

CONSTITUTIONAL STRUGGLES

Constitutionalism is more than a shorthand expression for the text of a constitution and the case law that accompanies it. To be worthy of the name, a constitution embodies a philosophy of government with sovereignty resting with the people, not solely with elected officials and judges. It should promote the commonweal and protect individual rights, including those of the minority. Especially crucial is the right of the people to meet together, to express their opinions individually and through associations, and to participate in free elections and self-government, including the shaping of constitutional values. Constitutions that merely sanction the use of governmental power without limiting it—those of autocratic and totalitarian states—are hostile to the concept of constitutionalism. The belief in judicial supremacy, frequently asserted over the last half century in the United States, is wholly at odds with constitutional government.

The Elements of Constitutionalism

The main elements of constitutionalism were identified by Henry St. John Bolingbroke in 1733: "By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed."¹ As Bolingbroke notes, governmental behavior is guided not merely by laws but also by institutions and customs. Legal principles must be set forth in a written document. Even the "unwritten" constitution of England—an amalgam of major enactments, minor statutes, judicial decisions, custom and convention, and parliamentary debates—is secured by publishing the fundamental principles for all to see: the Magna Carta, the Habeas Corpus Act, the Petition of Right, and the Act of Settlement.²

1. Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* 3 (1947).

2. H. R. G. Greaves, *The British Constitution* 15, 20–22 (1955); W. Ivor Jennings, *The Law and the Constitution* 32–40 (1943).

Fixed principles of reason, Bolingbroke's second criterion, cannot be defined with any exact meaning and application. At the very least the concept excludes political regimes that act in an arbitrary, irrational, and capricious manner. Constitutionalism cannot survive, even in the presence of a constitution, if the principles and standards of behavior are matters of whim for those in authority. Reason is more than an exercise in abstract logic or rational analysis. It must be tempered and regularly tested. As John Dickinson warned at the Philadelphia convention: "Experience must be our only guide. Reason may mislead us."³

As a constitutional standard, fixed principles of reason evoke the idea of natural law, "higher law," or *jus gentium*, which the Roman jurist Gaius called "that law which natural reason established among all mankind."⁴ Natural law is given concrete meaning in a scene from Sophocles' *Antigone*. One of Antigone's brothers, Polyneices, participated in a military attack on the city of Thebes. Among the defenders was his brother. Both men, meeting face-to-face, died in battle. Although the regent of Thebes, Creon, ordered Polyneices' body left to rot on the battlefield, Antigone defied the proclamation by burying her brother. When asked if she chose flagrantly to disobey the law, Antigone responds:

Naturally! Since Zeus never promulgated
Such a law. Nor will you find
That Justice publishes such laws to man below.
I never thought your edicts had such force
They nullified the laws of heaven, which,
Unwritten, not proclaimed, can boast
A currency that everlastingly is valid;
An origin beyond the birth of man.

Even Haemon, son of Creon, tells his father that he is "at loggerheads with open justice!" The chorus uses just eight words to define the issue of constitutionalism: "Where might is right there is no right."⁵

In one of the first examples of judicial review, Dr. Bonham's Case of 1610, Justice Coke announced that when an act of Parliament was "against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."⁶ Many decisions

3. 2 Farrand 278.

4. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* 17 (1955).

5. Paul Roche, trans., *The Oedipus Plays of Sophocles* 179, 189, 194 (1958).

6. 77 Eng. Rep. 646, 652.

by the Supreme Court have been against common right and reason, as the Court will at times acknowledge.

The natural (or higher) law doctrine enters American constitutionalism by way of John Locke's *Second Treatise on Civil Government* (1690). He believed that people living in the state of nature were governed by a law of nature, which obliged everyone to behave in a certain manner. Reason, "which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions." But humanity, biased and ignorant, fails to study the law of nature. When called upon to judge in their own cases, people punish others too harshly and excuse their own transgressions. As a result, "inconveniences" (Locke's mild term) emerged in the state of nature and created the need for a common, unbiased judge to referee disputes.⁷

Although Locke regarded the legislative power as supreme, it could not be arbitrary. The purpose of the legislature was to preserve life, liberty, and fortune. If it became destructive of those ends, people would find themselves in a condition worse than the state of nature. Under such circumstances the people were at liberty to dissolve the government and establish a new legislature.⁸

Locke's philosophy animates the Declaration of Independence. The opening sentence explains that the rupture with England was necessary so that Americans might "assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them." The idea of constitutionalism, emphasizing individual liberties and Locke's philosophy of government, appears in the very next paragraph:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed; That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.

Those sentiments lead to Bolingbroke's last two elements of constitutionalism: (1) government is directed to certain fixed objects of public good, and (2) the community gives its consent to be governed. Both points are consistent with Locke, who held that the legislature's power, "in the utmost bounds of it," was limited to the public good of the society. The executive's emer-

7. John Locke, *Second Treatise on Civil Government*, §§ 4–6, 13, 124–25.

8. *Id.* at §§ 135–37, 220–22.

gency power (the prerogative) was “nothing but the power of doing public good without a rule.”⁹

The principle of public consent and popular control is implicit in Locke’s belief that human rights existed prior to government. If government fails to protect those rights the people can change the government. In this sense the public’s interpretation of natural law and constitutionalism—as developed over a period of time—becomes the ultimate test of the legitimacy of civil law. The community can never agree to be governed by tyrannical or arbitrary regimes. It never loses control over the government it creates. Although regimes of that nature may exist, even supported by a written constitution and judicial rulings, they are not constitutional forms of government.

The conviction that individuals retain certain rights, never to be surrendered to government, was basic to Spinoza. He believed that “no man’s mind can possibly lie wholly at the disposition of another, for no one can willingly transfer his natural right of free reason and judgment, or be compelled so to do.” Any government attempting to control minds was, by definition, tyrannical. It was an abuse of sovereignty to seek to prescribe what was true or false, or what opinions should be held by men in their worship of God. “All these questions,” said Spinoza, “fall within a man’s natural right, which he cannot abdicate even with his own consent.”¹⁰

*Sutherland and Friedrich: Modern Views
on Constitutionalism*

These elements of constitutionalism, debated centuries ago, are present in more contemporary studies. Arthur E. Sutherland, writing in 1965, emphasized the “freedom of men, acting through an organized majority, to control their own political and economic fate.”¹¹ This principle rejects hereditary rule, divine right of kings, and rule by elites. Sutherland also said that government, to remain righteous and just, must create institutions to correct its own errors. As Madison cautioned in Federalist 51: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”

Sutherland recognized that his second principle could jar with the first. Government action may be unjust even if willed by a majority of the people. Judicial officers, less vulnerable to majoritarian pressures, may declare invalid

9. Id. at §§ 135, 166.

10. Benedict de Spinoza, *A Theologico-Political Treatise* 257 (2004).

11. Arthur E. Sutherland, *Constitutionalism in America* 2 (1965).

any government action that is inconsistent with standards of constitutional justice.¹² This proposition is not the same as "government by judiciary." Charles Evans Hughes reached too far with his injunction: "We are under a Constitution, but the Constitution is what the judges say it is."¹³ The Supreme Court is a coequal, not superior, branch. In his inaugural address in 1861, President Lincoln denied that constitutional questions could be settled solely by Supreme Court rulings. If government policy on "vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers."¹⁴ Constitutionalism has never been entirely what judges say it is.¹⁵

In many instances the judiciary decides that Congress is a more appropriate forum for reconciling conflicts between individual rights and government action. Supreme Court Justices recognize that members of Congress take the same oath as they do to uphold the Constitution and that deference to legislative judgment on constitutional questions is often an appropriate course.¹⁶ In performing their assigned constitutional duties, "each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."¹⁷

Moreover, Congress frequently passes legislation that has the effect of modifying a previous decision of a court. Because of the "political question" doctrine, many important constitutional issues are left to Congress and the President. Even when the courts intervene they often regard as authoritative a set of practices already established by legislators and executive officials.¹⁸ Still other constitutional questions never reach the courts because of hurdles of jurisdiction, mootness, standing, ripeness, and prudential considerations.

Sutherland points to three other criteria of constitutionalism. First, there

12. *Id.* at 2–3.

13. Charles Evans Hughes, *Addresses and Papers* 139 (1908).

14. 7 Richardson 3210.

15. Neal Devins & Louis Fisher, *The Democratic Constitution* (2015); Louis Fisher, *Constitutional Dialogues* (1988); Louis Fisher & Katy J. Harriger, *American Constitutional Law* (10th ed., 2013).

16. *Rostker v. Goldberg*, 453 U.S. 57 (1981), concerning male-only registration for military service.

17. *United States v. Nixon*, 418 U.S. 683, 703 (1974).

18. For legislative responsibility in shaping constitutional principles, see Louis Fisher, *Defending Congress and the Constitution* (2011); Louis Fisher, *The Supreme Court and Congress: Rival Interpretations* (2009); Neal Devins & Keith E. Whittington, eds., *Congress and the Constitution* (2005); Neal Devins & Louis Fisher, *The Democratic Constitution* (2014); J. Mitchell Pickerill, *Constitutional Deliberation in Congress* (2004); Louis Fisher, "Constitutional Interpretation by Members of Congress," 63 N. C. L. Rev. 707 (1985); Donald G. Morgan, *Congress and the Constitution* (1966); and William G. Andrews, ed., *Coordinate Magistrates: Constitutional Law by Congress and President* (1969).

must be fundamental equality among individuals. Although human beings are not identical, the standard of equality attempts to eliminate artificial and arbitrary inequalities, such as discriminatory treatment on the basis of race, sex, religion, or national origin. Second, the fundamentals of the constitutional system must be reduced to a written statement, either a concise constitution as in America or the fragmented, cumulative record of England. As a final element, Sutherland depends on structure to restrain government: dividing power first between the nation and the states and also within the central government (creating separate executive, legislative, and judicial bodies).¹⁹ It is fashionable today to entrust individual freedoms and liberties to the courts, but the framers depended on structural checks to provide more reliable safeguards.

To Carl Friedrich this division of power cuts across two planes: functionally (separation of powers) and spatially (federalism). The doctrine of separated powers has been heavily attacked in the twentieth century, first for impeding the flow of power to public administrators (who supposedly possess superior expertise not found among legislators), and second for interfering with the demand for centralized authority during World War II. Similarly, the push toward presidential power after the terrorist attacks of September 11, 2001, led to many executive abuses of basic freedoms. Friedrich warned that "many who today belittle the separation of powers seem unaware of the fact that their clamor for efficiency and expediency easily leads to dictatorship."²⁰ Nations that tried centralized, executive-oriented governments came to learn the virtues of checks and balances.

The Doctrine of Separated Powers

The abuse of power by Presidents after World War II stimulated a refocus on the separation doctrine. Opponents of presidential power claimed that the framers distrusted government (especially the executive) and attempted to fashion an instrument of checks and balances to prevent tyranny. Although the framers did indeed construct a system designed to restrain power, that was only part of their intention. It would be inaccurate and a disservice to their

19. Sutherland, *Constitutionalism in America*, at 4–7.

20. Carl Friedrich, *Constitutional Government and Democracy* 175 (1946). See his "Constitutions and Constitutionalism," *Int'l Encyc. Soc. Sci.* (1968), and "Separation of Powers," *13 Encyc. Soc. Sci.* 664 (1935), as well as Charles H. Wilson, "The Separation of Powers Under Democracy and Fascism," *52 Pol. Sci. Q.* 481 (1937). Arthur T. Vanderbilt, in the introduction to his *Doctrine of the Separation of Powers and Its Present-Day Significance* (1953), wrote that individual freedom and the progress of civilization were attainable only by adhering to the principles of the separation of powers.

labors at the Philadelphia convention to believe that they created a document primarily for the purpose of obstructing and hampering the operation of government. They wanted government to work.

It is important to understand the practical forces that led to the creation of separated branches. The American structure of government owes its existence to the experiences of the framers, not the theory of Montesquieu or precedents borrowed from England. The framers used Montesquieu selectively, adopting what they knew from their own experience to be useful and rejecting what they knew to be inapplicable. The product was more theirs than his. Having served in public life for many years, both in the colonies and in the fledgling republic, they knew firsthand the practical duties and problems of running a government. They were continuously and intimately involved in the mundane, down-to-earth matters of conducting a war and laying the foundation for a more perfect union. Their close familiarity with the classics in history and government, combined with the daily experience of public office, marked their special genius. They had vision without becoming visionaries.

British history, although valuable for the study of private and individual rights, is of marginal interest for the study of executive-legislative relationships in America. Questions of executive privilege, impoundment, and the war power cannot be resolved by harkening back to British practices. The Supreme Court made this valid observation in 1850: "In the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belongs to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the right and powers of the executive arm of the government are brought into question."²¹ Nonetheless, contemporary advocates of presidential power regularly cite British precedents.

It is said that powers are separated to preserve liberties. But separation can also destroy liberties. The French constitutions of 1791 and 1848 represented ambitious efforts to erect a rigid and dogmatic separation of powers. The first document produced the reign of Napoleon Bonaparte; the next effort led to the Second Empire.²²

Instead of indiscriminately championing the virtues of the separation doctrine, we should remember that it can satisfy a number of objectives, not all of them worth seeking. The framers of the American Constitution did not want a political system so fragmented in structure, so divided in authority, that

21. *Fleming v. Page*, 50 U.S. (9 How.) 603, 618 (1850).

22. M. J. C. Vile, *Constitutionalism and the Separation of Powers* 176-211 (1967).

government could not function. Justice Story pointed out in his *Commentaries* that the framers adopted a separation of power but "endeavored to prove that a rigid adherence to it in all cases would be subversive of the efficiency of the government, and result in the destruction of the public liberties."²³

Story's observation has been underscored by others. Justice Jackson in 1952 correctly identified the multiple goals that motivated the framers: "While the Constitution diffuses power the better to secure liberty, it also contemplates that the practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."²⁴ In 1976 the Supreme Court noted that the framers recognized that a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."²⁵ And in 1988 the Court reiterated that "we have never held that the Constitution requires that the three Branches of Government 'operate with absolute independence.'"²⁶

This conclusion is driven home by studying the political climate in which the framers drafted their document. If they wanted a weak government, if they wanted it shackled and ineffective, they could have retained the Articles of Confederation. They rejected that option for very good reason. Having labored under a weak government from 1774 to 1787, the framers deliberately jettisoned that model in favor of stronger central powers. Consciously, at the national level, they vested greater powers in an executive.

The distrust of executive power in 1776 (against the king of England and the royal governors) was tempered by two developments over the following decade. Americans discovered that state legislative bodies could be as oppressive and capricious toward individual rights as executive bodies. Also, many delegates to the Continental Congress watched with growing apprehension as the Congress found itself incapable of discharging its duties and responsibilities. Support began to grow for an independent executive, in large part for the purpose of ensuring more effective government.

This interpretation challenges a famous dissent by Justice Brandeis, who claimed in 1926 that the separation of powers doctrine was adopted *not* for efficiency but to preclude the exercise of arbitrary power.²⁷ His dictum, invoked regularly by those who urged legislative reassertion, is a half-truth. The

23. 1 Joseph Story, *Commentaries on the Constitution of the United States* 396 (2 vols., 1905).

24. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

25. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

26. *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988), citing *United States v. Nixon*, 418 U.S. at 707.

27. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

historical record is clear and persuasive that the inefficiency of the Continental Congress convinced the framers of the need for a separate and independent executive.²⁸

This practical source of the separation doctrine is generally overlooked or ignored. Much more satisfying, emotionally if not intellectually, is the belief that the Constitution was pounded into shape from abstract principles, with the name of Montesquieu leading the list of theorists. Gladstone reinforced this impression by describing the American Constitution as the most wonderful document ever "struck off at a given time" by the mind of man.²⁹ But the framers did not create out of whole cloth the document that guides us today. They were alert to the excesses and injustices committed by state legislators. They were sensitive—very sensitive—to the demonstrated ineptitude of the Continental Congress, which had to administer and adjudicate while trying to legislate. One branch of government performed all political tasks.

Because of the repeated failings of the Continental Congress, it soon began to delegate power—first to committees, then to boards staffed by people from outside the legislature, and finally, in 1781, to single executive officers.³⁰ These events occurred prior to the Philadelphia convention of 1787. The Constitution marked a fortunate continuity with political developments already under way. John Jay, after serving as Secretary of Foreign Affairs under the Continental Congress, remained in office in the Washington administration until Thomas Jefferson could take his place. Henry Knox was Secretary of War under the Continental Congress and under President Washington. Because of this orderly transition, it has been well said that the Constitution did not create a system of separated powers; rather, a system of separated powers created the Constitution.³¹

Several delegates at the ratifying conventions objected to the fact that the branches of government—legislative, executive, and judicial—had been intermingled instead of being kept separate. "How is the executive," demanded one irate delegate at Virginia's ratifying convention, "contrary to the opinion of all the best writers, blended with the legislature? We have asked for bread, and they have given us a stone."³² This outcry attracted some support, but not much. By the time of the Philadelphia convention, the rigid doctrine of separated powers had been replaced by a system of checks and balances. One contemporary pamphleteer called the separation doctrine, in its pure form,

28. See Louis Fisher, *President and Congress* 1-27, 241-70 (1972).

29. "Kin beyond the Sea," *North Am. Rev.* 127, no. 264 (Sept.-Oct. 1878), at 185.

30. Fisher, *President and Congress*, at 6-14.

31. 1 Francis Wharton, *The Revolutionary Diplomatic Correspondence of the United States* 663 (1889).

32. Quoted in 3 Elliot 280.

a "hackneyed principle" and a "trite maxim."³³ Madison devoted several of his Federalist essays to the need for overlapping powers, claiming that the concept was superior to the impracticable partitioning of powers demanded by some of the Antifederalists.³⁴

The system of checks and balances does not contradict the separation doctrine. Indeed, the two are complementary. Without the power to resist encroachments by another branch, a department might find its powers drained to the point of extinction. The Constitution allocated separate functions to separate branches, but "parchment barriers" were not dependable. It was necessary, Madison concluded in Federalist 51, that "ambition must be made to counteract ambition." In Federalist 48 he warned: "Unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."

The case for a strict separation of powers was tested in the form of an amendment to the Constitution. Three states—Virginia, North Carolina, and Pennsylvania—wanted to add a separation clause to the national bill of rights.³⁵ The proposed language read as follows: "The powers delegated by this constitution are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial[,] nor the executive exercise the powers vested in the legislative or judicial, nor the judicial exercise the powers vested in the legislative or executive departments."³⁶ Congress rejected this proposal, as well as a substitute amendment to make the three departments "separate and distinct."³⁷

Although powers are not separated in a pure sense, it does not help to characterize the federal government as a "blend of powers." The branches have distinctly different responsibilities, practices, and traditions. A certain distance between the branches is preserved by Article I, Section 6, of the Constitution, which prohibits members of either house of Congress from holding

33. Quoted in Vile, *Constitutionalism and the Separation of Powers*, at 153.

34. Federalist 37 and 47 attempted to rebut some of the Antifederalist objections regarding blended powers. For the latter, see Morton Borden, ed., *The Antifederalist Papers* (1965), papers 47, 48, 64, 67, 73, and 75.

35. 3 Elliot 280, and 4 Elliot 116, 121; John Bach McMaster & Frederick D. Stone, eds., *Pennsylvania and the Federal Constitution* 475–77 (1888).

36. Edward Dumbauld, *The Bill of Rights and What It Means Today* 174–75, 183, 199 (1957).

37. For the congressional debates, see 1 *Annals of Congress* 453–54 (June 8, 1789) and 789–90 (Aug. 18, 1789). For action by the Senate, see U.S. Senate, *Journals*, 1789–1794, I, 64, 73–74 (1820).

any other civil office (the Incompatibility Clause).³⁸ Article I, Section 6, also prohibits members of Congress from being appointed to any federal position whose salary had been increased during their term of office (the Ineligibility Clause). The framers wanted to prevent the executive from using the appointment power to corrupt legislators.³⁹

Congress is prohibited from increasing or diminishing the compensation of the President during the President's term of office or diminishing the compensation of the judiciary.⁴⁰ The Speech or Debate Clause is designed to protect legislators from executive or judicial harassment.⁴¹ The purpose of this clause is to "preserve the constitutional structure of separate, coequal, and independent branches of government."⁴²

Every occupant of the White House, after a short time in office, appreciates the degree to which an institutional separation exists, whether Congress is in the hands of the President's party or the opposition. That is as it should be. The President does not share with Congress his pardoning power, nor does Congress share with the courts its taxing and appropriations powers (although the judiciary monitors legislative activity). In 1974 the Supreme Court highlighted the separation that exists in the federal government by stating that the judicial power vested in the federal courts by Article III of the Constitution "can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."⁴³

Durability of the Doctrine

Has the balance among political institutions, as fashioned by the framers, failed to meet the test of time? Have events overtaken theory? Tocqueville, quoting with approval a passage from Jefferson, believed that the "tyranny of the legislature" in America would continue for a number of years before being replaced by a tyranny of the executive.⁴⁴ Yet presidential power, after cresting

38. But see *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974), in which the Supreme Court denied standing to plaintiffs who challenged the right of members of Congress to hold a commission in the armed forces reserves.

39. 1 Farrand 379-82, 386-90; 2 Farrand 283-84, 489-92.

40. For a case on judicial salaries and the No-Diminution Clause, see *United States v. Will*, 449 U.S. 200 (1980).

41. *United States v. Johnson*, 383 U.S. 169, 177 (1966).

42. *United States v. Helstoski*, 442 U.S. 477, 491 (1979).

43. *United States v. Nixon*, 418 U.S. at 704.

44. 1 Tocqueville, *Democracy in America* 280 (2 vols., 1945 ed.).

with Abraham Lincoln, subsided in the face of a determined and resurgent Congress. Writing in 1885, Woodrow Wilson believed that Congress had become the dominant branch. He said that the Constitution of 1787 was a form of government in name rather than in reality, "the form of the Constitution being one of nicely adjusted, ideal balances, whilst the actual form of our present government is simply a scheme of congressional supremacy."⁴⁵

Two decades later, glancing with covetous eyes toward the White House, Wilson predicted that the President "must always, henceforth, be one of the great powers of the world. . . . We have but begun to see the presidential office in this light; but it is the light which will more and more beat upon it."⁴⁶ The new wellspring of presidential power, according to his analysis, was the burden of international responsibilities thrust upon the United States. The Great Depression of the 1930s, joined with the personal qualities of Franklin D. Roosevelt, gave further impetus to executive power.

The reputation of Congress plummeted with such swiftness that Samuel P. Huntington, in an influential study published in 1965, suggested that unless Congress drastically altered its operation it should abandon its legislative role and merely concentrate on serving constituents and overseeing federal agencies.⁴⁷ The condition of Congress appeared to deteriorate even further, for in 1968 Philip B. Kurland charged that it did not have the "guts to stand up to its responsibilities." Congress was prostrate, the President transcendent. Kurland invited us to visit the "sickbed of another constitutional concept—the notion of separation of powers." Not only was the patient diseased; the affliction seemed terminal. Theoretically a cure was possible, but Kurland saw no grounds for optimism. The patient had lost the will to live.⁴⁸

These dire predictions suggest that the imbalance between President and Congress is chronic and permanent. At no time, however, has either branch been as all-powerful or as defective as critics claimed. The political system displayed a capacity for self-correction. Lyndon Johnson and Richard Nixon, testing the limits of presidential power during the 1960s and 1970s, were driven from office. Congress, flexing its muscles during this time of reassertion, ran into barriers erected by the courts. In 1976 the Supreme Court ruled against the Federal Election Commission because Congress had staked out a

45. Woodrow Wilson, *Congressional Government* 6 (1885).

46. Woodrow Wilson, *Constitutional Government in the United States* 78 (1908).

47. Samuel P. Huntington, "Congressional Responses to the Twentieth Century," in David B. Truman, ed., *The Congress and America's Future* 5–31 (1965). Writing a year later, however, Ralph K. Huitt argued that Congress played a more important part in legislation than its critics realized. See his "Congress, the Durable Partner," originally published in 1966 and reprinted in Ralph K. Huitt & Robert L. Peabody, *Congress: Two Decades of Analysis* 209–29 (1969).

48. Philip B. Kurland, "The Impotence of Reticence," 1968 *Duke L.J.* 619, 621.

role for itself in the appointment of four of the commission's six members. The Court held that this procedure violated the separation doctrine. Congress could not both legislate and enforce.⁴⁹

Between 1983 and 1986, the Court flirted with a rigid and impractical notion of separation of powers, suggesting that once Congress legislated, it could not participate in any way in the administration of a law.⁵⁰ Although not directly overruling those decisions, the Court in 1988 and again in 1989 issued rulings more favorable toward the overlapping of powers, emphasizing checks and balances over a pure separation of powers.⁵¹ In recent years, a 5-4 Supreme Court has used its political power to strike down congressional legislation on campaign finance (*Citizens United* in 2010) and to defer to legislative judgment with the Affordable Care Act (*National Federation of Independent Business v. Sebelius* in 2012).

The separation doctrine, subjected to ridicule for much of the twentieth century, still retains vitality. A longer view of American history provides room for optimism. Senator George Wharton Pepper in 1931 offered this perspective: "If the geometers of 1787 hoped for perfect peace and if the psychologists of that day feared disastrous conflicts, history, as so often happens, has proved that hopes were dupes and fears were liars. There has not been perfect peace; but the conflicts have not proved disastrous."⁵²

Implied Powers

In civics courses we are taught that the American Constitution is one of enumerated powers. This is satisfactory only if we stay within the classroom. Once we venture out and observe the actual workings of government, we confront a perplexing array of powers that are not expressly stated. They parade under assorted names: implied and inherent, incidental and inferred, aggregate, powers created by custom and acquiescence, and delicate "penumbras," "interstices," "emanations," and "glosses" that add strange new qualities to the Constitution. Whatever the name, the result is identical: the conferral of a power that is neither expressly stated in the Constitution nor specifically granted by Congress.

49. *Buckley v. Valeo*, 424 U.S. 1 (1976).

50. *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986).

51. *Morrison v. Olson*, 487 U.S. 654 (1988); *Mistretta v. United States*, 488 U.S. 361 (1989).

52. George Wharton Pepper, *Family Quarrels: The President, the Senate, the House* viii (1931).

The “genius and spirit of our institutions are hostile to the exercise of implied powers.” Thus spake the Supreme Court in 1821. After making the appropriate gesture it proceeded to deal amicably with these hostile forces. It was utopian, said the Court, to believe that government could exist without allowing the exercise of discretion somewhere. In this particular case the Court recognized that Congress possessed powers not expressly granted by the Constitution: the power to issue warrants to compel a party’s appearance and the power to punish for contempt.⁵³

If a constitution is intended to limit power, and if we admit powers that are not expressly stated, can government be kept within bounds? Let the imagination run to far corners, the answer is no. Let experience be our guide (the framers’ preference), and the prospect is more reassuring. The American Constitution cannot survive purely on the basis of express powers or “strict constructionism,” a phrase made popular by recent administrations. Implied powers are required for any government. As Madison noted in *Federalist* 44, “No axiom is more clearly established in law, or in reason, than that whenever the end is required, the means are authorized; whenever a general power to do a thing is given, every particular power necessary for doing it is included.”

The debate in 1789 on the Bill of Rights settled the need to grant implied powers to government. Members of the First Congress proposed that the Tenth Amendment be so worded that all powers not “expressly delegated” to the federal government would be reserved to the states. Madison immediately objected, insisting that it was impossible to limit a government to the exercise of express powers. There “must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutiae.” After eliminating the word “expressly,” the Tenth Amendment was adopted with this language: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁵⁴

Chief Justice Marshall cited this debate when he ruled on the implied power of Congress to establish a national bank, even though that power is not expressly authorized by the Constitution. Marshall observed that there was no phrase in the document that (like the Articles of Confederation) “excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.”⁵⁵ A constitution represented a general structure, not a detailed instruction manual:

53. *Anderson v. Dunn*, 6 Wheat. 204, 225 (1821).

54. 1 *Annals of Congress* 761 (Aug. 18, 1789).

55. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315, 404 (1819).

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.⁵⁶

In interpreting the Constitution it is important to understand that government is created to carry out certain functions required for the people. A number of essential activities find no ready reference in the Constitution. As Marshall remarked: "All admit, that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress."⁵⁷

The debate on implied powers is frequently sidetracked by partisan and policy motivations. Although Marshall upheld the U.S. Bank partly on the strength of Madison's reasoning on the Tenth Amendment, Madison strongly *opposed* the bank in 1791. This time he spoke against implied powers, insisting that the Constitution was not "a general grant, out of which particular powers are excepted; it is a grant of particular powers only, leaving the mass in other hands."⁵⁸ Despite Madison's opposition, the bill for a national bank passed the House of Representatives by a vote of 39 to 20.

Two years later Madison again assumed a partisan stance on implied powers. After President Washington issued what is now known as the Neutrality Proclamation, his administration was subjected to bitter attacks from those who sympathized with France. Alexander Hamilton, writing under the pseudonym "Pacificus," denied that the proclamation had been issued without authority. Hamilton derived the power to issue proclamations from the general clause of Article II of the Constitution: "The executive Power shall be vested in a President of the United States of America." He believed that it was unsound to limit the executive power to the particular items enumerated in subsequent sections. They should not derogate from the "comprehensive grant" of power in the general clause "further than as it may be coupled with express restrictions or limitations." With the exception of the Senate's participation in the appointment of officers and in the making of treaties, and

56. Id. at 406.

57. Id. at 415.

58. 2 Annals of Congress 1945 (Feb. 2, 1791).

Congress's power to declare war and to grant letters of marque and reprisal, all other executive powers were lodged solely in the President.⁵⁹

Jefferson, outraged by this doctrine, wrote to Madison: "For God's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in the face of the public."⁶⁰ Madison produced five articles under the name "Helvidius," charging that Hamilton's reading of the Constitution must be condemned "as no less vicious in theory than it would be dangerous in practice." The expansive interpretation of executive power would mean that "no citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative."⁶¹

Madison indulged in hyperbole, as did Hamilton. We could scarcely expect much else in the supercharged political atmosphere of 1793, heightened as it was by the intense rivalry between Hamilton and Jefferson in the Cabinet. But the issue they raised was to remain active. By the end of the nineteenth century the issue of implied powers for the President reached the Supreme Court in the case of *In re Neagle* (1890). Justice Stephen Field, serving as circuit justice in California, had his life threatened by two people he had sent to jail, David and Sarah Terry. David Neagle, a U.S. deputy marshal, was assigned to ride circuit to offer protection. One morning during breakfast, Field was assaulted by David Terry. Neagle, after identifying himself, shot and killed Terry. No statute authorized the President to appoint a deputy marshal for the purpose of protecting a Supreme Court Justice traveling in his circuit.

The Court, split 6 to 2, upheld the assignment of Neagle and his immunity from state law. His attorney acknowledged that there was no single specific statute making it a duty to furnish protection to a Supreme Court Justice. To the attorney, however, whatever was "necessarily implied is as much a part of the Constitution and statutes as if it were actually expressed therein."⁶² Justice Miller, announcing the opinion for the Court, agreed: "In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is 'a law' within the meaning of this phrase."⁶³

The two dissenting Justices did not dispute the proposition that "whatever is necessarily implied in the Constitution and laws of the United States is as much a part of them as if it were actually expressed." But they related im-

59. 4 The Works of Alexander Hamilton 437-39 (Lodge ed.).

60. 6 The Writings of Thomas Jefferson 338 (Ford ed.).

61. 6 The Writings of James Madison 152 (Hunt ed.).

62. *In re Neagle*, 135 U.S. 1, 27 (1890).

63. *Id.* at 59.

plied powers to the clause in Article I that augments the powers of Congress: "Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof." Finding no such law and believing that the federal government was powerless to try to punish a man charged with murder in this offense, they would have had Neagle placed in the custody of the sheriff of San Joaquin, California, to be tried by the courts of that state.⁶⁴

Theodore Roosevelt and William Howard Taft, in their debate on the boundaries of presidential authority, appear to have held diametrically opposed positions on implied power. Roosevelt asserted that it was the President's right and duty to do "anything that the needs of the Nation demanded, unless such action was forbidden by the Constitution or by the laws."⁶⁵ His argument follows the one presented in Hamilton's "Pacificus" writings. Taft maintained that the President "can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof."⁶⁶

Use of the words "express" and "specific" appears to put Taft in the camp of those who believe in enumerated powers. But it is clear that he recognized the need for implied powers—powers that can be "fairly and reasonably traced" or "justly implied." He even adds to the Constitution a "necessary and proper" clause for the President. When Taft's study is read in full, it is evident that he believed in a generous interpretation of executive power: incidental powers to remove officers, inferable powers to protect the lives and property of American citizens living abroad, powers created by custom, and emergency powers (such as Lincoln's suspension of the writ of habeas corpus during the Civil War). Summing up, Taft said that executive power was limited "so far as it is possible to limit such a power consistent with that discretion and promptness of action that are essential to preserve the interests of the public in times of emergency, or legislative neglect or inaction."⁶⁷

64. *Id.* at 77–78, 83. See also *In re Debs*, 158 U.S. 1 (1895), which supported the President's use of military force to break a railroad strike.

65. 20 *The Works of Theodore Roosevelt* 347 (1926).

66. William Howard Taft, *Our Chief Magistrate and His Powers* 139–40 (1916), available in paperback under the title *The President and His Powers* (1967).

67. For specific references in Taft's 1916 edition, see pp. 56 and 76 on removal powers, p. 95 on inferable powers, p. 135 for powers created by custom, p. 147 for suspension of habeas corpus, and p. 156 for the need for executive discretion and promptness of action. A comparison between Roosevelt and Taft appears in Fisher, *President and Congress*, at 33–37.

Inherent Powers

Federal courts, scholars, and public officials at times refer to “inherent” presidential power when the more accurate word is “implied.” The two terms are fundamentally different. Implied powers are drawn reasonably from express powers. They are therefore anchored in the Constitution. Inherent powers, by definition, are not drawn from express powers. As the word suggests, these powers “inhere” in a person or an office. *Black’s Law Dictionary* has defined inherent power in this manner: “An authority possessed without its being derived from another. . . . [P]owers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants.”⁶⁸ As a concept, inherent power is clearly set apart from express and implied powers.

The Constitution is protected when Presidents act under express and implied powers. It is in danger when they claim inherent powers. A constitution safeguards individual rights and liberties by specifying and limiting government. Express and implied powers serve that purpose. Inherent powers invite claims of power that have no limits, other than those voluntarily accepted by the President. What “inheres” in the President? The word “inherent” is sometimes cross-referenced to “intrinsic,” which can be something “belonging to the essential nature or construction of a thing.”⁶⁹ What is in the “nature” of a political office? Nebulous words and concepts invite political abuse and unconstitutional actions. They threaten individual liberties. Presidents who assert inherent powers move the nation from one of limited powers to boundless and ill-defined authority, undermining republican government, the doctrine of separation of powers, and the system of checks and balances.⁷⁰

Several Presidents have claimed the right to exercise inherent powers. On each occasion they were rebuffed by Congress, the courts, or both: Truman trying to seize steel mills in 1952 to prosecute the war in Korea,⁷¹ Nixon impounding appropriated funds,⁷² Nixon conducting warrantless domestic surveillance,⁷³ and Bush after the 9/11 terrorist attacks creating military tribunals without first obtaining authority from Congress.⁷⁴

68. *Black’s Law Dictionary* 703 (5th ed. 1979).

69. *Merriam-Webster’s Collegiate Dictionary* 614 (10th ed., 1965).

70. Louis Fisher, “The Unitary Executive and Inherent Executive Power,” 12 *U. Pa. J. Const. L.* 569, 586-90 (2010); Louis Fisher, “Invoking Inherent Powers: A Primer,” 37 *Pres. Stud. Q.* 1 (2007).

71. *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952).

72. *Train v. City of New York*, 420 U.S. 35 (1975); Title X of the Budget Act of 1974, 88 Stat. 297 (1974).

73. *United States v. United States District Court*, 407 U.S. 297 (1972); Foreign Intelligence Surveillance Act, 93 Stat. 1788 (1978).

74. *Hamdan v. Rumsfeld*, 542 U.S. 557 (2006).

Custom and Acquiescence

The Supreme Court often discourages the idea that a precedent, even when repeated, represents an adequate basis for authority. In *Powell v. McCormack* (1969), the Court stated that because "an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."⁷⁵ For example, "local tradition" is insufficient justification for the systematic exclusion of blacks or other minorities from jury service.⁷⁶ Fifty years of relying on the legislative veto did not save it from being held unconstitutional by the Supreme Court in 1983, although this method of congressional control persists.⁷⁷

Still, an action based on usage may acquire legitimacy. Practice and acquiescence for a number of years can be instrumental in fixing the meaning of the Constitution.⁷⁸ To the extent that an action is favorably exposed to popular judgment, custom does expand power. The Supreme Court, upholding the President's removal power in a 1903 decision, based its ruling largely on the "universal practice of the government for over a century."⁷⁹ Here constitutional law is made not by the courts but by the conduct of the executive and legislative branches.

Taft, often identified with a strict reading of the Constitution and presidential power, recognized that executive authority is based partly on custom: "So strong is the influence of custom that it seems almost to amend the Constitution."⁸⁰ A specific example dates from his own administration. After Congress had opened public lands in the West to encourage oil exploration, settlers began to extract oil rapidly, fearing that entrepreneurs on adjacent lots might tap from the same source. Because of the limited supply of coal on the Pacific coast for the navy, it appeared that the federal government might have to purchase from the private sector the very oil it had given away.

Taft issued a proclamation to withdraw the affected lands from private exploration. In the Supreme Court, it was argued that the President could not suspend a statute or withdraw land that Congress had thrown open to acquisition. The Court declined to approach the controversy from the standpoint of abstract constitutional theory. The President's action, it said, was based on

75. *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969).

76. *Eubanks v. Louisiana*, 356 U.S. 584 (1958).

77. *INS v. Chadha*, 462 U.S. 919 (1983); Louis Fisher, "The Legislative Veto: Invalidated, It Survives," 56 *Law & Contemp. Prob.* 273 (1993).

78. *Stuart v. Laird*, 5 U.S. (1 Cr.) 299, 309 (1803).

79. *Shurtleff v. United States*, 189 U.S. 311, 316 (1903). Additional commentary on custom and acquiescence appears in 16 *American Jurisprudence* 264-70 (1964).

80. Taft, *Our Chief Magistrate and His Powers*, at 135.

and supported by years of precedents. Although it was true that the President had acted without statutory authority (and in fact had acted against it), the Court held that "nothing was more natural than to retain what the Government already owned. And in making such orders, which were thus useful to the public, no private interest was injured. . . . The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location."⁸¹ It was not until 1976 that Congress reversed this interpretation of presidential power.⁸²

Justice Frankfurter described the cumulative impact of uncontested executive actions in these words: "A systematic, unbroken executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by §1 of Art. II."⁸³ In that same decision—the Steel Seizure Case of 1952—Justice Jackson spoke of a "zone of twilight" in which the distribution of power between Congress and the President is uncertain and "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."⁸⁴ Justice Brennan later noted: "The more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation."⁸⁵ Custom is a source of executive power—particularly when Congress fails to challenge and check.

Acquiescence has been part of Congress's record in permitting the war power to drift to the executive branch. In 1969 the Senate Foreign Relations Committee tried to explain this tendency by saying that Congress was unprepared for America's new role as a world power and the extraordinary demands placed on the Constitution. An atmosphere of real or contrived urgency encouraged legislative passivity. Congress was also overawed by the "cult of executive expertise." In addition, a legacy of guilt remained in the Senate after its rejection of the Covenant of the League of Nations in 1919. Senators practiced a form of penance that has "sometimes taken the form of

81. *United States v. Midwest Oil Co.*, 236 U.S. 459, 471 (1915).

82. 90 Stat. 2792, sec. 704(a) (1976).

83. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

84. *Id.* at 637 (Jackson, J., concurring).

85. *Walz v. Tax Commission*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring). See also *Payton v. New York*, 445 U.S. 573, 600 (1980), and *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). An excellent critique of the reliance on custom is by Michael J. Glennon, "The Use of Custom in Resolving Separation of Powers Disputes," 64 B. U. L. Rev. 109 (1984).

overly hasty acquiescence in proposals for the acceptance of one form or another of international responsibility."⁸⁶ The legacy of guilt here belongs more on President Wilson for refusing to accept Senate amendments.⁸⁷

Legislators are said to acquiesce because of the superior information and technical knowledge available to the executive branch. This attitude conceals a hidden motivation: an unwillingness to be held responsible for issues of national security and military preparedness. Delegation and acquiescence are natural by-products of the better-safe-than-sorry philosophy. In the years following World War II, the executive branch has repeatedly displayed its capacity to act on false information in both domestic policy and national security. No one need be awed by announcements from Presidents or executive officials.

The principles cited in this chapter provide the broad framework for the creation and protection of constitutional rights in America. The Constitution supplies a general structure for the three branches of government, assigns specific functions and responsibilities to each, and reserves certain rights to the people. Armed with powers of self-defense, the branches of government intersect in various patterns of cooperation and conflict. Strong public pressures beat against the branches, raising new constitutional issues and influencing their eventual resolution by legislators, executive officials, and judges.

86. S. Rept. No. 129, 91st Cong., 1st Sess. 15-16 (1969).

87. Louis Fisher, *Presidential War Power* 80-83 (3d ed. 2013).