**Chapter 1**

**Our Constitutional Structure of Government**

Overview

The point of this chapter is to provide a foundation in the basics of American constitutional structure. For some students this will be a review, for some a reminder, and for some, new information. The chapter is short, and therefore can be combined with the mundane tasks that tend to occur in a first class of the semester, such as student and professor introductions. The material in Chapter 1 is not difficult, but it is essential for the remainder of the course.

Getting Started

Try the following to kick off discussion:

1. Ask students what the first legal steps are for a group of persons who want to launch a start-up. What kinds of documents must be formally submitted to the state? At least some students are likely to know that these will include articles of incorporation. What kinds of information will be included in articles of incorporation? This will vary somewhat by state, but should include the names of founders, purposes of corporation, whether it is for-profit or non-for-profit, what will constitute the basis for sharing in the profit and/or governance of the group, who can become members, whether there will be a board of directors or other structure for governance, which kinds of decision can or must be made by the board, etc etc. Depending on the state, some of these details will be provided in a set of by-laws rather than the articles of incorporation. (You might want to check on how your state sets these requirements.)
2. How does the Constitution answer these questions for the U.S. government?

Separation of Powers

The concept of separation of powers among the three branches of government creates the horizontal dimension of the checks and balances principle. The framers of the U.S. Constitution saw this structure as essential for the security of liberty under the Constitution. “It is by balancing each of these powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution.” (John Adams, 1775)

Specific examples of checks and balances that derive from the separation of powers include:

* Presidential veto of legislation
* Congress’s power to override a veto by a two-thirds vote in both chambers
* Congress’s power to impeach executive and judicial branch officials
* Congress’s power to appropriate funds
* Congress’s power to initiate constitutional amendments
* The power of the federal courts to declare an act of Congress unconstitutional
* The requirement of consent of the Senate to confirm presidential appointments, and
* The requirement of Senate approval to ratify treaties.

*Bowsher v. Synar*

*Bowsher* is one of the most important Supreme Court cases to address the division of power between the executive and legislative branches. The case, brought by then Representative Mike Synar of Oklahoma, focused on the legitimacy of an obscure agency: the office of Comptroller General (CG). The CG is the head of the General Accounting Office (GAO), which was created in 1921 to oversee “the receipt, disbursement and application” of federal funds. The CG is appointed by the President with advice and consent of the Senate, from recommendations made by the Speaker of the House and the President pro tempore of the Senate.

In the 1985 budget act, Congress gave authority to the CG to determine automatic spending cuts to achieve deficit reduction. The Court found this structure to be unconstitutional.

The Court found that the CG operated under Congressional control, and therefore “may not be entrusted with executive powers.” Under the 1985 budget act, the CG was responsible for identifying which program funds had to be cut in order to achieve a targeted amount of deficit reduction. “Congress in effect has retained control [through this legislative branch agency] over the execution of the Act and has intruded into the executive function.” Nor could Congress delegate this power to the GAO: “The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.”

What is important about this case is not where the CG/GAO belongs in an organizational chart of the federal government, but understanding

* what were the indicia the Court used to determine its role and
* why the Court’s insisted that it had to be clearly in one branch or the other in order to operate constitutionally.

Defenders of the legislation argued that the CG’s role was simply to prepare a report. The Court closely analyzed the components of this “report,” however, and declared that the process involved the CG in interpreting and applying the law – functions of the executive branch and “the very essence of ‘execution’ of the law.”

After the decision, Congress passed legislation in 1987 that eliminated the CG’s problematic powers.

Federalism – State Constitutions - Conflicts

Federalism is the vertical dimension of separation of powers, a hierarchical system under which two (or more) levels of government exercise legal authority within the same geographic area. The Constitution establishes federalism as the system of power sharing between the federal government and the individual state governments.

Each of the states has its own constitution. One assignment might be for students to read their own state’s constitution; what stands out about it? All provisions of the states’ constitutions must comply with the U.S. Constitution. The Constitution grants certain powers exclusively to either the federal government or the state governments; other powers are shared by both. The extent of the powers granted to the federal government depends on how the pertinent sections of the Constitution are interpreted by the U.S. Supreme Court.

During the colonial period, the meaning of “federalism” was virtually the opposite of how we think of it today. Then, the word generally referred to a desire for a stronger central government. During the Constitutional Convention, the Federalist Party supported a stronger national government, while "anti-federalists" argued for stronger state governments. The Constitution was created largely to replace the Articles of Confederation, under which the United States operated as a loose confederation with a weak central government and more powerful state governments.

In explaining federalism and its proposed benefits, James Madison wrote in Federalist No. 46, that the national and state governments “are in fact but different agents and trustees of the people, constituted with different powers.” Alexander Hamilton, in Federalist No. 28, argued that federalism’s system of shared powers would benefit the citizens of all of the states. “If their [the peoples'] rights are invaded by either, they can make use of the other as the instrument of redress,” he wrote.

In essence, the federalists won the debate, which meant that the powers of the national or central government were strengthened over what they had been under the Articles of Confederation.

Conflict of State and Federal Law

The doctrine of federal preemption controls cases where state law conflicts with federal law. The Supremacy Clause – part of Article VI of the U.S. Constitution - declares that federal law is the "supreme law of the land." This means that judges in every state must follow the Constitution, laws, and treaties of the federal government. Under the doctrine of preemption, which is based on the Supremacy Clause, federal law preempts state law when the two conflict. Thus, a federal court may require a state to stop certain behavior it believes interferes with, or is in conflict with, federal law.

In the absence of federal law, or (usually) when a state law would provide more protections than what is available under existing federal law, state law controls. For instance, federal anti-discrimination law regulating service in restaurants does not include sexual orientation. The same is true under the state anti-discrimination law in Kansas. Therefore, an openly gay person in Kansas can be refused service simply for being gay. But the state law is different in Illinois, and the same person could file a complaint under Illinois state law for discrimination if their sexual orientation was the reason that they were denied service there.

*New York v. United States*

The issue here was whether Congress has the authority to force a state to adopt a federal regulatory program concerning low-level radioactive waste. *New York v. U.S*. reinvigorated the Tenth Amendment, and signaled the resurgence of dual federalism. It is cited in a wide variety of cases dealing with federal-state issues, including issues of products liability, assisted suicide, gun control, and gambling on Native American Reservations.

Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985 (the Act). The Act attempted to force states to arrange for the disposal of radioactive waste. The three parts of the Act were: (1) a monetary incentive to encourage states to open their own waste sites; (2) an access incentive, where states without waste sites could be denied access to waste sites in other states; and (3) a take title incentive, where a state that did not arrange for disposal of its waste would be required to take ownership of the waste. The take title provision gave a state two options. Either the state could (i) take title to the waste and risk whatever liability that followed, or (ii) regulate the disposal according to the congressional mandate. Either way, the state would be forced to implement the federal regulatory scheme and would be agents of the federal government.

The Court found that the take title provisionwas Congressional coercion. The monetary and access incentives are a permissible exercise of Congressional spending power. The Court reasoned that the Tenth Amendment of the Constitution is violated when Congress directs states to regulate in a particular field and in a particular way. The Constitution does not authorize Congress to commandeer the state legislative process by compelling states to enact and enforce a federal regulatory program.

Judicial Review

*Marbury v. Madison* is in many ways the seminal Supreme Court decision – the one that began the richest dynamics of constitutional adjudication. Before Chief Justice John Marshall’s opinion in the 1803 case, judicial review of acts of Congress was not an established principle. The Constitution does not explicitly provide for judicial review in its text, instead reserving to the federal courts “the judicial power of the United States” subject to “such exceptions, and under such regulations as the Congress shall make” (Art. III, Sect. 2). Indeed, the role that the Supreme Court would play in the federal system was relatively undefined.

The facts of the case (if not the figures involved) were surprisingly mundane in light of its eventual significance. Just as he was leaving office, President John Adams appointed 42 justices of the peace to serve in Washington D.C. and Alexandria, VA in an attempt to thwart some of the influence of incoming President (and life-long friend and nemesis) Thomas Jefferson. Then-Secretary of State John Marshall was charged with delivering the commissions, but most went undelivered before Jefferson assumed the Presidency. The new President ordered incoming Secretary of State James Madison not to deliver the remaining commissions. William Marbury, one of the would-be justices of the peace whose commission was never delivered, sued Madison in the Supreme Court, seeking a writ of mandamus to force Madison to complete his duty and deliver the commission.

The decision ultimately turned on the fact that Marbury brought the case directly in the Supreme Court – that is, he invoked the Court’s “original” as opposed to its “appellate” jurisdiction. The Constitution gives the Supreme Court original jurisdiction in a very limited range of cases: those “affecting ambassadors, other public ministers and consuls, and those in which a state shall be party” (Art. III, Sect. 2). In 1801, Congress had passed a statue adding to the Court’s original jurisdiction by giving the Court the power to issue writs of mandamus.

By the time the case was heard, Marshall had become Chief Justice of the Supreme Court. Today it seems astonishing that Marshall did not remove himself from participating in the case, given his involvement in the situation that led to it. His decision carving out a specific and powerful role for the Court in the American political process has stood for more than 200 years. The Court held that Congress did not have the power to add to the Supreme Court’s *original* jurisdiction, even though it is clearly established that Congress can augment the Supreme Court’s *appellate* jurisdiction. Therefore, the Court reasoned, the Supreme Court had no authority to issue the writ of mandamus.

Marshall’s decision that Congress acted improperly in trying to confer that power on the Court necessitated an extraordinary leap forward in the Court’s role. To declare that Congress acted improperly under these circumstances warranted two separate and equally important conclusions: first, that the Supreme Court should be the branch of government to interpret the Constitution (here, for purposes of deciding the jurisdictional question), and second, that the Supreme Court had the power to declare acts of Congress improper.

*Marbury* stands to this day as the landmark of constitutional law and theory, and since it was decided, the principle of judicial review has become a central facet of American governance.

The most ingenious enrichment device that I have found about *Marbury* is a podcast from Radiolab. You can find it here - <https://www.acast.com/moreperfect/kittens-kick-the-giggly-blue-robot-all-summer>

You may want to play parts of it in class or assign students to listen to it on their own.

*United States v. Nixon*

In the Watergate tapes case, in which President Richard Nixon sought to quash a subpoena issue for tapes and other materials relevant to the role of White House officials in the Watergate break-in, the Court ruled unanimously in favor of the United States and against President Nixon. Chief Justice Burger wrote the opinion for the Court, which concluded that presidents enjoy a constitutionally protected executive privilege, but that the privilege was not absolute. The Court decided that in this case, the President’s interest in keeping his communications secret was outweighed by the interests of the judiciary in providing a fair trial with full factual disclosure.

President Nixon’s attorneys first argued that the doctrine of separation of powers prevented the Supreme Court from hearing this case at all. They asserted that because the judicial and executive branches are separate, each with its own functions, the judicial branch should not be allowed to interfere with the functioning of the executive branch. The Court rejected this argument, responding that the case raised a constitutional question, and therefore clearly fell within the purview of the judicial branch as interpreter of the Constitution. To support this ruling, the Justices cited the Court’s decision in *Marbury v. Madison*, in which the Court declared that “it is emphatically the province and duty of the judicial department to say what the law is.”

President Nixon’s lawyers also asserted that the Court should find the president was entitled to absolute executive privilege. This meant that he could not be forced to reveal any of his confidential communications unless he chose to. The lawyers set out two reasons to support their argument. First, the president needed honest advice from his advisors, and these advisors might be uncomfortable giving advice if they knew that it could become public. Second, these confidential communications were essential for the president to carry out the duties assigned to the executive branch by the Constitution.

The Court acknowledged the validity of these interests and that the president was entitled to a degree of executive privilege. In this case, however, the interest of President Nixon in keeping his communications secret conflicted with the interests of the judicial branch in providing a full and fair trial. A fair trial required full disclosure of all facts and relevant information. The Justices held that the interests of the president must be balanced against the interests of the judicial branch when these interests conflict.

The Justices reasoned that the judiciary’s interest in the “fair administration of criminal justice” outweighed President Nixon’s interest in keeping the content of his tapes secret. One reason for this was that the only issue before the Court was whether the trial judge could privately inspect the tapes to determine whether they were essential to a fair trial. The Justices foresaw that there would be cases in which the president’s need for confidentiality would outweigh the interests of the judicial branch, such as when the secret communication involved “military, diplomatic or sensitive national security secrets.” [This last point could form the basis for an exam question.]

Important Terms

* **Checks and balances** - The American constitutional system includes the notion of the separation of powers. In this system, several branches of government are created and power is shared between them. At the same time, the powers of one branch can be challenged by another branch. “It is by balancing each of these powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution” (John Adams). Checks and balances include for example: judicial review, presidential veto of legislation and executive and judicial impeachment by Congress.
* The doctrine of **enumerated powers** serves as a restriction on the authority of both the Congress and the President by generally prohibiting the exercise of any power not specifically granted by the Constitution. Article I, Section 8 lists, or enumerates, the majority of the powers given to Congress – for example, the powers to declare war, to raise taxes, and to regulated interstate commerce. Absent such a grant of authority, Congress has no power to legislate; so, commerce that is purely local and intrastate, as opposed to interstate, in nature is off limits to Congress. Similarly, Article II outlines the President’s powers. The enumerated powers doctrine ensures that the Congress and the President have separate and limited spheres of authority.
* **Federalism** describes the legal relationship between the national (or federal) government and state governments. When the Supreme Court invokes principles of federalism, for example, it is often referring to the long-standing deference afforded the authority of the States – the idea being that there are certain issues and concerns beyond the scope of the federal government. The converse is true as well, with certain powers being denied the States and instead vested only in the federal government.
* **Judicial review** is the authority of the federal courts to decide the constitutional validity of actions taken by the Congress or the President. Although this doctrine is not explicitly stated in the Constitution, it stems from the early, seminal Supreme Court case of *Marbury v. Madison* and has become an accepted principle of federal court power. Judicial review operates as one of the principal checks on both Congressional and Presidential authority by establishing a mechanism of oversight on those branches.
* S**eparation of powers** is a bedrock principle of American constitutional government, whereby federal authority is separated into three different branches, each with specific, limited powers. Part and parcel of separation of powers is the idea of checks and balances, where each of the three branches has the ability to constrain the actions of the others. Note that separation of powers is not the same thing as federalism; the former describes how power is spread across the federal government (horizontal), while the latter describes how power is distributed between the federal government and the States (vertical).
* Article VI of the Constitution contains the **Supremacy Clause**, which says that the “Constitution and the laws of the United States … shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The Supremacy Clause is something like the federalism trump card: in the event that a federal law conflicts with a state law, the federal law prevails and the state law is preempted. Similarly, areas of power specifically carved out for the federal government by the Constitution are therefore presumptively outside the scope of state authority. For example, the “Dormant Commerce Clause” stands for the proposition that the individual states are generally forbidden from regulating interstate commerce because that authority was given to Congress (although Congress is empowered to allow the states to do so).

Review Questions

1. Probably the simplest way to conceive of the different responsibilities and powers of the three branches of the federal government is thus: the Legislature makes the laws, the Executive enforces the laws, and the Judiciary interprets and validates the laws.

2. The Legislature and the Executive Branch

3. One way to think about the process of “making law” is to start with the fact that all bills technically originate in Congress – even if the President has suggested them. Of course, the President does have a considerable amount of input on which legislation to prioritize and the final form of legislation, especially when the party he leads is in power. The ways in which regulatory agencies (see Chapter 3) – which are part of the Executive Branch – interpret and amplify as well as enforce statutes gives the President further ability to shape the ways in which the law actually operates in practice and not just on paper. The Judiciary, meanwhile, has the ultimate authority to interpret ambiguous legislation, allowing courts to interpret laws in ways in which Congress did not intend. The courts can also strike down both laws of Congress or Executive regulatory actions as violations of the Constitution. If, at this point, it seems that Congress’s role in making law is extinguished after a bill passes, it is important to remember that Congress retains the ultimate authority to go back and change the existing law or adopt new law if it is displeased with the direction in which the Executive and the Judiciary have driven its original legislation. At that point the cycle can begin anew. Each branch, then, has a distinct part in the process, with broad powers of that area of “making law” that are inevitably checked by the powers of another branch.

4. There are two important aspects to judicial review. First, the Supreme Court is authorized to decide the constitutional validity of acts of Congress. In this way, the Court is empowered to make certain that Congress does not overstep its bounds. If enumerated powers are a restriction on Congress, the Court is the enforcer. Second, the Court can interpret Congressional legislation that is ambiguous. When the Court makes such an interpretation, its reading of the statute is final unless Congress revises the law.