

**CONTESTATORY FEDERALISM:  
HOW STATES (AND PROVINCES, CANTONS, AND *LÄNDER*)  
GET THEIR WAY WITH CENTRAL GOVERNMENTS**

Jim Gardner

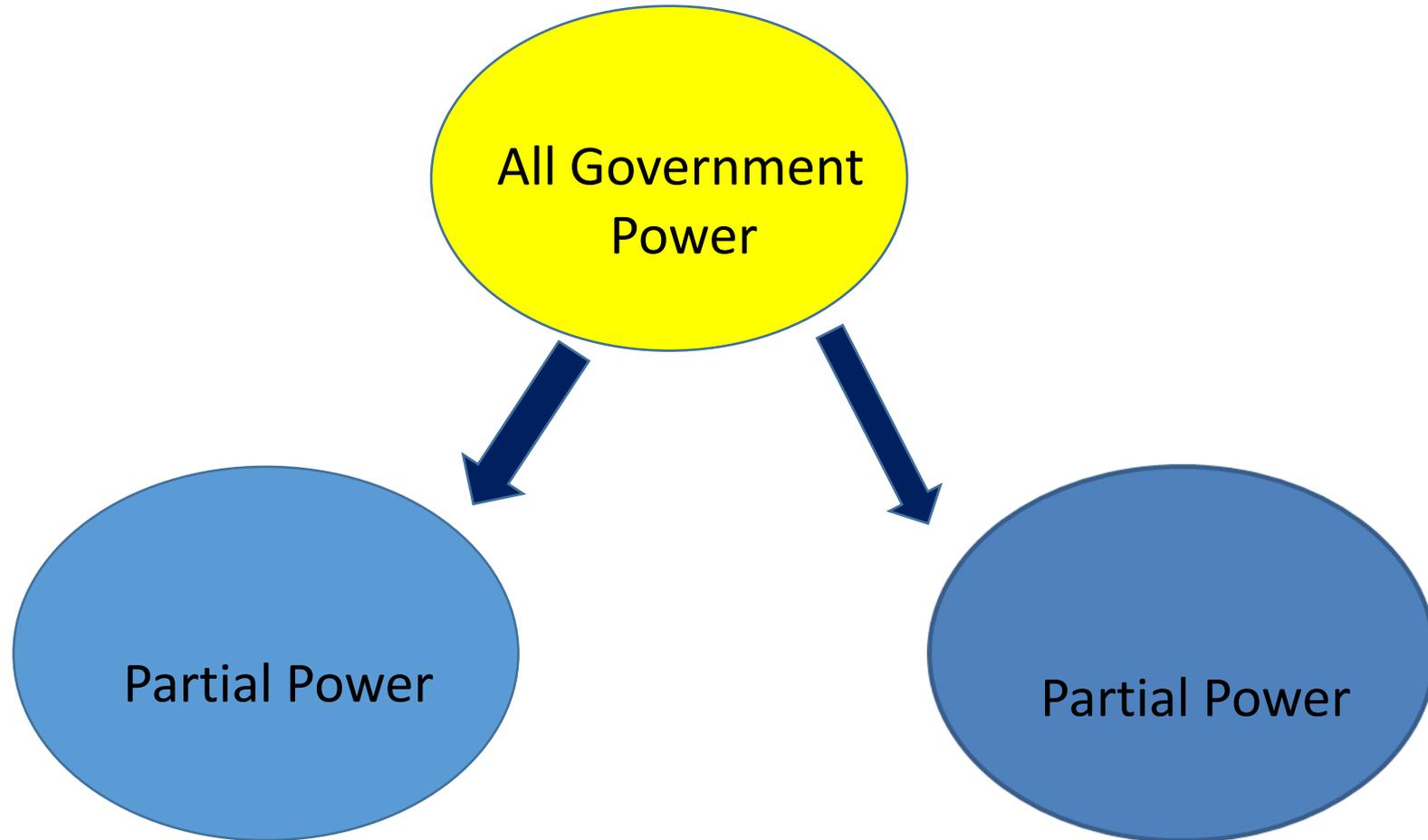
University at Buffalo School of Law

State University of New York

# The Problem

- In federal states, central government is always bigger, more populous, richer, more powerful
- In conflicts, how can subnational units (SNUs) *ever* get their way?
- Yet they do, from time to time – How??

# Federalism



# Why Federalism?

1. Subnational demands to retain autonomy
  - a. Historical: a condition of state formation (Switzerland, US, Argentina)
  - b. Protect ethnic or linguistic distinctiveness (Canada, Spain, Belgium)
    - But only if distinct populations are territorially distributed
2. Obtain benefits of decentralization
  - a. Enhanced satisfaction for political minorities
  - b. Protection of liberty through dispersion of power (Madison)

# Two Models of Federalism

1. US (sovereigntist, divided, legislative)
  - All government power is divided between the two levels; each level makes and implements its own policy within its sphere of competence
  - Examples: US, Canada, Australia, Switzerland, Argentina
2. German (integrated, administrative)
  - Federal government makes all major policy decisions
  - SNUs implement federal policy
  - And also their own policies in their own (usually limited) areas of competence
  - Examples: Germany, Austria, South Africa

# The Problem of Federal Sustainability

- Federalism requires a division of powers
- That division must be permanent
- Yet federalism is unstable: risk of collapse or fragmentation
- 27 of 44 federations formed in last 200 years have failed
- How can the initial allocation of powers be stabilized?

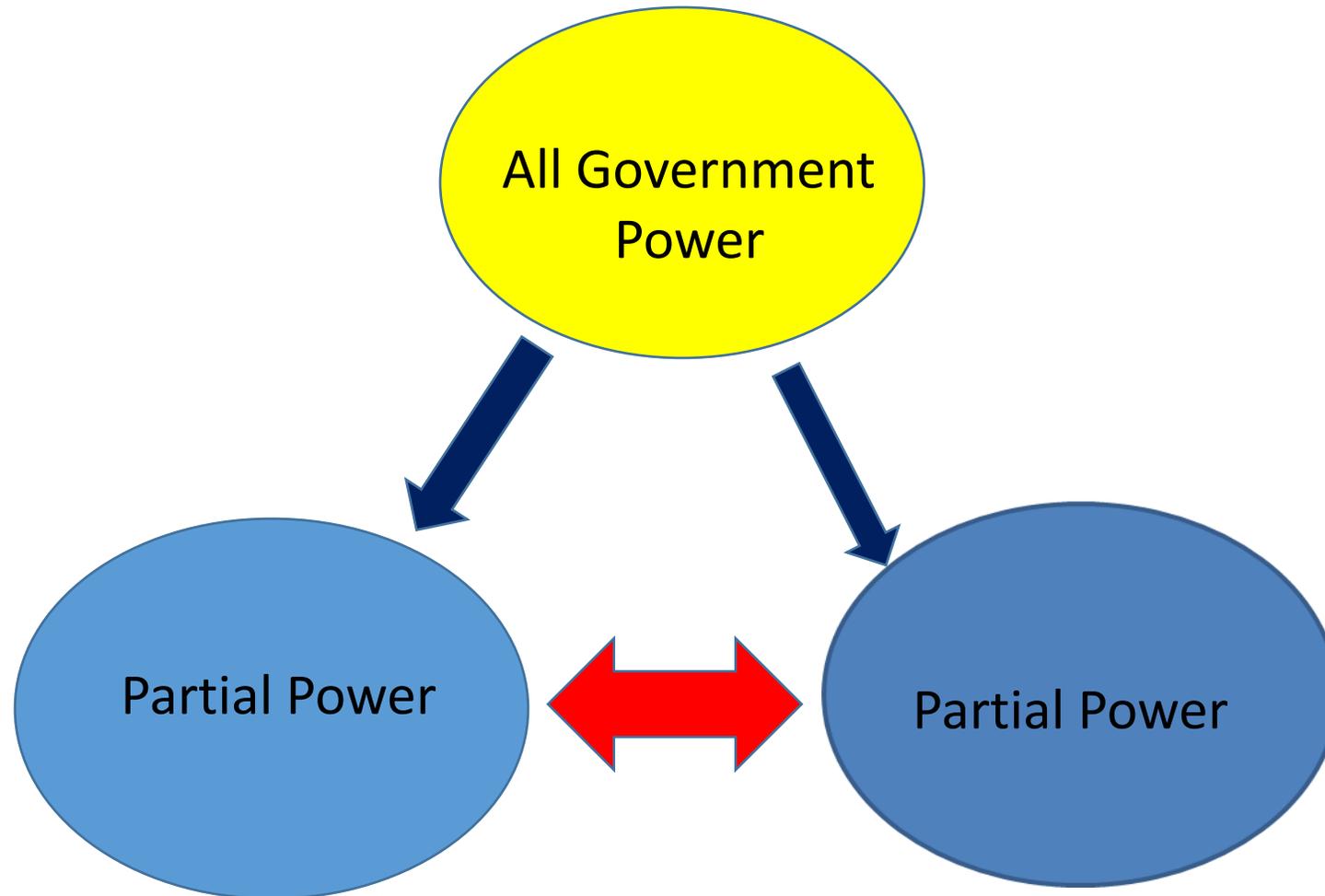
# Constitutionalism

- Habitual obedience to law by officials
- But officials may not feel bound, or may choose not to observe constitutional constraints
- Madison called these “parchment barriers”

# The Equilibrium Model

- Madison's solution: "contestatory governance"
- System is stabilized by dividing power among different power centers and putting them into competition with each other

# Division of power and contestation



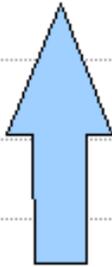
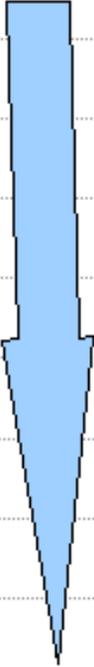
# Constitutions and Design

- Madison: “Ambition must be made to counteract ambition”
- Produces constitutional stability:
  - Permanent struggle produces stalemate at desired equilibrium point



# The Struggle

- How does it actually occur?
- What tactics do SNUs actually employ to try to get their way, at least once in a while?

	<b>More defiant</b>	Secession
		Violent resistance
		Defiance
		Invocation of third-party coercive processes
		Withholding cooperation
	<b>More neutral, independent</b>	Independent use of assigned powers
		<b>Subnational cooperation and harmonization</b>
		Negotiation and bargaining
		Influence in federal domestic policy making
		Direct participation in federal lawmaking
		Indirect influence in federal legislatures
		Political influence through parties
		Mobilization of popular opinion
		Influence on legislation through executive
		Influence on federal administration
	<b>More cooperative, integrated</b>	Participation in foreign policy

# Subnational Cooperation and Harmonization

- What it accomplishes:
  - Can make *national* policy without involvement of federal government
  - More aggressively, SNUs can occupy vacant policy space by exercising power of the first mover
    - “Reverse preemption” – designed to *exclude* federal government entirely
- How accomplished
  - Formal: treaty or concordat: Austria, Argentina, Italy, Switzerland, US (with approval of Congress)
  - Informal: ministerial conferences
    - Standing or ad hoc, nationwide or regional
    - Examples: Austria (Land governors), Switzerland (Conference des Cantons), Canada (first ministers, cabinet-level, bureaucrat-level)
- Examples of reverse preemption
  - US: Uniform Commercial Code
  - Switzerland: cantons negotiating education policy to keep feds out of the field