Part Two Institutional Authority

Structuring the Federal System

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ONE OF THE FIRST things everyone learns in an American government course is that two concepts undergird the U.S. constitutional system. The first is the separation of powers doctrine, under which each of the branches has a distinct function: the legislature makes the laws, the executive implements those laws, and the judiciary interprets them. The second concept is the notion of checks and balances: each branch of government imposes limits on the primary functions of the others. The Supreme Court may interpret laws, but Congress can introduce legislation to override the Court's interpretation. If Congress takes action, then the president has the option of vetoing the proposed law. If that happens, Congress must decide whether to override the president's veto. Seen in this way, the rule of checks and balances inherent in the system of separation of powers suggests that policy in the United States comes not from the separate actions of the branches of government but from the interaction among them.

A full understanding of the basics of institutional powers and constraints therefore requires a consideration of three important subjects. First, we must investigate the separation of powers system and why the framers adopted it; we take up this subject in the following pages. Second, because of the unique role the judiciary plays in the American government system, we need to understand how the Court has interpreted its own powers (located in Article III of the Constitution) and the constraints on those powers, as well as the powers of Congress (Article I) and the president (Article II). We consider these matters in Chapters 2, 3, and 4. Finally, throughout U.S. history the various institutions sometimes have taken on roles other than those ascribed to them in the Constitution (such as when the executive exerts legislative powers); and sometimes the Constitution is ambiguous about which branch has what powers (such as the power to make war). Chapter 5 takes up these important topics by exploring interbranch relations.

Origins of the Separation of Powers/Checks and Balances System

Even a casual comparison of the Articles of Confederation and the U.S. Constitution reveals major differences in the way the two documents structured the national government. Under the articles, the powers of government were concentrated in the legislature—a unicameral Congress in which the states had equal voting powers *(see Figure I-1)*. There was no executive or judicial branch separate and independent from the legislature. Issues of separation of powers and checks and balances were not particularly relevant to the articles, largely because the national government had almost no power to abuse. The states were capable of checking anything the central government proposed, and they provided whatever restraints the newly independent nation needed.

The government under the Articles of Confederation failed at least in part because it lacked sufficient power and authority to cope with the problems of the day. The requirements for amending the document were so restrictive that fundamental change within the articles proved impossible. When the Constitutional Convention met in Philadelphia in 1787, the delegates soon concluded that the articles had to be scrapped and replaced with a charter that would provide more effective power for the national government. The country had experienced conditions of economic decline, crippling taxation policies, interstate barriers to commerce, and isolated but alarming insurrections among the lower economic classes. The framers saw a newly structured national government as the only method of dealing with the problems besetting the nation in the aftermath of the Revolution.

But allocating significant power to the national government was not without its risks. Many of the framers feared the creation of a federal power capable of dominating the states and abusing individual liberties. It was apparent to all that the new government would have to be structured in a way that would minimize the potential for abuse and excess. The concept of the separation of powers and its twin, the idea of checks and balances, appealed to the framers as the best way to accomplish these necessary restraints.

The idea of separated powers was not new to the framers. They had been introduced to it by the political philosophy of the day and by their own political experiences. The theories of James Harrington and Charles de Montesquieu were particularly influential in this respect. Harrington (1611–1677) was an English political philosopher whose emphasis on the importance of property found a sympathetic audience among the former

colonists. His primary work, *Oceana*, published in 1656, was a widely read description of a model government. Incorporated into Harrington's ideal state was the notion that government powers ought to be divided into three parts. A Senate made up of the intellectual elite would propose laws; the people, guided by the Senate's wisdom, would enact the laws; and a magistrate would execute the laws. This system, Harrington argued, would impose an important balance that would maintain a stable government and protect property rights.

Harrington's concept of a separation of powers was less well developed than that later proposed by Montesquieu (1689–1755), a French political theorist. Many scholars consider his *Spirit of the Laws* (published as *De l'Esprit des Loix* in 1748), which was widely circulated during the last half of the eighteenth century, to be the classic treatise on the separation of powers philosophy. Montesquieu was concerned about government abuse of liberty. In his estimation, liberty could not long prevail if too much power accrued to a single ruler or a single branch of government. He warned, "When the legislative and executive powers are united in the same person, or the same body of magistrates, there can be no liberty. . . . Again, there is no liberty if the judicial power be not separated from the legislative and executive." Although Montesquieu's message was directed to the citizens of his own country, he found a more receptive audience in the United States.

The influence of these political thinkers was reinforced by the framers' political experiences. The settlers had come to the New World largely to escape the abuses of European governments. George III's treatment of the colonies taught them that executives were not to be trusted with too much power. The colonists also feared an independent and powerful judiciary, especially one not answerable to the people. The framers undoubtedly had more confidence in the legislature, but they knew it too had the potential of exceeding its proper bounds. The English experience during the reign of Oliver Cromwell was lesson enough that muting the power of the king did not necessarily lead to the elimination of government abuse. What the framers sought was balance, a system in which each branch of government would be strong enough to keep excessive power from flowing into the hands of any other single branch. This necessary balance, as John Adams pointed out in his *Defence of the Constitutions of Government of the United States of America* (1787–1788), would also have the advantage of keeping the power-hungry aristocracy in check and preventing the

majority from taking rights away from the minority.

Separation of Powers and the Constitution

The debates at the Constitutional Convention and the various plans the delegates considered all focused on the issue of dividing government power among the three branches as well as between the national government and the states. A general fear of a concentration of power permeated all the discussions. James Madison noted, “The truth is, all men having power ought to be distrusted to a certain degree.” Separated powers turned out to be the framers’ solution to the difficult problem of expanding government power, and at the same time reducing the probability of abuse.

Although the term *separation of powers* is nowhere to be found in the document, the Constitution plainly adopts the central principles of the theory. A reading of the first lines of each of the first three articles—the vesting clauses—makes this point clearly:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. [Article I]
>
> The executive Power shall be vested in a President of the United States of America. [Article II]
>
> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. [Article III]

In the scheme of government incorporated into the Constitution, the legislative, executive, and judicial powers resided in separate branches of government. Unless otherwise specified in the document, each branch presumably was limited to the political function granted to it, and that function could not be exercised by either of the other two branches.

In addition to the separation of powers, which reserves certain functions for specific branches, the framers placed into the Constitution explicit checks on the exercise of those powers. As a consequence, each branch of

government imposes limits on the primary functions of the others. A few examples illustrate this point:

- Congress has the right to pass legislation, but the president may veto the bills passed by Congress.
- The president may veto bills passed by Congress, but the legislature may override the president's veto.
- The president may make treaties with foreign powers, but the Senate must vote its approval of those treaties.
- The president is commander in chief of the army and navy, but Congress must pass legislation to raise armies, regulate the military, and declare war.
- The president may nominate federal judges, but the Senate must confirm them.
- The judiciary may interpret the law and even strike down laws as being in violation of the Constitution—a power the Court asserted for itself—but Congress may pass new legislation or propose constitutional amendments.
- Congress may pass laws, but the executive must enforce them.

In addition to these offsetting powers, the framers structured the branches so that the criteria and procedures for selecting the officials of the institutions differed, as did their tenures. Consequently, the branches all have slightly different sources of political power.

In the original version of the Constitution, these differences were even more pronounced than they are today. Back then the two houses of Congress were politically dependent on different selection processes. Members of the House were, as they are today, directly elected by the people, and the seats were apportioned among the states on the basis of population. With terms of only two years, the representatives were required to go back to the people for review on a frequent and regular basis. Senators, in contrast, were, and still are, representatives of whole states, with each state, regardless of size, having two members in the upper chamber. But state legislatures originally selected their senators, a system that was not changed until 1913, when the Seventeenth Amendment, which imposed popular election of senators, was ratified. The six-year, staggered terms of senators were intended to make the upper house less immediately responsive to the volatile nature of public opinion.

The Constitution dictated that the president be selected by the Electoral

College, a group of political elites chosen by the people or their representatives who would exercise judgment in casting their ballots among presidential candidates. Although the electors over time have ceased to perform any truly independent selection function, presidential selection remains a step away from direct popular election. The president's four-year term places the office squarely between the tenures conferred on representatives and senators. The original Constitution placed no limit on the number of terms a president could serve, but a two-term limit was observed by tradition until 1940 and was then imposed by constitutional amendment in 1951.

Differing altogether from the other two branches is the judiciary, which was assigned the least democratic selection system. The people have no direct role in the selection or retention of federal judges. Instead, the president nominates individuals for the federal bench, and the Senate confirms or rejects them. Once in office, federal judges serve for life, removable against their will only through impeachment. The intent of the framers was to make the judiciary independent. To do so, they created a system in which judges would not depend on the mood of the masses or on a single appointing power. Furthermore, judges would be accountable only to their own philosophies and consciences, with no periodic review or reassessment required.

Through a division of powers, an imposition of checks, and a variation in selection and tenure requirements, the framers hoped to achieve the balanced government they desired. This structure, they thought, would be the greatest protection against abuses of power and government violations of personal liberties and property rights. Many delegates to the Constitutional Convention considered this system of separation of powers a more effective method of protecting civil liberties than the formal pronouncements of a bill of rights.

Most political observers would conclude that the framers' invention has worked remarkably well. Through the years, the relative strengths of the branches have fluctuated. At certain times, the judiciary has been exceptionally weak, such as immediately after the Civil War. At other times, the judiciary has been criticized as being too powerful, such as when it repeatedly blocked New Deal legislation in the 1930s or when it expanded civil liberties during the Warren Court era. The executive also has led the other branches in political power. Beginning with the tenure of

Franklin Roosevelt and extending into the 1970s, references were often made to the “imperial presidency.” But when one branch gains too much power and abuses occur, as in the case of Richard Nixon and the Watergate crisis, the system tends to reimpose the balance sought by the framers.

Nevertheless, debates continue over how best to approach the separation of powers system from a constitutional law perspective. In many of the cases that follow, especially those in Chapter 5, you will see justices vacillate between formalist and functionalist approaches. Formalism emphasizes a basic idea behind the system: that the Constitution creates clear boundaries between and among the branches of government by bestowing a primary power on each. Under this school of thought, federal judges and justices should not allow deviations from this plan unless the text of the Constitution permits them. Functionalism, in contrast, rejects strict divisions among the branches and emphasizes instead a more fluid system—one of shared rather than separated powers. On this account, as long as actions by Congress or the president do not result in the accumulation of too much power in any one branch, the federal courts should be flexible, enabling—not discouraging—experimentation.

Contemporary Thinking on the Constitutional Scheme

The long-standing debate between functionalism and formalism is largely a normative debate—that is, it centers on how best to interpret the Constitution. As you read the cases to come and consider the logic behind the separation of powers doctrine, you may also want to take into account two contemporary approaches for understanding relationships among the three branches of government.

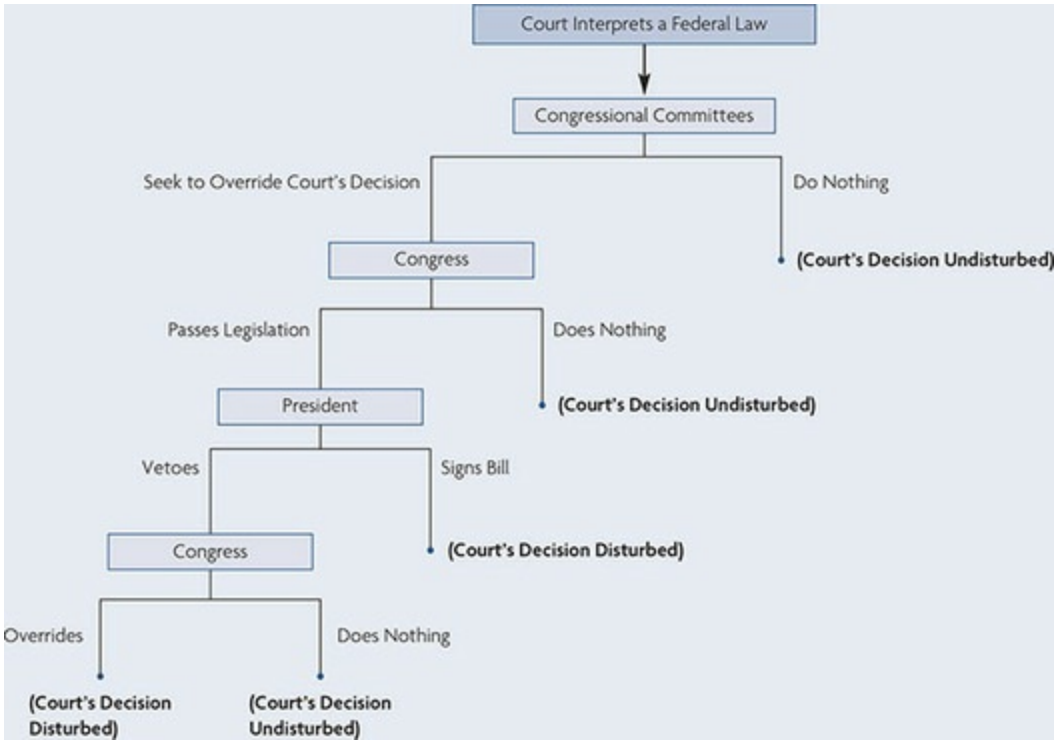
First are the “separation of powers games” offered by law professor William Eskridge and political scientists John Ferejohn and Barry Weingast, among others.[1] These games typically operate under some simple assumptions about the goals of the various institutions of government and the way the political process works. According to this school of thought, the aim of the institutions of government is to see the government’s policy—for our purposes, the ultimate state of the law—reflect the institutions’ positions. To put it another way, the branches hope

to set policy as close as possible to their ideal or most preferred point. The problem—and here is where assumptions about the nature of the process, including the separation of powers doctrine, come in—is that the political institutions do not make policy in isolation from one another. Rather, policy is set (or the game is played out) along the lines set out in Figure II-1. In this example, the Supreme Court makes the first "move" when it interprets a congressional statute or a constitutional provision. Congressional committees and other "gatekeepers" (majority-party leaders) then must decide whether they want to introduce legislation to override the Court's decision; if they do, Congress acts by adopting the gatekeepers' recommendations, adopting a different version of it, or rejecting it. If Congress passes legislation, then the president has the option of vetoing the law; if he does, the last move rests with Congress, which must decide whether to override the president's veto.[2][Insert Figure; pickup from pg. 53 of 9e; see PDF for edits.]

1 William N. Eskridge Jr., "Reneging on History: Playing the Court/Congress/President Civil Rights Game," *California Law Review* 79 (1991): 613–684; Eskridge, "Overriding Supreme Court Statutory Interpretation Decisions," *Yale Law Journal* 101 (1991): 331–455; John A. Ferejohn and Barry Weingast, "Limitation of Statutes: Strategic Statutory Interpretation," *International Review of Law and Economics* 12 (1992): 263–279. See also Knight and Epstein, *The Choices Justices Make*; and Pablo T. Spiller and Rafael Gely, "Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions," *RAND Journal of Economics* 23 (1992): 463–492.

2 In Figure II-1 we depict a sequence in which the Court makes the first "move" and Congress the last. We could lay out other sequences and include other (or different) actors: we could construct a scenario in which the Court moves first; Congress again goes next, but this time it proposes a constitutional amendment (rather than a law); and the states (not the president) have the last turn by deciding whether to ratify the amendment.

Figure II-1 The Supreme Court as a Strategic National Policy Maker



Source: Courtesy of Lee Epstein, Jack Knight, and Andrew Martin, "The Supreme Court as a Strategic National Policy Maker," *Emory Law Journal* 50 (2001): 593.

From these premises about the institutions' goals and about the sequence of play, perhaps you can see why the separation of powers doctrine is so important. Think about it this way. If the Supreme Court were the only institution of government, it would merely set policy at its preferred point; it would not need to consider the positions of Congress or the president. We know, however, that the Court is but one of several players in the game; therefore, it will take into account the preferences of others. If it sets the policy too far away from the position of, say, Congress, it could face an override. Congress might attempt to overturn the Court's decision with new legislation or "punish" the justices in other ways.

The last statement raises an interesting point: the separation of powers games proposed by Eskridge and others are designed to cover how the Court interprets federal laws because it is clear that Congress and the president can modify those interpretations by passing a new law. But these games are applicable (though perhaps in a different form) to constitutional interpretation as well.[3] The reason is that, as we consider in Chapter 2, the

other branches possess various powers through which they can modify constitutional decisions or invoke various mechanisms to sanction the Court.

3 See Lee Epstein, Jack Knight, and Andrew Martin, "The Supreme Court as a *Strategic* National Policy Maker," *Emory Law Journal* 50 (2001): 583–612; Rosenberg, "Judicial Independence and the Reality of Political Power"; Jeffrey A. Segal, Chad Westerland, and Stefanie A. Lindquist, "Congress, the Supreme Court and Judicial Review: Testing a Constitutional Separation of Powers Model," *American Journal of Political Science* 55 (2011): 89–104.

And that point brings us to the second approach, one that places emphasis on the "Constitution outside the Court." According to this account, the idea that only judges and justices interpret the Constitution is not only naive, but it also belies history. This at least was the argument Walter F. Murphy advanced more than thirty years ago when he asked, "Who shall interpret the Constitution?" His answer? Naturally, the courts, but not only the courts. The president, Congress, and even the people can also lay claim to playing a role in constitutional interpretation. Indeed, to Professor Murphy, that there is "no ultimate constitutional interpreter" is simply "a fact of American political life."[4] By way of example, Murphy points out that presidents of the stature of Thomas Jefferson, Andrew Jackson, and Abraham Lincoln were not willing to concede that they or Congress were obligated to accept the Supreme Court's constitutional interpretation as legally binding.

4 Murphy, "Who Shall Interpret the Constitution?"

To say that contemporary scholars have rallied around Murphy's thinking is to seriously understate the case. Since the late 1990s, a multitude of volumes have dealt with how Congress and the president are involved in constitutional interpretation.[5] That modern-day presidents, including George W. Bush and Barack Obama, have issued "signing statements" to express their interpretation of congressional legislation almost guarantees that more research will be forthcoming.[6]

5 See, for example, Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Mark Tushnet, *Taking the Constitution Away from the Courts*

(Princeton, NJ: Princeton University Press, 1999); David P. Currie, *The Constitution in Congress: Democrats and Whigs, 1829–1861* (Chicago: University of Chicago Press, 2005); and J. Mitchell Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System* (Durham, NC: Duke University Press, 2004).

6 Presidents may issue signing statements at the time they sign congressional bills. In such statements, they note their own interpretations of the laws or even assert their views of the "constitutional limits on the implementation" of some of the laws' provisions. For more on signing statements, see Philip J. Cooper, "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements," *Presidential Studies Quarterly* 35 (2005): 515–532; see also Chapter 4 of this volume.

Different as they may be, both approaches to the separation of powers system stress the role of all three branches of government in constitutional interpretation. The first emphasizes possible constraints on the Court imposed by the president and Congress. The second underscores that it is not only the Court that interprets the Constitution; the other institutions also can take and have taken on that task. As we explore the constitutional separation of powers/checks and balances system, keep in mind these contemporary accounts. Although our focus is on the Court's interpretation of various constitutional provisions, you will have a chance to consider the functions of the legislative and executive branches as well. You also will have ample opportunity to think about the extent to which the justices' perceptions of Congress and the president influence their decisions. In the coming pages we examine the significant political and legal clashes among the executive, legislative, and judicial branches, focusing on how the justices of the Supreme Court have interpreted and applied the Constitution to settle disputes. Throughout these constitutional controversies, what takes center stage are fundamental issues of institutional powers and the constraints placed on those powers.