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# Federalism

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## I. HOW THE FEDERAL AND STATE GOVERNMENTS SHARE POWER

### A. FEDERALISM AND THE CONSTITUTION

1. Federalism is a system of government in which more than one government holds governing authority over people within the same territory at the same time. This system was devised by the Framers as a way to reconcile the demands and interests of many states into a single political entity. An important debate at the Philadelphia Convention in 1787 involved the sharing of powers between the state and national governments. While the general form of a federal government, featuring a division of power between state and federal levels, was broadly accepted, exactly how government power was to be divided had to be hammered out. In the end, some powers were granted by the Constitution to either the federal or state governments, while some powers were shared.
2. Exclusive powers are those powers that are held entirely by either the federal government or state governments. A power that is exclusively held by the federal government may not be exercised by the states, and vice versa.
3. Concurrent powers are those powers that are shared by the federal and state governments and may be exercised by both.

## Examples of Powers Held by State &amp; Federal Governments\*

Exclusive Powers of Federal Government	Concurrent Powers	Exclusive Powers of State Governments
coin and regulate money	taxation	regulate education
conduct foreign relations	enact laws	regulate marriage
naturalization	define crimes and enforce punishments	regulate intrastate (within the state) commerce
declare war	establish courts	establish local governments
maintain army and navy	borrow money	conduct elections
regulate interstate and foreign commerce	charter banks and corporations	
establish postal system	build infrastructure (roads, dams, bridges, etc.)	
	exercise eminent domain	

\*This list includes examples only and is not inclusive of all powers.



*Conflicts often arise relating to state vs. federal power in specific areas. Questions about gun regulation and marijuana legalization, for instance, may lead to disagreement between state and federal laws. In these cases, the judicial branch determines which government holds authority in each particular circumstance. Considerations include the type of power in question and how the Constitution assigns (or denies) it, as well as the role of the Necessary and Proper Clause and the Supremacy Clause.*

## B. FEDERALISM IN PRACTICE

1. As with most aspects of government, the distinctions between exclusive and concurrent powers are not always clear. They are most commonly represented by two models or ideal types: dual federalism and cooperative federalism.

- a. Dual federalism portrays power within the federal system as clearly delineated between those powers exercised by the federal government and those held by the states. Under this analysis, each level of government holds and exercises specific powers within its own sphere of influence, and there is very limited overlap between the spheres. Dual federalism is often called *layer cake federalism* because, like a layer cake, the layers are distinctly separate from each other.
- b. The model of cooperative federalism envisions a system in which there is extensive overlap and interplay between state and federal exercises of power. In this view, the state and federal governments share concerns involving many of the same issues and policy areas, and often act, both independently and cooperatively, within the same spheres. This model is often referred to as *marble cake federalism*, to emphasize the complex interaction between the levels of government.



*The history of the United States reflects an evolving view of the appropriate exercise of power by each level of government. Overall, the trend has been an expansion of federal power into state and local areas, although, during certain periods, the ideal of dual federalism has been favored.*

2. Federal Grants (Grants-in-Aid). A primary avenue through which the federal government has extended its influence into state and local matters has been through the use of grants. These are transfers of money from one level of government (in this case, federal) to another to be used for a specified purpose. Federal grants may take several forms, some of which come with many requirements attached, some with few.
  - a. Categorical grants are grants of money to state and local governments that must be used in compliance with highly specific instructions.
  - b. Block grants are transfers of money to state and local governments given for broad purposes with few strings attached.
  - c. Federal revenue-sharing was a practice under which the federal government collected taxes nationally and then distributed a portion of that national tax revenue to state and local governments without specific policy requirements

attached. It was implemented in 1972 and reflected a movement away from what was perceived as the burdensome requirements of categorical grants. It was argued that local officials were in a better position than federal officials to determine how best to address issues on a local level. From a federal enforcement perspective, such a program was also easier and more efficient to administer. The revenue-sharing program was discontinued in 1986.

- d. Mandates are federal directives that generally require the recipient state or local government to comply with specific requirements in return for federal aid money. In other words, the grant of money is *conditional* on the recipient's compliance with specific federal requirements.
  - Some mandates may be unfunded. An unfunded mandate is one that imposes duties and associated costs on state or local governments without providing federal money to cover those costs.
- e. Federal incentives are monies offered to state and local governments and individuals for various purposes that serve the national interest.

**Models of Federal Assistance to State and Local Governments**

	<b>Key Features</b>	<b>Examples</b>
<b>Categorical Grant</b>	<ul style="list-style-type: none"> <li>- money transferred between levels of government</li> <li>- recipient must comply with specific requirements</li> </ul>	<ul style="list-style-type: none"> <li>- Head Start program grants provide money for early childhood education.</li> <li>- Medicaid program provides healthcare funding for eligible low-income families and individuals.</li> </ul>
<b>Block Grant</b>	<ul style="list-style-type: none"> <li>- money transferred between levels of government</li> <li>- recipient must comply with only broad purpose; few requirements</li> </ul>	<ul style="list-style-type: none"> <li>- Community Development Block Grant from the U.S. Department of Housing and Urban Development</li> <li>- The Temporary Assistance to Needy Families (TANF) program provides a block grant to states to provide limited financial support for low-income families.</li> </ul>

	Key Features	Examples
<b>Revenue Sharing</b>	<ul style="list-style-type: none"> <li>– revenue collected by federal government and transferred to state and local governments</li> <li>– spending at discretion of local officials</li> </ul>	<ul style="list-style-type: none"> <li>– 1986 revenue-sharing grants ranged from \$201 for the smallest town to \$41,957,530 for New York City</li> </ul>
<b>Mandate</b>	<ul style="list-style-type: none"> <li>– federal rule that imposes an obligation on state or local government</li> <li>– frequently associated with receipt of federal funding</li> </ul>	<ul style="list-style-type: none"> <li>– The Civil Rights Act of 1964 outlawed discrimination based on race, color, religion, sex, or national origin.</li> <li>– The National Minimum Drinking Age Act of 1984 conditioned receipt of federal highway funding on state compliance with raising the drinking age to 21.</li> </ul>
<b>Unfunded Mandate</b>	<ul style="list-style-type: none"> <li>– federal rule that imposes an obligation on state or local government without providing funds to help pay associated costs</li> </ul>	<ul style="list-style-type: none"> <li>– The Americans with Disabilities Act of 1990 prohibits discrimination against disabled Americans and requires states to comply with costly access requirements. No federal funds are provided.</li> </ul>



*Expect to encounter questions asking you to differentiate between block and categorical grants. In the case of a block grant, the states must spend federal funds on a broadly defined area of policy. For example, transportation block funds could be used for building roads, airports, train systems, or ports. However, with a categorical grant, states must use the money for a more specific policy area such as a categorical transportation grant that can only be used for building airports.*

3. *Devolution* is a federal effort to return authority temporarily to the states, including decisions about administering federal programs and spending federal money.

**C. MULTIPLE ACCESS POINTS**

1. An important concept with regard to both separation of powers as well as federalism, is the idea of access to power, or the ability of citizens to influence policy through multiple avenues. In this context, an *access point* is a place where individuals or groups can interact with government to affect government actions.
2. The separation of powers among the three branches of government creates numerous access points by giving each branch specific powers and making each branch responsible to the public in specific ways.

**Examples of Access Opportunities\***

<b>Legislative Branch</b>	<b>Executive Branch</b>	<b>Judicial Branch</b>
– Citizens vote for representatives whom they believe will represent their political views and interests.	– Citizens vote for an executive whom they believe will represent their political views and interests.	– Citizens vote for judges at the state level.
– Citizens share opinions with their legislators in many ways, such as phone calls, emails, social media, and town hall meetings.	– Citizens share opinions with the executive through phone calls, emails, and social media.	– Citizens may file lawsuits to enforce or dispute laws or regulations.
– Interest groups lobby legislators on behalf of their members.	– Citizens and interest groups interact with various agencies to influence regulatory policy.	– Interest groups may file <i>amicus curiae</i> briefs to influence court decisions.

\*This chart is not intended to include all of the many ways citizens and groups can access government.

3. The federal system allows for citizens to impact policy at both the state and federal government levels. The 50 state governments replicate the federal structure, allowing access to three branches at both levels of government.

## II. THE EVOLUTION OF FEDERALISM

### A. HOW POWER IS DIVIDED BY THE CONSTITUTION

1. Several sections and clauses within the Constitution address the sharing of power between the federal and state governments, but it is not always clearly defined. Under the federal system, states generally hold broad lawmaking authority within their borders, so long as they do not contradict federal law or infringe on individual rights. The power relationship between the state and federal governments has changed over time through several mechanisms, especially court decisions, and continues to evolve.
2. **Article 1, Section 8.** This section of the Constitution lists 17 specific (enumerated) powers of Congress, including the power to tax, the power to borrow on the credit of the United States, and the power to maintain military forces. This specific and rather narrow list reflects the concept of limited government. Congress was intended to be limited in its exercise of power to the 17 specific areas described.
3. **Necessary and Proper Clause.** The list of specific powers in Article 1, Section 8 concludes with the Necessary and Proper Clause. This clause grants Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . .” In other words, Congress holds powers, which are not specified in the Constitution, that may be reasonably related to the use of those powers that are listed. These are known as implied powers. It would be futile to try to list a power for everything Congress might need to do in order to effectively exercise its enumerated powers. For example, maintaining military forces involves contracting for the manufacture of weapons, procuring housing and food for troops, providing education, and numerous other actions not specified in the Constitution. The Necessary and Proper Clause allows these and thousands of other (not enumerated) powers to be exercised by Congress.



*Remember that the Necessary and Proper Clause is called the Elastic Clause because it expands the power of Congress.*

4. **Regulate Interstate (and Foreign) Trade.** One of the most expansive powers listed in Article 1, Section 8 is the power of Congress to regulate interstate (and foreign) trade. This authority is found in the Commerce Clause, which grants Congress the power to “regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes . . .” (Commerce is the movement of goods and services in an economy.) This brief clause has been the subject of intense controversy and has served as the primary basis for the expansion of federal power.
- Note that the Constitution gives Congress the power to regulate *interstate* commerce, or business between and among the states, but not *intrastate* commerce, the regulation of which is a power retained by the states.
  - Because it can be very difficult to determine what economic transactions are interstate versus intrastate, this power has been interpreted very broadly. With a few notable exceptions, most commercial activities have been found by the Court to be a part of the stream of interstate commerce.



*Scenarios in which the power of the federal government is expanded are very frequently related to the commerce power (through the Necessary and Proper Clause). This power has been used to prohibit discrimination, regulate controlled substances, prohibit human trafficking, and many other activities that do not obviously relate to interstate commerce. Also, when you see the term interstate, think of commerce power!*

5. **Article IV: Relations Among States**

- The Full Faith and Credit Clause requires states to accept the public acts, records, and judicial outcomes of the other states. For example, if two people are married in one state, their marriage must be recognized by the other states.
- The Privileges and Immunities Clause prohibits states from discriminating unreasonably against citizens of other states. For example, a state’s police force may not focus exclusively on out-of-state drivers for ticketing, but a state may charge higher tuition rates to out-of-state students, who do not support the state’s university system through their taxes.

- c. Extradition is the return of a fugitive from justice from one state to another. This is guaranteed by Article IV.
  - d. Congress admits new states to the union and governs U.S. territories.
  - e. The federal government must intervene militarily to protect states when needed.
6. **Article VI: Supremacy**
- a. The Supremacy Clause makes clear that the Constitution and all laws and treaties made by the federal government take precedence over state laws.
  - b. All state and federal officers must swear by oath or affirmation to uphold the Constitution, but religious requirements are prohibited as a requirement for holding office.
7. **The Tenth Amendment** states that “[t]he 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.” This amendment represents a counterweight to the broad interpretation of the Necessary and Proper Clause, and is critical to understanding the states’ rights arguments that historically tend to arise when states oppose a particular national policy. The Supreme Court does not have a strong tradition of recognizing specific rights or powers as belonging to the states. However, at times the Tenth Amendment has been referenced in decisions limiting federal power, and it is generally the basis for arguments asserting that specific powers are held by the states.
8. **The Fourteenth Amendment**, adopted in 1868 following the Civil War, has also had a profound impact on the allocation of power between the states and the federal government. Conceived to address the oppression of former slaves by southern state governments, its adoption was a requirement for those states’ readmission to the union and congressional representation. Section 1 defines citizenship and guarantees due process and equal protection to all persons. Specifically, the amendment prohibits any state from depriving any person of due process or equal protection. The Due Process Clause of the *Fourteenth Amendment* (not the Due Process Clause of the *Fifth Amendment*) has been used by the Supreme Court to prohibit states from infringing upon most rights guaranteed to citizens by the Bill of Rights, which was previously interpreted as solely limiting the power of the federal government.

### Constitutional Clauses Related to Federal and State Power

Constitutional Section or Clause	What It Says	How It Affects the Distribution of Government Power
Article I, Section 8	– lists 17 specific enumerated powers of Congress	– limits power of federal legislature (Congress)
Necessary and Proper Clause	– grants numerous additional unspecified powers to Congress if needed to carry out 17 enumerated powers	– expands power of Congress (Elastic Clause)
Commerce Clause	– grants Congress the power to regulate interstate and foreign trade	– expands power of Congress through Necessary and Proper Clause because “interstate commerce” is so broad
Supremacy Clause	– states that the Constitution and federal laws and treaties are the supreme law of the land	– limits state power by prohibiting states from acting contrary to federal laws and treaties
Tenth Amendment	– reserves all rights not explicitly granted by the Constitution to the federal government to the states	– enhances state power; limits federal power
Fourteenth Amendment	– Due Process Clause requires states to ensure due process of law – Equal Protection Clause requires that states afford equal treatment to all persons	– prohibits states from violating individual rights guaranteed by the U.S. Constitution – prohibits unequal treatment based on group membership

## B. THE SUPREME COURT AND THE EVOLUTION OF FEDERAL POWER

### 1. *McCulloch v. Maryland* (1819)

Questions around federal power and the extent of the Necessary and Proper Clause arose early in United States history. *McCulloch* was a result of Maryland’s attempt to impose a tax on the Second Bank of the United States. The cashier of the Baltimore branch, James McCulloch, refused to pay the tax. The Supreme Court held that the power to establish a national bank was implied by

the enumerated powers of Congress. The case produced two important rulings with regard to federal/state power sharing:

- a. **Facts of the Case:** In 1816, Congress chartered the Second Bank of the United States, which was the target of significant political opposition. Several states enacted anti-Bank laws. Maryland's law placed a tax on all banks operating in the state that were not chartered by the state. This tax was aimed squarely at the federal Bank. When the Bank failed to pay the tax, Maryland sued the Bank and its cashier, James McCulloch.
- b. **Constitutional Issue(s):** Does the federal government have the constitutional authority to charter a national bank? If so, does the state of Maryland have the authority to tax the bank?
- c. **Holding(s):** The federal government does have the constitutional authority to charter a national bank. States do not have the authority to tax a federal bank.
- d. **Reasoning:** The establishment of a national bank is a legitimate exercise of congressional power under the Necessary and Proper Clause of Article I. The Constitution grants Congress several powers, including the power to borrow, tax, coin money, and regulate commerce, that may be facilitated through a national bank. Although the establishment of a bank is not one of Congress's specifically enumerated powers, it is clearly within the category of actions anticipated by the Necessary and Proper Clause. The national bank is a helpful and appropriate means for Congress to implement its enumerated powers. Furthermore, under the Supremacy Clause, the state of Maryland did not have the authority to tax the bank. "[T]he power to tax involves the power to destroy." According to the Supremacy Clause, the state of Maryland may not impede the legitimate actions of the federal government.



*McCulloch v. Maryland is important because it is the foundational case broadly interpreting the scope of the Necessary and Proper Clause. The Court held that the Necessary and Proper Clause granted Congress implied powers, which it may use to carry out its enumerated powers. Secondarily, the Court relied on the Supremacy Clause to invalidate the state law to tax the national bank, which contradicted the federal law chartering the bank.*

2. *United States v. Lopez* (1995)

- a. **Facts of the Case:** Alfonso Lopez was a twelfth-grade student who carried a gun and ammunition into his Texas high school. He was convicted of violating the federal Gun-Free School Zones Act of 1990 which made it illegal “for any individual knowingly to possess a firearm [in] a school zone.” He was sentenced to six months in prison and an additional two years of probation.
- b. **Constitutional Issue(s):** Does the federal government have the authority to regulate firearms through the Gun-Free School Zones Act within the states under the Commerce Clause?
- c. **Holding(s):** No, the Commerce Clause does not allow Congress the power to regulate the carrying of handguns within states and the Gun-Free School Zones Act is unconstitutional.
- d. **Reasoning:** The Court held that the Gun-Free School Zones Act was unconstitutional because Congress lacked the power to regulate the carrying of handguns within states under the Commerce Clause. The court ruled that the law was criminal in nature and not related to commerce or economic activity.
- e. *United States v. Lopez* marked a departure from the Court’s willingness, throughout most of the 20th century, to accept a very broad range of activities as legitimate subjects of regulation by Congress under the commerce power. Lopez marks the limit of commerce power.



*On the AP® exam you will be asked about two required cases related to federalism: McCulloch v. Maryland (1819) and United States v. Lopez (1995). The Supreme Court in McCulloch v. Maryland ruled in favor of an expansion of federal power, but in United States v. Lopez the Court ruled in favor of states' rights. The overall trend in the late 20th century was for the courts to side with the federal government, but since the ruling in the Lopez decision, the Supreme Court has been less consistent.*