CHAPTER 9

Separation of Powers

I would rather be governed by 3 crazy people than by 1 crazy person.

—Martin Shapiro

Of all monopolies, the state’s monopoly on force is the most profitable to control. Some politicians in a democracy would, if they could, perpetuate their power by undermining popular competition for office and moving toward dictatorship. Antitrust theory suggests how to constrain such politicians. According to antitrust theory, expanding the size of a cartel needed to monopolize an industry destabilizes it. The cartel destabilizes because each member has a stronger incentive to defect. Similarly, separating state powers destabilizes political cartels by requiring the cooperation of more officials to monopolize government. Elections provide voters with the primary means to control officials, but separating powers is also necessary (Persson, Roland, and Tabellini 1997).

Besides destabilizing cartels, separating powers influences the conduct of government. A superior gives orders to a subordinate, whereas equals proceed by bargains. Separating powers transforms subordinates into equals and replaces orders with bargains. The decision to separate powers in the constitution is a choice for bargains over orders as the way to conduct government. Bargains impose negotiation costs, whereas hierarchy imposes costs of supervision.

This chapter concerns the way separate powers relate to each other. The need for cooperation among the branches of government causes them to behave strategically toward each other, and the constitution partly determines their best strategies. Simple game theory can explain the logic of power in different constitutions. I will answer such questions as the following:

Example 1: The U.S. Supreme Court has much more discretion in interpreting law than does the House of Lords, which is Britain’s highest court. Do courts usually enjoy more discretion in a presidential system than in a parliamentary system?

Example 2: Under an “open rule,” a legislature can amend a bill before voting on it. Under a “closed rule,” a legislature must vote on a bill without amending it. Most legislatures follow an open rule most of the time. However, the U.S. Congress sometimes follows a closed rule in voting on bills reported out of committees, and the Commission in the European Union
makes proposals to the Council of Ministers under a closed rule. How does the change from open to closed rule change the ways bills get drafted?

Example 3: The European Union increasingly resembles a bicameral democracy. How will bicameralism change the power of the branches of European government, including the Commission and the Court of Justice?

FORMS OF SEPARATED POWERS

The executive, legislative, and judicial powers of government can be united or separated. A dictatorship such as the former Soviet Union unites all three powers in the executive, who governs by decree.\(^1\) In contrast, any state with the rule of law, such as Great Britain, Germany, or the United States, separates the judiciary from the executive and legislature. A parliamentary system unites executive and legislative powers, as in Great Britain, where the Parliament's lower chamber elects the prime minister, or in Germany, where the lower chamber elects the chancellor.\(^2\) In contrast, a presidential system separates executive and legislative powers as in France and the United States, where the citizens directly elect the president. A unicameral system unites legislative powers in a single house, as in Great Britain where the House of Commons governs and the House of Lords comments. In contrast, a bicameral system divides legislative powers between the lower and upper houses, as in Germany or the United States. Thus the number of divisions of power can range from 0 in a dictatorship to 4 in a presidential, bicameral democracy, as depicted in table 9.1.

\(^1\) The Soviet Constitution provided for the separation of powers, but it had no effect on the real allocation of powers.

\(^2\) The German president has ceremonial powers only.
Table 9.1 oversimplifies reality. To illustrate complexity, Japan and Korea have mixed systems with a president and a prime minister. The president has much executive power, but the prime minister heads the cabinet and the government day by day. Another complication occurs when the effective allocation of power in politics does not correspond to the legal allocation in the constitution. For example, a dominant political party can unite powers separated in the constitution, as illustrated by the Communist Party in the former Soviet Union. Conversely, fragmented parties can separate powers united in the constitution, as illustrated by the government in Israel. The effective separation of powers depends on law (the constitution) and politics (parties). This chapter focuses on the former, not the latter. To keep the analysis simple, I often assume that political parties reinforce the constitutional allocation of powers, rather than undermine it.

Students of industrial organization sometimes say that only four numbers should matter to antitrust policy: one, two, three, and four-or-more. These cryptic remarks mean that a market with four or more suppliers behaves much like a perfectly competitive market, whereas each reduction in suppliers below four increases the likelihood of monopolistic practices. Generalizing, this rule of thumb implies that political conspiracy with four or more members is unmanageable. Assuming this generalization is true, dividing government into four branches provides the maximum protection against political conspiracies obtainable by constitutional separation of powers, and each decrease below four makes conspiracy more manageable.

**Consequences of Separating Executive and Legislative Powers**

In addition to destabilizing cartels, separating power causes government to proceed more by bargains and less by orders. Bargains impose negotiation costs, whereas hierarchy imposes supervision costs. According to table 9.1, different constitutions strike the balance differently. In a parliamentary system with tight party discipline, the prime minister gives orders to legislators of his own party. In a coalition government, the prime minister has some power to give orders to members of the government from different parties. In a presidential system, in contrast, the leading legislators do not sit in the cabinet and may not be members of the president's party, so the president typically needs to bargain with the leading legislators. To illustrate, the British prime minister issues orders to enact legislation in Parliament, whereas the U.S. president negotiates with Congress over legislation.

Several consequences follow from these facts. By increasing transaction costs, bargaining among the branches of government slows down the pace of legislation and reduces demand for it. Conversely, by reducing transaction costs, the unification of power speeds up legislation and increases demand for it.

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3 This belief is implicit in the common practice of measuring monopoly structure in an industry by its four-firm concentration ratio.
Figure 9-1 depicts these facts, where the horizontal axis indicates the quantity of legislation and the vertical axis depicts its price. The "demand" for legislation in figure 9-1 refers to the willingness of citizens to pay lobbyists for it. To keep the analysis simple, assume that lobbyists can exert their influence and obtain legislation for their clients. The "supply" of legislation refers to the cost to lobbyists of providing legislation. The separation of powers shifts the supply curve up, resulting in a rise in the price of legislation from $p_0$ to $p_1$, and a fall in the demand for legislation from $x_0$ to $x_1$.

Separating powers in figure 9-1 causes total expenditures by private citizens on legislation to change from $p_0x_0$ to $x_1p_1$. Total expenditures increase if demand is inelastic, and total expenditures decrease if demand is elastic. In consumer theory, demand for "necessities" is inelastic and demand for "luxuries" is elastic. Thus the separation of powers should increase total expenditures on legislation considered necessary by interest groups and decrease expenditures on legislation considered desirable but unnecessary. Whether aggregate expenditures increase or decrease depends on whether necessary or unnecessary expenditures predominate in the mix of legislation demanded by interest groups.

Besides changing total expenditures on lobbying, the separation of powers redirects it. When powers are separated, an interest group with influence over only one branch of government can block legislation. For example, an interest group with influence over the executive, and no influence over the legislature, might persuade the executive to veto a bill. Lowering the cost increases the demand by interest groups to block legislation. Conversely, when powers are separated, securing passage of new legislation requires influence with several branches of government. Raising the cost decreases the demand by interest groups to enact legislation. Thus the separation of powers privileges the status

![Figure 9-1 Demand for Legislation](image)
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quo. (Recall the demonstration in chapter 3 that privileging the status quo can fill the empty core in a game of majority rule.)

BARGAINING BETWEEN EXECUTIVE AND LEGISLATURE

Now I will contrast a unicameral parliamentary system, which unites executive and legislative powers, and a unicameral presidential system, which separates executive and legislative powers. To keep the analysis simple, I assume that political parties reinforce the constitutional allocation of power, so that the constitutional allocation of powers corresponds to their effective allocation.

Bargain Set

Assume that the government considers a bill to spend funds on a new activity. In a unicameral parliamentary system, a majority in the legislature suffices to enact the bill. To illustrate, if the British prime minister enjoys a secure majority in Parliament and party discipline holds, she can decide her preferred expenditure level and enact it. She does not need to negotiate with another branch of government or another party. Any negotiations that occur will take place among the members of the ruling party, typically within the cabinet. In contrast, a unicameral presidential system requires cooperation of the executive and legislature to enact legislation. To illustrate, if the president belongs to one party and another party controls the legislature, enacting legislation requires bargaining between the president and the legislature.

I will explain the logic of bargaining between legislature and executive with the help of figure 9-2. Without the legislature’s cooperation, the executive can block any bill, which results in expenditure level $0. The executive prefers for expenditures to increase from $0 up to $E, which is the executive’s most preferred expenditure. Beyond $E, the executive prefers for expenditures to decrease. $E_0$ indicates the level of expenditure that makes the executive indifferent about whether the bill is enacted or not. In the notation of a utility function, indifference implies $u^E(0) = u^E(E_0)$.

No rational person makes an agreement unless he prefers the results of cooperating rather than not cooperating. Consequently, any proposal for cooperating

![Fig. 9-2 Bargaining between Executive and Legislature](image-url)
that is worth discussing must give each player at least his threat value. Rather than no expenditures, the executive prefers positive expenditures up to $E_o$. Thus the executive is prepared to discuss the set of points $[0, E_o]$ in figure 9-2.

Without the executive’s cooperation, the legislature cannot enact a bill, thus obtaining expenditure level $0$. The legislature prefers for expenditures to increase from $0$ up to its most preferred expenditure $L$, as depicted in figure 9-2. Beyond $L$, the legislature prefers for expenditures to decrease. $L_0$ indicates the level of expenditure that makes the legislature indifferent about whether the bill is enacted or not: $u^L(0) = u^L(L_0)$. The legislature prefers no legislation rather than a bill larger than $L_0$. Any proposal for cooperation that is worth discussing must give the legislature at least its threat value, $u^L(0)$. So the legislature is prepared to discuss the set of points $[0, L_0]$.

As explained, the executive will discuss $[0, E_o]$, and the legislature will discuss $[0, L_0]$. The intersection of these two sets, which equals $[0, E_o]$ in figure 9-2, is the set of points that both parties are prepared to discuss. Thus $[0, E_o]$ is labeled discussion set in figure 9-2.

When the parties begin discussion, they will immediately identify some points preferred by both of them to other points. A change preferred by both parties moves from a point outside the Pareto set to a point inside the Pareto set given by $[E, L]$. The convergence of interests on points inside the Pareto set eliminates the need to bargain over points outside of it. To illustrate, starting from $0$ in figure 9-2, both the executive and the legislature agree to move to the right. The situation changes, however, when movement to the right reaches the executive’s most preferred point $E$. The executive will resist demands by the legislature for further moves to the right. The legislature, however, may demand moving further to the right as the price of cooperation. Consequently, further moves to the right will become the subject of bargaining. In general, choosing among points within the Pareto set requires bargaining.

The bargain set refers to the range of possible values that rational parties will bargain over as the basis of cooperation. For a point to be in the bargain set, both parties must be prepared to discuss it, and they must disagree about whether any better point exists. In other words, the bargain set in figure 9-2 equals the intersection of the discussion set and the Pareto set: $[E, E_o]$.

Negotiations between the executive and legislature will focus on the bargain set. If the parties cooperate successfully, a bill will be passed by the legislature and signed into law by the executive that requires expenditure somewhere in the range $[E, E_o]$.

My analysis of bargaining in figure 9-2 assumes a unicameral presidential system in which different parties control the executive and legislature. Now I will describe bargaining under bicameralism. Depicting bargaining between the executive and the two houses of a legislature, as in a bicameral presidential system with weak party discipline, requires slight modification of figure 9-2. Instead of thinking of $L$ in figure 9-2 as denoting the legislature, think of it as denoting the lower house. Let $U$ denote the legislature’s upper house. Adding $U$’s preferred point $S_U$ to figure 9-2 and adding $U$’s point of indifference with no
expenditure $U_0$ gives figure 9-3. By the same logic as before, $[0, U_0]$ indicates the discussion set in figure 9-2, $[U, L]$ indicates the Pareto set, and $[U, U_0]$ indicates the bargain set.\(^4\)

By adding a third power and moving from figure 9-2 to figure 9-3, the bargain set decreases. In general, additional division of powers can "weakly decrease" or "weakly increase" the range of bargaining.\(^5\)

The executive is usually a single person,\(^6\) whereas the legislature is a collection of individuals and parties. The preceding discussion treats each chamber of the legislature as a single person for the purposes of bargaining. In reality, legislatures often organize themselves to overcome divisions and strengthen their bargaining position with the executive. For example, the U.S. Congress gives committee chairmen effective veto power over some legislation, thus counterbalancing the president's veto power (Diermeier and Myerson 1994). In addition, the legislature reduces the executive's power by creating unwieldy executive agencies that the executive imperfectly controls (Moe and Caldwell 1994).

**Questions**

1. If the preferences of the upper house move a little to the right in figure 9-3, does the Pareto set increase, decrease, or remain unchanged? What about a move to the left?

\(^4\) Any one of the three powers can secure expenditures $0$ without cooperating with the others. The upper house is indifferent between $0$ and the expenditure level denoted $U_0$. Discussing levels of expenditure above $U_0$ with the upper house is pointless, so $[0, U_0]$ is the discussion set. The Pareto set is the range in between the most preferred points of the three actors, $[U, L]$. All three powers prefer a point inside the Pareto set to any point outside it. So bargaining converges to the intersection of the Pareto set and the discussion set, which can be written in notation as follows:

$$[0, U_0] \cap [U, L] = [U, U_0].$$

In general, the power that prefers the least expenditure determines the upper bound of the discussion set. The discussion changes when moving from figure 9-2 to figure 9-3 because I assume that $U_0$ is smaller than $E_0$. Similarly, the Pareto set expands when moving from figure 9-2 to figure 9-3 because $U$ is smaller than $E$. In this example, the relative locations of $U$, $E$, and $L$ are arbitrary assumptions made for purposes of illustration, rather than the actual preferences of real powers in a particular nation.

\(^5\) "Weakly decreases" is a term of art that means "cannot increase and might decrease."

\(^6\) In the Swiss federal system, however, the executive is a small committee of equals.
2. If the preferences of the lower house move a little to the right in figure 9-3, does the Pareto set increase, decrease, or remain unchanged?

3. Besides the legislature, executive, and the judiciary, Taiwan has two additional branches of government. A separate body of elected officials has the power to decide whether or not a person is qualified for office. The other elected body decides whether or not to impeach officials who violate the law or abuse their powers. Predict the effects of this further separation of power on the formation of political cartels and combating corruption of officials.

4. In discussing democracy’s empty core in chapter 3, I mentioned that democracy in India allegedly endures because the country contains so many different kinds of people. Discuss how the fragmentation of social groups affects the optimal separation of powers in the constitution.

Timing and Commitment

Which point in the bargain set will be chosen? In unstructured bargaining, game theory cannot predict precisely where agreement will occur within the bargain set. (A reasonable solution, called the Nash bargaining solution in chapter 3, requires the parties to split the surplus from cooperation.) Adding more structure to the bargaining process, however, can give the bargaining game an exact solution. I will discuss several processes yielding exact solutions and apply them to legislation.

TAKE-IT-OR-LEAVE-IT

Sometimes procedural rules give an official the power to make take-it-or-leave-it offers to the legislature. The recipient of a take-it-or-leave-it offer can accept or reject but cannot modify the proposal or offer an alternative. To illustrate using the European Union, the Commission makes proposals to the Council of Ministers that the Council can accept or reject but not amend. In the legislature, take-it-or-leave-it offers take the form of bills drafted in committee and proposed to the whole legislature under a procedural rule requiring legislators to vote for or against the bill without amending it. To illustrate, committees of the U.S. Congress sometimes report bills that the U.S. Congress decides under a “closed rule.”

A purely take-it-or-leave-it offer is final in the sense that only one offer is made. In reality, the rejection of a take-it-or-leave-it offer often results in revising and resubmitting another offer. To illustrate, rejection of a proposal made by the Commission to the Council of Ministers or made by a committee to the

7 To compute the Nash bargaining solution for the example in figure 9-2, let x denote the actual compromise reached. Cooperation yields the surplus $u^E(x) - u^E(0)$ to the executive, and $u^L(x) - u^L(0)$ to the legislature. Since x splits the surplus, it can be found by solving $u^E(x) - u^E(0) = u^L(x) - u^L(0)$. For the best justification of the Nash bargaining solution as a predictive theory, see Rubinstein 1982. Notice that the Nash solution involves combining the utilities of different people, without, however, the ethical significance that welfare theories give to interpersonally transferable utility.
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U.S. Congress does not preclude an alternative proposal. Although these offers are not necessarily final, reformulating and resubmitting an offer uses valuable time and energy. Consequently, a rejected offer sometimes gets abandoned, in which case the logic of final offers applies.

In any case, the simple logic of final take-it-or-leave-it offers illuminates more complex cases. The power to make a final take-it-or-leave-it offer gives all the bargaining power to one actor. Consequently, an actor with this power will make an offer in the bargain set closest to his most preferred point. The other parties will accept this offer because they prefer it to the status quo.

To illustrate using figure 9-2, identify the executive with the Commission in the European Union. By assumption, the Commission most prefers point E. Identify the legislature in figure 9-2 with the Council of Ministers. By assumption, the Commission can make a final take-it-or-leave-it proposal to the Council of Ministers. The Council of Ministers prefers any point up to \( L_0 \) rather than 0. Bargaining will focus on the bargain set \([E, E_0]\). The Commission will propose its most preferred point E and the Council of Ministers will enact the proposal.

As another illustration, consider the presidential veto. The "presentment clauses" of the U.S. Constitution require bills to be presented for signature by the president before becoming law.\(^8\) When the U.S. Congress enacts a bill, the president can sign or veto it, but he cannot modify it. I will model this process as a final take-it-or-leave-it offer by Congress to the president. To keep the example simple, assume that the Senate and the House have the same preferences, and they most prefer point L as depicted in figure 9-2. Identify the president's preferences with the executive in figure 9-2. By assumption, Congress can make a final take-it-or-leave-it proposal to the president. The president prefers any point up to \( E_0 \) rather than 0. Bargaining between the president and Congress will focus on the bargain set \([E, E_0]\). By assumption, Congress most prefers point L, which is above \( E_0 \). Therefore Congress will enact a bill slightly below \( E_0 \) and the president will sign it.

Questions

Assume that the executive nominates a candidate to serve as head of an administrative body and the legislature must confirm the nomination. Model the process as the executive's presenting the legislature with a final take-it-or-leave-it nomination. If the legislature refuses to confirm the nomination, the agency must function without a head.\(^9\) Depict the logic of the situation in a figure.

STRENGTH THROUGH COMMITMENT

In any finite sequential bargaining game, the player who makes the final offer presents its recipient with a take-it-or-leave-it choice. After a final take-it-or-leave-it offer, the player who made the offer cannot compromise, so the responsibility to compromise devolves to the other player. Consequently, the player

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\(^8\) Article I, section 7, clauses 2 and 3.

\(^9\) See McCubbins 1989; Ferejohn and Shapin 1990.
who makes the last offer has the power to extract the entire surplus of cooperation from the player who receives the final take-it-or-leave-it offer.

In general, a party who commits to a position reduces or loses the power to compromise. To illustrate, return to the preceding example of the presidential veto. As explained, if Congress most prefers point \( L \) in figure 9-2, then it will enact a bill slightly below \( E_0 \) and present the president with a final take-it-or-leave-it offer. Anticipating this fact, the president might try to commit to vetoing any bill above, say, \( E \). If the president succeeds in making a credible commitment, then Congress will have to lower the bill to \( E \) in order to make it law. In general, the actor in a bargaining situation who succeeds in making a credible commitment gains an advantage by losing the power to compromise.

Businesses make their promises credible by signing enforceable contracts. Politicians, however, typically have to rely on the weaker power of reputation. Thus to lend credibility to a threatened veto, the president may have to put his reputation at stake by appropriate publicity, such as repeating publicly that he will veto any bill over \( E \).

The preceding discussion of sequencing and commitment assumed final offers. Politics actually occurs through repeated interactions with tentative offers. The change from final take-it-or-leave-it offers to tentative take-it-or-leave-it offers complicates without threatening the economic logic of bargaining. In general, sequencing and commitment tip the balance of power in bargaining games in favor of the party who can eliminate his ability to compromise. In bargaining, there is strength in commitment. Structured bargaining has outcomes determined by sequencing and commitment, whereas unstructured bargaining has indeterminate outcomes.

LOGICAL OR PSYCHOLOGICAL?

Psychological experiments reveal some troublesome results for the economics of bargaining. Instead of demanding all of the surplus, the actor in experiments who makes the final offer often proposes to share the surplus as required by intuitive ideas of fairness. Furthermore, the party who receives an "unfair" final offer sometimes rejects it, even though he receives a higher objective payoff from accepting the unfair offer than from rejecting it.\(^\text{10}\) In experiments with final-offer games, many people stop short of pure economic logic. Insofar as these experiments with college students apply to career politicians, the economic models require modification to allow some role for intuitive concepts of fairness.

**Questions**

1. In an experiment, you have the power to make one offer to divide $10 with another person. If your partner accepts the offer, you get the money as agreed. If your partner rejects the offer, the two of you get nothing. What would you

\(^{10}\) Notice that the latter fact partly explains the former fact. Final-offer games are often called "ultimatum games" in experimental economics. Similar violations of economic rationality occur in "dictator games," where one party has all of the power and refuses to use it. See Hoffman and Spitzer 1985b and Hoffman et al. 1994.
offer? Does your offer depend on whether your partner knows who you are? Does your offer depend on whether you know who your partner is? Does your offer depend on whether you will play the game again with this partner?

2. The so-called gatekeepers in the U.S. Congress are powerful committees that can bottle up legislation and prevent it from reaching the floor for a vote. If the legislation reaches the floor for a vote under an open rule, however, the legislature can modify the committee's proposal. Modify figure 9-2 to depict bargaining between a "gatekeeper" committee and the whole legislature.

**Executive's Line-Item Veto**

The preceding section discussed how the U.S. president's veto power affects bargaining between the executive and legislature. Chapter 8 discussed how omnibus, multi-issue legislation with numerous riders can contribute to chronic government deficits in the United States and elsewhere. Responding to this problem, the U.S. Congress enacted legislation in 1996 giving the president the power to veto a single line or item in a multi-issue bill, without vetoing the entire bill, but this legislation was found unconstitutional in 1998. Similar legislation in many American states gives the governor power to veto lines in the budget enacted by the state legislature (Krasnow 1991).

I will explain how changing the legal process from the conventional veto, which I call "total veto," to the line-item veto dramatically increases the president's power. Perhaps the greatest increase in the executive's power concerns his command over interest groups. Consider a line in the budget providing, say, a subsidy of $50 million to the developers of flat-screen computer technology. A clever president can threaten to veto the item while letting the industry know that a generous campaign contribution might change his mind. In principle the executive could extract a donation of up to $50 million in exchange for not exercising the veto. Thus the line-item veto gives vast powers to the executive to extract "rents" from the special interests that receive subsidies in the budget enacted by the legislature.

In addition to increasing the president's power over special interests, the line-item veto also increases the president's power over Congress. I will explain this fact using a graph. To be concrete, let x and y represent government expenditure on guns and butter, respectively. Given the government's budget constraint, the president most prefers point \((x^*, y^*)\) in figure 9-4.

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11 *Clinton v City of New York*, 524 US 417 (1998). The legislation that was struck down by the court would have worked as follows: "The way it works is the president would sign a spending bill and then act within five days to reject an item. He could not rewrite spending figures—only reject them entirely—but he could cancel spending for new entitlement programs or eliminate tax breaks benefiting groups of fewer than one hundred. ... Congress then could pass a bill to reinstate the specific spending. And if the president vetoed that, a two-thirds vote in Congress would be required to override him and force the administration to spend the money. ... [T]he president's ability is limited compared to governors who can reduce the size of a budget line item" (Superville 1997, P. A3).
Recall that in figure 9-2 the point $E_0$ indicates the level of expenditure that leaves the executive indifferent to the status quo: $u^E(0) = u^E(E_0)$. I generalize the point $E_0$ in figure 9-2 to two-dimensional choice in figure 9-4. The indifference curve $u^E(x, y) = u^E(0, 0)$ in figure 9-4 connects all levels of expenditure on guns and butter for which the executive remains indifferent relative to spending nothing. (Increasing expenditures on both items widens the deficit, so the indifference curves form ellipses rather than the usual shape in the theory of consumer demand. 12)

In order to contrast the legislature’s discretionary power under the total veto and the line-item veto, I will model veto power as a final take-it-or-leave-it offer by the legislature to the executive. First consider the total veto. In the model of a final take-it-or-leave-it offer by the legislature, the executive will sign any bill enacted by the legislature with values $(x, y)$ inside the indifference curve $u^E(0, 0)$. Thus the legislature can choose any point in the set inside the indifference curve $u^E(x, y) = u^E(0, 0)$ in figure 9-4. The set of points $(x, y)$ satisfying $u^E(x, y) \geq u^E(0, 0)$ indicates the discretionary power of the legislature under the executive’s total veto power.

Now consider what happens when the executive can veto lines of expenditure in a bill without vetoing the total bill. Line-item veto power has two general forms. In the simplest form to analyze, the executive can replace the legislature’s proposed expenditure on an item with any lower level of expenditure. Some

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12 Let $p_x$ and $p_y$ denote the price of $x$ and $y$, respectively, so total state expenditures are $E = p_x x + p_y y$. Let $T$ denote tax revenues. Thus the deficit equals $T - E$. Write the executive’s utility function as $w^E(x, y, T - E)$. The function $w$ is concave in its three arguments, as with ordinary commodities in consumer demand theory. Substitute $p_x x + p_y y$ for $E$ to obtain $w^E(x, y, T - p_x x - p_y y)$. Holding $T$ constant, this expression defines $u^E$, where $u^E(x, y) = w^E(x, y, T - p_x x - p_y y)$. The indifference curves for $u^E$ are elliptical in $x$ and $y$. 

U.S. governors have this power. In general, the executive will exercise this veto power whenever he prefers lower expenditures on an item rather than the expenditures in the legislature's bill. To illustrate, a bill calling for expenditure \((x_1, y_1)\) in figure 9-4 would be line-item vetoed and replaced with expenditure \((x^*, y^*)\). Consequently, replacing the total veto with the line-item veto sharply diminishes the discretionary power of the legislature. In figure 9-4 the change reduces the legislature's discretionary power by an area that includes (but is not limited to) the area to the northeast of \((x^*, y^*)\) labeled "loss in legislature's discretionary power."

The second type of line-item veto, which the U.S. president briefly enjoyed, allows the executive to accept or reject expenditures in a bill line by line, but does not allow the executive to reduce expenditures. Line by line, the executive's choice is binary, not continuous. To illustrate, if a bill calls for expenditures \((x_1, y_1)\), the executive can sign the bill, veto the line of expenditure on guns thus yielding \((0, y_1)\), veto the line item on butter thus yielding \((x_1, 0)\), or veto both lines of expenditure thus yielding \((0, 0)\). Like the continuous line-item veto, the binary line-item veto shifts power from the legislature to the executive. The shift is smaller with the latter than with the former. (I omit a graphical demonstration because of its complexity.)

When the executive and legislature bargain successfully, the executive does not actually exercise its veto. Even if the executive seldom exercises the line-item veto, the threat tips the balance of power in favor of the executive relative to the legislature.

**Bargaining between Houses of Legislature**

Having discussed bargaining between the executive and legislature, now I discuss bargaining between the two houses of the legislature in a bicameral system. The logic of bargaining is easier to explain by focusing on constitutions giving equal power to the two chambers, as in the United States, rather than on constitutions giving less power to the upper chamber, as in Spain. My discussion only concerns a situation in which both houses must concur in order to enact the legislation at issue. When two chambers of the legislature disagree, they must bargain to a solution. To illustrate using the European Union, when the Council of Ministers and the Parliament disagree over proposed legislation, it sometimes goes to a "conciliation committee" drawn from both bodies. Similarly, when the U.S. Senate and House of Representatives enact somewhat different versions of the same bill, the differences must be resolved in a "conference committee." The conference committee members, who are drawn from both chambers, often have decisive power to shape the final legislation. They especially have this...
power when rules of procedure enable them to make take-it-or-leave-it offers to the two chambers of the legislature.

To illustrate, recall that figure 9-3 depicts take-it-or-leave-it offers involving the executive and the legislature. To depict take-it-or-leave-it offers by the conference committee, figure 9-5 revises figure 9-3. The horizontal axis in figure 9-5 represents state expenditures on a certain project, and the vertical axis represents the utility of the upper and lower chambers of the legislature. The lower chamber would prefer spending $L, and the closer the actual allocation is to $L, the better the lower chamber likes it. Similarly, the upper chamber would prefer allocating $U, and the closer the actual allocation is to $U, the better the upper chamber likes it. (Thus I assume that each chamber has single-peaked preferences in the dimension of choice.)

Now suppose the lower chamber passes a bill whose implementation requires spending $L, and the upper chamber passes a bill whose implementation requires spending $U. A conference committee must reconcile the two bills. If the committee reaches an agreement, the reconciled bill will be reported back to the two chambers under a closed rule, which allows each chamber to vote “yes” or “no” but not to amend the bill. If both chambers enact the reconciled bill, it becomes law. If either chamber of Congress rejects the reconciled bill, it does not become law and the allocation equals $0.

The logic of choice is simplest when the conference committee can make final take-it-or-leave-it offers to the legislature. Under this assumption, each chamber will vote for the bill if they prefer the level of expenditure in the bill rather than $0. According to figure 9-5, the lower chamber will vote “yes” on any bill between 0 and L(0), and the lower chamber will vote “no” on any bill outside the interval [0, L(0)]. Similarly, the upper chamber will vote “yes” on any bill between 0 and U(0), and the upper chamber will vote “no” on any bill outside the interval [0, U(0)]. Therefore, the conference committee has power to choose any value in the intersection of [0, L(0)] and [0, U(0)].
Under a closed rule, the conference committee can make take-it-or-leave-it offers. These offers, however, are not necessarily final. Now I will modify the analysis to allow for the fact that if either chamber rejects a take-it-or-leave-it offer, both chambers can enact fresh bills. The legislature is most likely to reject the conference committee's offer and enact fresh bills under two conditions. First, the transaction costs of fresh legislation must be low relative to the value of a fresh bill. Second, both chambers prefer an alternative bill to the one the committee proposes. If both chambers prefer an alternative bill, they may bypass the committee and vote directly for the bill that they both prefer. By enacting identical bills in both chambers, no reconciliation in a conference committee is required.

To illustrate, if the conference committee chooses any bill above L in figure 9-5, both chambers would prefer a bill to the left with lower expenditure than L. Alternatively, if the conference committee chooses any bill above U and below L, no alternative exists that both chambers prefer. Therefore the conference committee can choose any point between U and L. The zone between L and U, written [U, L], is the Pareto-efficient set, defined with respect to the preferences of the lower and upper chambers. 14

To summarize, the conference committee must also choose a point that both chambers prefer to no bill, as denoted by the intersection of [0, U(0)] and [0, L(0)]. Furthermore, assuming relatively low transaction costs of fresh legislation, the conference committee must choose a point in the Pareto set [U, L] to assure that its bill is not replaced by an alternative preferred by both chambers. Thus the conference committee's zone of discretion in figure 9-5 is given by the interval between U and U(0).

Questions

1. Redraw figure 9-5 so that the conference committee's most preferred point $K is outside the interval between $U and $L. Explain why the conference committee may not want to choose point $K.

2. Suppose the legislature were changed from bicameral (two chambers) to tricameral (three chambers). Would the Pareto sets in figure 9-5 increase, decrease, or remain unchanged?

Separation of Powers and Judicial Discretion

Unlike the legislature or executive, courts are not supposed to bargain with politicians. Even without bargaining, however, the separation of powers in other branches affects the court's discretionary power to interpret the law. Specifically, multiple vetoes on fresh legislation increase the discretionary power of the court.

14 Check for yourself that in the interval between L and U, no changes are possible that make one chamber better-off without making the other worse-off.
To see why, consider what happens when the government dislikes the court’s interpretation of a statute. The government may try to enact a new law whose explicit language precludes the court’s previous interpretation, in which case legislation **repeals** the court’s interpretation. The discretionary power of a court stops short at the point where its interpretation of existing law provokes repeal by fresh legislation. (Notice that this analysis parallels the analysis of discretion by administrative agencies in chapter 7.)

To depict the court’s discretionary power of interpretation caused by separating executive and legislative power, figure 9-6 modifies figure 9-2 by adding some points above the line, which I will explain. Assume that the legislature and executive bargain with each other and agree to enact bill B into law. (B is inside the bargaining set \([E, E_0]\).) Changed circumstances subsequently reveal ambiguous drafting of the legislation, which creates room for dispute over its meaning. To illustrate, assume the government uses funds authorized for expenditure on “roads” to acquire land for bicycle paths, and the automobile manufacturers bring a suit contending that a bicycle path is not a “road” as meant by statute.

Competing theories proclaim how the court **ought** to interpret the statute’s language. Perhaps the court ought to interpret the law according to the legislative bargain that enacted it, in which case the court would find that the law authorizes expenditure level B. This theory of interpretation requires examining legislative history to discover the intent of the law’s makers.

Or perhaps the court should try to interpret the statute according to the plain meaning of the words in which it is written, even when the meaning is not plain. For example, the court might ask linguists whether or not most speakers would describe a bicycle path as a “road.”

Or perhaps the court should interpret the law in the way that they think best serves the public interest. To illustrate in figure 9-6, let “J” indicate the point that, in the opinion of the judges, best serves the public interest. Under the public-interest theory, the court should interpret the statute to authorize expenditure level J.

Or, perhaps the judges should defer to the preference of the government by interpreting the law in the way most preferred by the executive, in which case the court would find that the law authorizes expenditure level equal to E.

Or, perhaps the judges should interpret the statute in light of changed preferences of the legislature and executive. To illustrate, assume that the executive’s

--- new Pareto set ---

\[
\begin{align*}
B & | J | E' | L' \\
0 & | E & | E_0 & | L & | L_0
\end{align*}
\]

--- Pareto Set ---

Fig. 9-6 Court Interprets Legislation
most preferred point shifts from $E$ to $E'$, and the legislature's most preferred point shifts from $L$ to $L'$, thus creating the new Pareto set $[E', L']$ for the executive and legislature. Notice that the original bargain $B$ lies outside the new Pareto set $[E', L']$. Thus, the current legislature and executive prefer for the level of expenditure to increase above the value $B$ favored by the enacting legislature. To implement these preferences, the government could enact fresh legislation. Alternatively, the court could save the government the transaction costs of fresh legislation by reinterpreting existing legislation to allow expenditures inside the new Pareto set $[E', L']$.

I have discussed some normative theories of interpretation. My present concern, however, is with the court's power, not its ethics. After a bill is enacted, the court must interpret legislation as cases arise. When cases expose ambiguities and unintended consequences of legislation, courts can change law by interpreting it. When the court makes law by interpretation, the government can respond by enacting fresh legislation that repeals the court's interpretation. Thus the court has discretionary power within the range of interpretations that will not provoke legislative repeal.

To repeal a court's interpretation of existing legislation, all the decision makers with the power to block legislation must prefer a fresh bill rather than the court's interpretation. In other words, the possibility of repeal requires the court's interpretation to be outside the Pareto set of the legislature and executive. Conversely, if the court's interpretation is Pareto efficient relative to the preferences of the decision makers who must cooperate to enact fresh legislation, no potential proposal exists that is preferred by all of them. So the court's discretionary power of interpretation corresponds to the set of possible laws that are Pareto efficient relative to the preferences of the decision makers who must cooperate to enact fresh legislation.¹⁵

To illustrate, consider the initial situation in figure 9-6 where the executive prefers $E$, the legislature prefers $L$, and, after bargaining, they enact bill $B$. The judges, however, believe that interpretation $J$ best advances the public interest. If the judges interpret the bill to mean $J$, which is inside the Pareto set $[E, L]$, then the executive and legislature cannot agree on an alternative. The executive prefers $J$ to any alternative to the right, and the legislature prefers $J$ to any alternative to the left. So the executive and legislature cannot agree to repeal the court's interpretation $J$ by enacting fresh legislation. In general, the court has discretionary power to choose any interpretation in the Pareto set $[E, L]$ without provoking repeal by fresh legislation.

Now consider what happens if the court's interpretation lies outside the Pareto set of the executive and legislature. Assume that the most preferred points of the executive and legislature shift to $E'$ and $L'$, so the new Pareto set is $[E', L']$. If the court interprets the legislation to mean $J$, which lies outside $[E', L']$, the executive and legislature prefer moving to the right. If transaction costs are not

¹⁵ I implicitly assume zero transaction costs of fresh legislation. Positive transaction costs of fresh legislation increase judicial discretion and the discretion of government administrators, as explained in chapter 7.
too high, the executive and legislature will bargain and agree on fresh legislature to repeal the court's interpretation by moving to the right. To preclude this possibility, the court should interpret the legislation to mean a point inside the set \([E', L']\). Thus the Pareto set of the sitting legislature and executive defines the court's discretionary power of interpretation.

Now I relate the court's discretionary power to the alternative constitutional forms described in table 9.1. Under a dictatorship, the judges take orders from the executive, which the Russians call "telephone justice." The rule of law requires separating the courts from the executive.

Moving down the list in table 9.1, a unicameral parliamentary system separates the courts from the unified executive and the legislature, which figure 9-7 depicts by equating the most preferred point of the executive \(E_1\) and the legislature \(L_1\). In a unicameral parliamentary system, a disciplined governing party can repeal any judicial interpretation at will, so the court has little discretionary power of interpretation. In other words, the courts can only win when interpreting legislation differently from the government if the difference in opinion is so small that the government prefers to avoid the transaction costs and embarrassment of overriding the court. In important cases, the court might as well interpret statutes as preferred by the government in the sitting legislature, unless the court wants to put the government through the exercise of enacting fresh legislation.

Now consider the consequence of an additional separation of powers, producing a bicameral parliamentary system or a unicameral presidential system. Since fresh legislation requires cooperation of two powers, the court can interpret statutes anywhere between their most preferred points without provoking repeal by fresh legislation. For a bicameral parliamentary system, figure 9-7 depicts this fact by the distance between the most preferred point of the lower house \(L_1\) and the upper house \(L_2\). In a bicameral parliamentary system, the court's discretionary power corresponds to the Pareto set \([L_1, L_2]\). Similarly, for a unicameral presidential system, figure 9-7 depicts the court's discretionary power.
power by the distance between the most preferred point of the president $E_2$ and the legislature $L_1$, which equals the Pareto set $[E_2, L_1]$.

Finally, consider the consequence of an additional separation of powers, creating a bicameral presidential system. The court can interpret legislation anywhere between the most preferred points of the three powers. Figure 9-7 depicts this fact by the distance between $E_2$, $L_1$, and $L_2$, which equals the Pareto set $[E_2, L_2]$.

In general, the court’s discretion in interpreting legislation equals the Pareto set for the officials who must cooperate to pass new legislation. Separating powers typically increases the court’s discretionary power of interpretation, and unifying powers typically decreases it.

Besides the constitution, political organization influences the cost of legislation. Fragmentation of political parties increases the court’s discretionary power, and concentration of parties decreases it. According to recent empirical research, these two variables—constitutional separation of powers and party fragmentation—explain much of the observed differences in the daring of courts in different countries (Cooter and Ginsburg 1996; Ramseyer and Rasmusen 1996). For example, the model correctly predicts judicial daring by U.S. courts, timidity by courts in Great Britain, and intermediate behavior by French and German courts.

These predictions about the discretionary power of courts assume that politics conforms to a democratic constitution with the separation of powers. Under these assumptions, obstacles that slow down legislation increase the discretionary power of the court. The effects may be different, however, in countries with a powerful executive and a weak tradition of democracy. In such countries, a slowdown in legislation may cause the executive to rule by degree. When paralysis afflicts the legislature, democracies look to the courts and autocracies look to the executive.

Questions

1. Why would you expect the discretionary power of the court to be roughly the same in a bicameral parliamentary system as in a unicameral presidential system? Why might they differ?

2. The United States has a bicameral presidential system, and Australia has a bicameral parliamentary system. A judge of Australia’s High Court argued that his court is less willing to consider policy in deciding cases than is the U.S. Supreme Court. He explained this difference by the fact that the Australian constitution, unlike the U.S. Constitution, contains no bill of rights (Mason 1986–87). Explain this fact using the preceding analysis, without referring to a bill of rights.

Supreme Court on the Edge

An historical example illustrates the application of the so-called spatial model of court discretion. In 1964 the U.S. Congress passed the landmark Civil Rights
CHAPTER NINE

![Diagram of H, S, V, P=C]

Fig. 9-8 Civil Rights Legislation and Bush Administration

Act, which ultimately caused much litigation and social change. Subsequently, Presidents Reagan and Bush appointed conservative Supreme Court justices who narrowed the interpretation of the Civil Rights Act and reduced its scope. I will use the spatial model to show how far the Supreme Court could go in this direction during the government of President Bush.

If the Supreme Court provoked fresh civil rights legislation, it could count on President Bush to veto it. Overriding the veto would require a two-thirds vote of both chambers of Congress. The Senate was more conservative than the House on civil rights issues. Thus the Senate constrained how conservative the Court’s interpretation could be without provoking fresh legislation.

By this reasoning, the Supreme Court’s zone of discretion in interpreting the Civil Rights Act was bounded on the right by the point at which two-thirds of the senators would vote for fresh legislation overturning the court’s decision. This situation is depicted in figure 9-8. H, S, P, and C represent the most preferred points of the House, Senate, president, and Court, respectively. V indicates the point at which two-thirds of the Senate would override a veto.

In fact, the Supreme Court’s decisions provoked a fresh civil rights bill in 1990, which passed both chambers of Congress and was vetoed by President Bush. The subsequent attempt to override the veto obtained the necessary two-thirds vote in the House, but fell two votes short of two-thirds in the Senate. Apparently the Supreme Court went to the edge without falling over. After examining the historical evidence, a prominent scholar concluded that the Supreme Court in fact acted as the model predicts.¹⁶

Questions

1. Suppose that preferences shift in just one branch of government, say the U.S. House, whereas preferences remain constant for the president and Senate. If existing legislation lies inside the Pareto set, no new legislation results. Use the spatial model to show that the change in the preferences of the House can change the court’s zone of discretionary power.

2. If the transaction costs of legislation increase, does the discretionary power of courts increase or decrease? Explain your answer.

3. In the American system, a presidential veto can be overridden by a two-thirds vote in both chambers of Congress. Use the spatial model to depict how the possibility of an override bounds the Court’s discretion.

¹⁶ Subsequently political circumstances changed and President Bush signed a new Civil Rights Act (Eskridge 1991).
4. The U.S. House and Senate narrowly pass slightly different bills, which are reconciled in committee. Upon receiving the bill, the president, instead of signing or vetoing it, does nothing for eight days and Congress adjourns ("pocket veto"). At its next session, Congress enacts the bill again and sends it to the president. Again, the president does nothing. After ten days, the bill automatically becomes law.\(^\text{17}\) Now administrators and courts must interpret law. Who made the law? What was their intent?

5. Justice Scalia of the U.S. Supreme Court especially favors "textualism," which means interpreting a statute by its text and ignoring legislative history. Explain how this approach simplifies the message sent to voters by a bill, but may increase the transaction costs of government.

**Constitutional Interpretation**

Unlike creating legislation, repealing interpretations of constitutions by courts requires constitutional amendments. For example, U.S. courts originally held that the U.S. Constitution prevents the federal government from taxing income, and the sixteenth Amendment repealed this interpretation by explicitly granting Congress the power to levy income taxes. Amending constitutions, however, is typically more difficult than enacting legislation, so constitutional interpretation typically conveys more discretionary power to courts than does statutory interpretation.

To depict the difference, consider a unicameral parliamentary system in which enacting a statute requires a vote by a majority of legislators, whereas amending the constitution requires a vote by two-thirds of legislators. To keep the example simple, assume that voting follows the median rule and the preferences of legislators roughly follow a normal distribution over a single dimension of choice as depicted in figure 9-9.

First consider ordinary legislation in figure 9-9. The median vote, labeled \(x^\ast\), will command a majority in the legislature against any alternative. If the majority enacts legislation denoted by \(x^\ast\), and if transactions costs are low, any attempt by the court to interpret the law as different from \(x^\ast\) will provoke repeal by fresh legislation. The court, consequently, has no discretionary power of statutory interpretation.

Constitutional interpretation is another matter. Beginning at the origin in figure 9-9, more than two-thirds of the legislators prefer moving to the right. A two-thirds vote will repeal the court’s interpretation of the constitution, so a court interpretation of the constitution in this zone provokes repeal by constitutional amendment. As the court’s constitutional interpretation moves farther to the right, however, it reaches point \(x_1\), where at least one-third of the legislature opposes moving further to the right. The legislature cannot agree to repeal an interpretation of the constitution in this zone.

\(^{17}\) Article I, section 7 of U.S. Constitution.
Equivalently, beginning at the far right of figure 9-9, more than two-thirds of the legislators prefer moving to the left. A court interpretation in this zone provokes repeal by constitutional amendment. As interpretation moves farther to the left, it reaches point $x_2$, where at least one-third of the legislators opposes moving further to the left. The legislature cannot agree to repeal an interpretation of the constitution in this zone.

As explained, when the court chooses any point between $x_1$ and $x_2$, at least one-third of the legislature will oppose any move to the left or the right. Thus the court’s zone of discretion in interpreting the constitution equals the interval $[x_1, x_2]$.

In general, lowering the obstacles to changing the constitution, such as requiring a simple majority instead of a super-majority, decreases the discretionary power of the courts to interpret the constitution. To illustrate by referenda, fifteen U.S. state constitutions provide for constitutional amendment or legislation by majority vote of the citizens, and no state requires a super-majority vote by the citizens. The courts in these states cannot easily shield unpopular decisions from the majority of citizens, and some highly publicized ballot initiatives have reduced minority rights. Conversely, greater obstacles to changing the constitution increase the discretionary power of the courts to interpret the constitution. To illustrate, in the thirty-five U.S. states that do not provide for referenda, the courts can shield unpopular decisions from the majority of citizens.

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18 Baker 1995, p. 146. When placing a proposal on the ballot, however, an initiative to amend the state constitution typically requires more signatures than an initiative to enact legislation.

19 The most famous are Colorado’s Amendment 2, which forbade the state or its localities to enact statutes protecting people from discrimination based on their sexual orientation or entitling them to affirmative action, and California’s Proposition 209, which prohibits many forms of affirmative action or racial preferences by the state, including contracting and university admissions.

20 In spite of these facts, Baker argues that peculiar features of U.S. federalism should cause the rights of minorities to increase from simple-majority rule by citizens seeking to amend U.S. state constitutions, as opposed to super-majority rule. As opposed to super-majority rule, simple-majority
Are court powers of constitutional interpretation excessive? Constitutions like that of the United States secure the independence of the court from politics, which gives the courts much discretionary power when interpreting the constitution. Constitutional review can set in motion a virtuous cycle that encourages compliance with the constitutional order and respect for basic civil and political liberties. Unlike the United States, some nations fear the insulation of constitutional interpretation from politics. Rather than allowing the court to impose its own views, some nations want courts to respond to the elected government when interpreting the constitution. To illustrate, the Supreme Court of Italy (Corte Suprema di Cassazione, which has nine divisions specialized in civil, criminal, and labor matters) does not decide constitutional questions. Instead, the Supreme Court refers constitutional questions that arise in its cases to the Constitutional Court. According to Article 135 of the Italian Constitution, the Constitutional Court consists of fifteen judges who serve for a nine-year term. Judges serving in other courts elect five constitutional judges, the president of Italy appoints five, and the united chambers of Parliament elect five. While the five judges chosen by the judiciary are relatively independent of politics, the other ten judges depend on politicians for securing high office upon completing their term on the Constitutional Court. Constitutional interpretation in Italy is thus a political activity by design.\(^{21}\)

Other countries use various devices to circumscribe the court’s power of constitutional interpretation. A procedure found in Mexico and Argentina, called “amparo,” permits a court to decide that a government policy or law was unconstitutional as applied to a particular person in a given case. Such a finding, however, does not imply that the policy or law is generally unconstitutional, nor does such a finding provide a precedent for future disputes.\(^{22}\)

In chapter 1 I explained that the constitution trumps statutes whenever they conflict. When a court case challenges the constitutionality of a statute, U.S. courts review the statute to determine whether or not it is constitutional. In contrast, constitutional courts in Europe are more reluctant to provoke a confrontation with the legislature by declaring legislation to be unconstitutional. Observers sometimes summarize the facts by saying that U.S. courts practice constitutional review of statutes and European courts do not. An intermediate procedure used in France permits a court to review the constitutionality of a rule allows more constitutional amendments to pass. These amendments can expand or repeal individual rights in state constitutions. The U.S. Constitution typically blocks attempts by states to repeal individual rights, whereas attempts to expand individual rights in state constitutions are allowed under the U.S. Constitution. Thus, proponents of expanding individual rights should favor simple-majority rule, not super-majority rule, to amend state constitutions. See Baker 1995.

\(^{21}\) Note, however, that the Constitutional Court does not decide the case that originally posed the constitutional issue. Having rendered its decision on the constitutional issue, the ordinary judge resumes his decision making on the original case. The fate of individual litigants is thus shielded from political influences. See Cappelletti, Merryman, and Perillo 1967, pp. 75–78, and Merryman 1985. Thanks to Francesco Paresi.

newly enacted statute. Once a new statute passes constitutional review, however, the statute's constitutionality cannot be challenged in subsequent cases. Thus the United States has ex post judicial review, France has ex ante judicial review, and most European countries have no judicial review.

Sometimes a court with wide powers, such as the U.S. Supreme Court, can choose whether to base its decision on statutory interpretation, constitutional interpretation, or judicial review. To appreciate the choices, consider figure 9-10's simplification of figure 9-6. The executive and legislature in figure 9-10 enact B as a bargain. The court believes that J is the best interpretation of the law for the public. The court considers whether to change the law by statutory interpretation, constitutional interpretation, or statutory review. Statutory interpretation allows the court to choose any point in the Pareto set \([E, L]\) without fear of repeal by fresh legislation. Constitutional interpretation permits the court to choose any point in a much larger set than \([E, L]\), which I do not depict in figure 9-10. Statutory review invalidates the statute, in which case the legislature and executive may enact a new bill. Assume the new bill will come as close to B as possible while respecting the court's decision. Thus the court's discretionary power in figure 9-10 is largest under constitutional interpretation, smallest under statutory review, and intermediate under statutory interpretation.

**Questions**

1. Suppose the majority needed to amend the constitution increases from two-thirds to three-quarters in figure 9-9. Depict the change in the court's discretionary power of constitutional interpretation. Would this change be larger or smaller if the distribution's variance increased?

2. In recent years the U.S. Supreme Court has interpreted the U.S. Constitution so as to resist congressional encroachment on the president's veto power. Under what conditions would you expect these interpretations to strengthen the Supreme Court's discretionary power?

**European Union: An Example**

After the Second World War, Europe realized an ancient dream by creating its first unified government since the Roman Empire.\(^{23}\) Beginning as a treaty of

\(^{23}\) This section is based on Cooter and Drexl 1994 and Cooter and Ginsburg 1998. Also see Schmidtchen and Cooter 1997.
cooperation in coal and steel production, the European Union, or EU (to use its current name), deepened its cooperation to include new policy areas and broadened its membership to fifteen states, with many more in line to join. Free trade proved a stronger force in uniting Europe than did the armies of Napoleon and Hitler. Recently Europe’s constitutional law has been the most innovative in the world, providing a model for prosperity and peace through regional government. I will use the methods developed in this chapter to analyze briefly the constitutional logic of the European Union.

**Institutions of the European Union**

Europe’s “primary law” consists of the treaties establishing the EU, whose amendment requires ratification by all member-states. Although Europe has no formal constitution, primary law is its de facto constitution. Primary law divides powers among Europe’s four most important institutions of government: the Commission, the Council of Ministers, the Parliament, and the Court of Justice.

The Commission is an administrative body currently consisting of nineteen commissioners and a president who is appointed by the Council. The Commission administers “common” policy areas, meaning the ever-expanding set of EU regulations. The governments of the member-states meet regularly, usually through the Council of Ministers, which is made up of cabinet-level officials from the member-states. The Council makes policy and enacts legislation. The European Parliament consists of 518 members, who were formerly appointed by the national governments, but now citizens directly elect a certain number of them in each country. The European Court of Justice consists of one judge from each member-state plus one additional judge. The Court interprets legislation and ensures that it is consistent with primary law. Cases may be brought before the Court by the main European organs of government, national

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24 Here are the main treaties constituting the primary law of the EU: European Coal and Steel Community Treaty, 1951; European Economic Community, 1957; European Atomic Energy Community, 1957; Merger Treaty, 1965; Single European Act of 1986 (providing for creating the Single European Market); and the Treaty of European Union, 1992.

25 In addition to these basic institutions, there are other institutions in the EU that do not play a direct role in the formation and interpretation of European law. These include the Presidency of the Commission, a new Council of Regions, the Economic and Social Committee, and the Central Bank.

26 European law allocates seats in the Parliament by country, not population. Thus Luxembourg has six seats, or approximately one for every 70,000 inhabitants, whereas Germans has 99 seats, or approximately one for every 800,000 inhabitants. Each country elects its representatives according to its own law, thus allowing district or at-large elections and allowing winner-take-all or proportional representation.

27 In 1987, a Court of First Instance was introduced to try to reduce the backlog of cases before the court. The Court of First Instance has jurisdiction over those areas of policy that the EU directly administers.
governments, national courts of member-states, and individuals who can show detriment from a Community Act.

Europe’s legislation comes in two basic types. Directives consist of instructions to the legislatures of all member-states requiring them to harmonize their legislation in order to unify European markets (“build the single market”). Directives must be implemented as national law by the legislature in each of the member-states, so different states may enact somewhat different laws to implement the same directive. Regulations are laws enacted by the EU that apply directly to the member-states. Unlike directives, regulations are uniform everywhere in Europe and they take effect without action by the member-states. Regulations are restricted to activities under the exclusive jurisdiction of the EU, such as the Common Tariff, the Common Agricultural Policy, and European competition policy.

Separation of European Powers

The interactions among European institutions in lawmakers are complex and varied. I will simplify greatly in order to explain how the division of powers in Europe’s primary law shapes its legislation. The Commission has the exclusive power to propose legislation. The procedure required to enact legislation depends on the legislation’s specific content. Different substantive laws must be enacted by different procedures. The procedures differ according to the level of agreement required in the Council. Some legislation requires a unanimous vote in the Council, whereas some legislation requires a “qualified majority.” (A qualified majority is a weighted majority, with heavier weights going to ministers from larger countries.) The procedures for enacting European legislation also differ according to the extent of participation required by Parliament. Depending on the issue, the Council can legislate unilaterally without any role for Parliament; the Council can legislate after consulting with the Parliament; the Council can legislate subject to a parliamentary veto; or legislation requires equal cooperation by the Council and Parliament.

To be precise, the following five procedures can be distinguished:

1. **Unilateral Unanimity (UU):** The Council can adopt or amend the Commission’s proposal by unanimous vote. If unanimity is not reached, the proposal is rejected.

2. **Unilateral Qualified Majority (UQM):** The Council can adopt the Commission’s proposal by qualified majority. Otherwise, the proposal is rejected.

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28 National courts in the member-states can ask the Court of First Instance for an advisory opinion when a suit before them raises an issue of European law.

29 If the Court of First Instance finds detriment, relief is given to the plaintiff, but the Community Act in question remains valid.

30 Under the current procedure of qualified majority, Italy, Germany, the United Kingdom, and France each have ten votes, Spain has eight, Belgium, Greece, the Netherlands, and Portugal each have five, Austria and Sweden four, Denmark, Finland, and Ireland three, and Luxembourg two. Adopting a proposal in most areas requires 62 out of 87 votes.
3. **Consultation (CS):** Same as the two unilateral procedures, except Parliament has the right to be consulted.

4. **Cooperation (Coop):** The Council can adopt the Commission’s proposal by a qualified majority and amend by unanimity. If, however, Parliament rejects the proposal, the Council can only adopt by unanimity.

5. **Co-decision (CD):** Adoption of a proposal by the Commission requires approval of the Council by a qualified majority and approval of Parliament by a majority.

The top of this list contains the original procedures for legislating, which gave almost all power to the Council and no power to Parliament. The Council represents governments and the Parliament represents people. Consequently, the original procedures were criticized for being undemocratic. Proceeding further down the list, changes describe the shift toward bicameralism and democracy.

Define the discretionary power of an institution as its ability to get the laws enacted that it prefers. Now consider how the trend toward bicameralism and democracy affects the discretionary power of European lawmakers, beginning with the Commission.

The Commission has the exclusive power to propose legislation. Some of its proposals will be enacted and others will be rejected or amended. The Commission has more discretionary power when it can choose among a larger range of alternatives from which to frame proposals that will be enacted into law. This range is set by the difficulty of enacting new legislation, which changes with the procedural rules. A change from unanimity rule in the Council to qualified majority rule increases the Commission’s discretionary power by making its proposals easier to enact. Conversely, a change in procedure that strengthens Parliament creates an obstacle to enacting legislation. Consequently, changes that strengthen Parliament decrease the Commission’s discretionary power by making its legislative proposals harder to enact.

To be precise, the unilateral procedure, or the procedure of consultation, permits the Council to enact proposals on its own, regardless of Parliament’s opposition. Under the unilateral procedures, the Council enacts proposals under a unanimity rule or a qualified majority rule. The change in procedure from unilateral-unanimity to unilateral-qualified majority in the Council increases the power of the Commission because it only needs a qualified majority in the Council to enact its proposals. In general, a procedural change requiring a weaker majority to enact legislation increases the discretionary power of the executive to propose legislation.

In contrast, the change from unanimity to consultation, or from consultation to cooperation, or from cooperation to co-decision, decreases the power of the Commission because as the role of Parliament in making law increases, the Commission must anticipate objections by two bodies (Council and Parliament) when proposing legislation. The Commission has a smaller range of alternatives from which to frame proposals that will actually become law. In general, a procedural change requiring two houses of the legislature, rather than one, to approve a proposal before it becomes law decreases the discretionary power of the executive to propose legislation.

In reality, the Commission cooperates closely with the Council and Parliament in developing proposals. The power of the Commission over legislation, as explained above, presumably affects its strength in bargaining with the Council and Parliament, as well as in affecting the ideology defining appropriate behavior by the institutions of European government.
Now I turn from the Commission to the Court. The latter is the mirror image of the former. As explained above, fresh legislation can be enacted to repeal judicial interpretation of existing law, so a court has discretionary power within the range of interpretations that will not provoke legislative repeal. A court's discretionary power of interpretation increases with the difficulty of enacting fresh legislation. A change from unanimity rule in the Council to qualified majority rule decreases the Court's discretionary power by making proposals easier to enact in the Council. Conversely, a change in procedure that strengthens Parliament increases the Court's discretionary power by making legislation harder to enact.

Figure 9-11 summarizes graphically how different procedures for legislation change the power of the Commission and Court. The judges on the Court have different philosophies about making law by interpreting law. These philosophies influence their willingness to exercise their power. I suspect that procedures giving the Court more real power will ultimately cause the judges to exercise more power.32

Questions

1. The co-decision process increases democracy by giving more weight to the European Parliament. Direct election of the head of the Commission is an alternative way to increase democracy. Predict the different consequences that these two ways to increase democracy have for the relative power of European institutions.

32 For evidence that courts generally behave in this way, see Cooter and Ginsburg 1996. For evidence on the active political role of the European Court of Justice, see Garrett, Kelemen, and Schulz 1998.
2. Chapter 5 explains the difference between voting on proposals that combine different issues ("splicing") and voting on each issue separately ("factoring"). In the Council of Ministers, the national ministers for agriculture meet as the Council to decide European farm policy, the national ministers of transportation meet as the Council to decide European transportation policy, and so forth. Assuming that the Council factors issues and the Parliament splices issues, predict some differences in their behavior.

CONCLUSION

In a unified state, concentrating power tempts the executive to dispense with competition for office and end democracy. Conversely, separating powers effectively, which requires both law (constitution) and politics (parties), helps to stabilize competition for control of the state and preserve democracy. Separating powers, however, has consequences for the operation of government that are not easily discerned without analytical tools. Separated powers must bargain with each other to legislate. The need for agreement restricts possibilities to the set of Pareto-efficient outcomes relative to the preferences of the powers. Timing and sequencing of decisions affect the distribution of power among branches. An official who can make take-it-or-leave-it offers can obtain most of the surplus from cooperation by imposing the need to compromise on others. Even though courts do not explicitly bargain, the separation of powers in other branches determines the courts’ discretionary powers of interpretation. Courts and administrators that interpret laws can exploit the scope of disagreement among the powers that must cooperate to change the law.