

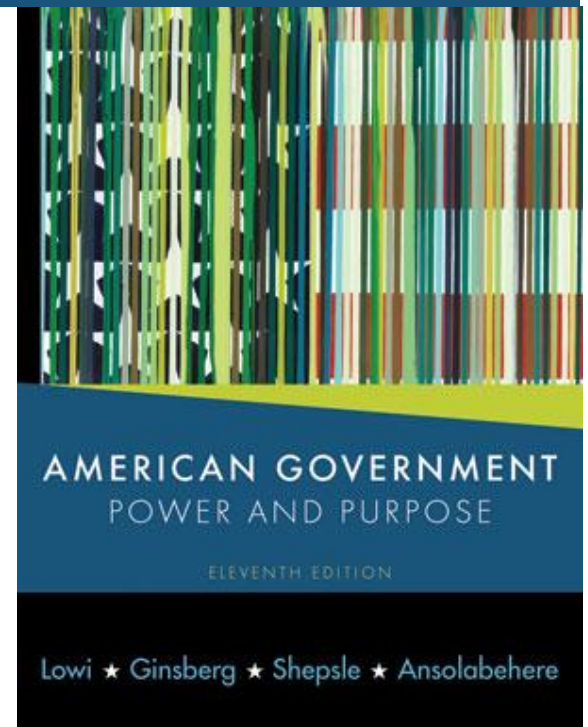
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Federalism and the Separation of Powers

AMERICAN GOVERNMENT

POWER AND PURPOSE

Lowi ♦ Ginsberg ♦ Shepsle ♦ Ansolabehere



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Antifederalists and the Vice Presidency

“The Vice-President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”

--Article I, Section 3,
of the Constitution

Antifederal objections to the constitutional position of vice president exemplify the late-eighteenth-century struggles over separation of powers and federalism.

On questions of **separation of powers** the framers of the Constitution looked primarily to Montesquieu, who argued, among other things, for a strict separation of the functions of the legislative, executive and judicial branches.

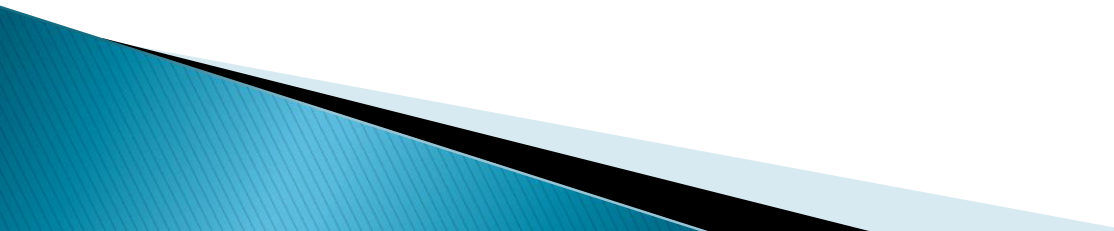
Some Antifederalists objected that, by making the American vice president both a member of the executive branch and president of the Senate, the Constitution violated this central principle of separation of powers.

Antifederalists believed that the states (former colonies) were, to a degree, independent entities that deserved equal representation *as states*. This was achieved in the Senate.



Viewing the Constitution's vice president in light of **federalism**, Antifederalists also objected that, in cases of tie votes, the vice president's state would have an additional vote and thus an unequal advantage in the Senate.

Even though this intense squabble was of minor importance at the time of the American founding, it exemplifies two salient issues that help us to understand late-eighteenth-century politics:

1. The concept of separation of powers was understood to demand a strict separation in the functions of the legislative, executive, and judicial branches of government.
 2. The relative strength of the states was at the heart of many of the political battles of the time.
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Federalism and the American Founding



The *balance of power* between the central government and the states was at the heart of the constitutional struggle between the Federalists and the Antifederalists.

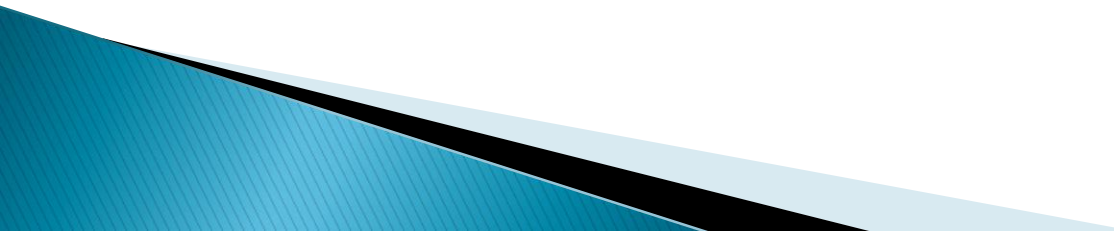
What the Federalists Were For

1. A powerful central government;
2. Government “filtered” from popular control;
3. A potentially expansive central government that could govern a large country.

What the Antifederalists Were For

1. The retention of state sovereignty and strength;
2. More popular control of state-run governments;
3. Fidelity to traditional notions of republicanism.

Although the Federalists won the struggle over ratification, the federal balance of power remained contested and paradoxical throughout American history and was at the heart of struggles throughout American history such as:

1. the ability of states to “nullify” federal laws;
 2. the Civil War;
 3. the power of the central government in the New Deal;
 4. the “rights” of states versus the rights of citizens in the civil rights movement.
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“[If] the people should in the future become more partial to the federal than to the State governments . . . the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.”

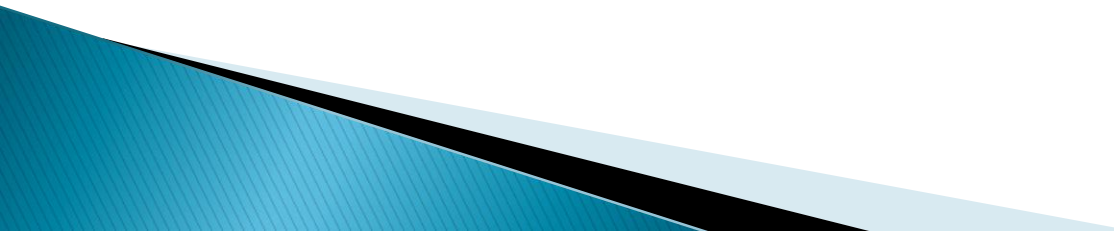
—James Madison (Publius)
Federalist 46



Federalism in the Constitution

Consistent with the framers' desire to divide the powers of government, the *Constitution's* federal division of power can be understood as an attempt to limit the power of the national government.

With *expressed powers*, the Constitution grants specific powers to the national government and reserves the rest for the states.



National Government Powers

- ▶ Expressed powers
 - collect taxes
 - coin money
 - declare war
- ▶ Implied powers
 - “necessary and proper” powers the national government gains due to their implication in the Constitution

State Government Powers

- ▶ Reserved powers
 - “police powers” (the powers to regulate the health, safety, and morals of its citizens)
- ▶ Tenth Amendment

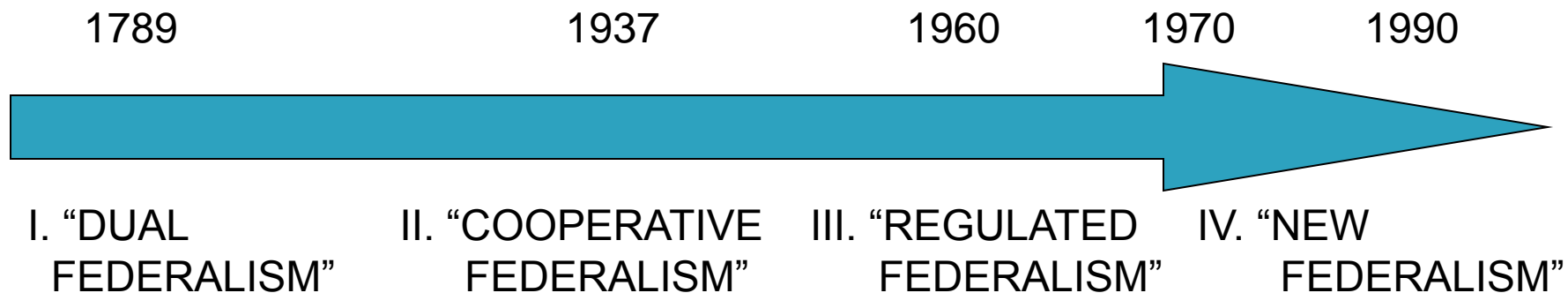


Tenth Amendment

“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.”

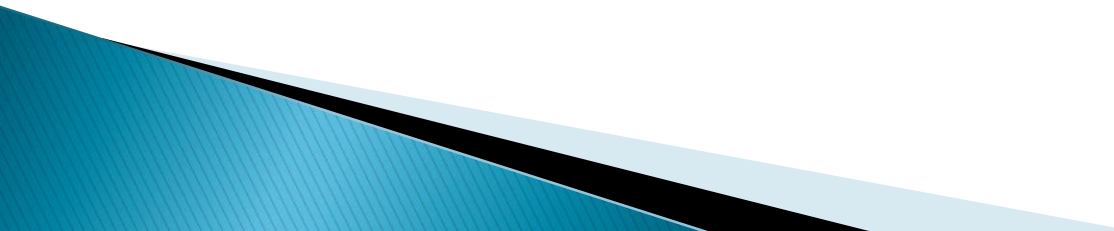
Stages of Federalism

There have been four stages of federalism throughout American history.



Stages of Federalism: Stage 1

STAGE 1: “Dual Federalism” (1789–1937)

1. Central government focused on promotion of commerce and distribution of resources.
 2. States retain most remaining powers.
- 

Stage 1: Dual Federalism

Article I, Section 8, of the Constitution set forth several powers of the national government, including:

- Commerce clause
- “Necessary and proper clause”
- *McCulloch v. Maryland* (1819)
- *Gibbons v. Ogden* (1824)

The “dual federalism” stage allowed for a relatively clear delineation of power between national, state, and local governments.



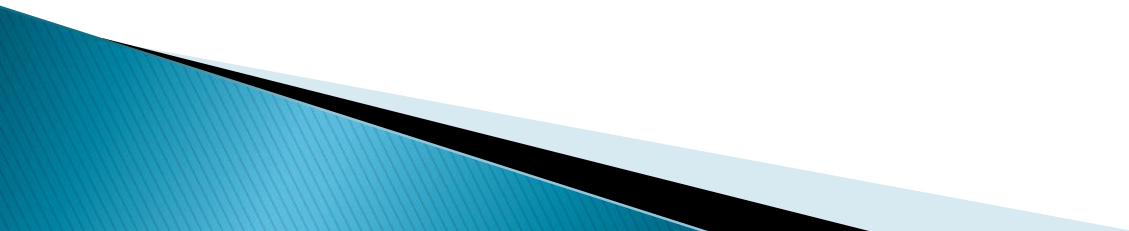
The Federal System: Specialization of Governmental Functions in the Traditional System, 1789–1937

National Government Jurisdiction (Domestic)	State Government Jurisdiction	Local Government Jurisdiction
Internal improvements	Property laws (including slavery)	Adaptation of state laws to local conditions (variances)
Subsidies	Estate and inheritance laws	Public works
Tariffs	Commerce laws	Contracts for public works
Public lands disposal	Banking and credit laws	Licensing of public accommodations
Patents	Corporate laws	Assessable improvements
Currency	Insurance laws	Basic public services
	Family laws	
	Morality laws	
	Public health laws	
	Education laws	
	General penal laws	
	Eminent domain laws	
	Construction codes	
	Land-use laws	
	Water and mineral laws	
	Criminal procedure laws	
	Electoral and political party laws	
	Local government laws	
	Civil service laws	
	Occupations and professions laws	

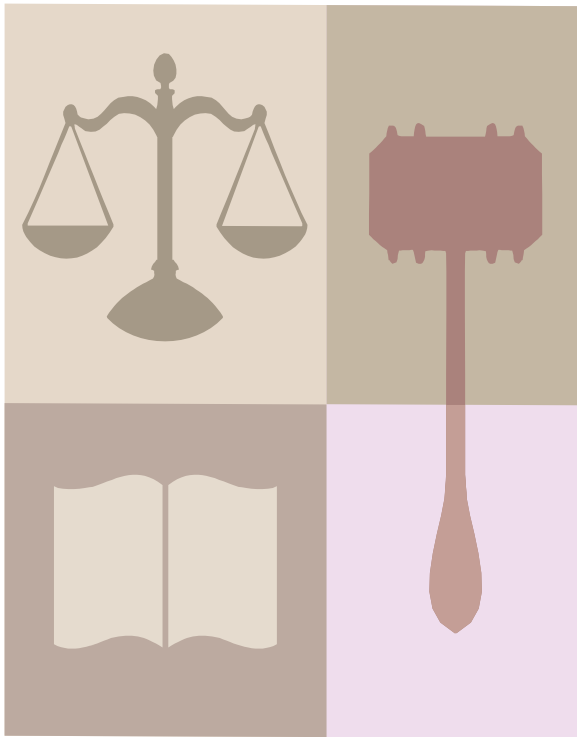
Stages of Federalism: Stage 2

STAGE 2: “Cooperative Federalism” (1937–?)

Franklin Roosevelt’s “New Deal” sparked a revolution in national policy making and an increased role for the national government, altering the balance of federal power.

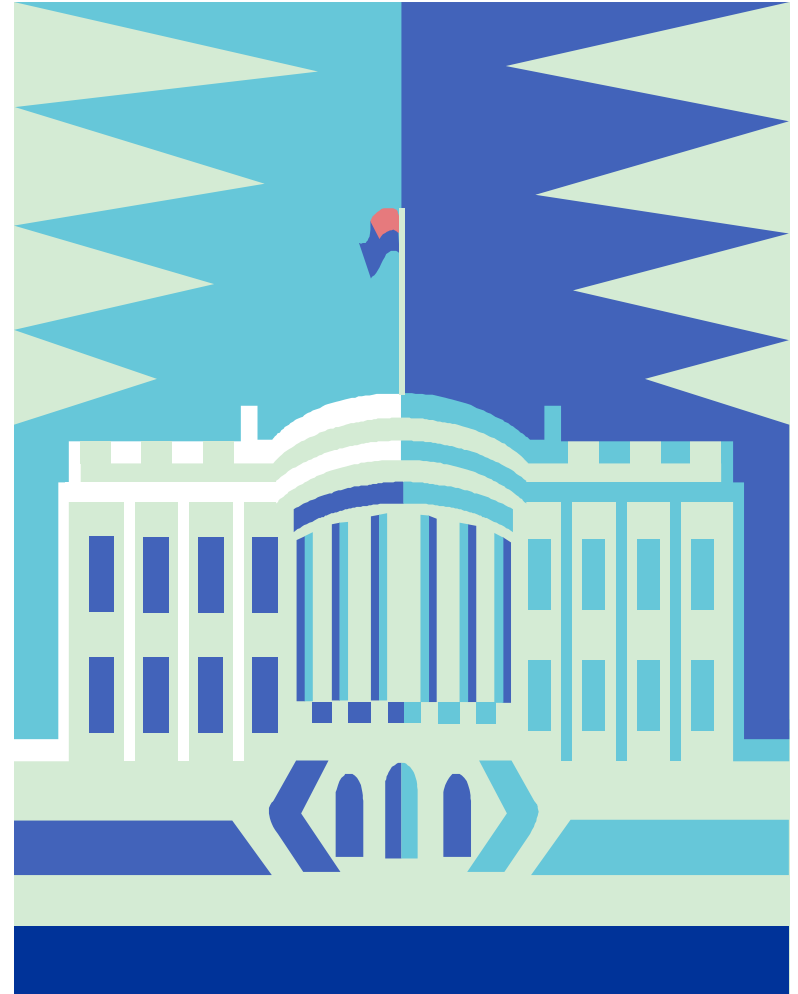


Stage 2: Cooperative Federalism



In *NLRB v. Jones and Laughlin Steel* (1937), the Supreme Court expanded its interpretation of the commerce clause to allow the national government to regulate as well as promote interstate commerce, allowing for an expansion of national government power and a blurring of the lines of authority between national and state government.

The New Deal's expansion of the national government and the executive branch further empowered the national government at the expense of state autonomy.



Under “cooperative federalism,” the national government would ensure state cooperation with federal policies by offering grants-in-aid.

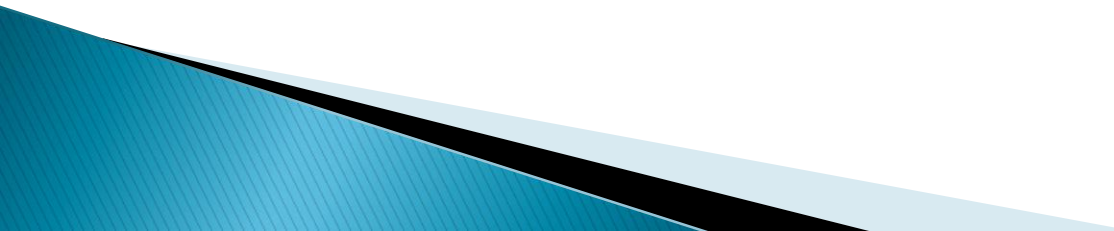
Block grants are given to states for general purposes and allow state officials greater discretion over how funds will be spent.

Categorical grants are given to states for more specific purposes, and most of the discretion remains in the hands of federal officials and officeholders.

Stages of Federalism: Stage 3

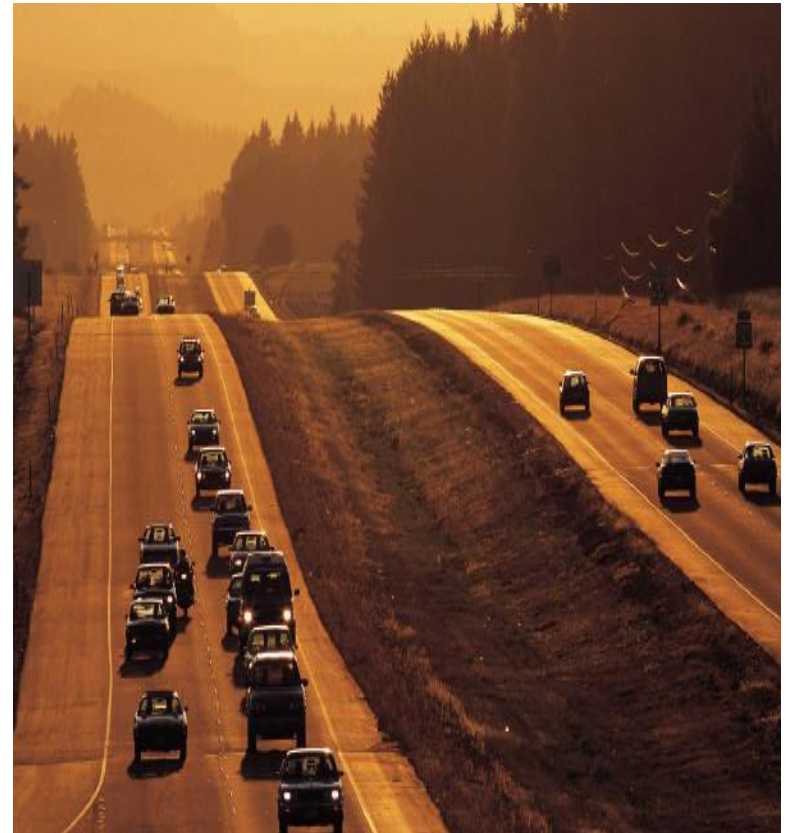
STAGE 3: “Regulated Federalism” (1960s–?)

As state and local governments came to depend on grant-in-aid support, the national government further intervened in state government decision making by threatening to withhold such grants. This is also known as **“coercive federalism.”**



Stage 3: Regulated Federalism

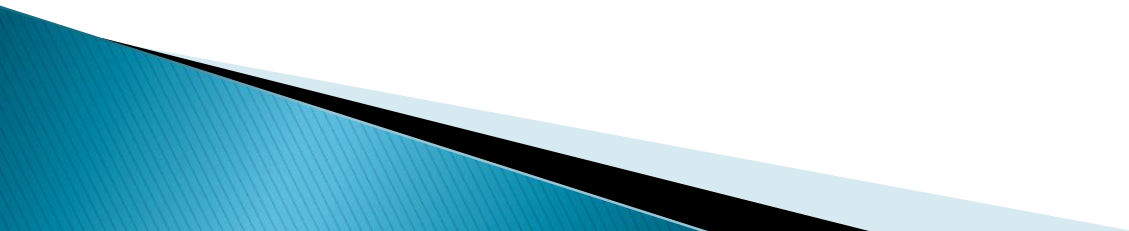
To regulate speed limits within states, the national government threatens to withhold federal transportation dollars, thus coercing states to comply with federal mandates.



Stages of Federalism: Stage 4

STAGE 4: “New Federalism” (1969–?)

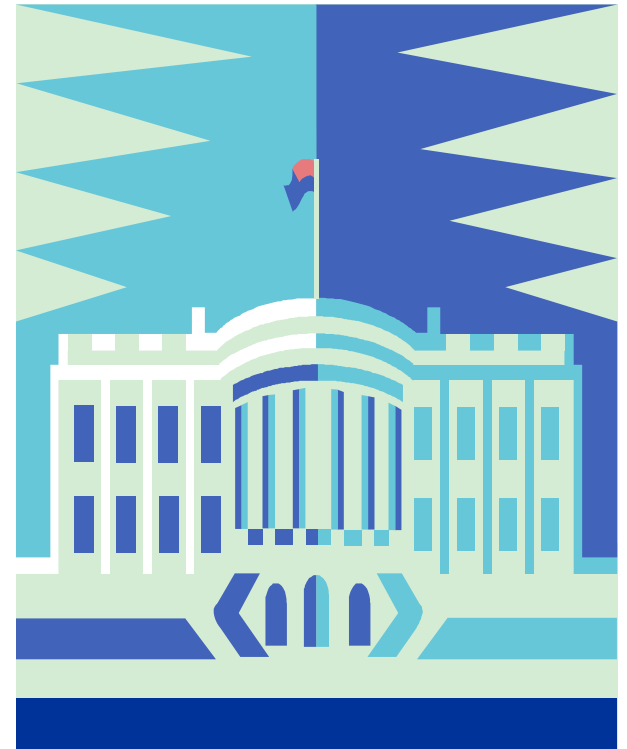
The waning in some respects of Franklin Roosevelt’s New Deal coalition and programs sparked a counter–federal trend, known as new federalism, that began to return discretion to the state and local governments.



Stage 4: New Federalism

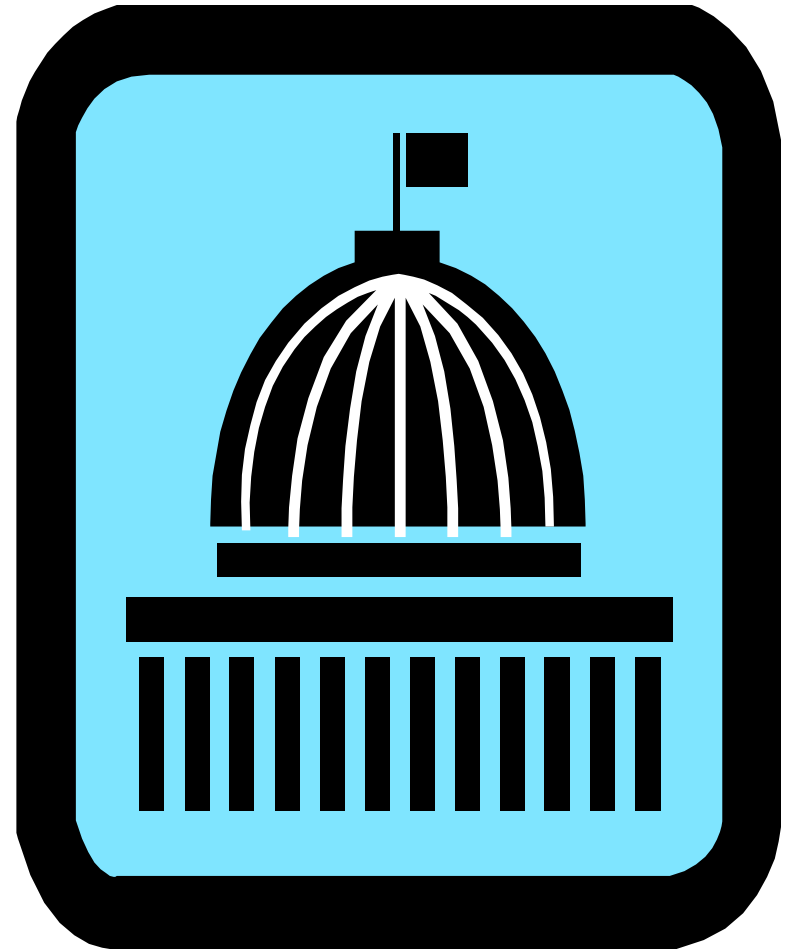
The “new federalism” trend of returning discretion to the states began in the executive branch as the Nixon, Carter, and Reagan administrations gave states a larger role in administering federal policies.

In the 1990s both Congress and the federal courts joined the new federalism revolution.

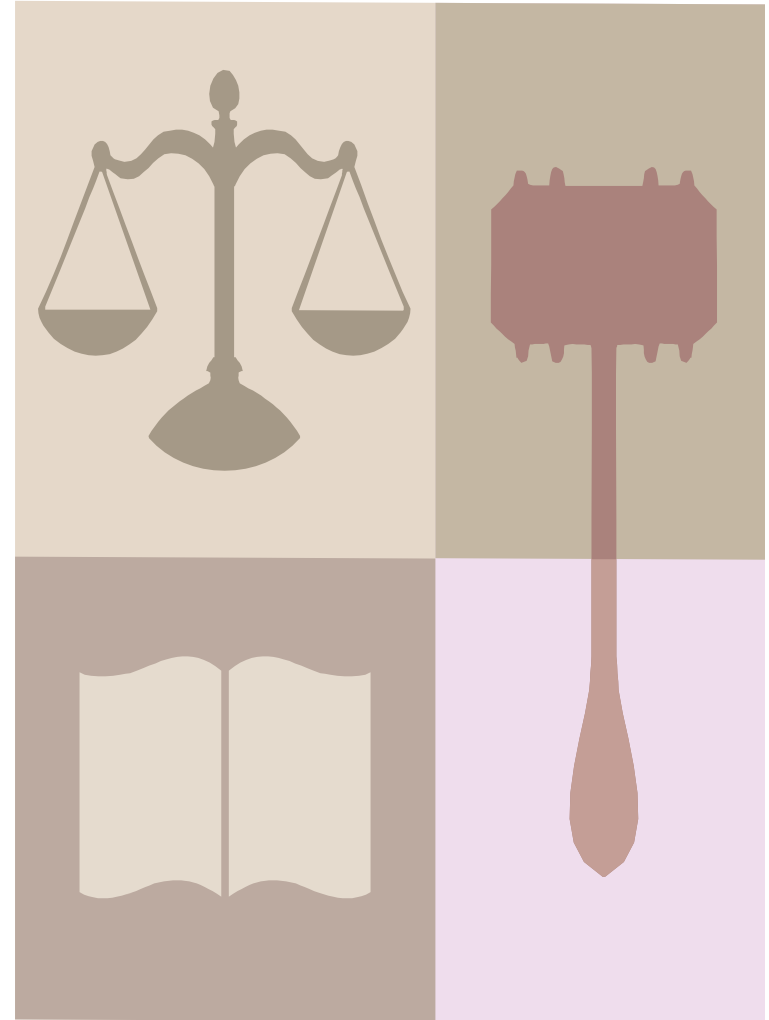


Congress: The Republican takeover of Congress after the 1994 elections led to a series of policies where the federal government “devolved” power to the states.

Welfare reform is a good example of such “devolution.”

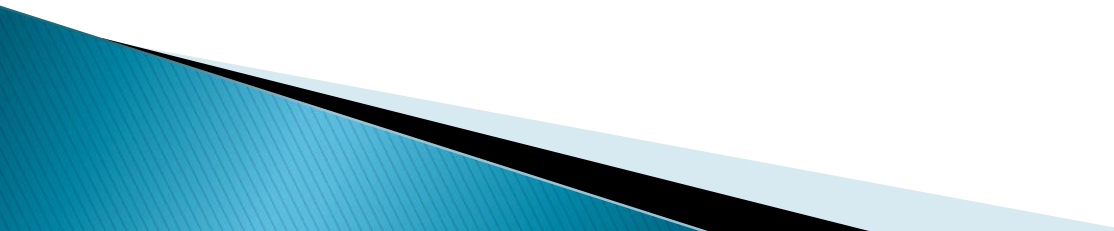


The Courts: In *United States v. Lopez* (1995) and *United States v. Morrison* (2000), the Supreme Court reversed its course by restricting its interpretation of what constituted “interstate commerce” to justify federal government involvement in the states.



“we would have to pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road . . . , but we decline to proceed any further.”

--Former Chief Justice William Rehnquist,
writing for the majority in *United States v. Lopez* (1995)

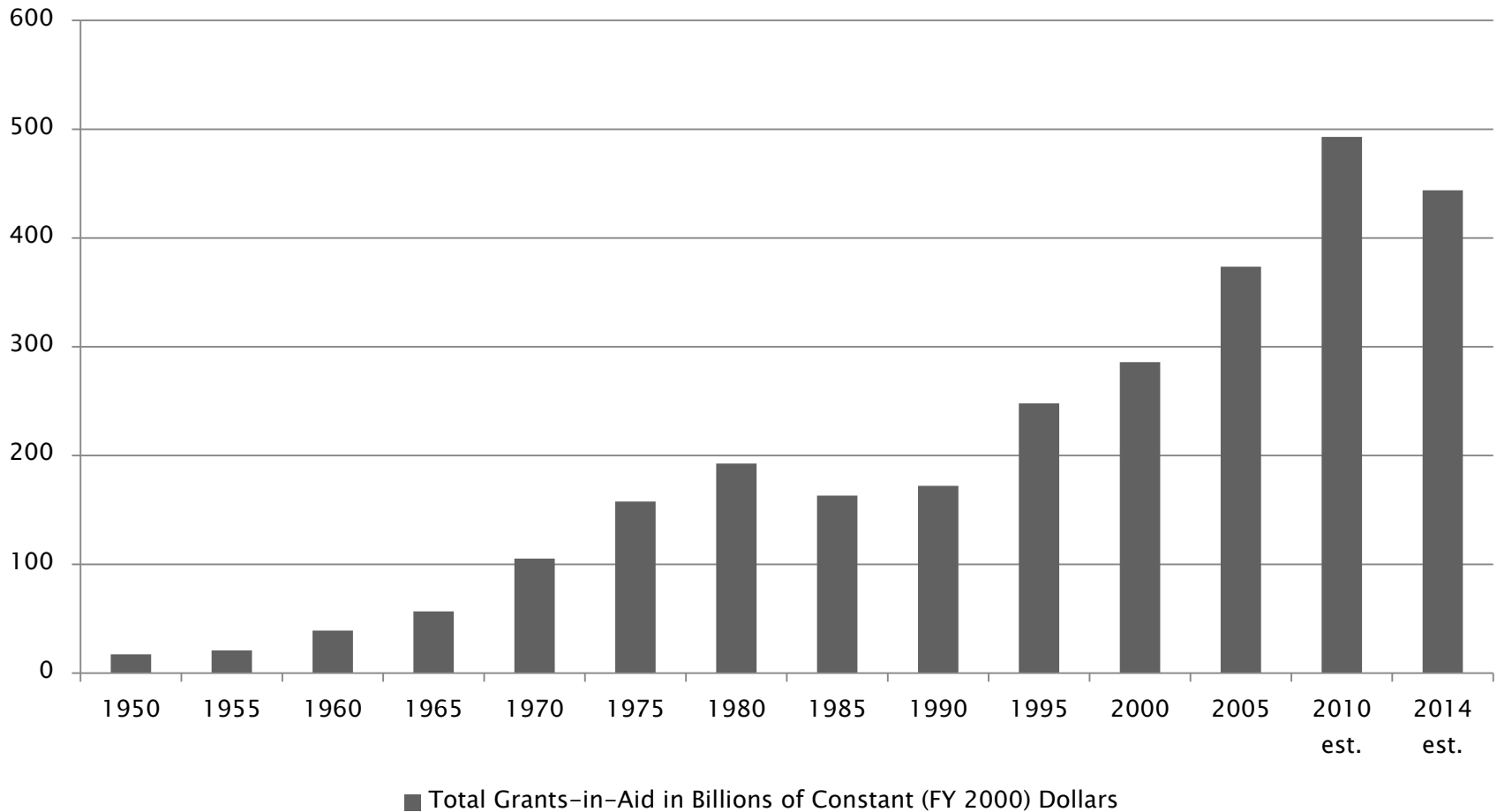




Despite recent court cases and new federalism trends, the growth of national government power in the twentieth century cannot be denied.

The cooperative federalism instruments of federal grants-in-aid to state and local governments continue to constitute an important part of state and local governments' budgets.

Total Grants-in-Aid 1950-2014



Source: U.S. Office of Management and Budget, Table 12.1 "Summary Comparison of Total Outlays for Grants to State and Local Governments: 1940-2014," *Historical Tables, Budget of the U.S. Government, Fiscal Year 2010* (Washington, DC: Government Printing Office, 2009), <http://www.whitehouse.gov/omb/budget/Historicals/>, accessed 9/20/2009.

Separation of Powers

Where **federalism** separates government power between the national, state, and local governments, **separation of powers** divides government power between the legislative, executive, and judicial branches.

- ▶ **LEGISLATIVE**
 - Congress
 - House and Senate
- ▶ **EXECUTIVE**
 - President
 - Bureaucracy
- ▶ **JUDICIAL**
 - Supreme Court
 - Other federal courts

“The Constitution is said to have created a system of separated powers. It did nothing of the sort. It created a system of separate institutions sharing power.”

—Richard Neustadt, *Presidential Power* (1960)



Separated Power

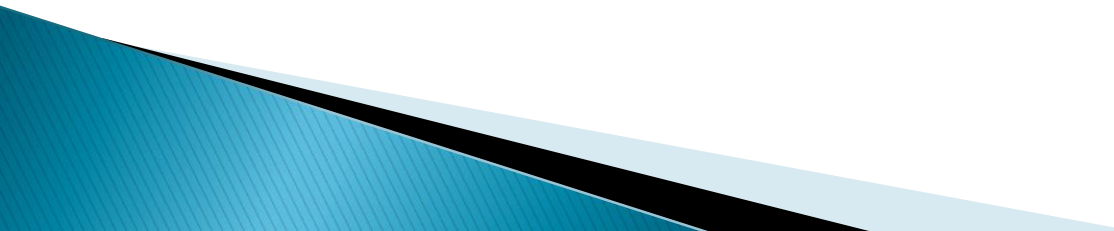
Following Montesquieu, Antifederalists argued for a strict separation of the legislative, executive, and judicial functions.

Separate Institutions *Sharing Power*

As Neustadt observed, American government actually creates separate “departments” of government that compete over comingled, or shared, powers.

The Rationality Principle: *All political behavior has a purpose.* Political behavior is goal-oriented.

By establishing separate institutions that share important powers (e.g., war making, legislation, appointments, etc.), the Constitution sought to pit the goal-oriented behavior of politicians in the legislative, executive, and judicial branches, respectively, against one another.



“Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”

--James Madison, Federalist 51



The Institution Principle: *Institutions structure politics* by establishing scripts and scorecards that allocate jurisdictional responsibility and power.

We can apply the logic of “ambition counteracting ambition” to understand many of the motivations for the Constitution’s structuring of the separation of powers.



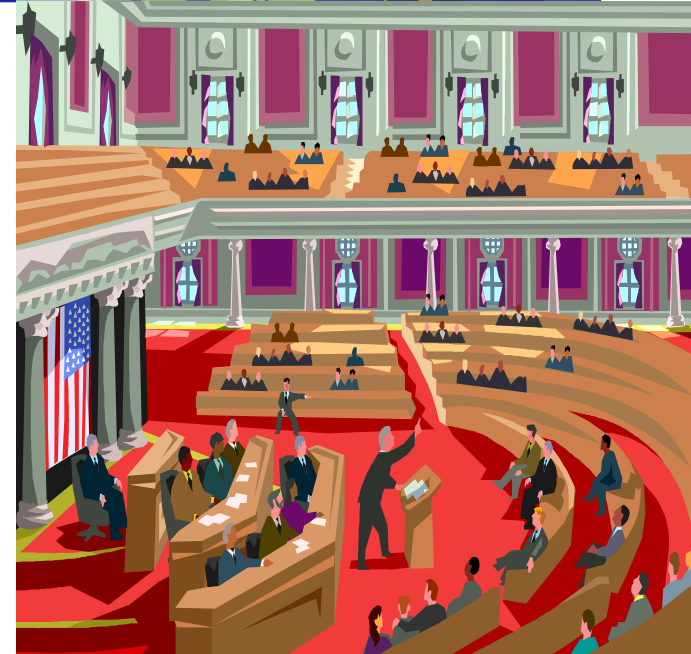
James Madison believed that a chief goal of the Constitution's separation of powers was to overcome the legislative dominance he expected and feared.

The Constitution as an Institutional Solution

1. Bicameralism;
2. The creation of a strong executive to counter Congress.

The *Rationality Principle* at work.

In the separation of powers' system of "checks and balances," each branch of government will seek to expand its own power and also to protect itself against "encroachments" by the other branches.

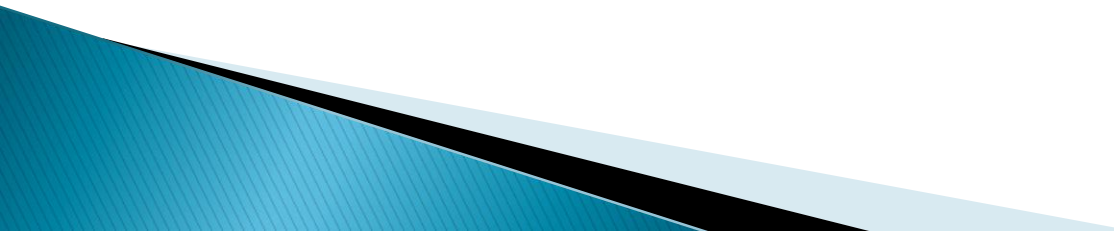


The last four decades of American history have seen a great deal of struggle between Congress and the president.

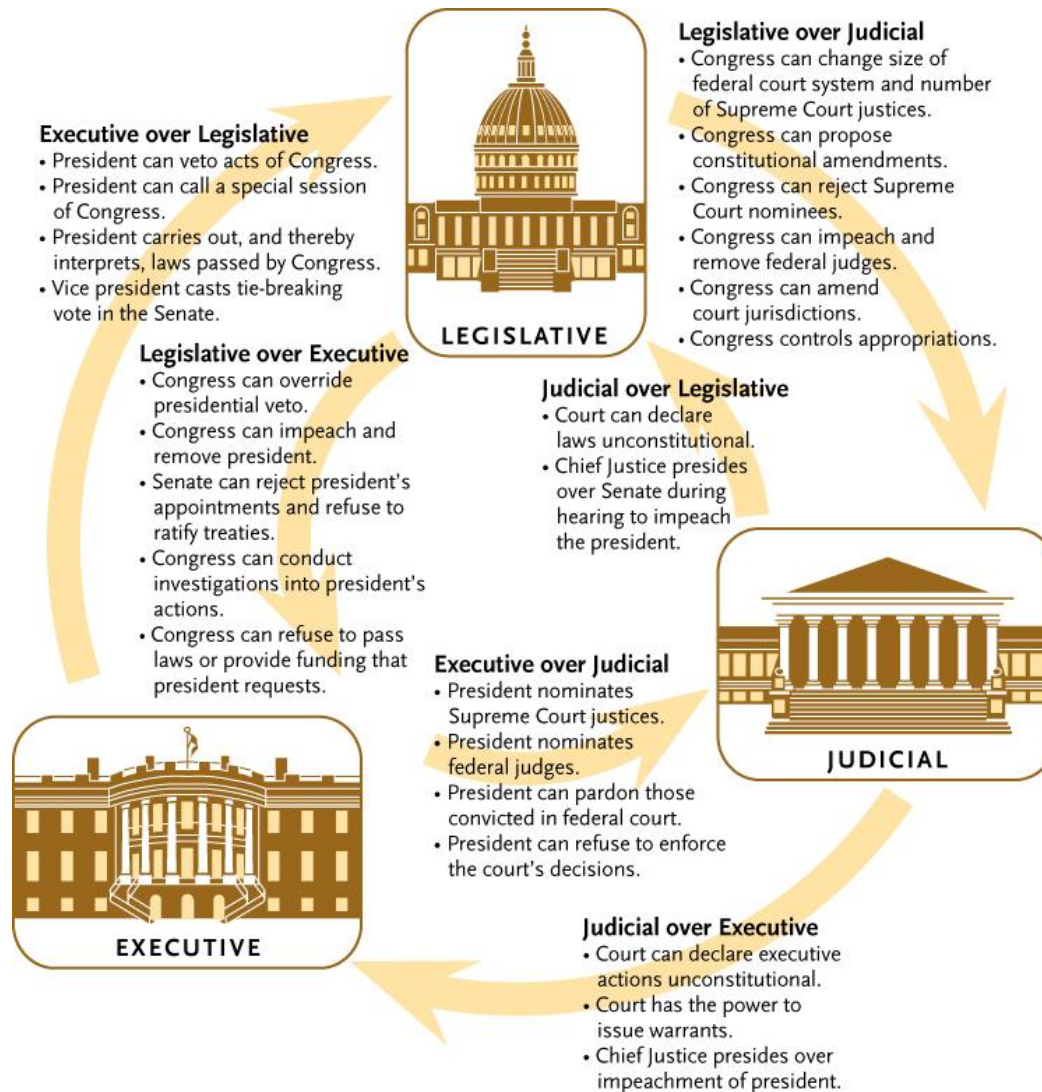
- ▶ Democratic Congresses struggled with the Nixon and Reagan White Houses for control over war and spending powers.
- ▶ A Republican Congress struggled for policy control and eventually impeached Bill Clinton.
- ▶ And, again in 2007 and 2008, Democratic Congresses confronted George W. Bush's administration over executive branch information and public policy more generally.

As problematic and partisan as these high-profile interbranch conflicts sometimes are, they nevertheless represent Madison's logic of "ambition" countering "ambition."

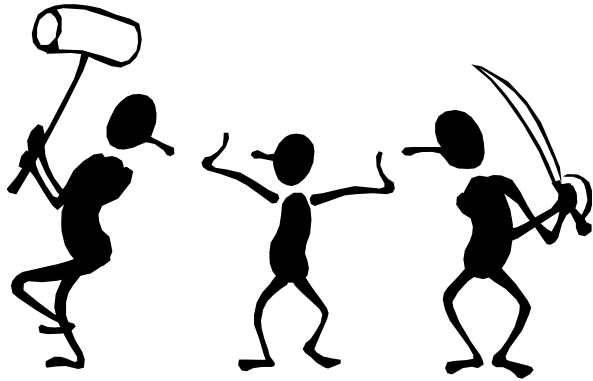
Indeed, the Constitution's separation of powers works, in part, due to an elaborate system of interbranch checks between the Congress, the executive, and the judiciary.



Checks and Balances



The Costs of Divided Government Power



Through federalism and the separation of powers, the Constitution sets up conflicts which act as barriers to collective action.

Divided government, when one party controls the White House and the other party controls at least one chamber of Congress, exacerbates the tensions between the branches. Under these circumstances, when collective action is necessary and desirable, the government must overcome these barriers.

In recent years, the Supreme Court has played an increasingly proactive role in determining the balance of power in the federal relationship often by restraining Congress's power.

A New Federal System? The Case Record, 1995–2006

Case	Date	Court Holding
<i>United States v. Lopez</i> , 514 U.S. 549	1995	voids federal law barring handguns near schools: It is beyond Congress's power to regulate commerce.
<i>Seminole Tribe v. Florida</i> , 517 U.S. 44	1996	voids federal law giving tribes the right to sue a state in federal court: "Sovereign immunity" requires a state's permission to be sued.
<i>Printz v. United States</i> , 521 U.S. 898	1997	voids key provision of Brady law requiring states to make background checks on gun purchases: As "unfunded mandate," it violated state sovereignty under the Tenth Amendment.
<i>City of Boerne v. Flores</i> , 521 U.S. 507	1997	restricts Congress's power under the Fourteenth Amendment to regulate city zoning and health and welfare policies to "remedy" rights: Congress may not expand those rights.
<i>Alden v. Maine</i> , 527 U.S. 706	1999	declares states "immune" from suits by their <i>own</i> employees for overtime pay under the Fair Labor Standards Act of 1938. (See also the <i>Seminole</i> case.)
<i>United States v. Morrison</i> , 529 U.S. 598	2000	extends <i>Seminole</i> case by invalidating Violence against Women Act: States may not be sued by individuals for failing to enforce federal laws.
<i>Gonzales v. Oregon</i> , 546 U.S.	2006	upholds state assisted-suicide law over attorney general's objection.

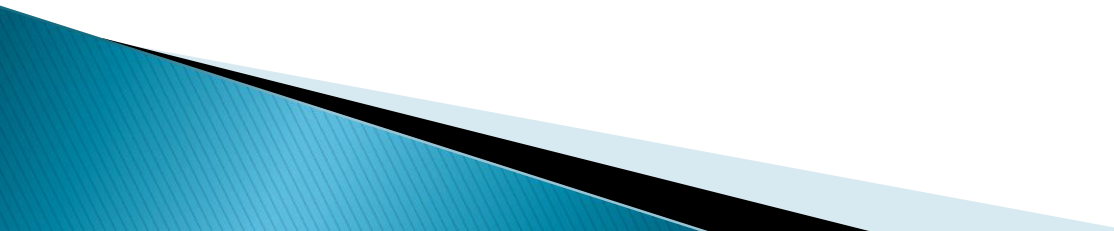
The Challenges of Divided Power

Critics of American government argue that the division of power—both federally and in terms of the separation of powers—constitutes a weakness of the political system.

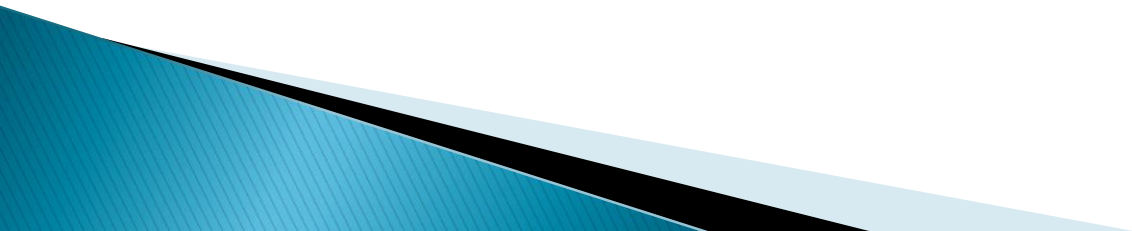
Still, the framers of the Constitution sought to create a political system in which collective action was sometimes difficult to achieve.

Divided Power and Governance

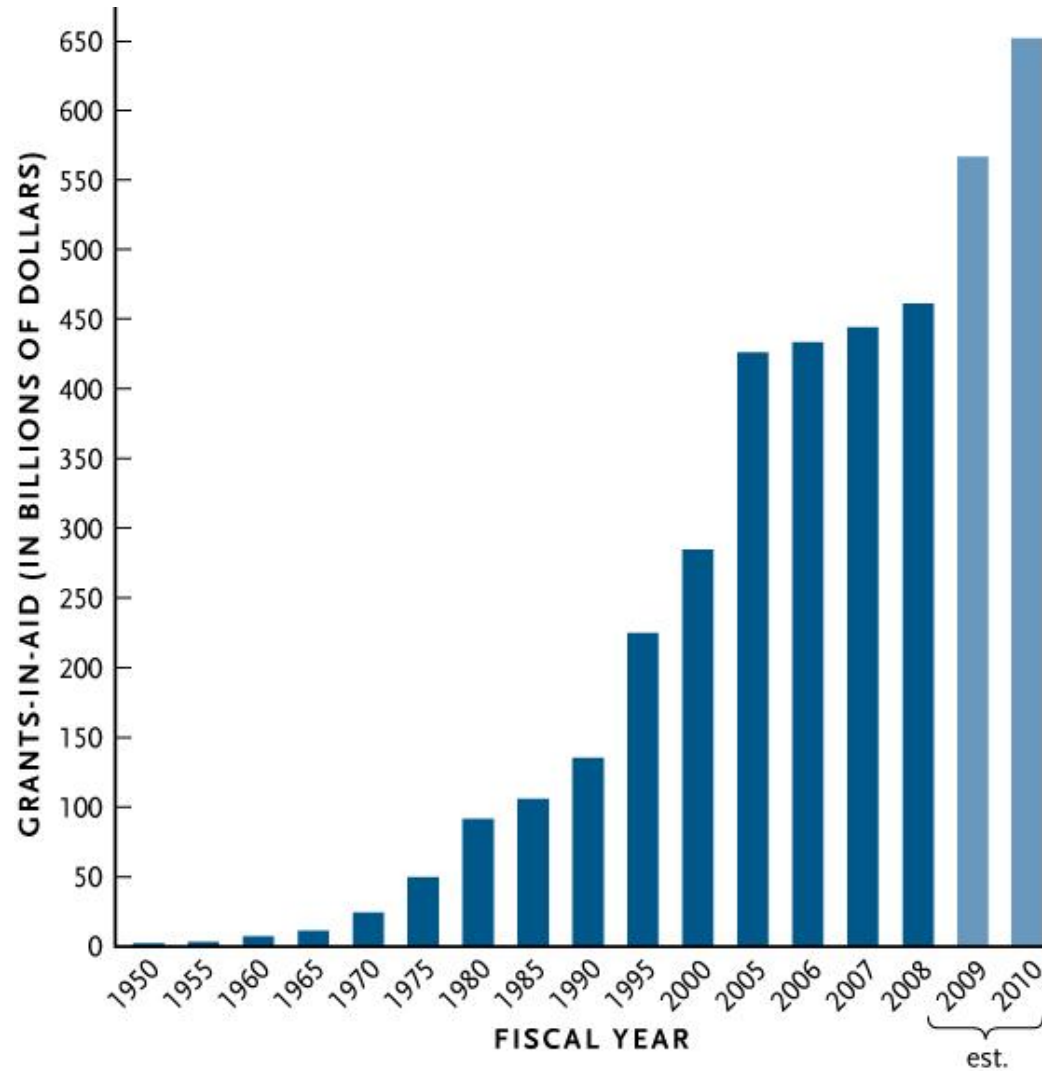
We continue to debate whether—and under what conditions—the greatest threat to America's interests is in its relative inaction due to separated power and federalism or in the potential for too much government control and, indeed, tyranny of the majority.



Additional Art for Chapter 3

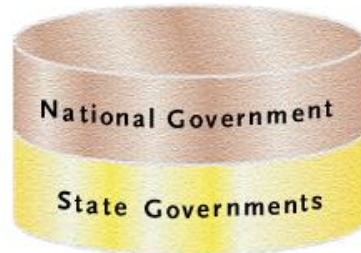


The Historical Trend of Federal Grants-in-aid



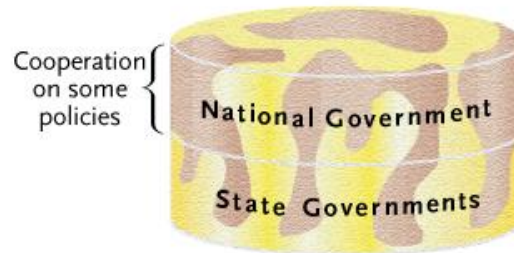
Four Views of Federalism

DUAL FEDERALISM



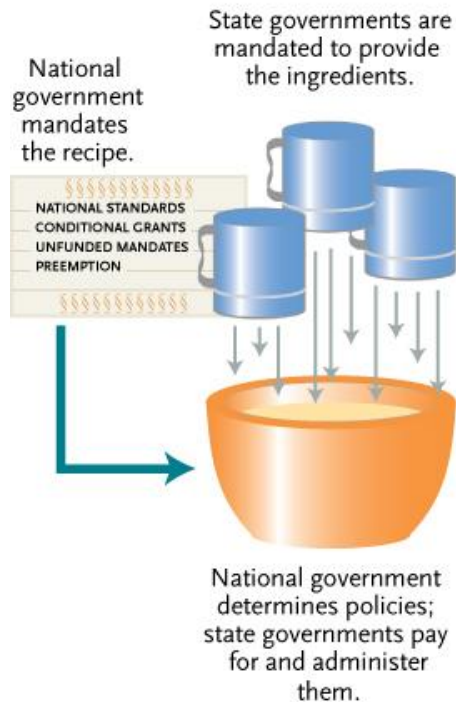
Layer Cake

COOPERATIVE FEDERALISM

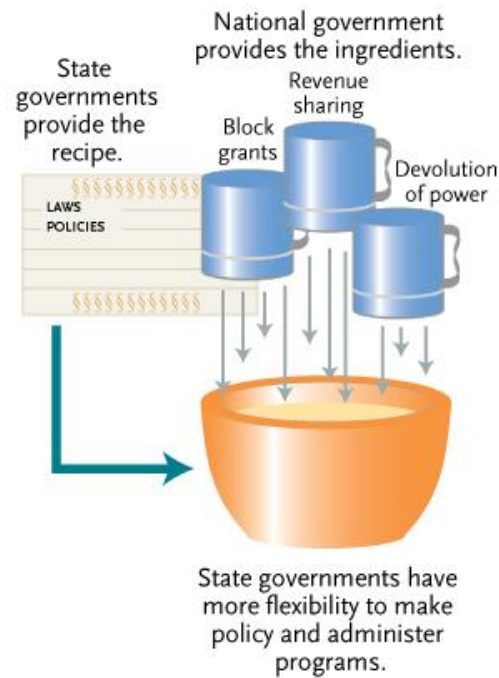


Marble Cake

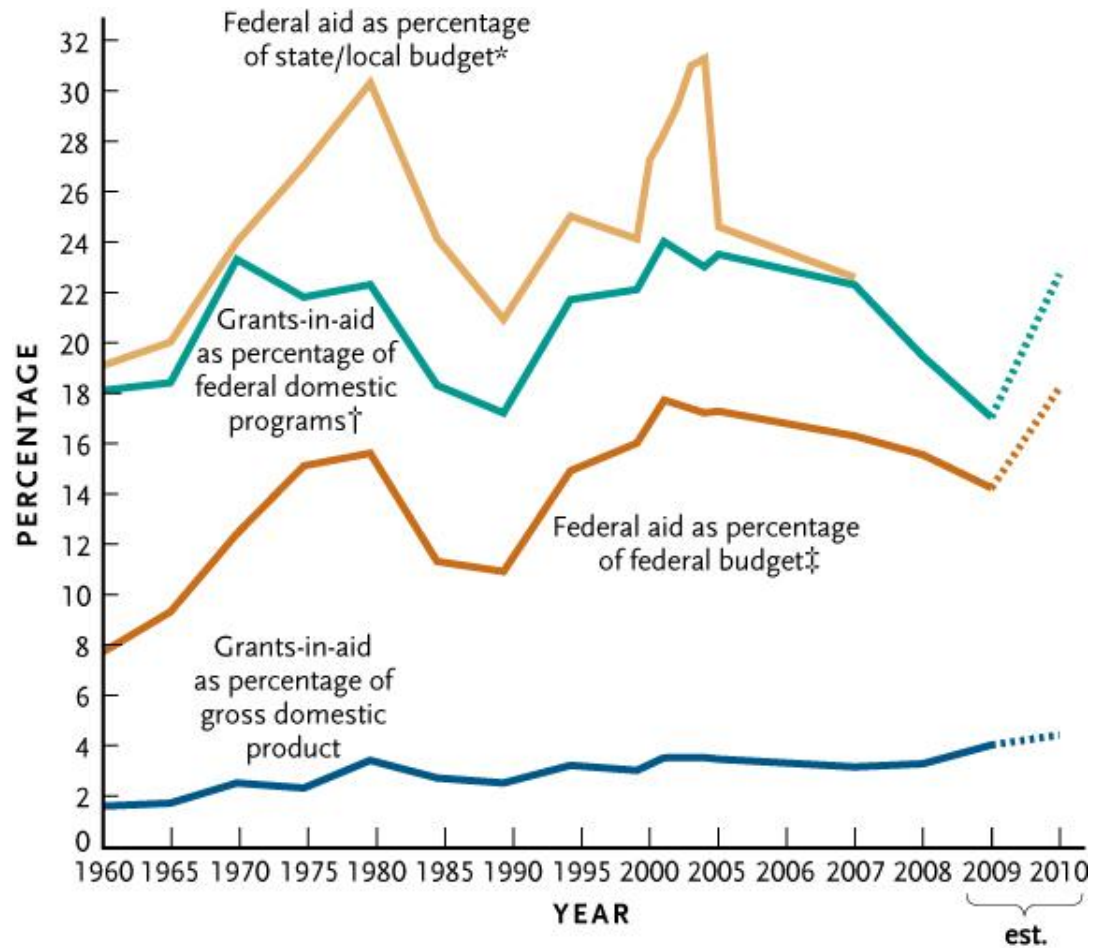
REGULATED FEDERALISM



NEW FEDERALISM



The Rise, Decline, and Recovery of Federal Aid



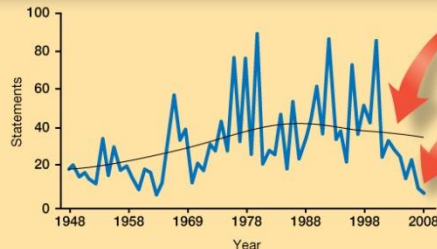
ANALYZING THE EVIDENCE

Bypassing Checks and Balances?

Although the system of checks and balances envisioned by the Founders seems to apportion checks equally among the branches, this has not stopped political actors from attempting to consolidate power. A recent example of one branch claiming greater power at the expense of the others is the increased use of presidential *signing statements*. Presidents use signing statements to offer their opinions on legislation and how it should be interpreted and implemented. However, recent presidents have made more frequent and calculated use of signing statements to nullify legislation they disagree with. An April 2006 article in the *Boston Globe* reported that President Bush used the practice to claim the authority to bypass over 750 statutes passed by Congress.¹

Criticism of this use of signing statements to reinterpret and nullify legislation has been sharp. A *New York Times* editorial blasted the Bush administration for "disrupt[ing] the founders' careful allocation of power among the president, Congress and the courts."² Senator Patrick Leahy (D-Vt.) accused the administration of utilizing "an extra-constitutional, extra-judicial step to enhance the power of the president."³ Senator Arlen Specter (R-Pa.) introduced legislation to curb the practice, and Senator Robert Byrd (D-Va.) and Congressman John Conyers (D-Mich.) commissioned a study to gauge the impact of the practice. As the figure below demonstrates, the threats and rhetoric from critics seem to have effectively reduced the total number of signing statements issued in the last two years of the Bush presidency. Further, soon after taking office in 2009, President Obama announced plans to use the practice much more modestly than the previous administration.⁴

SIGNING STATEMENTS PER YEAR



Use of signing statements to bypass Congress was high in the first few years of the Bush presidency.

In 2007 and 2008, Bush's use of signing statements dropped off considerably, suggesting that efforts by members of Congress and others to check the presidency had been effective.

Source: Data from the American Presidency Project, www.presidency.ucsb.edu/index.php (accessed 5/28/09).

¹Charles Savage, "Bush Challenges Hundreds of Laws," *Boston Globe*, April 30, 2006.

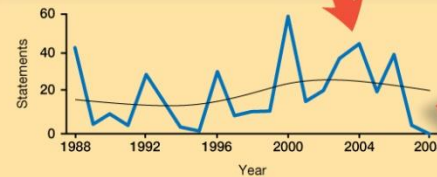
²"On Signing Statements," *New York Times*, March 16, 2009.

³Carl Hulse, "Lawmakers to Investigate Bush on Laws and Intent," *New York Times*, June 20, 2007.

⁴Charles Savage, "Obama Looks to Limit Impact of Tactic Bush Used to Sidestep New Laws," *New York Times*, March 9, 2009.

Presidents have also attempted to circumvent constitutional checks on their power by using the Constitution's *recess appointment clause*. The recess appointment clause in Article II, Section 2 allows presidents to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." The George W. Bush administration seized this language and regularly used recess appointments to bypass the Senate, which normally has the power to confirm (or not confirm) appointees to the executive and judicial branches. As the figure below demonstrates, early in his term, Bush used recess appointments at a higher rate than previous administrations.⁵

RECESS APPOINTMENTS PER YEAR



Not only did President Bush make a large number of recess appointments, but he made many controversial ones as well. Bush's recess appointments of Charles W. Pickering and William Pryor to federal appellate courts and John Bolton to the United Nations outraged Senate Democrats who had been blocking those nominations. However, it was not until his 2007 recess appointment of Sam Fox to be the United States' ambassador to Belgium that the Democrats took action. Fox's nomination was likely to be defeated by the Democratic-controlled Senate Foreign Relations Committee when the president withdrew it and gave him a recess appointment to the position. The move prompted Senate Majority Leader Harry Reid (D-Nev.) to declare his intention of keeping the Senate in permanent session. This maneuver, though highly unorthodox, was aimed at blocking the president from making further recess appointments. As the data demonstrates, it was effective in restoring the Senate's ability to check executive nominations. Following threats by Democrats in Congress, President Bush made a mere four recess appointments in 2007, and none in 2008. In this respect, then, it appears that the system of checks and balances envisioned by the framers had been restored.

⁵Ryan C. Black, Anthony J. Madonna, Ryan J. Owens, and Michael S. Lynch, "Adding Recess Appointments to the President's 'Tool Chest' of Unilateral Powers," *Political Research Quarterly* 60, no. 4 (December 2007): 645-54.

This concludes the presentation slides for Chapter 3: Federalism and the Separation of Powers

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