Separation of Powers: An Overview

Congressional Research Service

One of the key principles of the [U.S.] Constitution is separation of powers. The doctrine is rooted in a political philosophy that aims to keep power from consolidating in any single person or entity, and a key goal of the framers of the Constitution was to establish a governing system that diffused and divided power. These objectives were achieved institutionally through the design of the Constitution. The legislative, executive, and judicial branches of the government were assigned distinct and limited roles under the Constitution, and required to be comprised of different political actors. The constitutional structure does not, however, insulate the branches from each other. While the design of the Constitution aims, through separation, to prevent the centralization of power, it also seeks the same objective through diffusion. Thus, most powers granted under the Constitution are not unilateral for any one branch; instead they overlap. . . .

The American System in Global Context

The American system of separation of powers is not the most common arrangement of democratic institutions in the modern world. Most modern democracies are parliamentary systems, in which the legislative branch is sovereign, and the executive has no independent constitutional base of authority, instead being chosen by the legislature. . . . At their core, parliamentary systems are based on contested elections followed by unified party control of the powers of government. This is quite emphatically not the case with the American system. Our constitutional system is based on contested elections followed by separated control of the powers of governing. The system, by design, produces conflict. . . .

Separation of Powers: Origins

In order to fully illuminate the contemporary implications of our separation of powers system, it is helpful to understand its origins. The structure of the Constitution reflects the collective preferences of the state delegates who drafted it in 1787. These preferences were chiefly shaped by two things: the political philosophy of the colonial Americans, and their actual political experiences as English colonists. . . .

Enlightenment Thought

The modern conception of separation of powers developed largely among 17th and 18th century Enlightenment thinkers. Although many writers were active in this area, John Locke and Montesquieu are usually given credit for articulating the philosophy. In the *Second Treatise on Government*, Locke argues that a division between the legislative and executive powers is fundamentally necessary to secure the liberty of the people. If the two functions are fused into a single person or entity, the likely result is tyranny. . . .

In *The Spirit of Laws*, Montesquieu identifies three powers of the government: legislative, executive, and judiciary. He then argues for their placement in the hands of different people or entities. . . .

At the heart of the theory is a simple proposition about human nature: as noted by James Madison, men are not angels, and left unrestrained they will tend to abuse power. . . .

Early American Challenges

The dissatisfaction with the king and the colonial governors led many colonists in the 1770s to believe that strong legislatures were the key feature of optimal governments. . . . .

By the early 1780s, many began to rethink investing so much power in the legislatures. . . . The failure of the Articles of Confederation as a national governing document further eroded belief in government by legislature alone.

The Framers in Context

By the time the framers met to amend the Articles of Confederation, public opinion in the colonies had followed a meandering path, largely rejecting both the tyranny of an unchecked executive and the tyranny of an unchecked legislature. The proper arrangement of government for the enhancement of liberty is thus, they believed, one in which no one can gain unilateral power, and no power goes unchecked. As Madison argued in the *Federalist Papers*, the objective of the framers was to preclude a "faction" from gaining monopoly control of the government. . . .

Separation of Powers: Structure

The Constitution divides the federal government according to its core functions—legislative, executive, and judicial—and places each function primarily in a separate institution. The three institutions are given their distinct authority of their function, made

plain by the first sentences of each of the first three Articles. Article I begins, "All legislative power herein granted, shall be vested in a Congress of the United states." Article II begins, "The executive power shall be vested in a President of the United States of America." Article III begins, "The Judicial power shall be vested in one supreme Court[.]" This is separation of powers, as understood by the founders, in the most basic sense: the President is authorized to execute the law; Congress is authorized to make the law; and the Court is authorized to judge the law.

Separate Personnel

The Constitution specifically prohibits individuals from serving in Congress and another branch of the federal government. . . .

Independent Electoral Bases

The elected officials of the legislative and executive branches—the President, Vice President, Senators, and Representatives—are all drawn from constituencies that do not normally involve the other branches. The President and Vice President are chosen by electors from the states, all of whom are themselves currently chosen by popular vote in the states, but are by law picked in the manner each state legislature directs. Members of Congress are specifically barred from being electors, guaranteeing that they have no direct influence in the election of the President or Vice President. Members of the House and Senate are chosen by direct election in their districts and states, respectively, with no input from the other branches of the federal government.

While the federal judiciary is not filled in an independent manner—judges are nominated by the President and confirmed for office by the Senate—the Constitution mitigates legislative or executive branch intrusion into the judiciary by providing federal judges with tenure "during good Behavior," which in practice amounts to life tenure. . . .

Checks and Balances

While the Constitution provides separate institutions and bases of power, the structure does not insulate the branches from each other. While the design of the Constitution aims to prevent the centralization of power through separation, it also seeks the same objective through diffusion. . . . As political scientist Richard Neustadt has observed, what the Constitution created was "separate institutions sharing each other's power."

Overlapping Responsibility

Although each branch is the primary actor in the function that corresponds to its institution, no branch has unilateral control over its core function. Congress is vested with the legislative power, but the President may veto legislation—ensuring him/her a

bargaining position on legislation in most cases—and has the power to call Congress into session. The Supreme Court, through the implied power of judicial review, may declare acts of Congress and executive actions unconstitutional. The President is vested with the executive power, but Congress has legislative control over the bureaucratic design of the executive branch and the amount of financial resources the departments of the executive branch receive. Finally, while the Supreme Court has the judicial authority, Congress has the authority to create the inferior federal Courts and prescribe their jurisdiction and regulations, as well as to refine legislation in response to judicial decisions.

War and Foreign Policy

The Constitution specifically divides matters of war and foreign policy between the branches. The President is commander in chief of the armed forces under Article II, but Congress is granted the authority to declare war, raise and support an army and navy, and make rules governing the armed forces. Congress also has authority over appropriations, including funding for any war effort. The courts have the authority to declare actions of Congress or the President in relation to war unconstitutional.

General intercourse with other nations is also a shared responsibility. The President has many of the responsibilities of head of state, but the Senate provides its advice and consent to treaties, and Congress controls the appropriations and legislation needed to implement them. In other cases, Congress or the President may often find ways to reach agreements without a treaty, either through bilateral agreements of the executive branch, or, in the case of Congress, through public law.

Conflict

The constitutional structure of separation of powers generates strong political conflict. With political actors in each branch having preferences over public policy but not the capacity to unilaterally realize those preferences, it is inevitable that disagreement will be constant and political actors will seek to expand the power and influence of their respective branches. Far from a defect of the system, this conflict is the very essence of the framers' goal: arrange the federal government such that no faction can accumulate enough power to singularly dominate. . . .

Different Electora Bases

While the elected branches of the federal government have independent electoral bases (i.e., neither branch has a primary role in choosing the members of the other branch), they also have *structurally different* electoral bases. Representatives are elected every two years, from districts drawn to be approximately the same size. Senators are elected

every six years on staggered terms, from statewide votes. The President is elected every four years, from a national vote aggregated through state elections to an electoral college. At any given point in time, the House, Senate, and presidency will be filled with elected political actors drawn from different constituencies at different points in time. No single federal election in the United States can completely alter the political composition of the government; conversely, the composition of the government never completely reflects the preferences of the voters at any single point in time.

Consequently, the preferences of individual political actors, and the aggregate preferences of the elected branches of government, will never be perfectly aligned, and often will be in sharp conflict. Every election features important recent events, fresh issues, and new ideas that shift the preferences of voters and alter the electoral choices they make. All Americans are represented in the House, the Senate, and the presidency, but the differing aggregation systems—House districts, states in the Senate, and an indirect national vote for the presidency—create three bodies that, even if wholly elected at the exact same time, would sum to different preferences over policy.

Likewise, the varying length of terms for each of the elected branches creates different incentives and structures the political preferences of the actors. As the framers surmised, the shorter terms of Representatives would likely make them more responsive to rapid shifts in public opinion among their constituents, while the longer terms of Senators would insulate them against being aroused by quickly extinguished passions of public opinion. In addition to these regular time horizons for elections, the presidency now has a fixed time horizon; with a maximum of eight years in office, Presidents have strong incentives to move quickly to achieve their policy goals. Representatives and Senators, without such existential term limits, may often see less need for hurried action.

Foundations of U.S. Federalism

By Lee H. Rosenthal & Gregory P. Joseph

What precisely is American federalism? . . . The need for some degree of centralization among the various colonies became clear during the Revolutionary War. The demands of raising the army, putting it under a central command, supplying it, and raising funds for it exceeded state and local government capabilities. The revolutionaries recognized that some confederation was needed, but they remained deeply suspicious of centralized power. . . .

Articles of Confederation

The wartime urgency and the necessity of union, combined with the fear of a new overarching sovereign, led the revolutionaries to ratify the Articles of Confederation on March 1, 1781. The Articles left the states as the source of sovereign power but created a new central government with its powers derived from the consent of the states. . . .

The central government under the Articles was relatively feeble. The states delegated the central government limited powers and even more limited resources. That government was unable to levy taxes or regulate commerce and depended on the states for revenue; there was no executive and no independent judiciary; there were no standing land or sea forces; and any change to the Articles required the states' unanimous vote. Exercising the limited powers the new government did have, including making treaties and coining money, often required a majority or supermajority vote. . . .

The Articles proved unworkable. Disputes among states were difficult to resolve, and the central government was underfunded and unable to compel delinquent states to pay their shares of common expenditures. . . .

The challenge was to preserve state sovereignty within a national polity that could operate on a world stage, resolve interstate differences, and facilitate common interests. Fears that a central government would accumulate too much power and erode state sovereignty persisted, along with the fear that no central authority could govern such a huge expanse of territory.

The solution the Framers posited and the states adopted was the federalism embodied in the Constitution. "The Framers split the atom of sovereignty. The genius of their idea was that American citizens would have two political capacities, one state and one federal, each protected from incursion by the other." . . .

Developing "A More Perfect Union"

Between May and September of 1787, the Constitutional Convention met in Philadelphia to address and try to remedy the failures of the Articles of Confederation. Although the word "federalism" appears nowhere in the Constitution, it pervades the structure of the government the document creates.

Article I, Section 8 specifically enumerates the powers of Congress. At the time of the founding, there was little controversy that many of these powers were best suited for national regulation, including the power to provide for a common defense, declare war, raise an army and maintain a navy, regulate naturalization, coin money, regulate international commerce, and punish piracy and violations of international law. . . .

The Commerce Clause . . . empowers Congress to “regulate commerce . . . among the several states . . . .” The Commerce Clause . . . has been read to allow Congress to regulate any activity that in the aggregate has an effect on a national market, even if the conduct is purely intrastate.

The Constitution’s Taxation Clause . . . provides Congress with the power to tax and spend to “provide for the . . . general Welfare of the United States.” . . .

There was fervent opposition to the federalism built into the Constitution. . . . Many antifederalists, fearful of a powerful central government, demanded a Bill of Rights, which, in 1791, became the first ten amendments to the Constitution. . . .

The Tenth Amendment reads: “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.” The Tenth Amendment made explicit that “what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.”

On June 21, 1788, the ninth state, New Hampshire, ratified the Constitution, and it became effective. . . .

Civil War: Federalism in Crisis

The Civil War threatened the survival of the American experiment. Could states legitimately claim a right to secede from the nation? President Lincoln vehemently opposed the idea. . . . “[N]o State, upon its own mere motion, can lawfully get out of the Union.”

Secessionists strongly disagreed. Future Confederate President Jefferson Davis, announcing his departure from the United States Senate following Mississippi’s decision to secede, declared: “I have for many years advocated, as an essential attribute of State sovereignty, the right of a State to secede from the Union.” . . .

The South’s defeat in the Civil War greatly expanded the power of the federal government and “destroyed the doctrine that the Constitution was a compact among sovereign states, each with the right to interpose or nullify an act of Congress, and each with the ultimate right to secede legally from the Union.” . . .

Post Civil War: Reconstructing Federalism

When the Civil War ended, the country entered “Reconstruction,” a period that included rebuilding the roles of the federal and state governments. . . .

Ultimately, three constitutional amendments, commonly referred to as the Reconstruction Amendments, were ratified in the five years after the Civil War ended, altering the balance of federalism in America. The Thirteenth Amendment abolished slavery and the Fifteenth Amendment guaranteed African Americans the right to vote. The Fourteenth Amendment imposed substantial restrictions on state power and expanded the power of the federal government.

Section 1 of the Fourteenth Amendment. . . prohibits the states from depriving “any person of life, liberty, or property, without due process of law,” or “deny[ing] to any person within its jurisdiction the equal protection of the laws.” The Due Process Clause has since been interpreted to incorporate almost all of the provisions of the Bill of Rights against the states, and the Due Process and Equal Protection Clauses have since been interpreted to restrict or bar state regulation in diverse areas, including contraception . . . and same-sex marriage.

Significantly, Section 5 of the Fourteenth Amendment grants Congress the power to enforce the Fourteenth Amendment, providing a potentially broad grant of federal power. . . .

The Equal Protection Clause of Section 1 of the Fourteenth Amendment was effectively nullified when the Supreme Court ruled in 1896 that “separate, but equal facilities” were constitutional in *Plessy v. Ferguson*, authorizing state-sanctioned segregation. It was not until 1954 that the Supreme Court reversed that decision in *Brown v. Board of Education*, ruling that “separate educational facilities are inherently unequal.”

The Bill of Rights: What Does it Say?

National Archives: Founding Documents: https://www.archives.gov/founding-docs/bill-of-rights/what-does-it-say

The Bill of Rights is the first 10 Amendments to the Constitution. It spells out Americans’ rights in relation to their government. It guarantees civil rights and liberties to the individual—like freedom of speech, press, and religion. It sets rules for due process of law and reserves all powers not delegated to the Federal Government to the people or the States. And it specifies that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

First Amendment

The **First Amendment** provides several rights protections: to express ideas through **speech** and the **press,** to **assemble** or gather with a group to **protest** or for other reasons, and to ask the government to fix problems. It also protects the right to religious beliefs and practices. It prevents the government from creating or favoring a **religion.**

Second Amendment

The **Second Amendment** protects the right to keep and bear arms.

Third Amendment

The **Third Amendment** prevents government from forcing homeowners to allow soldiers to use their **homes**. Before the Revolutionary War, laws gave British soldiers the right to take over private homes.

Fourth Amendment

The **Fourth Amendment** bars the government from **unreasonable search and seizure** of an individual or their private property.

Fifth Amendment

The **Fifth Amendment** provides several protections for people accused of crimes. It states that serious criminal charges must be started by a **grand jury**. A person cannot be tried twice for the same offense (**double jeopardy**) or have property taken away without **just compensation**. People have the right against **self-incrimination** and cannot be imprisoned without **due process of law** (fair procedures and trials.)

Sixth Amendment

The **Sixth Amendment** provides additional protections to people accused of crimes, such as the right to a **speedy and public trial, trial by an impartial jury** in criminal cases, and to be informed of criminal charges. Witnesses must face the accused, and the accused is allowed his or her own witnesses and to be represented by a lawyer.

Seventh Amendment

The **Seventh Amendment** extends the right to a **jury trial** in Federal civil cases.

Eight Amendment

The **Eighth Amendment** bars **excessive bail and fines and cruel** and **unusual punishment.**

Ninth Amendment

The **Ninth Amendment** states that listing specific rights in the Constitution does not mean that people do not have **other rights** that have not been spelled out.

Tenth Amendment

The **Tenth Amendment** says that the Federal Government only has those **powers** delegated in the Constitution. If it isn't listed, it belongs to the states or to the people.

Dash for cash

If Britain wants an American-style energy boom, it should import American-style local taxation

Economist, Aug 24th 2013

"THERE are many, many more of us than there are of you," shouted protesters in Balcombe, a village in southern England with an exploratory drilling rig and a population swollen by eco-warriors, to the police and the frackers. Sadly, they are right. Britons are broadly opposed to hydraulic fracturing for oil and gas, or "fracking"—at least if it might happen anywhere near their homes. Cuadrilla, an energy firm, has already been spooked into shutting down its rig.

Fracking has transformed America's energy market and helped the country out of recession. It can create jobs, lower bills and reduce dependence on unreliable, autocratic oil- and gas-producing countries. Once a well is drilled—something that can be done increasingly speedily—it is scarcely more of a blot on the landscape than a garden shed. Nobody knows whether the earth under Britain can be pummelled into giving up much oil and gas, although the latest estimates suggest there is a lot of the stuff. Why not start looking?

For two broad reasons, say the protesters. The first objection to fracking, favoured by Greenpeace and smaller green groups like No Dash for Gas, is environmental. Hydrocarbons, say the campaigners, are bad; the methane occasionally emitted from

wells is a greenhouse gas; fracking can pollute water. The second objection, voiced more often by locals carrying “Frack off” signs, is to the lorries and disruption that come along with mining: pure NIMBYism.

The environmental objections are weak. Natural gas is far cleaner than coal. America’s many wells have produced little pollution—and the danger could be reduced by decent regulation. Technology is making it possible to drill many wells from a single pad and to reuse the water that is pumped in.

Oddly, the NIMBYs have a stronger case. Fracking is indeed a nuisance, particularly while wells are being drilled. Lorries clog the roads. Workers spend money locally—but they also get drunk and fight locally. In western Wyoming, rising crime strikingly tracked an increase in drilling.

Stuff their mouths with cash

Fracking has boomed in America partly because local people have been paid off handsomely. Landowners can sell the rights to the hydrocarbons under their fields. States tax extracted oil and gas, and redistribute much of the revenue to the affected counties, which spend it on glorious schools and fire stations. America has NIMBYs too—and some states have banned fracking outright—but money has proved a powerful salve.

In centralised Britain, by contrast, almost all the proceeds from fracking that do not flow to miners would end up in the Treasury’s coffers. Oil and gas rights are held in effect by the crown, not landowners. George Osborne, the chancellor of the exchequer, sets the tax on shale-gas production: it is 30%, much lower than taxes on North Sea fields. Mining firms pledge to pay £100,000 per well and 1% of revenues to local communities (not yet defined). As a result of a broad reform to business rates, local authorities may also be able to keep a share of the rates paid by energy firms, subject to complex calculations. This is simply too small and too vague a lure.

The ideal solution would be to radically decentralise the tax system and allow local authorities greater freedom to set extraction taxes—which would encourage miners to go where they are least disliked. Unfortunately, the government is unlikely to loosen its grip over taxation. But one simple change would help. Following long protests against wind farms, in April the rules were changed to allow local authorities to keep all the business rates paid by turbine installers. Do the same for fracking.