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## 5.1 Federalism and Preemption

### LEARNING OBJECTIVES

1. Explore how the Constitution creates a limited government through the separation of powers and through checks and balances among the three branches of government.
2. Learn how the Constitution resolves conflicts between state and federal laws.
3. Understand the rules surrounding preemption.

*Figure 5.1 Constitution of the United States of America*



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Have you ever read the Constitution from beginning to end? Look at the text of the Constitution. It's remarkably short—shorter than many people realize. Historically, it is the shortest and oldest written constitution still in force. Ironically, the Constitution's brevity may be one of the reasons that it endures to this day, as judicial interpretation has kept its meaning relevant for modern times.

Much of its content deals with the allocation of power among three separate and coequal branches of government. Substantively, much more attention is paid to the limitations on the power given to each of the three branches than to any positive grant of rights. Indeed, while many Americans believe that it is their “constitutional right” to be free, many of those freedoms are actually contained in the Bill of Rights,

which are amendments to the Constitution. In contrast, the main body of the Constitution is concerned primarily with structure. In other words, the Constitution is a document of prohibition, outlining what government cannot do as opposed to what government must do.

As a result of this structure, the Constitution is rarely the right place to deal with contemporary political issues, no matter how important. At the state level, many states permit frequent amendments to their constitutions to reflect contemporary public policy, from school funding to gambling to gay marriage. There is often support among many people for constitutional amendments to ban flag burning, permit prayer in school, ban gay marriage, or ban abortion. At the federal level, however, these issues are rarely resolved at the constitutional level. There is a practical bar, of course, given how difficult it is to amend the Constitution. Even if it were easier to amend, however, the Constitution remains very much a document of structure rather than substantive law.

During his confirmation hearings, Chief Justice John Roberts spoke of his role as an umpire calling the balls and strikes and not pitching or batting. If judges are umpires, then the Constitution sets forth the rules of the game. The biggest rule laid down in the Constitution is the separation of powers.

Fundamentally, the separation of powers requires that each branch of government play its own role in governing the people. The judicial branch plays a critical role in interpreting the Constitution and outlining the powers of the legislature and executive branches. The interplay between Article I (legislative) and Article II (executive) is no less important. Although more than two centuries have passed since the first Congress and the first president served, the limits of power between these two branches continue to be redefined, especially in the wake of the September 11 terrorist attacks.

Article I of the Constitution establishes the legislative branch through bicameral legislature. The lower House of Representatives, with frequent elections (every even-numbered year), has 435 members, with representation spread proportionately to a state's population as determined by a census every decade. The most populous state, California, has fifty-three members, while several states are so small that they have only one representative (Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming). The House is led by the Speaker of the House, typically from the party that holds the majority

in the House. The House is generally thought to represent the most contemporary views of the American public, with its large body of members and frequent elections.

As a check on the majority will, and on the power of larger states, the Senate is a smaller body with one hundred members (two from each state) and with less frequent elections (every six years). The Senate is meant to be a more deliberative body and to ensure a wider level of debate before impassioned legislation is hastily rushed into law. The makeup of the Senate means that citizens from smaller states, representing much fewer people, can often frustrate the will of the majority of Americans. The Constitution places the power to legislate with both chambers, but the House retains the exclusive right to originate bills raising revenue (taxation), while the Senate maintains the exclusive right to provide advice and consent to the president, where advice and consent are required. Additionally, while the House retains the right to impeach officials for “high crimes and misdemeanors,” the Senate tries such impeached officials.

Article II of the Constitution establishes the executive branch of government. While the Constitution was being drafted, the delegates knew that they wanted George Washington to be president. Washington was in retirement in Mount Vernon at the time, after successfully leading the colonies in the Revolutionary War. Since the delegates knew Washington would be president, they spent remarkably little time in writing Article II, which is very short. Washington was elected to both his first and second terms with 100 percent of the Electoral College vote, something no other president has since done. While Article II sets forth some of the mechanisms for becoming president—and is the only place in the Constitution that prescribes a specific oath of office—when the Constitution was drafted, little was known about what the president’s role would be.

Article II grants the president an almost total power over foreign affairs, including the power to make treaties and appoint ambassadors. He is commander-in-chief of the armed forces. The president is also responsible for executing, or enforcing, the laws of the country. While Congress can pass any legislation it wants to, ultimately legislation is meaningless unless there are sanctions for violating the law. Through the prosecutorial and police functions, the president ensures that the will of the people, as expressed through Congress, is carried out.

The Constitution's deliberate ambiguity on the powers of the president left much room for debate on how strong the executive branch should be. After the September 11 attacks, many in the George W. Bush administration argued for a strong unitary executive theory. Bush administration lawyers reasoned that only a strong executive could effectively wage war with Al-Qaeda. Under a congressional authorization, the administration embarked on a program to capture and kill terrorists around the world and to gather as much information about terrorist activities as possible. Many in Congress believed, however, that the executive branch overstepped its authority in pursuing these goals, leaving Congress behind.

For example, to collect intelligence on suspected terrorists in the United States, Congress passed a law, the Foreign Intelligence Surveillance Act, in 1978. FISA, as the law is known, requires federal law enforcement officials to seek a search warrant from a secret court before carrying out surveillance or wiretapping. The Bush administration routinely carried out surveillance on persons in the United States without this judicial oversight, arguing that it was part of the unitary executive theory to do so. In another program, the Bush administration allegedly captured suspected terrorists abroad and moved them to secret prisons outside the jurisdiction of the United States for interrogation, a practice known as extraordinary rendition. In late 2009, an Italian court convicted twenty-three American officials, including members of the Central Intelligence Agency (CIA), of extraordinary rendition in the case of a Muslim cleric kidnapped from Milan. The officials were convicted in their absence and have not been extradited to Italy. Extraordinary rendition is likely illegal under U.S. and international law, but lawsuits attempting to find out more information about the program have been thwarted by the executive branch's claim of the state secrets doctrine.

Congress and the president have also clashed over the treatment of suspected terrorists. Article I, Section 9 of the Constitution states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The right of habeas corpus is a fundamentally important right, appearing first in the Magna Carta and considered so important by Constitutional delegates that it was inserted into the text of the Constitution itself, not in the Bill of Rights. When the Bush administration began imprisoning suspected terrorists at the military base in Guantanamo Bay, Cuba, the administration took a series of unprecedented positions on the legal status of

those detainees, including the position that the detainees did not have the right to seek habeas relief. Federal courts, including the Supreme Court, gradually overturned most of these positions, and the detainees are now being tried by either military tribunals or civilian courts.

Another controversial position adopted by the administration was on the use of enhanced, or aggressive, interrogation methods. Critics claimed these techniques amounted to torture (which is banned by U.S. law as passed by Congress) and may be unconstitutional under the Eighth Amendment, which prohibits cruel or unusual punishment.

### **Video Clip: “Mancow” Waterboarded (unavailable on this PDF)**

Another aspect of the separation of powers that is less obvious is the separation of power between the federal and state governments, known as federalism. You already know that state and federal governments sometimes share power and that the rules of subject matter jurisdiction determine which legal system has jurisdiction over a particular matter or controversy. In some areas, such as family or property law, the states have near exclusive jurisdiction. In other areas, such as negotiating treaties with foreign countries or operating airports and licensing airlines, the federal government has near exclusive authority. In the middle, however, is a large area of subject matter where both state and federal governments may potentially have jurisdiction. What happens if state and federal laws exist on the same subject matter, or worse, what happens if they directly contradict each other?

Legal rules of preemption seek to provide an answer to these questions. Under the Constitution’s Supremacy Clause (Article VI, Section 2), the Constitution and federal laws and treaties are the “supreme law of the land” and judges in every state “shall be bound” by those laws. Let’s say, for example, that Congress sets the minimum wage at \$7.25 an hour. A state that passes a law making the minimum wage lower than that would immediately see the law challenged in federal court as unconstitutional under preemption and Supremacy Clause principles, and the state law would be overturned.

## Hyperlink: Medical Marijuana in the States

<http://www.npr.org/templates/story/story.php?storyId=113924395>

Under the federal Food and Drug Act, marijuana is classified as a Schedule I drug under the Controlled Substances Act, meaning it is restricted just like cocaine or heroin. Fourteen states have passed laws that permit marijuana to be grown, sold, and used for medicinal purposes, such as treating nausea and stimulating hunger in cancer patients. The federal government aggressively prosecuted medicinal use of marijuana, and in 2005 the Supreme Court ruled that the federal law trumps state laws, <sup>[1]</sup> meaning that local growers could be arrested and prosecuted under federal law even if what they were doing was perfectly legal and authorized under state law. In 2009 the Obama administration announced a change in policy. Listen to this National Public Radio story about what this change means for the medicinal use of marijuana in the states.

When there is no direct conflict between state and federal law, then the rules of preemption state that courts must look to whether or not Congress intended to preempt the state law when it passed the federal statute. If there is no clear statement by Congress that it wishes to preempt state law, or if it is unclear what Congress meant to do, then the state law will survive if possible (i.e., there is a presumption against preemption). Even if there is no statement by Congress on preemption, however, if Congress so completely regulates a particular subject area that there is “no room” left for states to regulate, then preemption exists. For example, after September 11, Michigan passed a law requiring student pilots in Michigan to pass a Federal Bureau of Investigation (FBI) background check. The Federal Aviation Administration, which sets forth pilot qualifications and licensing, has no such requirement, and since the federal government regulates the aviation industry completely (from airports to pilots to airlines to training standards), Michigan’s law is preempted.

## Hyperlink: Can States Regulate Car Safety Standards?

<http://www.nhtsa.dot.gov/cars/rules/import/fmvss/index.html>

Sometimes it's not clear whether or not a state law is preempted, and the courts must undertake a searching inquiry to determine congressional intent. In *Geier v. Honda*,<sup>[2]</sup> for example, a teenager filed a tort lawsuit against Honda for injuries she suffered during a car accident. Her lawsuit claimed that her 1987 Honda Accord was defective because it didn't have any airbags. Airbag technology, which existed at the time but was used primarily in expensive luxury cars, would have minimized her injuries. If she had won her state lawsuit in the District of Columbia, then in effect all 1987 Honda Accords sold in the District of Columbia would have to be equipped with airbags to avoid tort liability. Honda's defense was preemption. Under a federal regulatory scheme known as the Federal Motor Vehicle Safety Standards (FMVSS), the federal government sets forth safety standards that cars must meet to be sold in the United States. FMVSS 208 sets the standard for seat belts, and in 1987 manufacturers were required to install either airbags or passive (motorized) seat belts. A rule that required manufacturers to install airbags exclusively would directly contradict FMVSS 208, so the Supreme Court ruled that FMVSS preempted any state attempts to regulate motor vehicle safety standards.

When the Supreme Court found preemption in the Honda case, many in the business community wondered if a new era of preemption might have arrived. Federal regulation would in effect provide a shield against liability lawsuits. These hopes were short lived, as the Supreme Court continues to hold a presumption against preemption. The drug industry, in particular, would like preemption to end tort litigation.

## **Hyperlink: If the FDA Approves a Drug Label, Can Patients Still Sue Drug Manufacturers?**

<http://www.npr.org/templates/story/story.php?storyId=101465350>

Wyeth Pharmaceuticals manufacturers an antinausea drug called Phenergan, which was approved by the U.S. Food and Drug Administration (FDA) in 1955. Under federal law, the FDA must approve the wording on labels and documentation accompanying regulated drugs. The FDA-approved label contained warnings against "intra-arterial" injection, which carried the risk of irreversible gangrene. The plaintiff in



the case, Vermont musician Diana Levine, went to a clinic for treatment and ended up losing her arm when Phenergan was incorrectly administered to her. She sued Wyeth, arguing that the warning label on the drug didn't prohibit the type of injection that led to her injuries. A jury awarded her more than six million dollars in damages. On appeal to the Supreme Court, Wyeth argued that since the FDA approved the label, lawsuits arguing that the label was inadequate were preempted. The Supreme Court examined the history of the Food and Drug Act and ruled for Diana Levine, holding that when Congress wrote the law, it never meant to preempt state laws. In fact, the Supreme Court found that Congress meant for state lawsuits to work alongside the Food and Drug Act to ensure drug safety for consumers.

### KEY TAKEAWAYS

The Constitution is mainly a structural document, setting forth the allocation of power among the three branches of government and the limitations on that power. It is concerned mainly with what the government cannot do, as opposed to what the government must do. At the federal level, constitutional amendments are rarely used to carry out social policy. Article I of the Constitution establishes a bicameral legislature, with a House of Representatives and a smaller, more deliberative Senate. Both chambers must agree before legislation can be passed. Article II of the Constitution establishes the executive power in the president, who must execute the laws passed by Congress. The balance of power between Congress and the president is subject to much interpretation and change throughout history, including the post-September 11 era. Power is also divided between state and federal governments under federalism. The Supremacy Clause states that when there is a conflict between state and federal law, federal law wins. If there is no direct conflict, the state law survives unless Congress expressly preempts state law.

### EXERCISES

1. One of the attempts to use the Constitution to achieve a social policy was Prohibition. Review the twenty-seven amendments to the Constitution. Other than the Bill of Rights, can you identify other amendments used to achieve social policy?

2. Can you name your representatives in the House of Representatives and the Senate? Who is the current Speaker of the House and the Senate Majority Leader?
3. Can you think of current examples where legislation that is popular with the majority of Americans is held up in the Senate, especially by Senators from smaller states?
4. Do you believe that the United States is better served by a strong or weak unitary executive? Explain your answer.
5. Where should the balance of power lie between Congress and the president in prosecuting the war on terror? If the president believes enhanced interrogation such as waterboarding is necessary to obtain necessary intelligence, should Congress attempt to intervene?
6. In 2007 five victims of extraordinary rendition filed suit against Jeppesen Dataplan Inc. (a Boeing subsidiary), claiming that Jeppesen provided logistical support to the CIA's extraordinary rendition program. The government has so far successfully kept the case from going to trial, arguing that doing so would endanger government secrets. Do you believe that someone who has been subject to extraordinary rendition should be able to sue the government, or private companies, for what happened to them? Why or why not?
7. In the *Geier* case, the Supreme Court held that states may not regulate motor vehicle safety standards. How do you think states like California and Massachusetts can impose stricter emission controls on motor vehicles than the federal standard?

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[1] *Gonzalez v. Raich*, 545 U.S. 1 (2005).

[2] *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000).



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