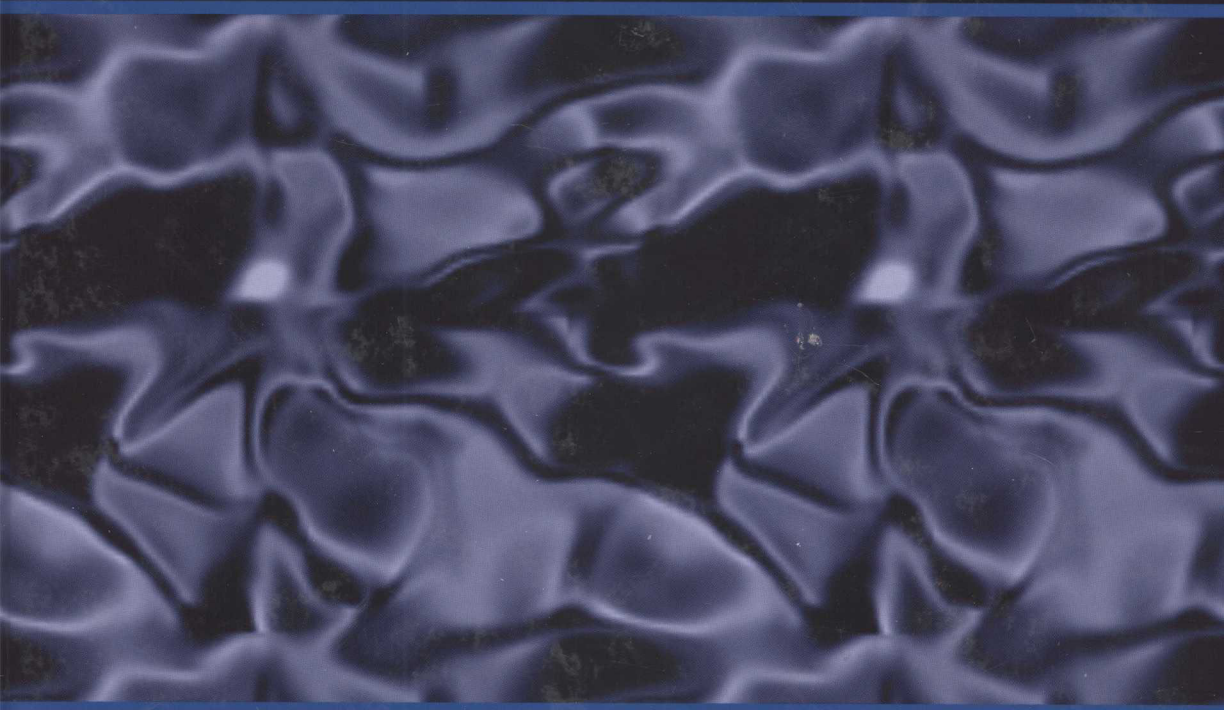
Economics of Constitutional Law

VOLUME I

The Structural Constitution

Edited by **Richard A. Epstein**



ECONOMIC APPROACHES TO LAW 25

Economics of Constitutional Law

Volume I

The Structural Constitution

Edited by

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Introduction: The Law and Economics of Constitutionalism

Richard A. Epstein

I. The Theory of Constitutionalism

Does Law and Economics Have Anything to Say about Constitutionalism?

To scholars and ordinary citizens alike, the title of these two volumes will bring to mind the first lines of a famous poem by Rudyard Kipling – 'East is east and west is west, and never the twain shall meet.'[1] Law and economics addresses issues commonly thought tied to commercial transactions, business organizations, or the direct regulation of the economy in such key areas as network industries and antitrust. In contrast, constitutions are matters of statecraft and political wisdom, which evoke norms of community governance, political structure, and individual rights – not the grubby concerns with prices and market structure. And even if economic behavior is subject to constitutional oversight or protection, the tools of law and economics are not thought widely to be useful in construing the deceptively simple textual passages whose meaning depends either on the intention of the original framers – no easy task to discern – or in the common understanding of a debated provision at the time of its incorporation in the governing document. Linguistics and cultural history seem better suited for dealing with constitutional issues than economic theory.

This basic point can be hammered home by noting that different national soils give rise to different constitutional traditions – if they are fortunate enough to develop any constitutional traditions at all. It is therefore only with caution that we reason from what institutions and practices we observe in one country to those we would expect to find in another. Economic theory purports to rely on universal laws to describe, for example, the behavior of individuals in competitive and monopoly markets. Its distinctive niche is to draw implications about individual and social welfare in the movement of prices, quantities, contract terms. It starts with this as a positive mission from which it – or its practical adherents – may seek to draw normative conclusions about the concordance, or divergence, between individual and social welfare. The most famous of these propositions is that of Adam Smith who demonstrated that under competition the 'invisible hand' led to the correspondence between these two measures of welfare. He further showed that this relationship was severed under conditions of monopoly. This program, and the language that it embodies are, at least at first blush, foreign to constitutional discourse. In addition, it hardly helps that economics adopts a universal language

that meshes only uneasily with the wide range of local solutions and practices of different nations and states on the grand questions of political power.

There is little to be said against this common skepticism about the place of economic analysis in constitutional law if the underlying claim is that economic theory should *banish* all other avenues to understanding constitutional design and interpretation. But the story plays out quite differently if the inquiry is shaped in a somewhat more modest fashion. The astute defender of the law and economics approach to constitutional analysis does not demand an intellectual monopoly over this topic. Rather, he is more sensibly only asking for a seat at the table, so that economic tools can be used to understand the critical conditions needed both to create and preserve a constitutional design wise enough and simple enough to withstand the constant pounding that the forces of self-interest will unleash in any political community. This was the problem that faced James Madison in 'Federalist Ten', which is included in this volume (Volume I, Chapter 1) precisely because it sets the stage for the extensive deliberations that follow. That same theme is addressed first in Cass Sunstein's celebrated article, 'Interest Groups in American Public Law' (Volume I, Chapter 2), and more recently in Robert Cooter's Constitutional Consequentialism: Bargain Democracy versus Median Democracy (Volume I, Chapter 3), which explores the different ways that various organizations can seek to aggregate preferences among individuals in order to establish a stable political order.

Put in this fashion, the first task of constitutional theory is to rely on the postulates of economic theory to answer the question of how to create durable institutions that are relatively impervious to the short-term exigencies of nature and social circumstance. Stated otherwise, constitutional law deals with strategy and not with tactics. As such, its deepest problems are world-wide so long as individuals with aggressive tendencies seek to live cooperatively in conditions of long-term peace and stability. Yet ironically, most of the materials included in this volume are distinctively American in origin or tone, and for two reasons, neither of which is easily avoidable. The first is that the United States (and the University of Chicago in particular) is the birthplace of the law and economics movement. Thus simple proximity has led American scholars to turn naturally to the American experience to grapple with the problems of constitutional law. Secondly, without question, the American constitution, warts and all, is the one legal document that has best stood the test of time. Putting aside the tumultuous interval of the American Civil War,[2] the U.S. Constitution has been in continuous operation now for 220 years. In addition, the American constitutional structure is one that by design is both rich and complex, replete with categorical commands – 'no state shall impair the obligation of contract' – and highly contextual standards – such as the prohibition against 'unreasonable searches and seizures.' It relies on many key structural elements of which the key ones are separation of powers, checks and balances, and a federalist system in which states have some degree of independent sovereign power, which they are said to be able to maintain against the demands of the national government. These great themes are the subject matter of the first volume. The document also contains key entrenched provisions to protect individual rights to property, to speech, to religion, and as of 2008, it appears, to bear arms.[3] These issues are the subject of the second volume. The United States Constitution also rests heavily on a doctrine of judicial supremacy, which means that the American system of judicial review allows the Supreme Court to strike down any legislation at the federal or state level that contravenes specific provisions in the constitution. The extensive body of constitutional decisions of the United States Supreme Court has been a huge boon to constitutional law and economics, by

supplying the field with an endless array of case studies that probe every aspect of constitutional governance.

The Public Choice Initiative

The purpose of this introductory essay therefore is to track some of these key elements and to do so from a perspective that embodies economic theory. The key linchpin in this study is the rise, first in the United States and now everywhere, of public choice as a branch of modern economic theory. The public choice movement owes its most important impetus to the work of James Buchanan and Gordon Tullock who in 1962 published their pathbreaking work, *The Calculus of Consent*, which was intended to address one simple but all pervasive question.[4] Take the usual rules of individual self-interest under conditions of scarcity and see how they play out, not in market settings, but in political ones. The differences between markets and governments are clear enough for these purposes. Markets rely on systems of unanimous consent, and thus offer a powerful guarantee that all participants to a market transaction (I put to one side all questions of duress, fraud and incompetence that undermine individual transactions) are left better off from the ex ante perspective in virtue of their agreement. The great strength of markets therefore is that they allow for decentralized improvements in social welfare by a rapid and dizzying array of voluntary transactions. The great insight of Adam Smith was that individuals who pursue their own self-interest in market settings will typically (but not necessarily) advance overall social welfare by, as it were, an 'invisible hand,' even though it is no part of their original intention. Quite simply, so long as each party to any given transaction values what he receives more than what he loses, there are individual gains all around, and hence social as well individual gains for each transactor. Egotism is therefore widely consistent with social welfare.

Buchanan and Tullock applied the logic of self-interest to situations in which individuals make their public (i.e. collective) choices through mechanisms like voting and committee rules to aggregate political sentiments into government actions or policies. The central point of their work is that the same forces of self-interest that explain how people work in markets also explain how they operate in various political settings. Only the results are not so sweet. Folks that follow the rules of contract can generate huge gains through the creation of competitive markets: self-interest leads to a rapid succession of voluntary transactions that improve social welfare. But put these self-interested individuals into a political context and these same instincts lead to very different consequences. Now self-interest cogently explains why the simplest form of democratic rule (while better than all the others, to paraphrase Winston Churchill) is a recipe for destruction of the social order through coalition politics. One stark hypothetical illustrates the basic danger. In an unconstrained popular democracy, it only requires 51 percent of a self-interested population to confiscate the wealth of the remaining 49 percent. All it takes are expensive steps to forge a winning coalition, which happily ignores the losses to noncoalition members. The bargains that produce positive sum games in markets produce negative sum games in politics.

From Human Nature to Practical Politics

From that simple insight, it is off to the races. On the descriptive side, the first question is whether this underlying account of human nature fits the facts: do we think that all individuals

are motivated by personal desires that lead them to want to engage in mass confiscation through an untamed political process? Or do enough people have some other-regarding sentiments sufficient to slow down the forces of self-interest? This question lay at the dispute between Hobbes on the one side, and Locke and his followers on the other. The Hobbesian model was one of relentless individual self-interest, which depicted ordinary people as willing to break rules without compunction so long as they could impose their will on others. That instability in the state of nature – a theme that all constitutional writers address – led to a situation in which the lives of all individuals were 'solitary, poor, nasty, brutish and short.'[5] Faced with this bleak future, men 'agreed' – tacitly, hypothetically, desperately – among themselves to hoist one of their number to a position of absolute control or sovereignty over the others. The point here was to swap out the risk of death from a thousand sources in exchange for the protection by, and submission to, a single person. That system could work, after a fashion, so long as that leader showed some compassion for the members of his community. But if all individuals have that relentless drive to consume the wealth of their neighbors, Hobbes' *Leviathan* will be no exception to the general rule, so that government by one, without any structural constraints, degenerates into the form of abusive tyranny that may turn out to be worse than the state of nature from which we shall escape. Think of Adolf Hitler, Josef Stalin, Mao Tse Tung, Idi Amin, Pol Pot, and Robert Mugabe, for starters. And note that there are no plausible contenders for the list from either the United States, or Great Britain, which for all their differences in constitutional arrangements both rely on the diffusion, not the concentration of power.

In one sense, the central challenge of modern constitutional theory is to find a way to escape the grim fate of Hobbes' purported solution. Yet just what tactics should govern that intellectual counterattack? The long and tortured history of political thought has produced only two answers which, fortunately, work in tandem. The first of these is to attack the assumption that all individuals have that quintessential Hobbesian selfishness. The second seeks to devise institutional arrangements to capitalize on that limited spirit of cooperation.

Confined Generosity

On the first point, the response to Hobbes is that most individuals are social creatures who from the outset had to grow up in communities where survival depended on cooperation against common enemies. Fortunately, individuals are endowed by nature (or their creator) with a love for their family and kin, which restrains individual self-interest, and which in turn gives them a set of dispositions that allows them, at least some of the time, to trust some persons with whom they do not share these tight bonds, and thus to obtain the gains that only cooperation and trade will promise. This approach is associated with the notion of 'inclusive fitness' which holds that ordinary individuals are in a sense vessels for their genes, which means that they take into account not only their own welfare but those of persons who are related to them by blood or marriage.[6] Spouses will care for each other because of their common investment in their children. Parents and children will care for each other because of the overlap in their genes. But the biological approach does not predict that each person will treat others as though they were themselves, but only that they will do so to the extent of that genetic connectedness, such that a parent (who shares 50 percent of its genes with the child) will be willing to incur one unit of cost if it will provide two or more units to the offspring – a condition that is more likely satisfied in earlier stages of development than in a later one, which leads to serious

conflicts of interests within that family as the benefits conferred approach that two-to-one ratio. More remote relations have smaller levels of overlap.

This entire pattern of imperfect cooperation also emerges in nonfamilial contract for the long-term advantages its supplies. There is in fact an enormous emerging body of recent experimental literature that suggests strongly that individuals are often far more willing to share than the relentless rational choice theory of individual self-interest predicts. One simple illustration of the overall phenomenon involves the simple game in which one person is made a 'controller' who is given an amount, say, $10, subject to this caveat. He must persuade some other individual to except some fraction of the gain, measured in dollar increments, in order to keep the rest. He makes therefore an offer that the other party is free only to either accept or reject, at which point the game comes to an end.[7] Rational choice theory has an unambiguous prediction on how this game will play out. Offer the single dollar, and the other party will accept, because $1 is greater than $0, so no rational person would turn it down. The controller therefore can expect to keep $9.

Yet the results usually do not turn out that way. People typically offer less than half, but usually $3 or $4 and regard themselves as more comfortable in so doing. It could well be that they are thinking of some long-term pattern of reciprocal dealings, itself a powerful natural norm.[8] Or that they fear social retribution if they exhibit such stinginess. Or that they actually think that they are not entitled to those windfall gains. Of course, one line of experimentation does not document a comprehensive account of human personality, any more than one swallow makes a summer. But in fact there has been an endless procession of elegant experiments and social observations that confirm this simple insight on human behavior in a dizzying array of social circumstances. 'Recent research has shown that altruistic punishment, that is, a person's propensity to incur a cost in order to punish freeloaders who fail to pull their weight in cooperative endeavors, can explain why genetically unrelated individuals are often able to maintain high levels of socially beneficial cooperation. This holds even when direct and indirect reciprocity or laws and regulations provide no incentives to behave cooperatively.'[9] Put in other terms, life is not one relentless prisoner's dilemma game, from which everyone routinely defects from the cooperative solution for the smallest private gain. And just for good measure, it turns out that there are some instances in which individuals will act to punish beneficial behavior at some cost to themselves, albeit at a lower frequency than they punish asocial behavior.

The stark Hobbesian account then is not fully correct, but it hardly follows that we should lurch to the opposite extreme by assuming that all people routinely adopt selfless behaviors, at which point the need for sound constitutional arrangements would quickly disappear. Rather, a better judgment is to treat these modern findings as though they support the central account of human nature found by Locke and Hume: there is real variance around a median of strong self-interest tempered by limited generosity. Locke in his *Second Treatise* says that governments are necessary to restrain those among us who would take the lives, liberty and property of others. His implication was that the bulk of individuals were sufficiently socialized so that they would not engage in these activities as a matter of course. The Humean account follows the same general tack: while individual self-interest is still the most powerful force, it is constrained both by family and personal loyalties, and by some sense of 'confin'd generosity' to unrelated individuals.[10]

Institutional Arrangements

These findings on the limits of self-interest open up possibilities that are just not available under the pure Hobbesian account: they explain why the search for sound constitutional arrangements has a chance of long-term success. The basic intuition is that most individuals would rather live in relative peace with each other, but in order to do so they must find ways to take collective action to prevent the outliers from ruining their plan, or worse, taking over the reins of government, to the detriment of all. No conceivable set of institutional arrangements will work if everyone possesses the relentless self-interest that Hobbes postulates. Some element of trust among strangers is needed to allow societies to cohere. Hope arises only because, and when, it turns out that individual self-interest is a random variable distributed in different amounts across any given population (and in different proportions across different populations). That last flicker from Pandora's box may not be sufficient to carry the day. Yet where it is present in sufficient quantities there is at least a chance that cooperative political institutions can emerge.

The task here is essentially two-fold. The people who are not at the extreme selfish tip of the distribution must find ways to control and limit those who are, for otherwise one person after another will resort to the same selfish tactics as a matter of survival. Force by even one person puts all other persons at risk. Hence we need criminal law and tort sanctions to make sure that those who use force against others are made to suffer from their sins, so that the calculus of self-interest will work to inhibit their anti-social actions. And at the other side, we have to be sure that individuals at the top tail of the distribution are protected from the tyranny of the majority whose collective action is needed to curb all forms of aggression. Stated otherwise, we need to develop institutions that allow one person to keep all others at bay in order to make beneficial arrangements with others – the world cannot exist only with majoritarian institutions. Once that is done, we need to develop rules of property and contract to allow individuals both to exclude others and to cooperate with their preferred trading partners on whatever terms they see fit – not only in business, but in marriage, and in all sorts of voluntary social and charitable arrangements.

The key point is that this uneasy mix of human sentiments reduces the amount of egoism that any set of sensible political institutions has to overcome. A problem that is intractable in the Hobbesian world has a chance for solution if the right institutions are superimposed on individuals with some residual willingness to cooperate. But institutions there must be: the evidence suggests that human sociability is widespread. But it is equally clear that we have not, and never will, enter that utopia where each individual consistently and without constraint, treats the welfare of another as having equal dignity with his own. So long as selflessness is not universal, the lambs must always keep their vigilance lest the lions overwhelm them. The fundamental challenge is to rely on the moral sentiments – a term that evokes Adam Smith's *A Theory of Moral Sentiments*[11] – that hold most people back from grasping behavior.

The guiding maxim then is, 'aggression no, cooperation yes.' That simple proposition does not end the inquiry into constitutionalism, but it charts the basic course. We know of course that without collective wisdom we cannot restrain aggression, and without enforcement mechanisms, even wisdom could founder. So the paradox of constitutionalism is that it must flout the maxim that it hopes to implement, by finding the right spots and means to use a state monopoly of force to limit certain private cooperative activities. This task is not easy, for it requires developing legal and social institutions to deal with the problem of democracy, even

as a substantial fraction of the population has larceny on the mind much of the time. The trade-offs are tenuous, for, if we revert to the market ideal of contractual solutions based on unanimous consent, we only swap one problem for another. The risk of confiscation, or worse, under majority rule, is now duly swapped out for a risk of paralysis, or worse, if one individual or some very small group is able to hold out against the adoption of desirable social programs. The reason these problems do not swamp private markets is that any chosen subgroup of the population can form its own limited partnership or exchange, so that the cooperation of everyone is not needed for transacting parties to work together, as it is in politics, where the state must have (in strict economic terms) a monopoly of power in its territory to maintain order. Put in modern Coasean terms, high transactions cost in holdout situations block any agreement when all individuals must be part of the settlement.[12] In the land of constitutional politics, no one will sleep well at night when 99 percent of the population agrees to lay down its arms if at the same time no steps are taken to prevent the dissenting one percent from taking over. Economic principles must enter into constitutional discourse on the ground floor.

Viewed in this way constitutionalism is an ongoing struggle to confront simultaneously the unsatisfactory extremes of confiscation and paralysis, when any effort to deal with the former aggravates the latter, and vice versa. *No* system of constitutional order can emerge unless this tension is defused. Thus there is no question that ethnic divisions can complicate governance and call for the creation of complicated structures to overcome generations of recrimination and distrust. These problems are most acute when there is a successful minority group that lives in the midst of an unsuccessful majority group. The skewed division between political might and economic productivity can lead to decisions for envious expropriation and exile, or worse, as most ongoing military conflicts are ethnically based – Sunni vs. Shiite, Palestinian vs. Israeli, Irish Catholic vs. Irish Protestant, Serb vs. Croat, and so the list goes on.

Classical Liberal versus Progressive

All of these peculiar conflicts could call for special institutional arrangements. Federalism is one; tying particular offices to particular groups is another. Yet even if these issues, so close to the question of constitutional order, are successfully resolved, it hardly follows that modern constitutions are driven by some invisible political hand to address *only* these two objectives. Writers in the progressive tradition, broadly understood, are deeply suspicious of private markets. This program is, accordingly, motivated by a set of core political beliefs that require the state to guarantee to all its citizens a set of entitlements that fight the market instead of mirroring it. At the somewhat modest level it could ban certain kinds of wage, loan or sales agreements. Alternatively, the constitution could allow, but not require, redistribution of wealth from rich to poor, be it in the form of a progressive income tax, an estate and gift tax, or an elaborate system of earned income tax credits. At its most aggressive level, a progressive constitution could create a regime of positive rights to housing, health care, and jobs. But the brute fact of economic scarcity tends to make these regimes precatory, for no one can generate by legal fiat the wealth needed to make good on these commitments as a matter of constitutional right. The more modest and successful strategy therefore is to read constitutions as allowing the legislature to work to achieve these ends, without requiring them to do so. At this point the political process, however imperfect, has to decide which mandates to impose or programs to fund. But any expansion of public duties necessarily requires an expansion of the government apparatus to implement and fund it, so it becomes no surprise that the growth of the

administrative state is tied to the expansion of the perceived class of legitimate state functions. And there is no question that this expansion rests in part on a shared rejection of the more constrained classical liberal conception of government.

We have said enough therefore to indicate where the key fault lines in constitutional deliberation are likely to occur. The repudiation of the narrow Hobbesian view not only increases the odds of a small government constitution devoted to advancing the maxim – aggression no, cooperation yes – but also toward the levels of redistribution that less self-interested people are willing to support. The more accurate account of human nature thus gives more running room in society for the adoption of legal rules that allow for redistribution through taxation or regulation. So in the end the struggle over constitutionalism offers a choice between two world views. On the one side lie those who see government as a necessary evil, needed to maintain order, but feared because of its ability to engage in tyrannical acts on either a large or small scale. On the other, and today much in the general ascendancy, lie the defenders of a social democratic or progressive tradition that sees in government a positive engine of social good beyond its undisputed night watchman function.

All of these themes come to the fore in discussion of constitutionalism. What then are the focal points of the discussion? Here the natural lines of division are between the structural constitution on the one hand and the protection of individual rights on the other. It is useful to discuss both of these chiefly, but not exclusively, in the context of American Federalism. Much of the discussion about theory will carry over to other nations. Parts of it, such as the discussion of separation of powers, also relate to the key choice of nonfederalist systems, which is the key choice between the presidential and parliamentary democracy, where the former keeps the executive leader outside the lawmaking body while the latter typically places that leader at its head. The second half of the discussion deals with the entrenched protection of individual rights, where it is critical to figure just how deeply they are entrenched, and what if anything can be shown to override them.

II. The Structural Constitution

Separation of Powers – Checks and Balances

Our basic analysis of core constitutional functions left us with this enduring dilemma: use a democratic system of unfettered majority rule, and the minority is at risk. Use a contractual device of unanimity, and the majority is held in the thrall of a powerful minority that holds out for a lion's share of the gain. The problem on both sides is acute because neither difficulty is of the 'one and done' sort. Each issue on a social agenda (indeed the creation of a social agenda as well) are subject to deterioration on both flanks, so that the constitutional system has to be strong enough to deal with repetitive assaults from self-interested parties coming from all directions at once. The difficulty is even more persistent than our earlier discussion indicated, because the problem festers even if many individuals are socially minded, by which it is only meant that they will in good faith work to achieve the best social, and not individual, outcome. For these purposes, it does not matter how that social aggregation is accomplished, so long as the rules are consistently applied. The only point that does matter is that the individual voter or political actor does grant himself pride of place in the general social calculation.

A problem of this magnitude is one that invites a complex administrative response. Quite simply, the simple economic logic of governance suggests that individuals should be prepared to invest extensive amounts of financial and cultural resources to create institutional structures that do not fall prey to these risks. One candidate for this result is a doctrine of separation of powers that places a crimp on majority rule without going back to the unanimity rule. The basic insight that fragmented power may be the best way to split the difference does not, however, mandate this or that unique solution. It just points to a class of divided power solutions that hold out some promise, without indicating which might be regarded as 'optimal.' In the American system, universal suffrage and simple majority rule are nowhere to be found. Instead the limitation on popular will is achieved at the legislative level by requiring all new measures to pass through two houses, whose members are elected for terms of different lengths by different procedures. The original Constitution had the senators from each state chosen for six years by the state legislators,[13] and members of the House of Representatives chosen for two-year terms by those procedures used at the state level to determine eligibility to the most numerous house.[14] The whole arrangement echoes back to the Roman Republic who divided power between the Senate as its upper house and its plebes in the lower.[15]

The need for the concurrence of two houses, instead of one, slows down but does not stop the legislative process. It requires that more individuals be brought into the winning coalition, which reduces the likelihood that a simple majority will be in a position to expropriate. But there are no ironclad guarantees. A rule that requires a two-thirds, supermajority may stop 55 percent of the public from expropriating the remaining 45 percent. But it does not eliminate the possibility that a larger group of 70 percent of votes can wreak greater havoc on the 30 percent minority. The causal connection between the structural dimensions of a constitutional order does not rule out the possibility that a single chamber with a supermajority might not be better than any of the known alternatives, a topic mooted in Saul Levmore's contribution to this volume on the fundamental but neglected issue of bicameralism (Volume I, Chapter 4).

As Levmore's article indicates, this problem is even more difficult than it seems at first blush, because the risk of majority expropriation lies not only in the choice of voting rules, but is influenced as well by the agenda setting rules and committee structure, both of which may determine how business is done within any chamber. And bicameralism does not address the question of intertemporal commitments which turn out to be critical on matters of budget and national security, where one Congress in a burst of reformist enthusiasm enacts laws that imposes predetermined limits on subsequent legislative bodies on key budget or national security issues.[16] In addition, the American system features a presidential veto, which can only be overridden by a two-thirds majority of each house, where the bill must first be returned to the house in which it originated, which places a very different type of restriction on legislation.[17] It is hard enough to overcome the double two-thirds restriction on the presidential veto, but it also seems likely that had the requirement been set at three-quarters of the members of each house, the presidential veto would be virtually impregnable. There is little doubt that there is a default bias in the American system that is tilted against new legislation at the federal level, and this result is commonly followed at the state, but not the local, level as well.

The current scheme with two houses and a separate president is of course just the most profound manifestation of two cardinal devices within the American system: separation of powers is one; checks and balances is the other. The former conceives of a division between the executive and the legislative branch, and a further division within the legislative branch.

Each of these branches is assigned a particular task but is not in a position to dislodge the other branches from their tasks. The making of laws and the execution of laws are considered to lie at polar extremes, and little attention is paid to the close cases that might lie between the poles by asking when legislative direction ends and executive discretion necessarily begins. Within the American framework, that plays out with respect to the constant tension between the power of Congress to set rules and regulations for the operation of the armed forces, and for the creation and discipline of a separate militia, as set against the designation of the President as Commander-in-Chief of the military.

Side by side is the system of checks and balances, where the actions of one branch can be stymied by the actions of another. In many cases the judiciary does not get into the act at all, as the rules of engagement between the various branches of government are clear enough to count as virtually self-enforcing. The system of presidential veto and congressional override is one such system, but there are many others as well, including the need of the President to obtain the advice and consent of the Senate in the appointment of senior administrative officials and, of especial importance today, judges to the various courts, including the Supreme Court of the United States.[18] Yet by the same token the ability of the President to grant reprieves and pardons is a power that is not subject to any check by any other branch of government.[19]

Judicial Review

Yet the most difficult feature of separation of powers involves the role of the judiciary in dealing with either legislation or executive action. The classical conception of separation of powers received its authoritative exposition in Baron de Montesquieu's *Spirit of the Laws*, published in 1748, and of immense influence in the colonies. Montesquieu clearly envisioned some separation between the legislative, executive and judicial branches, but he obviously did not envision the ultimate contours of the American model. He clearly thought, as did the American Founders, that the independence of the judiciary was a vital cog in the preservation of a stable and limited government, and that judgment is surely echoed in many provisions of the American Constitution, most notably those that prevent the Congress from reducing judges' compensation during office, and to secure their removal only for failure to comply with the standards of good behavior.[20]

Yet the distinctive American contribution that neither Montesquieu nor Locke, who wrote earlier, contemplated was the ability of the courts to strike down laws of the Congress or enjoin actions of the Executive that did not comply with the requirements of the Constitution. This ability of judicial review remains one of the most controversial features of any modern constitutional system. Within the American system it is reasonably uncontroversial that the courts can nullify statutes and executive actions that require them to perform actions that are inconsistent with their constitutional obligations. The US Constitution requires that persons be convicted of treason 'unless on the Testimony of two Witnesses to the same over Act, or on a Confession in open Court.[21] It takes no stretch of the imagination to realize that no court, either state or federal – and remember there was no necessity for Congress to create a system of lower federal courts[22] – should convict on the strength of the testimony of a single witness, or that the Supreme Court, if it reviewed that case, should refuse to honor the conviction.[23] Each branch followed its own view of what the Constitution required. Relative to each other they were in a

state of equipoise: each could resist the commands of others, so that divided parallel authority took precedence of a uniform interpretation.

That said, judicial review could also be far more ambitious, namely, by allowing the Supreme Court, and, subject to its review, all lower courts, federal and state, to strike down legislation or executive orders that relate to the general operation of government, without regard to whether they touch on any topic of judicial administration. As far as Montesquieu's scheme goes, the independence of the judiciary does not allow courts to enjoin actions of the Congress or the states that contravene either structural limitations or guarantees of individual rights. His system of separation of powers was closely tied to the British Constitution with its notion of parliamentary supremacy.[24] Under a presidential system that view of equal and coordinated powers creates more conflicts than it does in an integrated system in which the Prime Minister is just one member of the Parliament who must survive a vote of confidence at the most inopportune moments.

The President could order some unreasonable search and seizure, and keep the fruits of those unlawful expeditions for his own work, even if he cannot introduce that evidence before a tribunal that adjudges his activities unconstitutional. Or the Congress could enact legislation or impose taxes for purposes that fall outside the scope of its enumerated powers. It could then seize property for nonpayment, even if it could not call on the courts to aid in its improper task of revenue collection. But by the same token, the property owner could not have the courts return the seized property. Or take another example of the standoffs. The courts would have the last word if the federal or state government initiated judicial proceedings to condemn land for a public use. The condemnation could not go forward unless, at a minimum, just compensation was paid. But suppose that the government first seized the property, requiring its owner to seek relief. Now if the courts could not order the executive to pay compensation or return the property, the imperfect coordination between the branches could lead to a widespread disregard of the law with public demoralization. If push came to shove, the only constitutional remedy is impeachment for high crimes and misdemeanors, which is wildly improbable on any hotly disputed subject.

There is much to dread in the systematic institutionalization of these standoffs. The principle of judicial, as opposed to parliamentary, supremacy offers one way out of these impasses. Within the American system, a clear statement of the broader conception of judicial review dates only to 1958, in an opinion that was written to order the President to send in federal troops to secure the desegregation of public schools in Little Rock, Arkansas over the resistance of its governor, Orval Faubus.[25] There, a unanimous Supreme Court held that the Constitution was the 'supreme law of the land,' and, in a textual nonsequitur, that it was its authoritative interpreter. Accordingly, all officials and judges, either federal or state, had to act in accordance with its commands as the Court understood them. The strong assertion of judicial power in *Cooper v. Aaron* can thus be defended on the ground that it denies the President and the Congress any incentive to short-circuit the courts by acting unilaterally against targeted individuals or groups.

Yet once this vast power is given to the courts, ought it to be exercised? Massive amounts of ink have been consumed, without any present consensus, on how the court should adapt to this new role. Those who are concerned with the preservation of deliberative democracy have urged that the Court be reticent in using this power. Thus in perhaps the one most influential article on American constitutional law, James Bradley Thayer urged that courts be exceedingly

deferential in interfering with the judgments of the political branches.[26] Notable additions to this position have been written by Judge Learned Hand[27] and Alexander Bickel.[28] Yet others, concerned with the way in which political powers could be used to quash democratic means of dissent and protest, have taken the opposite position on at least some rights, particularly those that relate to speech and assembly.[29] And still others have urged for a willingness to have explicit judicial enforcement of all constitutional rights, even those that relate to property and economic liberties.[30]

The current law shows a crazy quilt pattern, evident in the remainder of this introduction, between those topics in which courts take a tough stand and in which courts take a relaxed stand. Matters of taxation are surely critical to the overall operation of any democratic system, yet there is a marked tendency on the part of the courts to impose little or no scrutiny on the behavior of the political branches with respect to broad programs on taxation.[31] The laxity gives rise to concerns that the public choice dynamic will lead to systematic overspending. Susan Rose-Ackerman (Volume I, Chapter 5) explores these concerns and proposes systems of judicial review that will force Congress to fund its own mandates through clear and transparent processes that would transform the rules now in place. On certain kinds of political questions, such as war and peace, the Court tends to be highly deferential to the political branches of government, even after *Marbury*. Thus the Court did not intervene on the question of whether the President had the unilateral power to terminate a treaty that had been ratified by the Senate.[32] But it did not treat that doctrine as a barrier to allowing the courts to order a redistricting of malapportioned electoral districts that gave disproportionate weight to rural interests.[33] Similarly, the Court will generally respect the control that each house of Congress has over its own internal affairs.[34] In other cases, as will become evident, there are sharp divisions of opinion. The Congress is given a wide berth on its decisions to regulate economic affairs; yet the states are held to much stricter standards, in the absence of Congressional intervention. Individual rights like speech and religion generally but not uniformly, receive strong judicial protection. The opposite is true with the protection of economic liberties and private property, even, frequently, in the face of retroactive legislation, which holds out the prospect of serious political abuse.[35]

The entire system has a rigidity that is most consistent with the presumption that all enacted laws should be regarded as an evil unless shown to be a good. When judges adopt that outlook in exercise of their power of judicial review, they take a hard look at any reasons that are put forward to deviate from the letter of the doctrine. The position here is not one of naïve literalism, for any complex constitutional structure will have its fair measure of gaps and close cases. But the initial attitude toward the basic provision will suggest the ease with which the constitutional provision can be modified or displaced. In those cases where judges carry a strong commitment to the particular institution, they will adopt a test of strict scrutiny whereby a heavy burden of proof lies on those who wish to displace the constitutional guarantee. And a classical liberal separation of powers, along with checks and balances, are key elements of a scheme that are intended to keep government in its proper place, so that strict scrutiny, or something close to it, will be the order of the day.

As might be expected, this version of constitutionalism does not sit well with the ambitions of the administrative state championed by modern progressives. One reason for the creation of these agencies is to overcome the bottlenecks that are said to arise with the creation of two separate chambers, each with its own rules. It is therefore no surprise that the early writers in