

POLITICS & POLICY

Congress Is Not a Coequal Branch of Government — It's Supreme

By JAY COST | January 14, 2019 6:30 AM



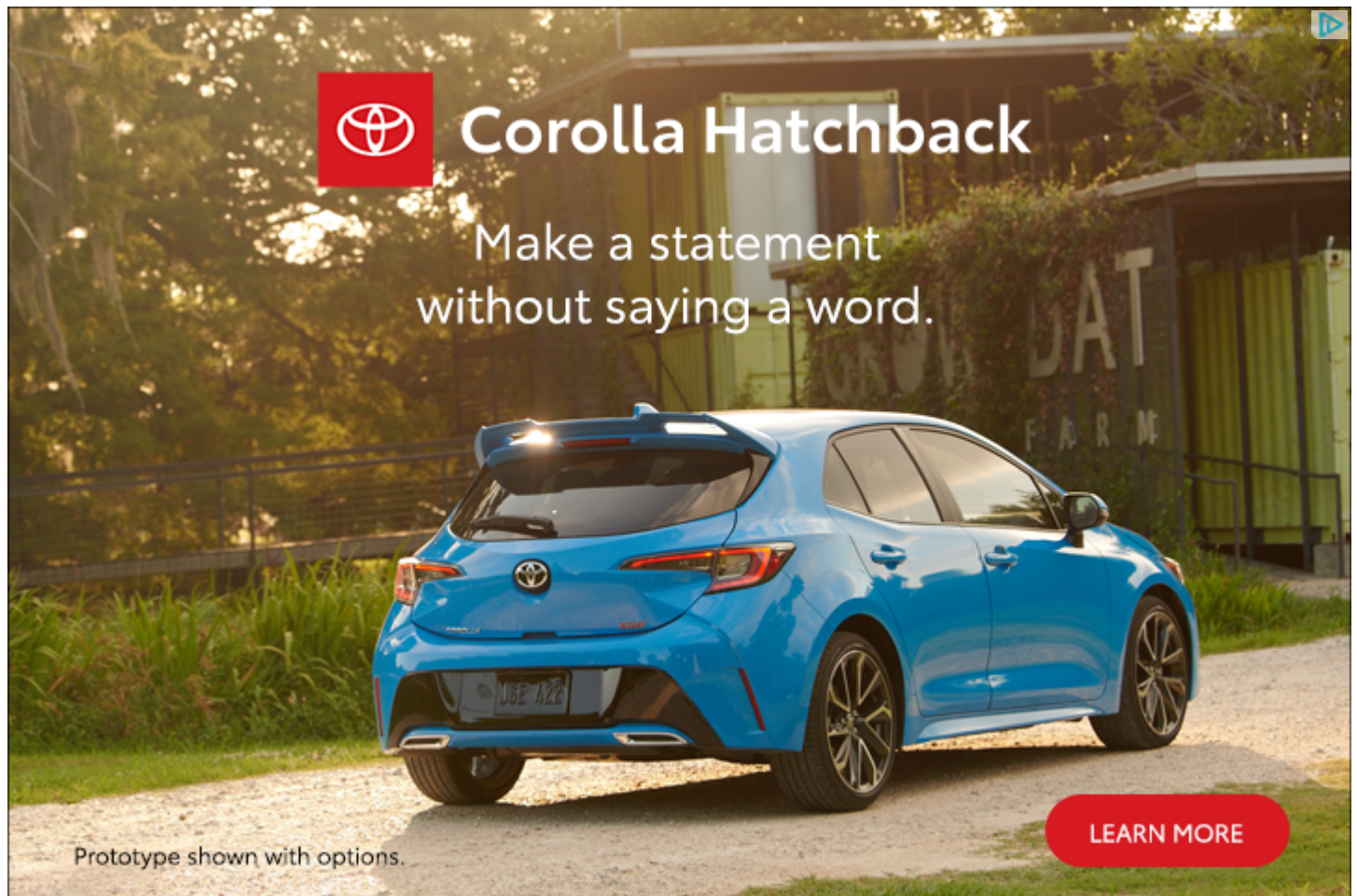
(Jonathan Ernst/Reuters)

Our country has forgotten aspects of republicanism, especially the notion of self-government.

When Nancy Pelosi was sworn in as speaker of the House earlier this month, she promised the American people renewed congressional vigor. Congress, she solemnly declared, is “coequal to the presidency and judiciary,” and House Democrats would act accordingly. **Democratic**

partisans masquerading as public intellectuals have similarly rediscovered the virtues of legislative power, touting the importance of Congress as a coequal branch of government.

The problem with this? Congress is not coequal. It is superior. The notion of coequality of the branches is a myth that has been popularized over the past half century, during the rise of the imperial presidency, as a way to boost the executive's standing in the eyes of the public.



ADVERTISEMENT

There are three main reasons that Congress is supreme. First, Congress can get itself involved in the actions of the other branches. It can override presidential vetoes. It can deny appointments to the executive and judicial branches. It can impeach officers of the executive and judicial branches. It can set legislative and judicial pay. It also has wide discretion in determining the size and shape of the

executive and judicial branches. Every executive department and indeed every officer except the president and vice president are creations of Congress. And Congress also has total authority to design the court system as it sees fit. While there are aspects of foreign affairs it cannot attend to, it can basically govern the domestic affairs of the country by itself. Indeed, it actually did this during the period 1867–69, when Radical Republicans in Congress acquired a veto-proof majority over President Andrew Johnson. The main domestic power that Congress cannot exercise by itself is amending the Constitution — for that, it needs the assent of the state legislatures.

Second, the other branches are largely incapable of interfering with Congress. Members of Congress are immune from arrest when they are conducting legislative business. They set their own pay. Each chamber determines its own rules. Each branch also decides who does and who does not get to sit as a member. And no member is allowed to take a job in the executive department while serving in Congress. The Founders were so serious about this that they established a capital city apart from the states, and *under the jurisdiction of Congress*, to make sure that some local potentate could not use geography to boss the legislature around.

Take these two concepts together and ask yourself: If I get to tell you what to do, but you do not get to tell me what to do, who is actually in charge?

NOW WATCH: ['Secretary of State's Speech on Mideast Policy Rebukes Obama and Iran'](#)

00:37 / 00:37

Third, think of the mandate that each branch has under the Constitution. The executive power is the power to enforce the law. The judicial power is the power to resolve controversies arising under the law. The legislative power is the power to make the law itself. *By necessity, it comes first.*

The Framers were cognizant of this. In *Federalist 51*, Madison justifies bicameralism in terms of maintaining congressional supremacy. “It is not possible to give” the judicial and the executive branches “an equal power of self-defense” against the Congress, because that would undermine the republican quality of the government, where “the legislative authority necessarily predominates.” Instead, the proper safeguard against legislative abuse is “to divide the legislature into different branches,” which will “render them . . . as little connected with each other” as practicable. If the branches were truly meant to be coequal, why would Congress need to be divided into two chambers?

The principle of legislative supremacy is part and parcel of the radical tradition of American republicanism, one that has sadly been lost over the generations. Republican freedom (as opposed to liberal freedom, which implies an absence of restraint) is the freedom to be subjected only to laws that we have a share in creating. In a true republic, therefore, the legislature must be chosen by the people and largely free to act according to public opinion. The notion that an unelected branch like the judiciary could have equal say in government would have struck the Founders as profoundly anti-republican — something much closer to the European model of government in which different social estates were against each other and the people ruled only in part. And even though the

executive branch is now popularly elected, it need not be under the terms of the Constitution. State legislatures have the sovereign authority to choose electors as they see fit. It is only the Congress that must, according to the Constitution, be chosen by the people.

The judicial and executive branches serve two essential functions of government, both of which derive from the legislative power. As mentioned above, they attend to the laws created by the Congress — the president enforcing them and the judiciary resolving disputes arising under them. They also provide a *partial* check against congressional intemperance. If Congress does something unwise or unjust, the president or the courts can step in to prevent the infraction, but only up to a point. After all, Congress can get around executive or judicial determinations by overriding vetoes, redesigning the courts, or proposing constitutional amendments; and if they believe that judicial or executive agents are acting in bad faith, they can remove them from their offices.

This shows the fundamental bet that the Founding Fathers made. Ultimately, they believed in the wisdom and virtue of the whole of the citizenry. They reckoned that if enough people want something to happen, then that something is probably the right thing to happen. So, provided that Congress has crossed its constitutionally established super-majoritarian thresholds, it can override judicial and executive objections and do pretty much anything it wants regarding domestic affairs.

Why then does it so often seem that Congress is *not* the supreme branch? The answer to that question is the other side of the Framers' wager. If the people are divided among themselves, the faction that wins a temporary and narrow majority should not have license to do whatever it pleases. Rather, it should be checked, by judges or presidents who (one hopes) are somewhat immune from volatile public passions. So, in times of persistent polarization and division — e.g., the early 21st century — Congress will struggle to reach those high

thresholds for action and appear to be impotent. But just because it cannot stir itself to act does not mean it lacks the power. It means only that it lacks the will.

We also cannot underestimate the psychological power of the imperial presidency, which has wormed its way into congressional business through subtle means. The people see the president as the leader of the nation. They look first to the president to solve their problems (or as the creator of their problems, depending on the partisanship of the executive officeholder). And Congress, in its capacity as the representative body of the people, *reflects this view as well*. Congress is subservient to the president because, ultimately, that is the way the people have come to see things.

Yet this does not legitimize the notion of coequal branches. Quite the opposite. It reveals the fact that our country has forgotten essential aspects of American republicanism — above all, the full meaning of *self-government*. We do not need a president to govern us. We govern ourselves, primarily through Congress. That is what the Founders envisioned, and it is why Congress is the supreme branch of the government.



JAY COST — Jay Cost is the author of ***THE PRICE OF GREATNESS: JAMES MADISON, ALEXANDER HAMILTON, AND THE CREATION OF AMERICAN OLIGARCHY.***

SPONSORED CONTENT

Recommended by