Chapter 3
Federalism and the Separation of Powers

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AMERICAN GOVERNMENT
POWER & PURPOSE
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Two of the Most Important Institutional Features

• *Federalism* divides power into two levels, national and state.
• *Separation of powers* divides each level of government against itself.
• These institutional features limit the power of government by dispersing power and making collective action difficult.
Auxiliary Precautions

• “A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”
  —James Madison, *Federalist 51*

• Federalism and the separation of powers are important precautions against the “tyranny of the majority.”
Institutions Are Not Carved in Stone

- Institutions are subject to revision and modification as competing forces seek new decision rules that will give them an advantage.
- Federalism and the separation of powers have evolved considerably over time.
Clicker Question

In *Federalist 51*, James Madison indicates that “auxiliary precautions” are a necessary check on popular government. What does he mean by “auxiliary precautions”?

A. the Council of Elders  
B. the institutions of federalism and separation of powers  
C. the system of home rule  
D. the emergency powers of the president
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D. the emergency powers of the president
Why Keep the States?

• Some at the Constitutional Convention, particularly Alexander Hamilton, preferred an even stronger national government than the one they created.
• The well-established history of the state governments was an important reason the states retained so much power.
Defining Federalism

• Federalism is the division of powers and functions between the national government and state governments.
• The Constitution provides “expressed powers” and “implied powers” to the federal government.
• The Tenth Amendment reserves the rest of governmental power for the states.
Why Federalism Matters: Hurricanes Katrina and Sandy

• In the case of Hurricane Katrina (2005), federal, state, and local officials blamed one another for the government’s slow response.

• When Hurricane Sandy (2012) hit the New Jersey shore, President Obama and state and local officials were very careful to work together to coordinate disaster response.
Federalism refers to

A. the division of powers and functions between the national government and state governments.
B. the division of power among the different branches of government.
C. the division of power between the House of Representatives and the Senate.
D. the division of power between the president and Congress.
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States’ Obligations to One Another

- The Constitution’s Full Faith and Credit Clause: States are to recognize actions and decisions taken in other states as legal and proper.
- The Privileges and Immunities Clause: A state cannot discriminate against someone from another state or give special privileges to its own residents.
Local Government and the Constitution

- Local governments (counties, cities, towns, etc.) are not granted any power in the Constitution, as they are creations of the state legislatures and state constitutions.
- Most states have given larger cities in their states home rule: a guarantee of noninterference in local affairs.
Four Stages of Federalism

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<th>Stage</th>
<th>Period</th>
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<td>Dual federalism</td>
<td>1789–1937</td>
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<td>Cooperative federalism</td>
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<td>Regulated federalism</td>
<td>1960s–1990s</td>
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<tr>
<td>New federalism</td>
<td>1990s–Present</td>
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Dual Federalism (1789–1937)

- Powers were shared between the federal and state governments.
- States exercised the most important powers.
- It was called “dual federalism” because the duties and operations of the different levels of government remained more strictly separated.
Dual Federalism (1789–1937)

<table>
<thead>
<tr>
<th>NATIONAL GOVERNMENT JURISDICTION (DOMESTIC)</th>
<th>STATE GOVERNMENT JURISDICTION</th>
<th>LOCAL GOVERNMENT JURISDICTION</th>
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<tbody>
<tr>
<td>Internal improvements</td>
<td>Property laws (including slavery)</td>
<td>Adaptation of state laws to local conditions (variances)</td>
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<tr>
<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>
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<td>Assessable improvements</td>
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<td>Currency</td>
<td>Insurance laws</td>
<td>Basic public services</td>
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<td>Family laws</td>
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<td>Morality laws</td>
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<td>Public health laws</td>
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<td>Education laws</td>
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<td>General penal laws</td>
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<td>Eminent domain laws</td>
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<td>Construction codes</td>
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<td>Land-use laws</td>
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<td>Water and mineral laws</td>
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<td>Criminal procedure laws</td>
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<td>Electoral and political party laws</td>
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<td>Local government laws</td>
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<td>Civil service laws</td>
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<td></td>
<td>Occupations and professions laws</td>
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</table>
Exceptional Cases Establish National Power

• *McCulloch v. Maryland* (1819) established the power of the federal government by utilizing the necessary and proper clause by utilizing the supremacy clause.

• *Gibbons v. Ogden* (1824) reinforced federal power.

• Despite these cases, federal power barely grew until the New Deal.
From Dual Federalism to Cooperative Federalism

• During the New Deal (1930s), Congress enacted legislation expanding the federal government’s role in regulating commercial activity.

• The Supreme Court shifted course and upheld federal regulation of a variety of commercial activities (NLRB v. Jones and Loughlin Steel Company).
Cooperative Federalism
(1937–1960s)

• Marked by supportive relations, sometimes partnerships, between the federal government and the state and local governments.

• A rise in “grants-in-aid”: funds given by Congress to state and local governments.
Rapid Expansion in Grants-in-Aid (1950–Present)
State and Local Budgets Are Dependent on Federal Dollars

![Graph showing the percentage of state/local budgets dependent on federal dollars over time. The graph includes three lines representing different types of federal aid: Federal aid as percentage of state/local budget, Grants-in-aid as percentage of federal domestic programs, and Grants-in-aid as percentage of gross domestic product. The graph spans from 1960 to 2012.]
Regulated Federalism (1960s–1990s)

• The federal government dictates national standards states must meet or rules states must follow.
• A rise in unfunded mandates: national standards or programs imposed on state and local governments without accompanying funding.
New Federalism (1990s–Present)

- Efforts to craft national policies to return more discretion to the states
- Rise in block grants
- Unfunded Mandates Reform Act
- Loosening of federal restrictions on grants-in-aid, like the Welfare Reform Act
- Efforts by the courts to interpret the interstate commerce clause more narrowly
# A New Federal System?

## The Case Record, 1995–2006

<table>
<thead>
<tr>
<th>CASE</th>
<th>DATE</th>
<th>COURT HOLDING</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States v. Lopez, 514 U.S. 549</td>
<td>1995</td>
<td>Voids federal law barring handguns near schools: it is beyond Congress's power to regulate commerce.</td>
</tr>
<tr>
<td>Seminole Tribe v. Florida, 517 U.S. 44</td>
<td>1996</td>
<td>Voids federal law giving tribes the right to sue a state in federal court: &quot;sovereign immunity&quot; requires a state's permission to be sued.</td>
</tr>
<tr>
<td>Printz v. United States, 521 U.S. 898</td>
<td>1997</td>
<td>Voids key provision of Brady law requiring states to make background checks on gun purchases; as an &quot;unfunded mandate,&quot; it violated state sovereignty under the Tenth Amendment.</td>
</tr>
<tr>
<td>City of Boerne v. Flores, 521 U.S. 507</td>
<td>1997</td>
<td>Restricts Congress's power under the Fourteenth Amendment to regulate city zoning and health and welfare policies to &quot;remedy&quot; rights; Congress may not expand those rights.</td>
</tr>
<tr>
<td>Alden v. Maine, 527 U.S. 706</td>
<td>1999</td>
<td>Declares states &quot;immune&quot; from suits by their own employees for overtime pay under the Fair Labor Standards Act of 1938. (See also the Seminole case.)</td>
</tr>
<tr>
<td>United States v. Morrison, 529 U.S. 508</td>
<td>2000</td>
<td>Extends Seminole case by invalidating Violence against Women Act: states may not be sued by individuals for failing to enforce federal laws.</td>
</tr>
<tr>
<td>Gonzales v. Oregon, 546 U.S. 243</td>
<td>2006</td>
<td>Upholds state assisted-suicide law over attorney general's objection.</td>
</tr>
</tbody>
</table>
Clicker Question

Under the Constitution, does the federal government have the power to enact a law prohibiting the possession of a firearm within 1,000 feet of a public school?

A. Yes
B. No
New Federalism and the Health Care Reform Act

Is the individual mandate in the new health reform law constitutional?

- **No!** There is no expressed power in the Constitution to require citizens to purchase anything from a private firm, and it has nothing to do with regulating interstate commerce.

- **Yes!** The penalty imposed for not purchasing health insurance is a tax. In addition, this is simply part of regulating a commercial activity, just as most states require people to purchase auto insurance.
Summing Up the Four Stages of Federalism

**Dual Federalism**
- National Government
- State Governments
- Layer Cake

**Cooperative Federalism**
- National Government
- State Governments
- Marble Cake
  - Cooperation on some policies

**Regulated Federalism**
- National government mandates the recipe.
- State governments are mandated to provide the ingredients.

**New Federalism**
- State governments provide the recipe.
- National government provides the ingredients.
  - Revenue sharing
  - Devolution of power
  - Block grants

**Recipes**
- National Standards
- Conditional Grants
- Unfunded Mandates
- Preemption
- National government determines policies; state governments pay for and administer them.

- Policies
- Laws
- State governments have more flexibility to make policy and administer programs.
The era of dual federalism was characterized by

A. a blending of roles between the federal and state governments.
B. the federal government enacting large numbers of unfunded mandates for the states.
C. a more strict division of roles between the federal and state governments.
D. the rapid expansion of grants-in-aid from the federal government to the states.
The Separation of Powers

• “You must first enable the government to control the governed; and in the next place oblige it to control itself.”
  —James Madison, *Federalist 51*

• The separation of powers seeks to limit the power of the federal government by dividing government against itself.
Checks and Balances: A System of Mutual Vetoes

- There is no strict separation of powers.
- The Constitution establishes mechanisms through which each branch of government is able to participate in and influence the activities of the others.
- Each branch has agenda and veto power that requires cooperation among branches to get things done.
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 tiebreaking 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

**EXECUTIVE OVER JUDICIAL**
- Court has the power to issue warrants
- Chief justice presides over impeachment of president

**JUDICIAL OVER EXECUTIVE**
- Court can declare executive actions unconstitutional

**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**
- 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 courts’ decisions
The Constitution did not create “separate but equal” branches.
  - The legislative branch was expected to be the most powerful branch.
  - This is one reason for bicameralism.

Branches are given the power to defend themselves against “encroachments.”
Separation of Powers and the Rise of Divided Government

- Democratic Congresses struggled with the Nixon and Reagan administrations for control over war and spending powers.
- A Republican House of Representatives struggled for policy control and eventually impeached Bill Clinton (although the Senate did not convict him).
- Today, a conservative Republican House majority battles President Obama and Senate Democrats for power.
Divided Government Has Remained the Norm

• In 2007 and 2008, Democratic Congresses confronted George W. Bush’s administration over issues ranging from the War In Iraq to the SCHIP Program.

• In 2011 and 2012, Republican control of the House of Representatives led to dramatic conflict over taxes and spending.
Checks and Balances: The Rationality Principle at Work

• The idea behind checks and balances is perhaps the clearest expression of the rationality principle at work.
• “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”
  —James Madison, Federalist 51
Checks and Balances and the Debt-Ceiling Increase

• Congressional Republicans wanted spending cuts, including cuts to Medicare.
• President Obama insisted on tax increases on the wealthy and defense spending cuts.
• Checks and balances kept each side from dictating terms to the other.
At the end of 2012, Congress and the president faced the “fiscal cliff,” a combination of spending cuts and significant tax increases set to kick in unless a different agreement could be reached.

Eventually, the parties agreed to increase taxes on those earning over $400,000 and set a deadline for the sequester later on.
Clicker Question

The framers of the Constitution employed the rationality principle by

A. giving the president the unilateral authority to detain enemy combatants.
B. giving the Supreme Court the police power.
C. giving reserved powers to the states.
D. giving each branch the incentive and the constitutional means to defend itself.
The Role of the Supreme Court Has Evolved over Time

- Judicial Review: the Court’s ability to strike down presidential actions or laws passed by Congress
- Used sparingly for most of American history
- Used more frequently in recent years
Collective Action or Collective-Action Problem?

Do federalism and the separation of powers facilitate collective action or create new collective-action problems? Both are true:

– By dispersing power, collective action is made more difficult.
– By giving each branch some influence over the others, these institutions facilitate negotiation, compromise, and moderation.