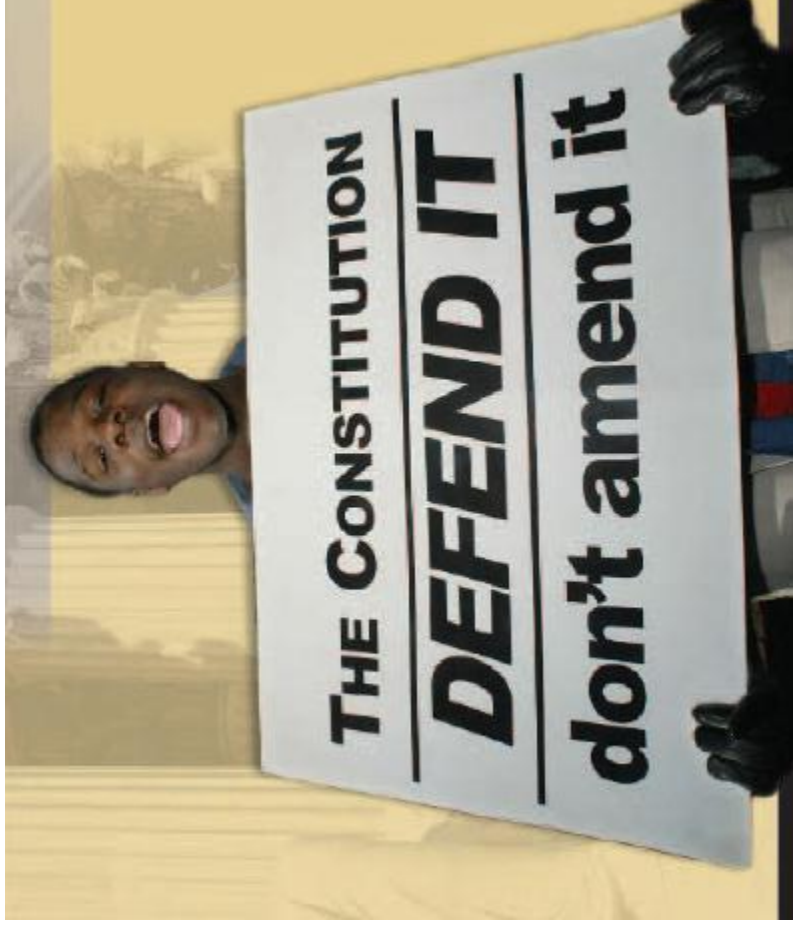


CONSTITUTIONAL UNDERPINNINGS



UNIT 1

CHAPTER 1

CONSTITUTIONAL

DEMOCRACY

DEFINING DEMOCRACY

MEANING OF DEMOCRACY (GOVERNMENT BY THE PEOPLE)

- **Constitutional democracy refers to a government that enforces limits on those who govern and allows people to be heard through free and fair elections**
- **Constitutionalism refers to how power is granted, dispersed, and limited**
- **Distinguishing feature of democracy is that government derives authority from its citizens**

DEFINING DEMOCRACY

HISTORICAL EVENTS THAT CREATED THE CONSTITUTIONAL DEMOCRACY OF THE UNITED STATES

- Formerly a term of derision - Positive meaning only in last 100 years
- Democracy today means representative democracy (democracy = republic)
- Republic
 - Same as indirect democracy
 - Solves problems of direct democracy (fear of mob rule or mobocracy)
 - “Secures the advantages of direct democracy while curing its weaknesses”

DEFINING DEMOCRACY

BELIEFS IN AMERICAN DEMOCRACY

- **Individual liberty**
 - All individuals must have the opportunity to realize individual goals
 - Every individual has rights; these rights are the source of all legitimate governmental authority and power
 - Freedom of expression; Right to assemble and protest
 - Opposite of statism (state supreme over individual)
- **Popular consent**
 - Governmental power from people
 - A willingness to lose if majority removes support
- **Equality of opportunity**
 - Jefferson's Declaration of Independence statement (“All men are created equal”)
 - What kind of equality? Equality of opportunity? Role of FDR’s 2nd Bill of Rights: economic security

DEFINING DEMOCRACY

BELIEFS IN AMERICAN DEMOCRACY

- **Free and fair elections**
 - Held at frequent intervals; decided by majority rule
 - All citizens should have equal voting power
 - Existence of opposition political parties
- **Majority rule**
 - Those with the most votes assume power
 - Majority still respects minority views
 - Constitution reflects fear of tyranny by majority

DEFINING DEMOCRACY

DISTRIBUTION OF POWER IN OUR SYSTEM (THEORIES OF DEMOCRACY)

- *Majoritarian (traditional) theory*
 - Leaders are heavily influenced by the will of the people
- *Elite theory*
 - Society is divided along class lines and that an upper-class elite rules
 - Wealth is seen as the basis of power
- *Pluralist theory*
 - Many centers of influence compete for power and control over public policy, with no one group or set of groups dominating
 - Pluralists view bargaining and compromise as essential ingredients to democracy
- *Hyperpluralism*
 - “Pluralism gone sour”
 - There are so many groups, and they are so strong, that government has become gridlocked and is unable to act

THE ARTICLES OF CONFEDERATION

“FIRM LEAGUE OF FRIENDSHIP”

- **U.S. began as a confederation**
 - Weak national government
 - States retained sovereignty
 - Unicameral Congress in which each state had one vote
 - No executive branch or judicial branch
- **Flaws**
 - Congress lacked the power to levy taxes; had to ask the states for revenue
 - Congress lacked the power to regulate or promote commerce among the states
 - Amendments required unanimous consent of all 13 states

THE CONSTITUTIONAL ROOTS OF THE AMERICAN EXPERIMENT

TOWARD UNITY AND ORDER

- Declaration of Independence >> Revolutionary War >> Articles of Confederation (1781) and its weak central government:
 - Articles created "fragile league of friendship," not a nation – true power is in the hands of the state legislatures
 - No power to tax
 - No chief executive and no national judiciary
 - No power to regulate interstate or foreign commerce
 - No national currency
 - Weak and inadequate central government
- Annapolis Convention in 1786 called for a convention to amend the Articles of Confederation
- Shays' Rebellion acted as a catalyst to strengthen the Articles of Confederation

THE CONSTITUTIONAL CONVENTION, 1787

THE DELEGATES

- **Only 40 of 55 delegates actively participated**
 - Most influential men of nation - “well-read, well-bred, well-fed, and well-wed”
- **Prime movers at the convention**
 - Alexander Hamilton, George Washington, and James Madison - “Father of Constitution” because of leadership and detailed notes of proceedings
- **Secret proceedings to encourage intellectual flexibility and to weaken convention enemies**

THE CONSTITUTIONAL CONVENTION, 1787

CONSENSUS

- All delegates supported republican government; scrap Articles
- Common philosophy was a general framework of government favoring the protection of property
- States would determine voting qualifications; suffrage for property owners only
- Provisions designed to increase the economic powers of the central government
- Agreed on national government consisting of a supreme legislative, executive, and judiciary branch
- Agreed on the need for a strong executive and an independent judiciary
- Stronger national government, but not tyrannical

THE CONSTITUTIONAL CONVENTION, 1787

CONFLICT AND COMPROMISE

- **The Virginia Plan (favored by more populous states)**
 - Called for a strong central government with a legislature composed of two chambers
- **The New Jersey Plan (favored by small states)**
 - Would give Congress the right to tax and regulate commerce and to coerce states
 - Would retain the single-house legislature in which each state would have the same vote
 - Plan contained the supremacy clause
- **The Connecticut Compromise**
 - Called for one house in which each state would have an equal vote and a second house in which representation would be based on population (only form of direct democracy in original Constitution for elected officials) and in which all bills for raising or appropriating money would originate

THE CONSTITUTIONAL CONVENTION, 1787

CONFLICT AND COMPROMISE

- North-South Compromises
 - Southern delegates insisted on a two-thirds majority in the Senate before presidents could ratify treaties
 - Issue of representation in the House of Representatives was resolved by the three-fifths compromise – counting of slaves (North gets taxes, South gets reps)
- Election of the President
 - Life term v. annual election >> compromise of a 4-year term
 - Method of election:
 - Some wanted election by Congress
 - Some wanted election by state legislatures
 - Some wanted direct election
 - Compromise: Electoral College system
- Other issues
 - Constitution establishes Supreme Court, but Congress may establish inferior courts

TO ADOPT OR NOT TO ADOPT?

FEDERALISTS VERSUS ANTIFEDERALISTS

- **Federalists:**
 - **Views**
 - Elites most fit to govern; Feared “excesses” of democracy
 - Favored strong central government
- **Antifederalists:**
 - **Views**
 - Feared concentration of power in hands of elites
 - Believed that government should be closer to the people
 - Feared strong central government, favored stronger state governments
 - Feared the lack of Bill of Rights (which would be added later to protect individual liberty) – their strongest argument
- The *Federalist* essays (written by Alexander Hamilton, James Madison, and John Jay) helped the ratification process

CHAPTER 2

THE LIVING

CONSTITUTION

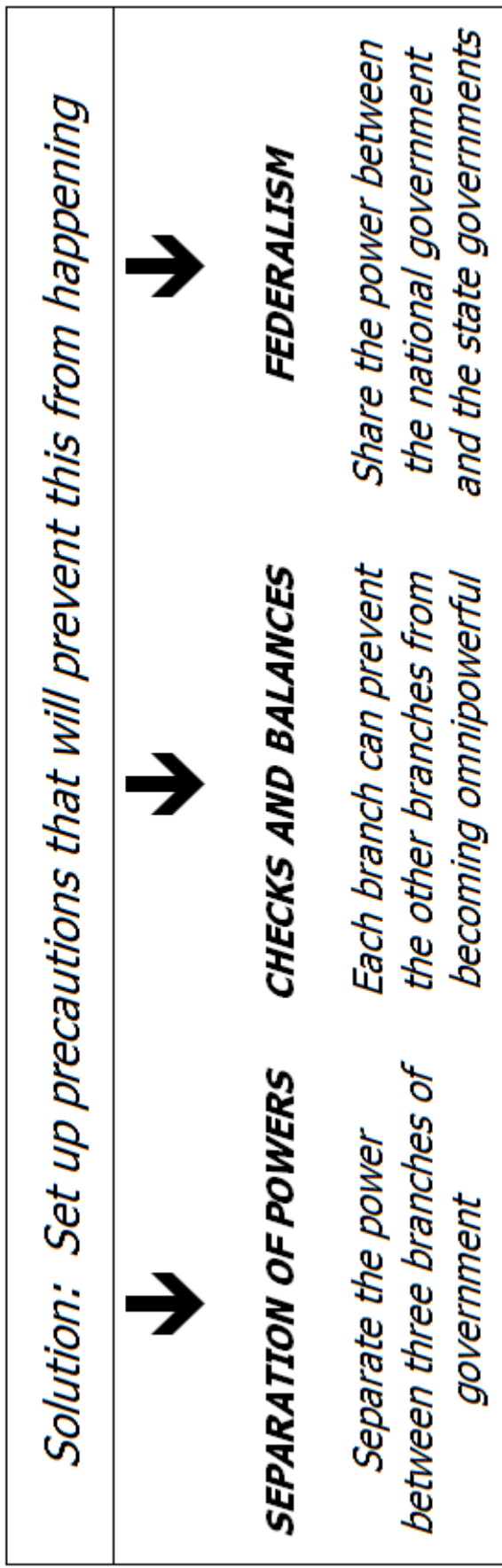
INTRODUCTION

WHY A CONSTITUTION?

- **Madison was concerned that government would be controlled by majority or minority factions**
- **Constitution is a supreme and binding law that both grants power to the government and limits the power of the government**

MADISONIAN MODEL

Fear that majority and minority factions could threaten the government



CHECKING POWER WITH POWER

SEPARATION OF POWERS (ONE OF MADISON'S AUXILIARY PRECAUTIONS)

- Allocation of constitutional authority to each of the three branches of the national government
- To Madison, tyranny was government that controlled all 3 branches of government >> division of power among the legislative, executive, and judicial branches
- Colonial experiences, e.g. excessive power in state legislatures >> need for strong executive
- Danger of one branch combining forces with another branch >> checks and balances

CHECKING POWER WITH POWER

CHECKS AND BALANCES (ONE OF MADISON'S AUXILIARY PRECAUTIONS)

- **Background**
 - 18th century view of government as something to be restrained, and modern view of government as something to be used for the common good.
 - Fear of tyranny among Founders >> distrust of government >> checks and balances as means of intentionally building inefficiency in order to prevent government abuse of power.
- Each branch has a role in the actions of others (veto, veto override, appointment and confirmation, treaty making and ratification, defense funding and Commander-In-Chief)
- Each branch is politically independent of the others
- Power struggles among three branches (especially Congress and the president)
- A majority of the voters can win control over only part of the government at one time. Staggering of terms within each branch >> a majority of voters can gain control over one part of government at one time, e.g. midterm congressional elections can serve as a check of the executive.
- Independent national courts are provided
- Political independence within each branch: no branch is dependent upon the other two for election (exception: judges are appointed by President) and continuance in office (life terms for judges ameliorate presidential influence)

CHECKING POWER WITH POWER

MODIFICATIONS OF CHECKS AND BALANCES

- **The Rise of National Political Parties**
 - In theory, should weaken checks and balances – a way of bringing the branches of government together. Constitution divides government, but parties bring people in government together.
 - In reality, however, parties are weak:
 - Dominance of only 2 parties >> each party has wide range of interests >> much disagreement within each party itself >> difficult to assert such strong control.
 - Prevalence of divided government, e.g. a president of one party and a congress of the other.

CHECKING POWER WITH POWER

MODIFICATIONS OF CHECKS AND BALANCES

- Expansion of the Electorate and the Move Toward More Direct Democracy
 - Direct Primaries – used more often than the caucus system
 - Initiative – a law proposed by the people and directly voted on by the people
 - Referendum – a law or amendment placed on the ballot by the state legislature
 - Recall – an election that can remove a public official from office
 - Changes in voting methods
 - Senators now chosen by people
 - Congressmen also chosen by people
 - Presidents chosen by electors who vote as the people have voted
 - Thus, members of two branches essentially chosen by same electorate > > **weakening of checks and balances in theory; however, split ticket voting has changed this.**

CHECKING POWER WITH POWER

MODIFICATIONS OF CHECKS AND BALANCES

- Establishment of Agencies Deliberately Designed to Exercise Legislative, Executive, and Judicial Functions
 - Growth of federal bureaucracy.
 - Development of numerous agencies with legislative, executive and judicial functions.
 - Congress often grants broad authority to agencies and lets them carry out the general will of Congress, e.g. Congress established an IRS to collect taxes, and then granted the IRS authority to help write the tax code, enforce the tax code, and settle disputes over the tax code.
 - Thus, growth of bureaucracy has caused a weakening of checks and balances.

JUDICIAL REVIEW

MARBURY V. MADISON (1803)

- Framers did not specifically provide for judicial review
- Court could not enforce an unconstitutional law (Section 13 of Judiciary Act)
- Chief Justice John Marshall reasoned that judges should interpret the Constitution, not the President or Congress
- Judicial review became established due to this case
- A single person may challenge an existing law through judicial hearings

CHANGING THE LETTER OF THE CONSTITUTION

FORMAL AMENDMENTS

- **Constitution should not change as an expression of basic and timeless personal liberties, but should adapt to changing conditions (amendment process)**
- **Legacy of the Articles: Unanimous vote to amend >> impractical >> desire to make process easier, but not too easy**
- **Process of amending reflects federal system**

CHANGING THE LETTER OF THE CONSTITUTION

PROPOSING FORMAL AMENDMENTS

- 1) Method by a two-thirds vote of both houses of Congress (only method used so far)
 - Congress has proposed 31 amendments
 - Increasing number of congressional attempts at constitutional amendments, for example, the Balanced Budget Amendment
 - Popularity of proposing amendments is due to trying to make a more responsive system
 - The 27th amendment took 203 years, a "reasonable time"?
- 2) Method by a convention called by Congress at the request of the legislatures in two-thirds of the states (has never been used)
 - Constitutional Convention called by Congress at request of 2/3 of states >> serious implications and fears of such a gathering:
 - Never used before
 - Fear of "runaway" convention that might get out of hand and implement wholesale changes in the Constitution.
 - Disturbing questions: Will convention stick to only the matter at hand? Will it take on other issues? Who gets to be delegates? How are they selected? How is representation among the states to be determined?

CHANGING THE LETTER OF THE CONSTITUTION

RATIFYING FORMAL AMENDMENTS

- Two methods – Congress decides which shall be used
 - 1) Approval by three-fourths of state legislatures
 - Most state legislatures ratify with simple majority, but some require a supermajority.
 - 2) Approval by specifically called ratifying conventions in three-fourths of the states
 - Amendment 21 done this way
 - A more directly democratic way. People elect delegates who state their positions on the proposed amendment. Citizens are in essence casting their votes on the amendment by voting for the appropriate delegates.
- Seven year period provided for ratification (generally)

Step 1 Amendment Is Proposed

Proposed by Congress by
a $\frac{2}{3}$ vote in both houses



Proposed at a national convention
called by Congress when
requested by $\frac{2}{3}$ (34) of
the State legislatures



Step 2 Amendment Is Ratified

Ratified by the State
legislatures of $\frac{3}{4}$ (38)
of the States



Ratified by conventions held
in $\frac{3}{4}$ (38) of the States



THE CONSTITUTION AS AN INSTRUMENT OF GOVERNMENT

INFORMAL AMENDMENTS

- **Why?**
 - “Constitution belongs to the living, not the dead” (Jefferson) – gets new blood over time (laws, amendments)
 - Jefferson believed each generation might need new Constitution.
 - This hasn’t occurred because of the informal changes that have allowed the Constitution to adapt to changing times (especially with Congress’ use of implied powers)

THE CONSTITUTION AS AN INSTRUMENT OF GOVERNMENT

INFORMAL AMENDMENTS

- **Congressional Actions**
 - Congress has passed laws that reinterpret and expand Constitutional provisions
 - e.g., Commerce Clause allows Congress to regulate and promote interstate and international commerce
 - Over time, Congress has passed many laws that define the Commerce Clause, including regulations on forms of commerce that didn't exist in 1789, such as railroad lines, air routes, and internet traffic

THE CONSTITUTION AS AN INSTRUMENT OF GOVERNMENT

INFORMAL AMENDMENTS

- **Presidential Actions**
 - **Executive privilege/executive orders (latter has the force of law)**
 - **Executive agreements with other countries**
 - **Right to send armed forces into hostilities**
 - **Right to propose legislation to Congress and work to secure its passage**

THE CONSTITUTION AS AN INSTRUMENT OF GOVERNMENT

INFORMAL AMENDMENTS

- **Judicial Actions**
 - The judiciary has been the most influential in interpreting the Constitution
 - Article III defines the power of the judiciary very broadly, but does not specifically mention judicial review
 - Supreme Court has changed constitutional interpretations to reflect new social economic conditions (*Plessy v. Ferguson*, *Brown v. Board*, *Texas v. Johnson*, *Lawrence v. Texas*)

THE CONSTITUTION AS AN INSTRUMENT OF GOVERNMENT

INFORMAL AMENDMENTS

- **Custom and Usage**
 - Has democratized our Constitution (presidential and vice presidential TV debates)
 - Examples - Cabinet, parties, committee system in Congress, senatorial courtesy, legislative veto, presidential nominating conventions

CHAPTER 3

AMERICAN

FEDERALISM

WHY FEDERALISM?

THREE SYSTEMS OF GOVERNMENT

1) Unitary system

- Places all governmental power in one, central, geographic area
- Not used because too reminiscent of British rule (strong, distant government that becomes tyrannical)
- More efficient than a federal system (which can be a bad thing)

WHY FEDERALISM?

THREE SYSTEMS OF GOVERNMENT

2) Confederation

- Allows central government to make regulations for constituent governments
- Not used because too reminiscent of Articles (tried and failed)

WHY FEDERALISM?

THREE SYSTEMS OF GOVERNMENT

- 3) Federalism
 - Constitutional division of powers between the national government and the states; both get their powers from a Constitution, not each other
 - Constitution (federally based) replaced the Articles (confederation based)
 - Federal system is NOT as efficient as a unitary system (which can be good)
 - Federalism issues are at the top of the political agenda along with the issue of devolution
 - Since the New Deal in the 1930s to today, there has been a shift of power from the states to the national government; since 1994 elections there has been an attempt to return power to the states
 - Federalism debates depend upon issue at stake and rival philosophies of national action vs. decentralization

WHY FEDERALISM?

ADVANTAGES

- *Federalism checks the growth of tyranny*
 - Inhibits formation of a single-interest majority
 - If tyranny occurred in a few states, federal government could prevent its spread to others (e.g. Shays' Rebellion)
 - National government has only those powers granted to it - all others belong to states through Amendment 10
- *Federalism allows unity without uniformity*
 - No need for consensus on every divisive issue
 - More suitable for geographically large nation – allows for differences among states
 - More suitable for heterogeneous people – allows for differences

WHY FEDERALISM?

ADVANTAGES

- *Federalism encourages experimentation*
 - States are "laboratories" for public policy experimentation (gambling in NV, med marijuana in CA)
 - States have been in the forefront on health care, voting, air pollution control programs
- *Federalism keeps government closer to the people*
 - Provides numerous arenas for decision-making
 - Local and state politics involve citizens in large numbers (most Americans had a stronger allegiance to their state and state government)
 - Multiple points of access for citizens

WHY FEDERALISM?

- **DISADVANTAGES**
 - Promotes inequality because states differ in the resources they can devote to providing services.
 - Enables local interests to delay or even thwart majority support for a policy.
 - Creates confusion because the different levels of government make it difficult for citizens to know what different governments are doing.

DEFINING FEDERALISM

DUAL (“LAYER CAKE”) FEDERALISM

- Prevalent through ~ 1937
- State governments and national government each remained supreme within their own spheres.
- Proper relationship between government and the states, portraying the states as powerful components of the federal government -- nearly equal to the national government.
- Powers and policy assignments of the layers of government were distinct, as in a layer cake.
- Suggested that the powers of the national government should be interpreted narrowly (Constitution gives the federal government limited powers and the rest should be to the states).
- Dual federalism is composed of four essential parts:
 - The national government rules by enumerated powers only. The national government may rule only by using powers specifically listed in the Constitution.
 - The national government has a limited set of constitutional purposes. The national government has only limited purposes.
 - Each government unit -- nation and state -- is sovereign within its sphere.
 - The relationship between nation and states is best characterized by tension rather than cooperation.
- Of primary importance in dual federalism is states' rights, which reserve to the states all rights not specifically conferred on the national government by the Constitution. According to the theory of dual federalism, a rigid wall separates the nation and the states.

Dual federalism

Dual Federalism



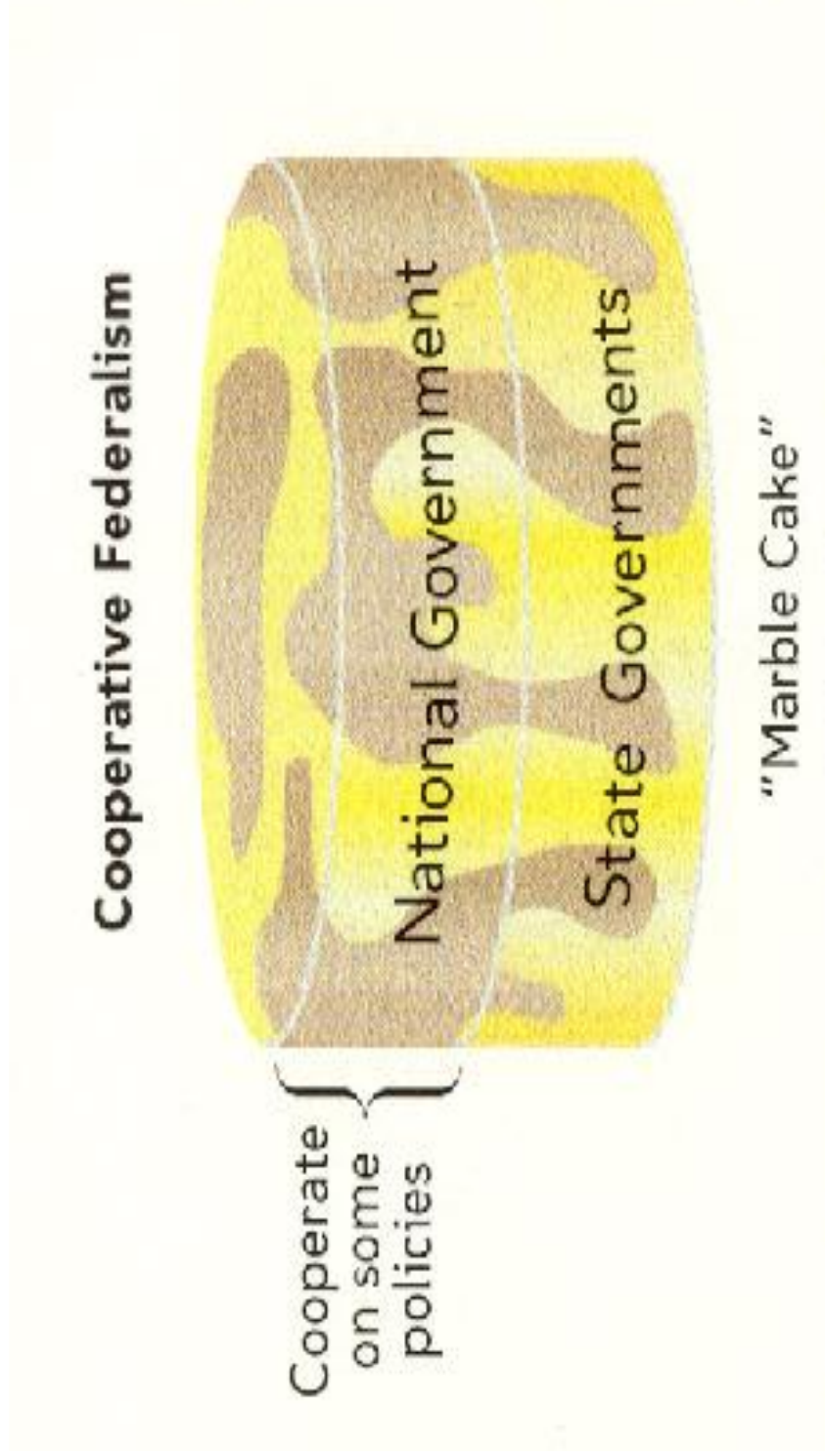
"Layer Cake"

DEFINING FEDERALISM

COOPERATIVE (“MARBLE CAKE”) FEDERALISM

- Prevalent since ~ 1937
- Mingling of responsibilities between the state and national government.
- Sharing powers & policy assignments, like a marble cake.
- Acknowledges a need for cooperation between state and federal governments.
- Suggests that powers of the national government should be interpreted broadly.
- Cooperative federalism rejects that state and national government must exist in separate spheres and is defined by three elements:
 - National and state agencies typically undertake government functions jointly rather than exclusively.
 - The nation and states routinely share power.
 - Power is not concentrated at any government level or in any agency. The fragmentation of responsibilities gives people and groups access to many venues of influence.

Cooperative federalism



DEFINING FEDERALISM

DIFFERENCE BETWEEN DUAL AND COOPERATIVE

- A critical difference between dual and cooperative federalism is how they interpret the elastic clause and Tenth Amendment.
- These two sections of the Constitution define the relationship between state and national governments.
 - Article 1, Section 8, lists the enumerated powers of congress and ends with the elastic clause, which gives Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" meaning the enumerated powers.
 - The 10th Amendment reserves for states or the people powers not assigned to the national government or denied to the states by the Constitution.
- Dual federalism insists that powers not assigned to the national government are only for states and the people, and claims that the elastic clause is inflexible.
- Cooperative federalism restricts the 10th Amendment and suggests supplements to the elastic clause.

DEFINING FEDERALISM

DEVOLUTION REVOLUTION

- Shifting of some authority from national government back to the states
- Associated with Nixon, Reagan, and especially associated with 104th (1995-1997) and 105th (1997-1999) Republican Congress: “Devolution Revolution”
- 1980s (Reagan) started shifting the responsibilities and costs for many programs to state governments
- Example: use of block grants in welfare reform bill of 1996 (Ended welfare as federal entitlement program and gave control to the States)
- Unfunded Mandates Reform Act of 1995 restricted future unfunded mandates
- Use of block grants to replace categorical grants
- Repeal of 55 m.p.h. speed limit

DEFINING FEDERALISM

DEVOLUTION REVOLUTION

- Supreme Court actions consistent with devolution:
 - Struck down Gun Free School Zones Act in 1995. Congress overextended itself when it linked gun control laws to the interstate commerce clause of the Constitution.
 - Struck down part of the Violence Against Women Act in 2000, saying that rape victims could not sue their attackers in federal court because it was up to the states – not Congress – to give such help to women victimized by violence. Again, the Court said that the Congress overextended itself with the use of the interstate commerce clause in passing the Act.
 - Struck down Religious Freedom Restoration Act in 1993. This act had restricted the power of the states to regulate religion >> this ruling gave states greater authority to regulate religion.
 - Struck down Brady Act in 1997 that required local law enforcement agencies to do background checks on gun buyers.

THE CONSTITUTIONAL STRUCTURE OF AMERICAN FEDERALISM

POWERS OF THE NATIONAL GOVERNMENT

- Powers granted **ONLY** to the national government are known as **exclusive powers**
 - Not all national powers are exclusive powers (such as tax)
- **Expressed (enumerated, delegated) powers**
 - Actually stated in the Constitution
 - Many are listed (enumerated) in Article 1, Section 8
- **Implied powers**
 - Not stated explicitly, but suggested implicitly
 - Importance of necessary and proper clause (elastic clause)
 - Allow the national government to extend its powers beyond those enumerated in the Constitution
- **Inherent powers**
 - Not stated explicitly, but held by the national government by virtue of its being a national government.
 - Some of these powers come from the Preamble (certain foreign policy powers such as immigration, diplomatic recognition, acquiring territory, or defending itself).

THE CONSTITUTIONAL STRUCTURE OF AMERICAN FEDERALISM

EXPANSION OF CENTRAL GOVERNMENT FUNCTIONS

- **These constitutional powers expand the power of the federal government**
- **The National Supremacy Article**
 - **States may not override national policies; this restriction also applies to local units of government, since they are agents of the states (Constitution and national laws are the supreme laws)**
 - **The supremacy clause in the Constitution states that federal law takes precedence over state law when the laws conflict**

THE CONSTITUTIONAL STRUCTURE OF AMERICAN FEDERALISM

EXPANSION OF CENTRAL GOVERNMENT FUNCTIONS

- The War Power
 - The national government has the power to wage war
- The Power to Regulate Interstate and Foreign Commerce
 - Through the commerce clause, Congress can regulate many activities and sustain other legislation as well
 - *Gibbons v. Ogden* (1824)
 - Only National government (Congress) may regulate interstate commerce
 - Power is not shared with the states

THE CONSTITUTIONAL STRUCTURE OF AMERICAN FEDERALISM

EXPANSION OF CENTRAL GOVERNMENT FUNCTIONS

- The Power to Tax and Spend
 - By attaching conditions to its grants of money, Congress may regulate what it cannot directly control by law
 - While Congress cannot technically legislate on everything, it can spend funds on virtually anything.
 - States don't have to accept federal money, but if they do, they must follow federal guidelines (e.g. federal highway funds can be denied if a state's alcohol purchasing age is less than 21, federal education funds can be denied if states do not comply with No Child Left Behind Act) – Federal "strings" attached to funding are ways in which the federal government can get its way on things.
 - Recent example: Obamacare – Supreme Court ruled it was a tax and that the federal government could require people to have healthcare

THE CONSTITUTIONAL STRUCTURE OF AMERICAN FEDERALISM

POWERS OF THE STATES

- States have RESERVED POWERS: the Constitution reserves for the states all powers not granted to the national government, subject only to the limitations of the Constitution
- Amendment 10 states that any powers not granted to the national government are reserved for the states
- **Examples:**
 - Establishing voting requirements
 - Running elections
 - Establishing education
 - Licensing professionals
 - Protecting community health
 - Establishing a vehicle code and state police

THE CONSTITUTIONAL STRUCTURE OF AMERICAN FEDERALISM

CONCURRENT POWERS

- Each state has concurrent powers with the national government
- Granted to Congress, but not denied by Constitution or courts to the states >> held by both national and state governments
- **Examples:**
 - Taxing
 - Borrowing
 - Establishing court system
 - Establishing law enforcement agencies
- Questions of federal/state authority are decided by courts

THE CONSTITUTIONAL STRUCTURE OF AMERICAN FEDERALISM

CONSTITUTIONAL LIMITS AND OBLIGATIONS

- **Congress' prohibitions**
 - Writ of habeas corpus shall not be suspended "except when in cases of rebellion or invasion the public safety may require it"
 - Prohibits bills of attainder
 - Prohibits ex post facto laws
- **States' prohibitions**
 - Cannot make treaties with foreign nations
 - Cannot authorize private parties to engage in piracy
 - Cannot coin money
- **States' prohibitions without congressional consent**
 - Cannot tax imports, exports, or foreign ships
 - Cannot keep troops or ships in peacetime (except the National Guard)
 - Cannot enter into compacts with other states or foreign nations which infringe upon national supremacy
 - Cannot engage in war, unless invaded or in imminent danger
- **National government cannot use powers to interfere with state responsibilities**
 - National government must guarantee to each state a republican form of government
 - National government must protect states against domestic insurrection
 - Note unfunded mandates and states' sovereign immunity cases

THE CONSTITUTIONAL STRUCTURE OF AMERICAN FEDERALISM

INTERSTATE RELATIONS

- **Full faith and credit**
 - Clause requires each state court to accept civil judgments and public records of other state courts (Article IV, Section 1)
 - Massachusetts Supreme Court legalized gay marriage in 2004. If a gay couple is married in MA, this clause suggests that other states must recognize the marriage.
 - However, in the 1990s, Congress passed the Defense of Marriage Act, which allowed each state to define marriage, and in effect not recognize gay marriage if the state defined marriage as a union between a man and a woman.
- **Interstate privileges and immunities (Article IV, Section 2)**
 - States must extend to citizens of other states the privileges and immunities granted to their own citizens
 - States may not impose unreasonable residency requirements
- **Extradition (Article IV, Section 2)**
 - Fugitives must be returned by the governor to the state from which they fled (some exceptions)
- **Interstate compacts**
 - Establishes interstate agencies to resolve interstate problems (must be approved by Congress)

THE ROLE OF THE FEDERAL COURTS: UMPIRES OF FEDERALISM

MCCULLOCH V. MARYLAND

- John Marshall established the doctrines of implied national power and national supremacy
- *McCulloch v. Maryland* was significant in providing support for nationalism
- Maryland attempted to tax a branch of the Bank of the U.S.:
 - It argued that taxing was one of its reserved powers.
 - In addition, it argued that the Bank was unconstitutional, anyway.
- The Court’s decision (under Marshall):
 - Need for more flexible interpretation of the Constitution so that it would endure >> Bank was “necessary and proper” >> establishment of implied powers.
 - “Power to tax involves power to destroy” >> states clearly not free to destroy the national government >> establishment of national supremacy.

THE ROLE OF THE FEDERAL COURTS: UMPIRES OF FEDERALISM

FEDERAL COURTS AND THE ROLE OF THE STATES

- **Actions by state and local officials can be challenged before a federal judge**
- **Preemption - federal laws take precedence over state and local laws (civil rights, water quality)**
- **Supreme Court has generally favored powers of federal government over the states**

THE ROLE OF THE FEDERAL COURTS: UMPIRES OF FEDERALISM

THE GREAT DEBATE: CENTRALISTS VERSUS DECENTRALISTS

- The decentralist (states' rights) position
 - The national government is nothing more than an agent of the states, and every one of its powers should be narrowly defined
 - Constitution carefully limits national authority to delegated powers
 - The 10th Amendment prohibits the national government from using delegated powers to interfere with activities reserved for the states
 - 10th Amendment gives broad powers to states
 - When in doubt as to which holds a power, matter should be resolved in favor of states
 - Implies strict interpretation of the Constitution
 - National governments has gotten too big and impersonal
 - State governments are closer to the people

THE ROLE OF THE FEDERAL COURTS: UMPIRES OF FEDERALISM

THE GREAT DEBATE: CENTRALISTS VERSUS DECENTRALISTS

- The centralist (nationalist) position
 - The Constitution is a supreme law established by the people; it was intended that the central government's powers be liberally defined
 - The national government is a government of all the people, and each state speaks for only some of the people
 - Constitution created by people (“We the people...”) and not the states.
 - Elastic, commerce, and taxing/spending clauses give great power to national government
 - Powers go to states only if they have been surrendered by national government.
 - When in doubt, matter should be resolved in favor of national government.
 - Implied loose interpretation of the Constitution.
 - Size of bureaucracy has remained relatively constant for last 40 years.
 - While state gov’t’s may be closer to people, some of those state governments have violated people’s basic rights (e.g. South during first 70 years of 20th century) – national government has been key protector of rights.

FISCAL AND REGULATORY FEDERALISM

“THE CARROT” AND “THE STICK”

- To use a common metaphor, the national government uses the need for fiscal assistance as both a carrot and a stick.
- The carrot is the federal dollars needed by the state, which come in the form of grants-in-aid.
 - As citizens’ needs expand, the states look to the national government to assist in meeting the financial aspects of fulfilling those needs.
- *FISCAL FEDERALISM = THE CARROT*
- The stick comes in the form of regulation and compliance with federal mandates to receive the money or to continue to obtain grants-in-aid.
 - Regulations such as minimum wage, speed limits, and handicap accessibility are examples of “sticks,” or mandates, that states must comply with to receive the national funds.
- *REGULATORY FEDERALISM = THE STICK*

FISCAL AND REGULATORY FEDERALISM

FISCAL FEDERALISM (“THE CARROT”)

- Fiscal federalism is the model of spending, taxing, and providing grants in the federal government system.
- The national government’s primary means of influencing state governments is giving money to states in the form of grants-in-aid (or grants).
- Since World War II, states have come to rely heavily on federal money.
- Likewise, the national government has also relied on the states to administer some federal policies, a practice called fiscal federalism.
- The nation’s leaders originally designed them to help fund agriculture, land grant colleges, and farm-related education.
- They grew to encompass many other types of funding such as public housing, urban development, and school lunch programs.

FISCAL AND REGULATORY FEDERALISM

PURPOSE OF FEDERAL GRANTS

- To supply revenue to state and local governments
- To establish minimum national standards in important areas (air quality, water quality)
- To equalize resources among the states (both rich and poor)
- To attack national problems, yet minimize the growth of federal agencies (reduces growth of federal bureaucracy >> federal government simply provides money to states and has states run the programs - under federal guidelines, of course)

FISCAL AND REGULATORY FEDERALISM

TYPES OF FEDERAL GRANTS

- **CATEGORICAL GRANTS (categorical-formula grants)**
 - Congress appropriates funds for specific purposes (e.g. roads, airports, housing, bilingual education)
 - National government agrees to pay a portion of the cost for these, and states pick up the balance >> these are sometimes called “formula grants” because grants are offered under a payment formula (e.g. 80%-20%)
 - States don’t have to accept these, but if they do they must comply with federal standards
- **BLOCK GRANTS**
 - Granted to support a collection of general programs (e.g. urban development, transportation) >> more state leeway in spending of the money = few federal restrictions
 - Associate these with 104th and 105th Republican Congress and devolution of power back to states

FISCAL AND REGULATORY FEDERALISM

TYPES OF FEDERAL GRANTS

- **PROJECT GRANTS**
 - Congress appropriates a certain sum, which is allocated to state and local units based on applications.
 - “Grantsmanship:” state competition for grants has led to development of the fine art of “grant writing.”
- **REVENUE SHARING**
 - General grant of money to states to spend as they please >> even more leeway than block grants
 - Associate these with Nixon and Reagan – more New Federalism.
 - As budget deficits skyrocketed in the last 80s, these ended – “no more revenue to share.”

FISCAL AND REGULATORY FEDERALISM

THE POLITICS OF FEDERAL GRANTS

- Arguments about what constitutes desirable public policy, where power should be located, and who will gain or lose by the various types of grants
- Iron triangles or issue networks: interest groups, congressional committees, and federal bureaucrats form forces and are effective in protecting programs
- The battle over the appropriate level of government to control the funds tends to be cyclical

FISCAL AND REGULATORY FEDERALISM

THE POLITICS OF FEDERAL GRANTS

- Democrats have generally favored greater funding, but with more “strings” associated with categorical grants.
- Republicans have generally favored less funding, but with fewer “strings” associated with block grants. Welfare is an example of this?
 - End of entitlement status of AFDC and federal guarantee of welfare checks with passage in 1996 of Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act of 1996).
 - Welfare block grants therefore replaced the welfare categorical grants.
 - Even as a block grant, the Welfare Reform Act involved federal “strings.”
 - No federal funds go to recipients who have not worked within 2 years.
 - No federal funds go to recipients who have received federal money >5 years.
 - States must spend at least 75% of what they had previously spent on welfare – this to avoid the “race to the bottom.”

FISCAL AND REGULATORY FEDERALISM

THE POLITICS OF FEDERAL GRANTS

- An exception to the “fewer strings” approach by the Republican Party is its support of the No Child Left Behind Act of 2002: In order to receive federal funds for education, states must:
 - Adopt subject matter standards.
 - Test all students in grades 3-8 on those standards.
 - Identify low-performing schools based upon that testing.
 - Require low-performing schools to develop improvement plans.
 - Allow parents of students in such schools that do not improve to transfer to other public schools.

FISCAL AND REGULATORY FEDERALISM

REGULATORY FEDERALISM (“THE STICK”)

- One way for Congress to pass mandates is to impose regulations and standards on state and local governments.
- In the past, Congress has forced state governments to meet certain federal guidelines. This is known as regulatory federalism.

FISCAL AND REGULATORY FEDERALISM

FEDERAL MANDATES

- **Mandate:** a federal order imposed upon states. Examples:
 - Americans with Disabilities Act (governors and mayors don't like because of costs to remodel)
 - Various environmental acts (e.g. Clean Air Act, Clean Water Act).
 - Individuals with Disabilities Education Act.
- **Purposes:** to meet a goal of the federal government.
- **Impact upon the states:**
 - Financial burdens, especially with unfunded mandates (e.g. ADA has imposed large costs upon states as they make “reasonable accommodations” for the disabled).
 - State complaints about federal heavy-handedness (e.g. if a state does not devise a plan and pay for the requirements of the Clean Air Act of 1990, the federal government will impose its own plan upon the state).
 - State complaints about federal blackmail (e.g. if a state doesn't comply with the Clean Air Act standards, federal funds can be withheld in other programs).
 - State complaints that federal government is altering the nature of federalism with its excessive power.
- **Republican response to mandates:**
 - Unfunded Mandates Reform Act of 1995 (part of Contract with America) restricted future unfunded mandates.
 - Required CBO to analyze impact of unfunded mandates on states.
 - Requires separate congressional vote on bills that impose unfunded mandates.
 - This is another example of the Devolution Revolution associated with the 104th Congress.

FISCAL AND REGULATORY FEDERALISM

NEW TECHNIQUES OF FEDERAL CONTROL

- These four techniques fall under the category of unfunded mandates
- 1) **DIRECT ORDERS**
 - State or local government must act under the threat of criminal or civil penalties
 - Equal Employment Opportunity Act (1972) – bars job discrimination by state and local governments on the basis of race, color, religion, sex, and national origin.
 - Pits the legal authority of Congress against the constitutional rights of the states.
- 2) **CROSS-CUTTING REQUIREMENTS**
 - Conditions on one grant extended to all federally-supported activities
 - Requirements imposed on virtually all grants to further various national social and economic policies.
 - Title VI of the Civil Rights Act (1964) – no person in the U.S. shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving federal assistance.
 - Title IX of the Education Amendments (1972) – prohibited sex discrimination in educational institutions receiving federal aid.
 - Davis-Bacon Act – construction projects receiving federal monies must pay union-scale or "prevailing" wages, even if less expensive labor is available.
 - The federal government will force states to follow the law through the Civil Rights Act and if the state doesn't, it risks losing money on all federally funded projects
- 3) **CROSS-OVER SANCTIONS**
 - Permit the use of federal dollars in one program to influence state and local policy in another
 - Failure to comply with the requirements of one program can result in reduced or terminated funds from another program that was separately authorized and separately begun.
 - Federal highway aid and minimum drinking age of 21
- 4) **PARTIAL PREEMPTION**
 - Federal law establishes basic policies but requires states to administer them usually without any federal funds
 - Clean Air Act of 1990