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1

Executive Power in the Shadow of Legislative Capacity

It is a core tenet of this Nation's founding that the powers of a monarch must be split between the branches of the government to prevent tyranny . . . Stated simply, the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings.

— COMMITTEE ON THE JUDICIARY, UNITED STATES HOUSE
OF REPRESENTATIVES V. DONALD F. MCGAHN

In ruling against the Trump administration's claims of "absolute testimonial immunity" to ignore congressional subpoenas, the DC District Court (quoted above) reminded the parties involved that the US separation of powers system was created to preclude the concentration of power in the hands of any one individual or institution, not least among them the president.¹ Informed by their experiences with colonial rule, the Constitution's framers indeed designed a system of competition to ensure no one branch of government mastered the others.

Though many at the time feared Congress and state legislatures would come to dominate governments, others predicted the executive branch would eventually pose the greatest threat. In a letter to his colleague James Madison, Thomas Jefferson wrote, "The tyranny of the legislature is really the danger most to be feared and will continue to be for many years to come. The tyranny of the executive power will come in its turn, but at a more distant period."² Madison, however, believed separation of powers would preclude that scenario. Writing in defense of this system, he argued functional governments required a "necessary partition of power among the several departments" with

proper checks and balances, so that the branches would keep “each other in their proper places.” In his now-famous dictum, “Ambition must be made to counteract ambition” (Hamilton, Madison, and Jay 2009).

In this book, we argue ambition is not enough to prevent the aggrandizement of executive power, even in a system where shared responsibilities impel institutional rivalries. Instead, legislatures must possess the political will *and the institutional capacity* to assert their authority and effectively constrain the executive branch. Capacity is central for understanding when executive power will flourish in a separated system and when it will be more equitably distributed across the branches.

Whether balance is actually maintained in US separation of powers systems is a critical debate in public and academic discourses. The specter of unbridled executive power looms large in the American political imagination, and presidents have not been reluctant to articulate sweeping visions of their authority. As the first wave of the COVID-19 pandemic raged in spring of 2020, President Donald Trump found himself at odds with governors who imposed myriad stay-at-home orders and business closures. Speaking from the White House, he presented a muscular view of his ability to override gubernatorial edicts: “When somebody’s the president of the United States, the authority is total.” Though he claimed this statement was validated by “numerous provisions” of the Constitution, it was quickly rebuked by many constitutional scholars and politicians, even those from his own party.³

Trump is hardly the first president to offer forceful claims of authority for his office. Confronting congressional gridlock, Barack Obama declared his intention to bypass legislative opponents in pursuit of his policy agenda, asserting, “I’ve got a pen to take executive actions where Congress won’t and I’ve got a telephone to rally folks around the country on this mission.”⁴ George W. Bush embraced expansive presidential prerogatives to justify signing statements designed to negate parts of the law and controversial national security powers, such as expansive wiretapping, enhanced interrogation, and indefinite detention. Decades earlier, Richard Nixon defended his actions during the Watergate scandal by virtue of merely being president, declaring in a 1977 interview with journalist David Frost, “When the president does it that means it is not illegal.”⁵

Many argue this “imperial” view of presidential power has grown increasingly common over time (Healy 2008; Rudalevige 2008; Schlesinger 1973).

As one political observer recently noted, “Trump per se isn’t the problem. Power is the problem, and years and the chickens we have so carefully raised by weakening constraints on the executive branch are finally coming home to roost.”⁶

Some academics, too, believe such expansions of executive power have undermined the US separation of powers system. Law professor Neal Devins, for example, calls checks and balances in the contemporary era “an abject failure.”⁷ Professor Peter Shane contends we are currently living in “Madison’s nightmare,” as the separation of powers system grows “increasingly battered” by the “gathering concentration of power in the hands of the federal executive” (2009, 3). Pessimism reigns regarding legislatures’ ability to redress encroaching executive power. Posner and Vermeule (2010, 14) write, “The administrative state does indeed feature an imperial executive; the critics are wrong only in thinking that anything can be done about this fact.”

Fears of executive overreach likewise pervade state governments, where gubernatorial power comes under the microscope. Like presidents, governors also advance capacious views of their executive prerogatives. In 2015, New York Governor Andrew Cuomo remarked: “I am the executive and therefore I use executive power. . . . I have many powers beyond those which the Legislature passes . . . the executive, whether it’s the President, the mayor or the governor, you run the government. . . . And you have a whole host of powers that are apart and aside from the Legislature.”⁸

The COVID-19 pandemic alerted many to the broad powers governors wield, as decisions to issue stay-at-home orders and mandate health requirements for businesses became subjects of national controversy. While most applauded gubernatorial actions to quell the deadly pandemic, others decried executive abuses. In a letter to the Oregon Legislature, Jackson County commissioners demanded limitations on Governor Kate Brown’s puissant emergency powers, pleading: “While this level of authority may be appropriate for a short-term state of emergency caused by a fire, earthquake, or other natural disaster, as applied to an emergency like the novel coronavirus, the Governor has essentially unchecked authority to issue orders for an unlimited amount of time which dramatically impact the lives of everyday Oregonians.”⁹

In this book, we ask a series of questions related to these lamentations: Is there a balance of power between the branches of government, in line with Madison’s vision? Or are legislatures dominated by overpowered executives, as many fear? What resources and policymaking opportunities do

legislatures need to constrain executives? Do American legislatures possess them? What are the implications for executive power and its limits? How do these dynamics vary across time and contexts? The answers to these questions have profound consequences for the distribution of institutional power in the United States. These concerns are not just academic. They are also the subject of ongoing policy debates.

Members of Congress and policy experts alike attribute at least part of what they see as ebbing legislative power to their declining institutional resources. A new wave of reformers has emerged intent on bolstering congressional capacity. For example, the Legislative Branch Capacity Working Group was founded in 2016 to “assess the capacity of Congress to perform its duties” and “to collaborate on ideas for improving the legislative branch’s performance in our separation of powers system.”¹⁰ These efforts are complemented by the House Select Committee on the Modernization of Congress, created in 2019 to study issues regarding legislative capacity. Broadly, this reform movement advances proposals to enhance staff size, salaries, expertise, and other resources. However, the questions of whether these remedies would effectively restrain presidential action, and the degree to which legislative power has actually diminished, have received less scrutiny.

We agree that whether a separation of powers system fails or succeeds depends on legislatures’ capacity to challenge the executive branch. We develop a theory specifying a new understanding of what legislative capacity is as well as how and when it matters for legislatures *and* executives. When their capacity is lacking, legislatures struggle to check executive power. We further delineate the direct and indirect effects of capacity on executives’ incentives for unilateralism. Presidents and governors can act alone to shift policies, potentially in ways that make legislative majorities worse off relative to the status quo. When legislative capacity is high, however, executives will hew closer to the legislature’s preferences. Under these circumstances, they will forbear from using their relatively diminished discretion to act against highly capable legislative majorities for fear of retribution. Whether executive power is thwarted or thrives thus depends on legislatures’ capacity for constraint, not just their will. We leverage rich variation in legislative capacity at the federal and state levels to provide empirical support for these new conceptual and theoretical arguments, demonstrating its effects on discretion, oversight, and executive unilateralism. Across time and contexts, our results reveal that legislative constraint over presidential or gubernatorial prerogatives is far from constant. Separation of powers does not guarantee executive restraint.

Overall, our argument and its accompanying evidence demonstrate legislative capacity is at the heart of separation of powers politics in the United States and affirms the importance of legislatures in checking executive power. Yet scholarly and public attention has traditionally focused elsewhere.

Separation of Powers Politics and Policymaking

Since World War II, US politics has experienced a surge in interparty polarization and incidences of divided partisan control between the presidency and Congress. Unsurprisingly, executive-legislative conflicts are often at the forefront of public and academic discourse regarding public policy. Research in this area clearly demonstrates these interbranch dynamics have strong effects on policymaking outcomes, particularly with respect to lawmaking, appropriations, and appointments (e.g., Binder 1999; Cameron 2000; Howell et al. 2000; Jones 2001; Kirkland and Phillips 2018; Krehbiel 1998; McCarty 2015).

Such findings are perhaps unsurprising given the assent of *both* legislatures and executives is generally required for these activities in systems of separate, but shared powers. But are legislative preferences still influential in policymaking where only action by the executive is necessary? Can legislatures constrain the exercise of executive unilateral power? And, if so, why? After all, presidents and governors can seemingly pursue policies unilaterally that Congress and state legislatures cannot amend, given the debilitating gridlock and perpetual delay inherent to lawmaking. Despite provocative presidential rhetoric, many empirical studies of unilateralism do not reveal an executive unbound. Instead, the literature largely finds that legislatures confine executive power, even when they have divergent political and policy goals.

Many studies, for instance, demonstrate interbranch divisions motivate legislative activities, such as oversight, discretion, budgets, and appointments, to restrain the executive branch (e.g., Epstein and O'Halloran 1999; Kriner and Schickler 2016; Lewis 2004; McGrath 2013). Other research shows executives alter their policymaking actions in the face of partisan opposition in Congress, issuing fewer unilateral actions, such as executive orders, proclamations, and memoranda (e.g., Belco and Rottinghaus 2017; Howell 2003; Lowande 2014; Mayer 2002), relying less on other administrative activities like rulemaking (Potter and Shipan 2019; Yackee and Yackee 2009; Acs 2019), and even reducing the use of military force internationally

(e.g., Howell and Pevehouse 2007). The fact that executives adjust their behavior in this way implies they face constraints from legislative actors, even for ostensibly independent powers like unilateral actions.¹¹

The juxtaposition of the expansive views of executive power described at the outset of the chapter with these findings presents numerous unresolved puzzles about separation of powers systems in the United States: Why are there high levels of executive restraint, particularly since the rising prevalence of divided government and gridlock should increase incentives for unilateral action? What mechanisms underlie these patterns? Do such findings manifest across time and space, or are there contexts where we observe less legislative constraint and thus greater executive ambition? Answering these questions requires a deeper examination of the institutional capacities of legislatures. Specifically, we highlight their opportunities for challenging executive power and the resources available to act upon those opportunities.

What Is Legislative Capacity?

In general, institutional capacity is the ability of an institution to execute the core functions of its mission. In the case of legislatures, these functions encompass, but are not limited to, representation, constituent services, and legislation. Here, we highlight activities most implicated in constraining executive actors, including executive branch oversight, crafting legislation to limit bureaucratic discretion (i.e., the leeway given to executive actors when implementing the law) or to undermine executive policy actions, and generating policy information required for all of these endeavors.

We depart substantially from previous conceptualizations of legislative capacity, by arguing it can be divided into two distinct domains: *resource capacity* and *policymaking capacity*. We define the former as the tangible materials and human capital legislatures can acquire, usually through financial means, to carry out their core tasks. For example, legislators require a sufficient number of qualified, expert, and experienced staff to manage their legislative and oversight duties. Staffers research policy alternatives, draft legislation, maintain contact with executive agencies, and prepare questions for oversight hearings.

We additionally spotlight policymaking capacity, which we define as the opportunities afforded to legislatures to influence the development and implementation of public policy. These opportunities are typically conferred through the institutional rules that define legislative power. Policymaking

capacity is largely missing from contemporary discussions of congressional capacity but plays a somewhat larger role in research on state legislatures, where scholars sometimes consider factors like session length. The opportunities for legislatures to influence policy, however, are much broader and encompass an array of statutory and nonstatutory tools. Oversight hearings, agenda power, legislative vetoes, appointment and confirmation powers all offer mechanisms for legislatures to impose costs on executives for acting against their interests and may deter such actions in the first place. Importantly, many of these tools do not require supermajorities to execute, which allows legislatures to employ them as *ex post* checks on the executive even under circumstances of gridlock.

Our conceptualization of legislative capacity is not merely a taxonomic enterprise. Instead, we argue these distinct domains interact to determine the degree to which legislatures can advance their interests in the policymaking process. *Both* policymaking and resource capacities are necessary conditions for legislatures to be high-capacity institutions in our conceptual framework. Lacking either leaves them ill-equipped to constrict executive power.

Legislative capacity is by no means a fixed or predetermined entity. It has varied substantially in both historical and contemporary eras, across Congress and state legislatures. These changes, which we explain and leverage throughout the book, have produced significant consequences for the distribution of policymaking power in the United States and for the question of whether executive power is constrained in different contexts.

Transformations in Legislative Capacity across Time and Context

Writing in 1888, British statesman Lord Bryce observed, “Congress . . . has succeeded in occupying most of the ground which the Constitution left debatable between the president and itself” (Bryce 1995 [1888], 203). Presidents in the nineteenth century, particularly after the Civil War, are frequently described as forgotten clerks who left little imprint on the institution (Neustadt 1990 [1960]). Given its constitutional powers and the limited functions of the government in the early republic, Congress naturally became the center of US governance and dominated federal policymaking during this era.

Yet, by the turn of the twentieth century, Congress found itself outmatched by the growing technological, social, and economic challenges facing the country and an energetic executive branch seemingly better positioned to manage these dramatic developments (Cooper 2017). The federal

government undertook unprecedented economic and social interventions that continued through the New Deal and World War II.

Presidents responded to this shift in the locus of policymaking power by seizing greater control over executive branch agencies, typically with congressional acquiescence. During the first four decades of the twentieth century, Congress responded little in terms of institutional change to the extraordinary policy developments it was itself creating. As the federal government expanded, Congress stayed the same and consequently became relatively less powerful. Legislative staff sizes barely increased, spending on the institution stagnated, and the public showed little appetite for augmenting congressional resources and power. As shown in figure 1.1, Congress spent \$229 million (in 2009 dollars) on itself and employed 225 committee staffers in 1905.¹² But by 1935, these figures grew little in real terms, to only \$248 million and 294 staffers. While some improvements did occur during this period (e.g., the creation of the Legislative Research Service and the Government Accounting Office), by and large Congress's capacity lagged behind the quickly changing nature of American governance.

Motivated by the desire to equalize power between the two branches, this institutional disparity belatedly led to numerous legislative reforms. Prodded by legislative entrepreneurs like Senator Robert LaFollette, and outside groups such as the American Bar Association and the American Political Science Association, Congress assembled broad, bipartisan coalitions to enact major reforms augmenting its capacity, including the Legislative Reorganization Acts of 1946 and 1970. New legislative support institutions, such as the Congressional Budget Office (CBO) and the Office of Technology Assessment, promised to afford legislators access to unbiased, policy-relevant information independent of the executive branch.

Indeed, the need for self-sufficiency was a commonly cited rationale for these reforms. When creating the CBO in 1974, for example, the reporting committee noted, "Compared to the president, Congress is in a disadvantaged position for making budgetary decisions. Congress does not have its own budget staff and it must rely upon the President for information, judgments, and evaluations. . . . All this makes Congress painfully dependent upon Presidential agencies. . . . It gets only what the executive gives, and only when the executive gives it" (H. Rpt. 93-579, 7).

Accordingly, congressional resource capacity rapidly increased following these mid-twentieth century reforms, as depicted in figure 1.1. Legislative expenditures surged dramatically, reaching a peak of \$5.8 billion in 2010, and

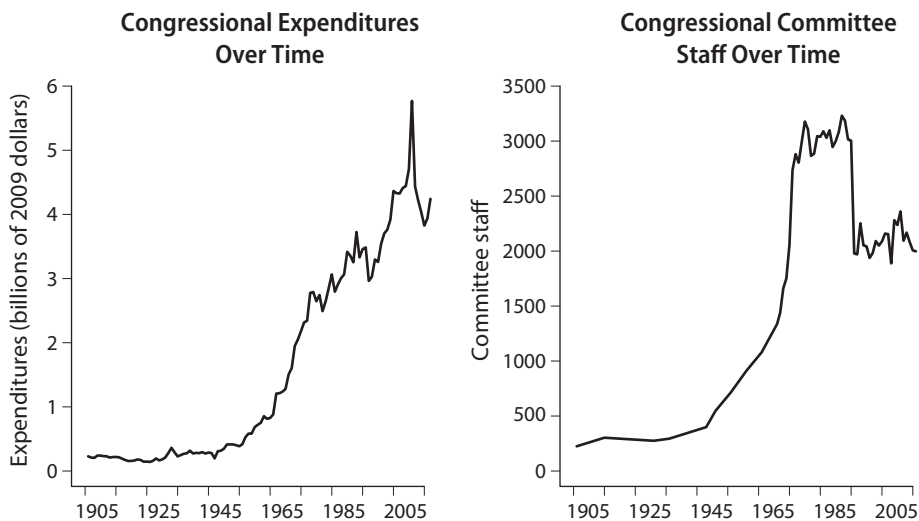


FIGURE 1.1. Congressional expenditures, in billions of 2009 dollars (left), and the number of congressional committee staff (right), between 1905 and 2015.

hovered between \$4 billion and \$5 billion throughout most of the twenty-first century. At the same time, committee staffing also rose dramatically, but crested earlier in the late 1980s and early 1990s (3,231 staffers in 1991). Importantly, resources have also *decreased* at times. New Republican majorities in the 1990s, for instance, reduced staffing to fulfill their Contract with America's central tenet of curtailing congressional spending.

Legislative capacity in US states has likewise ebbed and flowed. State constitutional framers too were scarred by their colonial origins, initially designing constitutions featuring robust legislative power and weak governors. Chief executives gradually acquired additional powers, such as qualified vetoes and appointments, to better counterbalance once omnipotent legislatures (e.g., Squire 2012). Yet states today still differ considerably in the relative balance of executive and legislative power. Some states' governments, for instance, only require a simple majority to override a gubernatorial veto, while others mandate a two-thirds supermajority. Other legislative powers, like the amount of time legislators spend in session, have likewise fluctuated historically within and across states, which has implications for the manifestation of gubernatorial authority (Bolton and Thrower forthcoming).

State legislative resources also vary, featuring periods of expanding resource capacity and decline. For instance, the top panel of figure 1.2 illustrates

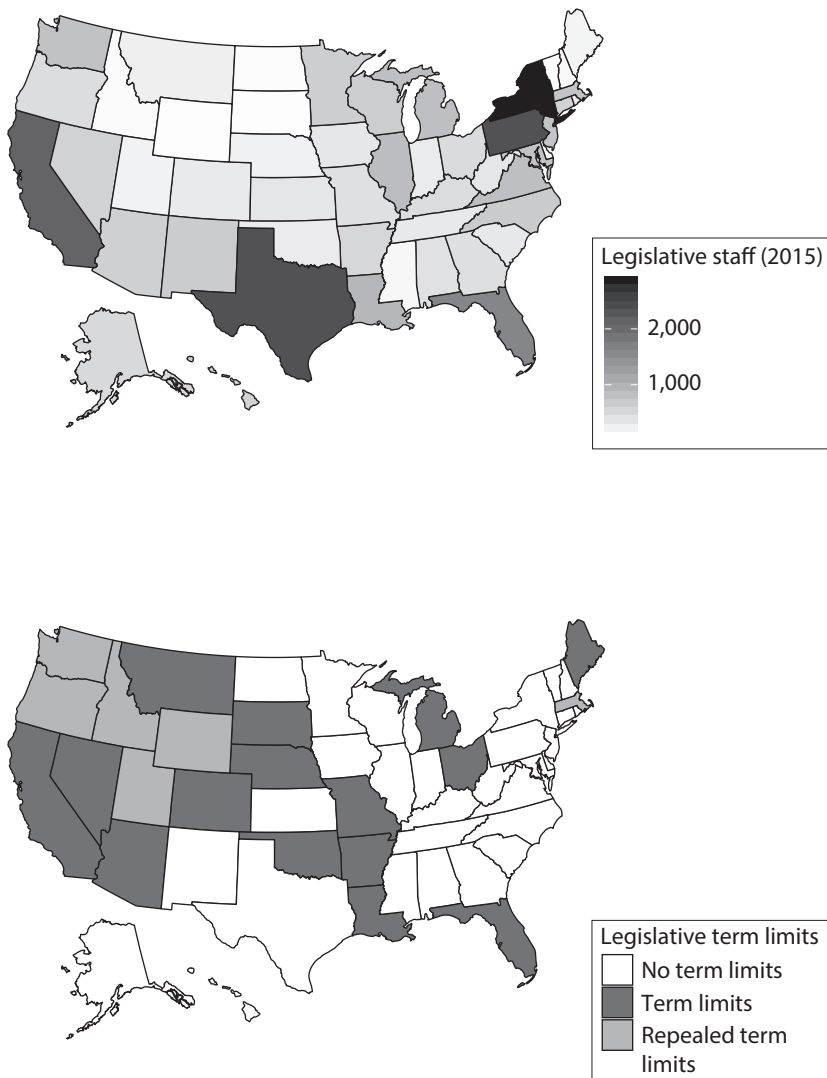


FIGURE 1.2. Staffing numbers and the incidence of term limits across the US states in 2015.

differences in total staff available for each state legislature in 2015. States like New York, California, and Texas employed the most legislative staff with each exceeding two thousand total individuals, while others such as Delaware, Idaho, and Vermont all maintained less than two hundred staffers. Additionally, the 1980s and 1990s ushered in a wave of new term limit reforms that restricted the time legislators could hold office. These reforms have been

the subject of much scholarly research, due to their implications for legislators' turnover and human capital (e.g., Kousser 2005). As the bottom panel of figure 1.2 demonstrates, many states have implemented (e.g., Ohio, Florida, Nevada) and in some cases subsequently removed (e.g., Washington, Massachusetts, Oregon) these restrictions, while others never imposed them in the first place (e.g., Tennessee, Wisconsin, and Pennsylvania). Overall, just like Congress, there is substantial variation in state legislative capacity, which has profound consequences for separation of power politics.

Executive Power through the Lens of Legislative Capacity

Accordingly, we develop a new understanding of interbranch policymaking and executive power that brings legislative capacity to the fore to answer two central questions. First, how does a legislature's capacity influence its ability to constrain the executive branch in pursuit of its policy and political goals? Second, how does legislative capacity shape executive incentives to exercise power, particularly through unilateral actions?

Theoretical Argument and Contributions

Briefly, we argue that a legislature's capacity has a direct impact on its production of ex ante and ex post constraints on the executive. Legislative capacity, furthermore, can moderate the effects of executive-legislative disagreement on such policymaking activities. While legislatures might want to check executives in different circumstances, they can only do so when endowed with sufficient resources and opportunities to make policies. In this way, their ability to act according to their ideological and other motivations is limited by their institutional capacity. When capacity is plentiful, legislative majorities can constrict executive branch discretion. They can likewise deploy, or threaten, ex post sanctions for executives using discretion in ways they find unfavorable. These ex ante and ex post control mechanisms act in concert to restrain executives and are not perfectly substitutable.

Of course, we are not the first to posit legislative capacity as important for legislative outputs. Similar to previous scholars (e.g., Huber and Shipan 2002; McGrath 2013), we argue capacity should moderate the relationship between interbranch policy disagreement and legislative actions limiting executive power, like oversight and laws restricting discretion. Differing from these studies, we jointly analyze ex post and ex ante activities, asserting both are

necessary for executive constraint. Further, we contend capacity can influence these activities under divided or unified government, though to a greater extent for the former.

Although legislative capacity has more or less straightforward consequences for legislative outputs, a key contribution of this book is to unite disparate literatures to understand its incentive effects for executives' behavior—even for *unilateral* actions that do not ostensibly implicate legislatures. The prospect of unfettered unilateral power poses stark challenges to separation of powers systems, seemingly allowing executives to “evade” adversarial legislatures to obtain more favorable outcomes than what they might achieve from the legislative process. We argue, however, such an evasion strategy is premised on the idea that executives do not expect retribution if they use their discretion against legislative interests. This assumption might be true when legislatures lack either the resources or the opportunities to impose such constraints. Yet, when legislatures maintain the opportunities and means for confronting executive power, executives must tread more carefully. If they use their discretion to unilaterally shift policies in opposition to legislative preferences, chief executives may face costly punishment, either directly or indirectly related to the policy. Whether executives can expect such sanctions of course, depends on legislative capacity. In the face of interbranch conflict, executive power prospers under diminished legislative capacity, but recedes when encountering legislatures properly equipped with resources and opportunities. Importantly, both domains of legislative capacity are necessary, but not alone sufficient, conditions for executive constraint.

Our argument has important implications for assessing the nature of executive power and resolves a central tension in the study of American politics. While political observers view executives as being able to freely brandish unilateral actions to bypass unfriendly legislatures, political scientists repeatedly find modern presidents decrease their reliance on unilateralism in the face of congressional opposition. Yet few explore the theoretical and empirical underpinnings of this counterintuitive result. By highlighting legislative capacity, our theory identifies what legislatures need to constrain executives. In doing so, we can identify conditions under which presidents and governors should forbear from unilateralism or when executive power will flourish. In relating capacity to unilateral action, moreover, we acknowledge the centrality of legislative power for executive constraint.

While our theoretical account might appear obvious to some readers, it runs counter to recent scholarship questioning whether legislatures—or any other institution, for that matter—perform a meaningful role in tempering

executive power. Much of this literature instead promotes the public, and threats of its disapproval, as the most effective check. According to Posner and Vermeule (2010, 4), “The major constraints on the executive do not arise from law or from the separation-of-powers framework . . . but from politics and public opinion.” Christenson and Kriner (2020, 26) reinforce this view: “Because the institutional checks exercised by Congress and the courts are so weak, public opinion may be the last and most important check on the unilateral president.”

We recognize the serious institutional constraints legislatures encounter when passing laws, highlighted by these and other scholars. However, the consistent findings of executive responsiveness to *congressional* preferences indicate it may be premature to jettison legislative explanations of executive constraint. By acknowledging that legislatures’ powers go well beyond passing laws and further exploring how policymaking opportunities, resources, and interbranch division interact, we gain important insights into what they need to curb executive power.

We do not reject the idea that the public informs executive action. Indeed, our account reinforces some of these dynamics. For instance, Christenson and Kriner (2020) show how congressional “fire alarms” can raise controversy over presidential actions and diminish public support. We posit Congress needs capacity to actually pull the alarm, an activity that requires information, along with other resources, to investigate and publicize executive violations. These same capacities endow legislatures with the means to impose *ex ante* and *ex post* constraints that curtail unilateralism in other ways. In sum, our argument affirms the centrality of legislatures, and by extension separation of powers politics, to executive constraint through a variety of mechanisms.

Empirical Findings and Contributions

We use numerous original datasets to empirically evaluate these claims. First, we collect new historical data on congressional capacity, beginning in the early twentieth century. In the aggregate, we employ data on overall committee staffers and legislative expenditures. At the committee and subcommittee levels, we rely upon congressional directories dating back to the 1950s to develop annual measures of staff sizes, along with staffer and member experience to characterize human capital. Unlike previous congressional studies that mostly examine one of these resources at a time, we use multiple measures of capacity in various legislative contexts to provide validation of our theory.

Second, we offer comprehensive qualitative and quantitative analyses of the historical origins and political dynamics underlying both congressional and state legislative capacity (chapters 3 and 7, respectively). Previous research considering capacity typically assumes it to be exogenous. By studying the evolution of legislative capacity, we can not only better understand its political development, but also improve the quality of our empirical inferences about its effects on legislative and executive behavior.

Third, we analyze the consequences of legislative capacity and partisan division for *ex ante* and *ex post* mechanisms of control over the executive branch. With respect to the former, we use a measure of discretion based on the federal appropriations process (chapter 4), which yields a consistent and comparable characterization of discretionary authority for more than three hundred agencies from fiscal years 1960–2012. We likewise explore a variety of measures capturing the frequency and intensity of congressional oversight activities, at both the chamber and committee levels (chapter 5). With our combined data, we offer the most comprehensive study of congressional discretion and oversight to date, clarifying a literature conflicted about when, and even if, capacity matters. We uncover strong overall support for our hypotheses, demonstrating that Congress's ability to limit discretion and engage in oversight to achieve its goals depends fundamentally on its resources. While capacity is typically ignored in legislative research (especially at the federal level), our analyses demonstrate its importance for producing familiar empirical findings in the literature on the consequences of interbranch division.

Next, we leverage annual variation in congressional capacity to examine its impact on executive unilateralism. By compiling a dataset of presidential executive orders issued between 1905 and 2019 (chapter 6), we show patterns of evasion or constraint depend centrally on congressional capacity. Prominent scholarly findings of constraint in the modern era are not inevitable, but the product of a series of mid-twentieth-century reforms enacted by Congress to invigorate its capacity. Moreover, we link data on executive orders by issue area to our measure of discretion developed in chapter 4, illustrating the way presidents rely more extensively on unilateralism when they retain greater perceived leeway from Congress in a particular policy area. This empirical test provides direct support for the mechanisms underlying our theory by confirming one key way capacity connects legislative and executive action.

We further evaluate our theory in the US states, which feature many structural similarities to the federal separated system. Importantly, though, there are vast differences between and within states over time, in *both* policymaking

and resource capacities. The former has remained sufficiently elevated in Congress (see chapter 3), thus precluding a full assessment of our theoretical claims in the federal context. Variation in the US states, however, facilitates the testing of our predictions about how both domains of capacity interact to affect executive power. We do not examine state governments hoping to merely replicate the findings of the federal analysis. *Instead, the states provide the key test for the sum of our theoretical claims.*

There are few studies of executive unilateralism in the states, most of which consider a limited time frame or a single issue area. Here, we assemble the most exhaustive dataset of over twenty-five thousand state executive orders, spanning all fifty states between 1993 and 2013 (chapter 7). Unlike existing state politics studies that either focus on a singular aspect of legislative capacity or aggregate multiple domains into one additive index (e.g., legislative professionalism), we offer several measures of our two dimensions of capacity. Similar to our federal analyses, we capture resource capacity using staffing, as well as factors like legislative expenditures and term limits. We operationalize policymaking capacity through numerous legislative powers that vary across and within states over time, such as veto override thresholds, majority party agenda-setting power, and regulatory review. In doing so, we engage seriously with the two distinct concepts of legislative capacity to understand their individual and interactive effects on executive unilateralism.

We believe the sum of these conceptual, theoretical, and empirical contributions advances the study of legislative-executive interactions in the United States. By bringing legislative capacity to the fore of our analysis and examining executive power through its lens, we gain new insights into the conditions necessary for constraint in separation of powers systems. These insights have important implications for understanding the dynamics of institutional power in both the federal and subnational contexts.

Summary and Conclusion

The first article in the inaugural issue of the *American Political Science Review*, “The Usurped Powers of the Senate,” by A. Maurice Low, studied whether the balance of power between the House, Senate, and the president had strayed from constitutional intent. Since its publication more than a century ago, political scientists remain intrigued by the political dynamics of executive-legislative conflict and the degree to which one branch may overpower the other. Scholars have extensively probed these interactions, yielding deep

insights about how the branches of government interact in the policymaking process, how different institutional features influence their bargaining, and how the actions of one branch affect the incentives and strategies of the other.

Recognizing this long line of outstanding research, we offer a different understanding of interbranch relations by examining executive power through the lens of legislatures. We do so by bringing legislative capacity to the vanguard of study. Previous literature on separation of powers mostly centers on how partisan and ideological division between these two branches drives public policy choices. We argue, however, that many of those relationships—on both the legislative *and* executive sides—are contingent to an unacknowledged degree of legislative capacity.

In the process, we offer an important conceptual distinction between two domains of legislative capacity: policymaking and resource capacities. Both work in concert to forge the incentives of executives engaging in unilateralism. Centering the narrative on legislative capacity sheds light on the puzzle of why executives are restrained in some contexts, but not others. In this way, we directly link legislative capacity, legislative activities, and executive behavior in a way that has not been previously done, emphasizing the centrality of legislatures for executive constraint.

Consequently, we can better discern whether and when our democratic system of separation of powers operates truly as the constitutional framers intended. Though Madison seemed confident the “ambitions” of one individual or branch of government would be properly checked by the others, we illuminate conditions under which this principle fails. Legislators, and any other political actors for that matter, require not only the *will* but also the *ability* to check other branches of government and prevent the aggrandizement of any one institution. As such, capacity is crucial for understanding the distribution of power in American governance.

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