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When the Gods wish to punish us they answer our prayers.
Oscar Wilde

May your wishes be fulfilled.
Ancient Chinese Curse

The framers of the Constitution were unmistakably clear in their intention that the architecture of the national government be designed around the separation of powers. The Separation of Powers as a label was never articulated, but the principle was, and often. The following are among the most familiar, first from Madison's Notes of the Debate at the Federal Convention in Philadelphia in 1787:

> Mr. Dickenson considered the business as so important that no man ought to be silent or reserved. He went into a discourse of some length, the sum of which was, that the Legislature, Executive, & Judiciary departments ought to be made as independent as possible. . . .[1]

> Col. Mason, thought the office of Vice-President an encroachment on the rights of the Senate; and that it mixed too much the Legislative & Executive, which as well as

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1. JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 56 (W.W. Norton 1987) (1787).

> the Judiciary Department, ought to be kept as separate as possible.[2]

Madison took every opportunity to repeat the principle in *The Federalist*:

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that . . . [the] accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny.[3]
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> . . . After discriminating . . . the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be is the great problem to be solved.[4]
>
> In order to lay a due foundation for that separate and distinct exercise of the different powers of government, . . . it is evident that each department should have a will of its own. . . . The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all of the cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.[5]

The separation of powers was designed to meet two objectives. First, it was designed to reduce if not eliminate the fear of popular tyranny by legislature, for "In republican government, the legislative authority necessarily predominates."[6] Second, it was designed to address the even more intensely shared fear of the national government itself by virtually guaranteeing that policy decisions would be difficult if not impossible to make.

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2. *Id.* at 596.
3. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).
4. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).
5. THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).
6. *Id.*

Yet, despite its clarity, the original intent of the framers was overturned or disregarded as soon as the First Congress opened its doors. Congress immediately made Treasury Secretary Alexander Hamilton its own agent, an American Chancellor of the Exchequer. Some would think of him as prime minister. And it was Congress, not the President, whose command produced Hamilton's three great reports that would virtually set the national agenda for the next several decades. (*Report on the Public Credit*, 1790;[7] *Report on Manufactures*, 1791;[8] and his valedictory, *Report on the Public Credit*, 1795.[9]) And the original enactments of the new national government were large decisions, fundamental decisions and essentially congressional decisions—including such monumental public policies as the Jay Treaty, the Bank of the United States, the assumption of state debts, the Judiciary Act, the first national excise taxes, the payment of claims for war services, explorations and surveying, and, above all, the adoption of the Amendments that became the Bill of Rights.

In other words, America was moving fast, given the average speed of constitutional development, toward realization and institutionalization not of the Separation of Powers but of its opposite, the *fusion* of powers—on the classic Westminster model. The presidency was not unimportant under Washington or Adams, but it was part of a Congress-centered government in which both of the popular Branches (and the Third Branch as well) were under the control of a single, Federalist party in Congress. Little of this bore any resemblance to the Constitution's design, except perhaps the separate names for the three separate Branches.

Constitutional development continued in the same direction after the Jeffersonian/Republican revolution of 1800. The so-called Era of Good Feelings (1808-1828) was a smile put on the face of one-party domination of the national government, but it established once and for all the important democratic principle of Loyal Opposition. It also gave America its first experience with genuine party

7. U.S. DEPT. OF TREASURY, REPORT OF THE SECRETARY OF THE TREASURY TO THE HOUSE OF REPRESENTATIVES, RELATIVE TO A PROVISION FOR THE SUPPORT OF THE PUBLIC CREDIT OF THE UNITED STATES (Print 1790).

8. U.S. DEPT. OF TREASURY, REPORT OF THE SECRETARY OF THE TREASURY OF THE UNITED STATES ON THE SUBJECT OF MANUFACTURES (Print 1791).

9. U.S. DEPT. OF THE TREASURY, REPORT OF THE SECRETARY OF THE TREASURY ON THE PUBLIC CREDIT OF THE UNITED STATES (Print 1795).

government—which means one-party government with occasional alternation of which party governs.

This period also produced more than a mere intimation of the direction and nature of constitutional development. If the test of institutionalization is succession and continuity under different regimes, *fusion of powers* was being institutionalized. Quite contrary to the intent of the framers, the presidency was drawn further and further into congressional domination. Congress not only controlled the legislative agenda, it literally controlled selection of the chief executive himself. First, it controlled the system of *nominating* candidates for President (King Caucus). It also controlled the system for *electing* the President, because virtually everyone had to expect that with three or more serious candidates for President, most actual presidential elections would end up in the House of Representatives, given the great difficulty of producing the absolute majority of Electors required by the Constitution. Why else would the original Article II provide that in the absence of an absolute majority of electors the House choose "from the five highest on the List,"[10] and in its amended form (XIIth Amendment) have House choose from the top three?[11] Thus, the presidency was not merely drawn into the sphere of congressional influence. The presidency itself had become politically dependent on the legislature—just as the founders had feared and had tried to head off by constitutional design—because Congress had become the actual constituency of the presidency. That's real-life fusion, of the parliamentary kind.

Development of a fusion of powers Constitution probably would have become complete and irreversible if there had not been a sudden change in the party system, following the end of the Era of Good Feelings. Two historically important changes produced the Jacksonian Revolution: (1) the replacement of King Caucus with the convention as the presidential nominating system; and (2) the replacement of the probability of ultimate House election of the President with the undermining of the electoral college itself through the simple practice of pledging Electors. These two developments took presidential selection completely outside of Congress and gave the presidency a popular base totally and completely independent of Congress. In the process, the Separation of Powers

10. U.S. CONST. art. II, § 1, cl. 3 *amended by* U.S. CONST. amend. XII.
11. U.S. CONST. amend. XII.

was saved by the very institution—party—that was publicly reviled by virtually every founder, including Madison. The separation of powers was not only saved from oblivion; it was strengthened by virtue of its consonance with the new two-party system, despite the fact that it was only a bi-product of that two-party system. In other words, the parties were oblivious to the intent of the framers. The presidency was simply strengthened in relation to Congress as a coincidental or accidental consequence of winning elections.

Although the presidency was strengthened in relation to Congress, Congress remained the dominant institution, literally the First Branch, throughout the Nineteenth and into the Twentieth century. By 1890, Woodrow Wilson could entitle his textbook *Congressional Government.*[12] And by the time he had abandoned political science and had become President of the United States, Wilson expressed his yearning for a British variant of republicanism by defining the presidency as an office of "stewardship;" he even proposed that responsible party government could be best established by removing the minority party members from the congressional committees. Nevertheless, despite a century of congressional domination, the presidency—thanks largely to the workings of the party system—could maintain enough independence and exercise enough of the "checks and balances" to approach a reasonable approximation of a separation of powers regime.

Although the Roosevelt Revolution was more than anything else a constitutional revolution—in that it permanently altered federalism and put the President at the center and Congress at the periphery of the national government—the Roosevelt Revolution did not overturn or replace the Separation of Powers in the form in which it had prevailed since the 1830s. Even as late as 1960, Richard Neustadt's salutary formulation served quite well as an approximation of original intent and of operating reality: "separated institutions sharing power."[13]

But just about the time Neustadt's formulation was becoming the coin of the constitutional realm, realities were undermining it. A Second Constitutional Revolution was breaking out, one that would nationalize civil rights and establish the welfare state. These changes would in turn destroy the two-party system as we had known it—not by giving us a multiparty system (more's the pity)

12. WOODROW WILSON, CONGRESSIONAL GOVERNMENT—A STUDY IN AMERICAN POLITICS (1890).

13. RICHARD E. NEUSTADT, PRESIDENTIAL PROCESS 33 (1960).

but by altering the form of party government from alternating one-party rule to *rule by two permanent majority parties.*

There is no mystery as to how this has happened, but the consequences of it have not yet been made clear and very much need to be. The Second Constitutional Revolution was a set of "wedge issues" that produced, through several sledgehammer blows, a severing of the South from the Democratic party. This did not, however, produce the electoral realignment that most political scientists were expecting and predicting—and hoping for. Instead, we got an incomplete electoral realignment and an almost complete *ideological* realignment, which gave us what came to be called *divided government.* Between 1946 and 1998 (the end of the 105th Congress), 32 of the 52 years (almost 62 percent) were years of divided government. (This includes the first six Reagan years when Republicans controlled the presidency and the Senate but not the House of Representatives.) Of the 30 years between 1968 and 1998, 24 years (80 percent) were years of divided government. And in the 18 years since the election of Ronald Reagan, 16 of them (or 89 percent) were years of divided government.

At first, divided government didn't seem to matter very much. Presidents continued to turn out the proposals, and Congress continued to pass important legislation, most in response to presidential initiatives, but much of it in response to their own. And we continued to appraise the national system in the terms set by Neustadt in 1960. But a closer look at the past 18 years reveals another pattern entirely, and it matters a great deal because it appears to be the culmination of new institutional adjustments, not the mere turn of a cycle.

This new direction of constitutional development deserves a better name. Divided Government is no longer a proper name for the phenomenon because it fails to convey anything beyond the statistical fact of its existence. What we need is a new name that can capture and convey to the mind's eye a conception of its constitutional significance. My tentative label for it is Absolute Separation of Powers.

For the first time in our history we now have the "separate and independent Branches" that the framers envisioned so clearly. It is not only in accord with the architecture they had designed but also is producing the consequences they had hoped it would produce. But they don't have to live with the Absolute Separation of Powers; we do.

In order to appraise the Absolute Separation of Powers we need to define the phenomenon and explore how we got it. For that we have to look back again at the parties and party government. As defined earlier, party government during the Nineteenth Century was a system of one-party government, with parties alternating command. But that no longer prevails. We still have essentially a two-party system, but we do not have party government in the same sense. What we have now—and have had for long enough to consider it institutionalized—is dual-party government *with each party nested in one of the Branches.* This is better understood not as party government or as two-party government but as *duopoly government.* With fully confirmed expectations that each party will control one of the Branches, each party therefore operates as a *majority party.* After awhile each begins to think like a majority party, and that is a special kind of mentality. In fact, it is a highly anti-innovation type of mentality, comparable to the same situation in a duopolistic or oligopolistic economy. With a guaranteed position, or market share, there is a strong tendency to be risk averse: "We must be doing something right." "If it ain't broke don't fix it!" "Don't quit while you're ahead." In other words, *long-standing majority parties are not only non-innovative but are anti-innovation.* As in the economics sphere, when there are just two or three providers in a political market, they can easily know each other's basic interests without collusion and can cooperate without conspiracy. And they can compete in a so-called bipartisan manner by picking specialized areas of competition—such as party (brand) loyalty, negative advertising, and research (including exposure)—without trying to go the whole way through vigorous, all-out market (electoral) competition that might harm the competitor but risks harming oneself as well. Each competitor has a vested interest in the other—and also a vested interest in keeping additional competitors out of the competition altogether.

From this perspective, we can also see that when each party is nested in a separate Branch, it doesn't matter very much which Branch, as long as the probability remains high that each party will have a sanctuary, that each will win a piece of the government. From another complementary perspective, the party duopoly has given each Branch its own popular base just like the others. Whereas in 1832, the party system gave the presidency a popular base independent of Congress, the party system today gives Congress a new popular base that is no longer tied to the small geographical constituencies that comprised its traditional base. Geogra-

phy or territoriality had in fact always been the very essence of republican government in the United States. States were the geography of the Senate (whether elected by state legislatures, as was the case until 1912, or by state popular vote since then). This was equally true of the House, particularly after 1842, when Congress tried by law to stamp out all other methods of representation except the single-member district, which is in principle a system of geographic representation with each district being in theory compact, contiguous, and as close as possible to equal in population. That formality still exists, and geographic representation still has a certain amount of substance to it. But that substance is now not only decreasing but is being subordinated to the more diffuse regional and national public opinion and campaign finance constituencies resembling those of the President and the Senate. Note, for example, the decreasing percentage of campaign money that comes from within the home district of a member of Congress or even from the home state of a Senator. Moreover the United States population is now so loose and heterogeneous that increasing numbers of districts are artificial, no matter how the district lines are drawn. As a consequence, the same principles of politics and representation govern the presidency, the Senate and the House. There is no longer the "mixed regime" that used to inform all hopes of republican government.

Now we can go back to the earlier question of whether we can actually live with the legacy of the Absolute Separation of Powers intended by the framers and visited upon us in this most recent epoch of constitutional history. At first glance it would appear that there are two answers, falling along strictly party lines. Republicans would be expected to approve, given their loyalty to original intent as a general rule, and because of their allegiance to Ronald Reagan's belief that "government is the problem, not the solution." Republican liberals (i.e., the traditional free-market ideologues that have comprised the core of the Republican party since its founding) have made common cause with the genuine communitarian and Christian conservatives that comprise their Right wing to stigmatize the national government, and they have been so successful that their own liberal tradition has had to be closeted as the L-word. If the Absolute Separation of Powers has rendered the national government virtually incapable of governing—or more precisely, incapable of making substantial, substantive policy decisions—that constitutes a grand set of Republican campaign pledges that have been honored. Democrats would be expected to

espouse the opposite position toward the question of living with the Absolute Separation of Powers, because the Democratic party for most of this century has favored presidential government and governmental innovation. However, their adjustment to the two-party duopoly has led them to the contrary position, *embracing* the Absolute Separation of Powers, with President Clinton a model Republican favoring "the end of the era of big government."

The following is a review of the record of governing under this new constitutional regime of Absolute Separation of Powers. There are five dimensions.

1. First, during the past 18 years—nay, during the past 25 years—there has been little to no innovation at the national government level. That is to say, there have been almost no genuine, substantial substantive decisions expressed in law involving a lawmaking relationship of sharing power between the two Branches. The only exceptions of any substantive character involving both Branches in genuine lawmaking have been laws aimed at *downsizing* existing programs without actually terminating any. Note well that in over 60 years, only two major New Deal agencies have been terminated. The Civil Aeronautics Board (CAB) was abolished by, of all people, President Carter. The second one was the Interstate Commerce Commission. It was finally abolished under President Clinton after a 15-year effort on the part of the Republicans. Three or four other programs that have been substantially gutted—for example, agriculture price supports, telephone and cable regulation, and entitlements within AFDC—but even here, the agencies were left in place, available for later "upsizing." In all other actions, downsizing has been the essential direction of both the major parties, and this downsizing has been at the *margins*, not addressing the substance. Here is the way the libertarian British journal *The Economist* put it in their bottom-line assessment of the Republican Congress's Contract with America:

> So it seems like a revolution. But what are the revolutionaries actually doing? . . . They are consolidating . . . the New Deal, which they so roundly deplore. . . . By squeezing budgets without eliminating functions, the Republicans are asking the government to deliver on every promise ever made [but] with less and less money.[14]

14. *The Evolution of a Revolution*, THE ECONOMIST, Nov. 4, 1995, at 25.

The historic tax reform laws of 1981 and 1986 were also essentially downsizing at the margins. But even if one grants for the sake of argument that Reagan's 1980s tax reform laws were substantive and therefore exceptional, this is more than counterbalanced by the fact that annual deficits mushroomed after 1981, their rate of increase grew larger all during the 1980s, *and the largest share of the growth in the annual deficits is attributable to the incapacity of the current system of national government to go deeper than the margins in order to make the substantive decisions to cut whole domestic programs and whole agencies, whole bomber wings and whole military bases.*

This new regime actually gives us an operational definition of *innovation* by delineating so clearly the difference between innovative and incremental, between substantial and marginal. Substantial innovation requires considering the substance of a program or agency from a zero base. Incremental or marginal decisions are decisions to expand or contract by percentage changes without taking the nature of the program or agency into account. Cutting at the margins involves no genuine policy decision and no genuine sharing of powers between the two separated institutions of President and Congress. In this light, the last 18 years has not been an era of deadlock or gridlock or immobilism, because these imply substantive disagreements without resolution. What we have now is incapacity to govern—or better, a government of bookkeepers.

This mentality was reinforced by two laws, one of 1974 and one of 1985. The 1974 Budget and Impoundment Control Act[15] was adopted by a Democratic Congress against a Republican President to provide Congress with its own source of budget information and power to compete with the Executive Branch's OMB—to answer OMB item by item with mind-numbing budgetary figures on each and every governmental activity. Through a process called "reconciliation," new congressional budget committees were given the power to adopt budget resolutions that set advance spending targets for agencies and large categories of agencies that would require Congress and the Executive Branch to limit spending within those "spending caps." Reconciliation pushed almost every policy decision into a budgetary process—to the advantage of the bookkeeping mentality.

15. Pub. L. No. 93-344, 88 Stat. 291 (codified at 31 U.S.C. § 1001 *et seq.* (1994)).

The 1974 Act was reinforced by the 1985 Gramm-Rudman-Hollings legislation[16] establishing mandatory deficit reduction ceilings that would produce a balanced budget by 1991. Any year the established deficit targets were not met, automatic cuts *across the board* were to be made, with a formula set by law to reduce the budgets of all governmental activities at a given percentage. As one authority put it, these two reforms "moved budgetary gimmickry from the sidelines to the center stage."[17] Some say the 1974 and 1985 decisions contributed to an enhancement of presidential power, and others say that it restored to Congress more powers to retaliate, thereby maintaining the balance between the two Branches. Either way, the debate between the two Branches was forced and formalized toward the budgetary margins, and the alterations of relative power between the two Branches would have to be considered incremental at every step of the way.

2. A second dimension of the Absolute Separation of Powers is the recent and growing tendency of both Branches to take actions that do not require the other Branch at all. These are actions of a law-like character and effect and status, but do not require the two independent institutions to share power. The most significant case study is President Reagan's approach to deregulation. One of his first actions after taking office was Executive Order 12291,[18] establishing within the Office of Management and Budget an Office of Information and Regulatory Affairs (OIRA) "to provide for presidential oversight of the regulatory process,"[19] subjecting every proposed rule to a cost-benefit test. (Oversight by OIRA was required of all regulatory agencies directly under the President's authority and was made morally obligatory for the independent commissions.) Although OIRA recommended rejection of few of the rules submitted to it, the review process itself added significant delays to the time required to develop a new rule, it discouraged agencies from developing certain rules at all, and the number of rules dropped precipitously. President Bush went even further than

16. Balanced Budget and Emergency Deficit Control (Gramm Rudman Hollings) Act of 1985, Pub. L. 99-177, 99 Stat. 1038 (codified at 2 U.S.C. §901 *et seq.* (1985)).

17. Lawrence J. Haas, *Endless Tinkering*, NAT'L J. 2831, 2831 (1989), *quoted in* ROBERT J. SPITZER, PRESIDENT & CONGRESS—EXECUTIVE HEGEMONY AT THE CROSSROADS OF AMERICAN GOVERNMENT 111 (1993). *See also* James A. Thurber, *The Impact of Budget Reform on Presidential and Congressional Governance, in* DIVIDED DEMOCRACY 145, 145-70 (James A. Thurber, ed., 1991).

18. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

19. *Id.*

Reagan by making his own Vice President, Dan Quayle, head of the regulatory review process. Meanwhile, Congress was not taxed with having to make any substantive regulatory decisions at all.

Even though Democrat Clinton was more likely than a Republican President to favor some re-regulation, there is ample evidence that he, like his Republican predecessors, prefers the independent route. The best recent example is his sending Vice President Gore to the AFL-CIO winter meeting in February 1997 to announce the issuance of new guidelines requiring companies doing business with the government to maintain good relations with their workers and the unions that represent them. The government could reject hundreds of millions of dollars worth of contracts and contract bids from companies that do not have a satisfactory record of employment practices. This was denounced as a blatant political payoff for union support in the 1996 presidential election, and so it must have been. But the fact remains that he could have paid them off just as well with legislative proposals and could have gotten political credit no matter what Congress did. Other examples of presidential actions independent of Congress in 1996 alone include: strict new EPA standards for solid particles emitted by power plants, automobiles, oil refineries, etc.; the same for ozone; termination of Reagan-era approval of property owners draining wetlands of up to 10 acres; an executive order establishing a 1.7 million-acre national monument in Utah; unilateral termination of a program that had permitted logging in old growth forests.

3. The third dimension of the consequences of the new regime of the Absolute Separation of Powers is the familiar Bully Pulpit ploy—the announcement at the highest possible rhetorical level of hopelessly unrealistic to relatively trivial proposals that convey the impression of effectiveness. Favorite examples are President Clinton's commitment to putting school children in uniforms; a national goal of grading local school and teaching effectiveness; computerizing all classrooms; organizing a citizen army of a million volunteer tutors to meet the goal of bringing all children to genuine reading ability by the end of third grade; ordering federal agencies to recruit and hire welfare recipients to fulfill the national goal of moving people from welfare to work, even as the civil service is being "downsized." President Clinton is carrying to still greater heights of eloquence President Bush's "thousand points of light."

4. A fourth dimension of the institutional consequences of the Absolute Separation of Powers is what can only be called "Tie Us to the Mast"—constitutionally and legally self-imposed preventives or self-imposed decision rules that make government action virtually impossible. These can also be seen as Congress's effort to find a means of action independent of the President, as the President has found means of taking action independent of Congress. One of the best examples has existed for a long time but has come into significantly increased use in the past decade—the so-called filibuster rule. There has been such an increase in the use and in the threat of filibuster that Senate leadership would be loathe to bring up a bill for a vote unless they were fairly certain they had a "filibuster-proof" 60 votes. The mere threat of filibuster is virtually enough, without having to go through the inconvenience of a real one. Another, of course, is the setting of spending caps on broad categories of governmental activities, forcing a kind of zero-sum game among competing agencies, such that an increase in one has to be compensated for by a decrease in one or more others, or worse, a provision for revenue enhancements to cover the increase. This not only forces the discourse toward the margins and away from the substance of government activities, as observed earlier, but it also amounts to a decision at the beginning of a congressional session to tie the hands of substantive legislative committees and congressional entrepreneurs to inhibit any tendency toward substantial innovation.

Still other examples of Tie-Me-To-the-Mast decision prevention rules are being sought. The most important of these are the proposed three-fifths vote requirement on all tax increases and on all substantive actions that would contribute to an increase in the deficit. The most sought-after of these is the balanced-budget amendment, which would not only constitutionalize discourse at the margins but would put virtually all taxation and all substantive policy innovation beyond the reach of majoritarianism in the legislature.

Finally, there is one instance of congressional decision avoidance that warrants close scrutiny not only because of its intrinsic importance but because of the likelihood that it will be imitated. This is the Defense Base Closure and Realignment Commission established by Congress in the final days of the Cold War. Special provision was made for the independence of this Commission by giving it the authority to make an annual listing of recommendations for military bases to be closed, with the stipulation that the

House and Senate could only vote the entire list of recommendations up or down, with no additions or deletions. Having given itself no "line-item veto," Congress truly tied itself to the mast.

Other such commissions to relieve the President and Congress of some of their duties are in the pipeline. The closest to enactment is a Commission to fix the Consumer Price Index (CPI) which allegedly has been overstating the rate of inflation and therefore unrealistically boosting welfare and Social Security benefits that are pegged to the CPI. A second important and highly likely one is a Commission to provide America with the campaign finance reform that the political parties in Congress cannot bring themselves to provide. A third example is the expanded use of the Special or Independent Counsel, which is a tie-us-to-the-mast type of action even though it involves the Third Branch.

5. The fifth and last dimension of the consequences of the new regime points toward still a larger and gloomier pattern produced by the Absolute Separation of Powers and the party duopoly that supports it. This is the very striking emergence of "politics by other means"[20]—the displacement of popular processes of political decision, with an increasing proportion of policy choices made outside the electoral realm altogether.

American political life has become notorious for the shrinkage of the electoral domain. In the 1994 congressional elections, voter turnout was 39 percent, and in the 1996 presidential election, turnout was 48.5 percent—compared to well over 80 percent on average in other Western democracies. Of possibly greater significance is the continued decline in genuine competition in the electoral arena, the absence of which helps to explain lower voter turnout. In 1986, 1988 and 1990, 98 percent of congressional incumbents who sought re-election were successful. In 1992, despite the appearance of a national anti-incumbent movement, close to 95 percent of incumbents seeking re-election were successful; and in 1994, despite the earthquake producing the first two-House Republican majorities in 42 years, the incumbent re-election rate was 91 percent. President Clinton's decisive re-election in 1996 did not affect this; quite the contrary, the incumbency re-election rate in Congress had climbed back up to over 95 percent. The higher the

20. *Inspired by* BENJAMIN GINSBERG AND MARTIN SHEFTER, POLITICS BY OTHER MEANS—THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA (1990).

incumbency re-election rate, the lower the degree and intensity of electoral competition.

Troubling as these patterns may be on the face of it, the deeper and less obvious meaning is far more troubling, because these various patterns of non-competitive elections are being produced by the party duopoly whose inherent incentive is to avoid head-on, direct electoral competition. Such parties are organizationally weak, and weak parties leave individual candidates with the lonely job of raising most of their campaign money for themselves—which is quite a task in this era of $3-4 million campaigns even for the House. Under these circumstances, political activity makes every candidate, official and staffer personally vulnerable as never before, not only to *electoral* judgment but to *legal action* and *personal disgrace*. For example, between 1970 and 1990, there was a tenfold increase in the number of criminal prosecutions against national, state and local officials. And this *substantially understates* the turnover due to personal disgrace because many leave politics to *avoid* exposure and prosecution.[21]

This is the essence of "politics by other means." There is indeed turnover of membership in the American political class. For example, of those members of the House of Representatives in 1984, only 28.5 percent were still in the House ten years later. But the turnover comes from almost everything *but* direct electoral competition—from death, retirement for fear of defeat, move upward or outward to other political offices, occasional (rare) defeat in the primaries for renomination, and, most significantly in recent years, criminal exposure, prosecution, indictment and conviction.

These exposures that lead to political turnover without electoral competition are called political scandals, and indeed they are just that: scandal, the revelation of a corrupt act. But do the increasing numbers of scandals indicate that American politics is more corrupt than it was in the past? Doubtfully so—when one stops a moment to ponder the Watergate epoch of the 1970s or Teapot Dome of the 1920s or the pre-Reform decades of the late Nineteenth centu-

21. *See id.* at 6; *see also* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 212 (1994). This increase in the number of indictments brought by federal prosecutors against national, state and local officials substantially understates the extent of political turnover through personal disgrace because of the many political figures such as Ronald Reagan's Attorney General Edwin Meese and former Democratic Speaker of the House Jim Wright who leave office and politics in order to avoid further exposure and probable prosecution.

ry. Scandals are more frequent today because of the two-party duopoly. Parties have become organizationally too weak to channel ambition into socially constructive ends.

Ambition is to politics what greed is to the economy. Self-interest within appropriate channels—observed Adam Smith among many others—can be socially far more beneficial than voluntary acts of good will. And it is no accident that extralegal and illegal actions were taken to new heights while the presidency and the vice presidency were both occupied by Southerners. The art of the political shakedown is associated with the South not because it is more corrupt but because of the long Southern history of weak party organizations. In one-party systems as in duopolies, party organizations are always weak, and when a party is weak for long stretches and not just cyclically weak, all ambitious political players are forced to work strictly for themselves. When party organizations are relatively strong, the deals the political players have to make can be spread (or laid off or hedged) over time and space, within a corporate setting. (Parties are corporations too.) When the party organization is weak, the deals one candidate makes cannot be spread across time and space but have to be personal and immediate. In other words, only the candidate can honor the debt, and it must be honored during the candidate's own term of office. The pressures become incessant as the resources shrink. Clinton and Gore knew what it took to win, and the money they raised was entirely for themselves. Very little of it was shared with the other candidates running on the Democratic ticket. That is one of the major reasons why there have been such short presidential coattails in recent years and why Presidents and Vice Presidents are no longer exempt from personal disgrace. Gore and the shakedown of the innocents in the Bhuddist temple is a mere symptom which no amount of campaign finance reform can fix.

Now add to weak party organizations the duopoly factor. Party leaders can often alter the relative power position of the parties without a full-scale electoral confrontation by weakening or eliminating one or more of the opposing party's leaders. It's a risky strategy, but often worth the risk to alter the power position of the opposition party at the margins for just long enough to gain some particular advantage. The young Republican Newt Gingrich took a great risk for himself and his party against the very senior Democratic Speaker Jim Wright. But it paid off rather measurably at a point when Speaker Wright was beginning to compete with President Bush even on matters of foreign policy. But not for long and

only at the margins. It didn't help Bush win re-election in 1992 and it contributed in only a small way to the 1994 Republican congressional victory—which, after all, lasted only for one session of the 104th Congress. Here is another case of the party duopoly working at the margins—in this case, shaving momentarily the power of the opposition party.

APPRAISING THE ABSOLUTE SEPARATION OF POWERS

Something is rotten in the state of America. It is a functioning system but not a functional one. American government today is a minimalist solution in a country with maximum demands and expectations. The legitimacy of an enormous democratic politics in a large republican government cannot survive a national governmental process whose operational code is action-prevention and the adoration of the bottom line.

This is no appeal for another 40 fat years of the kind of governmental growth that held the New Deal coalition together. It is an appeal for common sense over and against an ideologically supported denial of the capacity to govern.

Signs abound suggesting that America is trying very hard to deny the republican dream, and these signs are not all as recent as some of the examples given above. The following is a parsimonious inventory of efforts by contemporary political leaders to strip the American polity of its power and integrity:

(1) Delegation of legislative power away from Congress to the Executive, 1933-73.
(2) Delegation of fiscal/monetary power from Congress and the President to an independent and self-financing Federal Reserve.
(3) Delegation of large chunks of national power to the states, which have actually done little in the past several decades to deserve the reputation for virtue they now enjoy, and which vary immensely in terms of their capacity and wealth to meet the added responsibilities delegated to them.
(4) Rejection of policy making in favor of marginal analysis.
(5) Replacement of law with economics as the language of the state.
(6) Displacement of policy making with bookkeeping.

(7) Denial of the separateness from and the integrity of the political in relation to the moral and the economic realms.

People are fond of saying that "God looks after fools, drunkards and the United States of America." We have indeed been lucky:

(1) We were able to spend untold trillions of dollars to win the Fifty Years War, 1939-1989 (yet are now telling ourselves that we cannot ask our grandchildren to help pay for it).
(2) We were able to control world trade to our advantage for most of that same period.
(3) We defied the oxymoron "institutionalized innovation," and our government-subsidized R&D inventiveness has kept us just ahead of the curves of runaway inflation and disastrous depression.
(4) We survived the one big decision that turned sour—Vietnam (and now we wonder whether we should ever make big policy decisions again).

The United States has enjoyed a fairweather system of government for nearly 50 years. But can we continue to win every war and muddle through every crisis? What are we going to do when the weather turns foul or when the fat years turn to lean? Can we survive the unintended consequences of a *mega*policy decision not to make policy decisions, by squeezing without choosing? Can we survive a government of bookkeepers?

The capacity to govern is not something a nation-state is born with—however free we were born. The capacity to govern is not something that can be provided by even the most enlightened constitutional architecture—although that is an indispensable starting point. The capacity to govern is virtually a physical capacity that requires a lot of practice. And the capacity to govern in a democratic republic requires still more practice, because it must not only continually prove itself by its successes but maintain its legitimacy by coping with policies and programs that fail. Good government requires experience with success and experience with failure, and above all experience with trying. Use it or lose it. The capacity to govern is going to wither in a procrustean bed of Absolute Separation of Powers.