

普通高等教育“十二五”规划教材



21世纪法学规划教材

法律英语高级教程

A Course-book
of the English
Language of Law

宋 雷 郑达轩 主编



北京大学出版社
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丛书出版前言

秉承“学术的尊严,精神的魅力”的理念,北京大学出版社多年来在文史、社科、法律、经管等领域出版了不同层次、不同品种的大学教材,获得了广大读者好评。

但一些院校和读者面对多种教材时出现选择上的困惑,因此北京大学出版社对全社教材进行了整合优化。集全社之力,推出一套统一的精品教材。

“21 世纪法学规划教材”即是本套精品教材的法律部分。本系列教材在全社法律教材中选取了精品之作,均由我国法学领域颇具影响力和潜力的专家学者编写而成,力求结合教学实践,推动我国法律教育的发展。

“21 世纪法学规划教材”面向各高等院校法学专业学生,内容不仅包括了 16 门核心课教材,还包括多门传统专业课教材,以及新兴课程教材;在注重系统性和全面性的同时,强调与司法实践、研究生教育接轨,培养学生的法律思维和法学素质,帮助学生打下扎实的专业基础和掌握最新的学科前沿知识。

本系列教材在保持相对一致的风格和体例的基础上,以精品课程建设的标准严格要求各教材的编写;汲取同类教材特别是国外优秀教材的经验和精华,同时具有中国当下的问题意识;增加支持先进教学手段和多元化教学方法的内容,努力配备丰富、多元的教辅材料,如电子课件、配套案例等。

为了使本系列教材具有持续的生命力,我们将积极与作者沟通,结合立法和司法实践,对教材不断进行修订。

无论您是教师还是学生,在适用本系列教材的过程中,如果发现任何问题或有任何意见、建议,欢迎及时与我们联系(发送邮件至 bjdxcbbs1979@163.com)。我们会将您的意见或建议及时反馈给作者,供作者在修订再版时进行参考,从而进一步完善教材内容。

最后,感谢所有参与编写和为我们出谋划策提供帮助的专家学者,以及广大使用本系列教材的师生,希望本系列教材能够为我国高等院校法学专业教育和我国的法治建设贡献绵薄之力。

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2012 年 3 月

前 言

随着法律语言学(Legal Language 或 the Language of Law)在中国的兴起和蓬勃发展,以英语作为介质的法律英语(Legal English 或 the English Language of Law)在我国的发展蔚为壮观。同时,世界政治、法律、经济、贸易、金融、文化等交流活动的发展也为法律英语的学习带来便利,法律文件的翻译活动也日渐普及,为此,法律英语相关教材不断问世,但如何更好教会学生拓展其专业水平的教科书在国内相对鲜见。基于此,我们在编写了多种法律英语教材的基础上重新设计和编写了本教程,旨在让读者认识为“法律人”(Lawyer)所适用的法律语言,帮助他们提高法律英语水平,期待他们最终能掌握和比较熟练地应用法律英语实际开展各种相关工作或研究。

法律英语的涉及面极广,一般可以将有关材料分为两大类,即 Black Letter Law(严谨的法律原则,包括法律、法规、条例、命令、合同等等)和 Legal Literature(法学著述),而属于 Legal Literature 的范围很广泛,它包括法律评论文章(law review articles)、法学论文(treaties)、专著(monograph)、法官判决词(judge's opinion)等。这类著述相对晦涩深奥,常有不为非法律人理解的行话(legalese)在内,作者一般从交叉学科的视角对法学等进行诠释、剖析、解构和建构。

本书所选课文的语篇、语义及语用结构等均属中等以上难度,编者对不少课文都作有比较详尽的注释。此外,每课课文之后还附有大量的涉及法律英语的词汇、阅读理解、交互作用、案例赏析等练习。本书更具特色的是每课练习均设有一定的法律语言特征分析与法律翻译技能培养的简单介绍,并配有相关的翻译练习,以期帮助读者提高以英语作为介质的法律翻译能力。

本教程编写人员主要有:宋雷、郑达轩、倪清泉、谢金荣、谯莉、耿茜茜、薛婷婷等人。其中,倪清泉负责第16课的编写,谢金荣负责第8、15课的编写,谯莉负责第13课的编写,耿茜茜负责第6课的编写,薛婷婷负责第10课的编写,尹延安参加了第1、12、18课的部分编写,刘雅晴、王涛、王玉华、邓莎等参加了第7、9、11、14、17课的部分编写,张瑜参加了第1、4、18课的部分编写,郝立蓉参加了第3、12课的编写。

本书主编除材料收集和整理外,还参加了第2、3、4、5、7、9、11、14、17等课的编写,第1、12、18课的部分编写工作,并负责全书统编、刊校工作。

教材编写是件极科学和极艰巨的任务,尽管本书的编写得到西南政法大学研究生教研室各位同仁的指导和帮助,但鉴于编者的经验、水平等关系,错误在所难免,恳请不吝赐教。

宋 雷 郑达轩

2012年于西南政法大学

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Lesson One



Separation of Parties, Not Powers

Learning objectives

After learning the text and having done the exercises in this lesson, you will:

- familiarize with knowledge of the legal characteristics and the nature of separation of parties rather than separation of powers;
- acquire an appreciation of the vocabulary and grammar or syntax relevant to separation of powers and separation of parties in the constitutional setting;
- become aware of the information required in order to understand the separation of parties in the US constitutionality;
- cultivate the practical abilities to put to use the language in the specific context;
- be able to do some translation from Chinese to English and from English to Chinese.



Text

Separation of Parties, Not Powers

• Introduction

American political institutions were founded upon the Madisonian^① assumption of vigorous, self-sustaining political competition between the legislative and executive branches. Congress and the President would check and balance^② each other; officeholders would defend the distinct interests of their distinct institutions, and ambition would counteract ambition.

① James Madison, Jr.: 詹姆斯·麦迪逊(1751—1836), 美国著名政治家和政治理论家, 第四任美国总统(1809—1817), 因起草美利坚合众国联邦宪法被人尊称为“宪法之父”, 并极力主张和草拟美国“权利法案”。起草宪法后, 极力推动各州批准该宪法的工作, 他和亚历山大·汉密尔顿以及约翰·杰伊的合作成果造就了备受后人瞩目的《联邦党人文集》(1788年)的诞生。他担任总统期间曾领导进行第二次美英战争, 保卫了美国的共和制度, 为美国赢得彻底独立建立了功绩。他在1776年参加弗吉尼亚宪法的制定, 并且是弗吉尼亚会议的一位领导人。他还是出席大陆会议的代表, 是制宪会议的主要人物、众议院议员、民主共和党的组织者。

② check and balance: 制衡, 制约与平衡。check and balance principle(分权制衡原则)是美国政治制度中一个非常重要的概念。

To this day, the idea of building self-sustaining political competition into the structure of government is frequently portrayed as the unique genius of the U. S. Constitution and largely credited for^① the success of American democracy. Yet the truth is closer to the opposite. The success of American democracy overwhelmed the branch-based design of separation of powers^② almost from the outset, preempting the political dynamics that were supposed to provide each branch with a will of its own. What the Framers^③ did not count on was the emergence of robust democratic competition, in government and in the electorate. Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government but rather through an institution the Framers could imagine only dimly but nevertheless despised^④: political parties. Parties came to serve as the primary organizational vehicle for mobilizing, motivating, and defining the terms of democratic political competition, creating alliances among constituents and officeholders that cut across the boundaries between the branches and undermined Madisonian assumptions of branch-based competition. Few aspects of the Founding generation's political theory are now more clearly anachronistic^⑤ than their vision of legislative-executive separation of powers.

Nevertheless, few of the Framers' ideas continue to be taken as literally or sanctified as deeply by courts and constitutional scholars as the passages about interbranch relations^⑥ in Madison's *Federalist 51*^⑦. This Article re-envision the law and theory of separation of powers by viewing it through the lens of party competition. In particular, it points out that during periods—like the present—of cohesive and polarized^⑧ political parties, the degree and kind of competition between the legislative and executive branches will vary significantly and may all but disappear, depending on whether party control of the House, Senate, and presidency is divided or unified. The practical distinction between party-divided and party-unified government thus rivals, and often dominates, the constitutional distinction between the branches in predicting and explaining interbranch political dynamics. Recognizing that these dynamics will shift from competitive when government is divided to cooperative when it is unified calls into question basic assumptions of separation of powers, law and theory. More constructively, refocusing the separation of powers on parties casts nu-

① be credited for: 归功于某人,如:He is credited with the invention(这个发明是他的功劳)。To credit (sb.) with (an amount / a quality),把(某数)记入(某人)账户的贷方,记入为(某人)存款;相信(某人)具有(某性质)。To credit success to (sb.),把成功归于某人。

② branch-based design of separation of powers:基于国家权力的不同部门而设定权力的分立。

③ Framers:在文中指美国的制宪者、开国元勋们,开国一代(Founding Fathers of the United States)。

④ an institution the Framers could imagine only dimly but nevertheless despised:制宪者们可以隐隐约约想象得到却不屑为之的一种制度。

⑤ anachronistic:年代出错的,时代错误的,不合时代潮流。源自 anachronism:时代错误,弄错年代;与时代不合的事物,如:Contemporary monarchy is an anachronism(现代的君主政体是不合时宜的事物)。

⑥ interbranch relations:国家各部门之间权力的关系。

⑦ *Federalist 51*:指《联邦党人文集》第51篇。《联邦党人文集》或称《联邦论》、《联邦主义论文集》(Federalist Papers),是18世纪80年代数位美国政治家在制定美国宪法的过程中所写作的有关美国宪法和联邦制度的评论文章的合集,共收有85篇文章。这些文章最早连载于纽约地区的报纸,之后在1788年,首次出版了合集,书名为《联邦党人》(The Federalist)。此书主要对美国宪法和美国政府的运作原理进行了剖析和阐述,是研究美国宪法的最重要的历史文献之一。

⑧ polarized:极化的,两极分化的;偏振的,如:The public opinion has polarized on this issue(在这个问题上公众的意见已两极分化)。

merous aspects of constitutional structure, doctrine, and institutional design in a new and more realistic light.

• Madison and the Mechanisms of Political Competition

According to the political theory of the Framers, “the great problem to be solved” was to design governance institutions^① that would afford “practical security” against the excessive concentration of political power. Constitutional provisions specifying limited domains of legitimate authority were of minimal utility, for, as Madison explained, “a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.” The solution to this great problem was, instead, to link the power-seeking motives of public officials to the interests of their branches. By giving “those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others,” the Framers hoped to create a system in which competition for power among the branches would constrain each safely within its bounds. With multiple government departments pitted against each other^② in a competition for power, an invisible-hand dynamic might prevail in which “ambition would be made to counteract ambition.”

Madison’s vision of competitive branches balancing and checking one another has dominated constitutional thought about the separation of powers through the present. Yet it has never been clear exactly how the Madisonian machine was supposed to operate. Particularly puzzling is Madison’s personification of political institutions, his hope that each branch might come to possess “a will of its own.” If branches of government pursued their own interests, and if these interests were similar to the power-mongering interests^③ that the Framers attributed to individual political actors, then branches might indeed compete with one another for power. But of course, government institutions do not have wills or interests of their own; their behavior is a product of the wills or interests that motivate the individual officials who compose them. Madison saw the need for a linkage between “the interest of the man” and “the constitutional rights of the place,” but he never provided a mechanism by which the interests of actual public officials would be channeled into maintaining the proper role for their respective branches.

① governance institutions: 治理制度, 治理机制。governance: 治理, 管治, 统治, 管理, 支配; 统治方式, 管理方法, 如 global governance (全球治理); ownership structure and corporate governance performance (股权结构与公司治理绩效); the community governance (社区治理); collaboration game and governance of relation of governments (合作博弈与府际治理)。

② pit against: 使竞争, 使相互角斗, 如: The government leadership and rural social forces pitted against each other (政府主导与乡村社会力量相互对垒); For many women, profession and family are pitted against one another on a high-stakes collision course (对许多女性来说, 职业和家庭在一个高风险的冲突过程上是互相抵触的)。

③ power-mongering interests: 角逐权利者的利益, 争权夺利者的利益, power-monger: 角逐权力者, 争权者。

From the modern perspective of consolidated democracy^①, it is hard to see how such a mechanism would arise. Even assuming, with the founding generation, that officeholders are driven by a “lust for self-aggrandizement,” the structure of democratic politics effectively channels those ambitions into a different set of activities that has nothing to do with aggrandizing their departments or defending them against encroachments. Individual politicians gain and exercise power by winning competitive elections and effectuating political or ideological goals. Neither of these objectives correlates in any obvious way with the interests or power of branches of government as such. Madison’s will-based theory of separation of powers would seem to require government officials who care more about the intrinsic interests of their departments than their personal interests or the interests of the citizens they represent. Democratic politics is unlikely to generate such officials.

The founding generation’s assumptions about the workings of representative democracy^② may help account for Madison’s optimism. First, elections were not then conceived as the competitive contests they soon became. Instead, they were understood and practiced largely as matters of acclamation, focusing on personal qualities more than issues and interests and primarily serving to ratify existing social and political hierarchies. George Washington’s^③ assumption of the presidency is a paradigmatic example. Second, to the extent political issues were discussed, it was in the civic republican vocabulary of disinterested concern for the common good^④, shunning explicit appeals to interest. With large election districts for the House^⑤ and indirect election of the Senate and President providing further insulation from the self-interested demands of constituents, it was possible to envision officeholders who would “refine and enlarge the public views” and whose “wisdom might best discern the true interest of their country.” In this kind of political, or apolitical, world, it was possible to imagine that, once elected, officeholders would not be tempted by constituent pressures and competing ideological or policy goals to sacrifice the constitutionally assigned duties and powers of their branches—simply because constituent pressures and divergent interests were kept to a minimum.

Less optimistically, the founding generation also had good reason to doubt whether representative democracy would work at all and, consequently, good reason to fear that government officials

① Consolidated democracy: 统一(整合)民主制,如:一国绝大多数的人民把民主体制当作是合法制度予以接受,民众接受有关民主的基本准则并参与到各个层面的市民社会生活。(A democracy is considered “consolidated” when it is the only game in town. What this means is that a large majority of the countries’ population accepts the democratic institutions as legitimate and thus they exist relatively unchallenged. However, this also means that there must be a strong democratic culture in place as well. This means that, in general, the population believes in the basic tenets of democracy and participates in various aspects of civil society.)

② representative democracy: 代议制民主,公民选举代表掌握国家决策权力的民主形式。代议制民主下,公民的民主权利主要体现在选举代表的权利上。与直接民主制(direct democracy)相对。

③ George Washington: 美国首任总统(1789—1797),由于他扮演了美国独立战争和建国中最重要的角色,故被尊称为美国国父。

④ common good: 公益/共同利益;在苏格兰指公共财产,如:law is an ordinance of reason for the common good(法律是维护公众利益的理性条令)。

⑤ House: 此处指 House of Representatives, [美]众议院,美国立法机构两院的下院,上院为参议院(Senate)。

would pursue interests entirely disconnected not just from those of their nominal constituents^①, but from the public good as well. Madison's scheme for pitting competing branches against one another may have been meant only as a fail-safe^②, in case Antifederalist^③ fears of radical democratic failure came to pass. If one branch fell under the control of a would-be monarch or tyrannical cabal, the other branches might provide a check by using their constitutional powers to block oppressive measures or, as the founding generation vividly recalled from the English Civil War^④, by leading an opposing army to fight for control of the state. In the worst-case scenario, better to be ruled by several warring tyrants than a single omnipotent one. For the Federalist Framers, however, this kind of figurative and literal interbranch warfare was meant only as an "auxiliary precaution." The "primary control on the government" would be its "dependence on the people," which would link the political self-interest of legislators to the interests of the voters who determined their professional fates. If representative democracy worked as the Framers hoped, in other words, competition for power among the branches would be replaced by competition for power among politicians and groups of constituents.

In fact, this is just what happened: Madison's design was eclipsed almost from the outset by the emergence of robust democratic political competition. Rather than tying their ambitions to the constitutional duties or power base of their departments, officials responded to the material incentives of democratic politics in ways that now seem natural and inevitable: by forming incipient organizations that took sides on contested policy and ideological issues and by competing to marshal support for their agendas. These efforts led inexorably, though haltingly, to the organization of enduring parties that would facilitate alliances among groups of like-minded elected officials and politically mobilized citizens on a national scale.

The idea of political parties, representing institutionalized divisions of interest, was famously anathema to the Framers, as it had long been in Western political thought. Equating parties with nefarious "factions," the Framers had attempted to design a "Constitution Against Parties." But the futility of this effort quickly became apparent. By the end of the first Congress^⑤, it had become clear that political competition organized around issues and programs had the potential to divide coalitions of officeholders and cut through the constitutional boundaries between the branches.

① Constituents: adj. 组成的,形成的(部分);有权制宪、修宪的(会议)如“立宪会议”(constituent council); n. 委任人(指委任并授权他人为自己的代理人);选民(在自己所在的选区选出代表该选区并在公共事务中关注他们利益的议员的人)。此处指选民。

② fail-safe: n. 自动故障装置; adj. 自动故障装置的,故障自动保险的;能组织军事攻击的;万无一失的。

③ Antifederalist: 反联邦主义者,反联邦党员,是1642年至1651年在英国议会派与保皇派之间发生的一系列武装冲突及政治斗争;英国辉格党称之为清教徒革命(Puritan Revolution)。此事件对英国和整个欧洲都产生了巨大的影响,并由此将革命开始的1640年作为世界近代史的开端。

④ English Civil War: 英国内战(1642—1651),也被称作 The Civil War in Great Britain。

⑤ 此处应指第一次大陆会议(First Continental Congress)。第一次大陆会议在1774年召开,组建了军队并任命乔治·华盛顿为大陆军总司令,讨论殖民地反抗英国统治的问题。1775年4月19日,英国士兵与殖民地反叛者在马萨诸塞州列克星敦发生遭遇战,战争爆发了。1776年7月4日,大陆会议通过了《独立宣言》。

The earliest efforts toward alliance formation were initiated by Treasury Secretary Alexander Hamilton^①, who in 1790 began to recruit members of Congress to forge a coalition in favor of his economic development program. His leading congressional opponent, James Madison, joined with Thomas Jefferson^② to organize opposition. As the political battle in Congress intensified, both sides recognized the need to cultivate public support. By the 1796 elections, Federalists and Republicans^③ had coalesced into competing groupings, with party leaders controlling nominations and, at least in some states, rudimentary party machinery organizing campaigns focused more on issues and platforms than on the local stature of the candidates. When Congress convened in 1797, its members were clearly identified as Federalist or Republican and regularly voted along those lines. The precursors of the modern political parties had taken root, planted by the very Framers who had authored a Constitution against them.

To be sure, the early organizations, caucuses, and proto-parties were organized with regret and regarded as temporary expediciencies that would fade when the urgent need to defeat a treasonous enemy had passed—as they did, to some extent, after the collapse of the Federalist Party inaugurated the “Era of Good Feelings.”^④ The Jacksonian period, however, brought lasting recognition and acceptance of a “party system” of democratic politics: an ongoing competition, as Professor Richard Hofstadter^⑤ later defined it, between stable, organized parties, alternating power and control within shared acceptance of a constitutional framework. Acceptance of this idea has rightly been called a “revolution in political structure that lies at the foundation of modernity.”

At the very least, the rise of partisan politics worked a revolution in the American system of separation of powers, radically realigning the incentives of politicians and officeholders. As an initial example, consider the role of parties in transforming the presidency into a genuinely independent counterweight to Congress. During the country's first forty years or so, a chasm emerged between the predicted and actual effects of the constitutional design on the President's capacity to

① Treasury Secretary, 是指美国财政部长,而在英国,财政部长为 Treasury Chief.

Alexander Hamilton: 亚历山大·汉密尔顿(1757—1804), 是美国的开国元勋之一,宪法的起草人之一,财经专家,是美国的第一任财政部长,美国政党制度的创建者,在美国金融、财政和工业发展史上,占有重要地位。因政党相争而决斗丧生。2006年,汉密尔顿被美国的权威期刊《大西洋月刊》评为影响美国的100位人物第5名。

② Thomas Jefferson: 托马斯·杰斐逊(1743—1826), 美国政治家、思想家、哲学家、科学家、教育家,第三任美国总统。他是美国独立战争期间的主要领导人之一,1776年,作为一个包括约翰·亚当斯和本杰明·富兰克林在内的起草委员会的成员,起草了美国《独立宣言》。此后,他先后担任了美国第一任国务卿、第二任副总统和第三任总统。他在任期间保护农业,发展民族资本主义工业。从法国手中购买路易斯安那州,使美国领土近乎增加了一倍。他被普遍视为美国历史上最杰出的总统之一,同华盛顿、林肯和罗斯福齐名。

③ Federalists: 联邦党(Federalist Party 或 Federal Party)是在1792年到1816年期间存在的一个美国政党。由美国首任财政部长亚历山大·汉密尔顿(Alexander Hamilton)成立。联邦党是美国在1801年之前的执政党。主张增强联邦政府的权力。主要的支持者来自新英格兰和一些南方较富有的农民。其竞争对手为民主共和党。联邦党是后来辉格党和共和党的前身。

Republican: 共和党(Republican Party), 又常被简称为 GOP(Grand Old Party, 大佬党), 是美国当代的两大主要政党之一,另一个是民主党。1856年创党以来,共和党在39届总统选战中赢得了23届,包括了最近10届中的6届;自从那时开始29位美国总统有18位都是共和党人。共和党创立于1854年,结合了当时反对奴隶制度扩张的政治势力。在现代政治中,共和党则被视为是社会保守主义和经济古典自由主义的政党。

④ Era of Good Feelings: “和睦时代”, 是美国历史上一个独特的时代,这个时期主要包括詹姆斯·门罗任职总统的8年(1817—1825)。

⑤ Richard Hofstadter: 理查德·霍夫施塔特(1916—1970), 20世纪50年代的美国公共知识分子、历史学家。

stand apart from Congress. The Framers had specifically rejected congressional appointment of the President on the ground that making the President reliant on congressional support would deny him the requisite independence. Yet after Washington's presidency, party caucuses in Congress quickly became the mechanism for identifying and selecting credible presidential candidates. The rise of legislative parties as gatekeepers for the presidency, together with the expectation that elections would often be decided in the House of Representatives (as they were in two of the four open-seat presidential elections from 1800 to 1824), meant that Congress played a major role in selecting the President. As a result, the American government effectively operated for much of its first forty years with a congressionally dominated fusion of legislative and executive powers. So much for Madison's prediction that separated powers would create checks and balances by joining "the interest of the man" with "the constitutional rights of the place." The political interests of the man who held the presidency, it turned out, had little to do with furthering some abstract conception of the presidency's proper role, but were instead rooted in the necessity of winning and keeping office. Presidents maximized their political prospects not by creating an independent "will" for the executive branch or competing with Congress for power, but instead by acquiescing in congressionally dominated government.

Not until the presidency of Andrew Jackson^① did American government begin to resemble in practice the Madisonian system of separation of powers that existed on paper. Jackson was the first President to circumvent Congress by appealing directly to the people, claiming that his office embodied the American people as a whole. His revolutionary use of the veto backed up this claim.^② As a leading historian of the presidency puts it, for the first time the presidency "was thrust forward as one of three equal departments of government, and to each and every of its powers was imparted new scope, new vitality."

The inauguration of the independent presidency under Jackson was made possible by two institutional changes, both emerging from the invention of political parties. First, Martin Van Buren's^③ creation of the mass-scale political party generated pressure for popular control over presidential nominations, leading to the replacement of the congressional caucus system by national

① Andrew Jackson: 安德鲁·杰克逊, 是美国第七任总统(1829—1837)。首任佛罗里达州州长、新奥尔良之役战争英雄、民主党创建者之一, 杰克逊式民主因他而得名。在美国政治史上, 19 世纪二三十年代第二党体系(Second Party System)以他为极端的象征。杰克逊始终被美国的专家学者评为美国最杰出的 10 位总统之一。

② His revolutionary use of the veto backed up this claim: 他革命性地使用总体否决权以支持这种主张。Jackson 所行使的总统否决权比历史上所有总统使用否决权之和还要多, 其中包括最著名的美利坚合众国第二银行案的否决, 其早期行使否决权主要还是基于宪法, 而后期则更多是基于他和国会的不和, 这些较为典型地反映出美国总统的独立性。(Jackson vetoed more bills than all previous Presidents combined, Presidential Vetoes, including his famous veto of the Second Bank of the United States, which was accompanied by the strongest statement of the presidency's independent role that had thus far been issued in American history. Even the course of his vetoes reflected the increasing functional separation of the Presidency from Congress: Jackson's early vetoes were based on constitutional objections, traditionally a more widely accepted basis for exercise of the veto, while his later ones rested on mere policy disagreement with Congress.)

③ Martin Van Buren: 马丁·范布伦, 美国第八任副总统(1833—1837)及美国第八任总统(1837—1841)。他是美国《独立宣言》正式签署后出生的第一位总统。为人圆滑, 诡计多端, 是一个出色的政党组织者, 有“魔术师”和“红狐狸”之称。是前总统安德鲁·杰克逊最得力的助手。1837 年继位上台后, 和加拿大爆发了边界争端, 他灵活处理。但后来美国又爆发了第一次经济危机。虽然这不是他的错, 但人民对范布伦失去信心。1840 年他竞选连任时, 败于威廉·亨利·哈里森。后来又两度参加竞选, 都遭到失败, 从此退出政坛, 回到故乡。

nominating conventions as of 1832. Second, the Democratic Party's novel practice of running presidential electors pledged in advance to vote for particular candidates undermined the electoral college^① by turning it into a mere tabulating device, one likely to yield a majority winner; this all but eliminated the role of the House of Representatives in resolving presidential elections. Taken together, these two institutional changes wrested control of the presidency away from Congress by forging an independent, popular electoral base for the President.

Thus, it took the mass-scale Democratic Party of Van Buren and Jackson to create the possibility of Madisonian competition between Congress and the President that the original constitutional design had promised but failed to deliver. For all of the Framers' aversion to parties, credit for the belated birth of genuinely separated powers must go to the mass political party—the embodiment of the factionalized politics the Framers most loathed. One failure of constitutional design was corrected, ironically, by another.

The correction, however, was neither permanent nor complete. Just as parties can create the conditions necessary for interbranch competition to emerge, they can also submerge competition by effectively reuniting the branches. As we elaborate below, if government officials are motivated primarily by policy and partisan goals, then single-party control of multiple branches of government will tend to create cross-branch cooperation among like-minded officeholders. Once again, parties can—and often do—change the relationship between Congress and the President from competitive to cooperative.

For present purposes, however, it is enough to see that from the outset of government under the Constitution, practical politics undermined the Madisonian vision of rivalrous branches pitted against one another in a competition for power. The emergence of a robust system of democratic politics tied the power and political fortunes of government officials to issues and elections. This, in turn, created a set of incentives that rendered these officials largely indifferent to the powers and interests of the branches per se. In Madison's terms, "the interests of the man" have become quite disconnected from the interests of "the place."

Instead, the electoral and policy interests of politicians have become intimately connected to political parties. Since the early conflicts between Federalists and Republicans, politicians have affiliated themselves with the party whose platform comes closest to their own policy preferences, and parties, in turn, have exerted influence over members' policy goals and their ability to achieve them in office. The result has been a strong correlation between party affiliation and political behavior. Even the most casual observer of Washington politics understands that congressional opposition to a President's initiatives and nominees will come predominantly, if not entirely, from members of the opposite party.

To observe that the political interests of elected officials generally correlate more strongly with party than with branch is not to assert that political interests perfectly track party affiliation. They

① electoral college: 美国由各州所选出的总统选举团制度。美国国父们在宪法中确定“选举团”制度是为了在国会选票与大众选票之间搞妥协,但宪法文本中并没有 Electoral College 这个术语,《宪法》第 2 条与第十二修正条款所使用的均为“elector”。