



IDEAS

# The Constitution Isn't Working

And the Supreme Court can't fix it by itself.

By David French



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JULY 12, 2022, 7 AM ET

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On the last day of the Supreme Court's most recent term, the Court released two cases that highlight a challenge to American democracy—a challenge that is the direct result of one of the Founders' more consequential miscalculations. They granted Congress more power than any other branch of government, and they mistakenly thought Congress would possess a sense of institutional responsibility and authority. Instead it is largely a partisan body, drained of any sense of independent civic duty, and American democracy suffers as a result.

The two cases seem unrelated at first glance. One is *West Virginia v. EPA*, in which the Supreme Court struck down the Environmental Protection Agency's Obama-era clean-power rule. The Court relied on the so-called major-questions doctrine, a relatively new term for the legal idea that if Congress intends to delegate significant power to regulatory agencies to fashion new rules and regulations, it has to do so explicitly.

[Read: The Supreme Court's EPA ruling is going to be very, very expensive](#)

The second case is *Biden v. Texas*. The Court upheld the Biden administration's decision to reverse the Trump administration's "remain in Mexico" policy, which required a small number of non-Mexican nationals who were detained at the border to wait in Mexico during their removal proceedings.

What do these cases have in common? They both arose from serious and problematic congressional inaction. In the EPA case, the executive branch was responding to legitimate concerns about climate change, but the executive branch is not supposed to be a lawmaking body. In the "remain in Mexico" case, Congress failed to fund sufficient immigration detention facilities, rendering it impossible for the president to comply with Congress's mandate that immigrants who are not "clearly and beyond a reasonable doubt" entitled to entry "shall be detained." This left the president with the

choice of releasing migrants into the country or requiring them to return to the “foreign territory contiguous to the United States” from which they arrived.

Article I, Section 1 of the Constitution states, “All legislative Powers herein granted shall be vested in a Congress of the United States.” With the growth of the administrative state, Congress has effectively delegated some of its legislative powers to administrative agencies, which promulgate regulations that have the force of law. For example, many of the rules that govern American immigration, environmental policy, workplace safety, and the securities industry are regulations promulgated by the executive branch, not statutes passed by Congress.

Chief Justice John Roberts sees a problem there. In his majority opinion in the EPA case, he wrote that any judicial inquiry into administrative authority must answer “whether Congress in fact meant to confer the power the agency has asserted.” If Congress did not mean to confer such power on the agency, then the agency does not have the legal authority to act—no matter how pressing the matter or how urgent the crisis. In other words, if Congress fails to act, its failure does not empower the executive branch to fill the legal gap.

As Justice Brett Kavanaugh wrote in his concurrence in the *Biden v. Texas* decision, “The larger policy story behind this case is the multi-decade inability of the political branches to provide DHS with sufficient facilities to detain noncitizens who seek to enter the United States pending their immigration proceedings. But this Court has authority to address only the legal issues before us. We do not have authority to end the legislative stalemate or to resolve the underlying policy problems.”

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What does any of this have to do with the Founders? How do these cases reflect a challenge to American democracy? The problem is simply this: Congress was intended to be the most potent branch of government. It is now the most dysfunctional. And it's dysfunctional in part because the Founders did not properly predict the power of partisanship over institutional responsibility.

Even worse, Congress's dysfunction radiates to other branches of government. Both the presidency and the judiciary assume more power than they should, escalating the stakes of presidential elections and the intensity of judicial confirmations.

Describing the branches of government as "co-equal," as many people do, is simply wrong. Read the Constitution and you'll quickly see that Congress has more theoretical power than any other branch. It can fire the president. It can fire any member of the federal judiciary, including the Supreme Court. It can define the jurisdiction of federal courts and the numbers of judges and justices. Its powers are enumerated in the first article of the Constitution for a reason. It's not equal. It's preeminent.

Only Congress can declare war. Only Congress can authorize public spending. And for all the talk of the Founders' suspicion of democracy, they gave these significant

powers to the most democratic branch of government.

In reality, however, this independent congressional power depends a great deal on its willingness to uphold its *institutional* responsibility, to see itself as a separate branch of government that is jealous of its own power and prerogatives. The constitutional theory isn't that, say, Democrats will check Republicans but that Congress will check the presidency.

Substitute an overriding *partisan* purpose for institutional responsibility, and the system starts to falter. We see this most plainly in the impeachment context. Congress has quite clearly tended to view impeachment primarily through a partisan lens. When Mitt Romney voted to convict Donald Trump during Trump's first impeachment trial in 2019, he was the first senator in American history to cross partisan lines to vote to convict a president.

Congress is now less an independent branch of government and much more a collection of partisan foot soldiers supporting or opposing the sitting president's agenda. Combine this partisan purpose with a closely divided country and you have a formula for deadlock, and worse.

Politics abhors a power vacuum, and Congress's absence has been filled by the presidency. As Congress shrinks, the presidency grows. On a bipartisan basis, presidents now choose to act whenever Congress "fails."

So now it is presidents who, in effect, declare war. Time and again, they initiate military hostilities without congressional approval. Their administrative agencies write laws of great consequence. They draft executive orders that are even designed to redirect funds appropriated by Congress to new presidential priorities. And the quirks of the Electoral College mean we now face a system where most Americans (who live in safe red or blue states) don't cast truly meaningful votes for the one person who holds all this power. This reality breeds instability, and that instability is amplified each time a president is elected in spite of losing the popular vote.

And this brings us back to the Supreme Court. An emerging Court majority is now highly skeptical of presidential power. Through a series of technical rulings grounded in both the Administrative Procedure Act and in the Constitution itself, the Court is imposing intense scrutiny on executive actions—such as the Trump administration’s attempt to repeal DACA and add a citizenship question to the 2020 census, the Biden administration’s OSHA vaccine mandate, and the Obama-era clean-power rule.

On a pragmatic basis, a dangerous game is afoot. The Supreme Court is telling Congress, “If you want something done, you’ll have to do it yourself.” But what if Congress simply doesn’t do anything? What if it continues to place partisan imperatives over its institutional responsibilities? The Supreme Court can deny the president additional power, but it cannot force Congress to do its work.

Indeed, if Congress continues to abdicate its fundamental constitutional obligations, it will cause even more degradation in the American body politic. Troubling gaps in law and policy will be left entirely unaddressed, and a less and less powerful president will be unable to alter the national course.

Despite all this, however, the Court is constitutionally correct. It is not the role of the judicial branch to enlarge the power of the presidency merely because Congress has lapsed into partisan impotence. Ratifying the continued expansion of the administrative state would only enable Congress’s worst instincts and further damage American democracy.

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