

Sec. 1—The Congress

Legislative Powers

stitutional means and personal motives to resist encroachments of the others.” Thus, “[a]mbition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”⁸

Institutional devices to achieve these principles pervade the Constitution. Bicameralism reduces legislative predominance, while the presidential veto gives to the President a means of defending his priorities and preventing congressional overreaching. The Senate’s role in appointments and treaties checks the President. The courts are assured independence through good-behavior tenure and security of compensation, and the judges through judicial review will check the other two branches. The impeachment power gives to Congress the authority to root out corruption and abuse of power in the other two branches. And so on.

Judicial Enforcement

The difficulty for the Court in policing the separation of powers lies in its efforts to maintain the theoretical separation of branches while also accommodating the practical need for some intermixture of governmental functions.⁹ Further, since the power of the Court itself is subject to the dictates of the doctrine, the role of the Supreme Court has been problematic at best. In fact, throughout much of our history, most notable political disputes over separation of power arose between the elected “political branches” and were resolved without judicial intervention. It is only in recent decades that cases involving the doctrine have been regularly decided by the Court.

For many years, judicial construction of the doctrine arose only in relation to particular clauses of the Constitution. For instance, the nondelegation doctrine—that Congress may not delegate its Article I legislative authority—was from the beginning suffused with a separation-of-powers premise.¹⁰ However, the almost immediate demise of judicial enforcement of the doctrine was a reflection of the Court’s inability to give any meaningful content to its separation-of-powers concerns.¹¹ On the other hand, the Court has periodically

⁸ *Id.* at No. 51, 349.

⁹ “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Justice Jackson concurring).

¹⁰ *E.g.*, *Field v. Clark*, 143 U.S. 649, 692 (1892); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825).

¹¹ *See Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Justice Scalia dissenting).