Our American Constitution

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ESSAY

On September 17, 1987, the United States celebrated the two-hundredth anniversary of the signing of the Constitution. Congress created the Commission on the Bicentennial of the United States Constitution to encourage commemoration of the Constitution. In pursuit of this goal the Commission and the West Publishing Company sponsored a National Bicentennial Essay Competition for Law Students. The Southwestern Law Journal *is pleased to cooperate with the Commission by reprinting the following winning entry from within the Fifth Federal Judicial Circuit.*

OUR AMERICAN CONSTITUTION

*by Daniel J. Balhoff**

"WE hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[1] It may seem odd that an essay about the United States Constitution should open with words from the Declaration of Independence, but these words capture the essence of the American mission, the fruition of which the Constitution made possible. With these words a nation was christened more than two hundred years ago, a nation born in revolt but conceived in liberty. When its people finally won their independence on the battlefield, an even more formidable task faced them—how to "secure the blessings of liberty to [themselves] and [their] posterity."[2] The story of their struggle not only to win freedom but to defend it and hand it down to succeeding generations is the story of America.

When asked to explain why we enjoy so many personal freedoms in this country, the understandable inclination of many is to point to the Bill of Rights. But these provisions, while important, list only a fraction of the total panoply of rights enjoyed by every American citizen. Furthermore, many national constitutions have "bills of rights." Why has America succeeded in guaranteeing rights when other nations have failed? The fundamental reason is the structure of government set up in the United States Constitution, a structure based upon the twin pillars of separation of powers

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1. The Declaration of Independence para. 2 (U.S. 1776).
2. U.S. CONST. preamble.

and federalism. It is this unique structure that has enabled Americans to exercise personal freedoms to a truly unique extent.

This essay seeks to explore the structure of our government under the Constitution—both how it was intended to work and how it has worked. It therefore discusses provisions for separation of powers and federalism in the Constitution, and how these provisions have guaranteed individual liberties.

I. SEPARATION OF POWERS, FEDERALISM, AND THE CONSTITUTION

A. Philosophical and Historical Bases

Baron de Montesquieu, a French political philosopher, is generally credited as being the first to espouse a separation of governmental powers as a means to guarantee freedom. In 1748 he observed that all governments, including democracies, tended to aggrandize power to themselves. This concentration of power came at the expense of the liberties of the citizenry. Montesquieu decided that the best way to avoid this problem was to divide the powers of the sovereign:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[3]

Montesquieu's theory of a tripartite government with distinct legislative, executive, and judicial branches was implemented to varying degrees by the thirteen American states after the Revolution.[4] In 1787 this theory became the basis for the national government envisioned in the newly proposed United States Constitution.

The original Constitution was divided into a preamble (describing the goals of the newly formed government) and seven articles. The first three of these articles set forth the structure of the national government: article I, section 1, "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives";[5] article II, section 1, "The executive power shall be vested in a President of the United States of America";[6] article III, section 1, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[7] Thus the full power of the new government could not be exercised without the consent of three distinct bodies: the Congress had to pass a law;

3. Montesquieu, *De l'Esprit des Lois*, *in* THE GREAT LEGAL PHILOSOPHERS 169.
4. THE FEDERALIST No. 47, at 316 (J. Madison) (Modern Library College ed.).
5. U.S. CONST. art. I, § 1.
6. *Id.* art. II, § 1.
7. *Id.* art. III, § 1.

the President had to enforce it; and the judiciary had to judge the law's applicability in any particular case.

Federalism is based upon the idea that a local government, being closer to the problems of the citizenry, is more responsive toward those problems than is a national government. But federalism in the United States Constitution was not a product of pure political theory to the same extent as was separation of powers. It was, instead, a product of tradition, experiment, and compromise.

Before the Revolution, the thirteen states were thirteen very dissimilar colonies with relatively few ties among them. Each had its own colonial government, which answered only to the King and Parliament. When the colonies declared independence, they became thirteen separate nations, allied only in war against the King. The first "national government" set up was under the Articles of Confederation. This government had little real power, the exercise of which depended on the consent of the several states. There was no question that each state had the right to secede. Sovereignty, then, rested solely in the states, and the national government derived its authority from them.

Dissatisfaction with this loose confederation prompted national leaders to meet in Philadelphia in the summer of 1787 in an attempt to revise the Articles of Confederation so that the national government might have sufficient powers to carry out its affairs.

Given the consensus that the national government had to be strengthened, a key concern of the delegates at the Constitutional Convention was how to achieve the proper balance of power between the national and state governments. Through a series of historic compromises, the federal system resulted as the solution. Sovereignty was not to abide in either the national government nor the states alone; sovereign powers were instead divided. This federalism was manifested in two ways: first, the national government was limited to powers enumerated in the Constitution, whereas the states exercised plenary powers; and second, state constituencies participated in the structure of the national government. The first element, enumerated federalism, has been the subject of much case law and political discussion. It is, however, the second element, structural federalism, that continuously, though subtly, comes into play in our constitutional system. This structural federalism is one of the key characteristics that distinguish the American system of government from all others.

B. How the Structure Works

Most Americans probably can name several features of our government—the presidential veto, judicial review, impeachment—but few fully realize how these elements fit together in a system that brings to bear the virtues of separation of powers and federalism at every phase of the process.

In the normal constitutional scheme, all laws officially originate in Congress. The President may propose the enactment of a law, but the de jure effect of such a proposal would be no different from that of a citizen's sugges-

tion to his congressman. The primary force in the lawmaking scheme, then, is in Congress.

Congress is divided into two bodies: the House of Representatives and the Senate. These bodies represent two very different constituencies. Each member of the House represents a population approximately equal to that represented by each of his fellow congressmen. The House therefore has a *national* constituency in that every person in the nation is equally represented. The Senate, on the contrary, is apportioned not according to population but instead by states, each state having two senators. The Senate therefore has a *federal* constituency. Before a bill can pass Congress, it must receive the support of a majority of the populace as a whole and of the states as reflected by their respective representatives.

If the bill passes both houses of Congress, it is sent to the President. If ours were a system of strict separation of powers, the President, as head of the executive branch, would have no part in the making of laws. But the Constitution assigns him a veto power. If he signs the bill, it becomes the law of the land. If he vetoes it, the bill is sent back to Congress, which may override the veto by two-thirds majority of each house. The ability to override means there is a greater measure of separation of powers than if the veto were absolute. There is less separation, however, than if there were no veto at all. The effect of the veto, as is the effect of any breach of separation of powers, is to unite the branches in purpose and thrust by forcing the formation of a consensus between the legislature and the executive.

The President, in considering whether or not to sign the bill into law, brings to bear a peculiar mixture of national and state constituencies. The President is not elected by winning a majority of the popular vote, but instead by garnering a majority of the electoral vote. A state's electoral vote is calculated by adding its number of representatives (allocated according to national principles) to its number of senators (allocated according to federal principles). Another federal twist is the winner-take-all aspect of each state's electoral votes. This forces a presidential candidate to try to win as many states as possible instead of trying to pile up large majorities in just a few states. It is therefore possible for a candidate to place second in the popular vote count, but nevertheless be elected President.

Thus a bill is reviewed by three constituencies—one national, one federal, and one mixed—before it may become law. Hopefully, each institution—the House, the Senate, and the President—will take into consideration the first element of federalism, that is, whether the bill falls within the constitutionally enumerated powers of the national government. If this were the only provision for federalism, the protection of states as viable political institutions would depend solely upon the benevolence of the players in the national government. Fortunately the Constitution buttresses the enumerated restrictions with structural federalism, which make certain that the concerns of the states are considered throughout the process. Whereas an elected official surely may try to remember his duty to the Constitution, he more surely will not forget his duty to the constituents that elected him. The framers

recognized this political nature and, instead of denouncing and trying to overcome it, they used it as an essential element of the process. They believed in a limited government. They achieved that end by requiring that each expansion be passed before three different and often conflicting constituencies.

Once a bill becomes law, it is the duty of the President to enforce it. The President's mixed constituency affects his actions in the enforcement of laws in the same way as in the decision whether or not to veto. Thus the Electoral College brings elements of federalism into the execution of the laws. These elements would be removed if, as many have suggested, the Electoral College were abolished and the President were elected strictly by popular vote.

Under a system of pure separation of powers, the President would be responsible to the people alone and Congress would have no say in the execution of the laws. The Constitution, however, gives Congress a check on the executive power through the power of impeachment of officials (including the President) and the Senate's ability to reject appointments. These congressional powers lessen the separation and have the effect of forcing the executive branch to conform (at least somewhat) to congressional wishes.

Whenever the government deprives a person of life, liberty, or property, amendments to the Constitution guarantee "due process of law." This phrase has been interpreted to encompass, at the very least, a right to notice and a hearing before an independent magistrate.[8] But it is the Constitution's structure of government and its provision for an independent judiciary that breathe life into this right.

The Constitution requires very little in the way of a national court system. Theoretically, all the document mandates is one Supreme Court with jurisdiction in a very few areas, none of which touch the common man. It also allows Congress to set up lower federal courts and grant much more extensive jurisdiction. The casual observer might wonder why Congress would grant a rival branch more power. Upon further reflection, the answer becomes clear: Congress needs courts to implement its laws. Without federal court jurisdiction, Congress would be at the mercy of the various state court systems. Although Congress has little control over federal courts, it has even less over state courts.

Why, then, has Congress not given federal courts jurisdiction equal to the possible constitutional limits? Here again structural federalism comes into play. The state-related constituencies of Congress can be counted upon to oppose extensions of federal court power that diminish state control. The end result of this jurisdictional tug-of-war is an ever-shifting balance between two viable court systems—federal and state.

The product of this constitutional structure, which combines elements of separation of powers and federalism, has been an inefficient and generally slow-moving government. Some advocates have come out in favor of

8. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-80 (1975).

streamlining the system so that all its constituent elements could pull together in a common cause. But, as Chief Justice Warren Burger noted in *Bowsher v. Synar*:[9]

> That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of the governmental power.[10]

The very genius of the system lies in its inefficiency.

II. GUARANTEEING INDIVIDUAL LIBERTIES

A person's freedom may be threatened by any of three sources: foreign powers, fellow citizens, or his own government. In order to judge the Constitution's success in protecting individual liberties, we must gauge its ability to deal with each of these threats. We therefore must look to our history as a nation and let it pass judgment for us.

A. Dealing With Foreign Powers

The Constitution vests the entire power of conduct of foreign affairs in the national government. This represents the commonly held belief that it is necessary that the United States speak with a single voice when dealing with allies and foes alike. The plenary powers of states thus do not extend into this arena. But, once again, structural federalism gives state-based constituencies a role.

The most awesome foreign affairs power of the American government, as it is with any government, is the power to declare war. The Constitution vests this power in Congress alone. But the war power as it is understood in our system extends far beyond actions taken in connection with declared war. Presidents have ordered military intervention in foreign countries on numerous occasions in times of peace, that is, in the absence of a declared war. The Supreme Court has generally recognized such presidential actions and related executive orders to be constitutional, deriving authority from the President's position as Commander-in-Chief.[11] Such actions can serve an important purpose in protecting American interests abroad and, in some cases, averting full-scale war. It is notable, though, that such actions have yielded only a varying measure of success. Conversely, of the five declared wars in our history,[12] four have been complete victories for the United States. Only the War of 1812 was not, and this has been generally considered a draw.

The President and his subordinates also protect American interests by negotiating treaties with other nations. These agreements cover a wide variety

9. 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986).
10. *Id.* at 3187.
11. *See* G. GUNTHER, CONSTITUTIONAL LAW 370-77 (11th ed. 1985).
12. The War of 1812, Mexican War, Spanish-American War, World War I, and World War II were the declared wars.

of subjects, from military alliances to trade policy. The Constitution requires that the Senate approve any treaty before it can take effect. The approval requirement brings not only the legislature into the process, but also the accompanying state interests. This has proved to be more than just a nominal obstacle in the President's latitude in this area, as many treaties have been rejected by the Senate.

On the whole, the United States has been able to conduct a successful foreign policy. No hostile power has invaded American soil since 1815. The nation is involved in working military and economic alliances with other nations throughout the world. The system has been successful in keeping the peace most of the time, but the Constitution has provided the effective option of war when necessary. The end result is that Americans have not only been able to maintain their own independence, but have also been able to win freedom for millions of others throughout the world.

B. Balancing Citizens' Rights

Recognizing that the maximization of individual liberty is a worthy goal, it must be noted that no one is truly free in a state of anarchy. Such a state has a master as oppressive as any. The master is fear. He demands the complete devotion of his subjects. In such a state, citizens are prisoners in their own houses. A central goal of any virtuous government must be to eliminate anarchy so that people can live and work together in peace. The challenge of a system dedicated to freedom is to strike the proper balance between government control and anarchy so that its citizens serve no king—neither fear nor state.

Historically, states have held the primary responsibility for keeping public order in our constitutional system. The states all have laws against such crimes as murder, assault, and theft and employ police to enforce these laws. State courts handle the great majority of criminal cases in this nation, and state penitentiaries house those found guilty. State legislatures decide the penalties for violations. And, importantly, state taxes pay for the operation of each state's system.

Essentially, then, the fifty states represent fifty different ways of maintaining public order. Each way has its faults and virtues, and each has a price tag. The result is a virtual free market, the service being protection from crime, and the price, taxes. Just as manufacturers compete for customers, the states (especially in today's mobile society) must compete for citizens and industry. Thus there is additional pressure on each state to improve the quality of protection and lower the cost. Each state experiments to this end with new ideas in sentencing, parole, police methods, etc. All the states learn from the mistakes and successes of each state and each new experiment.

One facet of maintaining public order is the decision of how to fairly distribute conflicting rights. The grant of a right to one person often involves a corresponding suppression of another's freedom. The national government has played an important role in the resolution of such conflicts. One exam-

ple is Congress's fight against discrimination. Congress has had to reconcile the right to equal opportunity on the one hand with the right of private property on the other. This struggle has resulted in the civil rights laws. The structure of the legislative process has ensured that all of the competing interests had access to a full hearing in the resolution of this problem.

C. *Putting a Harness on Government*

Thomas Paine, the great patriot and pamphleteer, once observed that government is at best a necessary evil.[13] As was discussed in the foregoing paragraphs, government is *necessary* to protect the population from threats from abroad and anarchy at home. But why is it an *evil*? Because when government exceeds its mandate to guarantee freedom and acts as an instrument of ever increasing control, it ceases to be a solution and becomes a part of the problem. Unfortunately, as Montesquieu observed, this is the tendency of all governments. This was the failure of all systems before 1789; overcoming that tendency in the states and the national government has been the ultimate challenge to the Constitution.

Before the Civil War the national government had few checks on the states. Many people, led by John Calhoun of South Carolina, asserted that the national government derived its powers from the sovereign states, and that the states had a right to secede. This question was solved by the Civil War: the states did *not* have a right to secede and, like the national government, derived their powers from the Constitution. This division of powers shifted further in favor of the national government as a result of the post-Civil War amendments to the Constitution.[14] Furthermore, the protection of structural federalism was diluted greatly when the election of senators was taken out of the hands of state legislatures and given to the people as a whole.[15] The national government has since been in a much stronger position to right state wrongs.

The Voting Rights Act of 1965[16] is a well-known example of Congress stepping in to correct such abuses. Many states had been denying many of their citizens one of the rights most fundamental to a democratic society—the right to vote. The people being disenfranchised had no recourse in the state political system to correct this abuse. Congress saw this problem and acted. Now all segments of the American adult population have the right to vote and the ability to exercise that right.

The federal courts have also acted to correct state offenses. The Supreme Court has interpreted the fourteenth amendment's requirement that states guarantee "due process of law" to mean that most provisions of the Bill of Rights are applicable to the states. States must therefore respect an individual's right to a jury trial, the confrontation of witnesses, free speech and

13. T. PAINE, COMMON SENSE (1776), reprinted in I WRITINGS OF THOMAS PAINE 69 (M. Conway ed. 1984).

14. U.S. CONST. amends. XIII, XIV, XV.

15. *Id.* amend. XVII.

16. 42 U.S.C. § 1973 (1982).

religion, free press, and many more freedoms too numerous to mention. Since they have jurisdiction over all cases involving constitutional questions,[17] the federal courts have been able to effectively guarantee those rights.

Presidents have also played a role in correcting state transgressions. A good example is that of President Dwight Eisenhower. When the State of Arkansas refused to desegregate its schools in conformity with a federal court order in 1957, President Eisenhower sent troops into Little Rock to enforce the order.

But even without these instances of intervention by the national government, the pressures of competition ensure that states will not be unrestrained in dealing with their own citizens. For instance, most of the states had state churches after the Constitution was originally ratified. There was no constitutional provision barring such establishment at that time. But every state had disestablished religion by the mid-1800s. Religious freedom had been guaranteed not by military intervention or court order, but instead because of competition for commerce and industry. The system used natural human instincts to expand the horizons of freedom.

Unlike the states, the national government has no outside force to review its actions other than the electorate. The national government is of course bound to constitutional restrictions, but these restrictions are interpreted by one of its own branches, the Supreme Court. This relationship has concerned many states' rights advocates throughout the nation's history. On the surface, it appears that only self-restraint can keep the national government from unchecked growth. But the structural elements of separation of powers and federalism have provided an effective harness.

An important curb on congressional and presidential abuses of power is judicial review, the courts' ability to declare acts of the legislative and executive branches unconstitutional. This power was first asserted by the Supreme Court in 1803 in the landmark case of *Marbury v. Madison*.[18] Many have critized this assertion, arguing that it is a breach of separation of powers for one branch, the judiciary, to void the acts of its co-equal branches. However, as Chief Justice John Marshall explained in *Marbury*, judicial review is not a breach but instead is a logical and necessary element of separation of powers. It is the function of the Supreme Court, as it is with any court, to apply the law by which it is bound to the facts of the case at hand. Implicit in that function is the duty to determine what the law is that binds the Court. The law of the land is the Constitution and statutes passed in pursuance of the Constitution.[19] The Supreme Court must therefore determine if a federal statute in question is in compliance with the Constitution before it can perform its judicial role. The Court could not perform

17. The federal courts have possessed broad jurisdiction in this area since the passage of the Judiciary Act of 1875, ch. 137, 18 Stat. 470 (1875) (current version at 28 U.S.C. § 1331 (1982)).

18. 5 U.S. (1 Cranch) 137 (1803).

19. U.S. CONST. art. VI.

its sworn duty to uphold the Constitution if it were divested of this power. This is the basis of judicial review. Armed with the power of review, the federal courts have on many occasions stopped the other two branches from overstepping constitutional bounds, thereby making certain that the individual liberties listed in the Bill of Rights are guaranteed for all.

The greatest restriction on the abuse of power by the national government, however, has been the inefficiencies inherent in the structure itself. The involvement of different constituencies and the diffusion of authority has arrested the trend that has afflicted so many other systems, the trend toward consolidation of power. The Supreme Court has used its power of judicial review to maintain this structure.[20] The result has been a national government that has had to prioritize its goals and act upon only those of the most pressing national concern. This has meant that a great number of citizens' affairs have proceeded unregulated. The product has been a society of people who have been free to pursue their own dreams and destinies and to put their talents to work for themselves, their families, and society as a whole. This system has fostered America's rise to the position of the greatest economic and military might in the world.

III. CONCLUSION

But America is more than a military power, more than a economic giant. Indeed, this is more than just a nation. America is an idea, the unrelenting belief that God made man to be free. Strip away the rest, wonderful though it is, and the idea still remains, majestic and undeniable. The challenge of the Constitution has been to make that idea a reality. Through two centuries, as Americans have pushed back the frontiers of their nation, crossing the Appalachians, the Mississippi, and the Rockies, venturing even into the depths of outer space, the Constitution has met this challenge and has prevailed. The American system of government, limited by the structural elements of federalism and separation of powers, not only has protected the individual liberties won in the Revolution, but has expanded those guarantees with the passage of time. The system certainly has benefitted from its able defenders: the Washingtons, the Madisons, and the Marshalls of yesterday and today. But it is the system itself, and particularly its structural features, that has provided these great men a forum in which to champion their cause, the cause of freedom. In this bicentennial year of its conception, let us firmly resolve never to forget that the United States Constitution is the very lantern that houses the precious flame of that freedom. Armed with this lantern, it is our challenge and solemn duty to fulfill the American destiny and shine its brilliant light for all mankind to see.

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20. *See, e.g.*, Bowsher v. Synar, 106 S. Ct. 3181, 3188-89, 92 L. Ed. 2d 583, 596-97 (1986) (reporting provisions of act unconstitutional since Congress must play no role in execution of laws); INS v. Chadha, 462 U.S. 919, 951-59 (1983) (legislative veto provision of act violated separation of powers); Buckley v. Valeo, 424 U.S. 1, 140 (1976) (act providing for senate commission enforcement violates appointments clause of constitution).