

SYMPOSIUM  
SEPARATION OF POWERS AS  
A SAFEGUARD OF FEDERALISM

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FOREWORD: THE IMPORTANCE OF STRUCTURE  
IN CONSTITUTIONAL INTERPRETATION

*Antonin Scalia\**

I am pleased to open this Symposium, which draws attention to the important role of structure in the Constitution. In the days when I taught constitutional law, the University of Chicago Law School had two constitutional courses. One was entitled Individual Rights and Liberties, and focused primarily upon the guarantees of the Bill of Rights. The other (I forget the title of it) focused upon the structural provisions of the Constitution, principally the separation of powers and federalism. That was the course I taught—and I used to refer to it as *real* constitutional law. The distinctive function of a constitution, after all, is to constitute the political organs, the governing structure, of a state. Many of the personal protections against the state taught in constitutional law courses here—restrictions upon unlawful searches and seizures, for example—used to be taught in Europe as part of administrative law. They were, to be sure, made part of our Constitution (though most of them as an appendage to the original document). And that was no doubt desired. But it is a mistake to think that the Bill of Rights is the defining, or even the most important, feature of American democracy. Virtually all the countries of the world today have bills of rights. You would not feel your freedom secure in most of them—though you likely would in England or Australia, which are two of the very few exceptions.

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\* Associate Justice, Supreme Court of the United States.

Consider, for example, the following sterling provisions of a modern bill of rights:

Every citizen . . . has the right to submit proposals to state bodies and public organisations for improving their activity, and to criticise shortcomings in their work. . . . Persecution for criticism is prohibited. Persons guilty of such persecution shall be called to account.

[C]itizens . . . are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations. Exercise of these political freedoms is ensured by putting public buildings, streets, and squares at the disposal of the . . . people and their organizations, by broad dissemination of information, and by the opportunity to use the press, television, and radio.

. . . .

Citizens . . . are guaranteed freedom of conscience, that is, the right to profess or not to profess any religion, and to conduct religious worship, or atheistic propaganda. Incitement of hostility or hatred on religious grounds is prohibited.

Wonderful stuff. These were provisions of the 1977 Constitution of the Union of Soviet Socialist Republics.<sup>1</sup> They were not worth the paper they were printed on, as are the human rights guarantees of a large number of still-extant countries governed by Presidents-for-Life. They are what the Framers of our Constitution called “parchment guarantees,” because the *real* constitutions of those countries—the provisions that establish the institutions of government—do not prevent the centralization of power in one man or one party, thus enabling the guarantees to be ignored. Structure is everything.

The constitutional structure of the United States has two main features: (1) separation and equilibration of powers and (2) federalism. Each functions to safeguard individual liberty in isolation, but they provide even greater protection working together. James Madison captured this idea when he explained that the constitutional structure provides “a double security” to the rights of the people.<sup>2</sup> Discussing “considerations particularly applicable to the federal system of America,”<sup>3</sup> he wrote:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided

1 Konstitutsiia SSSR (1977) [Konst. SSSR] [USSR Constitution] arts. 49–50, 52.

2 THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

3 *Id.*

between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.<sup>4</sup>

Those who seek to protect individual liberty ignore threats to this constitutional structure at their peril.

Two examples illustrate the point. In *Morrison v. Olson*,<sup>5</sup> the Supreme Court upheld the independent counsel provisions of the Ethics in Government Act of 1978,<sup>6</sup> a frank and undisguised attempt by Congress to assign elsewhere the President's authority to prosecute—and to decline to prosecute—violations of the law. The accomplishment of this feat required several compromises of constitutional structure, including provision for the appointment of principal executive officers by federal judges at (in effect) the instance of members of Congress, and restriction of the President's power to supervise and remove officers performing core executive functions.<sup>7</sup> The consequences of the Act, which ultimately led to its demise, were predictable. Prosecutors with no executive supervision and essentially unlimited budgets were investigating alleged criminal wrongdoing by the President or his close associates during every administration while the Act was in effect. Some investigations lasted longer than the tenure of the Attorneys General who were required to trigger the judicial appointment. The harvest of criminal convictions was sparse, but the diminution of presidential prestige, and hence of presidential power, was substantial. So was the injustice done to many "targets," who were treated to the luxury of their own personal, publicly announced, highly publicized, full-time criminal investigator (with a large full-time staff) for years on end.

In *Printz v. United States*,<sup>8</sup> the Court invalidated provisions of the Brady Handgun Violence Prevention Act<sup>9</sup> requiring state and local law enforcement officers to perform background checks on prospective handgun purchasers.<sup>10</sup> Since the statute dealt with commerce, Congress was free to regulate handgun purchases directly.<sup>11</sup> The question in *Printz* was whether Congress could require the states to

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4 *Id.*

5 487 U.S. 654 (1988).

6 Pub. L. No. 95-521, tit. VI, §§ 601–604, 92 Stat. 1824, 1867–75.

7 *See id.* § 601(a), 92 Stat. at 1869, 1872.

8 521 U.S. 898 (1997).

9 Pub. L. No. 103-159, 107 Stat. 1536 (1993).

10 *See Printz*, 521 U.S. at 933–35.

11 *See United States v. Lopez*, 514 U.S. 549, 559–61 (1995).

regulate such purchases on behalf of the federal government. We held that it could not for reasons of both federalism and separation of powers. As a matter of federalism, the Constitution does not authorize Congress to commandeer state officers for the enforcement of the laws that it enacts. That would vastly increase the number of federal agents, and hence the power of the federal government. And it would allow Congress and the President to evade apparent responsibility for (not to mention the cost of) enforcing unpopular federal mandates. As a matter of separation of powers, commandeering state law enforcement officers would enable Congress to avoid the essential check that the laws it enacts depend for their execution upon the competing political branch of the presidency.<sup>12</sup> The Act thus undermined both pillars of the “double security . . . to the rights of the people” that Madison described.

In *Separation of Powers as a Safeguard of Federalism*, Professor Clark explores the relationship between these two primary features of the constitutional structure.<sup>13</sup> Specifically, he argues that the detailed law-making procedures established by the Constitution serve not only to uphold the constitutional separation of powers, but also to safeguard federalism. His thesis has potential implications for several important areas of the law. I congratulate him and the participants here today for investigating these questions, and I applaud the *Notre Dame Law Review* for selecting this topic. This Symposium draws welcome attention to the fundamental role constitutional structure plays in securing our individual liberty, and reminds us what is at stake if we fail to preserve it.

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12 See U.S. CONST. art. II, § 3 (specifying that the President “shall take Care that the Laws be faithfully executed”).

13 See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).