

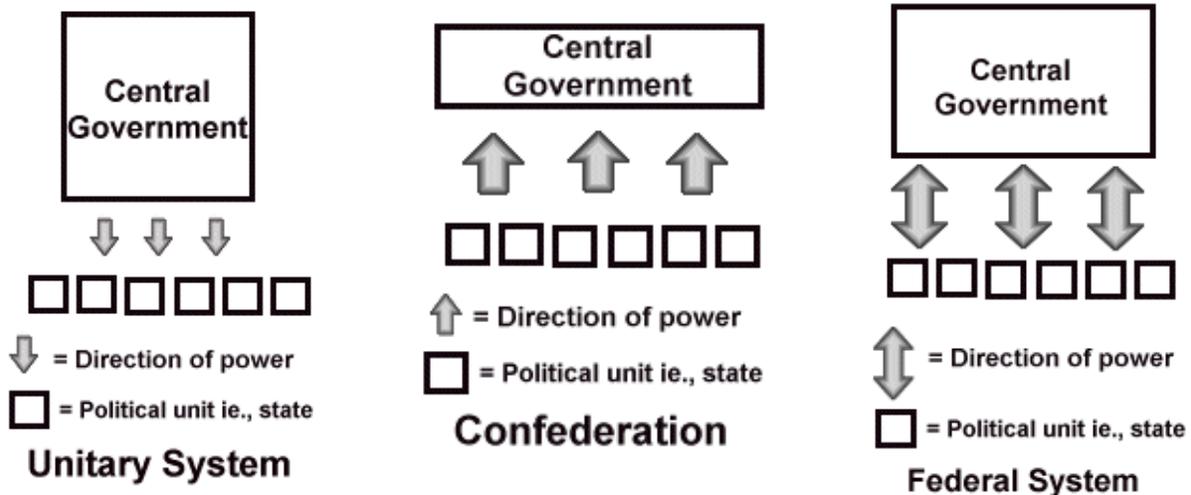
Federalism and the U.S. Constitution

Concepts of Federalism

Federalism is a type of government in which the power is divided between the national government and other governmental units. It contrasts with a **unitary government**, in which a central authority holds the power, and a **confederation**, in which states, for example, are clearly dominant.

While the Constitution addressed only the relationship between the federal government and the states, the American people are under multiple jurisdictions. A person not only pays his or her federal income tax but also may pay state and city income taxes as well. Property taxes are collected by counties and are used to provide law enforcement, build new schools, and maintain local roads.

Throughout the 20th century, the power of the federal government expanded considerably through legislation and court decisions. While much recent political debate has centered on returning power to the states, the relationship between the federal government and the states has been argued over for most of the history of the United States.



The constitutional framework

Although the Constitution sets up a federal system, nowhere does it define what federalism is. However, the framers of the Constitution were determined to create a strong national government and address the shortcomings of the Articles of Confederation, which allowed

the states too much power. In terms of the balance of power between the federal government and the states, the Constitution clearly favors the federal government.

The powers specifically given to the federal government are not as relevant to the expansion of its authority as the Constitution's more general provisions; that is, Congress is to provide for the general welfare (preamble) and ". . . make all laws which shall be necessary and proper . . ." (Article I, Section 8). In the Constitution as ratified, there is no similar broad grant of powers to the states. It emphasized what states cannot do (Article I, Section 10) and gave them authority in just a few areas — namely, establishing voter qualifications and setting up the mechanics of congressional elections. This reduction in power was corrected through the Tenth Amendment, which reserved to the states or the people all powers either not specifically delegated to the national government or specifically denied to the states. The language in the general welfare and elastic clauses and the Tenth Amendment is vague enough to allow widely different interpretations. Because both federal and state governments can turn to the Constitution for support, it is not surprising that different concepts of federalism have emerged.

Dual federalism

Dual federalism looks at the federal system as a sort of "layer cake," with each layer of government performing the tasks that make the most sense for that level.

The initial framing and ratification of the Constitution reflected this theory. Even those people supporting a stronger national government proposed that powers in the federal government be distinct and limited, with certain tasks enumerated for the national government in the Constitution and the remaining tasks left to the state governments. Because this theory leaves each government supreme within its own sphere of operations, it is also sometimes called *dual sovereignty*.

One more-extreme outgrowth of this theory is the idea of **states' rights**, which holds that, because the national government is not allowed to infringe on spheres left to state government, doing so violates the states' constitutional rights (especially the Tenth Amendment, which specifically reserves un-delegated powers for the states). Federal government action in those spheres represents an unlawful seizure of power by one level of government at the expense of another. This view has historically been popular in the South, where it was viewed as preventing national government interference in the region's race relations, but it has been invoked elsewhere as well. Before the Civil War, some voices said that, to protect their rights, states could secede from the Union or declare national laws that affect them null and void ("**nullification**") — but those arguments are no longer taken seriously, except by extremist groups. Instead, the U.S. Supreme Court resolves disputes within the federal structure, and because the Court is a national institution, it rarely favors the states.

Cooperative federalism

The theory of **cooperative federalism** emerged during the New Deal, when the power of the federal government grew in response to the Great Depression. It does not recognize a clear distinction between the functions of the states and Washington, and it emphasizes that there are many areas in which their responsibilities overlap. For example, drug enforcement involves federal agents, state troopers, and local police. The federal government supplies funds for education, but the state and local school boards choose curriculum and set qualifications for teachers. (Interestingly, attempts to set national standards for students in certain subjects have raised concerns of federal intrusion.) The notion of overlapping jurisdictions is expressed by the term *marble-cake federalism*.

Cooperative federalism takes a very loose view of the elastic clause that allows power to flow through federal government. It is a more accurate model of how the federal system has worked over much of U.S. history

Federal-State Relations

Federalism is a fluid concept. Historically, the relationship between the two levels of government has been defined by the courts, Congress, and funding policies.

The role of the courts

Questions concerning the respective powers of the states and the federal government are constitutional, and the courts must address them. Early Supreme Court decisions reflected the views of Chief Justice John Marshall, who personally favored a strong national government. In defining commerce in the broadest possible terms in *Gibbons v. Ogden* (1824), he argued that Congress's power to regulate interstate commerce could be "exercised to its utmost extent." Marshall's interpretation of the **commerce clause** has provided a means to enforce civil rights laws and regulate wages, working conditions, and other areas that seem, at first glance, far removed from federal jurisdiction. At the same time, however, he believed the Bill of Rights imposed no restrictions on the states.

Throughout most of the 19th century and on into the 1930s, the Supreme Court did not follow Marshall's lead; it was reluctant to allow an expansion of federal power at the expense of the states. As the makeup of the Court changed with the appointments made by President Franklin Roosevelt, so did the direction of its decisions. In the areas of civil liberties and civil rights in particular, the Supreme Court and the lower federal courts have set national standards that states and municipalities are obligated to follow. Through their interpretation of the due process and equal protection clauses of the Fourteenth Amendment, they have brought about a significant transfer of power from the states to the federal government. This amendment, along with the Fifteenth and the Twenty-fourth, has largely restricted the authority of the states to determine who can vote and where they cast their

ballots. The courts have directed how state and local authorities draw their congressional, legislative, and school-board district boundaries.

In recent years, the Supreme Court limited the powers of the federal government in favor of the states. *United States v. Lopez* (1995) held that Congress cannot prohibit guns in the area around a public school under the commerce clause. The Court also upheld Oregon's "death with dignity" law, which allows the terminally ill to end their lives, against a federal challenge, in *Gonzales v. Oregon* (2006).

The role of Congress

Legislation can compel states either directly or indirectly to take action they otherwise might not take. Again, civil rights provide a pertinent example. The 1965 Voting Rights Act intruded on the constitutional power of the states to set voter qualifications by challenging the literacy tests and poll tax that were used in the South to get around the Fifteenth Amendment.

A wide range of environmental laws establishes requirements for air and water pollution control and the disposal of hazardous wastes to which states and municipalities must adhere. These are examples of **mandates**.

Congress may also threaten to cut off funds if states do not implement a particular policy. Although a law forcing the states to establish 21 as the minimum drinking age or 55 miles per hour as the maximum highway speed might be unconstitutional, Congress can and did threaten to cut off federal highway funds to states that did not comply with the two limits. This is known as a **condition of aid**.

The role of funding policies

The most powerful tool the federal government has in its relations with the states is money. A *grant-in-aid* is funding provided by the federal government to the states or municipalities. The earliest federal grants were land. Under the Morrill Act (1862), the states received large tracts of land for the specific purpose of establishing agricultural and mechanical colleges (still known as **land-grant colleges**).

A **categorical grant** earmarks funds for a specific purpose. The two types of categorical grants are project and formula grants. A **project grant** is awarded on the basis of competitive applications; money from the National Institutes of Health or the National Endowment for the Humanities is awarded in this manner. While many project grants go to individuals, **formula grants** go to states and municipalities that meet the requirements described in the legislation. Depending on what the grant is for, factors such as the age, education, and income level of the population; the number of miles of highway; or the unemployment rate might be relevant to qualifying for aid.

A **block grant** is given for more general purposes than categorical grants — say, mental health, community services, mass transit, or job training — and state and local governments have a great deal of flexibility in how the money is actually spent. A county may decide to upgrade its buses rather than build a light rail system, for example. This does not mean, however, that strings are not attached to block grants. Recipients are bound by federal mandates. The county upgrading its buses may be required to buy a certain percentage of them from a minority-owned business or hire additional drivers from a training program for those on welfare.

Key Concepts in the U.S. Constitution

The Constitution, which was approved by the delegates to the Convention on September 17, 1787, established a republican form of government, explained the organization of that government, and outlined the federal system.

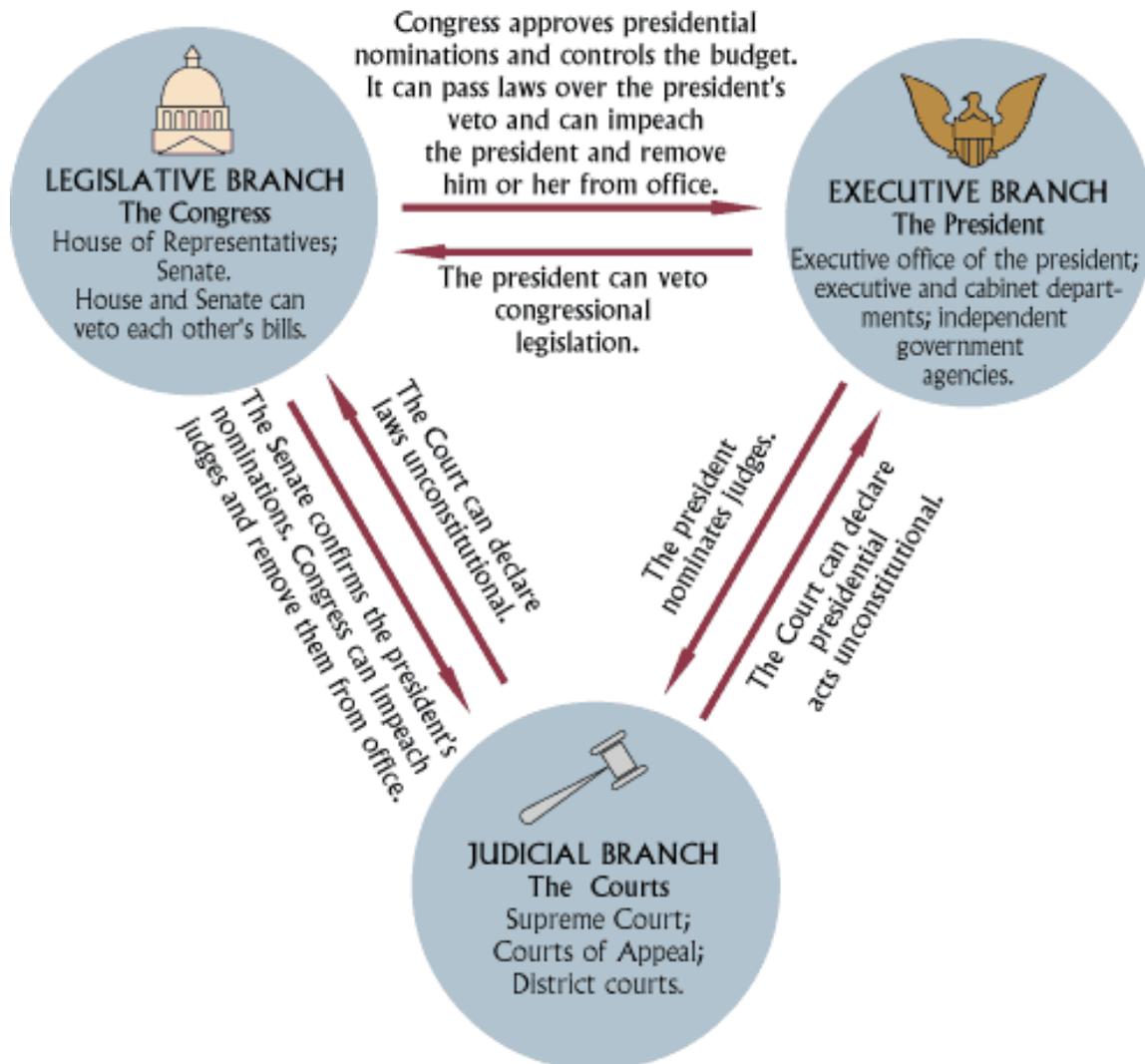
Republican form of government

The Constitution established the United States as a republic in which power ultimately is in the hands of the people and is exercised by their elected representatives. The Republic was not a democracy in the modern sense, however. The framers of the Constitution, many reluctantly, accepted slavery. There were property qualifications for voting, and some states denied the right to vote to religious minorities. Women did not get to vote in the national elections until 1920 (Nineteenth Amendment). The original draft of the Constitution did not include protection of basic civil liberties.

The organization of government

The government's functions are divided among three branches: the legislative branch that makes the laws (Congress), the executive branch that carries out the laws (president), and the judicial branch that interprets the laws (courts). This division is known as the **separation of powers**. In addition, under the system of **checks and balances**, the powers of one branch of government are limited by the powers given to another branch. Congress makes laws, but the president can veto legislation. Congress can override a president's veto with a two-thirds vote of both houses (a check on a check). While the president appoints judges to the Supreme Court, the Senate can reject an appointee through its power to give "advice and consent."

How Checks and Balances Work:



The Amendment Process and Bill of Rights

The Constitution (Article V) provides that amendments can be proposed either by Congress, with a two-thirds vote of both houses, or by a national convention requested by two-thirds of the state legislatures. Amendments are ratified by three-fourths of the state legislatures or by conventions in three-fourths of the states. Only the Twenty-first Amendment, which repealed Prohibition in 1933, was adopted by state conventions.

The Bill of Rights

Congress proposed 12 amendments in September 1789; three-fourths of the states approved ten of them in December 1791, creating the Bill of Rights. The following list summarizes the Bill of Rights:

- Prohibits the establishment of a state religion and protects freedom of the press and speech and the rights to assemble and petition the government (Amendment I)
- Guarantees the right to keep and bear arms in the context of a state militia (Amendment II)
- Prohibits the stationing of troops in homes without consent (Amendment III)
- Protects against unreasonable searches and seizures and requires **probable cause** for search warrants (Amendment IV)
- Establishes a **grand jury** to bring indictments in capital or serious cases, protects against **double jeopardy** (a person cannot be tried twice for the same crime) and **self-incrimination** (individuals cannot be forced to testify against themselves), and guarantees **due process** and **eminent domain** (compensation must be paid for private property taken for public use) (Amendment V)
- Guarantees the right to a speedy trial by an impartial jury in criminal cases, to be informed about charges, and to have representation by counsel (Amendment VI)
- Provides for trial by jury in most civil cases (Amendment VII)
- Prohibits excessive bail or fines and cruel and unusual punishments (Amendment VIII)
- Does not deny people any rights not specifically mentioned in the Constitution (Amendment IX)
- Gives to the states or the people powers not granted to Congress or denied to the states (Amendment X)

Subsequent amendments to the Constitution

Since the enactment of the Bill of Rights, the amendment process has been used sparingly. While numerous amendments have been proposed in Congress, only a handful have gone to the states for action. An additional 17 amendments to the Constitution have been ratified over the last 200 years; six proposals failed to win enough support — most recently, the Equal Rights Amendment, strongly backed by women's groups, and an amendment to give the District of Columbia full representation in Congress. The country has used the amendment process once to promote a particular social policy; Amendment XVIII (1919) prohibited the manufacture and sale of intoxicating liquors but was repealed in 1933 (Amendment XXI). The other amendments either address how the government operates or expand equality. Table 1 provides a brief summary of the amendments added to the Constitution since the enactment of the Bill of Rights.

Table 1: Some Important Amendments to the Constitution

Amendment	Date	Subject
XIII	1865	Slavery abolished
XIV	1868	Due process and equal protection of the law given to all persons born or naturalized in the U.S.
XV	1870	Right to vote cannot be denied because of race, color, or previous condition of slavery
XVI	1913	Federal income tax established
XVII	1913	Direct election of senators
XVIII	1919	Prohibition
XIX	1920	Women given the right to vote
XXI	1933	Prohibition repealed
XXII	1951	President limited to two terms



Alice Paul and other suffragettes who worked for passage of the 19th Amendment, giving the right to vote to women.