

University at Buffalo School of Law

Digital Commons @ University at Buffalo School of Law

Baldy Center Blog

Baldy Center

9-14-2020

Matthew Steilen, The Place of Norms in Separating Power

Matthew Steilen

University at Buffalo School of Law, mjsteile@buffalo.edu

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/baldy_center_blog

Recommended Citation

Matthew Steilen, *Matthew Steilen, The Place of Norms in Separating Power*, (2020).

Available at: https://digitalcommons.law.buffalo.edu/baldy_center_blog/3

This Article is brought to you for free and open access by the Baldy Center at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Baldy Center Blog by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

Blog 3

Matthew Steilen, The Place of Norms in Separating Power



Blog Author: Matthew Steilen, Professor of Law, School of Law, University at Buffalo

Introduction: One of the chief intellectual discoveries of the past four years has been the degree to which government rests on norms: on a shared sense of the proper way to go about the business of government. This is unsurprising for followers of the law and society movement, with which the Baldy Center is so closely associated. From the beginning, scholars of law and society have demonstrated the limits of formalism in explaining how the law actually works. One can think of the Trump presidency as finally demonstrating for the wider world of legal scholars, the essential role of shared understandings, legal culture, accepted practice, informal conventions, and customs in our separation of powers. The judge-made doctrine has changed only at the margins, and its major holdings remain intact, but the real meaning of separation of powers has been altered dramatically.

The Place of Norms in Separating Power

Blog Author: [Matt Steilen](#), Professor of Law, School of Law, University at Buffalo

Keywords: Constitutional law, Norms, Law and Society, Legislation, Politics, Public policy, Government, Norms, Separation of powers, Judiciary, President, United States, History, Policy, Power, Political Culture, National identity.

One of the chief intellectual discoveries of the past four years has been the degree to which government rests on norms: on a shared sense of the proper way to go about the business of government. This is unsurprising for followers of the law and society movement, with which the Baldy Center is so closely

associated. From the beginning, scholars of law and society have demonstrated the limits of formalism in explaining how the law actually works. One can think of the Trump presidency as finally demonstrating for the wider world of legal scholars, the essential role of shared understandings, legal culture, accepted practice, informal conventions, and customs in our separation of powers. The judge-made doctrine has changed only at the margins, and its major holdings remain intact, but the real meaning of separation of powers has been altered dramatically.

When we think of separation of powers, we usually think of judicial doctrines that are designed to keep each branch within its proper limits, but as the new focus on norms shows, separation of powers is also about how each branch works on its own. If a branch can't do what it was formally designed to do because of a breakdown in norms, then there will be pressure for that function to appear elsewhere in the constitutional system. One can view the administrative state this way: in the nineteenth century, as Professor Blackhawk has shown, Congress could not carry out the administrative functions it was originally assigned through the petition process and through appropriations. [1] There was little sustained political will to try to make changes to keep those administrative functions in Congress. So, in 1946, the petition process was essentially eliminated and Congress' administrative functions were transferred to the executive branch.

It's worth trying to generalize this account to see what other stories we could tell. One might offer a similar story about Congress' foreign policy functions, many of which were transferred to the President in a series of delegations beginning in the 1930s and 40s concerning trade and the use of armed force. One could tell such a story about congressional control over and supervision of the government. Congress' impeachment function has rarely if ever, worked on the presidency, because the hold of elites on the office was broken in the early 19th century, and a party system was created to nominate presidential candidates whose parties divided precisely on the norms that should govern conduct in office. The impeachment function was replaced, in part, by judicial processes—criminal investigations, usually—whose scope was hemmed in by a variety of judicial doctrines, principally the doctrines of executive privilege and executive immunity. In recent years the doctrine of standing has been recruited to assist in limiting judicial processes to enforce the law against the President or high-ranking executive officials.

I wonder whether we could say the same thing of the legislative function, that is, of Congress' power to make law by passing bills and submitting them to the President for signature. Just like Congress' administrative functions, just like its foreign policy functions, just like its impeachment and oversight functions, the legislative function requires norms to work. If those norms are abandoned or prove unsustainable, then it will be impossible to use the legislative function to solve the problems that demand a national solution. The unemployment crisis triggered by the Coronavirus might fit here. Are

the norms surrounding the legislative function breaking down? Recently an old article by John Murrin has been coming to mind, titled, "A Roof without Walls: The Dilemma of American National Identity." The basis thesis of that article, as I recall, was that there was not, at the time of the founding, a national political culture sufficient to sustain the operation of a robust national government. The American government was a roof without the walls of a shared culture to sustain it. What formed in its place was a veneration of the Constitution and the ongoing project of constitution-making. Today I am tempted to conclude that whatever shared, national political culture we were able to create has lapsed. Without any tissue connecting members of Congress, it seems unlikely for them to be able to work with one another in any of the ways necessary to sustain a successful exercise of the legislative function. A usable national legislative function is an accomplishment of political culture. Since we lack the culture necessary to sustain it, we should expect replacements to arise elsewhere in the system.