Chapter 3
Federalism and Separation of Powers

AP Government
The Separation of Powers

If federalism separates government power between the national, state, and local governments, the separation of powers divides government power between the legislative, executive, and judicial branches.

- LEGISLATIVE
  - Congress
  - House and Senate
- EXECUTIVE
  - president
  - bureaucracy
- JUDICIAL
  - Supreme Court
  - other federal courts
Separation of Powers

• Self enforcing by giving each branch of government the means to participate in and partially or temporarily obstruct the workings of each other.

• This ability to influence the activities of other branches is the basis of Checks and Balances.
FIGURE 3.4 Checks and Balances

Executive over Legislative
- President can veto acts of Congress.
- President can call a special session of Congress.
- President carries out, and thereby interprets, laws passed by Congress.
- Vice president casts tie-breaking vote in the Senate.

Legislative over Executive
- Congress can override presidential veto.
- Congress can impeach and remove president.
- Senate can reject president’s appointments and refuse to ratify treaties.
- Congress can conduct investigations into president’s actions.
- Congress can refuse to pass laws or provide funding that president requests.

Legislative over Judicial
- Congress can change size of federal court system and number of Supreme Court justices.
- Congress can propose constitutional amendments.
- Congress can reject Supreme Court nominees.
- Congress can impeach and remove federal judges.
- Congress can amend court jurisdictions.
- Congress controls appropriations.

Judicial over Legislative
- Court can declare laws unconstitutional.
- Chief Justice presides over Senate during hearing to impeach the president.

Executive over Judicial
- President nominates Supreme Court justices.
- President nominates federal judges.
- President can pardon those convicted in federal court.
- President can refuse to enforce the court’s decisions.

Judicial over Executive
- Court can declare executive actions unconstitutional.
- Court has the power to issue warrants.
- Chief Justice presides over impeachment of president.
Constitution

- The framers provided for legislative supremacy by making Congress the preeminent branch.
- Shown by the powers given to the Legislative branch in Article I of Constitution
  - Sole power of appropriations
  - Power to initiate all revenue bills
  - Divided against itself, House vs. Senate
Powers of National Government

• In the Constitution, Article I, Section 8 – 18 *Expressed powers* to the national government.
  – All other powers reserved for states

• “Necessary and Proper Clause”
  – Also referred to as implied powers
    • Expansive interpretation of delegated powers

• Supremacy Clause
  – All national laws and treaties the “Supreme Law of the Land”.

[Image of the US Capitol Building]
Powers of State Government

• Anti-federalists
  – Feared strong central government
  – Wanted amendment to limit national power.
  – 10th Amendment became known as reserved powers amendment.

• States - Power of coercion
  – Develop and enforce criminal codes
  – Administer health and safety rules.
  – Regulate the family via marriage and divorce laws.
  – License individuals
  – Power to define private property.
  – Regulations of fundamental matters known as police powers

• Concurrent Powers
  – Chartering banks, licensing businesses, labor conditions, products.
Federalism

• National and State governments have certain levels of sovereignty used to restrain power of the other.

• Under Articles of Confederation
  – States made own trade agreements w/ foreign countries
  – Tax barriers between states

• After Constitution adopted
  – For nearly 150 years, virtually all of the fundamental policies governing the lives of Americans were made by the state legislatures.
Article IV, Section 1

• Full Faith and Credit
  – Each state expected to honor the “public Acts, Records, and Proceedings” that take place in other states.
  – Drivers license, marriage license

• Controversy
  • Same sex “civil unions” and marriages
  • Defense of Marriage Act in 1996
    – Federal government will not recognize gay marriage
Article IV, Section 2

• **Comity Clause** - Promote national unity
  – Privileges and immunities of one state should be entitled to similar treatment in other states.
  – States cannot discriminate against someone from another state
  – No special privileges to its own residents

• **Criminal Justice**
  – States are required to return fugitives to the states they have fled.
Compacts

- Two or more states reach legally binding agreements about how to solve a problem that crosses state lines.
  - Port Authority of New York and New Jersey
Home Rule

• States legislatures and constitutions gave power to localities.

• A guarantee of noninterference in various areas of local affairs.

• The power delegated by the state to a local unit of government to manage its own affairs.
Stages of Federalism
There have been four stages of federalism throughout American history.

1. “Dual Federalism”
2. “Cooperative Federalism”
3. “Regulated Federalism”
4. “New Federalism”
Stages of Federalism: Stage 1

STAGE 1: “Dual Federalism” (1789–1937)

1. Central government - focused on promotion of commerce and distribution of resources.

2. States - retained most remaining powers.
Stage 1: Dual Federalism

Article I, Section 8 of the Constitution set forth several powers of the national government, including:

• commerce clause
• “necessary and proper” clause
• *McCulloch v. Maryland* (1819)
• *Gibbons v. Ogden* (1824)

The “dual federalism” stage allowed for a relatively clear delineation of power between national, state, and local governments.
McCulloch v. Maryland

- First case favoring national power
- Question - Congress had the power to charter a bank
  - Bank of the United States
  - “Necessary and proper” used to expand power
- 2nd Question - Maryland had the right to tax the bank
  - “the power to tax is the power to destroy”
Gibbons v Ogden

- State of New York could grant a monopoly to Robert Fulton’s steamboat company to operate an exclusive service between New York and New Jersey.
- Ogden got his license from Fulton but Gibbons got his from the U.S. government.
- Marshall used the commerce clause to establish interstate commerce as a source of power for the federal government.
Slow Growth of National Power

• Dual Federalism – two-layered system
  – National and state
• Remained dual for 2/3 of our history
• Necessary and proper used the commerce clause to slowly expand national power.

1. “Dual Federalism”
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<td>Internal improvements</td>
<td>Property laws (including slavery)</td>
<td>Adaptation of state laws to local conditions (variances)</td>
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<td>Subsidies</td>
<td>Estate and inheritance laws</td>
<td>Public works</td>
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<td>Tariffs</td>
<td>Commerce laws</td>
<td>Contracts for public works</td>
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<td>Public lands disposal</td>
<td>Banking and credit laws</td>
<td>Licensing of public accommodations</td>
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<td>Patents</td>
<td>Corporate laws</td>
<td>Assessable improvements</td>
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<td>Currency</td>
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<td>Basic public services</td>
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**TABLE 3.1** The Federal System: Specialization of Governmental Functions in the Traditional System, 1789–1937 (top)
STAGE 2: “Cooperative Federalism” (1937–?)

Franklin Roosevelt’s New Deal sparked a revolution in national policy making and an increased role for the national government, altering the balance of federal power.
Stage 2: Cooperative Federalism

In *NLRB v. Jones and Laughlin Steel* (1937), the Supreme Court expanded its interpretation of the commerce clause to allow the national government to regulate as well as promote interstate commerce.

Allowed for an expansion of national government power and a blurring of the lines of authority between national and state government.
The New Deal’s expansion of the national government and the executive branch further empowered the national government at the expense of state autonomy.
As state and local governments came to depend on grant-in-aid support, the national government further intervened in state government decision making by threatening to withhold such grants. This is also known as "coercive federalism."
Grants-In-Aid

• Under “cooperative federalism,” the national government ensures state cooperation with federal policies by offering grants-in-aid.

• Categorical Grants-In-Aid
  – Given to states for more specific purposes, and most of the discretion remains in the hands of federal officials and officeholders.

• Block Grants
  – Given to states for general purposes and allow state officials greater discretion over how funds will be spent.

• Project Grants
  – Submit proposals to federal agencies.

• Formula Grants
  – Use a formula (Need, Capacity to Pay) to determine the amount of federal funds states receive.
Stage 3: Regulated Federalism

- Federal government threatens to withhold money unless states enact national standards.
  - Civil rights, poverty programs, environmental issues.
- Unfunded Mandates
  - Unfunded Mandates Reform Act
  - More than $50 million – “Stop, look, and listen”


1. “Dual Federalism”
2. “Cooperative Federalism”
3. “Regulated Federalism”
STAGE 4: “New Federalism” (1969–?)

The waning in some respects of Franklin Roosevelt’s New Deal coalition and programs sparked a counter-federal trend, known as “new federalism”, that began to return discretion to the state and local governments.
Stage 4: New Federalism

The “new federalism” trend of returning discretion to the states began in the executive branch as the Nixon, Carter, and Reagan administrations gave states a larger role in administering federal policies.
In the 1990s, both Congress and the federal courts joined the “new federalism” revolution.

In Congress, the Republican takeover after the 1994 elections led to a series of policies through which the federal government “devolved” power to the states.

Welfare reform is a good example of such “devolution.”
Divided government, when one party controls the White House and the other party controls at least one chamber of Congress, exacerbates the tensions between the branches. Under these circumstances, when collective action is necessary and desirable, the government must overcome these barriers.

In recent years, the Supreme Court has played an increasingly proactive role in determining the balance of power in the federal relationship, often by restraining Congress’s power.
3 Principles

• Three principles that make up the primary framework of Constitution are federalism, separation of power, and individual rights.
11th Amendment

- State **Sovereign Immunity**
  - Holds that states are immune from lawsuits by private individuals or groups claiming that the state violated a statute enacted by Congress.

- Supreme court often acts as referee in these issues.
Supreme Court

• Chief Justice Marshall – Nationalizing Court
• Chief Justice Roger Taney – Extreme Denationalizing period - Slavery
• FDR – Court started as anti-national but after 1936 election, began longest pro-nationalizing period.
• Burger and Rehnquist courts turning tendency back toward the states.