

The Constitution: Out of Balance? (And should we care?)

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“Were [the judicial power] joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe.”
Blackstone, *Commentaries on the Laws of England*¹

“Last Thursday I described the American form of government as a three-horse team provided by the Constitution Two of the horses are pulling in unison today; the third is not.”
Franklin D. Roosevelt, announcing the Court-packing plan in a radio address on March 9, 1937.

There is a commercial for a product that I can’t recall just now in which a succession of special-effects enhanced persons is shown with one side of their bodies more developed than the other. The most memorable one shows a slender woman doing bicep curls, one arm holding a five-pound weight, the other arm, looking like the governor of California’s, curling a fifty-pound dumbbell.

Keep that image in mind, since the title of these Constitution Day remarks is “The Constitution: Out of Balance?” That is, does the constitution get out of balance when one party controls both the executive and legislative branches? I emphasize that when I say *constitution* I am speaking about the lower case “c” constitution (meaning health, physique, the way things are put together) not the capital “C” Constitution (the document approved this week in 1787 and sent to the states to be ratified). Two hundred nineteen years later, the enduring myth that our success in civil government is due to the “big C” Constitution should not obscure the fact that the “little c” constitution of the United States, as it is now and as it was designed by the Framers, does not contain three separate but equal branches.

Back to our body builder pumping, not iron, but gold. Pumping lots of gold. The federal budget in this era is approaching \$3 trillion per year. Of that, the total federal judiciary’s budget is approximately \$6 billion per year. Of that two-tenths of one percent of the budget, about \$1 billion is paid to the executive branch in the form of rent to the General Services Administration. Rather

than the three-horse team President Roosevelt described, a more accurate image would be two horses and a rather captive gadfly. This is no new development. In the first decades of the Supreme Court's existence, Chief Justice John Marshall put off being appointed until the end of President John Adam's term because he didn't want to leave private practice, and several justices resigned from the Court to pursue more prestigious careers in state government.

And this imbalance was the way things were meant to be. As Alexander Hamilton wrote in Federalist Paper No. 78, the federal judiciary was designed to be the least dangerous branch, exercising judgment but not will, controlling neither the legislative branch purse nor the executive branch sword. Did it work out that way?

Some readers are likely interested in the natural sciences; others astronomy. Once, everyone knew that the sun rose in the east, moved across the sky, and set in the west. We still describe the day by sunrise and sunset even though we believe that the twenty-four hour day is really caused by the earth rotating on its axis, not by the sun revolving around the earth. Copernicus had a tough time selling that idea to the scientists of his day, not for religious reasons, but because when you compared his theory to Ptolemy's, the geocentric system explained the motion of the planets more accurately. Then Kepler had the insight that the planets moved in elliptical orbits, not circular ones, and more people got on board, but it was still one arbitrary system versus another. The last holdouts were convinced when Newton offered a simple inverse square law governing the force of gravity, which not only described the orbit of the planets around the sun, but explained why it worked. The Age of Reason could begin.

The catch is that, although Newton could explain the motion of two bodies around their common center, finding the solution of the orbits of three equal bodies remains a very difficult problem to this day. The same problem occurs in constitutional politics. You may have studied it as the ice cream problem.

Consider a beach: long, flat, sandy, and hot. Professor Barlow opens the only ice cream stand on the beach. Where should he put it to optimize his profits? Answer: anywhere he wants. We might like him to be in the center, and he might put the stand in the center if he were looking to make the beachcombers happy, but if he wants to go all the way to the right or to the left, he's still the only ice cream vendor on the beach. Thus the one-ice-cream-stand beach or the one-party state is stable, even if most people are not happy with it.

Then Professor Nagengast opens an ice cream stand on the same beach. Where? Toward the center, but only just a little closer than Professor Barlow's. That way he picks up anyone from Professor Barlow's stand all the way to the other end of the beach. Professor Barlow, faced with his customers from that end defecting to the new guy, will relocate past Professor Nagengast just a little closer to the center. This leapfrogging process will continue until both are at the center and have an

inside position on half the beach. We consumers might like them to split the beach into thirds but, just like Republican and Democratic candidates, they can't move far from the center without losing customers. The two-stand beach and the two-party state are stable, and everyone is happy except the ones on the extreme ends.

If a third ice cream stand sets up on the beach or a third party enters the political arena, that makes the system unstable. Any one party has an incentive to get a little out on the edge to steal the customers on the margin, forcing one or both of the other parties to change their stands (pun intended) in rapid and unpredictable succession. This doesn't benefit the consumer. Maybe it does explain the instability of Italian politics in the post-war era, or why Strom Thurmond, George Wallace, and Ross Perot were such wild cards in American presidential races. Whether it's ice cream stands or politics, three makes an unstable crowd.

What I'm suggesting is that the long run harmony of the American political system is due in large part not to the brilliance of the Framers or something exceptional about Americans, but to the existence of two, and only two, major political parties, something not contemplated in the Constitution and something which most of the founding generation feared and therefore ignored, until the messiness of the election of 1800 led to the adoption of the Twelfth Amendment.

What the Framers did foresee was nonpartisan struggle for power between the executive and legislative branches. They sought to regulate that in two ways: by separation of powers and by checks and balances. Despite the Constitution and the attachment of the founding generation to the lessons of the Glorious Revolution (the English one in 1688, not the one in 1776) and to legislative supremacy, at the outset of the Constitutional era the dominance of the executive branch was unquestionable. But mostly this was due to the personal prestige of George Washington. By the War of 1812, the center of gravity passed back to its intended home in the legislative branch. In the era before the Civil War, the great Senate orators Webster, Calhoun (who had resigned from the executive branch), and Clay attempted to mediate the sectional conflicts between the West, South, and East, between farmers and bankers, between slave holders and abolitionists. To contrast that era with today, consider that John Quincy Adams returned to the House of Representatives after his one term as president, and imagine how strange the sight of Nixon or Ford returning to the House (or Clinton or Carter running for governor) would be.

Of course, the Civil War briefly concentrated power in the executive branch due to the unique personality of Abraham Lincoln. That this was a temporary aberration and not a shift away from the general dominance of the legislative branch can be seen in the experience of Lincoln's successor, Andrew Johnson, who was impeached for attempting to fire a member of his own cabinet. *Congressional Government*, the textbook by President Woodrow Wilson, the erstwhile professor of political science, pretty much described in the title what the American Constitution was all about. It

was the Gilded Age, the Senate was known as the Millionaires' Club, there was no income tax, and the federal budget was in surplus.

As the twentieth century approached, so did a new philosophy. Locke's idea that the State was to protect (by not interfering with) life, liberty, and property—each country squire was an "Army of One"—was replaced by a new idea, influenced by Bismarck's plan for Germany, to improve things—to "Be All You Can Be." The federal government was not immune from this new way of thinking. The Interstate Commerce Commission, the Departments of Commerce and Labor, and the Federal Reserve Bank system were created in this era. And, of course, the Sixteenth Amendment came to allow us to pay for it all, just in time for World War I. Wars and economic crises allowed Wilson and both Roosevelts opportunities to shift power from the states to the national government, and from the legislative to the executive branch. The military demands of the nuclear era in both the Cold War and the hot wars in Korea and Vietnam cemented this shift. If the constitutional balance in the nineteenth century was described by Wilson's book, the twentieth century could receive its title from historian Arthur Schlesinger, Jr.'s book, *The Imperial Presidency*.

Of course Schlesinger meant his title as a criticism, not merely a description, because of his unease with the way the president was exercising its power. Widespread opposition to presidents Lyndon Johnson (for waging an increasingly unpopular war) and Richard Nixon (for his maladroit handling of Watergate and a hostile Congress) was the catalyst for our current era of declining presidential and rising congressional power.

Some of you are skeptical about that description. You don't see a declining presidency because you hear in the media about W's war and selected stories about wiretaps and Abu Ghraib. Consider recent history: Clinton's legislative legacy was not his health care plan but the Welfare Reform Act of 1996 and the Defense of Marriage Act. And it's hard to imagine Lucy Rutherford getting the same treatment as Monica Lewinsky. Meanwhile, Bush forty-three has cast, through five years of his presidency, only one veto. What about war powers? Abraham Lincoln lost more American soldiers in five hours in a cornfield in Maryland than have died in five years of the war on terror. When Lincoln received Chief Justice Taney's opinion commanding him to release a prisoner detained without charges, he ignored it. Lincoln dealt with criticism by putting opposition journalists in jail. Hard to imagine today. Most of FDR's actions during World War II were not reported until twenty years later and imagining Iran-Contra type hearings over Lend Lease belongs in science fiction. Truman stopped coal and rail strikes by sending the Army. Hard to imagine today.

So, despite today's news seeming like a turbulent froth, control of the government regularly bounces back and forth between Republicans and Democrats. Underneath, the structure of the Constitution moves with slow and steady ebbs and flows of power between the executive and legislative branches. And with the New Deal as the only exception, when one party dominates both

political branches, the tug of war between the two branches tends to prevent that party from implementing any extreme change. All thanks, not to the wisdom of our Framers, but to the power of two.

So what happens when the judiciary makes three a crowd, and attempts to act as a power center? Let's go back to the beginning, the case law students cut their teeth on, *Marbury v. Madison*. You all know the story: in 1803, John Marshall found that President Jefferson was in the wrong for not letting Marbury have his commission as justice of the peace, an appointment that President Adams made on his way out in order to sabotage the Jefferson administration coming in. But Marshall contented himself with scolding Jefferson because, he found, the statute giving Marbury his day in court was unconstitutional. A master stroke, claiming for the Federalist judiciary the right to strike down federal statutes, but giving Republican Jefferson no traction for a political war that the judiciary surely would have lost. And although the Marshall Court was not shy about striking down state laws, which it did eighteen times, it was fifty-four years before another federal law was declared unconstitutional. The case was *Dred Scott v. Sanford*. Where Marshall achieved a symbolic victory and kept the Court out of a political struggle, Chief Justice Taney committed the judicial branch to the position that the Congress was powerless to regulate slavery (and implicitly, that the president was too, other than by enforcing fugitive slave laws). One could argue that the Civil War would have come anyway, but the Court's attempt to bar any political settlement of the slavery question undoubtedly made the war an inevitable outcome of the election of 1860.

The Supreme Court, perhaps chastened, did not again take it upon itself to tell the political branches of government what the Constitution permitted them to do until the New Deal. From 1910 to 1930, the legal culture ran behind the political culture, as the Supreme Court under Chief Justices White and Taft overturned more than 200 state economic laws, including minimum wage and maximum hours laws. But, by the end of his first term, Franklin Roosevelt's program of committing the federal government to massive and detailed intervention in the economy set the stage for another constitutional confrontation. It was precipitated by the famous sick chicken case of 1935, *Schechter Poultry v. United States*, in which the Supreme Court struck down a law that delegated power to the executive branch to prescribe "codes of fair competition" based on what the administration believed was best for the country. The Supreme Court said two important things: not every local economic activity could be regulated as interstate commerce and Congress could not delegate its legislative duties to the executive branch. Both were indisputably correct interpretations of the Constitution and both undoubtedly would have led to the success of FDR's court packing scheme, and maybe a more radical alteration of American government, because the Supreme Court had interposed itself as the arbiter of the limits for a Democratic Congress and Democratic president, both of which approved of the New Deal programs. The Supreme Court retreated from these two

exposed positions in *NLRB v. Jones and Laughlin Steel* (1937), conceding that Congress could regulate not only commerce but any economic activity which had a substantial impact on commerce, and by accepting, in *Humphrey's Executor v. United States* (1935), that Congress could create administrative agencies which, because they were in theory independent of the executive branch, could issue the kind of detailed regulations forbidden in *Schechter Poultry*. The stage was set for FTC, NLRB, OSHA, HUD, FEMA, and other alphabetic agencies to expand the power of Congress, in theory, and of the president, in fact. For the next fifty years, however, the fights would be between two equal branches of government with the Supreme Court as cautious bystander, not referee.

Not that the Supreme Court retreated from politics during this time. The Court could again cloak itself in Hamilton's description of it as *The Least Dangerous Branch*, the title Professor Alexander Bickel chose for his book about the most famous case of the twentieth century. Which was...?

Correct, *Brown v. Board of Education*. Leaving aside the particulars of the case, it exemplifies the other great constitutional change of the twentieth century. That was the Supreme Court's great transfer of power over traditionally local and state issues like education and criminal law from state governments to the federal level, especially to the federal judiciary. The Warren Court revolution of the 1950s and 1960s in criminal procedure and the First Amendment and the Court's subsequent forays into writing national abortion and death penalty laws, though controversial, never threatened the constitution (little "c") or the Court. That is because they pitted the federal government against the states, and the states, especially after the Seventeenth Amendment, were no longer players in constitutional politics.

After Watergate, the Supreme Court drew minor lines between Congress and the president. The Court held in *Morrison v. Olson* (1988) that independent counsel statutes were constitutional, giving Congress a weapon to harass an opposition president. On the other hand, in *INS v. Chadha* (1983), the Court's declaration that a one-house veto of administrative regulations violates the Constitution potentially removed one of Congress' few checks on the executive-administrative apparatus of government. But in general, the decisions of the Rehnquist era are important only to political scientists and professional politicians, and few Americans can name a decision since *U.S. v. Nixon* (1974)—the Nixon tapes case—that affects the relations between the political branches.

And so today, history repeats itself. One party controls the White House and Congress and is involved in a war unpopular with the public, with the twist that the conduct of foreign policy takes place in the distorting lenses of cell phone cameras and the twenty-two minute news cycle. How has the Supreme Court weighed in so far? Is it tempted to referee interbranch disputes as it did in the New Deal era of one party government, or to commit itself to one party's view of the Constitution,

as it successfully did under Marshall and unsuccessfully did under Taney?

In 2004 in *Hamdi v. Rumsfeld* and *Rasul v. Bush*, the Supreme Court held that federal district courts could hear petitions for writs of habeas corpus by United States citizens detained as enemy combatants and by foreign nationals detained on American soil. In response, the Congress passed and the president signed the Detainee Treatment Act of 2005, which denies habeas corpus relief to foreign nationals detained at American-controlled Guantanamo Bay, but provides limited judicial review to the military commissions that have the power to determine an enemy combatant's status and criminal liability. This summer, in *Hamdan v. Rumsfeld* (2006), the badly split Supreme Court held that the military commissions designated to try enemy combatants violate the Uniform Code of Military Justice and portions of the Geneva Convention. It seems we have the stage set for a constitutional conflict where two branches of government, controlled by one party, want one thing and the Court wants something else.

What will happen to the Constitution? As President Reagan used to say about the deficit, don't worry, it's big enough to take care of itself. If the Fall elections shift the House or, less likely, the Senate to the Democrats, the ordinary give and take of politics, the battle to be seen as the party closer to the center, will resolve the conflict. If the Republicans hold on to the House and Senate, history suggests that the Supreme Court, with a new majority containing new Justices, will backtrack from confrontation in order not to be rendered irrelevant by having its decisions ignored.

NOTES

¹ William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769, Vol. 1* (Chicago: University of Chicago Press, 1979), 319.