

exercises that grow out of the existence of the national government, expands the power of the presidency. By signing congressional legislation into law, the president assumes the responsibility of enforcing the laws of the land. Reference is also made to the president's authority in the area of foreign policy. This article also outlines the mechanics of the Electoral College and determines its procedures in the case where a candidate does not receive a majority of the electoral votes. The article refers to executive departments, though it does not specifically mention the president's cabinet or the federal bureaucracy.

## **Executive Powers**

Because of the unique qualities of the presidency, the qualifications for office are the strictest among the three branches. The president must be a natural-born citizen (unlike senators and representatives, who can be naturalized citizens), at least 35 years old, and a resident of the United States for at least 14 years. The source of power of the president comes from the language in Article II Section 1, "The executive power shall be vested in a president of the United States of America." The term of office is four years, limited by constitutional amendment to no more than two terms.

The president becomes a central and unique player in government as a result of the manner in which the definition of chief executive is stated. The only specific powers and duties listed in Article II Sections 2 and 3 include:

- the power to act as commander in chief of the armed forces;
- the ability to obtain information from members of the executive branch;
- the power to grant pardons;
- the power to make treaties with the consent of the Senate;
- the power to appoint ambassadors, justices, and other officials with the advice and consent of the Senate;
- the power to sign legislation or veto legislation;
- the duty to give Congress a State of the Union report;
- the power to call special sessions of the Congress; and
- the inherent power of the president.

Even though there are far fewer powers and responsibilities listed for the president than for the Congress, because the president can interpret the role of the executive in a broad manner, the power of the president in modern times has increased more than the other branches. From the administration of Franklin Roosevelt and the implementation of his New Deal to the new world order of George H. W. Bush, the power of the president has been on the rise. As head of state, the visibility of the president in ceremonial areas far exceeds that of a Congressman. The president is also considered the titular head of the political party in power and thus wields a great deal of power in relation to party appointments.

## **The Vice President**

The vice president's responsibility is also listed in Article II. The only stated responsibility of the vice president is to preside over the Senate and be the deciding vote if there is a tie vote. This occurred in President Clinton's first administration when Vice President Al Gore cast the decisive vote to pass the president's budget proposal. It was a key piece of legislation for the new president and set the course of his economic program. The vice president is also next in line to succeed the president in case of death and, as a result of the Twenty-fifth Amendment, can take over the presidency if the president is disabled.



- Promoting citizenship education and public awareness for lawful permanent residents, and providing an option for naturalization applicants to use credit cards to pay the application fee.”

The program was highly controversial and was criticized by the Republican leadership in Congress and was challenged by the Republican Congress, the governor of Texas, and other states attorneys general. In 2017, the Supreme Court was deadlocked 4-4 and these regulations remained in effect. As a result of the 2016 election, after the Republicans took control of all branches of government, President Trump reversed the executive order and gave Congress six months to come up with a legislative solution.

One of President Trump’s first executive orders was a travel ban aimed at immigrants from seven Muslim countries in the Middle East. The ban was halted as a result of a ruling by the Ninth Circuit Appeals Court. The Trump administration issued a revised order as a result of that ruling which the Supreme Court was scheduled to hear arguments in the 2017 term. Many of Trump’s first hundred-day accomplishments were the repeal of Obama administration executive orders. Trump also signed over 50 executive orders covering domestic and foreign policy issues such as:

- A memorandum directing the Secretary of Defense to draw up a plan within 30 days to defeat ISIS.
- A memo ordering an investigation into whether aluminum imports are hurting national security.
- An order meant to improve accountability and whistleblower protections for Veterans Affairs employees.
- An order directing a review of national monument designations under prior administrations.
- An order meant to affirm local control of school policies, and examine certain Department of Education regulations and guidance to determine their compliance with federal law.
- An order directing a task force to review regulations affecting the agriculture industry memorandum to restructure the National Security Council and the Homeland Security Council.

## JUDICIAL BRANCH

Article III outlines the nature of the judicial branch. It is interesting to note that, unlike the first two articles, this article is the most vague regarding the qualifications of its members. It refers to one Supreme Court and how cases get there. But it does not give the Supreme Court the broad authority it has assumed. This authority of judicial review was given to the court in the landmark case of *Marbury v Madison* (1803). The scope of the court system is set in Article III, and the jurisdiction of the system is defined. This article also defines treason and provides for a range of penalties, including death, if a person is convicted of this crime. The only time this penalty has been carried out was when Ethel and Julius Rosenberg were convicted of giving the Soviet Union information concerning U.S. development of the atom bomb. They were tried and convicted of treason and executed after the Supreme Court denied their appeal.

It becomes apparent that by separating the three branches of government, the framers of the Constitution were concerned with the delicate balance of power among the branches. The Constitution neatly lays out the various powers of each branch of government without any reference as to which of the branches should be the lead player.

### Judicial Powers

Unlike the legislative and executive departments, the judiciary has no specific qualifications for office. The Constitution in Article III states that judges shall “hold their offices during good behavior.” The Supreme Court is the only court established by the Constitution. Lower federal courts are



established by the Congress. Even the size of the Supreme Court is not defined. It has remained at nine sitting justices in modern times, although the number has been as low as five. Franklin Roosevelt attempted to “pack” the court in 1937 after the court ruled a number of his New Deal acts unconstitutional. Congress rejected his attempt. The appointment of Supreme Court justices, by extension of the description of service, is their lifetimes. Typically, Supreme Court justices come from other federal judgeships. The appointment process has become more and more difficult as a result of close questioning by the Senate Judiciary Committee.

Appointments by Richard Nixon were turned down. One of the most publicized confirmation hearings took place when George H. W. Bush sent Clarence Thomas’s name to the Senate, and he was accused by Oklahoma law professor Anita Hill of sexual harassment. Thomas was appointed to the court. In addition, nominees are also questioned on their attitudes regarding potential issues the court may have to rule on, such as abortion. Nominees must tread a very thin line during this process and not be too specific. They must avoid creating a conflict that would arise if they rule on a case they have already spoken about.

The major power given to the judicial branch is defined as “the judicial power (which) shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made.” The real power, that of judicial review, has grown in importance throughout the history of the court. The Constitution describes cases through original jurisdiction that the court can hear directly. The vast majority of cases heard in the Supreme Court are brought on appeal from state and federal courts. This is called appellate jurisdiction.

Congressional law as well as presidential actions have also been taken up by the Supreme Court. It is interesting to note that of the three branches of government, the Supreme Court has no direct responsibility or accountability to the voters. Sitting justices, once confirmed, decide on cases based on their interpretation of the Constitution. The impact of the Supreme Court on policy making has increased in modern times. Many court experts point to the landmark decision of *Brown v Board of Education* (1954) as a turning point in the history of the court.

## **The Unwritten Constitution Makes It a Living Document**

The unwritten constitution, as well as the Constitution’s elasticity, adds to its viability. Political parties, the president’s cabinet, special-interest groups, political action committees, and the federal bureaucracy are important examples of tradition, precedent, and practice incorporated into our form of government.

The elastic clause and powers given to the Congress in the Constitution are perhaps the greatest instruments of change that Congress has at its disposal. From the passage of the Judiciary Act of 1789 to the creation of the many executive branch departments, Congress has used its power to expand the size of government. Congress has used the elastic clause to pass civil rights legislation, has broadly interpreted the meaning of interstate commerce, and has passed a war-powers act under its power to declare war.

Neither the Constitution nor any law provides for the establishment of political parties, nominating conventions, primaries, or most of the political system we are used to. Even though the *Federalist Papers* warned of the danger of political factions, and George Washington echoed that point of view, the influence of political parties has become a dominant feature of government. When the Republican Party can unite and not provide a single vote for the president’s budget proposal, one can see the importance of party politics. When a party decides to start a filibuster (continuous debate) in the Senate to block the passage of legislation, this becomes an additional check.

The Supreme Court has also gone beyond the constitutional parameters in establishing precedent. From the *Marbury v Madison* (1803) decision establishing judicial review to *Roe v Wade*



(1973), which found a way to constitutionally protect the right of a woman to have an abortion, the court is plowing new ground based on its interpretation of the Constitution.

Custom and tradition are an integral part of government. After executive departments were established by Congress, Washington announced the formation of cabinet positions. Congress then codified this concept as they approved additional cabinet positions. A two-term president was the accepted tradition until Franklin Roosevelt broke it. After he died, an amendment limiting presidential terms was passed, making the tradition a written component of the Constitution.

## **A Balance of Power Is Achieved Through Checks and Balances**

Based upon the writings of Montesquieu in *The Spirit of Natural Laws*, and James Madison's Federalist No. 47, the concept of checks and balances became a central feature to our government. As Madison stated, "It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers."

Some specific examples of how each branch of government has used its power to check another branch may be useful to illustrate the importance of this feature.

- President Barack Obama used his veto power when the Republican Congress voted to repeal the Affordable Care Act.
- The Senate changed its rules to increase the number of presidential appointments that required Senate confirmation.
- In 2013, Congress did not approve a federal budget, resulting in a government shutdown.
- In 2015, the Supreme Court ruled that same-sex marriage was constitutional, opening the door for marriage equality.

As of 2017, there had been more than twenty-five hundred presidential vetoes of congressional bills. Congress overrode more than a hundred of those vetoes. The Supreme Court has found more than a hundred acts of Congress unconstitutional. The Senate has refused to confirm 27 nominees to the Supreme Court and nine cabinet members. Other appointees have withdrawn as a result of expected Senate opposition. There have been several cases of congressional impeachment of federal judges. One way the president can get around Senate opposition to an appointment is through a "recess appointment," a temporary appointment of the president's choice made during a congressional recess. This temporary appointment can serve for only one year, at the end of which the president must resubmit the nominee for Senate confirmation. The Supreme Court ruled that many of the appointments were unconstitutional.

The critics of checks and balances point to the potential for a constitutional crisis developing if one branch attempts to challenge the authority of another. For instance, if the president as commander in chief deploys troops in a country for an extended period of time and ignores the provisions of the War Powers Act—an act of Congress that limits presidential authority to send armed forces to another country—there is a good possibility that an unresolvable conflict could occur between the executive and legislative branches. Typically, the Supreme Court does not get involved in adjudicating those kinds of conflicts. In fact, Congress challenged the president's authority in such unapproved conflicts in Somalia and the former Yugoslavia, but stopped short of placing restrictions on his authority.

Probably the most significant feature of checks and balances is that it consistently proves that our republic is one of limited government.



## Required Document

### Federalist No. 51

Madison wrote Federalist No. 51 to lay out the reasons for three separate independent branches of the national government. This would ensure the people had their liberty. Madison preferred that each branch be elected by the people, but he realized the judicial branch had special qualifications making that impossible. Madison also argued that checks and balances would prevent one branch of government from becoming too strong. As in Federalist No. 10., Madison is concerned about factions but sees the election of government officeholders as the solution.

*Key Quote:*

“If men were angels, no government would be necessary.”

## IMPEACHMENT IS THE ULTIMATE CHECK OF A PRESIDENT WHO ABUSES POWER

- The House of Representatives has the power to initiate impeachment proceedings.
- The Senate has the power to try impeachment proceedings.
- The Chief Justice of the Supreme Court presides over impeachment trials.

## Illustrative Example

### The Impeachment of Bill Clinton

In one of the most bitter and partisan political clashes in American history, the House of Representatives voted in 1998 for two articles of impeachment against President Clinton. This was the first impeachment of an elected American president—Andrew Johnson, impeached in 1868, had succeeded the assassinated Lincoln. The events leading to Clinton’s impeachment read like a sordid novel. Special Prosecutor Kenneth Starr had been investigating Clinton’s role in the Whitewater land acquisition and other alleged White House abuses, including the dismissal of travel office personnel and illegally obtained FBI tapes. Clinton had also been fighting other legal battles. Paula Jones, an Arkansas government official, accused the president of sexual misconduct when Clinton was governor of Arkansas. Clinton denied the charges, and Jones sued the president. The Supreme Court ruled unanimously that Jones’s civil suit could proceed while Clinton was still in office. Clinton testified and denied the charges as well as charges that he had been involved sexually with White House intern Monica Lewinsky. When this relationship with Lewinsky was reported over the Internet in January 1998, Starr began investigating to determine whether Clinton had lied during his testimony in the Jones suit. Clinton publicly denied any sexual misconduct with Lewinsky; Starr’s inquiry took seven months to complete.

The investigation culminated with the unprecedented testimony of the president appearing before a grand jury on video. Clinton again denied any legal wrongdoing, but admitted publicly that he had misled the American people and, indeed, had a relationship with the young intern. Starr completed his report in August 1998 and concluded there was “credible” evidence that Clinton may have committed impeachable offenses. The House Judiciary committee voted on four articles of impeachment. The House rejected two of the articles and submitted to the Senate the final articles accusing the president of high crimes and misdemeanors as a result of grand jury perjury and obstruction of justice. With the Senate unable to muster the two-thirds vote required to find Clinton guilty, the president was acquitted on all charges.

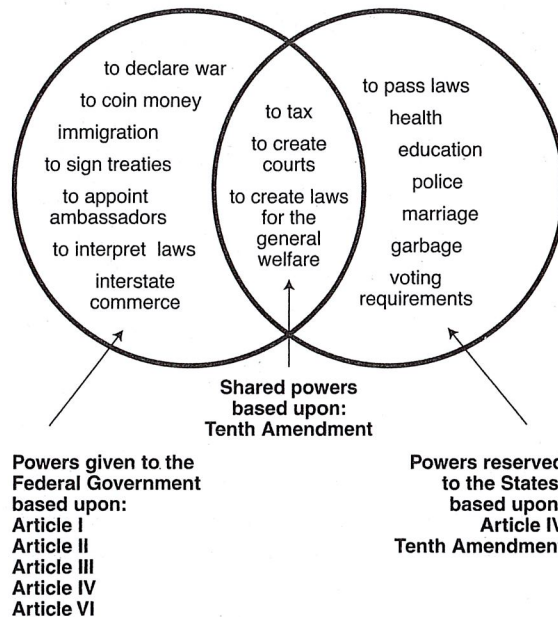


## KEY CONCEPT 1.D: FEDERALISM

Federalism, the division of power between a central, or federal, government and state governments, has been a fundamental and evolving feature of our system of government. Political scientists consider the balance of power between the federal government and the states as defined by the powers given to the Congress by the Constitution and the reserved powers given to the states by the Tenth Amendment. There is also fiscal federalism: how the federal government offers federal assistance through different kinds of grants to state and local governments.

The **Big Idea, Constitutionalism**, is reflected by this concept.

### DUAL FEDERALISM: THE CIRCLE THEORY



### CONTEMPORARY CONNECTION

In 2009, the Department of Education announced the “Race to the Top” grant program that states could apply for if they adopted specific testing and teacher-evaluation procedures and a “common core” curriculum. At first a majority of states took part in the program, but by 2015 some decided to opt out because they believed the federal government was becoming too intrusive in what was supposed to be a state-run function—education.



## Federalism Is Defined as a Vigorous Relationship Between the Federal and State Governments

Besides establishing a balance of power among the three branches of government, the U.S. Constitution maps out the relationship between the federal government and the states in two articles and one amendment.

In Article IV, the term “full faith and credit” is used to describe the mutual respect and legality of laws, public records, and judicial decisions made by states. In effect, if Nevada has laws establish-



ing rules for marriage and divorce, New York must recognize those laws as valid. Congress passed the Defense of Marriage Act (DOMA), and President Clinton signed it into law in 1996. This law gave states the authority not to recognize same-sex marriages performed in other states, and it also denied gays who were legally married all the federal benefits given to other married couples. This law was challenged, and the Supreme Court ruled in the case of *Windsor v United States* that the section of the Defense of Marriage Act that denied federal benefits to legally married same-sex couples was unconstitutional, thus enabling legally married same-sex couples to be potentially eligible for some of over a thousand federal benefits. However, states that did not recognize same-sex marriages were still able to do so, although if a legally married same-sex couple moved to that state the couple would still receive federal benefits.

Ultimately, the Supreme Court ruled 5–4 in 2015 in *Obergefell v Hodges* that the equal protection clause of the Fourteenth Amendment required that states issue marriage licenses to same-sex couples. This meant that same-sex marriage was legal in the United States. In the case that state laws do conflict with each other, the law within each state is recognized as legal for that state. By extension, Section 2 recognizes that “the citizens of each state shall be entitled to all the privileges and immunities” of citizens in all the states. This provision is significant because it guarantees that the rights of a citizen in one state will be respected by other states. The phrase “privileges and immunities” becomes a significant phrase in the Fourteenth Amendment, which tells states they cannot abridge the privileges and immunities of its citizens. States also recognize the legitimate claim to fugitives through extradition. Finally, in Article IV Section 4, the United States guarantees every state a “republican form of government.” The use of the word *republican* is important. It suggests that every state must establish a limited representative government. It also guarantees that the United States will protect every state from outside attacks or internal strife.

## STATE GOVERNMENTS

Perhaps the most significant statement that defines the relationship of the federal government to the states is found in Article VI. The supremacy clause asserts that “the Constitution, and the laws of the United States . . . shall be the supreme law of the land.” In effect, this clause tells the states that they cannot pass laws or pursue actions that come into conflict with federal actions. It also refers to all state officials pledging their allegiance to the Constitution. The court case *McCulloch v Maryland* in 1819 established this precedent when Maryland was told it could not tax the National Bank.

The concept of federalism, the overall relationship between the federal government and state governments, is defined in the Tenth Amendment of the Constitution. This amendment specifically tells the states that they have reserved powers: Powers not delegated to the federal government by the Constitution belong to the states.

Advocates of a strong federal system believe state and local governments do not have the sophistication to deal with the major problems facing the country. These advocates often believe local politicians are provincial in their point of view and would favor sectional issues that do not take into account the interests of the entire nation. Those who favor a strong federal system also point to the inability of state and local governments to support the vast programs financially because of an inadequate tax base. They also feel an elitist group would gain control of the smaller governments and ignore the needs of the minority.

Critics of a strong federal system point out that local leaders are most sensitive to the needs of their constituents. They also believe the states can better develop public policy that can be supported by a broad tax base. And critics point to the many demands made upon local governments by the federal government in order to receive financial aid from the federal government.



Through this debate it can be seen how important the relationships among levels of government is. This relationship can affect the kind of political participation that exists. It can determine the kind of public policy that is developed and implemented. Such issues as a national drinking age, a national speed limit, and consistent emission standards in every state have emerged in the debates over which level of government is best suited to solve the problems facing the country. Additionally, after the Republicans won back control of Congress in 1994, the issue of devolution of federal power, returning the balance of federal-state responsibilities back to the states, emerged in the name of unfunded mandates: regulations passed by Congress or issued by regulatory agencies to the states without the federal funds to support them.

## **Local Governments Also Have a Unique Relationship with the Federal Government**

Compared to other means of dividing power, federalism establishes a unique working relationship with the other levels of government and its people. Neither component can abolish or alter the other single-handedly. Conversely, a unitary system of government centralizes all power, while a confederation decentralizes all power. Most parliamentary governments such as Great Britain and France are unitary. Power can be taken away from the local unit by the central authority. The former Soviet Union, after its breakup, formed the Russian Confederation. The United States at first had a confederation, the Articles of Confederation, which failed after a few short years in existence. The loosest confederation that exists on the international scene is the United Nations.

The advantage of the federal system over a unitary system and confederations is that a distinct line is drawn between what is in the purview of the central government versus what local governments are concerned with. The central government is concerned with the broader issues affecting the entire country, such as foreign policy, interstate matters, and immigration. Local governments are concerned with matters that have a direct impact on the daily lives of their citizens, such as motor vehicle laws, garbage, education, and public health and welfare. Shared interests involve methods of raising revenue and creating a criminal justice system as well as common spending programs. Public policy is developed by both state and federal legislation. Yet, at times, the distinction between which policies are federal and which should be developed by the states becomes cloudy.

## **Illustrative Example**

### **Federalist No. 9**

#### **Tracing the Evolution of Federalism**

Even before the Constitution was ratified, strong arguments were made in the *Federalist Papers* by Alexander Hamilton, John Jay, and James Madison, urging the inclusion of a federal form of government to replace the failed confederation. In Federalist No. 9 Hamilton states, "This form of government is a convention by which several smaller states agree to become members of a larger one, which they intend to form. It is a kind of assemblage of societies that constitutes a new one, capable of increasing, by means of new associations, until they arrive to such a degree of power as to be able to provide for the security of the united body." Those who feared that the federal government would become too strong were assured by Madison in Federalist No. 14 that "in the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws . . . . The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity." These excerpts illustrate the fact that a federal form of government was central to the success of the new Constitution.

Buckner - p. 89 - 97