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4.4 Divisions of Power

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LEARNING OBJECTIVES

In this section, you will learn:

1. How power is divided in republics, and why that is done.
2. What the tradeoffs are between federal and unitary systems of government.

How do societies remain free? Constitutions, as we have seen, can declare there are all kinds of freedoms. For them to work, people have to obey the law. One answer has been dividing power within a government, so that there are checks on the power of any one part of government, or on the power of any particular interest group. If the power of the government is limited, citizens see that government is not overstepping its bounds, and are more likely to go along and obey the law.

Power within a government can be divided in various ways. Obviously, in authoritarian governments, power isn't divided, and so there is no check on the power of whoever has the authority. This can create a couple of problems. First, it robs people of the ability to peacefully take action if the government does something they don't like. Second, there are no brakes if the government gets carried away—nothing in the system that could force those in authority to adhere to the laws as written.

Checks on power begin with elections. Elections effectively split power between the people and the government. If citizens don't like something government is doing, they can vote the rascals out. But elections are periodic—they only happen every so often—and in the short term, government can do things that an election will take too long to

rectify.

A second check on power is the division of power into different branches. This isn't very common around the world; many republics tend to concentrate power in the legislative branch. That's especially true of parliamentary systems, where the head of government, the prime minister, is usually the leader of the majority party in parliament. So in that system, there is no separate branch that checks the power of parliament (except, perhaps, a constitutional court that can rule on the constitutionality of a particular law). This is called legislative supremacy—most power in the government rests with the legislative body. It has the advantage of letting things happen more quickly. In a parliamentary system, a new majority party can make changes more quickly, as there is no president to veto new laws, or usually even another legislative chamber where proposed changes can bog down.

That happens in a country such as the United States, where power is divided between co-equal branches of government. In the case of the U.S., that means only Congress can pass laws; the president must sign them to become law; and the court system can declare laws to be unconstitutional and thereby null and void. Of course, the president appoints federal judges, who must be confirmed by the U.S. Senate, and Congress as a whole can impeach and remove any federal official from office for “high crimes and misdemeanors” (one of those maddeningly vague moments in the Constitution—a misdemeanor? Though if the president were caught shoplifting, we might all have some questions). The ancient Roman Republic had even more checks on power, to the point where needed reforms were impossible to push through because somebody nearly always had the power to keep them from happening. American government can sometimes look that way, although when the game is on the line, the system does allow change to happen, such as the passage of civil rights laws in the 1960s. On the other hand, it took nearly 100 years after the Civil War for the question of civil rights to be meaningfully addressed. Consequently, division of power into branches is both a prize and a penalty in government: The checks and balances inherent in such a division make it harder for government to get carried away, and also make it harder to get anything done.

Divisions of Power: Federalism, Unitary Systems, and Confederations

A third way of dividing power is called **federalism**, which is a system of government that divides power between different levels of government. A confederacy would give most if not all the power to states that make up the confederation, while a unitary system of government puts all the power in the hands of the central government.

Most of the world's governments (nearly 90 percent) are **unitary**. A strong central government lends power to subnational governments, who cannot make and execute policy on their own. Unitary governments can create or abolish subnational units of governments. Federal governments typically cannot. The U.S. national government, for example, can't decide that Wyoming would be much better as a part of Montana, or that two Dakotas is just one too many.

The other choice usually is a **confederation**, in which a group of states are equal partners in a government. While this prevents a strong central government from dictating to its members, it also means nobody's in charge. The United States, from 1783-1788, was a confederacy, under the Articles of Confederation. It didn't work very well. The national government couldn't pay its debts, which caused the economy to shrink; the

states were on the edge of war over trade and territorial issues. The Confederate States of America seceded from the Union in 1861, leading to the Civil War. They, too, suffered the problem of being unable to fully compel the member states to support the war effort.

The European Union is a confederation. Although there is a freely elected European Parliament, it lacks the full authority to force the 27 member states to do everything it might. The power of the confederation largely exists because the member nations have signed on to the treaties creating it, because they share a common currency (the Euro) and because states such as Germany and France have so much more economic power than the other members (and can't afford to see it all fail). It helps that all the member nations are fairly well-developed states and all republics with regular elections of their own. The EU also seems to be very careful in not stepping on the sovereignty of its member nations. As a consequence, despite EU provisions that require member nations to maintain roughly balanced budgets, big budget deficits in Greece, Italy and Spain have provoked a financial crisis for the entire union.

Federalism divides and shares power between the **national government** (often referred to as the federal government in the U.S.) and **subnational governments** such as states or provinces. Subnational governments may be bound by a national constitution, but have some ability to work within that framework to create their own particular laws. In U.S. federalism, for example, states have the ability to regulate trade within their borders, but only the federal government can regulate commerce that crosses state borders. National governments usually retain the sole ability to provide for national defense and the conduct of foreign relations, whereas both the states and the national government can create traffic and environmental laws. Both levels have the ability to raise revenues and spend money, while only national governments can address topics relating to international trade. Larger nations sometimes turn to federalism to manage widespread territories, such as the United States, Canada and Australia.

Federalism comes in degrees: In weak federalism, states don't get very much power, as in Mexico or Brazil. In strong federalism, subnational governments have a higher degree of power, as in Canada. The United States, if you're keeping score, is somewhere in between. Worldwide, 26 states are federal republics; nine more have granted some local authority to regional governments.

For example, for most of its history, the United Kingdom was a unitary state. England conquered Wales and Ireland, and was united with Scotland when James I became king of both nations in 1603. Ireland won its independence in 1921, but the six counties of what became Northern Ireland voted to remain in the United Kingdom. But then, in 1997, people in Scotland and Wales voted for devolution, by which the central government granted some authority to local assemblies there. Northern Ireland also now has its own local assembly as well. All have the ability to raise taxes, spend money and order their own affairs, but they are not sovereign states.

Creating a federal structure on paper doesn't make one, however. China has 22 provinces, four municipalities, five autonomous regions, and two special administrative regions. Of these, only Hong Kong and Macao, the special administrative regions, can be said to enjoy any sort of self-rule, and a majority of their legislatures are appointed by the central government in Beijing. The autonomous regions include Tibet, where dissatisfaction with Chinese rule has led to violence and unrest.

American Federalism

Being in between strong and weak federalism, the **American version of federalism** is actually a good example of all the challenges and benefits of a federal society.

You should note a couple of things right away:

1. American federalism divides power between the states and the national (federal) government. That equation does NOT include the many thousands of local governments, which are not mentioned in the Constitution and largely borrow power from the states. Each state is, in effect, a unitary government. Some states have granted limited home-rule charters to large local governments, but that's a state-level decision, and not provided for in the U.S. Constitution.
2. The division of power at the national level into three branches, while an important feature of American government, is NOT a feature of American federalism. A unitary-style government could also have a similar division of power into branches; a federal government could also have no division of power at its upper level.

Federalism is, in some ways, an American invention. Confederacies had existed before, and they lacked central power and hence the ability to get anything done. The Founding Fathers, having lived through four years under the Articles of Confederation, saw that they needed a central government with enough power to do what was needed, but still not so much power that it could oppress the people and the states. And the states, to buy into this, were going to want to retain some of their own power as part of the bargain. This fundamental distrust of centralized power, along with the perhaps grudging admission that some of it was necessary, led to both the division of federal power into three branches, and the division of power between the states and the national government.

So who has the power? The U.S. Constitution does seem to provide some space for a strong national government in a number of places:

- The "necessary and proper" clause (sometimes called "the elastic clause" because of its ability to stretch to cover a lot of ground) of the Constitution (Article I, Section 8, clause 18): This says Congress shall have the necessary and proper authority to do what needs to be done.
- The supremacy clause (Article VI, clause 2): The Constitution is established as the supreme law of the land.
- The commerce clause (Article I, Section 8, clause 3): Only Congress has the ability to regulate interstate commerce.
- The spending clause (Article I, Section 8, clause 1): Congress is expressly granted the ability to raise taxes and spend money.

Couple these features with the power of the presidency and the national government's greater ability to raise money, and you have a recipe for a strong national government. I don't think this is necessarily a bad thing. Others disagree.

Then again, there's the 10th Amendment to the Constitution, and the last piece of the Bill of Rights: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That can be interpreted in any number of ways, and has been. Does it mean the federal government can only do things expressly described in the Constitution? Does it mean anything not addressed in the Constitution is up to the states? Does it create wiggle room for interpreting the Constitution, or take it away? Some people would tell you they are

sure it means one thing or another, and others would simply disagree.

American federalism is said to have gone through a number of phases, including the following:

- Dual federalism: 1790–1932. The federal government did its thing, and the state government did their thing, and there was very little overlap.
- Cooperative federalism: 1933–1980. This featured a much larger role for the federal government, with more money flowing to the states, along with marching orders to go with the cash. States became conduits for federal policy, with federal matching funds there to entice the states to administer programs such as welfare.
- New federalism: 1980–present. Some scholars would divide this up into more than three categories, and probably call this era something else. But these aren't necessarily meaningful distinctions. Sometimes the federal government has pushed programs onto the states (pay for it yourself). At other times, the federal government has attempted to dictate to the states (the Defense of Marriage Act, No Child Left Behind, the continued criminalization of marijuana and hemp). The Feds have given states money via block grants with few restrictions, categorical grants with lots of restrictions, and revenue sharing with no restrictions. Typical federal funding still often involves matching funds for a specific purpose. An unresolved question remains: Should the federal government have the ability to mandate state and local programs based on its ability to provide money for them? What if it provides no money? So it's unclear what New Federalism is precisely, because it is not consistent in how it treats state/federal relations.

And that's typical of U.S. federalism in general. As with so many things in U.S. government, the precise nature of American federalism is ill-defined. Thomas Jefferson, who was not an author of the Constitution, thought that states should be able to just say no to acts of Congress (a term called "nullification"). State governors in our own time are sometimes heard to express such thoughts. The term "states' rights" gets trotted out from time to time, to justify something states want to do or to protest an imposition from the federal government. We should be clear: for most of its history, the term states' rights largely meant only one thing: The ability of states to legally discriminate against citizens of color. So while it has taken on a wider meaning in recent decades, it doesn't have a happy history.

Whatever the issue, the states and the federal government are often at odds at who gets to do what, and who gets to pay for it. So while states tended to favor the reform of the welfare system in the mid-1990s, they certainly didn't want to give up federal funding of the system. Similarly, Congress has used federal funding of the highway system as a carrot and a stick to get states to raise their minimum drinking laws: Raise it to 21, or you lose your federal highway funds. Only tourism-dependent Louisiana did not comply.

Federalism's Strengths and Weaknesses

These kinds of issues underscore both the strengths and weaknesses of the federal system, which are many.

Strengths:

- It allows experimentation and specialization at the state and local level. States are free to try different ways of pursuing policy objectives.

- It allows flexibility and diversity in making policy. States can tailor programs to the particular conditions, needs and desires of their citizens.
- It brings government closer to the people, ensuring responsiveness. All those levels of government mean that there's someone you can turn to for help.
- It helps to protect liberty, by providing a strong national government that can prevent states from usurping liberty, but also making it hard for federal government to do the same. States provide, in effect, another interest group that can contend with the power of the national government.
- Increases opportunity for participation. Once again, there's room amid all that government for people to get involved.
- Improves efficiency. States and local governments may be more efficient at providing public services.
- Helps to manage conflict by providing arenas for its articulation. By giving more people more access to a responsive government, people are more likely to address their grievances without resorting to violence.

Weaknesses:

- It can make government seem more remote—insulating the government from the people. While in many ways the many levels of government can be a good thing, it can also be confusing. Who's responsible for what, and where do you turn?
- Federalism, and all those levels of government, makes elections more complex. The United States has perhaps the longest ballots in the world. Ballot drop-off is a frequent feature of U.S. elections. Citizens get to the bottom of the ballot, decide they don't know anything about either candidate for state superior court judge, and stop voting
- It impedes the adoption of national standards. One state or province might want one set of environmental laws, while another might want fewer protections and more emphasis on economic opportunity.
- And that gets at the heart of the matter: Divisions of power make action more difficult, which can be both a good thing and a bad thing. Federalism's strength is also thereby its weakness. It is a slow system of government, which keeps us from doing really stupid things in the heat of the moment (Prohibition being one of the few bad examples). It also, however, is slow to change, with compromise between the factions represented in Congress, the presidency, the courts and the voters being required for anything to get done. So federalism forces deliberation and caution, which can be both good and bad.

KEY TAKEAWAYS


- Most of the world's governments are unitary. A few dozen are federal; very few have been confederacies.
- Federalist governments share power with subnational governments; unitary governments do not.
- Federalism has both strengths and weaknesses.


EXERCISES

1. If you live in the United States, what does your state allow or prohibit that varies from what the federal government allows or prohibits?
2. How much should a federal government have the power to compel subnational

governments to do things? How much should subnational governments have the power to say no?

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