

“SEPARATION OF POWERS: ENSURING GOOD GOVERNMENT”

WEEK 5 — WILL MORRISEY  WILLIAM AND PATRICIA LAMOTHE PROFESSOR IN THE U.S. CONSTITUTION

THE SEPARATION OF POWERS helps to ensure good government at the same time it guards against tyranny. Independent in function but coordinated in the pursuit of justice, the three branches of government—legislative, executive, and judicial—must each have enough power to resist the encroachment of the others, and yet not so much that the liberty of the people is lost.

LECTURE SUMMARY

A political regime has three dimensions: the ruling institutions, the rulers, and the way of life of the people. In America, the rulers—the people themselves—and their ruling institutions—staffed by the people’s representatives—aim at securing the Creator-endowed natural rights of all citizens. The Framers did this in two ways. “Vertically” considered, our ruling institutions are defined by federalism, or the division of power between the national, state, and local governments. “Horizontally” considered, the ruling institutions of the federal government itself are separate and co-equal.

In the American regime, the Constitution is the “supreme law of the land.” No one branch is superior to it; all three branches have a duty to abide by it. While each of the three branches plays a unique role in the passage, execution, and interpretation of laws, all of the branches must work together in the governing process.

The legislative branch is closest to the people. It is also the branch in which the danger of majority tyranny lurks. The passions of the people are reflected most in the House of Representatives, where the members are elected for terms of two years. The Senate, with its six-year term of office, was designed to be a more stable legislative presence than the House.

The defining characteristic of the executive is “energy.” The president can act swiftly and decisively to deal with foreign threats and to enforce the law, and can also provide a check on legislative tyranny through the veto.

Members of the judiciary, the third branch of government, must exercise judgment in particular cases to secure individual rights. Through “judicial review,” the judiciary is given the authority to strike down laws that are contrary to the Constitution. But judicial review is not judicial supremacy; even the Supreme Court must rely upon the other branches once it has rendered judgment.

The checks that each branch can exercise against the encroachment of the others ultimately protect the liberties of the people. The separation of powers promotes justice and good government by having each branch perform its proper function. This institutional design allows the sovereign people to observe and to know which branch is responsible for which actions in order to hold each to account. The sense of mutual responsibility built into the separation of powers is a reflection of the moral and civic responsibility all Americans share.

KEY PASSAGES FROM THE READINGS

FEDERALIST 52 ~ James Madison

“As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people.”

(*The U.S. Constitution: A Reader*, page 310)

FEDERALIST 55 ~ James Madison

“As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.”

(*The U.S. Constitution: A Reader*, page 323)

“Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.”

(*The U.S. Constitution: A Reader*, page 323)

FEDERALIST 57 ~ James Madison

“The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society, and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.”

(*The U.S. Constitution: A Reader*, page 325)

“If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and

manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it.” (*The U.S. Constitution: A Reader*, page 327)

“If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty.” (*The U.S. Constitution: A Reader*, page 327)

FEDERALIST 62 ~ James Madison

“A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained.” (*The U.S. Constitution: A Reader*, page 334)

“It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.” (*The U.S. Constitution: A Reader*, page 335)

“No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability.” (*The U.S. Constitution: A Reader*, page 336)

FEDERALIST 70 ~ Alexander Hamilton

“Energy in the executive is a leading character in the definition of good government.” (*The U.S. Constitution: A Reader*, page 345)

FEDERALIST 71 ~ Alexander Hamilton

“The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests.” (*The U.S. Constitution: A Reader*, page 354)

FEDERALIST 78 ~ Alexander Hamilton

“The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE NOR WILL but merely judgment.” (*The U.S. Constitution: A Reader*, page 380)

MARBURY V. MADISON ~ John Marshall

“Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.” (*The U.S. Constitution: A Reader*, page 392)

STUDY QUESTIONS

1. What does Publius say is the end of government? How does he define it?
2. Dr. Morrissey identifies three “dimensions” that constitute a regime. What are they?
3. What are the key differences between the House and the Senate?
4. What is judicial review? How does the judiciary employ judicial review to protect the Constitution?
5. Which branch ultimately determines the meaning of the Constitution?

DISCUSSION QUESTIONS

1. How are the separation of powers and checks and balances related?
2. How has the Seventeenth Amendment, which requires the direct election of United States Senators, changed the Founders’ Constitution?
3. How can legislative deadlock be a positive thing?
4. Publius writes that “energy” is the defining characteristic of the executive branch. Is the modern executive too strong? If so, what accounts for its strength?
5. For Publius, “responsibility” of the government to the people was an important idea. What does it mean today for government to be responsible to the people? What does it mean for people to carry out their duties with responsibility?



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