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CHAPTER

DIVIDING GOVERNMENT HORIZONTALLY AND VERTICALLY

Outline

- I. Background
 - A. Reasons for dividing government
 - 1. Afraid of concentration of power
 - 2. Ensure that system of government would prevent consolidation of power
 - B. Format
 - 1. Federal government divided among three branches
 - a. Legislative—Congress
 - b. Executive—President and other executive officers
 - c. Judicial—Supreme Court and lower federal courts
 - 2. Horizontal division—separation of powers
 - a. Different powers allocated to each branch
 - b. Powers include checks on other branches
 - 3. Vertical division—federalism
 - a. Enumerated powers
 - (1) Federal government assigned specific tasks pertaining to problems nation must address
 - b. Powers retained by states
 - (1) Problems more amenable to local solutions
 - (2) Powers not explicitly given by the Constitution to the federal government
 - (a) Police powers
 - C. Issues raised by horizontal and vertical division
 - 1. Challenges to decisions made by one branch for violation of separation of powers
 - 2. Conflicts between state and federal governments as to which has power in a specific area
- II. Separation of Powers Doctrine
 - A. No explicit mention of separation of powers doctrine
 - 1. Implicit in structure and language of Constitution
 - B. Constitution outlines powers of each branch
 - 1. Powers exclusive to a particular branch
 - a. Article I—legislative power
 - b. Article II—executive power
 - c. Article III—judicial power
 - 2. Concern over extent of power specifically granted as interference with another branch
 - a. Five separate issues arising from separation of powers doctrine
 - (1) Executive encroachment on legislative power
 - (2) Congressional encroachment on executive power
 - (3) Executive privilege and immunity
 - (4) Congressional immunity
 - (5) Congressional encroachment on judiciary
 - b. A few cases indicate that language and structure are weak
 - 3. Executive encroachment

- a. Significant amount of executive power is implied, not specific
 - (1) Clear that President cannot make law
 - (a) *Youngstown Steel*, 343 U.S. 579 (1952)
 - i. In response to labor dispute closing steel mills, President issued executive order to seize mills during Korean War
 - ii. Court struck down seizure order
 - a) Executive action undertaken without congressional assent
 - b) Improper exercise of lawmaking power explicitly granted to Congress
 - iii. Concurring opinions
 - a) Rely heavily on rejection of seizure as option to labor dispute when debating Taft-Hartley Act
 - b) Usurpation of congressional power
 - iv. Dissent
 - a) Under these circumstances executive action warranted
- b. Where Congress appears to agree with executive action it is considered to be within the scope of executive authority
 - (1) *Dames & Moore v. Regan*, 453 U.S. 654 (1981)
 - (a) Congressional approval is just one factor to be considered
 - i. Insufficient on its own to allow executive action
 - ii. Prior agreement of Congress in similar situations
 - iii. Foreign powers involved
4. Congressional encroachment on presidential power
 - a. When Congress monitors executive branch acts
 - (1) Device known as legislative veto
 - (a) Included in statute delegating certain powers to federal agencies
 - (2) If agency acts in a manner Congress does not agree with, legislative veto allows both houses of Congress to cancel the executive action
 - (3) Constitutionality of legislative veto
 - (a) Violation of presidential veto power
 - (b) Violates bicameral structure of Congress
 - (c) Exercise of legislative power impermissible
 - i. Where the purpose and effect is altering legal rights outside the legislative branch
 - (d) *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1982)
 - b. Violation of separation of powers when Congress delegates responsibility for enforcement of laws to one who can only be removed by Congress
 - (1) Enforcement is an executive act
 - c. Where Congress is not attempting to limit executive power and increase its own, there is no violation of separation of powers doctrine
5. Executive privileges and immunities
 - a. Constitution protects leaders from constraints on their independence by providing immunity
 - (1) President
 - (a) President is safe from criminal prosecution during tenure in office
 - (b) President subject only to impeachment by the House of Representatives and trial in the Senate
 - (2) Federal judiciary
 - (a) Federal judges are protected by a grant of life tenure
 - (b) Salaries of federal judges may not be reduced during their tenure
 - (3) Congress
 - (a) Congresspersons are immune from liability for statements made during debate
 - (b) Congressional immunity promotes full and free discussion in arriving at determinations
 - i. Article I, sec. 6—Speech and Debate Clause
 - (c) Extent of immunity
 - i. *Hutchinson v. Proxmire*, 462 U.S. 111 (1979)

- a) Absolute immunity for information originally presented on the floor of the Senate then disseminated in a newsletter
 - ii. Comments made outside deliberations and communications in committee and legislative proceedings are not covered and may be subject to liability
 - (4) Executive branch immunity
 - (a) Some immunity exists
 - i. Not as extensive as that provided to Congress
 - (b) Balancing of interests
 - i. No general acceptance of immunity from subpoenas for President and other executive officers
 - ii. President has absolute immunity from civil liability for official acts
 - a) *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)
 - 1) Mandate of separation of powers entitles the President to absolute immunity from damages
 - (i) Based on importance of President to effective functioning of government
 - (ii) Court balanced this against exercise of jurisdiction in private suits
 - (iii) Remedy still existed
 - (c) Only qualified immunity for high officials
 - i. Officials seeking immunity have the burden of proof that public policy requires a grant of immunity
 - a) Distinction between centrality of President to the government and that of his aides
 - 1) *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)
 - (d) President has no immunity for acts unrelated to his Office
 - i. *Clinton v. Jones*, 520 U.S. 681 (1997)
 - a) President being sued for acts while governor of Arkansas
 - b) Sought temporary immunity during term in office
 - c) Court found that temporary immunity during term not required by the Constitution
 - 1) Immunity for acts has basis in functions of the acts and not the identity of the actor
 - 2) No separation of powers violation
 - (e) Executive privilege
 - i. *United States v. Nixon*, 418 U.S. 683 (1974)
 - a) President refused to turn over tapes to special prosecutor investigating Watergate break-in at Congress' direction
 - b) Court found that Constitution provides for executive privilege
 - c) Court found privilege not applicable to instant materials
 - d) Unanimous opinion
 - 1) Neither separation of powers nor need to protect communications alone or together sustain claim of absolute immunity from judicial process
 - (i) Need to show that national security would be damaged to support such a claim
- 6. Encroachment on judicial powers
 - a. Issues arise infrequently
 - b. Same general rules are applicable
 - (1) Other branches may not appropriate judicial functions
 - (2) Judiciary may not take on functions designated to the other branches
 - c. Congress may assign to the judiciary actions that could be considered lawmaking if the subject relates to the role of the courts
 - (1) *Mistretta v. United States*, 488 U.S. 361 (1989)
 - (a) Arose from passage of the Sentencing Reform Act
 - i. Congress established the United States Sentencing Commission to develop guidelines for federal sentencing

- a) Seven commission members
 - 1) At least three federal judges
 - 2) Balance to be appointed by the President with the advice and consent of the Senate
- (b) *Mistretta*, sentenced under the guidelines, challenged them as unconstitutional
 - i. Claimed unconstitutional delegation of Congressional lawmaking power to the judiciary
- (c) Guidelines found constitutional
 - i. No violation of separation of powers
 - a) Commission not part of judicial branch
 - b) Congress not proscribed from delegating power to experts to formulate policy
- (d) J. Scalia's dissent
 - i. Constitution does not provide for Congress to exercise governmental power other than making law
 - ii. No place for overlap of functions

III. Federalism

A. State and federal governments coexist

- 1. There are limits on each
 - a. Federal limits mandated in the Constitution proscribe all federal action not specifically set forth in the Constitution
 - b. State action is legitimate unless it infringes on the limits imposed by the Constitution
 - (1) Tenth Amendment: "Powers not delegated to the United States . . . [are] reserved to the states"
- 2. State governments have general police power
 - a. Allows legislation for the protection of the health, welfare, and safety of citizens
- 3. Federal government without general police power
 - a. Federal government cannot act for the health, welfare, or safety of the nation's citizens
 - b. For an action to be valid it must fall within the enumerated powers and not violate constitutional limitations

B. Cases on federalism arise in the context of the Commerce Clause

C. Historical perspective on federalism

- 1. Birth of the Nation: 1770–1820
 - a. Tension between the desire for a strong federal government and desire for states to retain the major share of power
 - (1) Articles of Confederation
 - (a) Limited the federal government to a Congress with strictly limited power
 - (2) Problems with government under the Articles led to writing of Constitution
 - (3) Tension continued after ratification of the Constitution over which branch retained what powers
- 2. Years leading to Civil War: 1820–1860
 - a. Balance of power centered on economic development and regulation
 - b. Federal government played large role in economic development
 - (1) *McCulloch v. Maryland*, 17 U.S. 316 (1819)
 - (a) Issue: whether federal government had power to establish a national bank under the Necessary and Proper Clause
 - (b) Court construed the issue broadly
 - i. Doctrine of implied powers
 - ii. Chartering of bank was valid
 - c. Clashes over power to regulate commerce increased
 - (1) Clashes over tariffs
 - (2) South Carolina claimed a right of the states to nullify federal laws
 - (a) Led directly to the Civil War
- 3. Post-Civil War growth: 1880–1900
 - a. Expanding power of federal government
 - (1) Taking more active role in regulating and reforming the economic system

- (a) Result of industrialization in the economic and social structure
 - b. More central role in regulating commerce
 - 4. Progressive Era: 1900–1920
 - a. Move by state governments to address problems of industrialization, urbanization, and immigration
 - (1) Problems perceived as the result of the federal government’s support of “big business”
 - (2) Reforms moved from state to national level
 - b. Passage of Sixteenth Amendment—federal income tax
 - (1) Provided increased revenues to the federal government
 - (2) Led to revenue sharing with the states
 - (3) Gave federal government additional power to direct national agenda
 - 5. New Deal, World War II, and post-war prosperity: 1930–1960
 - a. Franklin Roosevelt’s election and response to the Great Depression secured the power of the federal government
 - b. Cooperation between state and federal governments to achieve common goals during the war and the following period
 - 6. The Great Society and the Vietnam War: 1960–1970
 - a. Active role for federal government in solving problems
 - (1) Civil Rights Act of 1964
 - (2) Head Start Program
 - b. With passage of time, conflict between state and federal regulators
 - (1) Overlap of problems
 - (2) State regulators wanted greater control over programs in their jurisdictions
 - c. With Vietnam War, beginning of change in the balance of power between the federal and state governments
 - 7. The new federalism: 1970–2003
 - a. Nixon presidency brings efforts to reduce federal government control over grant programs and welfare reform
 - b. In 1990s Court increasingly willing to strike down federal laws, finding actions more properly within the states’ police power
 - (1) *United States v. Lopez*, 514 U.S. 549 (1995)
 - (a) Gun-Free School Zone Act of 1990 challenge
 - (b) Court found unconstitutional for exceeding power under the Commerce Clause
 - i. Act is criminal in nature, not having to do with commerce
 - (c) Trend toward narrowing federal power under the Commerce Clause continues
 - D. Federalism—state oversight of the federal government
 - 1. Line drawing authority between the states and federal governments
 - a. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995)
 - (1) States’ ability to restrict number of terms one could serve in Congress
 - (2) 5–4 decision striking down term limits as unconstitutional
 - (a) Majority ruled on constitutional provision regarding specific requirements for congressional membership
 - i. Individual states could not modify these
 - (b) Dissent—Constitution did not prevent states from imposing additional requirements
 - b. *Cook v. Gralike*, 531 U.S. 510 (2001)
 - (1) Court held that state constitutional amendment requiring ballot designation “Disregarded Voters’ Instructions on Term Limits” unconstitutional
 - (2) Unanimously found it exceeded state power granted by the Constitution
- IV. Summary
 - A. To avoid concentration of power the government was divided horizontally and vertically
 - B. Court takes seriously these restrictions on government power
 - 1. Court consistently interprets separation of powers doctrine narrowly
 - 2. Interpretation is not as consistent in the area of federalism
 - a. Court more subject to vagaries of historical, social, and economic factors

Key Terms and Definitions

attachment: Formally seizing property (or a person) in order to bring it under the control of the court; this is usually done by getting a court order to have a law enforcement officer take control of the property.

enumerated powers: Those powers specifically granted to the three branches of government in the U.S. Constitution.

executive privilege: The right of the President of the United States and subordinates to keep some information (primarily documents) from public disclosure. The privilege is used most often for military and diplomatic secrets.

federalism: A system of political organization with several different levels of government (e.g., city, state, and national) co-existing in the same area, with the lower levels having some independent powers.

immunity: The freedom of national, state, and local government officials from prosecution for, or arrest during, most official acts and their freedom from most tort lawsuits resulting from their official duties.

indeterminate: With the exact time period not set. For example, an indeterminate sentence is a criminal sentence with a maximum or minimum set, but not the exact amount of time.

injunction: A judge's order to a person to do or to refrain from doing a particular thing.

police powers: The government's right and power to set up and enforce laws to provide for the safety, health, and general welfare of the people.

separation of powers: The division of the federal government (and state governments) into legislative (lawmaking), judicial (law interpreting), and executive (law carrying-out) branches; each acts to prevent the others from becoming too powerful.

Taft-Hartley Act: (29 U.S.C. 141) A 1947 federal law that added several employers' rights to the union rights in the Wagner Act; it established several union "unfair labor practices" (such as attempting to force an employee to join a union).

Review Questions

1. Justice Scalia's position on the separation of powers seems to be at odds with the majority in *Mistretta*. What are the differences between his position and the Court's position in that case?
2. What was the purpose of dividing the powers of the federal government among the three branches? What areas of conflict emerge from the separation of powers?
3. Compare and contrast the federal government's power under the "Necessary and Proper" Clause with the state governments' police power.
4. What distinction was drawn between the grant of absolute immunity for the President and immunity for those who worked closely with the President in *Nixon v. Fitzgerald*?
5. Discuss the economic, political, and social forces that affected the balance of power between the state and federal governments from colonial times to the present.

Internet Connections

1. For more information on the Framers' intentions regarding the horizontal and vertical division of power, visit The United States Constitution Online at <http://www.USConstitution.net>.
2. To learn more about federalism, visit the home page for *Publius: The Journal of Federalism* at <http://www.lafayette.edu/publius>.