

AMERICAN CONSTITUTIONALISM

Introduction

Americans justify important political decisions by referring to the Constitution of the United States. When President George W. Bush ordered the invasion of Iraq, he explained that Article II authorized the commander in chief to take the military steps necessary to protect the United States. The Supreme Court in *Roe v. Wade* (1973) struck down all state laws banning abortion because seven justices concluded that the Fourteenth Amendment protected a woman's right to terminate a pregnancy. The civil rights movement mobilized supporters by claiming that our Constitution required equal treatment under the law. Abraham Lincoln argued that the Constitution created an indissoluble Union and that Southern secession violated the fundamental law of the land.

American Constitutionalism provides an introduction to this American practice of justifying political action by constitutional argument. We explore how constitutional arrangements and arguments shape American politics, as well as how political considerations influence the operation of the constitutional system. Our goal is to familiarize readers with the important constitutional issues that have excited Americans over the years and are still vigorously debated in our time. A second goal is to break the habit of equating American constitutionalism with the decisions of the Supreme Court of the United States. Constitutionalism in the United States covers more topics, is more complex, and is more interesting than one would gather from merely reading essays by judges in law reports.

Most important, we wish to provide readers with a more sophisticated understanding of how constitutionalism works in the United States – something beyond the simple view that constitutionalism has nothing to do with politics, and the equally simple view that constitutionalism is nothing more than a dressed up version of ordinary politics. American constitutionalism is a distinctive form of politics with distinctive goals and modes of justification. That legislators, presidents, and justices must support their decisions by discussing the meaning of specific constitutional provisions and the significance of previous constitutional precedents limits the actions governing officials may take. When issuing the Emancipation Proclamation, President Abraham Lincoln declared free *only* those slaves in areas still under Confederate control. He believed he lacked the constitutional power to abolish slavery in areas under Union control. Lincoln in 1863 was doing something more complex than merely following constitutional rules or acting on extra-constitutional values and policy preferences. Supreme Court justices have frequently voted to sustain laws as constitutional while condemning them as unwise and ill-conceived, regarding it as a legislative task to make the policy decision. The Emancipation Proclamation and numerous other episodes in American constitutionalism are consequences of the interaction between legal principles, political opportunities, and partisan commitments. Constitutional discourse permeates American politics, and political concerns pervade constitutional arguments. Constitutional practices in the United States have neither been motivated solely by simple fidelity to the clear commands of the fundamental law nor wholly by short-term political agendas. American constitutionalism is not a philosophy seminar and constitutional doctrines are not theoretical abstractions, even though brilliant legal minds toil in libraries for years exploring how constitutions and constitutional provisions are best interpreted. Constitutional arguments are as much the stuff of politics as the pork barrel and the log roll, even though constitutionalism is a different kind of politics than the pork barrel or the log roll. The interplay of legal principles, moral values, partisan interests, and historical development is a central feature of our constitutional system. Understanding this interplay is a precondition for any realistic assessment of how this system actually works, how American constitutionalism should work, and how our political order might work better.

American Constitutionalism is inspired by a number of distinctive considerations. In sharp contrast to conventional constitutional texts that are designed primarily to teach students how to analyze contemporary opinions by Supreme Court justices, the following pages highlight how

- American constitutionalism is structured by the interaction between law and politics.
- Justices and elected officials are influenced by law and politics when making constitutional decisions.
- American history has been characterized by a struggle over constitutional authority.
- Many important constitutional issues throughout American history have been decided primarily and exclusively by non-judicial officials.
- American constitutionalism is a practice that occurs within particular historical periods and political eras.
- Historical development matters for shaping the constitutional practice of the moment.

Studying American Constitutionalism

Students and citizens evaluating the relative importance of “law” and “politics” on American constitutionalism must have adequate knowledge of the broader contexts in which constitutional controversies arise, are debated, and settled. In addition to reviewing the important and interesting constitutional arguments made throughout American history and the more general jurisprudential concerns that structured these legal assertions, our introduction to American constitutionalism identifies the central features of the political system at the time those arguments were made which help explain why some arguments and constitutional movements were more successful than others. These crucial elements of constitutional politics include the most important partisan coalitions that fought for electoral supremacy, the main interests that supported those coalitions, the positions those coalitions took on the most important issues that divided Americans, and the extent to which one coalition was more successful than others at gaining control of the national government. These political and jurisprudential contexts are necessary for understanding why only some important political questions are resolved into constitutional issues at particular times, the differences between the major parties on those political issues that were resolved into constitutional issues, the tactics prominent political actors adopted to make their constitutional vision the law of the land, and what institutions of government each coalition believed were responsible for resolving the major constitutional controversies of the day.

To help readers explore these relationships between law and politics we have divided American constitutional development into nine relatively distinct and stable political regimes: Colonial, Founding (1776-1787), Early National Period (1787-1828), Jacksonian (1828-1860), Civil War/Reconstruction (1860-1876), Republican (1876-1932), New Deal/Great Society (1932-1980), and Contemporary (1980-). This periodization is hardly perfect or uncontroversial. 1896 is generally considered a pivotal year in American constitutionalism. Important differences exist between the New Deal and Great Society constitutional orders. Political scientists dispute whether the 1968 presidential election, the 1994 congressional elections, or perhaps, the 2006 congressional elections ushered in a distinctive constitutional era, and similar disputes rage over whether the contemporary era is best characterized by increased conservatism or political polarization. Still, given the problems inherent in any periodization, we believe our scheme is reasonable and useful. Each of our seven eras is marked by important constitutional stabilities that mark that period off from previous and later eras. Constitutional politics before the Civil War was structured by debates over policies to promote economic development such as national territorial expansion, banking, and internal improvements that seemed less salient to most Americans after Reconstruction. The constitutional questions over national power to regulate the economy and redistribute economic risks and returns that divided Americans from 1876 to 1932 were thought settled by the New Deal, but reemerged in transmuted and muted form at the end of the twentieth century. Then again, whether this or any other periodization does justice to American constitutionalism is one question students studying American constitutionalism ought to consider.

This historically oriented organization is one of the most distinctive features of this volume. We believe approaching American constitutionalism through an analysis of these political regimes provides the best framework for a more sophisticated understanding of crucial constitutional episodes. Consider

struggles over constitutional authority. Conventional accounts suggest that, with the exception of apparently random attacks on judicial power, Americans have been content to vest federal courts with the final say over constitutional meaning. A regime politics approach identifies more regular patterns. Political coalitions upon first gaining electoral majorities challenge judicial authority being wielded by the last remnants of the deposed regime. As the new political coalition consolidates control over the national government and appoints their adherents to the federal bench, elected officials become friendlier towards courts. Many Jacksonians, still struggling to win national power, condemned judicial review in the 1830s; most endorsed judicial supremacy in the 1850s, when they were firmly in control of the federal courts. The children of those New Deal Democrats who had condemned the Hughes Court during the battles of the 1930s became Great Society Democrats who worshipped the liberal Warren Court in the 1960s. Nevertheless, governing coalitions through their lives remain partly committed to the values underlying their early anti-judicial rhetoric. Warren Court decisions were vigorously opposed by both conservative Republicans and those New Deal liberals who came of age during the Depression. The principles that New Dealers laid down when attacking judicial protection of property rights help explain why the liberal justices on the Warren Court refrained from creating “new property” rights to government welfare benefits while vigorously protecting free speech and promoting racial equality.

In this volume, we provide critical readings on significant constitutional issues, organized by the historical era within which they were debated. Even so, each is identified by its doctrinal subject, and an alternative table of contents is provided that organizes the materials by subject matter categories rather than historical era. For each excerpted reading, we provide an introduction detailing the circumstances that generated the constitutional controversy, the political and legal context within which the relevant political actors operated, and the larger significance of the material excerpted and the broader issue. We also provide extended analytical notes on important developments and issues in American constitutionalism, as well as endnotes with additional information and queries relating to the readings and bibliographies of additional readings.

A second distinctive feature of this volume is our recognition that American constitutionalism extends beyond the U.S. Supreme Court. Supreme Court opinions are indispensable for understanding American constitutional interpretation and practice, that practice cannot be fully understood by reading only Supreme Court opinions. Our title, *American Constitutionalism*, is deliberately chosen. Our subject is broader than the text of the U.S. Constitution or cases in constitutional law. American constitutionalism takes shape not only in the judiciary, but also in the legislature and the executive. Constitutional provisions and principles are elaborated within the national government, by state and local officials, and on streets and meeting places throughout the United States. Constitutional meaning is determined by government officials, party platforms, campaign speeches, legal treatises, and newspaper articles. We provide generous selections from the landmark Supreme Court opinions that one would expect to see in such a volume, but we also provide the arguments of lawyers to the Court, judicial opinions written in the lower courts and state courts, attorney general opinions and presidential speeches, congressional debates and legislative reports, party manifestos, pamphlets produced by interest groups, and scholarly commentaries.

These two features of this volume are not unrelated. An historical approach that emphasizes the interplay of “political regimes” and “constitutional visions” raises questions about the extent to which constitutional meaning is primarily generated by judges or by non-judicial actors. An exclusive focus on judicial opinions ignores the numerous constitutional issues raised by, for example, national expansion and presidential war-making powers, almost all of which were debated and settled by elected officials. Even when courts make constitutional rulings, those rulings are typically preceded by political efforts to secure judicial consideration, either because the crucial elected officials believe the justices will buttress their constitutional positions or because they have partisan reasons for avoiding political responsibility for that decision. Elected officials similarly decide the fate of judicial decisions once they are handed down. If we pay too much attention to *Brown v. Board of Education* (1954), we will overlook the crucial role the Civil Rights Act of 1964 played in securing desegregation. If we concentrate too narrowly on the words of the Court in *Brown*, we miss the equally significant and diverse words of others such as Harry Truman,

Dwight Eisenhower, the Southern Manifesto, and Martin Luther King, Jr. As recent scholarship has emphasized, not only were those other voices at least as important as those of the justices in securing change in the racial order and making the constitutional transformation of the mid-twentieth century, but their words are also illuminating in our effort to understand our constitutional ideals and grapple with competing constitutional values.

Attention to regime politics provides readers with fresh and vital perspectives on contemporary issues in American constitutionalism. Citizens thinking about federalism, affirmative action, the right to privacy, or the war on terror will benefit by supplementing an understanding of Supreme Court precedents with an understanding of those features of contemporary American politics that made these questions salient at the turn of the twenty-first century, and have shaped the way judges, politicians, and scholars have framed constitutional debates. That separation of powers questions became increasingly prominent during a time of persistent divided government is hardly surprising. Present controversies over the war on terrorism similarly cannot be understood until one explores the different constitutional lessons each major party learned from the American experience in Vietnam. This long view of American constitutional development exposes the ways that constitutional issues recur, transform or disappear. Our contemporary constitutional debates take place against the background of debates and resolutions of the past. Greater awareness of that background can put our current and future debates in a new light.

Our goal is to understand American constitutionalism *in* time as well *through* time. Supreme Court cases are often abstracted out of their immediate political and historical contexts, linked through doctrinal formulations to decisions made years and decades distant from them. These doctrinal connections are not to be ignored. American constitutionalism is a multi-generational project, and our constitutional discourses and institutions are self-consciously intertemporal. American constitutional development occurs through time, building on and reconstructing what has come before. But our constitutional controversies also occur in time, in the moment. They reflect an inheritance, but they also reflect an immediate configuration of interests, ideas and institutions. Understanding constitutional argument, and constitutional development, requires recognizing the connections that exist between a given constitutional case and other decisions and events that make up a given era. Whether we are primarily interested in constitutional ideas or in constitutional politics, we would be remiss in ignoring either context. This volume seeks to provide both.

When providing professional training to law students, there is at least a logic to focusing on the most recent Supreme Court decisions in constitutional law that lawyers might need to decipher for clients or use in their advocacy. Even in the context of a law school curriculum, however, we believe this leaves the average lawyer unprepared for the complexity of American constitutional practice. For everyone else, there is even less excuse for this cramped approach to understanding American constitutionalism. If our goal is not simply to interpret Supreme Court cases but to understand American constitutionalism, then we should be open to the full range of the American constitutional experience, whether they are the subject of current litigation. If our goal is to engage the fundamental questions that have roiled American politics or understand the dynamics of constitutional development, then we would be well served by widening our perspective and appreciating both the technical acuity of judicial opinions and the political context within which those skills are exercised.

In seeing the full scope of American constitutionalism, a wider range of questions, practices, and processes come into view. Basic constitutional institutions provide normative and procedural frameworks that allow political debate and decision making to move forward in ways that both political winners and losers alike consider legitimate. At the same time, preexisting constitutional commitments confer advantages on some political movements and partisan coalitions relative to others. We hope the materials provided here allow readers to think about questions of constitutional interpretation and what the text that we have means, but also to think about questions of constitutional design and practice. If resolving fundamental disputes was merely a matter of consulting a neutral referee, such as a Supreme Court, whose authority was acknowledged by all players, then constitutional politics would be a simple matter of appeals, decisions, and essays in law books. Because our system does not work in this way, we have written this book.

Volume 1: Structure of Government: Introduction

It is conventional to divide constitutional law into two parts, one focusing on the structures and powers of government and the other focusing on civil liberties. We have followed that convention here, and this volume is primarily concerned with the constitutional structures and powers of government. This convention is, however, of somewhat recent origin, and the distinction that it draws is somewhat arbitrary. Until the mid-twentieth century, classes and casebooks were simply organized around “constitutional law.” “Civil liberties” became a distinct area of study in the 1960s and was, in effect, the study of the Warren Court and the rise of a new jurisprudence centered on the Bill of Rights. This is a convenient but somewhat misleading way of dividing up the constitutional universe, and we have felt free to depart from it when necessary.

The first task of a constitution is to structure a government and allocate governmental powers. That structure may be centralized or fragmented. Those powers may be consolidated or diffused. They may be purposeful and fixed or open-ended and adaptable. The powers of government and its individual organs may be expansive or delimited. Specifying what powers the government has and how those powers are distributed among government officials necessarily requires setting boundaries. Those boundaries, those limitations on powers of a government official, may be internal and procedural. “The president may do *this*, but only the legislature may do *that*.” “Policy proposals become laws only if *these* steps are followed.” But those boundaries may also be external and substantive. “No government official may do this.” “These powers and rights are *reserved to the people*.” Understanding how political power is organized is essential to understanding how political power may be exercised.

The American constitutional system is one of fragmentation and delimitation. Government power is broken into pieces and placed in many different hands. There are several rationales for doing so.

One goal of fragmenting power in this way is to *empower government to do the right things* (and disempower it from doing the wrong things). The drafters of the U.S. Constitution met in Philadelphia in the summer of 1787 because they thought the existing constitutional system, the system that had emerged out of the American Revolution, was broken. The “vices of the political system of the United States,” as James Madison outlined them on the eve of the Philadelphia convention, were not primarily the result of government having too much power.¹ They were the result of power being misallocated and misused. The constitutional challenge, as the Federalists saw it in the 1780s and many others have seen it since, is how to enable government to accomplish what it should while preventing it from doing what it should not. The consequences of mishandling this challenge are potentially dire. Alexander Hamilton began the essays known as *The Federalist Papers* exhorting the people of New York to deliberate on the proposed U.S. Constitution carefully. They had already had “an unequivocal experience of the inefficacy of the subsisting federal government.” Through “their conduct and example” of choosing a better form of government, the people of America would

decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.²

¹ See Chapter Three below.

² Alexander Hamilton, “No. 1,” in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), 33.

Or, as Franklin Delano Roosevelt, declared in a message to Congress encouraging the legislature to adopt his plan for reorganizing the executive branch, a task he thought was essential to adapting the Constitution to the requirements of the new age.

In these troubled years of world history, a self-government cannot long survive unless that government is an effective and efficient agency to serve mankind and carry out the will of the Nation. . . . This battle, too, must be won, unless it is to be said that in our generation national self-government broke down and was frittered away Will it be said “Democracy was a great dream, but it could not do the job?” Or shall we here and now, without further delay, make it our business to see that our American democracy is made efficient so that it will do the job that is required of it by the events of our time?¹

In the earliest days of the new Congress after the adoption of the Constitution, Madison hailed “the establishment of a more effective government, having recovered from the state of imbecility that heretofore prevented a performance of its duty.”² The creation of an independent executive branch was to give the government “energy.” An independent judiciary would provide the body politic with its “arms” and “legs.”³ A good constitution can draw together and point the force of the nation’s resources toward the protection of the interests and liberties of the people, while a badly designed constitution would dissipate those resources or worse turn them against the people’s rightful interests.

A second goal of fragmenting power in this way is to *preserve the constitutional order itself*. As Madison famously noted, “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”⁴ Having created a constitutional government capable of identifying and advancing the common good, how can we keep the tools of government from being misappropriated and misapplied? Having placed power where it would do the most good, what is to prevent it from being rearranged? What is “sufficient to restrain the several departments within their legal rights,” to keeping their “power within due bounds,” and to “preventing and correcting infractions of the Constitution”?⁵ The careful distribution of political power was to accomplish this goal as well. Consolidated power made abuses of power more likely. The fragmentation of power might reduce the risk and consequences of abuse.

Within the American constitutional system, political power is fragmented both vertically and horizontally. Vertically, the constitutional system is composed of layers of government sitting atop one another. The most notable and fundamental example of this is the division of powers between the federal government and the state governments in an arrangement known as federalism, but there are other layers of government as well such as county and city governments within the states and territorial governments alongside the states. Horizontally, both the U.S. Constitution and the state constitutions allocate government power among three branches or departments: the legislative, the executive, and the judicial. These branches of government sit alongside each other, formally equal or coordinate to one another. There are vertical and horizontal elements within these basic divisions as well. For example, federalism encompasses not only the relationship between the federal and state governments but also the relationships *among* the state governments. The executive branch not only exists alongside the legislative and judicial, but it is itself composed of myriad offices and agencies that create issues of coordination and control. Along both these vertical and horizontal dimensions, these various political institutions are

¹ Franklin Delano Roosevelt, “Message to Congress Recommending Reorganization of the Executive Branch, January 12, 1937,” in *The Public Papers and Addresses of Franklin D. Roosevelt*, ed. Samuel I. Rosenman, vol. 5 (New York: Harper & Brothers, 1938), 669.

² *Annals of Congress*, 1st Cong., 1st sess. (April 9, 1789), 107.

³ James Madison, *Notes on the Federal Convention of 1787* (New York: Norton, 1987), 46, 72.

⁴ James Madison, “No. 51,” in *The Federalist Papers*, 322.

⁵ Madison, “No. 49,” 317; Madison, “No. 50,” 317.

networked together, bound together by shared duties, responsibilities and powers, cooperating and struggling with one another to advance their interests and ambitions.

Federalism

Many countries have a unitary, national state. They may have political subdivisions (known, for example, as divisions, provinces or states), but these are for administrative convenience. The scope of the powers of these political subunits, their budgets, and even their very existence, are ultimately under the control of the national government. In practice, a unitary government may decide to centralize or decentralize most political decisions and administrative tasks, but those are decisions to be made by the national government itself and for the sake of its own interests and convenience. United Kingdom, France, Italy and Japan are all unitary states.

The United States is a federal state, and a unitary state was never a serious constitutional option. Other federal states include Germany, Canada, Australia and Switzerland. In a federal system, the states are organic components of the constitutional system, as fundamental to the political structure as is the national government. The states exist as independent political systems, with their own lawmaking power, policymaking responsibility, taxing capacity, and enforcement mechanisms.

Federalism requires drawing boundaries between governments and defining the relationships among them. The constitutions of the individual American states organize the internal governance of those states and define the powers of those state governments. The U.S. Constitution primarily organizes the national government, identifies the boundaries between the national government and the states, and defines the relationship among the individual states. Especially since the addition of the Fourteenth Amendment after the Civil War, the U.S. Constitution also imposes some limits and obligations on state governments relative to their own citizens and residents.

Section 8 of Article I of the U.S. Constitution, for example, lays out most of the powers of the national government. These are understood to be *enumerated powers* – that is, the Constitution provides a complete list of the powers that are delegated to the national government. As the Tenth Amendment to the Constitution emphasizes, all other political powers not enumerated in the body of the Constitution, either in Article I or elsewhere, “are reserved to the States respectively, or to the people.” (Of course, the national government is explicitly prohibited from exercising some powers as well, such as those listed in Section 9 of Article I of the U.S. Constitution or in the first ten amendments to the Constitution, collectively known as the Bill of Rights.) The supremacy clause in Article VI of the Constitution also establishes that when operating within these boundaries and exercising its delegated powers, the action of the federal government is “the supreme law of the land” and trumps any conflicting state law or constitutional provision. But as Madison admitted in *The Federalist Papers*, “the task of marking the proper line of partition between the authority of the general and that of the State governments” was an “arduous” one and unavoidably “obscure.”¹ Like the constitutional drafters themselves, we have struggled ever since to determine the proper constitutional bounds on the powers of the national government and exactly what powers were delegated either expressly or by implication to the national government and what was reserved to the states or to the people. The Constitution also identifies a few obligations that the national government owes to the states, such as the obligation to guarantee a republican form of government in the states and protect them against invasion.

The U.S. Constitution primarily organizes and regulates the national government, but it also has relevance for the states. The state governments are constituted by their own state constitutions, and they are generally understood to be governments of general jurisdiction armed with the full “police power” of government (the power to protect the safety, health, welfare, and morals of the community). That is, they are the constitutional reverse of the enumerated powers of the national government. State governments are assumed to have all the political powers usually possessed by sovereign governments unless they are explicitly prohibited to them. Every state constitution includes its own list of powers that are prohibited

¹ Madison, “No. 37,” 227, 229.

to its state government (or the rights guaranteed to its residents against the state government). These are supplemented by limitations on the powers of the state governments that are contained in the U.S. Constitution. Section 10 of Article I of the U.S. Constitution contains an initial list of limitations on the states, some of which are designed to limit the interference of the states with the national government or each other (such as the prohibition on the individual states against engaging in war without with the consent of Congress or actual invasion) and some of which are designed to protect individual rights, especially of individuals who might not be residents of those states (such as the prohibition on states impairing the obligation of contracts). This relatively brief list of federally defined and guaranteed limitations on the state governments was significantly expanded by the addition of the Fourteenth Amendment. The U.S. Constitution also imposes some obligations on the states to each other and to the citizens of other states (such as the full faith and credit clause that requires states to recognize the public acts and judicial proceedings of the other states).

Separation of Powers

The American constitutional system distributes government powers functionally among separate political institutions. It identifies particular government powers as legislative, executive, or judicial in nature and allocates them to a branch of government with particular responsibility for that government function. There is nothing natural about this functional categorization. It is largely an inheritance of seventeenth and eighteenth century constitutional disputes between Parliament and the king in England. In the course of those debates, supporters of the Parliament, including the poet John Milton and the philosopher John Locke, attempted to identify a set of government responsibilities and powers that were particularly suited to parliamentary control and from which the king should be excluded. Out of those debates arose the idea that the powers of government could be separated into the categories of legislative and executive, and that the “legislative” powers of imposing taxes and making laws were to be controlled by Parliament. That new constitutional settlement was established by the civil war that ended with the beheading of King Charles I in 1649 and the overthrow of King James II in the Glorious Revolution of 1688. Observing these developments, the French political thinker, Baron de Montesquieu, popularized the idea, identifying three basic powers of government – “that of making the laws, that of executing public resolutions, and that of judging the crimes or disputes of the individuals” – and insisted that “all would be lost” if those three powers were entrusted to the same person or political body.¹ Both practical experience with the British form of government and the writings of political thinkers instilled a firm commitment to the doctrine of a three-part separation of powers into American constitutionalism.

The importance of the doctrine of separation of powers was clear. The meaning of the doctrine was less clear. As Madison admitted,

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces – the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science. . . . All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberations, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.²

When the U.S. Constitution declared that “the executive power shall be vested in a president,” it left quite a bit of room for disagreement as to what exactly had been placed in the president’s hands. Moreover, the

¹ Charles Louis de Secondat Montesquieu, *The Spirit of the Laws*, ed. Anne Cohler, Basia Miller, and Harold Stone (New York: Cambridge University Press, 1989), 157.

² Madison, “No. 37,” 228-229.

American constitutions soon began to modify the strict separation of powers. The *strict separation of powers* means the allocation of the different functions and powers of government to distinct and independent political institutions. The executive cannot exercise the legislative power, and vice versa. The strict separation of powers is modified, however, by *checks and balances*. Checks and balances require that each branch be given the tools to protect itself from the encroachments and prevent the abuses of the other branches. Checks and balances largely work by allowing the separate institutions to share some powers. Thus, the president is given a role in the legislative process with the veto power, and Congress is given a role in the execution of laws by requiring Senate approval for the appointment of executive officers. This sharing of powers is a further “invitation to struggle” over the direction of government policy and who will control the making of policy.¹

The United States is the leading example of a *presidentialist political system*. Presidential systems sharply separate the executive and legislative branches of government, giving the president (or chief executive) significant independent powers and providing for the separate selection of executive and legislative officials. The American states all follow this basic model (though their chief executives are called governors rather than presidents), as do a few other countries. The more common pattern for the organization of democratic governments is a *parliamentary political system* (a political system that did not assume its modern form until the nineteenth century). Parliamentary systems do not sharply distinguish the executive and legislative branches. Instead, the leadership of the executive branch (the prime minister and his cabinet) is chosen by the legislature and serves as the effective leadership of the legislative branch as well. Many revolutionary era state constitutions created governments that resembled parliamentary systems with weak governors who were highly accountable to the legislatures, but these were soon replaced by constitutions that featured stronger and more independent executives. Presidentialist systems can vary in having a unitary executive or a plural executive. The U.S. president is an example of a *unitary executive*. The president (along with the vice president) is the only constitutionally designated executive officer, all executive power is vested in the president’s hands, and all other executive officers are appointed by the president. The president is the “chief executive.” Many American states have *plural executives*. Executive responsibilities and powers are vested in several distinct constitutional offices, not centralized in the hands of a single chief executive. Those other offices are filled independently and those office-holders are not directly accountable to a chief executive. For example, the state of Texas has a plural executive, and thus a relatively weak governor, with the heads of many executive departments including the attorney general, the secretary of state, the comptroller of public accounts, and the agriculture commissioner, among others, being independently elected and setting their own policy.

Within each historical era, the readings below are organized into five substantive parts. The first two focus on the *powers of the national government* and *federalism*, respectively. The readings in the first relate to the scope of express and implicit powers of the national government relative to the state governments. The readings in the second address the relationships among the states or between the federal and state governments and the powers of the state governments. The next two substantive parts focus on *separation of powers* and *judicial power*. The readings in the first address the power of the legislative and executive branch relative to each other. The readings in the second relate the scope of the judicial power. The final part highlights *other constitutional issues* that cut across or are not captured by the four prior categories.

¹ Edward S. Corwin, *The President*, 4th revised edition (New York: New York University Press, 1957), 171.