The Separation of Powers

Chapter 3: Federalism and the Separation of Powers

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THE SEPARATION OF POWERS

As we noted at the beginning of this chapter, the separation of powers gives several different federal institutions the ability to influence the nation's agenda, to affect decisions, and to prevent the other institutions from taking action—dividing agenda, decision, and veto powers. This arrangement may be cumbersome, but the Constitution's framers saw it as an essential means of protecting liberty.

In his discussion of the separation of powers, James Madison quoted the originator of the idea, the French political thinker Baron de Montesquieu: "There can be no liberty where the legislative and executive powers are united to the same person . . . or where the power of judging is separate from the legislative power and executive."

Using this same reasoning, many of Madison's contemporaries argued that there was not enough separation among the three branches, and Madison had to backtrack to insist that complete separation was not required.

Of course, shifting interpretations of the Constitution often reflect underlying struggles for political power and nowhere is this more true than in the realm of federalism. Generally speaking, those political forces that control the national government advocate a jurisprudence of nationalism. Those uncertain of their ability to retain control of the commanding heights of Capitol Hill and the White House but more sure of their hold on at least some states support respect for state power and remind Americans of the wisdom of the Tenth Amendment. Thus, the Marshall Court reflected the nationalistic spirit of America's founders. Marshall's successor, Chief Justice Roger Taney, gave us the most extreme decenationalization period, virtually inventing the concept of states' rights, as slavery and its expansion were endangering the Union. Franklin Delano Roosevelt created a Court that would advance his efforts to strengthen the powers of the federal government. In recent decades, Republicans, who control a majority of the states, have expressed respect for states' rights while Democrats, with more power at the national level, have sought to increase the power of the federal government. This is reflected in the fact that the Burger Court (1969-96) and the Rehnquist Court (1996-2005) were more sympathetic to the powers of the states, whereas the Roberts Court (2005-present) has generally supported national power. How different institutional forms will influence decision, agenda, and veto powers is a matter of political principle—and political interest.

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This is the secret of how Americans have made the separation of powers effective: they have made it self-enforcing by giving each branch of government the means to participate in, and partially or temporarily obstruct, the workings of the other branches.

Checks and Balances: A System of Mutual Vetoes

The means by which each branch of government interacts with the others is known informally as checks and balances. This arrangement gives each branch agenda and veto power, under a decision that requires all the branches to agree on national policies (Figure 3.4). The best-known examples are the presidential power to veto legislation passed by Congress; the power of Congress to override the veto by a two-thirds majority vote; the power of Congress to impeach the president; the power of the Senate to approve presidential appointments; the power of the president to appoint the members of the Supreme Court and the other federal judges with Senate approval; and the power of the Supreme Court to engage in judicial review (discussed below). The framers sought to guarantee that the three branches would in fact use the checks and balances as weapons against each other by giving each branch a different political constituency: direct, popular election of the members of the House and indirect election of senators (until the Seventeenth Amendment, adopted in 1913); indirect election of the president (still in effect, at least formally); and appointment of federal judges for life. All things considered, the best characterization of the separation-of-powers principle in action is, as we said in Chapter 2, "separated institutions sharing power."33

Legislative Supremacy

Although each branch was to be given adequate means to compete with the other branches, it is also clear that within the system of separated powers the framers provided for legislative supremacy by making Congress the preeminent branch. Legislative supremacy made the provision of checks and balances in the other two branches all the more important.

The most important indication of the intention of legislative supremacy was made by the framers when they decided to place the provisions for national powers in Article I, the legislative article, and to treat the powers of the national government as powers of Congress. In a system based on the "rule of law," the
power to make the laws is the supreme power, Section 8 provides in part that "Congress shall have Power To lay and collect Taxes ... To borrow Money ..."

The regular Commerce [emphasis added] The Presidents also provided for legislative supremacy in their decision to give Congress the sole power over appropriations and to give the House of Representatives the power to initiate all revenue bills. Madison recognized legislative supremacy as part and parcel of the separation of powers:

It is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little concerned with each other as the nature of their common functions and their common dependence on the society will admit.36

In other words, Congress was so likely to dominate the other branches that it would have to be divided against itself, into House and Senate. One almost certainly say that the Constitution provided for divided government. For three things:

Although "presidential government" gradually supplanted legislative supremacy after 1937, the relative power position of the executive and legislative branches since that time has varied. The degree of conflict between the president and Congress has changed with the rise and fall of political parties, and it has been especially tense during periods of divided government, when one party controls the White House and another controls Congress, as has been the case almost continuously since 1969.

Checks and Balances: The Rationality Principle at Work

The framers' idea that the president and Congress would check and balance each other's powers, in part, on application of the rationality principle. The framers assumed that each branch would seek to maintain or even expand its power and would resist what the framers called "encroachments" on its prerogatives by the other branch. This idea certainly seems consistent with the behavior of presidents and congressional leaders. At least since the Nixon administration, presidents and members of Congress have battled almost constantly over institutional prerogatives. For example, what culminated in the Watergate struggle between Congress and President Richard Nixon began when Nixon sought to implement a reorganization of the executive branch that would have increased presidential control and reduced congressional oversight powers.37 After Nixon's resignation, Congress enacted several pieces of legislation, including the War Powers Act, to delimit presidential power. When he took office, President Ronald Reagan worked to undo Congress's efforts and to bolster the power of the White House. Reagan had a good deal of success, particularly in undermining the War Powers Act, though Congress ultimately put a stop to it through investigations into presidential wrongdoing in the so-called Iran-Contra affair. During the Clinton era, Congress impeached the president but failed to convict him. During President George W. Bush's second term in office, Congress and the president battled constantly over the president's frequent refusal to disclose information to Congress on the basis of executive privilege and his assertions that only the president was competent to manage the nation's security. "I am the decider," the president famously averred. During his first months in office, President Obama had little reason to clash with Congress. Both houses were controlled by Democrats, and the Democratic leadership was eager to cooperate with the new president. However, this "honeymoon" between Obama and Congress ended when the GOP took control of the House of Representatives in 2010 and fought the president, particularly on taxes and the federal budget. In 2011, Congress forced the president to agree to spending cuts to avoid an impending credit default (see Chapter 15).

Though each institution has registered success and failures in this struggle over time, the president has generally possessed an advantage. The president is a unitary actor, whereas Congress, as a collective decision maker, suffers from collective action problems (see Chapter 13). That is, each member of Congress may have individual interests that are inconsistent with the collective interests of Congress as a whole. For example, when Congress initially registered its support for President Bush's plan to use force in Iraq in 2003, members were uneasy about the fact that the president was asserting that he actually did not need congressional approval—that he was the only decider. The president was using the war to underline claims of institutional power, but few members of Congress thought it would be politically safe to express that viewpoint when the public was clamoring for action. These considerations help explain why, over time, the powers of the presidency have grown and those of Congress diminished.38

We will return to this topic in Chapter 7.

The role of the judicial branch in the separation of powers has depended on the power of judicial review (see Chapter 9), a power not provided for in the Constitution but asserted by Chief Justice Marshall in 1803:

If a law be in opposition to the Constitution if both the law and the Constitution apply to a particular case, so that the Court must either decide that

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36 The Federalist, nos. 51, p. 322.
Marshall's decision was an extremely important assertion of judicial power and has been the basis of the judiciary's influence in American life ever since. In effect, Marshall declared that whenever there was doubt or disagreement about which rule should apply in a particular case, the Court would decide. In this way, Marshall made the Court the arbiter of all future debates between Congress and the president and between the federal and state governments.

In terms of numbers of cases, judicial review of the constitutionality of acts of the president or Congress is relatively rare. For example, there were no Supreme Court reviews of congressional acts in the 50-plus years between Marbury v. Madison (1803) and Dred Scott v. Sandford (1857). In the century or so between the Civil War and 1970, 84 acts of Congress were held unconstitutional (in whole or in part), but there were long periods of complete Supreme Court deference to Congress, punctuated by flurries of judicial review during times of social upheaval. The most significant of these was 1935-36, when 12 acts of Congress were invalidated, blocking virtually the entire New Deal program. Then, after 1935, when the Court made its great reversals, no significant acts were voided until 1983, when the Court declared unconstitutional the legislative veto, a practice in which Congress authorized the president to take action but reserved the right to rescind presidential actions with which it disagreed. Another decision, in 1986, struck down the Gramm-Rudman Act of 1985, which mandated a balanced budget. That act, the Court held, delegated too much power to the comptroller general, a congressional official, to direct the president to reduce the budget. The Supreme Court became much more activist (that is, less deferential to Congress) after the elevation of Justice William H. Rehnquist to the position of chief justice in 1986. All of the cases in Table 3.1 altered some aspect of federalism by deeming unconstitutional all or an important portion of an act of Congress, and the end of this episode of judicial activism against Congress is not over. Between 1995 and 2002, at

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**Table 3.1**

**A NEW FEDERAL SYSTEM? THE CASE RECORD, 1995-2006**

<table>
<thead>
<tr>
<th>CASE</th>
<th>DATE</th>
<th>COURT HOLDING</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States v. Lopez,</td>
<td>1995</td>
<td>Voids federal law barring handguns near schools: It is beyond Congress’s power to regulate commerce.</td>
</tr>
<tr>
<td>514 U.S. 540</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Seminole Tribe v. Florida,</td>
<td>1996</td>
<td>Voids federal law giving tribes the right to sue a state in federal court: “sovereign immunity” requires a state’s permission to be sued.</td>
</tr>
<tr>
<td>517 U.S. 44</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Printz v. United States,</td>
<td>1997</td>
<td>Voids key provision of Brady law requiring states to make background checks on gun purchases: as an “unfunded mandate” it violated state sovereignty under the Tenth Amendment.</td>
</tr>
<tr>
<td>521 U.S. 506</td>
<td></td>
<td></td>
</tr>
<tr>
<td>City of Boerne v. Flores,</td>
<td>1997</td>
<td>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.</td>
</tr>
<tr>
<td>521 U.S. 507</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aiden v. Maine, 527 U.S. 706</td>
<td>1999</td>
<td>Declares states “immune” from suits by their own employees for overtime pay under the Fair Labor Standards Act of 1938. (See also the Seminole case.)</td>
</tr>
<tr>
<td>United States v. Morrison,</td>
<td>2000</td>
<td>Extends Seminole case by invalidating Violence against Women Act: states may not be sued by individuals for failing to enforce federal laws.</td>
</tr>
<tr>
<td>529 U.S. 510</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gonzales v. Oregon, 546 U.S. 243</td>
<td>2006</td>
<td>Upholds state assisted-suicide law over attorney general’s objection.</td>
</tr>
</tbody>
</table>

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34 Marbury v. Madison, 1 Cranch 137 (1803).
35 The Supreme Court struck down eight out of ten New Deal statutes. For example, in Panama Refining Company v. Ryan, 293 U.S. 388 (1935), the Court ruled that a section of the National Industrial Recovery Act of 1933 was an invalid delegation of legislative power to the executive branch. And in Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935), the Court found the National Industrial Recovery Act itself to be invalid for the same reason.
Democrats and the president said they refused to allow a vote on any continuing resolution (CR) to extend the government's spending authority. The Obama administration. The president responded with a veto. In Clinton v. City of New York, 524 U.S. 417 (1998), conservative Republicans in the House of Representatives launched a major rebellion against the president's conduct in the war on terrorism by enacting legislation outlawing a number of harsh methods authorized by the president for the interrogation of terrorist suspects. The president responded with a veto. In 2011, the newly elected Republican House of Representatives promised to repeal the president's recently enacted health care program. The Senate, still controlled by the Democrats, disagreed, and the president promised to veto any bill that threatened what he viewed as the major achievements of his first term in office. In the meantime, legal challenges to the new law eventually led to a Supreme Court decision upholding main provisions of the new legislation. The dispersion of power among different institutions authorized by the president for the interrogation of terrorist suspects. The president responded with a veto. In 2004, the Supreme Court struck down the Line Item Veto Act of 1996 on the grounds that it violated Article I, Section 7, which prescribes procedures for congressional enactment, and presidential acceptance or veto, of statutes. The line item veto allowed the president to veto specific items in spending and tax bills without vetoing the entire bill. The Court held that any such change in the procedures of adopting laws would have to be made by amendment to the Constitution, not by legislation. The fifth confrontation came after the September 11, 2001, terrorist attacks. But because of the terrorism scare, it was the least restrictive of the five. In Rasul v. Bush, decided in 2004, the Court held that the estimated 500 "enemy combatants" detained without formal charges at the U.S. Naval Station at Guantanamo Bay, Cuba, had the right to seek release through a writ of habeas corpus. However, in Section 7 of the 2006 Military Commissions Act, Congress declared that enemy combatants held at Guantánamo Bay could not avail themselves of the right of habeas corpus. Then, in 2008, the Supreme Court responded by striking down Section 7 and affirming that the Guantánamo detainees had the right to challenge their detentions in federal court. The Court noted that habeas corpus was among the most fundamental constitutional rights and was included in the Constitution even before the Bill of Rights was added.

Institutions are designed to solve collective action problems, but the solutions can take many different forms. The framers of the American Constitution believed that agendas, decision, and veto powers should be dispersed among many different institutions. And because history matters and the 13 existing states already possessed considerable autonomy when the Constitution was drafted, the framers had little choice but to relinquish a considerable measure of agenda, decision, and veto powers to them as well. The result was our federal system of separated powers.

Critics of the American constitutional framework have often pointed to this dispersion of governmental power as a source of weakness and incoherence in America's policy-making processes. Because of federalism, America's national government is often unable to accomplish what might be a matter of course in most nations. For example, in the case of United States v. Lopez, cited earlier, the Supreme Court invalidated a federal statute prohibiting the possession of firearms near schools, saying that it was an unconstitutional encroachment on the sovereignty of the states. In a country with a unitary system of government, this statute would not face this type of hurdle.

Because of the separation of powers, Congress often finds itself at odds with the president—or the president by Congress—in efforts to bring about changes in policy. The president possesses a veto over congressional action. Congress can, by legislation, seek to limit the powers of the executive. In 2008, for example, Congress attempted to express its displeasure with the president's conduct in the war on terrorism by enacting legislation outlawing a number of harsh methods authorized by the president for the interrogation of terrorist suspects. The president responded with a veto. In 2011, the newly elected Republican House of Representatives promised to repeal the president's recently enacted health care program. The Senate, still controlled by the Democrats, disagreed, and the president promised to veto any bill that threatened what he viewed as the major achievement of his first term in office. In the meantime, legal challenges to the new law eventually led to a Supreme Court decision upholding main provisions of the new legislation. The dispersion of power among different institutions of government ensures that collective action will be difficult, though not impossible.

At times, however, stalemate between Congress and the president may become so severe that the government is virtually paralyzed. In 2013, for example, conservative Republicans in the House of Representatives launched a major political attack on the Obama administration. The GOP refused to allow a vote on any continuing resolution (CR) to extend the government's spending authority that contained funding for the Affordable Care Act (ACA), the president's signature health care program. Senate Democrats and the president said they
would not accept a CR that did not provide funding for the ACA. Without a CR, much of the government’s spending authority lapsed, and thus most federal agencies were forced to close in a “government shutdown.” Republicans also threatened to refuse to raise the nation’s debt limit, reducing the government’s borrowing power and forcing still further cuts in government programs, to say nothing of posing a serious threat to the federal government’s credit worthiness. In this situation, a partial shutdown of the federal government was the result when Congress and the president both hoped to gain political advantage from the politics of stalemate. After a tense 16 days, Republicans and Democrats agreed to a spending bill and a new debt ceiling that would continue government operations for at least three more months.

Thus the separation of powers has real political consequences. The framers, though, did not want to make collective action too easy. They thought it was important to provide checks and balances that would protect the nation from the tyrannical actions of a small number of leaders, as well as from precipitous and thoughtless actions on the part of larger groups—the framers called this latter possibility “majority tyranny.” The framers believed that well-constructed institutions should diminish the likelihood of inappropriate and unwise collective action, even at the cost of occasional stalemate. In recent years, the U.S. government often has been criticized more for what it has done, especially with regard to the wars in Iraq and Afghanistan, than what it has not done. Many Americans believe that Congress should have done more to thwart presidential war policies and hope the judiciary will do more to delimit presidential war powers in the future. The framers likely would have understood this desire to check the executive branch. Stalemate is not always the worst collective outcome.

For Further Reading

Selections highlighted in red are included in Readings in American Politics: Analysis and Perspectives, Third Edition.


