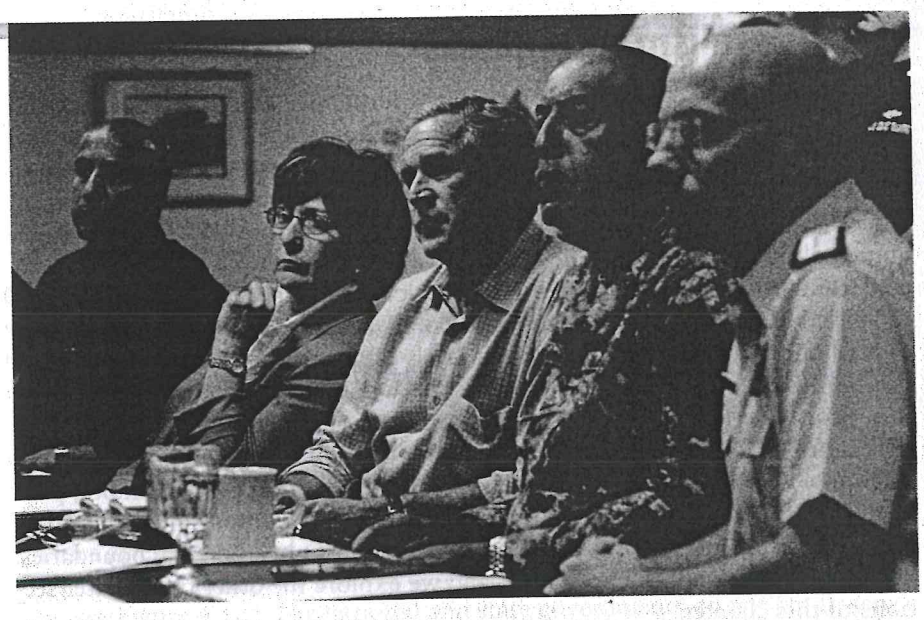

All Eyes on New Orleans
Hurricane Katrina devastated Louisiana and New Orleans. Less than a month later, a more powerful hurricane named Rita seemed headed on the same path of destruction. This time, all levels of government—state, local, national—attended a briefing aboard the USS *Iwo Jima* in advance of the powerful storm. From left to right: New Orleans mayor Ray Nagin, Louisiana governor Kathleen Babineaux Blanco, President George W. Bush, Lt. General Russell Honoré (responsible for military relief in the aftermath of Katrina), and Rear Admiral Larry Hereth (the principal federal official for Hurricane Rita). Rita landed west of New Orleans with less impact than Katrina. Still, the storm caused $10 billion in damage. *(© Jason Reed/Reuters/Corbis)*

Some call the New Deal era revolutionary. There is no doubt that the period was critical in reshaping federalism in the United States. The national and state governments had cooperated before, but the extent of their interactions during President Franklin Roosevelt's administration clearly made the marble-cake metaphor the more accurate description of American federalism. In addition, the size of the national government and its budget increased tremendously. But perhaps the most significant change was in the way Americans thought about their problems and the role of the national government in solving them. Difficulties that at one time had been considered personal or local were now viewed as national problems requiring national solutions. The general welfare, broadly defined, became a legitimate concern of the national government.

In other respects, however, the New Deal was not so revolutionary. For example, Congress did not claim any new powers to address the nation's economic problems. Rather, the national legislature simply used its constitutional powers to suit the circumstances. Arguably those actions were consistent with the overall purpose of the U.S. Constitution, which, as the preamble states, was designed in part to "insure domestic Tranquility . . . [and] promote the general welfare."

More recently, concerns over terrorist attacks on U.S. soil have expanded national power. In the month after the events of September 11, 2001, the Congress swiftly passed and the president signed into law the USA-Patriot Act (Public Law 107-56). Among other provisions, the law expanded significantly the surveillance and investigative powers of the Department of Justice. After some disagreement about its structure and organization, federal policymakers created the Department of Homeland Security in 2002, a new department that united over twenty previously separate federal agencies under a common administrative structure. In a move to further expand domestic surveillance activities, President Bush gave approval to wiretaps without warrants of American citizens suspected of terrorist ties. Congress had established a process for obtaining judicial warrants before or after such surveillance, but the president maintained that he had inherent power as commander in chief to act without regard to the congressional act.[10]

NSA = No Such Agency *or* National Security Agency?
The National Security Agency is the national government's largest intelligence service, much larger than the CIA. NSA is responsible for the worldwide collection and analysis of foreign communications. Its eavesdropping covers every type of communication medium, from mobile phone and radio to instant messaging and e-mail. For a long time, the NSA's existence was not acknowledged by the national government. NSA's domestic mission had been confined to court-warranted communications of foreign agents on American soil. In an effort to unearth evidence of terrorist activities following September 11, however, President George W. Bush relaxed these domestic restrictions to allow warrantless monitoring of people in the United States who placed international calls and engaged in Internet communications. President Bush defended his action as crucial to national security. His critics claimed his actions were lawless invasions of constitutionally protected liberties. *(Evan Vucci/AP/Wide World Photos)*

The role of the national government has also grown as it has responded to needs and demands that state and local governments were unwilling or unable to meet. Legislation is one prod the national government has used to achieve goals at the state level. The Voting Rights Act of 1965 is a good example. Section 2 of Article I of the Constitution gives the states the power to specify qualifications for voting. But the Fifteenth Amendment (1870) provides that no person shall be denied the right to vote "on account of race, color, or previous condition of servitude." Before the Voting Rights Act, states could not specifically deny blacks the right to vote, but they could require that voters pass literacy tests or pay poll taxes, requirements that virtually disenfranchised blacks in many states. The Voting Rights Act was designed to correct this political inequality (see Chapter 7).

The act gives the national government the power to decide whether individuals are qualified to vote and requires that qualified individuals be allowed to vote in all elections, including primaries and national, state, and local elections. If denial of voting rights seems to be widespread, the act authorizes the appointment of national voting examiners to examine and register voters for *all* elections. By replacing state election officials with national examiners, the act clearly intrudes on the political sovereignty of the states. The constitutional authority for the act rests on the second section of the Fifteenth Amendment, which gives Congress the power to enforce the amendment through "appropriate legislation."

Judicial Interpretation

How federal courts have interpreted the Constitution and federal law is another factor that has influenced the relationship between the national government and the states. Continuing with the example of the Voting Rights Act, it is important to remember that the law was not universally acclaimed when it was originally passed. Its critics used the language of dual or layer-cake federalism to insist that the Constitution gives the states the power to determine voter qualifications. The act's supporters claimed that the Fifteenth Amendment

guarantee of voting rights should take precedence over states' rights and thus gives the national government new responsibilities.

The U.S. Supreme Court, the umpire of the federal system, ultimately resolved this dispute. It upheld the act as an appropriate congressional enforcement of the Fifteenth Amendment.[11] The Court settles disagreements over the powers of the national and state governments by deciding whether the actions of either are unconstitutional (see Chapter 14). In the nineteenth and early twentieth centuries, the Supreme Court often decided in favor of the states. Then, for nearly sixty years, from 1937 to 1995, the Court almost always supported the national government in contests involving the balance of power between nation and states. After 1995, a conservative U.S. Supreme Court tended to favor states' rights, but not without some notable and important exceptions. Exploring the Court's federalism jurisprudence provides a useful window on changes to the system that have transpired since the nation's founding.

Ends and Means. Early in the nineteenth century, the nationalist interpretation of federalism prevailed over states' rights. In 1819, under Chief Justice John Marshall (1801–1835), the Supreme Court expanded the role of the national government in the landmark case of *McCulloch* v. *Maryland*. The Court was asked to decide whether Congress had the power to establish a national bank and, if so, whether states had the power to tax that bank. In a unanimous opinion that Marshall authored, the Court conceded that Congress had only the powers conferred on it by the Constitution, which nowhere mentioned banks. However, Article I granted Congress the authority to enact all laws "necessary and proper" to the execution of Congress's enumerated powers. Marshall adopted a broad interpretation of this elastic clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The Court clearly agreed that Congress had the power to charter a bank. But did the states (in this case, Maryland) have the power to tax the bank? Arguing that "the power to tax involves the power to destroy," Marshall insisted that states could not tax the national government because the powers of the national government came not from the states but from the people.[12] Marshall was embracing cooperative federalism, which sees a direct relationship between the people and the national government, with no need for the states to act as intermediaries. The framers of the Constitution did not intend to create a meaningless document, he reasoned. Therefore, they must have meant to give the national government all the powers necessary to carry out its assigned functions, even if those powers are only implied.

Especially from the late 1930s to the mid-1990s, the Supreme Court's interpretation of the Constitution's **commerce clause** was a major factor that increased the national government's power. The third clause of Article I, Section 8, states that "Congress shall have Power . . . To regulate Commerce . . . among the several States." In early Court decisions, beginning with *Gibbons* v. *Ogden* in 1824, Chief Justice Marshall interpreted the word *commerce* broadly to include virtually every form of commercial activity. But later courts would take a narrower view of that power.

commerce clause The third clause of Article I, Section 8, of the Constitution, which gives Congress the power to regulate commerce among the states.

Roger B. Taney became chief justice in 1836, and during his tenure (1836–1864), the Court's federalism decisions began to favor the states. The Taney Court took a more restrictive view of commerce and imposed firm limits on the

powers of the national government. As Taney saw it, the Constitution spoke "not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States."[13] In the infamous *Dred Scott* decision (1857), for example, the Court decided that Congress had no power to prohibit slavery in the territories.

The judicial winds shifted again during the Great Depression. After originally disagreeing with FDR's and the Congress's position that the economic crisis was a national problem that demanded national action, the Court, with no change in personnel, began to alter its course in 1937 and upheld several major New Deal measures. Perhaps the Court was responding to the 1936 election returns (Roosevelt had been reelected in a landslide, and the Democrats commanded a substantial majority in Congress), which signified the voters' endorsement of the use of national policies to address national problems. Or perhaps the Court sought to defuse the president's threat to enlarge the Court with justices sympathetic to his views. ("The switch in time that saved nine," rhymed one observer.) In any event, the Court abandoned its effort to maintain a rigid boundary between national and state power.

The Umpire Strikes Back. One scholar has gone so far as to charge that the justices have treated the commerce clause like a shuttlecock volleyed back and forth by changing majorities.[14] Looking at the period from the New Deal through the 1980s, the evidence to support that claim appears rather unconvincing. However, in the 1990s, a series of important U.S. Supreme Court rulings involving the commerce clause suggested that the states' rights position was gaining ground. The Court's 5–4 ruling in *United States* v. *Lopez* (1995) held that Congress exceeded its authority under the commerce clause when it enacted a law in 1990 banning the possession of a gun in or near a school. A conservative majority, headed by Chief Justice William H. Rehnquist, concluded that having a gun in a school zone "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas—all appointed by Republicans—joined in Rehnquist's opinion, putting the brakes on congressional power.[15]

Another piece of gun-control legislation, known as the Brady bill, produced similar eventual results. Congress enacted this law in 1993. It mandated the creation by November 1998 of a national system to check the background of prospective gun buyers in order to weed out, among others, convicted felons and those with mental illness. In the meantime, the law created a temporary system that called for local law enforcement officials to perform background checks and report their findings to gun dealers in their community. Several sheriffs challenged the law.

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One of the questions in the IDEAlog self-test deals with stricter gun-control laws. How did you answer that question?

The Supreme Court agreed with the sheriffs, delivering a double-barreled blow to the local-enforcement provision in June 1997. In *Printz* v. *United States* (1997), the Court concluded that Congress could not require local officials to implement a regulatory scheme imposed by the national government. In language that seemingly invoked layer-cake federalism, Justice Antonin Scalia, writing for the five-member conservative majority, argued that locally enforced background checks violated the principle of dual sovereignty by allowing the national government "to impress into its service—and at no cost to itself—the police officers of the 50 States." In addition, he wrote, the scheme violated the principle of separation of powers by congressional transfer of the

president's responsibility to faithfully execute national laws to local law enforcement officials.[16]

Federalism's Shifting Scales. In what appeared to signal the continuation of a pro–states' rights trajectory, in 2000 the justices struck down congressional legislation that had allowed federal court lawsuits for money damages for victims of crimes "motivated by gender." The Court held that the Violence Against Women Act violated both the commerce clause and Section 5 of the Fourteenth Amendment. Chief Justice Rehnquist, speaking for the five-person majority, declared that "the Constitution requires a distinction between what is truly national and what is truly local."[17]

But just as an umpire's strike zone can be ambiguous—is it knees to belt or knees to letters?—the Court more recently has veered from its states' rights direction on federalism. Perhaps the best-known decision in this vein is *Bush* v. *Gore,* the controversial Supreme Court decision resolving the 2000 presidential election. That tight election did not result in an immediate winner because the race in Florida was too close to call. Florida courts, interpreting Florida election law, had ordered ballot recounts, but a divided Supreme Court ordered a halt to the process and gave George W. Bush the victory. In an unrelated case from 2003, the Court also ruled against the states when it declared unconstitutional, by a 6–3 vote, a Texas law that had outlawed homosexual conduct between consenting homosexual adults. In the process, the decision also overturned a prior Court decision from the 1980s that had upheld Georgia's right to maintain a similar law.[18]

In two recent death penalty cases, the Court reflected the ambiguity and dynamic nature that frequently characterize the American federal system. In 2002, the Court denied state power to execute a defendant who was mentally disabled, reasoning that because many states had deemed such a practice inappropriate, "evolving standards of decency" in the nation suggested it was time to halt the practice.[19] In 2005, the Court again relied on evolving standards of decency to strike down a state death penalty for seventeen-year-olds.[20] In both cases, the Court acted against the policy of individual states by asserting national power to declare that the death penalty amounted to cruel and unusual punishment and thus violated the Constitution.

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Should people convicted of murder get the death penalty or life in prison? Take IDEAlog's self-test.

Grants-in-Aid

Since the 1960s, the national government's use of financial incentives has rivaled its use of legislation and court decisions as a means of influencing its relationship with state governments. Simultaneously, state and local governments have increasingly looked to Washington for money. Leaders at these lower levels of government have attempted to push their own initiatives by getting leverage from new national interest in a variety of policy areas. Thus, if governors can somehow convince national policymakers to adopt laws that buttress state priorities, then these state officials can advance their own priorities even as Washington's power appears to grow. Through a sort of back-and-forth process of negotiation and debate, the dynamics of the American federal system are revealed yet again. The principal arena where many of these interactions take place is in debates over federal grants-in-aid.

grant-in-aid Money provided by one level of government to another to be spent for a given purpose.

A **grant-in-aid** is money paid by one level of government to another level of government to be spent for a given purpose. Most grants-in-aid come with