Constitutional Fidelity and Interbranch Conflict

Mariah Zeisberg

This paper considers the significance of the American Constitution’s distinctive structuring of the branches for our understanding of constitutional purposes generally, and for executive prerogative as regards war powers, more specifically. I argue that constitutional theories which emphasize constraint as a primary conceptual category are inadequate, and I instead argue that constitutional fidelity starts with the effective pursuit of proper government purposes. From an examination of the political conditions supporting the operation of the three branches, I suggest that the Constitution’s purposes include the establishment of a system of interbranch deliberation as a means, and the realization of a distinctive moral vision of political relationship, as an end. This moral vision of political relationship prizes independence and mutuality in the pursuit of common goals, and tolerates and even welcomes contentiousness about constitutional meaning as a distinctive moral good. Finally, I offer a few considerations on how such considerations might lead us to a reworked conception of executive prerogative as regards war powers.

I

Why should we understand constitutionalism in terms of proper purposes? Usually, constitutional theorists argue as if constraint is the fundamental category for understanding constitutionalism. Jon Elster tells us that constitutions can be understood primarily as devices of constraint, necessary for overcoming “the problems of passion, time-inconsistency, and efficiency.”1 Giovanni Sartori understands that “constitutions are, first and above all, instruments of government which limit, restrain and allow for the control of the exercise of political power.”2 John Rawls, too, understands constitutionalism as a guarantee that “certain basic political rights and liberties” will be taken “off the political agenda . . . thereby establishing clearly and firmly the rules of political contest.”3 This understanding is not the same as one which emphasizes the constitution’s fundamentality (or supremacy). We can accept the Constitution’s supremacy without elevating constitutional constraint to political supremacy. John Marshall is perhaps the most significant jurist for developing this distinction — he contributed greatly to the development of the idea of the constitution’s supremacy, yet his notion of constitutionalism was oriented, not around constraint, but around the supremacy of constitutional purposes.4

An understanding of constitutional fidelity like Marshall’s, one which emphasizes purposes over constraint, is more consonant with the framers’ understanding. The framers were almost obsessed with “energetic” government, government with the capacity to pursue the ends that are properly those of government.5 They understood, as we understand today, that political freedom requires more than limited government. In fact, sometimes government will have to act strongly to create the conditions for liberty.6 An understanding of constitutional fidelity which includes the effective pursuit of purposes like security, the general welfare, prosperity, human dignity, freedom, and equality is not inconsistent with the idea of constitutional constraint, but it does require us to reformulate what we mean by constraint. Instead of understanding constraint as the sine qua non of constitutional government, we can understand it as a mechanism for focusing power onto its appropriate objects. Sotirios Barber has eloquently articulated this alternative conception: he speaks of constitutional constraints as, “derivative and secondary, not fundamental; they were the conduits or channel markers of a dedicated or focused program. These channel markers helped to define the program by setting it apart from others, and in this way they negated the others.”7 A government which does not observe due process guarantees, for example, will divert its power towards the persecution of innocent people — an improper purpose.

The advantage of understanding constitutional government according to its purposes is that such an understanding gives us a richer standpoint from which to evaluate constitutional fidelity. In addition to evaluating whether or not government adheres to formal procedural and substantive limitations, we can evaluate how effectively government is pursuing its purposes. Among those purposes of the American Constitution, I would like to posit two not often discussed. I suggest that the institutional relationships the Constitution establishes can lead us to an appreciation for the value of interbranch deliberation.

From an examination of the political conditions supporting the operation of the three branches, I suggest that the Constitution’s purposes include the establishment of a system of interbranch deliberation as a means, and the realization of a distinctive moral vision of political relationship, as an end.
and towards a distinctive moral understanding of political relationship.

II

Although the preamble, the list of rights in the Bill of Rights, and the powers granted to government are sometimes taken as a definitive list of constitutional purposes, we can also excavate sensible purposes through a structural analysis of the relationship between the branches. The constitutionally-established national branches are often characterized as ‘separated powers.’ Separation of powers is a classic doctrine. The term itself does not appear in the Constitution, and the Constitution manifests a significant departure from that classical theory. Instead of using the term, then, I prefer to speak directly to the conditions upon which the doctrine is held to rest. These conditions themselves, not the doctrine of separation of powers, offer us a proper starting point for considering a constitutional vision of the purposes of the relationships between the branches.

The first condition is the independence of the branches. The branches are independent from each other in several respects. The occupants of each branch are selected through a different type of political process. Presidents are responsible to an electorate which is national in scope; House and Senate members, to geographically-defined constituencies; and Supreme Court Justices are selected after a deliberative process in which both the President and the Senate participate. In no case does the same public, or the same process, name the occupants of more than one branch; furthermore, officials are not free to serve in more than one branch. Finally, officials within each branch do not rely upon the evaluations of any other officials for continuation in office.9

The second condition is that, in addition to enjoying independent sources of democratic and constitutional authority, the branches are structured to achieve different values, and hence are necessarily structured to encourage varied perspectives on constitutional meaning.10 In part, this is related to their differently configured sources of representational authority: since the President is elected by the nation as a whole, he may claim a distinctive perspective, one related to that national mandate. (Jefferson believed the president had a special capacity to “command a view of the whole ground.”)11 But this is also related to the structure of each branch which supports its distinctive function. The legislature is structured to make broad policy in the interests of citizens from different geographic areas and with different opinions about politics. The judiciary is structured to judge the effects of these decisions upon particular individuals, and to protect rights. And the executive is a unitary office, the most efficient of the three, structured to ensure the capacity to respond to events quickly, provide initiative to the legislature, and protect national security. The creation of branches structured to pursue different public values relies upon the device of representation for its proper operation. Presidents represent not only the national electorate, but also a substantive political concern for security.

We can reasonably infer that the structure of each branch, which supports its achievement of distinctive political values, will similarly affect how that branch evaluates constitutional meaning. We can expect judicial understandings of the Constitution to be especially preoccupied with rights, for example, and for the executive to understand the Constitution in a way that emphasizes its role in providing for national security.12 Hence the structure of each branch supports the emergence of particular, differing, and independent relationships to the Constitution. We see here a second condition of the relationship of national institutions to one another: these different functions lead to distinctive institutional perspectives, perspectives which may lead the branches to distinctive evaluations of constitutional meaning in service of their distinctive political goals.

The two conditions I have laid out are both conditions of separateness. If we consider only them, then we might think of the branches as sealed off from one another, each pursuing its tasks in a hermetically-sealed political universe. The final condition is what brings the branches into relationship. It is their shared powers. To be effective, government decisions almost always require the cooperation of more than one branch. The capacities for governance of each of the branches are incomplete, but require one another to be effective, and this mutual need brings the branches into relationship — if the occupants, that is, understand properly the requirements of making their political commitments operative.

This last condition demonstrates how the doctrine of “separation of powers” can be misleading.13 The executive can propose legislation, veto bills, call Congress into special session, and adjourn the houses under certain circumstances. Executive orders provide a significant locus for executive ‘lawmaking,’ especially with the rise of the administrative state, where so many of the government’s activities are conducted under the umbrella of executive prerogative. Congress creates every executive office and agency, establishes lines of authority within...
the executive branch, and shares in the appointments power; and both the legislature and executive share in some judicial powers, the executive through the power to pardon, initiate law suits, and to defend the government when it is sued; and the legislature through appointments, impeachments, decisions on jurisdiction, and laws structuring the judiciary. The courts exercise legislative and executive authority in their capacity to rectify legal wrongs through their equitable powers. Madison describes this pattern as “partial agency in, or . . . controul over the acts of each other.” This pattern, then, is a final noteworthy condition: shared powers bring the branches into relationship with one another, activating the potential of their independent sources of authority and distinctive perspectives to bring them into conflict.

These conditions mean that the possibility for interbranch conflict is endemic to American politics. The branches cannot destroy each other; and if officials within the branches care about making their political commitments operative, they cannot ignore each other. Because these conditions taken together are what activate the possibility for interbranch conflict, I will call them the conditions of conflict. What sense can be made of these conditions? What kinds of constitutional purposes do they indicate?

III

The first value revealed by the conditions of conflict is the desirability of interbranch deliberation over the proper use of government powers. This is a means to other constitutional ends — to stability, intelligent problem solving, the rule of law, the protection of rights, and the pursuit of effective public policy in service of the common good. These conditions of conflict reveal that the proper orientation of political conflict is upon the question of the skillful use of government powers, where the branches’ evaluations of “skill” is conditioned by their distinctive functions in pursuing the multiple goals of constitutional government. The exercise of government power is, after all, what brings the branches in relation to each other. Each branch can be expected to express different understandings on how that power should be used; likewise, each branch is required to grapple with the perspectives of the other branches if it cares about seeing its visions enacted. This grappling creates the possibility of interbranch deliberation, and that interbranch deliberation is a crucial component, I argue, in the right functioning of the American constitutional polity.

By deliberation, I mean more than talk. I also mean to refer to the signals that the branches give each other through their actions — laws passed repudiating executive interpretations of war powers, for example, or efforts to amend the Constitution. Branches speak with their actions as well as with words. The actions that the branches take on behalf of their constitutional visions, and the reasons they offer to the public for those actions, are encompassed by my conception of interbranch deliberation.

The Constitution seems to endorse the desirability of interbranch dialogue through explicit provisions, for example in provisions for the state of the union address and the keeping of legislative journals, and for the seeming requirement that the executive offer reasons when he vetoes a bill, so that the originating house may “enter the Objections at large on their Journal, and proceed to reconsider it.” What is so valuable about interbranch deliberation? After all, the actions of the occupants of each branch are subject to review by the electorate. The electorate can evaluate on its own whether the various branches are pursuing the common good. Why should the branches evaluate each other?

Answering this question requires taking seriously the distinction between superficial public opinion and deeper, deliberative opinion. A government which tries to ascertain the common good through a single representative body will have difficulty discriminating between superficial public opinion and deliberative public opinion. The single representative institution will respond to both, and the burden of ensuring that the public policy that issues is deliberative falls entirely upon institutions of civil society. A constitutional structure which instead incorporates deliberation between and among different valuable perspectives enhances the opportunity for governmental policies to represent a reflective choice among alternatives. The structure of government itself bears some of the weight of ensuring that decisions reflect deliberative opinion. Although civil society still has its role to play in supporting the efforts of individual citizens to come to more justifiable positions, it does not bear all of the weight.

Jeffrey Tulis has used this insight to illuminate a key problem of deliberative democracy. Although deliberative democrats have worked hard to describe the kinds of arguments that are appropriate for democratic deliberation, “there is little discussion of institutional mechanisms to maximize the likelihood that relevant arguments, or relevant perspectives, will actually be advanced. If it works as intended, separation of powers makes it more likely that relevant perspectives will be advocated because these arguments are so tethered to interest and institutional position.” A concern for individual rights finds a more sure footing in political deliberations because there is a special institution, the Supreme Court, whose members’ own interest is connected to
the interest of their place, and the interests of that place are connected to their substantive charge of protecting rights. Of course, the Supreme Court’s stature is not always associated with how effectively it protects rights. But even so, this special function is the primary basis upon which its claims to substantive authority are based, and so it is important for the Court that the Court be perceived as protecting rights. The desire to be perceived as protecting rights translates, we must hope, into an effort to actually contribute towards their protection.

IV

Interbranch deliberation is a tool, helpful for moving policies towards the common good, a common good which is presumed to contain elements of popular will, the protection of rights, and national security. But the conditions of conflict also support a moral vision of political relationship, one which emphasizes the role of independence and mutuality in achieving political outcomes in the common good. This moral vision is distinctive because it gives a special place to the value of disagreement as a contributing factor to the legitimization of political power. This is a moral conception which makes sense of the conditions of conflict and which, as a moral conception, deserves to be affirmed as a constitutional end. The two purposes are related, because interbranch deliberation works most effectively when participants act on the basis of its underlying moral vision.

Many political theorists believe that unanimity is, at bottom, the only thing that can legitimize the exercise of political power. The positing of theoretical unanimity as essential to the exercise of legitimate power is a common ingredient of the social contract tradition, raised to 20th century prominence again by the work of John Rawls. Some theorists use this work to go much further. At least one scholar, Robert Burt, believes actual unanimity to be a precondition for the legitimate exercise of power. Even theorists who premise their work on the desirability of conflict also seem to presume that disagreement profoundly threatens legitimacy.

But interbranch deliberation works by and through conflict. It requires conflict to function at all, and through careful institutional design, it assures a place for that conflict. Ideally, dissenters concerned for the common good always have an institutional design where their voices may be heard. Interbranch deliberation doesn’t require just any kind of disagreement; it is premised on disagreement about the common good, or the Constitution, and is informed by public values like security, rights, and the general welfare. But it requires disagreement nonetheless, and it creates the conditions for that disagreement to emerge through the distinctive structuring of each branch.

This kind of constitutional theory, according to which the possibility of conflict even over constitutional meaning is institutionally entrenched, can offer us a distinctive perspective on the nature of political authority. The most important insight it encourages is about the conventionality of political authority. Harvey Mansfield’s reading of Hobbes shows us that, whereas the mixed regimes in classical polities relied on pre-existing sources of power for their authority (the nobility, for example, or the demos), a constitutional government is both artificial and representative. Mansfield writes, “since government has no right or power of its own, [Hobbes’s] political science can apportion its powers more from an analysis of the nature of political power than from a need to satisfy the demands of existing powers.” Both separation of powers, and American-style representation itself, are based on a conventional understanding of politics whereby the values of the common welfare are seen as functionally and theoretically prior to the values of entrenched, powerful social groups. The distinctive values which comprise the common good are what guide the structuring of the branches, not the needs of these powerful groups. Political power is hence understood as something far more artificial, far more abstract, than the power of one group to dominate another.

I believe that this conventional understanding of politics, which allows for branches to be related to each other according to their functions, in turn makes a distinctive moral contribution to the politics of constitutional government. Representation means that there is literally no political authority without elections; and yet the authority that is created through elections is never the authority of the people acting directly, but rather is the authority of representatives trying to ascertain what the will of the people is. The effect is a destabilization of the perceived congruence between any particular policy and the “public will.” The conditions of conflict magnify this effect, further destabilizing the easy equation between what the government does and popular will. They magnify this effect by proliferating the modes of representation in politics, thereby offering incitements to officials in each branch to publicly question the extent to which other political officials are faithfully executing the public will. This public questioning among and between institutions paints an even more vivid portrait of the unstable reality of the public will, emphasizing that “no legal form can enable any small group in Washington, D.C. to speak unequivocally for We the People . . .”

Such a process can, borrowing the words of George Kateb, continuously assert “[t]he artificial nature of political authority.” Hence one of the chief virtues of representation and the
conditions of conflict is that they together allow citizens some distance from their government, fostering a pervasive skepticism about authority. In Kateb’s words, the destabilization of political authority teaches that “those who wield authority must themselves be skeptical toward their roles and themselves and that necessary authority must be wielded in a way that inflicts minimum damage on the moral equality of all people.” Kateb also notes as distinctive moral lessons of representation the “incitement to claim the status of citizen — or something analogous — in all nonpolitical relations of life,” and “a sense of moral indeterminacy . . . the belief that . . . a number of contrasting and competing responses or answers to morally tinged questions are to be expected and welcomed.” These moral lessons rely upon a belief that something important, a significant critical edge, is lost when citizens fully identify with every action of their government. The very tenuousness of the representative claims of government, enhanced by the conditions of conflict, give American constitutional government a distinctive moral appeal in its relationship with the governed.

The standard answer for why the Constitution would establish the “separation of powers” is that the conditions of conflict provide a mechanism for resisting tyranny. But our discussion so far points the way towards another, rarely discussed benefit of this way of arranging institutions. The benefit lies in the value of continuous public assertions of disagreement with public policies.Perceiving this value requires us to judge that policies may be in the common good even if there is no consensus as to what that common good is. Indeed, the lack of consensus about the common good may be helpful in the process of ascertaining what that good is, because it prompts citizens and officials to make arguments, advance facts, and consider reasons that they might otherwise ignore. This seems to be the logic of the structuring of the branches: conflict will help to reveal the truth about the common good. This judgment, in turn, creates a tolerance towards allowing the possibilities for disagreement over the common good to flourish. Such flourishing, and such tolerance, I believe, are themselves in the common good.

Furthermore, if we translate the institutional conditions of conflict into normative guidelines for political conflict in general, we arrive quite easily at an acknowledgement of respect for individual autonomy (one’s own, and that of others), appreciation and respect for the value of distinctive political opinions, and a commitment to mutuality in service of political projects oriented towards achieving the common good. The moral vision is one in which disagreement and contentiousness about the nature of the common good are not seen as inherently threatening to political authority.

V

Before ending this discussion, I would like to point to one area of politics which could benefit greatly from such a revised understanding of constitutional purposes: the domain of executive prerogative in war powers. What follows is meant to be suggestive only, an effort to show how a particular political dispute might be revised by the conception of interbranch relationship I have articulated above.

Since the Korean War, the executive branch has been dominated by a perspective of prerogative which I will call “insular.” The insular understanding argues that “our government is divided into three distinct branches, independent except in the specific ways the Constitution itself provides for interaction.” This is the understanding of Burger’s opinion in INS v. Chadha. For Burger, the constitutional mechanisms bringing the branches into relationship with each other did not indicate a vision whereby the branches continuously deliberate over each other’s use of their powers. These mechanisms rather indicate “explicit, and separately justified” exemptions to a general plan whereby political power is divided according to narrowly-defined categories. The understanding is “insular” not because it seeks to insulate the President’s use of prerogative from review by the electorate, but because it seeks to insulate the prerogative power from review by the other branches. Such an understanding would allow the President to shield himself from having to negotiate with the political weight of institutions whose claims to authority are structured around values that might conflict with his own.

While it is understandable that the executive would claim such power, the proper functioning of the American constitutional system, according to the vision I have laid out, requires Congress and the Courts to resist his claims. They should resist on behalf of an alternative vision of prerogative, which I will call “relational.” A relational understanding of prerogative understands the war power to be shared by the executive and Congress. It receives its most eloquent judicial expression in Justice Robert Jackson’s concurring Youngstown opinion, where Jackson argues that the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.” Making war should be impossible without the consent of both the executive and Congress.
Furthermore, Congress should not offer its consent without considering the question according to its own distinct perspective. This is the normative significance of the second condition of conflict. Congress has a distinctive institutional capacity worth insisting on — a special capacity to consider the costs of war, for example, and how those costs will be distributed among various groups. Although the President himself should, of course, deliberate over these matters within the executive branch, the executive branch is structured to encourage one distinctive perspective on constitutional meaning. Presidents are free to fire, chasten, or silence many key staffers who do not support executive branch aims — indeed, this is important for the maintenance of the independence of that unitary office. But this means that the President, like any other single authority acting alone, is an unreliable source of guidance on security threats. Although Congress has tried to resist insular executive prerogative with the War Powers Act of 1972, this law ironically accepts the insular conception by conceding that the President should be exempt from congressional scrutiny when he commits troops for fewer than 90 days. Conceding that much can mean conceding the entire war power.

The relational and insular understandings are not stand-ins for a “pro-Congress” or “pro-executive” approach to war powers. A relational understanding of prerogative is not a call for a return to the days of Congressional dominance. Neither is it a call to circumscribe the President’s exercise of his powers. National security today does require enormous power, including executive power far more vast than anything the framers imagined. Institutional partisans would have us ask how much power each branch should enjoy, as if power were a zero-sum commodity. The question that the relational/insular distinction seeks to address, instead, is about the kind of relationships between the branches that should condition the exercise of the sovereign power available to the government as a whole — a sovereign power which is emphatically not the same as the power of one institution. Finally, and perhaps most importantly, a relational understanding does not presume that it is always wrong to go to war. Many pro-Congress scholars have rested their case on the idea that Congress should have war authority because Congress will be more reluctant to engage in war — a position that presumes that going to war is always the least desirable outcome.

The relational understanding, instead, presumes that war could sometimes be an appropriate political response, but that the question of war, like other questions of politics, benefits from the distinctive contributions of more than one branch, and that conflict between the branches on the proper use of the war power serves the common good.

I cannot here make a full argument for a relational conception of prerogative. I hope only to suggest an account of constitutional purpose which emphasizes the significance of interbranch conflict; which points to a distinctive moral understanding of politics, where contentiousness is understood as a necessary ingredient in the quest for the common good; and which offers some traction on the difficult problem of war powers. All of these suggestions are subject to formidable objections. But as war becomes the new state of normalcy, and as the doctrine of separation of powers faces increasing challenges from phenomena like the rise of the administrative state and the increased need for effectiveness in the pursuit of constitutionally-sanctioned ends, I believe that a full reconsideration of the purposes and moral vision animating the branches’ relationship to one another is warranted.

Mariah Ziebisch is a Ph.D. Candidate in Politics at Princeton University.

Endnotes

9. Except in the case of impeachment — but the barriers to this are high, too high to be of consequence in ordinary politics.
11. Thomas Jefferson’s First Inaugural, March 4, 1801.
12. The fact that these branches enjoy distinctive perspectives should not be taken to mean that the executive does not care about rights, for example, or that the Court is unconcerned with security.


21. For example, for Louis Michael Seidman, the need for extreme inclusiveness on the basis of substantive views means that a constitution must be totally value-neutral in order to be legitimate. Louis Michael Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (New Haven: Yale University Press, 2001).


27. Kateb, 361.


31. But see Tulis (1987) for analysis of how direct appeals to the people can shortchange interbranch interactions.


34. For example, see John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton: Princeton University Press, 1993). In at least one case, Congress was more eager to engage in war than the President — for the undeclared naval war with France, in 1798–1800, during John Adam’s presidency. Treanor, 749.