

Legislative Capacity, Executive Power, and the Development of Separation of Powers Politics
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This book project explores the historical dynamics of the American separation of powers system by examining how the development of legislative capacity over time has changed the nature of presidential-congressional relations and, consequently, the exercise of executive power. The starting point for our project is the rapid growth in the size and scope of the federal government that began in the late 1800s. We contend that this development had profound consequences for the separation of powers system. In particular, while the executive branch was expeditiously growing, Congress remained largely the same. The staff sizes of Congress barely increased over the period from 1905-1946 and there were few sources of policy information independent of the executive branch available to Congress. Because of this, we argue that there was an imbalance in power that allowed the president and executive branch to circumvent Congress and enact policies opposed to legislative preferences. Over time, Congress corrected this resource deficit, giving it the ability to better constrain presidential power.

With these considerations in mind, we develop a theory of legislative constraint on executive power that is contingent on legislative capacity. Overall, we argue that low capacity legislatures have difficulties in constraining the executive branch, being unable to adequately perform their oversight functions or write legislation limiting discretion. Consequently, these are the times in which the executive can exercise the greatest power, particularly to bypass an ideologically unfriendly legislature. However, when its capacity is high, the legislative branch can effectively constrain an opposing executive. Thus, executive power is contained, particularly during periods of heightened inter-branch conflict. We provide a variety of empirical tests to evaluate this theory in the United States, drawing on new historical datasets related to congressional and presidential characteristics as well as novel subnational data across all 50 states.

We begin our empirical exploration by examining the ways in which capacity has structured the ability of Congress to carry out its basic functions of legislating and oversight throughout American history. Drawing on both primary source material and the secondary literature, we illustrate the waxing and waning of congressional capacity throughout history and the scholarly and political debates surrounding it. Then, we examine more systematically how capacity structures two routine legislative functions – writing laws and overseeing the executive branch.

With respect to the former, we develop a new measure of statutory discretion based on the authority given to agencies in the appropriations process, accounting for both the amount of money appropriated and spending limitations imposed by Congress. We use this measure to show how changes in legislative capacity influence Congress's ability to delegate more or less authority to agencies based on their ideology. Particularly, low capacity legislatures are unable to limit executive discretion to political opponents. This finding is the basis for why the use of executive orders, whose authority is based on statutory discretion, has changed over time based on the development of legislative capacity. Similarly, we also examine changes in congressional oversight of the executive branch based on the advancement of legislative capacity in a separate chapter, finding that the ability of Congress to monitor the executive branch (particularly when it is controlled by an opposed president) is contingent on capacity. These two chapters together

demonstrate the ways in which diminished capacity can impair legislatures from carrying out fundamental tasks.

Then, we turn to the second key implication of the theory, i.e. the ways in which legislative capacity alters the incentives of the executive branch. In particular, we focus on how presidents' and governors' use of unilateral power is responsive to capacity. Our theory suggests that executives will be freer to use unilateral power in the face of lower capacity legislatures, and their incentives to do this will be greatest during periods of ideological division with the legislature. In this way, incapacity disadvantages the legislature vis-à-vis the executive.

To test this argument, we first examine presidential use of executive orders from 1905-present. We find that during periods of low congressional capacity, presidents issued significantly greater numbers of executive orders during periods of divided government, a pattern consistent with executives bypassing Congress to pursue their policy interests. However, as congressional capacity increases, this pattern reverses, suggesting significantly more constraint on presidents in their use of unilateral power.

Because the results at the federal level provide only one time series of unilateral action, we also test our argument at the state level in the US, which provides rich variation in the institutional and political contexts across states and over time. We put our argument to the test with a dataset of more than 30,000 gubernatorial executive orders issued in the U.S. states and find patterns consistent with the federal level – legislative capacity conditions the ability of governors to pursue their policy preferences unilaterally in the face of a hostile legislature.

Overall, the theoretical arguments and empirical results offer important insights into the dynamics of the separation of powers system in the United States. Legislative capacity plays, currently and historically, an important role in the performance of Congress and the state legislatures. Through structuring the ability of legislatures to carry out core functions, capacity also greatly shapes the incentives of executives. When legislative capacity is low, presidents and governors have a freer hand in pursuing policy goals that may be opposed by legislatures. However, when capacity is high, they face significant constraint. The Founders believed that ambition and preference divergence among the branches of the federal government would be sufficient for sustaining a system based on checks and balances. However, our work demonstrates that actors must have not only the will, but also the ability, to perform these checking functions for a separation of powers system to properly function.