Federalism: The Division of Power

Objectives
You may wish to call students’ attention to the objectives in the Section Preview. The objectives are reflected in the main headings of the section.

Bellringer
Have students discuss whether they get to make decisions about their lives or whether their parents make all the decisions. Tell them that they are really discussing how power is divided in their families. Explain that in this section, they will learn about the division of power between the National Government and the States.

Vocabulary Builder
Tell students that the Political Dictionary terms all relate to a problem the Framers of the Constitution faced. Have students draw a conclusion about what that problem was. Then ask them, as they read, to relate each term to how power is distributed.

You know that federal law requires young men to register for military service at age 18; that most employers must pay their workers at least $5.15 an hour and time-and-a-half for overtime; and that no person can be denied a job on the basis of his or her race or ethnicity.

You also know that State law says that you must have a driver’s license in order to drive a car; that it is illegal for anyone under 21 to buy alcoholic beverages, or for anyone under 18 to buy cigarettes or other tobacco products; and that only those persons who can satisfy certain requirements can buy or own firearms.

These examples illustrate a very complex system: the division of governmental power in the United States between National and State governments. This section will help you better understand that complicated arrangement.

Federalism Defined
Federalism is a system of government in which a written constitution divides the powers of government on a territorial basis between a central, or national, government and several regional governments, usually called states or provinces. Each of these levels of government has its own

Why Federalism?
When the Framers of the Constitution met at Philadelphia in 1787, they faced a number of difficult issues. Not the least of them: How could they possibly create a new central government that would be strong enough to meet the nation’s needs and, at the same time, preserve the strength of the existing States?

Few of the Framers favored a strong central government based on the British model; and all of them knew that the Revolution had been fought in the name of self-government. Yet they also knew that the government under the Articles of Confederation had proved too weak to deal with the nation’s many problems.

Remember, most of the Framers were dedicated to the concept of limited government. They were convinced (1) that governmental power poses a threat to individual liberty, (2) that therefore the exercise of governmental power must be restrained, and (3) that to divide governmental power, as federalism does, is to curb it and so prevent its abuse.

Block Scheduling Strategies
Consider these suggestions to manage extended class time:

Divide the class into two groups. One group should create a graphic organizer showing the powers granted to the government (one column identifying the powers, second column identifying which level of government has them, third column explaining why). The other group should create a similar graphic organizer showing the powers denied to the government. Have students refer to the text and to Article 1, Section 8 of the Constitution for details.
substantial set of powers. Neither level, acting alone, can change the basic division of powers the constitution has created. In addition, each level of government operates through its own agencies and acts directly through its own officials and laws.

The American system of government stands as a prime example of federalism. The basic design of this system is set out in the Constitution. This document provides for a division of powers between the National Government and the States. That is, it assigns certain powers to the National Government and certain powers to the States. This division of powers was implied in the original Constitution and then spelled out in the Bill of Rights:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

—10th Amendment

In effect, federalism produces a dual system of government. That is, it provides for two basic levels of government, each with its own field of authority. Each operates over the same people and the same territory at the same time.

Federalism’s major strength is that it allows local action in matters of local concern, and national action in matters of wider concern. Local traditions, needs, and desires vary from one State to another, and federalism allows for this very significant fact.

Illustrations of this point are nearly endless. For example, a third of the States are directly involved in the liquor business, operating it as a public monopoly; elsewhere private enterprise is the rule. In 48 States many gas stations are self-service; in New Jersey and Oregon, the law forbids motorists to pump their own gas. Only one State—North Dakota—does not require voters to register in order to cast their ballots. Only Nebraska has a unicameral (one-house) legislature. Oregon is the only State that has legalized physician-assisted suicide. Only five States—Alaska, Delaware, New Hampshire, Montana, and Oregon—do not impose a general sales tax.

While federalism allows individual States to handle State and local matters, it also provides for the strength that comes from union. National defense and foreign affairs offer useful illustrations of this point. So, too, do domestic affairs. Take, for example, a natural disaster. When a flood, drought, hurricane, or other catastrophe hits a particular State, the resources of the National Government and all of the other States can be mobilized to aid the stricken area.

The National Government provides protection from harm for the entire country. State governments provide protection from harm within State borders. Critical Thinking How do these photos illustrate the federal system?

Powers of the National Government

The National Government is a government of delegated powers. That is, it has only those powers delegated (granted) to it in the Constitution. There are three distinct types of delegated powers: expressed, implied, and inherent.

The Expressed Powers

The expressed powers are delegated to the National Government in so many words—spelled out, expressly, in the Constitution. These powers are also sometimes called the “enumerated powers.”

You can find most of the expressed powers in Article I, Section 8. There, in 18 clauses, the Constitution expressly gives 27 powers to Congress. They include the power to lay and collect taxes, to coin money, to regulate foreign commerce, to declare war, and to maintain the national army and navy.

The National Government provides protection from harm for the entire country. State governments provide protection from harm within State borders. Critical Thinking How do these photos illustrate the federal system?

The implied powers are often described as implied from the expressed powers. For example, the Constitution expressly states that Congress shall have the power to "lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States." From this, the courts have implied the right of Congress to borrow money.

Organizing Information

To make sure students understand the main points of this section, you may wish to use the Venn diagram to the right.

Teaching Tip A template for this graphic organizer can be found in the Section Support Transparencies, Transparency 6.

Point-of-Use Resources

Guided Reading and Review Unit 1 booklet, p. 24 provides students with practice identifying the main ideas and key terms of this section.

Lesson Planner For complete lesson planning suggestions, see the Lesson Planner booklet, section 1.

Political Cartoons See p. 15 of the Political Cartoons booklet for a cartoon relevant to this section.

Critical Thinking They show that while local matters can be handled by a single State’s resources, for large national concerns huge amounts of resources from the National Government and the States may be pooled.
Share the following quotation with students:

“Were we directed from Washington when to sow and when to reap, we should soon want for bread.”

—Thomas Jefferson

Discussion
Ask students what Jefferson meant by his remark. Then ask how Jefferson’s perspective is still relevant to the “tug-of-war” power struggle that is a regular part of American federalism.

Point-of-Use Resources

Section Support Transparencies
Transparency 18, Visual Learning; Transparency 117, Political Cartoon

Close Up on Primary Sources
Baron de Montesquieu, The Spirit of the Laws (1748), p. 58

The powers delegated to the National Government include the power to coin money, to prohibit race-based discrimination, and to conduct foreign relations. In 1971, Richard Nixon (right) became the first American President to visit China; his historic trip led to United States recognition of the government of the People’s Republic of China. Critical Thinking Why is establishing diplomatic relations considered an inherent power?

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“to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

—Article I, Section 8, Clause 18

Through congressional and court interpretation, the words necessary and proper have come to mean, in effect, “convenient and useful.” Indeed, the Necessary and Proper Clause is sometimes called the Elastic Clause, because, over time, it has been stretched to cover so many situations.

Here are a few of the thousands of examples of the exercise of implied powers. Congress has provided for the regulation of labor-management relations, the building of hydroelectric power dams, and the building of the 42,000-mile interstate highway system. It has made federal crimes of such acts as moving stolen goods, gambling devices, and kidnapped persons across State lines. It has prohibited racial discrimination in granting access to such places as restaurants, theaters, hotels, and motels.

The Implied Powers
The implied powers are not expressly stated in the Constitution but are reasonably suggested—implied—by the expressed powers. The constitutional basis for the implied powers is found in one of the expressed powers. Article I, Section 8, Clause 18 gives Congress the “necessary and proper power.” The Necessary and Proper Clause says that Congress has the power

and interstate commerce, to raise and maintain armed forces, to declare war, to fix standards of weights and measures, to grant patents and copyrights, and to do many other things.

Several other expressed powers are set out elsewhere in the Constitution. Article II, Section 2 gives several powers to the President. They include the power to act as commander in chief of the armed forces, to grant reprieves and pardons, to make treaties, and to appoint major federal officials. Article III grants “the judicial Power of the United States” to the Supreme Court and other courts in the federal judiciary. Finally, several expressed powers are found in various amendments to the Constitution; thus, the 16th Amendment gives Congress the power to levy an income tax.

Preparing for Standardized Tests

Have students read the passages under Powers of the National Government on pp. 89–91 and then answer the question below.

Which of the following is not a power of the National Government?

A raising and maintaining armed forces
B granting patents and copyrights
C enacting uniform marriage and divorce laws
D prohibiting racial discrimination in access to such places as restaurants and hotels

Answer to . . .

Critical Thinking Establishing diplomatic relations is a power traditionally held by sovereign states, and is thus an inherent power.
Congress has taken these actions, and many more, because the power to do so is reasonably implied by just one of the expressed powers: the power to regulate interstate commerce.¹

The Inherent Powers

The inherent powers belong to the National Government because it is the national government of a sovereign state in the world community. Although the Constitution does not expressly provide for them, they are powers that, over time, all national governments have possessed. It stands to reason that the Framers of the Constitution intended the National Government they created to hold these powers.

The inherent powers are few in number. The major ones include the power to regulate immigration, to deport aliens, to acquire territory, to grant diplomatic recognition to other states, and to protect the nation against rebellion or other attempts to overthrow the government by force or violence.

One can argue that most of the inherent powers are implied by one or more of the expressed powers. For example, the power to regulate immigration is suggested by the expressed power to regulate foreign trade. The power to acquire territory can be drawn from the treaty-making power and the several war powers. But the doctrine of inherent powers holds that it is not necessary to go to these lengths to find these powers in the Constitution. In short, these powers exist because the United States exists.

Powers Denied to the National Government

Although the Constitution delegates certain powers to the National Government, it also denies the National Government certain powers. It does so in three distinct ways.

First, the Constitution denies some powers to the National Government in so many words—expressly.² Among them are the powers to levy duties on exports; to take private property for public use without the payment of just compensation; to prohibit freedom of religion, speech, press, or assembly; to conduct illegal searches or seizures; and to deny to any person accused of a crime a speedy and public trial or a trial by jury.

Second, several powers are denied to the National Government because of the silence of the Constitution. Recall that the National Government is a government of delegated powers; it has only those powers the Constitution gives to it.

Among the many powers not granted to the National Government are the powers to create a public school system for the nation, to enact uniform marriage and divorce laws, and to set up units of local government. The Constitution says nothing about these matters. It says nothing that would give the National Government the power to do any of these things, expressly, implicitly, or inherently. In short, the lack of any such provision—the silence of the Constitution—denies power to the National Government.

Third, some powers are denied to the National Government because of the federal system itself.

¹Article I, Section 8, Clause 3. The doctrine of implied powers is treated in greater detail in Chapter 11.
²Most of the expressed denials of power are found in Article I, Section 9 and in the 1st through the 8th amendments.

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**Constitutional Principles**

**Limited Government**

Although the Necessary and Proper Clause of the Constitution seems to give Congress an almost unlimited power to make laws on any topic that it wishes, there are some limitations. The process of judicial review allows the nation’s courts to determine which laws are unconstitutional, thereby limiting the types of laws that Congress creates to those that are necessary and proper.

**Activity**

Have students consider the powers given to Congress by the Necessary and Proper Clause and the court’s practice of judicial review. Ask students to consider whether both of these powers are necessary to U.S. government. Allow time for students to create arguments to support their positions, then hold a debate on the topic.

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**Voices on Government**

President Ronald Reagan (1911–2004) was 69 years old when he took office in 1981. During his two terms, President Reagan made it a priority to give power back to the States. The excerpt below comes from his first inaugural address.

“It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government.”

**Evaluating the Quotation**

What does President Reagan mean when he notes that “the Federal Government did not create the States; the States created the Federal Government”? Create a three-column chart with the following headings: Expressed Powers, Implied Powers, and Inherent Powers. Write each of the following examples on slips of paper and hand them out to students. Ask students to place their example in the appropriate category: regulating immigration, collecting taxes, coining money, regulating labor relations, building dams, building highways, prohibiting discrimination, declaring war, and giving diplomatic recognition.

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**Point-of-Use Resources**

- The Enduring Constitution Limited Government, p. 4
- Basic Principles of the Constitution Transparencies Transparencies 16-22, Limited Government

**Answer to . . .**

**Evaluating the Quotation** President Reagan refers to the fact that the individual States existed before a National Government was formed. It was the several States that called for a convention to revise the Articles of Confederation, out of which rose the National Government as we know it today.
Clearly the Constitution does not intend that the National Government should have any power to take action that would threaten the existence of that system. For example, in the exercise of its power to tax, Congress cannot tax any of the States or their local units in the carrying out of their governmental functions. If it could, it would have the power to destroy—tax out of existence—one or more, or all, of the States.\textsuperscript{3}

The States

The 50 States are the other half of the very complicated equation we call federalism. Their role in the American federal system is no less important than the role of the National Government.

Powers Reserved to the States

As you recall, the 10th Amendment declares that the States are governments of reserved powers. (See page 89.) The reserved powers are those powers that the Constitution does not grant to the National Government and does not, at the same time, deny to the States.

Thus, any State can forbid persons under 18 to marry without parental consent, or those under 21 to buy liquor. It can ban the sale of pornography, outlaw prostitution, and permit some forms of gambling and prohibit others. A State can require that doctors, lawyers, hairdressers, and plumbers be licensed in order to practice in the State. It can confiscate automobiles and other property used in connection with such illicit activities as illegal drug trafficking or prostitution. It can establish public schools, enact land use laws, regulate the services and restrict the profits of such public utilities as natural gas, oil, electric power, and telephone companies, and do much, much more.

In short, the sphere of powers held by each State—the scope of the reserved powers—is huge. The States can do all of those things just mentioned, and much more, because (1) the Constitution does not give the National Government the power to take these actions and (2) it does not deny the States the power to take them.

How broad the reserved powers really are can be understood from this fact: Most of what government does in this country today is done by the States (and their local governments), not by the National Government. The point can also be seen from this fact: The reserved powers include the vitally important police power—the power of a State to protect and promote the public health, the public morals, the public safety, and the general welfare.

The Constitution does not grant expressed powers to the States, with one exception. Section 2 of the 21st Amendment gives the States a virtually unlimited power to regulate the manufacture, sale, and consumption of alcoholic beverages.

Powers Denied to the States

Just as the Constitution denies many powers to the National Government, it also denies many powers to the States. Some of these powers are denied to the States in so many words.\textsuperscript{4} For example, no State can enter into any treaty, alliance, or confederation. Nor can a State print money or deprive any person of life, liberty, or property without due process of law.

Some powers are denied to the States inherently—that is, by the existence of the federal system. Thus, no State (and no local government)

\textsuperscript{3}But note that when a State, or one of its local units, performs a so-called nongovernmental function—for example, maintains liquor stores, runs a bus system, or operates a farmers market—it is liable to federal taxation. We shall come back to this point later, in Chapter 25.

\textsuperscript{4}Most of these expressed prohibitions of power to the States (and so, too, to their local governments) are found in Article I, Section 10 and in the 13th, 14th, 15th, 19th, 24th, and 26th Amendments.
can tax any of the agencies or functions of the National Government. Remember, too, each State has its own constitution. That document also denies many powers to the State.\(^5\)

### The Exclusive and the Concurrent Powers

Most of the powers that the Constitution delegates to the National Government are **exclusive powers**. These powers can be exercised by the National Government alone. They cannot be exercised by the States under any circumstances.

Some of these powers are expressly denied to the States. Examples include the power to coin money, to make treaties with foreign states, and to lay duties (taxes) on imports. Some powers are not expressly denied to the States but are, nonetheless, among the exclusive powers of the Federal Government because of the nature of the particular power involved. The power to regulate interstate commerce is a leading example of this point. If the States could exercise that power, trade between and among the States would be at best chaotic and at worst impossible.\(^6\)

Some of the powers delegated to the National Government are **concurrent powers**. The concurrent powers are those powers that both the National Government and the States possess and exercise. They include, for example, the power to levy and collect taxes, to define crimes and set punishments for them, and to condemn (take) private property for public use.

The concurrent powers are held and exercised separately and simultaneously by the two basic levels of government. That is, the concurrent powers are those powers that the Constitution does not grant exclusively to the National Government and that, at the same time, does not deny to the States. The concurrent powers, in short, are those powers that make it possible for a federal system of government to function.

### The Federal System and Local Governments

Government in the United States is often discussed in terms of three levels: national, State, and local. However convenient this view may be, it is at best misleading. Recall that there are only two basic levels in the federal system: the National Government and the State governments.

Governments do exist at the local level all across the country, of course. In fact, there are more than 87,000 units of local government in the United States today. You will take a look at them later in this book. For now, keep this important point in mind: All of these thousands of local governments are parts—subunits—of the various State governments.

Each of these local units is located within one of the 50 States. In its constitution and in its laws,
Chapter 4 • Section 1

Background Note
Recent Scholarship
Although the basic structure of the new government was established by the Constitution, much hung in the balance during the early years of the nation. Federalists and Anti-Federalists, Jeffersonians and Federalists—the battle was joined as these two factions warred over the relative weight and influence of the National Government, on the one hand, and the States, on the other. Various illustrious characters were at the forefront of this momentous struggle; Thomas Jefferson and John Marshall were two of the most influential. Author James F. Simon, a former Time magazine correspondent, tells the story of the consequential debate between Jefferson and Marshall in his book What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States. Jefferson favored State’s rights; Marshall favored a strong Federal Government. One became President; the other, Chief Justice of the Supreme Court. Simon brings their very public argument to life and at the same time illuminates this period in history.

Point-of-Use Resources

Close Up on the Supreme Court
McCulloch v. Maryland (1819), pp. 28–29

Answer to . . .
Interpreting Charts When laws governing oil tanker safety were passed at both the State and national levels, the Supreme Court ruled on which would take precedence.

The Supremacy Clause

The Supreme Law of the Land
As you have just seen, the division of powers in the American federal system produces a dual system of government, one in which two basic levels of government operate over the same territory and the same people at the same time. Each State has created these units. None exists apart from its parent State. Local government can provide services, regulate activities, collect taxes, and do many other things. It can do these things, however, only because the State has established and given it the power to do so. In short, when local governments exercise their powers, they are actually exercising State powers.

Another way of putting all of this is to remind you of a point that was first made in Chapter 1. Each of the 50 States has a unitary form of government—a central government that creates local units of government for its own convenience. Such an arrangement is bound to result in conflicts between national law and State law.

The Supremacy Clause
The Framers anticipated these conflicts—and so they wrote the Supremacy Clause into the Constitution. That provision declares that

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. 

—Article VI, Section 2

As you can see from the chart above, the Constitution and the laws and treaties of the United States are “the supreme Law of the Land.” This means that the Constitution stands above all other forms of law in the United States. Acts of Congress and treaties stand immediately beneath the Constitution.7

The Supremacy Clause has been called the “linchpin of the Constitution” because it joins the National Government and the States into a

Interpreting Charts The Supremacy Clause creates a hierarchy of laws. Local law (city and county charters and ordinances) must yield to State law. State law must yield to federal law. At the top of the hierarchy is the United States Constitution, which stands above all other forms of law in the United States. How does the case of United States v. Locke illustrate this hierarchy of laws?
single governmental unit, a federal government. In other words, the Supremacy Clause holds together the complex structure that is the American federal system.

The Supreme Court and Federalism
The Supreme Court is the umpire in the federal system. One of its chief duties is to apply the Supremacy Clause to the conflicts that the dual system of government inevitably produces. The Court was first called to settle a clash between a national and a State law in 1819. The case, *McCulloch v. Maryland*, involved the controversial Second Bank of the United States. The bank had been chartered by Congress in 1816. In 1818, the Maryland legislature, hoping to cripple the bank, placed a tax on all notes issued by its Baltimore branch. James McCulloch, the branch cashier, refused to pay the tax, and the Maryland courts convicted him for that refusal. The Supreme Court unanimously reversed the Maryland courts. Speaking for the Court, Chief Justice John Marshall based the decision squarely on the Constitution’s Supremacy Clause:

> "[I]f any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action...[T]he states have no power...to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress..." —*McCulloch v. Maryland*, Opinion of the Court

Since this landmark case, it has been impossible to overstate the significance of the Court’s function as the umpire of the federal system. Had the Court not taken this role, the federal system and probably the United States itself could not have survived its early years. Justice Oliver Wendell Holmes once made the point in these words:

> "I do not think the United States would come to an end if we [the Court] lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." —*McCulloch v. Maryland*, Opinion of the Court

The case is also critically important in the development of the constitutional system because in deciding it, the Court for the first time upheld the doctrine of implied powers. It also held the National Government to be immune from any form of State taxation.

The Supreme Court first held a State law unconstitutional in a case from Georgia, *Fletcher v. Peck*, 1810. The Court found that a Georgia law of 1795 making a grant of land to John Peck amounted to a contract between the State and Peck. It ruled that the legislature’s later repeal of that law violated the Constitution’s Contract Clause (Article I, Section 10). Since then, the Court has heard thousands of other cases. (In the *McCulloch* case, the Court’s opinion was long.)

### Section 1 Assessment

**Key Terms and Main Ideas**
1. Why did the Framers settle on federalism as the system of government for the new nation?
2. Explain each of the following: expressed powers, implied powers, and inherent powers.
3. Do local governments have powers other than those granted to them by their State? Explain your answer.
4. What is the significance of *McCulloch v. Maryland* in the development of the federal system?
5. Drawing Conclusions Identify several public issues in your community that you think are best handled locally, not by the Federal Government.

**Critical Thinking**
6. Determining Relevance In *Texas v. White*, 1869, Chief Justice Salmon P. Chase declared: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." Identify three specific provisions in the Constitution that indicate an "indestructible Union" and three that point to "indestructible States."

**Progress Monitoring Online**

For: Self-quiz with vocabulary practice
Web Code: mqa-1041

For: An activity on federalism
Web Code: mqd-1041

**Quiz** Unit 1 booklet, p. 25 includes matching and multiple-choice questions to check students’ understanding of Section 1 content.

**Presentation Pro CD-ROM** Quizzes and multiple-choice questions check students’ understanding of Section 1 content.

**Answers to...**

**Section 1 Assessment**

1. The Framers believed that without restraint, a strong central government posed a threat to individual liberty. They chose federalism because it would restrain the central government’s power.
2. Express powers are those that are explicitly stated in the Constitution, while implied powers are those that are not stated, but can be reasonably assumed. Inherent powers are those that are not explicitly stated, but are powers that national governments have historically had.
3. No; local governments exist because States create them and grant them specific powers.
4. This case was the first time the Court settled a clash between State and federal law.
5. Answers will vary, but should reflect an understanding of local and federal powers.
6. Students might identify Article I, Section 8; Article II, Section 2; Article I, Section 10; Article VI, Section 2. For “indestructible States,” students might list the 10th Amendment; Article I, Section 9; and the 1st through 8th Amendments.