

CHAPTER 3

Federalism and the Separation of Powers

CHAPTER OVERVIEW

Two of America's most important institutional features are federalism and the separation of powers. Federalism is an institutional structure that seeks to limit government by dividing it into national and state levels. Separation of powers seeks to limit the power of the national government by dividing its functions across legislative, executive, and judicial branches, compelling each branch to share governmental power.

Federalism—the distribution of power among the national government and the states—has changed enormously since the writing of the Constitution as the powers and limitations of the national and state governments have been renegotiated throughout American political history. Although the experience under the Articles of Confederation convinced many framers of the need for a stronger central government, the colonial legacy and historical attachments to the states necessarily dictated a federal framework in which the states retained important powers. Indeed, throughout most of the nineteenth century, the national government's role was remarkably constrained. Still, the seeds of national power were being planted, and by the twentieth century, the balance of power had shifted in favor of the national government. Much of this change can be attributed to changes in popular conceptions of the proper balance of power, beliefs among competing groups regarding where their interests are best served, and the way emerging realities and needs have called for increased control at the national level.

Traditionally, American federalism worked under a system of *dual federalism* in which the powers and responsibilities of the national and state governments were defined with relative clarity. But even in this traditional system, the Constitution's ambiguity about the reach of federal and state power led

to a continued negotiation of the federal contract. Constitutional provisions such as the necessary and proper clause, the supremacy clause, and the commerce clause were the bases of important constitutional struggles over federal power. By the 1950s, the national government used *cooperative federalism* to provide positive inducements, mostly through grants-in-aid, to get the states to act as it wished. Eventually, beginning in the 1960s, the national government employed what is called *regulated federalism* to compel states to act in accordance with its wishes or risk losing federal assistance in other areas. The national government has even used an associated tactic, known as unfunded mandates, which compels states to follow national government dictates but also to find their own ways to pay for implementation of the policy. From dual federalism to regulated federalism, the overall trend has been toward the expansion of national government power and influence; only during the most recent period of *new federalism* have agents of the national government sought to return discretion and influence to the states to make and implement public policies.

Still, the Obama administration has evinced a greater affinity for federal authority, perhaps signaling a resurgence of patterns of regulated federalism. In both the millions of dollars issued in federal grants in Obama's 2009 budget and the health care reform law, new legislation seems to favor federal government power over state autonomy, though some state officials have resisted. In this latest ambivalent moment, the Supreme Court stands as a referee mediating conflicts among citizens and between levels of government as to where decisions and policies are most appropriately made and where power in the federal system most appropriately resides.

The division of labor and responsibility in the federal system is matched by the division of labor among the legislative, executive, and judicial branches of government. Rather than a strict separation, however, the Constitution provides for a series of structural relationships where the powers are, in Madison's words, "connected and blended." The imposition of such intertwined structural relationships transformed the "mere parchment barriers" into complex institutional arrangements, where actors in different branches of the national government had appropriate and sufficient power to check the activities of actors in other branches. This system of checks and balances necessitates broad consensus for implementing governmental decisions across the various departments of government at the national level.

As was the case with the evolving balance of power in the federal relationship, the checks and balances system in America's separation of powers is itself a contract that has been renegotiated throughout American political history. Although the framers of the Constitution envisioned that the legislative branch would be supreme at the national level, legislative supremacy has

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been supplanted by presidential government since 1937. And as was the case with the allocation of power among the three branches of the national government, whereas the Supreme Court has been more activist in overturning congressional decisions, it has been largely deferential to the increasing power of the executive branch since the New Deal. The framers' vision of separation of powers rests, in part, on the expectation that individual officeholders would protect the powers of the institutions they controlled in efforts to protect their own power and influence. But whereas James Madison famously wrote of the separation of powers in *Federalist 51* that "ambition must be made to counteract ambition," in recent years, scholars of the separation of powers have wondered if the presidential government that emerged during the New Deal has been taken too far.

The patterns of conflict and cooperation follow closely the patterns of divided and unified party control of government. From 2001 to 2006, the Bush administration was unusually aggressive in asserting a unitary executive theory that justified expansion in executive power, while the Republican-controlled Congress, critics charged, failed to sufficiently "counteract" the "ambition" of the White House. To be sure, the return of divided government after the 2010 elections has spurred more conflict between the Republican-controlled House of Representatives and the Obama administration than existed when the Democrats controlled both chambers of Congress. Critics of the American constitutional framework often point to the dispersion of power in the federal framework and to the separation of powers as a source of weakness and incoherence. In short, they would argue that these structures provide too many impediments to governmental action. Still, it is important to remember that the framers—fearful of tyranny—did not want to make such action easy.

Discussion Topics and Questions

1. Consider the division of power in the federal framework under the Articles of Confederation and the first few decades under the Constitution. Many Americans at the time considered themselves New Yorkers, Marylanders, Virginians, and so on, rather than Americans. And the individual states remained sovereign despite the increase in the power of the central government under the Constitution. Some have argued that the division of authority under the Articles and even under the Constitution reflects rather a transnational organization such as NATO, the United Nations, or the European Union. What do you think? How are the Articles different from a transnational organization? How are the two analogous? Does the American experience hold any lessons for the prospects of globalization?

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2. Getting the fifty states to act in concert is difficult. What role do instruments such as grants and mandates or the federal relationships known as cooperative federalism and regulated federalism play in overcoming the difficulties associated with achieving collection action? Why does the national government employ these devices? What do these developments mean for the future of the federal balance of power?
3. In *Federalist 39*, James Madison argues that the Constitution has created a government that is “neither wholly federal nor wholly national.” He argues instead that the Constitution reflects a mix of federal principles and nationalizing forces. How has this mix changed throughout American political history? What explains this change? What special role do the Supreme Court and the federal judiciary play in determining the relative balance of power between the national and state governments?
4. Is the separation of powers a good idea? Proponents of the system argue that it allows for a check on the various departments of government. Americans are often so wedded to the idea of separated powers that we believe that without such arrangements, tyranny, corruption, and all other manner of governmental vices would ensue. However, other successful democracies mix the executive and legislative branches of government in profitable ways. Some even argue that without such a mix it is difficult to hold the government as a whole accountable for its actions, considering that the separation of powers provides politicians with a blame-avoidance structure whereby Congress can blame the president, and vice versa. What are the respective benefits and costs of a separated system and a parliamentary system that mixes executive and legislative authority?
5. In what ways does the issue of same-sex marriage exemplify both the flexibility allowed in the American federal system and the problem of coordinating the sometimes vastly different political outlooks and political cultures of America’s diverse states? In what ways might same-sex marriage be a good example of federalism allowing America to experiment with new policies and new social forms? How might we consider proposed constitutional amendments to preclude states from having to grant “full faith and credit” to same-sex marriages a failure of federalism in this regard?

GETTING INVOLVED

Inasmuch as the national government can seem distant from individual citizens, Chapter 3’s focus on federalism provides a good opportunity to remind students that they are governed locally as well as by their national and state

governments. Have students examine local news sources for information on upcoming public meetings of their city or county council, the local school or zoning boards, or other local government meetings. Have students attend these meetings and report back on: (1) the kinds of public decisions that are made in their local communities on a regular basis; and (2) the amount of public participation and the kinds of voices represented in these meetings. Have them consider the extraordinary influence that citizens who do get involved might wield, given the nature of local government and the likely low levels of citizen awareness and participation in local policy making.

Class Activities, Demonstrations, and Simulations

1. Have students form small groups to debate on who was to blame (Democrats or Republicans) for the current budget deficit, Bush-era institutional struggles over court appointments, secrecy in the executive branch, the financial collapse in 2008, or the meager and slow nature of the economic recovery since then. After they have had time to debate each of these issues, have them identify themselves as either Democrats or Republicans (if independents, ask them which party they tend to favor). In most instances, Democrats will blame Republicans for these issues and Republicans will blame Democrats. Ask students to consider what this state of affairs means for the prospect of holding the government as a whole collectively responsible for its actions. Ask them to consider whether holding the government accountable is easier when one party controls both the Congress and the White House.
2. *Understanding Politicians' Goals.* What do governors want from the federal system? What do senators, House members, and the president want? Have students consider who, among political elites, gains from the use of categorical and block grants. What exactly do these various politicians gain from the use of each? This discussion might lead to an overall consideration of how and why politicians want and use discretion in their decision making for both political and policy purposes. To drive home the fact that such federalism issues are not merely partisan issues that pit Democrats against Republicans, have students examine the website of the bipartisan National Governors Association (www.nga.org). Click the NGA Policy Positions link under Federal Relations. Examine the NGA's permanent policy statement on Principles for State-Federal Relations as well as the association's statements on other policy issues. Have students consider and discuss how the goals (and thus the behavior) of governors differ from those of policy makers at the federal level. What does the Governors

Association’s call for national officeholders to exercise federal forbearance reveal about the common goals and purposes of the nation’s governors?

TEACHING SUGGESTIONS FOR SUPPLEMENTARY DATA SLIDES

Having divided power between the national government and the states, the Constitution produced ongoing contests regarding where the power appropriately resides. Moreover, federalism produces tensions between America’s increasing aspirations for national standards and its traditional disposition to allow states latitude about how to proceed. Examining the “Medicaid and FMAP Rates, 2009” and “Vote by Mail Policy” figures, ask students to consider the wisdom of allowing state flexibility in these two different policy areas. What is gained and what is lost by letting the states decide? What patterns exist? Have students explore a range of potential explanations, including economic factors, political factors, and community standards/cultural factors that might exist in different states and different regions of the country and how they might affect each state’s disposition toward means-tested redistributive policies and liberalizing access to the polls. How might the “Growth in Federal Grants-in-Aid” affect the balance between, on the one hand, national standards and uniformity and, on the other hand, state flexibility and autonomy?

ANALYZING THE EVIDENCE

Many questions throughout American political history and in contemporary public policy center around issues of federalism. Ask students to recount the ideological arguments in favor of and in opposition to national health care and trace their lineage in the context of other federalism questions such as nullification, civil rights, and interstate commerce. Is the problem that as America developed national aspirations it nevertheless retained a federal system of government that divides power between the national government and the states? To the extent that increasing the percentage of Americans with access to health insurance is a national goal, how does the flexibility of federalism impact the differential achievement of that goal? Have students examine the figures on Medicaid Eligibility and Percent Uninsured for regional, ideological, and partisan patterns. It is also true that federalism allows for flexibility and experimentation. Examining the figure on the “Percentage of population without health insurance,” ask students to consider the extent to which Massachusetts led the way in decreasing the number of uninsured Americans.

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SAMPLE LECTURE

Antifederalists—those who opposed the ratification of the Constitution—objected to many different aspects of the Constitution in regard to the overall power of the national government, the conception of the republic they identified within the document, and the theories of governance exemplified by the processes it established. Because they were not unified in thought or coordinated in action, it would take an entire semester to chronicle the Antifederalist objections to the Constitution. Oddly enough, among the aspects of the Constitution that elicited the vociferous objections of some Antifederalists was the vice presidency.

Knowing something about the power, or lack of power, of the vice president, you may find this odd. Although recent vice presidents have exercised increasing influence within each succeeding administration, the vice presidency is still an office that lacks sufficient authority for independent action. The vice presidents of the eighteenth and nineteenth centuries were even less influential than those of the contemporary era. Given that the Antifederalists were primarily concerned with what they believed was the extraordinary power granted to the central government and its officials by the Constitution, it would seem odd that such a weak office would cause so much ink to be spilled on their side.

So what were the Antifederalists objecting to? Foremost among their objections to the construction of the vice presidency was the vice president's role as president of the U.S. Senate. Asking whether the vice president was to be part of the executive branch or the legislative branch, Antifederalists objected that the vice presidency violated the strict separation of powers. Moreover, they argued that one state—the vice president's home state—would have an extra vote in the Senate. This would give inordinate power to one state in a political system in which the states and state interests were expected to dominate.

Now I don't raise this controversy over the vice presidency because it was the most important bone of contention between the Federalists and the Antifederalists. It was not. Nor was the controversy over the vice presidency all that consequential a constitutional question throughout American political history—at least not thus far. The reason this vice-presidential controversy is important is that it sheds light on the nature of key political debates regarding the Constitution and gives us insight into the political matters that concerned many of the participants in the constitutional struggle. The issues of controversy regarding the vice presidency were concerned, first, with a politics dominated by states and thus concerned with the relative balance of power among those states and, second, with how power would be divided

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among the legislative, executive, and judicial branches of the government at the national level.

Questions such as these regarding the separation of power and federalism were at the heart of the constitutional struggle. It is important to understand that these structures were shaped by the historical moment and the political struggles at the time of the founding. For example, a key issue at the time of the writing and ratification of the Constitution regarded the nature of the relationship between the central government and the state governments. The two sides of this argument—those who argued for a stronger role for the central government and those who wanted to preserve the influence and sovereignty of the state governments—were informed by previous experiences with both strong and weak central governments. Many scholars argue that the Revolution was fought because certain colonial Americans chafed at the British government's management of colonial affairs. Although the British government had allowed the American colonies to develop largely unattended for much of the eighteenth century, both the allure of an economic boom in the colonies and an effort by the British to retire some debt forced the question regarding exactly what the relationship was between Great Britain and the American colonies. The question that confronted both the British and the Americans regarded sovereignty and where it resided. The British believed that sovereignty resided in Britain alone. Many Americans proposed a notion of dual sovereignty whereby the Crown was sovereign for some purposes but some amount of sovereignty still resided in the colonies as separate and popularly elected governments. The question of whether sovereignty could be split was very problematic for political thinkers at the time.

It would continue to be problematic for Americans as they wrestled with the division of power between the central and state governments under both the Articles of Confederation and the Constitution. These questions regarding the proper balance of power between the national and state governments went to the heart of the Federalist–Antifederalist debate over the Constitution. Whereas Antifederalists learned and remembered the lessons of life under the British Empire and the potential for strong governments to accrue even more power at the expense of liberty, Federalists were more concerned about the problems of the critical period and the potential for weak governments to degenerate into anarchy. As was the case with many different elements of the Constitution, the federal framework for dividing influence between the central government and the states was a result of compromises between different groups and political thinkers who generally either wanted more centralized authority or much less. The question regarding central and state authority was left unsettled and explicitly subject to change. In *Federalist 46*, Madison argued that the balance of power between the central and

state governments was changeable under the Constitution; he wrote that if “the people should in the future become more partial to the federal than to the State governments,” it would be due to the “manifest and irresistible proofs of a better administration” of the national government. In that case, he argued, “the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.” Thus, despite his own propensities for a stronger national government and, perhaps more important, despite the inclinations of most people toward the maintenance of power in the states, Madison and the Constitution left the balance of power between the central government and the states a contestable, changeable, and unsettled question. The extent to which these questions were left unsettled provoked a series of crises in American politics as different groups and interests interpreted the relative power between the central government and the states differently. The conflicts of the Civil War, the New Deal, and the civil rights movement were fought, at least in part, over the state-national relationship. The uneasy relationship between the states and the central government continues to be debated in contemporary political battles.

Throughout American history, the unsettled question of federalism has evolved in roughly three stages. Although the national and state governments have engaged in some manner of partnership throughout American history, much of the nineteenth century represents an era of what political scientists call dual federalism, in which the national government and the states worked under a division of labor, with the national government focused primarily on the promotion of commerce, leaving most other government functions to the states. Under this system of dual federalism, the state governments tended to dominate most spheres of American government. Whereas this state of affairs remained dominant throughout the nineteenth century and for the most part well into the twentieth century, by the 1930s, under Franklin Roosevelt’s New Deal, the national government began to expand its role in the federal system. For this change to take place, however, a new constitutional interpretation of the role of the national government in the federal framework was required. In a 1937 Supreme Court case—*National Labor Relations Board v. Jones and Laughlin Steel Corporation*—the Supreme Court reversed previous interpretations of the commerce clause and, many argue, the entire course of the American federal relationship. In this case, the Supreme Court expanded its definition of what constituted interstate commerce and, in turn, expanded exponentially the range of things the national government could do in American politics. No longer was the national government resigned only to the promotion of commerce between the states; increasingly, after 1937, the national government could also regulate state activity as long as it could establish some connection to commerce. This converted the commerce

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clause from a limitation on the expansion of the national government to a license and justification for expanding federal power.

The Great Depression, a more activist presidency, and an expanded bureaucratic state at the national level all combined to alter the federal balance of power during and after the presidency of Franklin Roosevelt. Playing an even greater role in the federal framework, the central government extended its reach into state and local affairs through the provision of grants-in-aid. To accomplish the complex policy goals of the contemporary era, grants-in-aid are important mechanisms that the national government can use to induce the very diverse state and local governments to act collectively for a federal—or even a national—purpose. The earliest grant-in-aid programs were developed as a mechanism to circumvent constitutional restrictions on the power of the national government. In the nineteenth century, when Congress sought to give aid to farmers in the form of land grants and agriculture-related education, it was unclear whether the Constitution allowed such congressional assistance because most agriculture at the time did not qualify as interstate commerce. Thus, Congress made grants available to the states that, in turn, would implement the national policy without raising the question of constitutionality. The national government's use of grants-in-aid is an important and telling example of how institutions can be employed to overcome collective action problems: when the national government seeks to get the states to act collectively, grant-in-aid inducements have proven to be useful policy tools.

The increased use of such grants in the twentieth century to positively induce states to engage in certain practices is known as cooperative federalism. Generally, we distinguish between two types of grants-in-aid: block grants and categorical grants. Block grants tend to be grants-in-aid given to states for more general purposes such as education and public works. Categorical grants, on the other hand, provide much more specific guidance from the national government authorities regarding how funds should be spent. In the end, national, state, and local governments cooperate to combine dollars from national, state, and local coffers to make and implement policy throughout the federal system. For the most part, the state and local governments have welcomed such federal dollars. Still, in this era of cooperative federalism, it is important to note that key political battles between national and state officials regarding who should exercise the most control have persisted. For example, the characteristic that most distinguishes block grants from categorical grants concerns who—national politicians or state and local politicians—has the most discretion and control over how the federal funds are spent. The decision to use block grants or categorical grants is an important political decision because it determines which politicians—

federal or state—get to decide how crucial federal funds are spent. As a rule, governors and other state officials prefer block grants to categorical grants because they allow these officials to enjoy more freedom to pursue their own political and policy goals.

Many argue that the cooperative relationship between the central government and the states has slowly given way to a system of national dominance. As state and local governments come to depend on such grant-in-aid support from the national government, the national government's ability to withhold grants becomes something of an important policy tool itself, as well as a source of influence for the national government. By the end of the twentieth century, observers noted that the power of the central government had so increased that the relationships between the central government and the state governments had become coercive in nature; that is, the central government began using its legislative powers and ability to fund programs in states to coerce states into complying with federal policies and mandates. In recent years, scholars of the federal system have argued that the era of cooperative federalism has given way to something that would more appropriately be termed *coercive federalism* or *regulated federalism*. Under such an arrangement, the national government threatens to withhold federal funds if state and local governments refuse to comply with and help enforce some other policy goal. For example, when the national government wanted states to lower speed limits, it threatened to withhold transportation dollars unless states complied. Like the influence of the national government in the era of cooperative federalism, such coercive or regulatory influence at the national level is a means of achieving collective action in a diverse and divided federal system.

Although the national government's ability to induce, direct, and even coerce the activities of state and local governments has increased, in recent years there seem to be signs of a reversal of this trend. During the Nixon and Reagan administrations, presidents touted what was known as a *new federalism* in which the national government would return more discretion over policy decisions to state and local officials. For example, the new federalism tended to rely more on block grants than on categorical grants. Moreover, particularly since the Republican takeover of Congress in the mid-1990s, the national government has shown interest in devolving power from the national government to the states. Finally, the courts have signaled their support for devolution as well. If the changing nature of the federal relationship began with the Supreme Court's new interpretation of interstate commerce in 1937, recent Supreme Court decisions seem to put the brakes on expanding national government power. In 1995, in a case called *United States v. Lopez* and again in 2000 in *United States v. Morrison*, the Rehnquist Court seemed

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willing to narrow the interpretation of interstate commerce and to restrict the power of Congress and, in turn, the national government over the states. Writing the majority opinion in *Lopez*, Chief Justice William Rehnquist said that for interstate commerce

to justify increased federal action, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Still, four Supreme Court justices disagreed with the majority's reversal in regard to the federal–state relationship. Led by Justices Souter and Breyer, these dissenting voices suggested that the Court's *Lopez* decision disregarded nearly sixty years of Supreme Court precedent and struck at the very heart of Congress's ability to make national policy.

This battle over the federal relationship is one that is sure to continue. Indeed, the Obama administration's health care law raises serious federalism issues in its effort to require states to establish insurance exchanges and expand their Medicaid programs. This has led a number of governors to object that the federal government has overstepped its authority and is infringing on state autonomy; several state attorneys general have filed suits in federal courts charging that the health care law's requirements violate the Tenth Amendment. Inasmuch as these questions remain up in the air and inasmuch as the balance of power on the Supreme Court represents a narrow majority in favor of restricting congressional and federal influence, the confirmations of Bush appointees John Roberts as chief justice and Samuel Alito as associate justice and Barack Obama's appointments of Sonia Sotomayor and Elena Kagan as associate justices likely will have important ramifications for the balance of power between the national government and the states. The Supreme Court is certain to weigh in on the constitutionality of the health care law.

Although there have been ebbs and flows in the changing balance of power between the state governments and the national government, the general trend throughout American history (and especially throughout the twentieth century and into the twenty-first) has been toward an increase in the role

and influence of the national government. Despite the importance of trends in recent years toward restricting the interpretation of interstate commerce, the new federalism, and devolution, the twentieth century was a century of expanding national government power in the United States. Besides dividing power between the central government and the states, the Constitution also divided power between the different departments of government at the national level. The same logic of pitting one set of political elites against another that was employed in the federal framework was also employed at the national level. One of the political thinkers that the framers of the Constitution, other Federalists, and even Antifederalists pointed to was Baron de Montesquieu. Montesquieu provided the theoretical basis for separated powers. Antifederalists contended that Montesquieu believed that the departments of government—legislative, executive, and judicial—needed to be completely separated from one another. And, they contended, this was a deficiency of the Constitution. Strictly speaking, the Constitution does not separate powers. As the political scientist Richard Neustadt writes, the Constitution establishes a system of “separate institutions sharing power.”¹ That is to say, although the legislative power is found most extensively in the U.S. Congress, the presidential veto as well as presidential powers to report to Congress on the state of the Union and convene Congress in times of necessity are legislative powers themselves. Thus, the legislative power is separated among the Congress and the presidency. Important aspects of the overall separated power structures in national government can be understood by examining the relationship between the legislative and executive branches of government. The Constitution sought to commingle the powers of the branches and establish institutional checks that prevented any department of government from dominating the others. In *Federalist 51*, James Madison wrote:

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 connected with each other as the nature of their common functions and their common dependence on the society will admit.

Notably, Madison considered legislative “predominance” an “inconveniency.” And his means of solving this problem was institutional. First, he sought to erect a barrier to legislative action in the form of bicameralism by pitting the House against the Senate. Moreover, Madison believed that a strong

1. Richard E. Neustadt, *Presidential Power and the Modern Presidents* (New York: Free Press, 1990), p. 29.

and independent presidency and executive branch would also counteract the predominance of Congress.

Through the process of “separating power” among the legislative, executive, and judicial branches, the Constitution pitted different political elites at the national level against one another, thus using the power of political actors at the national level to control, in part, the power of other political actors at the national level. Employing the goals and ambitions of national political elites to check the ambitions of other political elites, the “separated power” framework helped to arrest the power of the national government. Madison made this explicit in *Federalist 51* when he wrote:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

For Madison, arranging the different departments of government in this way ensured that “the private interest of every individual may be a sentinel over public rights.” This is an interesting concept that we should explore a little more deeply. Recall the view that the Constitution can be seen as a solution to the myriad problems that had emerged during the critical period (John Adams’s “intolerable burden of accumulated evils”). The institutional arrangements in the Constitution can also be the solution to the self-interested nature of politicians and political elites as well. As was the case with Madison’s plan for “curing the mischiefs of faction” in *Federalist 10*, in both the federal and separation-of-powers institutional structures, the Constitution does not seek to “solve” the problem of self-interest of individuals. Rather, these institutional structures seek to harness self-interest in such a way that, when channeled through the institutions of government, the self-interested behavior of state governments, the central government, and political actors within the separation-of-powers framework safeguard the liberty of individuals and fuel the performance of self-limiting government.

Although there are important constants in constitutional politics, the U.S. Constitution is a remarkably flexible document in terms of allowing for political power and influence to change over time in regard to both the federal balance of power and the balance of power among the three branches of government. Recall that in *Federalist 46*, James Madison argued that if the people changed their minds regarding the institutions they trusted most to pursue their interests, then “the people ought not surely to be precluded from

giving most of their confidence where they may discover it to be most due.” These relationships were left unsettled, at least in part. Just as the balance of power between the state governments and the central government has shifted over time, the balance of power among the three branches of government at the national level has changed dramatically throughout American political history. And, just as Madison had expected, politics and popular support would often be at the heart of changes in the balance of power in both the federal and separation-of-powers frameworks. As the political power of these various branches was enhanced by their ability to reach out to different groups in society and establish political bases of popular support, their ability to compete in the separated-power system at the national level was enhanced. Because the Constitution left many of the important functions of the national government open to contests among the legislative, executive, and judicial branches, it would be politics that would help to determine who dominated from one political era to the next.

The prospect of Democratic dominance in the 2008 elections, held as they were in the context of very low approval ratings for the outgoing Bush administration (and the Republican Party more generally) and a precipitous economic collapse, led Barack Obama to make bold promises of hope and change. But any call to national action in American politics will necessarily be filtered through the federalism and separation-of-powers frameworks. On the separation-of-powers front, Obama was elected atop a ticket that also produced large Democratic majorities in both the House and the Senate. Although there were important intraparty differences, the ambition of congressional Democrats in Obama’s first two years fueled rather than counteracted President Obama’s ambition to expand his influence and enact his policy goals. Still, the ambitions of well-placed Republicans in the Senate, particularly after the election of Scott Brown in Massachusetts, meant that even the ambitions of the minority party could counteract the president’s policy ambitions. Moreover, once Republicans took control of the House of Representatives after the 2010 elections, the return of divided government made clear that the ambition of Republicans in the House would serve as a potent counterpoint to the president’s ambitions for policy change and, of course, reelection.

This story has been somewhat different in regard to the federal framework. To be sure, Obama’s initial popularity, particularly in some states, led to a great deal of cooperation between the administration and Democratic governors. Still, a number of moderate to conservative states were led by Republican governors who had voiced significant opposition to Obama’s policies, even where those policies aim to provide more federal dollars to state governments. And with the rise of a Tea Party movement ideologically opposed

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to government activism and a growth in the number of Republican governors after the 2010 elections, opposition to administration policies in the federal system increased. Republican governors—aided by the federal division of power—constitute a significant source of conservative opposition to Obama.

However successful America's new experiment with unified national government will be, one thing is certain: critics will continue to raise questions about the proper division of power in both the separation-of-powers and the federal frameworks.

LECTURE OUTLINE

- I. Introduction: federalism and separation of powers
 - A. Antifederalists' objections to the vice presidency
 1. The vice president's state would have an additional vote in the Senate.
 2. It commingled executive and legislative powers.
 - B. Minor squabble over the vice presidency provides insights into the politics of the time and the concerns of the Federalists and Antifederalists.
 1. Federal balance of power and importance of the states
 2. Separation of powers

- II. Federal balance of power was at the heart of the constitutional struggle.
 - A. Federalist and Antifederalist dispute was fundamentally about the extent to which the states would maintain independence.
 1. Federalists argued for stronger central government.
 2. Antifederalists argued for state retention of sovereignty.
 - B. Although the Federalists won with the ratification of the Constitution, the division of power between the central government and the states remained flexible and unsettled.
 1. In *Federalist 46*, Madison argues that the people will decide the question of federal–state dominance.
 2. The balance of power has changed over time as we have vacillated between the poles of freedom and order.

- III. There have been three stages of federalism in American history.
 - A. Nineteenth-century dual federalism
 1. National government focused on promotion of commerce.
 2. Most remaining functions were retained by the states.

- B. Post–New Deal expansion of the role and function of national government: cooperative federalism
 - 1. 1937 Supreme Court case—*National Labor Relations Board v. Jones and Laughlin Steel Corporation*—provides an expanded interpretation of the commerce clause that empowers the national government to regulate as well as promote interstate commerce.
 - 2. Expansion of national bureaucratic state apparatus and more activist government leads to the national government employing grants-in-aid to induce state action.
 - a. Block grants
 - b. Categorical grants
 - C. National dominance and “regulated federalism”
 - 1. State reliance on national government grants allows national government to coerce state policy making under threat of withholding funds.
 - 2. “Cooperative federalism” gives way to increased national government power.
 - D. Returning power to states
 - 1. New federalism programs return some policy-making discretion to state officials.
 - 2. Republican takeover of Congress ushers in some continued devolution of policy-making power to states.
 - 3. Recent Supreme Court decisions begin to constrict the interpretation of the commerce clause and call into question congressional power vis-à-vis the states.
- IV. Separation-of-powers system is another means by which the Constitution divides power.
- A. Division of power among branches of government
 - 1. Legislative
 - 2. Executive
 - 3. Judicial
 - B. Traditional notion *à la* Montesquieu that powers needed to be strictly separated
 - 1. Antifederalists argued that the Constitution did not strictly separate these powers and that this was a deficiency of the plan.
 - 2. Federalists argued that rather than providing for a strict separation, the Constitution should provide for commingling of functions.

- a. The framers created a system of checks and balances.
 - b. Richard Neustadt argues that it in fact is a system of “separate institutions sharing powers.”
- V. The Constitution employs the separation of powers to avoid any branch’s becoming too dominant.
- A. Federalists feared legislative dominance.
 - B. They solved this problem by erecting structural obstacles to legislative action.
 - 1. Bicameralism
 - 2. Strong and independent executive branch
 - C. Separation-of-powers system pits the ambition of politicians against the ambition of other politicians.
 - D. Whereas the state of unified government from 2009 to 2010 muted separation of powers conflict between the Democratic Congress and the Obama administration, partisan conflict returned to the separation of powers with Republicans’ return to power in the House of Representatives.

Suggested Further Reading

Federalism allows for diversity of the states and regions under a broad umbrella of unity in the national government. For the classic treatment of how the federal principle has been applied in different countries (the United States, Switzerland, Canada, and Australia), see K. C. Wheare, *Federal Government* (New York: Oxford University Press, 1946). William H. Riker offers a more formalistic view of federalism that surveys its uses from ancient to medieval and modern times and examines the federal structure’s impact on other political institutions in *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964). On the state and national governments, as partners as well as competitors, see Daniel J. Elazar’s *American Federalism: A View from the States* (New York: Crowell, 1966).

Recent developments in federalism have returned scholarly attention to the subject. Paul E. Peterson’s *Price of Federalism* (Washington, D.C.: Brookings Institution, 1995) explores the appropriate division of power between state and national governments by different policy areas. Although Peterson recognizes an important role for the states, he argues that when it comes to redistributive policies such as welfare, devolving power to the states will result in a “race to the bottom” in the provision of these services. Timothy J. Conlan’s *From New Federalism to Devolution* (Washington, D.C.: Brookings Institution, 1998) examines the historical trend since the 1970s of returning

federal power to the states. This book considers the new federalism policies of the Nixon and Reagan administrations and the rapid devolution that House Republicans pursued once they took over Congress in 1995. For a discussion of how devolution fundamentally affects public policy priorities, see Pamela Winston's *Welfare Policymaking in the States: The Devil in Devolution* (Washington, D.C.: Georgetown University Press, 2002). Most recently, an account of the intellectual and historical underpinnings of American federalism can be found in Alison L. LaCroix's *The Ideological Origins of American Federalism* (Cambridge, Mass.: Harvard University Press, 2011).

To further explore issues regarding the separation of powers between Congress and the presidency on issues such as appointment and removal powers, the veto, appropriations and spending issues, and foreign policy and war powers, see Louis Fisher, *Constitutional Conflicts between Congress and the President*, 4th ed., rev. (Lawrence: University Press of Kansas, 1997). For a recent treatment of the vast rise of executive power, see Matthew Crenson and Benjamin Ginsberg, *Presidential Power: Unchecked and Unbalanced* (New York: Norton, 2007). Exploring the political side of these constitutional conflicts between Congress and the presidency, Benjamin Ginsberg and Martin Shefter examine the role of investigations and the criminal process in the battles over institutional politics in *Politics by Other Means: Prosecutors and the Press from Watergate to Whitewater*, 3rd ed. (New York: Norton, 2002). David R. Mayhew's *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–1990* (New Haven, Conn.: Yale University Press, 1991) provides an account of how divided party control of the Congress and the presidency can be (and has been) made to work over time.

It is interesting to note how the history of both federalism and the separation of powers are invoked and reconstructed to help politicians meet their goals. Forrest McDonald recounts the strategies used in the concept of states' rights in the nineteenth century in *States' Rights and the Union Imperium in Imperio, 1776–1876* (Lawrence: University Press of Kansas, 2002). And in *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Mass.: Harvard University Press, 1999), Keith E. Whittington examines how changing constructions of the meaning of the Constitution have both empowered and constrained political actors at different points in American history.

Suggested Videos

An excellent examination of the constitutional provisions regarding federalism can be found in *The Constitution: That Delicate Balance*, volume 13: "Federalism" (Annenberg/Corporation for Public Broadcasting Collection, 1982,

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60 minutes). Federal judges and legal scholars, including Kenneth Starr and the then future Supreme Court Justice Ruth Bader Ginsburg, examine the future of federalism from the point of view of the federal judiciary in *Federalism in the 21st Century* (C-SPAN Public Affairs Video Archives, 1993, 93 minutes). For an account of the extraordinary importance and strength of governors in the era prior to the New Deal, see *America—Huey Long* (Turner Home Entertainment, 1987, 88 minutes).

Key thinkers and foreign policy makers discuss the history and constitutionality of the War Powers Resolution at a conference at Hofstra University in *War Powers Resolution* (C-SPAN Public Affairs Video Archives, 1990, 90 minutes). Of course, many of the separation-of-powers disputes between Congress and the presidency are mediated by the United States Supreme Court; for a re-creation of a landmark constitutional debate over presidential power that includes both the late Chief Justice of the U.S. Supreme Court William Rehnquist and former Associate Justice Sandra Day O'Connor, see *Presidential Power in Times of Crisis: The Steel Seizure Case Revisited* (KTEH and Stanford University, 2003, 57 minutes).

Suggested Websites

Federalism—the division of power among the national, state, and local governments—is a key component of the U.S. constitutional system of government. Among many other similar groups, the National Governors' Association (www.nga.org), the National Conference of State Legislatures (www.ncsl.org), and the United States Conference of Mayors (<http://usmayors.org/>) seek to coordinate the actions of these various actors in the U.S. federal framework. Their websites explore contemporary issues in the context of federalism.

The Administrative Office of U.S. Courts' website offers useful exercises such as structured discussions on constitutional matters, including the separation of powers; see the Courts' treatment of separation-of-powers issues in the *Hamdan v. Rumsfeld* case at <http://www.uscourts.gov/EducationalResources/ConstitutionResources/SeparationOfPowers/Background.aspx>.