Emily Hinnendael
Lesson Plan: Division and Separation of Powers
High School Level

Historical Background:

As the United States shaped their new nation following the Revolutionary War, many soon realized how difficult it would be to create a new system of government. Americans had struggled with the Articles of Confederation and knew they needed something stronger. There had been issues with collecting taxes, regulating interstate and foreign trade, not having an executive branch which could enforce laws, not having a national court system to settle legal disputes, and a significant lack of national unity. After the Philadelphia convention in 1787, a new constitution was created. There were a few key conflicts at the Constitutional Convention, which had a profound impact on the way in which it was written and the way in which our government is run today. The idea of a strong central government or having strong state governments, large states vs. small states, and the north vs. the south were all topics to be discussed and worked through since they were of utmost concern. After reaching agreement on issues of representation and slavery, the delegates divided up power between the states and the national government and separated the national government's power into three branches.

This new system of government was a form of federalism that divided power up between the national and state governments. Delegated powers are those that are powers granted to the national government by the Constitution. These powers include control of foreign affairs, national defense, regulating trade between the states, and coining money. Reserved powers are those that are powers granted to the state governments by the Constitution. These powers include supervising education, establishing marriage laws, regulating trade within ones state. In some areas, both levels of government share powers such as the right to tax, to borrow money, to pay debts, and establish courts.

The delegates found it important to protect the rights of the states, but also to grant some powers exclusively to the national government. At the same time, it was important to limit the authority of the government as well.

How would they do this? They created three branches of government: legislative branch, executive, and judicial. The legislative branch was set up to make laws, the executive branch was set up to carry out or execute the laws, and the judicial branch was set up to interpret the laws. Not only did they create a separation of powers, but the delegates also needed to make sure that one branch did not over power the others. They established a system of checks and balances to prevent this from happening. For example by setting this system up, the Senate has to approve some of the president's decisions, even though the president has considerable power. The president can veto acts of Congress, but Congress can override a veto by two-thirds vote.

It is imperative that our students have a sound understanding of the way in which our government was set up and the way it functions today. It is also important for students to realize the compromises and hours of debate that took place in order to create the United States Constitution. Not only was it a complicated process of creating this document, but it was also incredibly challenging to sell it to the rest of the country. Students should be aware of all of these efforts put forth and should also understand the important roles that each branch plays, how laws are made, passed, and enforced is essential to understanding our constitution and today's government.

Summary (including objectives):

In this lesson students will look at the three branches of government and will also look at the division of powers between the state and federal governments. Students will be given scenarios where they need to distinguish between national or state governments' power and how each branch checks or limits one another.

At the end of this lesson students will be able to:

List and explain the three branches of government.
Define federalism, legislative, executive, and judicial branch, checks and balances, federalists, antifederalists.
Examine and describe how the checks and balances of the federal system work in the United States government.
Apply their knowledge to modern day cases, scenarios, and issues in the news today.

Content Standard Alignment*: the lessons contained in this project align with parts of each of the following content standards.*

USI.8 Describe the debate over the ratification of the Constitution between Federalists and Anti-Federalists and explain the key ideas contained in the Federalist Papers on federalism, factions, checks and balances, and the importance of an independent judiciary. (H, C)

USI.11 Describe the purpose and functions of government. (H, C)

USI.14 Explain the characteristics of American democracy, including the concepts of popular sovereignty and constitutional government, which includes representative institutions, federalism, separation of powers, shared powers, checks and balances, and individual rights. (H, C)

USI.15 Explain the varying roles and responsibilities of federal, state, and local governments in the United States. (H, C)

Procedures: Day 1:

Class will begin by students creating a three-columned chart on a piece of paper titled: ***Shared Powers***. Each student will need to complete their own chart as they respond to the following questions:

What decisions do you believe **your parents** should make for you?

What decisions should **you** be able to make yourself?

What decisions should be made **cooperatively or together**?

After students have filled in the charts (10 minutes), come together as a class to discuss each student's ideas. Some possible responses might include:

Shared Powers:

Decisions Parents or Guardians Might Make	Decisions Teenagers and Parents/Guardians Might Make Together	Decisions Teenagers Might Make
curfew	clothes to wear	food to eat
age when a teenager can start to drive with friends in the car	activities to do with friends	structuring one's time
appropriate age to date	classes a teenager might take	school activities to participate in

After students have generated a list, ask the following questions:

- Did every student in the class have the same perspective about who might make certain decisions?
- Have you and your parents or guardians ever had a conflict over who gets to make certain decisions?
- Why is it important that some decisions are made exclusively by parents or guardians?

Explain that the division of power between teenagers and parents is similar to the division of power between the states and the federal government. This division of government power is known as federalism.

Go over the definitions of the following terms on the board/overhead:

Federalism is the division of powers among the local, state, and national governments, which was established by the Constitution.

Again, why would we need this division in power? Think about the shared powers you as young adults share with your parents. Think about the powers you make for yourself and the powers that only your parents make for you.

Think about these things on a government/political level. Why would you want a national AND state government? What are the pros and cons?

Limited Government is when the government has only the powers that the Constitution gives it. Everyone from the president to you as a student must obey the law.

Checks and Balances is a system which safeguards against abuse of power. In other words, each branch of government has the power to check or limit the actions of the other two. ***Pass out chart***.

What are these branches?

Executive: President of the United States. This branch carries out the laws that the Legislative Branch makes.

Legislative: Congress. This branch makes the laws that the President carries out and the Judicial Branch interprets.

Judicial: Court system. This branch explains and interprets the laws that the Legislative makes and the President carries out.

Day 2:

How would each branch check or limit one another?

Checks and Balances Activity:

Students will be broken up into three groups representing the three branches of government. Each group will review the checks and balances chart provided below.

Circumstances (below) will be read aloud and each group will decide if their branch of government has the power to perform this action. Each group will indicate if they believe they have the power to do so by holding up a small hand held white board with either "yes" or "no" written on it.

The teacher will then ask the class if they agree with the answer that each group has given. Once they have established the correct branch of government, the other groups will decide if they have the power to check or limit that branch's power. Students should be prepared to explain what power their branch has to check the other branch's power.

Circumstances:

- Homeland Security officials have been ordered to open suspicious packages they believe might be from terrorists.
- A bill recently passed to allow citizens to choose their own health care plan under Medicare.
- The United States has signed a peace treaty with Iran.
- A law, recently passed in a state legislature banning gay marriage, is being challenged as unconstitutional.
- A bill is passed outlawing American citizens from making contributions to charitable organizations from the Middle East.
- A replacement for the Attorney General has been given to Congress.
- A recent law closing a tax reduction for U.S. companies establishing off shore companies is ruled unconstitutional.
- A recent bill to increase funding for education was passed over the President's rejection of the bill.
- A health care insurance company has been ordered to pay for additional treatment requested by a patient.

Review: as a class, discuss the reasons for federalism, a limited government, checks and balances, and each of the branches.

Students will then look over Federalist #47 to understand how federalism and the separation of powers came about:

FEDERALIST No. 47

The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts

From the New York Packet.
Friday, February 1, 1788.
MADISON

To the People of the State of New York:

HAVING reviewed the general form of the proposed government and the general mass of power allotted to it, I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts.

One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point.

The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure, then, not to mistake his meaning in this case, let us recur to the source from which the maxim was drawn.

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority. This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is

possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR. Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR." Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments, and has qualified the doctrine by declaring "that the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other AS THE NATURE OF A FREE GOVERNMENT WILL ADMIT; OR AS IS CONSISTENT WITH THAT CHAIN OF CONNECTION THAT BINDS THE WHOLE FABRIC OF THE CONSTITUTION IN ONE INDISSOLUBLE BOND OF UNITY AND AMITY. " Her constitution accordingly mixes these departments in several respects. The Senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments. The President, who is the head of the executive department, is the presiding member also of the Senate; and, besides an equal vote in all cases, has a casting vote in case of a tie. The executive head is himself eventually elective every year by the legislative department, and his council is every year chosen by and from the members of the same department. Several of the officers of state are also appointed by the legislature. And the members of the judiciary department are appointed by the executive department.

The constitution of Massachusetts has observed a sufficient though less pointed caution, in expressing this fundamental article of liberty. It declares "that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them. " This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches. Lastly, a number of the officers of government are annually appointed by the legislative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the Constitution have, in this last point at least, violated the rule established by themselves.

I pass over the constitutions of Rhode Island and Connecticut, because they were formed prior to the Revolution, and even before the principle under examination had become an object of political attention.

The constitution of New York contains no declaration on this subject; but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments. It gives, nevertheless, to the executive magistrate, a partial control over the legislative department; and, what is more, gives a like control to

the judiciary department; and even blends the executive and judiciary departments in the exercise of this control. In its council of appointment members of the legislative are associated with the executive authority, in the appointment of officers, both executive and judiciary. And its court for the trial of impeachments and correction of errors is to consist of one branch of the legislature and the principal members of the judiciary department.

The constitution of New Jersey has blended the different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature; is chancellor and ordinary, or surrogate of the State; is a member of the Supreme Court of Appeals, and president, with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council of the governor, and with him constitutes the Court of Appeals. The members of the judiciary department are appointed by the legislative department and removable by one branch of it, on the impeachment of the other.

According to the constitution of Pennsylvania, the president, who is the head of the executive department, is annually elected by a vote in which the legislative department predominates. In conjunction with an executive council, he appoints the members of the judiciary department, and forms a court of impeachment for trial of all officers, judiciary as well as executive. The judges of the Supreme Court and justices of the peace seem also to be removable by the legislature; and the executive power of pardoning in certain cases, to be referred to the same department. The members of the executive council are made EX-OFFICIO justices of peace throughout the State.

In Delaware, the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice-presidents in the executive department. The executive chief, with six others, appointed, three by each of the legislative branches constitutes the Supreme Court of Appeals; he is joined with the legislative department in the appointment of the other judges. Throughout the States, it appears that the members of the legislature may at the same time be justices of the peace; in this State, the members of one branch of it are EX-OFFICIO justices of the peace; as are also the members of the executive council. The principal officers of the executive department are appointed by the legislative; and one branch of the latter forms a court of impeachments. All officers may be removed on address of the legislature.

Maryland has adopted the maxim in the most unqualified terms; declaring that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other. Her constitution, notwithstanding, makes the executive magistrate appointable by the legislative department; and the members of the judiciary by the executive department.

The language of Virginia is still more pointed on this subject. Her constitution declares, "that the legislative, executive, and judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the justices of county courts shall be eligible to either House of Assembly. " Yet we find not only this express exception, with respect to the members of the inferior courts, but that the chief magistrate, with his executive council, are appointable by the legislature; that two members of the latter are triennially displaced at the pleasure of the legislature; and that all the principal offices, both executive and judiciary, are filled by the same department. The executive prerogative of pardon, also, is in one case vested in the legislative department.

The constitution of North Carolina, which declares "that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other," refers, at the same time, to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.

In South Carolina, the constitution makes the executive magistracy eligible by the legislative department. It gives to the latter, also, the appointment of the members of the judiciary department, including even justices of

the peace and sheriffs; and the appointment of officers in the executive department, down to captains in the army and navy of the State.

In the constitution of Georgia, where it is declared "that the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other," we find that the executive department is to be filled by appointments of the legislature; and the executive prerogative of pardon to be finally exercised by the same authority. Even justices of the peace are to be appointed by the legislature.

In citing these cases, in which the legislative, executive, and judiciary departments have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several State governments. I am fully aware that among the many excellent principles which they exemplify, they carry strong marks of the haste, and still stronger of the inexperience, under which they were framed. It is but too obvious that in some instances the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation, of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper. What I have wished to evince is, that the charge brought against the proposed Constitution, of violating the sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author, nor by the sense in which it has hitherto been understood in America. This interesting subject will be resumed in the ensuing paper.

PUBLIUS.

Day 3:

Quick recap of yesterday's class and then go into federalism activity.

Federalism Activity:

Each student will be given a list of powers and each will have to be placed in the chart below. Remind students to think about how this relates to the chart they made allocating powers made by their parents, themselves, and both. Remind students to take their time to consider which category would be the most appropriate fit based on the description.

- declare and engage in war
- conduct elections
- print and coin money
- govern marriage laws
- maintain an army, navy, and air force
- regulate interstate and foreign commerce
- regulate intrastate commerce
- punish lawbreakers
- levy and collect taxes
- protect the rights of citizens
- set traffic standards
- admit new states
- provide for public safety
- borrow money
- establish and maintain schools
- negotiate treaties with foreign countries
- protect public health
- determine the qualifications of voters
- set up a post office
- set rules for immigration
- maintain the state militia (also known as the National Guard)

Powers of the National Government	Powers shared by the State and National Governments	Powers of the State Government

When all students have completed their charts, have them compare with another classmate. What are their findings? Have them discuss any discrepancies they may have found. Bring the students together as a class and correct any charts that need it. Place the answer key below on the overhead so all students are able to make sure they have the right information.

Powers of the National Government	Powers Shared by the State and National Governments	Powers of the State Governments
declare and engage in war print and coin money maintain an army, navy, and air force regulate interstate and foreign commerce set rules for immigration admit new states negotiate treaties with foreign countries set up a post office	punish lawbreakers levy and collect taxes protect the rights of citizens set traffic standards provide for public safety borrow money protect public healt	conduct elections govern marriage laws regulate intrastate commerce establish and maintain schools determine the qualifications of voters maintain the state militia (also known as the National Guard)

Homework: Federalism And Physician-Assisted Suicide

Directions:

Students will be given the handout below on physician-assisted suicide and how it may illustrate controversy over federalism. Students will read the handout and answer the following questions and be prepared to discuss their answers in class the following day.

In 1997, the state of Oregon enacted the first law in the country that permitted doctors to prescribe a lethal dose of federally controlled drugs to terminally ill patients who wished to commit suicide. Critically ill patients often spend several years in pain until succumbing to the illness. The Death with Dignity Act intended to provide patients with an option to experience what some see as a more humane way to die. According to the legislation, a physician cannot personally inject the lethal drugs, but the patient may use the prescription to privately end his or her life. Since the law was enacted in 1997, 246 people in Oregon have committed drug-assisted suicide.

In 2001, Attorney General John Ashcroft gave a directive that threatened to punish any doctor who prescribed a lethal dose of drugs for the purpose of assisted suicide. Ashcroft argued that the law violated the federal Controlled Substances Act (CSA) of 1971. Under this interpretation of the CSA, it would be illegal to prescribe controlled substances, such as barbiturates, to end a patient's life.

The case was appealed to the Supreme Court and Gonzales v. Oregon was heard in 2005.

Questions to Consider

Answer the following questions on a separate sheet of paper.

1.) Provide a brief summary of the issue.

2.) Explain how the concept of federalism is evident in this issue.

3.) Look at the chart previously used when discussing shared powers between the national and state governments.

4.) What do you think are the best arguments for Oregon to make about the power of the state to make and enforce its own laws related to this case?

5.) What do you think are the best arguments for the federal government to make about how its powers apply in this case?

6.) What position would you take on this issue? Is it the right of the federal or state governments to make a decision on this issue? Why?

Day 4:

Students will discuss their answers to the homework assigned.

Their next activity will be to perform the same assignment, but in groups and with a different topic.

Federalism And Medical Marijuana Laws:

Students will need to consider how the issue of medical marijuana illustrates controversy over federalism.

Decide as a group who will have each of the following roles:

- Discussion leader: This person will make sure that the group discussion is focused, and that all students are involved in the discussion and can contribute ideas.
- Note taker: This person will be sure to record all ideas legibly.
- Timekeeper: You have 15 minutes to complete this handout with your group and to prepare your presentation. The timekeeper should be sure to keep the work on schedule. He or she should also help the presenter stay on track for time.
- Presenter: After your group discusses your answers, the presenter should be ready to give a three- to four-minute presentation about your group's decision.

In 1996 the citizens of California approved a referendum called Proposition 215, the Compassionate Use Act. The law allowed citizens of the state to use marijuana for medicinal purposes after a doctor has concluded the use would benefit the patient's health. In turn, doctors would be protected from legal actions for prescribing a drug that is illegal. Federal drug law, the Controlled Substances Act, did not provide a similar exemption for critically ill people -- federal agents continued to investigate and prosecute people who possessed "medical" marijuana.

Ms. Angel Raich was a citizen of California and had a number of serious health problems, including an inoperable brain tumor, seizures, and chronic pain disorders. For approximately five years, Raich had been using marijuana. According to her physician, she had exhausted "essentially all other legal alternatives." Her medical condition prevented her from growing the marijuana; therefore Raich was dependent on two caregivers

to grow it for her. Raich was joined in the lawsuit by Diane Monson, a California citizen with similar medical problems who grew her own marijuana.

In August 2002, deputies from the county sheriff's department came to Monson's home, along with agents from the Drug Enforcement Agency (DEA). After an investigation, the county deputies decided the marijuana was legal under California's Compassionate Use Act. However, the county deputies and federal agents remained there for three hours while the county district attorney and U.S. Attorney argued over jurisdiction and applicable law. Eventually the DEA destroyed six marijuana plants belonging to Monson.

Because of the DEA raids resulting in the seizure of Monson's marijuana plants as a part of a federal search warrant and with a threat of federal criminal prosecution, Raich asked the federal district court to prohibit enforcement of federal drug laws against a person in her situation.

The district court denied ruled against Diane Monson, but the appellate court reversed the lower court, ruling that localized and noncommercial cultivation, sharing, possession, and use of marijuana under the direction of a physician was intrastate commerce and, therefore, beyond the power of Congress to regulate or prohibit. The case was appealed to the U.S. Supreme Court.

Questions to Consider:

1.) Provide a brief summary of the issue.

2.) Explain how the concept of federalism is evident in this issue.

3.) What do you think are the best arguments for Monson to make about the power of the state of California to make and enforce its own laws related to this case?

4.) What do you think are the best arguments for the federal government to make about how its powers apply in this case?

5.) What position would you take on this issue? Is it the right of the federal or state governments to make a decision on this issue? Why?

6.) What do you think the Supreme Court decided in 2005?

Day 5:

Students have learned about modern day examples of federalism and how checks and balances work today.

They have also looked at how this relates to their every day lives. Now it is time to look at a more historical

view on the balance of power between the states and the national government.

Students will watch "One Nation Under Law" as part of the PBS Series: Supreme Court and will answer the

following questions: possible answers are in italics below the question.

1. Why did the French Revolution worry the Federalists?

The Federalists saw that the French Revolution devolved into mass murder of the aristocracy, anarchy, and the destruction of property. They believed it was dangerous to let an angry mob go unchecked.

2. What did Jefferson and his supporters think about the French Revolution?

The French Revolution was not entirely bad, in fact, it could be seen as a good revolution, and bloodshed may be necessary to keep the power of the central government in check.

3. What did Jefferson fear when Hamilton said the national government should have a standing army?

Jefferson believed the new, increasingly strong national government was like a new monarchy -- and not very different than the authority Great Britain held over the American colonies. He feared that if the national government had a standing army, it would use the army to oppress common people and to keep all the power to itself.

4. When judges appointed by Federalists enforced the Alien and Sedition Acts, what happened to politicians and others who criticized President Adams in writing or in speeches?

They were thrown in jail.

5. Why was the swearing in of Thomas Jefferson as president ironic?

Jefferson was sworn in by Chief Justice John Marshall, a leader of the Federalists and someone Jefferson completely hated (politically). To quote historian Newmyer, "So, you have Marshall holding the Bible, Jefferson has his hand on the Bible swearing to uphold the Constitution, which Marshall is absolutely sure he [Jefferson] was going to destroy."

Ask students to hypothesize on how the issues highlighted in the clip may have laid the groundwork for debates over how much power the national government should have.

Hold a class discussion and pose the following question:

1. Do you feel that the United States has a weak or strong central government today?

After a brief discussion about the above question, break the students up into two groups. One group will be advocates for a weak central government. The other will be advocates for a strong central government.

The following statements will be put up on the overhead to prompt debate: (one at a time)

1: The common person (such as artisans, shopkeepers, and farmers) should take an active role in government.

2: It is important to challenge the government, even if it leads to revolution.

3: The British aristocracy should be admired and the British form of government should be used as a model.

4: The presidency should be a position that meets the wants and needs of the people.

5: The Supreme Court should have the ability to interpret laws passed by the federal and state governments.

Day 6:

Students will be asked to read the following article on President Bush from the Boston Globe. The article is lengthy, but it is important for the students to see that the issue of checks and balances and abiding by the constitution is critical, even today.

Bush challenges hundreds of laws

President cites powers of his office

By Charlie Savage, Globe Staff | April 30, 2006

WASHINGTON -- President Bush has quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution.

Among the laws Bush said he can ignore are military rules and regulations, affirmative-action provisions, requirements that Congress be told about immigration services problems, "whistle-blower" protections for nuclear regulatory officials, and safeguards against political interference in federally funded research.

Legal scholars say the scope and aggression of Bush's assertions that he can bypass laws represent a concerted effort to expand his power at the expense of Congress, upsetting the balance between the branches of government. The Constitution is clear in assigning to Congress the power to write the laws and to the president a duty "to take care that the laws be faithfully executed." Bush, however, has repeatedly declared that he does not need to "execute" a law he believes is unconstitutional.

Former administration officials contend that just because Bush reserves the right to disobey a law does not mean he is not enforcing it: In many cases, he is simply asserting his belief that a certain requirement encroaches on presidential power.

But with the disclosure of Bush's domestic spying program, in which he ignored a law requiring warrants to tap the phones of Americans, many legal specialists say Bush is hardly reluctant to bypass laws he believes he has the constitutional authority to override.

Far more than any predecessor, Bush has been aggressive about declaring his right to ignore vast swaths of laws -- many of which he says infringe on power he believes the Constitution assigns to him alone as the head of the executive branch or the commander in chief of the military.

Many legal scholars say they believe that Bush's theory about his own powers goes too far and that he is seizing for himself some of the law-making role of Congress and the Constitution-interpreting role of the courts.

Phillip Cooper, a Portland State University law professor who has studied the executive power claims Bush made during his first term, said Bush and his legal team have spent the past five years quietly working to concentrate ever more governmental power into the White House.

"There is no question that this administration has been involved in a very carefully thought-out, systematic process of expanding presidential power at the expense of the other branches of government," Cooper said. "This is really big, very expansive, and very significant."

For the first five years of Bush's presidency, his legal claims attracted little attention in Congress or the media. Then, twice in recent months, Bush drew scrutiny after challenging new laws: a torture ban and a requirement that he give detailed reports to Congress about how he is using the Patriot Act.

Bush administration spokesmen declined to make White House or Justice Department attorneys available to discuss any of Bush's challenges to the laws he has signed.

Instead, they referred a Globe reporter to their response to questions about Bush's position that he could ignore provisions of the Patriot Act. They said at the time that Bush was following a practice that has "been used for several administrations" and that "the president will faithfully execute the law in a manner that is consistent with the Constitution."

But the words "in a manner that is consistent with the Constitution" are the catch, legal scholars say, because Bush is according himself the ultimate interpretation of the Constitution. And he is quietly exercising that authority to a degree that is unprecedented in US history.

Bush is the first president in modern history who has never vetoed a bill, giving Congress no chance to override his judgments. Instead, he has signed every bill that reached his desk, often inviting the legislation's sponsors to signing ceremonies at which he lavishes praise upon their work.

Then, after the media and the lawmakers have left the White House, Bush quietly files "signing statements" -- official documents in which a president lays out his legal interpretation of a bill for the federal bureaucracy to follow when implementing the new law. The statements are recorded in the federal register.

In his signing statements, Bush has repeatedly asserted that the Constitution gives him the right to ignore numerous sections of the bills -- sometimes including provisions that were the subject of negotiations with Congress in order to get lawmakers to pass the bill. He has appended such statements to more than one of every 10 bills he has signed.

"He agrees to a compromise with members of Congress, and all of them are there for a public bill-signing ceremony, but then he takes back those compromises -- and more often than not, without the Congress or the press or the public knowing what has happened," said Christopher Kelley, a Miami University of Ohio political science professor who studies executive power.

The Constitution grants Congress the power to create armies, to declare war, to make rules for captured enemies, and "to make rules for the government and regulation of the land and naval forces." But, citing his role as commander in chief, Bush says he can ignore any act of Congress that seeks to regulate the military.

On at least four occasions while Bush has been president, Congress has passed laws forbidding US troops from engaging in combat in Colombia, where the US military is advising the government in its struggle against narcotics-funded Marxist rebels.

After signing each bill, Bush declared in his signing statement that he did not have to obey any of the Colombia restrictions because he is commander in chief.

Bush has also said he can bypass laws requiring him to tell Congress before diverting money from an authorized program in order to start a secret operation, such as the "black sites" where suspected terrorists are secretly imprisoned.

Congress has also twice passed laws forbidding the military from using intelligence that was not "lawfully collected," including any information on Americans that was gathered in violation of the Fourth Amendment's protections against unreasonable searches.

Congress first passed this provision in August 2004, when Bush's warrantless domestic spying program was still a secret, and passed it again after the program's existence was disclosed in December 2005.

On both occasions, Bush declared in signing statements that only he, as commander in chief, could decide whether such intelligence can be used by the military.

In October 2004, five months after the Abu Ghraib torture scandal in Iraq came to light, Congress passed a series of new rules and regulations for military prisons. Bush signed the provisions into law, then said he could ignore them all. One provision made clear that military lawyers can give their commanders independent advice on such issues as what would constitute torture. But Bush declared that military lawyers could not contradict his administration's lawyers.

Other provisions required the Pentagon to retrain military prison guards on the requirements for humane treatment of detainees under the Geneva Conventions, to perform background checks on civilian contractors in Iraq, and to ban such contractors from performing "security, intelligence, law enforcement, and criminal justice functions." Bush reserved the right to ignore any of the requirements.

The new law also created the position of inspector general for Iraq. But Bush wrote in his signing statement that the inspector "shall refrain" from investigating any intelligence or national security matter, or any crime the Pentagon says it prefers to investigate for itself.

Bush had placed similar limits on an inspector general position created by Congress in November 2003 for the initial stage of the US occupation of Iraq. The earlier law also empowered the inspector

to notify Congress if a US official refused to cooperate. Bush said the inspector could not give any information to Congress without permission from the administration.

In December 2004, Congress passed an intelligence bill requiring the Justice Department to tell them how often, and in what situations, the FBI was using special national security wiretaps on US soil. The law also required the Justice Department to give oversight committees copies of administration memos outlining any new interpretations of domestic-spying laws. And it contained 11 other requirements for reports about such issues as civil liberties, security clearances, border security, and counternarcotics efforts.

After signing the bill, Bush issued a signing statement saying he could withhold all the information sought by Congress.

Likewise, when Congress passed the law creating the Department of Homeland Security in 2002, it said oversight committees must be given information about vulnerabilities at chemical plants and the screening of checked bags at airports.

It also said Congress must be shown unaltered reports about problems with visa services prepared by a new immigration ombudsman. Bush asserted the right to withhold the information and alter the reports.

On several other occasions, Bush contended he could nullify laws creating "whistle-blower" job protections for federal employees that would stop any attempt to fire them as punishment for telling a member of Congress about possible government wrongdoing.

When Congress passed a massive energy package in August, for example, it strengthened whistle-blower protections for employees at the Department of Energy and the Nuclear Regulatory Commission.

The provision was included because lawmakers feared that Bush appointees were intimidating nuclear specialists so they would not testify about safety issues related to a planned nuclear-waste repository at Yucca Mountain in Nevada -- a facility the administration supported, but both Republicans and Democrats from Nevada opposed.

When Bush signed the energy bill, he issued a signing statement declaring that the executive branch could ignore the whistle-blower protections.

Bush's statement did more than send a threatening message to federal energy specialists inclined to raise concerns with Congress; it also raised the possibility that Bush would not feel bound to obey similar whistle-blower laws that were on the books before he became president. His domestic spying program, for example, violated a surveillance law enacted 23 years before he took office.

David Golove, a New York University law professor who specializes in executive-power issues, said Bush has cast a cloud over "the whole idea that there is a rule of law," because no one can be certain of which laws Bush thinks are valid and which he thinks he can ignore.

"Where you have a president who is willing to declare vast quantities of the legislation that is passed during his term unconstitutional, it implies that he also thinks a very significant amount of the other laws that were already on the books before he became president are also unconstitutional," Golove said.

Defying Supreme Court
Bush has also challenged statutes in which Congress gave certain executive branch officials the power to act independently of the president. The Supreme Court has repeatedly endorsed the power of Congress to make such arrangements. For example, the court has upheld laws creating special prosecutors free of Justice Department oversight and insulating the board of the Federal Trade Commission from political interference.

Nonetheless, Bush has said in his signing statements that the Constitution lets him control any executive official, no matter what a statute passed by Congress might say.

In November 2002, for example, Congress, seeking to generate independent statistics about student performance, passed a law setting up an educational research institute to conduct studies and publish reports "without the approval" of the Secretary of Education. Bush, however, decreed that the institute's director would be "subject to the supervision and direction of the secretary of education."

Similarly, the Supreme Court has repeatedly upheld affirmative-action programs, as long as they do not include quotas. Most recently, in 2003, the court upheld a race-conscious university admissions program over the strong objections of Bush, who argued that such programs should be struck down as unconstitutional.

Yet despite the court's rulings, Bush has taken exception at least nine times to provisions that seek to ensure that minorities are represented among recipients of government jobs, contracts, and grants. Each time, he singled out the provisions, declaring that he would construe them "in a manner consistent with" the Constitution's guarantee of "equal protection" to all -- which some legal scholars

say amounts to an argument that the affirmative-action provisions represent reverse discrimination against whites.

Golove said that to the extent Bush is interpreting the Constitution in defiance of the Supreme Court's precedents, he threatens to "overturn the existing structures of constitutional law."

A president who ignores the court, backed by a Congress that is unwilling to challenge him, Golove said, can make the Constitution simply "disappear."

Common practice in '80s
Though Bush has gone further than any previous president, his actions are not unprecedented.

Since the early 19th century, American presidents have occasionally signed a large bill while declaring that they would not enforce a specific provision they believed was unconstitutional. On rare occasions, historians say, presidents also issued signing statements interpreting a law and explaining any concerns about it.

But it was not until the mid-1980s, midway through the tenure of President Reagan, that it became common for the president to issue signing statements. The change came about after then-Attorney General Edwin Meese decided that signing statements could be used to increase the power of the president.

When interpreting an ambiguous law, courts often look at the statute's legislative history, debate and testimony, to see what Congress intended it to mean. Meese realized that recording what the president thought the law meant in a signing statement might increase a president's influence over future court rulings.

Under Meese's direction in 1986, a young Justice Department lawyer named Samuel A. Alito Jr. wrote a strategy memo about signing statements. It came to light in late 2005, after Bush named Alito to the Supreme Court.

In the memo, Alito predicted that Congress would resent the president's attempt to grab some of its power by seizing "the last word on questions of interpretation." He suggested that Reagan's legal team should "concentrate on points of true ambiguity, rather than issuing interpretations that may seem to conflict with those of Congress."

Reagan's successors continued this practice. George H.W. Bush challenged 232 statutes over four years in office, and Bill Clinton objected to 140 laws over his eight years, according to Kelley, the Miami University of Ohio professor.

Many of the challenges involved longstanding legal ambiguities and points of conflict between the president and Congress.

Throughout the past two decades, for example, each president -- including the current one -- has objected to provisions requiring him to get permission from a congressional committee before taking action. The Supreme Court made clear in 1983 that only the full Congress can direct the executive branch to do things, but lawmakers have continued writing laws giving congressional committees such a role.

Still, Reagan, George H.W. Bush, and Clinton used the presidential veto instead of the signing statement if they had a serious problem with a bill, giving Congress a chance to override their decisions.

But the current President Bush has abandoned the veto entirely, as well as any semblance of the political caution that Alito counseled back in 1986. In just five years, Bush has challenged more than 750 new laws, by far a record for any president, while becoming the first president since Thomas Jefferson to stay so long in office without issuing a veto.

"What we haven't seen until this administration is the sheer number of objections that are being raised on every bill passed through the White House," said Kelley, who has studied presidential signing statements through history. "That is what is staggering. The numbers are well out of the norm from any previous administration."

Exaggerated fears?
Some administration defenders say that concerns about Bush's signing statements are overblown. Bush's signing statements, they say, should be seen as little more than political chest-thumping by administration lawyers who are dedicated to protecting presidential prerogatives.

Defenders say the fact that Bush is reserving the right to disobey the laws does not necessarily mean he has gone on to disobey them.

Indeed, in some cases, the administration has ended up following laws that Bush said he could bypass. For example, citing his power to "withhold information" in September 2002, Bush declared

that he could ignore a law requiring the State Department to list the number of overseas deaths of US citizens in foreign countries. Nevertheless, the department has still put the list on its website.

Jack Goldsmith, a Harvard Law School professor who until last year oversaw the Justice Department's Office of Legal Counsel for the administration, said the statements do not change the law; they just let people know how the president is interpreting it.

"Nobody reads them," said Goldsmith. "They have no significance. Nothing in the world changes by the publication of a signing statement. The statements merely serve as public notice about how the administration is interpreting the law. Criticism of this practice is surprising, since the usual complaint is that the administration is too secretive in its legal interpretations."

But Cooper, the Portland State University professor who has studied Bush's first-term signing statements, said the documents are being read closely by one key group of people: the bureaucrats who are charged with implementing new laws.

Lower-level officials will follow the president's instructions even when his understanding of a law conflicts with the clear intent of Congress, crafting policies that may endure long after Bush leaves office, Cooper said.

"Years down the road, people will not understand why the policy doesn't look like the legislation," he said.

And in many cases, critics contend, there is no way to know whether the administration is violating laws -- or merely preserving the right to do so.

Many of the laws Bush has challenged involve national security, where it is almost impossible to verify what the government is doing. And since the disclosure of Bush's domestic spying program, many people have expressed alarm about his sweeping claims of the authority to violate laws.

In January, after the Globe first wrote about Bush's contention that he could disobey the torture ban, three Republicans who were the bill's principal sponsors in the Senate -- John McCain of Arizona, John W. Warner of Virginia, and Lindsey O. Graham of South Carolina -- all publicly rebuked the president.

"We believe the president understands Congress's intent in passing, by very large majorities, legislation governing the treatment of detainees," McCain and Warner said in a joint statement. "The Congress declined when asked by administration officials to include a presidential waiver of the restrictions included in our legislation."

Added Graham: "I do not believe that any political figure in the country has the ability to set aside any . . . law of armed conflict that we have adopted or treaties that we have ratified."

And in March, when the Globe first wrote about Bush's contention that he could ignore the oversight provisions of the Patriot Act, several Democrats lodged complaints.

Senator Patrick J. Leahy of Vermont, the ranking Democrat on the Senate Judiciary Committee, accused Bush of trying to "cherry-pick the laws he decides he wants to follow."

And Representatives Jane Harman of California and John Conyers Jr. of Michigan -- the ranking Democrats on the House Intelligence and Judiciary committees, respectively -- sent a letter to Attorney General Alberto R. Gonzales demanding that Bush rescind his claim and abide by the law.

"Many members who supported the final law did so based upon the guarantee of additional reporting and oversight," they wrote. "The administration cannot, after the fact, unilaterally repeal provisions of the law implementing such oversight. . . . Once the president signs a bill, he and all of us are bound by it."

Lack of court review
Such political fallout from Congress is likely to be the only check on Bush's claims, legal specialists said.

The courts have little chance of reviewing Bush's assertions, especially in the secret realm of national security matters.

"There can't be judicial review if nobody knows about it," said Neil Kinkopf, a Georgia State law professor who was a Justice Department official in the Clinton administration. "And if they avoid judicial review, they avoid having their constitutional theories rebuked."

Without court involvement, only Congress can check a president who goes too far. But Bush's fellow Republicans control both chambers, and they have shown limited interest in launching the kind of oversight that could damage their party.

"The president is daring Congress to act against his positions, and they're not taking action because they don't want to appear to be too critical of the president, given that their own fortunes are tied to his because they are all Republicans," said Jack Beermann, a Boston University law professor. "Oversight gets much reduced in a situation where the president and Congress are controlled by the same party."

Said Golove, the New York University law professor: "Bush has essentially said that 'We're the executive branch and we're going to carry this law out as we please, and if Congress wants to impeach us, go ahead and try it.' "

Bruce Fein, a deputy attorney general in the Reagan administration, said the American system of government relies upon the leaders of each branch "to exercise some self-restraint." But Bush has declared himself the sole judge of his own powers, he said, and then ruled for himself every time.

"This is an attempt by the president to have the final word on his own constitutional powers, which eliminates the checks and balances that keep the country a democracy," Fein said. "There is no way for an independent judiciary to check his assertions of power, and Congress isn't doing it, either. So this is moving us toward an unlimited executive power."■

Assessment:

Each student will create a poster presentation on federalism, the three branches of government, and checks and balances. The following requirements & directions will be used to grade each project:

Division and Separation of Powers Poster Presentation:

Task: Your assignment is to create a poster which demonstrates knowledge based on information you have learned in class, in homework assignments, and additional research done outside of class. You will be required to present the poster in class in front of your classmates.

Requirements: The following must be included in your poster:

- ✓ Title
- ✓ Your name
- ✓ All terms and names defined or explained (federalism, checks and balances, three branches, limited government)
- ✓ Visuals
- ✓ Charts explaining each concept
- ✓ At least 2 news articles demonstrating checks and balances

- ✓ At least 2 paragraphs explaining the purpose of federalism and the way in which our government runs today

Go to SSEC TAH Site