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THE RISE AND FALL OF THE "DOCTRINE" OF SEPARATION OF POWERS

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As the Constitution of the United States nears its two hundredth anniversary, there is a frenzy of celebration. However awesome the accomplishment, I submit that it is no slander to recognize that the 1787 document was born of prudent compromise rather than principle, that it derived more from experience than from doctrine, and that it was received with an ambivalence in no small part attributable to its ambiguities. Indeed, its most stalwart supporters doubted its capacity for a long life. It should not be surprising, then, that even today there is disagreement over whether the Constitution of 1787 is now merely an artifact of late eighteenth-century American history or a *vade mecum* which has, in fact, controlled the allocation of government powers and the restraints on those powers throughout the two centuries since its birth.

The fact is — to use Professor Paul Freund's language — that the Constitution is, and has been from the beginning, both a structure and an organism, which does not permit it to be treated merely as an upper-case statute nor, as Learned Hand might have had it, as a mere counsel of moderation. Parts of the Constitution use words and phrases that resonate with meanings derived from history and the common law. Parts of the Constitution will necessarily have meanings dependent upon the context in which they are being applied. Added to these are fundamental conceptions that are not attachable to any particular words or provisions, such as federalism and separation of powers, that must be worked out by addition and subtraction of language and history.

To oversimplify constitutional meaning, as we tend to do especially when we talk of the Constitution on celebratory occasions, is to ignore what in fact the Founders wrought. To sophisticate constitutional meaning, as we tend to do when we write "learned" articles or briefs or judicial opinions for the specialists who read them, tends to substitute the subjective for the objective and to cover over the conceit with rhetoric. The document was a product of the Age of Reason; its understanding should come through the use of the mind. It cannot be

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factored to provide easy answers even by the most modern of computers.

The original constitutional notions of division of powers and functions were based not only on "separation of powers," but on a concept of "balanced government" and of "checks and balances" as well. If the three ideas rested on a single base of mistrust — a mistrust of governmental authority concentrated in the same hands — they were far from the same in their forms. Checks and balances suggested the joinder, not separation, of two or more governmental agencies before action could be validated — or the oversight of one by another. Balanced or mixed government involved separation, but by way of providing different voices for the different elements in a society, as with the Crown, the Lords, and the Commons in England. The anticipated elite quality of the Senate or its putative role as representatives of the States rather than the people thereof may be explained as a search for such balance. In fact, Madison's rationalization for the division of powers suggests a more substantial notion of balancing forces, but for him the forces to be balanced were multitudinous and not few.

Separation of powers certainly encompasses the notion that there are fundamental differences in governmental functions — frequently but not universally denoted as legislative, executive, and judicial — which must be maintained as separate and distinct, each sovereign in its own area, none to operate in the realm assigned to another. The tendency even today is to think of the constitutional separation of powers in these terms. What Madison wrote in 1788, however, remains true today and has proved true in the interim. He said in the 37th *Federalist:*

> Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive, and Judiciary; or even the privileges and powers of the different Legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.[1]

The consequence has been that problems of separation of powers have more often been sought to be resolved by invoking one or the other of the classifications as a shibboleth, what Holmes and Cardozo referred to as judgment by labels.

The life of the Constitution, however, from its birth to its bicentennial has not been theory but experience. This proposition is not merely a paraphrase of Holmes' famed dictum in *The Common Law*

1. THE FEDERALIST No. 37, at 235 (J. Madison) (J. Cooke ed. 1961).

about law and logic.[2] It was recognized and acknowledged at the Convention of 1787. On August 13, Mr. Dickinson of Delaware remarked: "Experience must be our only guide. Reason may mislead us."[3] Both Holmes and Dickinson were discounting deductive logic in favor of assaying effects that were known rather than those merely inferred a priori. The notion has been iterated by prominent contemporary historians. Thus, Professor Edmund S. Morgan wrote:

> The social compact, fundamental law, the separation of powers, human equality, religious freedom, and the superiority of republican government were continuing ideals . . . .
>
> But if Englishmen supplied the intellectual foundation both for the overthrow of English rule and for the construction of republican government, Americans put the ideas into practice and drew on American experience and tradition to devise refinements and applications of the greatest importance. . . .
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> . . . .
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> . . . The separation of governmental powers into a bicameral legislature, an executive and a judiciary, which was an older and more familiar way of checking depravity, was rendered far more effective by the existence of a written constitution resting directly on popular approval. The written constitution also proved its effectiveness in later years by perpetuating in America the operation of judicial review, of executive veto, and of a powerful upper house of the legislature, all of which had been or would be lost in England, where the constitution was unwritten and consisted of customary procedures that could be altered at will by Parliament.[4]

The American concept of separation of powers — if I may now use that term as shorthand — is the prime example of the proposition that experience rather than theory grounds the Constitution. In no small part, this consequence is attributable to necessity rather than choice. In part, the necessity derives from the fact that, Professor Morgan — and Montesquieu and John Adams — to the contrary notwithstanding, separation of powers as adopted by the American Constitution had no true precedents either in fact or in theory. As Professor Gordon Wood so successfully demonstrated in *The Creation of the American Republic 1776-1787*,[5] because the new American government was sui generis, it was not possible to trace all its provisions to any of the almost unlimited antecedents invoked at the Convention or

2. O.W. HOLMES, THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience.").

3. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 398, 69th Cong., 1st Sess. 533 (C. Tansill ed. 1927).

4. Morgan, *The American Revolution Considered as an Intellectual Movement*, in CAUSES AND CONSEQUENCES OF THE AMERICAN REVOLUTION 172, 185, 189 (E. Wright ed. 1966).

5. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969).

to the only slightly smaller number of political savants to whom appeal was equally readily made.

Montesquieu was often credited at the time of the founding as well as since with being the inventor of the tripartite system of separated powers, or at least was thought to have discovered it in the English system of government. Montesquieu was himself more modest. He deserves to be heard in his own words:

> Whoever shall read the admirable treatise of Tacitus on the manners of the Germans, will find that it is from them the English have borrowed the idea of their political government. This beautiful system was invented first in the woods.
>
> . . . It will perish when the legislative power shall be more corrupt than the executive.
>
> It is not my business to examine whether the English actually enjoy this liberty, or not. Sufficient it is for my purpose to observe, that it is established by their laws; and I inquire no further.[6]

Perhaps the only political theorists of equal stature to Montesquieu in the eyes of the new constitution-makers were John Locke and James Harrington. Locke, too, saw a tripartite division of functions, that is, he asserted three classes of powers: legislative, executive, and federative, the last being what we might today term the "foreign affairs power," and this he allocated to the executive branch.[7] Harrington's *Oceana* sounded more like a plan for balanced government, but he had a tripartite functional division: a Senate to propose laws, an Assembly to enact them, and an executive to enforce them.[8] The judicial branch was noteworthy by its absence in all but name in those programs. In all three plans of government — Montesquieu's, Locke's, and Harrington's — all power was really divided between an executive and a legislature. The judiciary lost its inferior status under the prodding of John Adams.[9]

What Harrington and Locke shared that might well have appealed to Madison — certainly to Jefferson who was busily occupied in Paris and absent from Philadelphia at the time of the framing — was the notion of minimalist government. The structure of government was an important safeguard to the liberties of the governed for Harrington and Locke, but certainly of no less importance was the limited role of

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6. C. MONTESQUIEU, THE SPIRIT OF LAWS bk. 11, ch. 6, at 213 ("Of the Constitution of England") (D. Carrithers ed. 1977) (T. Nugent trans. 1750).

7. J. LOCKE, TWO TREATISES OF GOVERNMENT 382-84 (P. Laslett 2d ed. 1967).

8. *See* J. HARRINGTON, *The Commonwealth of Oceana,* in THE POLITICAL WORKS OF JAMES HARRINGTON 172-87 (J. Pocock ed. 1977) (Pakeman ed. 1656).

9. *See, e.g.,* J. ADAMS, THOUGHTS ON GOVERNMENT (1776), *reprinted in* 4 THE WORKS OF JOHN ADAMS 189-209 (C. Adams ed. 1851); MASS. CONST. of 1780 (drafted by John Adams).

government. This attitude purported to be written into a constitution by limiting the national government to delegated powers, but then was written out of it with the necessary and proper clause.[10] There can be little doubt, however, that the Founders were exceedingly worried about entrusting their national government with power over them. Government was a necessity; it was not a good. And any man was a frail reed on which to rest other men's liberty. Thus, Benjamin Fletcher Wright, in his introduction to the John Harvard Library edition of *The Federalist,* noted:

> [T]he conception of human nature stated, reiterated, and depended upon in *The Federalist* is pessimistic or, in the most usual sense of the word, realistic. Men are not to be trusted with power, because they are selfish, passionate, full of whims, caprices, and prejudices. Men are not fully rational, calm, or dispassionate. Moreover, the nature of man is a constant; it has had these characteristics throughout recorded history. To assume that it will alter for the better would be a betrayal of generations unborn.[11]

The American constitution of 1787 made the notion of separation of powers both more simple and more complex than it had been under previous regimes or in earlier texts. As Professor Gordon Wood has told us:

> Americans had retained the forms of the Aristotelian schemes of government but had eliminated the substance, thus divesting the various parts of the government of their social constituents. Political power was thus disembodied and became essentially homogeneous. The division of this political power now became (in Jefferson's words) "the first principle of a good government," the "distribution of its powers into executive, judiciary, and legislative, and a sub-division of the latter into two or three branches." Separation of powers, whether describing executive, legislative, and judicial separation or the bicameral division of the legislature (the once distinct concepts now thoroughly blended), was simply a partitioning of political power, the creation of a plurality of discrete governmental elements, all detached from yet responsible to and controlled by the people, checking and balancing each other, preventing any one power from asserting itself too far. The libertarian doctrine of separation of powers was expanded and exalted by the Americans to the foremost position in their constitutionalism, premised on the belief, in John Dickinson's words, that "government must never be lodged in a single body." Enlightenment and experience had pointed out "the propriety of government being committed to such a number of great departments" — three or four, suggested Dickinson — "as can be introduced without confusion, distinct in office, and yet connected in operation." Such a "repartition" of power was designed to provide for the safety and ease of the people, since "there will be more obstructions interposed" against

10. U.S. CONST. art. I, § 8, cl. 18.

11. Wright, *Introduction* to THE FEDERALIST 1, 27 (John Harvard Library ed. 1961).

errors and frauds in the government. "The departments so constituted," concluded Dickinson, "may therefore be said to be balanced." But it was not a balance of "any intrinsic or constitutional properties," of any social elements, but rather only a balance of governmental functionaries without social connections, all monitored by the people who remained outside, a balanced government that worked, "although," said Wilson, "the materials, of which it is constructed, be not an assemblage of different and dissimilar kinds."[12]

The new form of separation of powers was not wholly appreciated when the ratification processes were in place. As Madison said in *Federalist* No. 47: "One of the principal objections inculcated by the more respectable adversaries to the constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct."[13] *Federalist* Nos. 47 through 51 were devoted to refuting that charge, largely by revising the classic notions of separation of powers.

It was evident from Montesquieu's resort to the British model, said Madison, that he did not mean that there could be no partial overlap of governmental functions in different departments. Montesquieu meant only "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted."[14] So, too, Madison pointed out: "If we look into the constitutions of the several states we find that notwithstanding the emphatical, and in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct."[15] Having disposed of Montesquieuan theory and American experience in No. 47, he proceeded in No. 48 to demonstrate that it is not sufficient merely "to mark with precision the boundaries of these departments in the Constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power."[16] It is to be recalled that he had conceded in No. 37 that it was impossible sharply to delineate the different powers labeled legislative, executive, and judicial. In No. 51, he justified the mélange as "so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each

12. G. WOOD, *supra* note 5, at 604.

13. THE FEDERALIST No. 47, at 323 (J. Madison) (J. Cooke ed. 1961).

14. *Id.* at 325-26 (emphasis in original).

15. *Id.* at 327.

16. THE FEDERALIST No. 48, at 332-33 (J. Madison) (J. Cooke ed. 1961).

other in their proper places."[17] The result was a new conception of a balancing of powers so well described in the quotation from Professor Wood. And here Madison recited one of his most frequently quoted arguments:

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.[18]

It must be remembered that some fundamental differences dividing the Framers were never mediated at the Convention. One concerned the identity of that part of government which posed the greatest threat to individual liberty. One group of some of its most powerful thinkers — Madison and Hamilton, for example — believed that the great danger was that a democratic legislature threatened to absorb all government power. The other group saw the danger of tyranny in a singular executive, an attitude that had been expressed in the Declaration of Independence's indictment of the King and in the omnipresent fear that, unless he were George Washington, the man who controlled the army could use it to subjugate the people. The objective of separation of powers was to preclude the concentration of legitimate government authority in either Congress or the President. Frequent elections were one device directed to that end. But, as Madison remarked, "experience has taught mankind the necessity of auxiliary precautions."[19]

Thus, Madison, purportedly no friend of factions, nevertheless reduces the essential protection against tyranny to the multiplication of interests:

> Whilst all authority . . . will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority. In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in

17. THE FEDERALIST No. 51, at 347-48 (J. Madison) (J. Cooke ed. 1961).

18. *Id.* at 349.

19. *Id.*

> the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.[20]

Even the most informed of the Founding Fathers did not anticipate the rise of national political parties.

It is to be noted that, just as the judiciary played little part in the theoretical constructs of Montesquieu, Locke, et al., and although the Americans had clearly suffered from their courts' lack of independence, especially the Court of the Vice-Admiralty, the debates and arguments over separation of powers expressed little fear of judicial hegemony. Their worries focused on legislative or executive usurpation of power. Whether the judiciary as used in the tripartite systems of separation was regarded in the image of juries, which seemed to be Montesquieu's idea, or to be like the Courts at Westminster, the Framers were generally of a mind that the executive and the legislature ought to keep their hands off the courts. No concern was displayed that the courts themselves represented a threat to the other two national branches or to the people. (That the federal judiciary was recognized as a threat to another division of powers, that between the nation and the states, is another tale for another time.)[21]

The national judiciary was recognized, as Hamilton put it in *Federalist* No. 78, as the "least dangerous branch."

> It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
>
> . . . [T]he judiciary is beyond comparison the weakest of the three departments of power; . . . it can never attack with success either of the other two; . . . though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter . . . so long as the judiciary remains truly distinct from both the legislative and the executive.[22]

Nevertheless, the judiciary was at the cornerstone of the concept of a "limited constitution" for which separation of powers was to be a guarantee, especially where the concern was to limit the authority of the legislature.

"By a limited Constitution," Hamilton said, again in No. 78,

> I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations

20. *Id.* at 351-52.

21. *See, e.g.*, Kurland, *Federalism and the Federal Courts*, 1986 BENCHMARK 17.

22. THE FEDERALIST No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961).

of particular rights or privileges would amount to nothing.[23]

Thus, the American invention of judicial review became an essential ingredient in the American version of separation of powers. Indeed, it was to become a most important practical element. In doing so, the judiciary may long since have exceeded the limits of its own authority as contemplated by the authors of the Constitution. Such a grand role for judges as presently exercised was certainly not in keeping with their status on either side of the Atlantic at the turn of the eighteenth century. Passing on the validity of legislative acts certainly could not be said to be intrinsically or exclusively a judicial function in 1787; it was equally exercisable by an executive council, as in Pennsylvania and New York, or by one part of the legislature itself. Madison would have provided for congressional — rather than judicial — review of state legislation. But, as experience of the last two hundred years has shown, the American judiciary need not be given power in order to exercise it.

There are some of the highest authority who would not look at the doctrine of separation of powers as based on opposition of one force or interest against another. Perhaps because of the benignity of their own natures, their faith in the goodness of man, an unwillingness to find evil implicit in power, they would see only a specialization of function and comity behind the doctrine. Thus, Edward Levi wrote that the Framers

> did not envision a government in which each branch seeks out confrontation; they hoped the system of checks and balances would achieve a harmony of purposes differently fulfilled. The branches of government were not designed to be at war with one another. The relationship was not to be an adversary one, though to think of it that way has become fashionable.[24]

Alas, "to think of it that way" is not merely a modern fashion. The authors of the Constitution were more cynical, certainly Madison was. Remember the 51st *Federalist:*

> But 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. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. . . .
>
> This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.[25]

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23. *Id.* at 524.

24. Levi, *Some Aspects of Separation of Powers,* 76 COLUM. L. REV. 371, 391 (1976).

25. THE FEDERALIST No. 51, *supra* note 17, at 349.

I should reiterate that the underlying, if unstated, premise of all theories of separation seems to have been a minimalist government. The doctrine has afforded less and less adequate protection for the individual as government has grown into the Leviathan it has become. Constitutional law seems to have remained truer to the goal of separation of powers — the liberty of the people — than to the specific means it adopted toward that end.

When we turn from the framing and the attitude of the Framers to the early execution of the Constitution by the first Congresses, the first Presidents, and the first Supreme Courts, it quickly becomes evident that the doctrine of separation of powers as a practical guide to the division of power was not to be determined by reasoning from principle to application. Rather, like the common law, and constitutional law as a whole, the principle tends to be derived from the actions — sometimes contradictory — that are seen to have invoked this constitutional doctrine. A few examples of our early history should suffice.

Since the question whether a person may serve more than one branch of government at the same time has recently been called into issue as a question of separation of powers, perhaps we can start our capsule history there. During Washington's presidency, John Jay served for six months both as Chief Justice and as ambassador to negotiate the treaty with Great Britain that still bears his name. And John Marshall continued as John Adams' Secretary of State even after his appointment as Chief Justice of the United States.

Of course, from the outset, the first Congress was necessarily precluded from any appointment to the executive branch, since article I, section 6, clause 2, forbade a member of Congress from serving "during the Time for which he was elected" in "any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time." Joint service in Congress and another "Office under the United States" was, in any event, banned by the same clause. But this stricture apparently did not apply to those who served the legislative branch rather than in it. The Secretary of the Treasury, Alexander Hamilton, it will be recalled, was given an office in which he was made responsible to the Congress even though he was "the principal officer in [an] executive department."

The originators of our government seemed somewhat reluctant to join different functions, especially judicial and executive, to the same office. Justices of the Supreme Court refused, as Justices, to pass on veterans' pension claims, although some readily did so as "commis-

sioners."[26] That kind of business did not fall within the description of their powers as set out in article III. Nor would the Justices venture to give Washington an opinion on the construction of a treaty, since such opinions were the duty of "the principal Officer in each of the executive Departments," according to article II, section 2, clause 1.[27]

Similarly, the House of Representatives was rebuffed in its efforts to participate in the making of the Jay treaty, when Washington refused its request for relevant documents.[28] He acknowledged his duty to share those documents with the Senate, whose advice and consent were necessary to the treaty's validity. And when the question was raised in the House whether the Senate's approval should be equally required by law for discharge of the Secretary of State as for his appointment, the argument focused on whether there was implicit in the appointment provision the requirement of a parallel process for discharge. Contrary to modern speculation, the House did not purport to establish a constitutional rule barring a requirement of congressional control on tenure.[29]

Jefferson, confronted with the question of the authority of the United States to negotiate the acquisition of the territory of Louisiana, doubted his capacity to do so because of the absence of a constitutional provision relating to acquiring territory. There was no question here whether the power to act belonged to him or to Congress or to the judicial branch, but whether the people had given it to the national government at all. But this, I submit, was the way that the early members of our government decided questions of allocation of power among the three branches: it was not so much whether the power was legislative, executive, or judicial in nature, but where it was found to have been allocated in the basic document. Separation of powers was not then a rule of decision; it was a construct on which a constitution was framed, not a measure of the validity of a particular government action. What did the Constitution say or imply was the question for these early governors. Thus, when Jefferson's archenemy John Marshall came to justify the acquisition of the territories acquired from France and Spain, he had no trouble resting it in the treaty power and the national government's apparently undivided power to make war.[30]

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26. *See* Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

27. Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488 (H. Johnston ed. 1891).

28. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 112 (1972).

29. *See* P. KURLAND, WATERGATE AND THE CONSTITUTION 75-103 (1978).

30. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542-43 (1828).

It was still early days when the judicial branch, in holding a congressional statute invalid for the first time, declared that it was not the arbiter of the limitations on each branch of government except insofar as the governmental action in question impinged on the rights of an individual and the court had to decide in the context of a case or controversy what the applicable law was. In an opinion that purported to be a self-denying ordinance, *Marbury v. Madison,*[31] the Supreme Court held that it lacked authority to issue an original writ of mandamus although authorized to do so by the first Judiciary Act, because that statute exceeded the grant of powers in article III. The Court resorted not to any general notion of separation of powers but rather to a simple search of the Constitution to see whether the particular power in question was authorized by that document. It clearly asserted that the judiciary had no general oversight powers to determine the propriety of executive behavior. Marshall wrote:

> It is scarcely necessary for the court to disclaim all pretensions to ["jurisdiction" over the "prerogative of the executive"]. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[32]

At the beginning then, I would repeat that it was clear that the doctrine of separation of powers was not a rule of decision. The inefficacy of resorting to a general notion of separation of powers to resolve contests between two branches of government has long since been demonstrated by our history. There are probably many reasons for this. Two of them are patent. First, to resort to the idea that there is a tripartite division of powers, legislative, executive, and judicial, each term self-defining, is to deal with phantasms. If we take the basic arguments usually asserted that it is for the legislature to make the rules governing conduct, for the executive to enforce those rules, and for the judiciary to apply those rules in the resolution of justiciable contests, it soon becomes apparent that it is necessary to government that sometimes the executive and sometimes the judiciary has to create rules, that sometimes the legislature and sometimes the judiciary has to enforce rules, and sometimes the legislature and sometimes the executive has to resolve controversies over the rules. And these variations became more imperative as government became more invasive and com-

31. 5 U.S. (1 Cranch) 137 (1803).

32. 5 U.S. (1 Cranch) at 170.

plex. Moreover, some parts of government have nothing to do with rules of conduct. There is nothing implicit or self-evident in any of the three labels that permits resort to the generalization about separation as a device, especially for the resolution of hard cases.

When we shift our focus from the general proposition to an interpretation of the particular allocations of power specified in the Constitution, we face different difficulties. Most of these difficulties derive from the movement away from the idea that the national government was a government of limited powers to the current recognition that somewhere in the grants of power to the national government is to be found authority to act. The limits on government are not substantive, they are now essentially procedural; they no longer depend on what the Constitution says that any branch can do but what it says that it cannot do. In sum, one would have to say that if the separation of powers doctrine rested on a desire to protect the liberty of the individuals subject to government actions, the protection is no longer to be found in the separation of powers but rather in the Bill of Rights, in the provisions of article I, sections 9 and 10, and in the fourteenth amendment's due process and equal protection clauses. Incidentally, if this be true, it explains in part why the realm of the judiciary has become more and more expansive in the totality of our governance. Limited government, or minimalist government, in Lockean or Harringtonian terms, is a matter of ancient history; its demise is probably coincident with the growth of the idea of implied powers.

Jefferson was pretty long-sighted in foretelling the arguments that would destroy the limits on the grants of power that the Constitution had made. In a letter to Edward Livingston, dated April 30, 1800, he wrote:

> The H. of R. sent us yesterday a bill for incorporating a company to work Roosevelt's copper mines in N. Jersey. I do not know whether it is understood that the Legislature of Jersey was incompetent to this, or merely that we have concurrent legislation under the sweeping clause. Congress are authorized to defend the nation. Ships are necessary for defence; copper is necessary for ships; mines necessary for copper; a company necessary to work mines; and who can doubt this reasoning who has ever played at "This is the House that Jack Built"? Under such a process of filiation of necessities the sweeping clause makes clean work.[33]

Of course, if one reads the "sweeping clause," article I, section 8, clause 18, it readily becomes apparent that the only implier of powers that it recognizes is the Congress, whether the powers to be implied

33. *Reprinted in* 3 THE WRITINGS OF THOMAS JEFFERSON 443, 444 (P. Ford ed. 1896).

are those of the legislature, the executive, or the judiciary. The clause reads: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The last part of the Clause — "and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" — remains to this day among the forgotten provisions of the Constitution of 1787.

In any event when Marshall played "This is the House that Jack Built," just as Jefferson had predicted, in validating the incorporation of the Bank of the United States, he went beyond the sweeping clause in noting the necessity of not confining the Constitution to a strict reading of its terms. In *McCulloch v. Maryland,* he wrote:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.[34]

But who is to decide what those implications are? Each branch for itself? And, when they come into conflict, as they did in Jackson's time over the very bank that Marshall had sanctified in *McCulloch,* where does one find the principle for resolution in the doctrine of divided powers? Is it, as it was then, a question of which branch can bend the other to its will, presumably through the force of public opinion?

Indeed, over our history, the most important contests for power between the legislative and executive branches of the national government have been resolved by confrontation. Each side has weapons at its command to wound and maul the other. The most devastating at Congress' disposition, the power of impeachment, has had to be used with caution. It proved ineffective against the judiciary in the case of Justice Samuel Chase, and a losing and ineffective cause against the first President Johnson. But ordinarily the threat of its use is sufficient, if the only goal is to remove a man from office rather than to change policy. Usually, impeachment and its threat do not cure the excessive aggrandizement of the office, as President Nixon's case clearly demonstrates. The judicial power of injunction, the legislative

34. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315, 404 (1819).

power over appropriations and of contempt, the executive power to ignore challenges by other branches to its power by appeals to the electorate and its control of disbursements and appointments have been the usual weapons employed. Compromise has more often prevailed than total victory by either contestant. But it is in this way that the separation of powers has tended to work, not in terms of pure doctrine, nor yet in terms of what assures the liberties of the people.

Where the alleged overreaching of one branch or another impinges on the rights of a person, association, or corporation, the judicial branch has more and more often been called on to determine whether the challenged authority is legitimate. With the extension of national power to a general hegemony over the lives of the people living within its domain, however, the question thus raised ordinarily is not whether the governmental power exists, but by which office can it be exercised. For this reason, the claims resolved by judicial action have tended to be of not much moment because, at least as between the legislature and the executive, whichever choice the judiciary makes is subject to direct renegotiation by the principals. Thus, for example, when the Supreme Court declares the legislative veto unconstitutional, as it did in *INS v. Chadha,*[35] the legislative choice is to submit or to withdraw the delegation that was conditioned on the legislative veto. Were it not so weak-willed, Congress would reclaim its legislative power, most of which it has delegated without any grumbling about separation of powers. When the Court declares that the President has an executive privilege to withhold documents from legislative scrutiny, as it did in dicta in *United States v. Nixon,*[36] without a phrase or scintilla of legislative history in the Constitution or its origins to support it, the legislature can still resort to its other powers to compel delivery. For the most part, however, what Learned Hand said in 1942 remains true today:

> A constitution is primarily an instrument to distribute political power; and so far as it is, it is hard to escape the necessity of some tribunal with authority to declare when the prescribed distribution has been disturbed. . . . And . . . granted the necessity of some such authority, probably independent judges were the most likely to do the job well. Besides, the strains that decisions on these questions set up are not ordinarily dangerous to the social structure. For the most part the interests involved are only the sensibilities of the officials whose provinces they mark out, and usually their resentments have no grave seismic

35. 462 U.S. 919 (1983).

36. 418 U.S. 683, 705-08 (1974).

consequences.[37]

Perhaps if the question had been whether there was or was not government power to act, Hand might not have been so cavalier about it as when it was merely a question of which official should assert the power. The demise of limited national government has demeaned many constitutional questions, not least those of division of powers. In part, I suppose this is true because the office of the presidency has grown in size and so much of the so-called executive power is exercised by multitudes in the bureaucracy. The result is that the enhancement of the executive branch does not seem to be fostering the lone man on the white horse. Nevertheless, my instincts — perhaps because of my age — are with Mr. Justice Jackson, when he said in the *Steel Seizure Case:* "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."[38]

To this point, I have concentrated on the origins and development of the constitutional concept of separation of powers. If the Founding Fathers had been right, that concept should have limited the growth of each branch lest any of them become dominant. If I turn to the question of the growth of each of the three divisions, I think I have to say that the notion of separation has had little or nothing to do with it. Contrary to the expectations of such as Madison and Jefferson, far from bringing all government power within its ambit, the legislative branch has become the least of the three both as threat to and protector of the people's liberty. The executive branch has become imperial and imperious. And the judiciary has developed from that "98-lb. weakling" into the muscular giant, just as the ads of Charles Atlas said he could in the pulp magazines of yesteryear.

It is true that the legislative power and the executive power have been like occupants of opposite ends of a seesaw: as one rises, the other declines. It is equally true that the balance has not remained constant, so that for much of our earlier history legislative power was the more dominant.[39] But for the last half century, the executive has been up and the legislature down.

Explanations are not hard to come by. The first remains the growth of national government power so that almost nothing is beyond its scope. Early Congresses were in session for very short peri-

37. L. HAND, *The Contribution of an Independent Judiciary to Civilization,* in THE SPIRIT OF LIBERTY 155, 159-60 (I. Dilliard ed. 1960).

38. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (concurring opinion).

39. W. WILSON, CONGRESSIONAL GOVERNMENT (Meridian ed. 1956).

ods of time. Even the first Congress, which had to establish the government, produced a volume of statutes that may best be described as miniscule. Today the Congress is almost never out of session, and its output fills volumes that can barely be lifted. But the result has been that the legislation that passes tends to be merely an outline of the problem plus a delegation of power to make the necessary rules to effectuate solutions. Congress has thus given away most of its authority to make the rules for the governance of society. Second, there is an absence of discipline among the 535 members of Congress. It is a huge body without a head. Most of its legislation does not originate within Congress but is a response to demands or instructions from executive authorities. Too much congressional time is spent as agents of constitutents seeking relief in the myriad of government agencies that Congress has created but does not control. The rest of its time seems to be spent in trying to oversee the execution of the laws by way of investigatory hearings which, in theory, are held to help frame legislation but which, in fact, are more devoted to exposure than to cure. The image of Gulliver among the Lilliputians readily comes to mind.

The executive branch, on the other hand, has burgeoned. It constantly grows stronger. Part of the cause for the disparity was well stated by Mr. Justice Jackson in the *Steel Seizure Case:*

> Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.
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> . . . .
>
> But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.[40]

It might fairly be said that if any one thing was anathema to the Founding Fathers, or most of them, it was the notion of the royal prerogative. This much of the Declaration of Independence clearly

40. 343 U.S. at 653-54 (concurring opinion).

was a well-accepted lesson. But who, today, would gainsay the words of Louis Heren in his 1968 book *The New American Commonwealth:*

> The modern American presidency can be compared with the British monarchy as it existed for a century or more after the signing of Magna Carta in 1215. . . .
>
> . . . .
>
> . . . Indeed, it can be said that the main difference between the modern American President and a medieval monarch is that there has been a steady increase rather than a diminution of his power. In comparative historical terms the United States has been moving steadily backward.[41]

In part, the rise of the presidency can be attributed to the emergence of the United States as the prime actor on the stage of world affairs. Whether this should be dated from the Spanish-American War, or from World War I, it must certainly be acknowledged as a *fait accompli* since World War II. Wars create conditions in which even so reticent a president as Abraham Lincoln will place necessities over the niceties of political or constitutional theories. By the time of the second Roosevelt, the necessity for marshaling the forces of the nation toward the single goal of victory consolidated powers in the executive. We have been in a continuing crisis of foreign affairs ever since. The exercise of what Locke called the federative power — not one of the three divisions to which we have become accustomed — he placed in the executive branch by necessity. The Supreme Court has waffled about whether the power of foreign affairs is legislative or executive or some combination of the two. Certainly the recent decision in *Dames & Moore v. Regan*[42] suggested that the President's action in the Iranian assets case was acquiesced in by Congress, but it takes a lot of judicial legerdemain to make this convincing. Whether presidential power is juridically justified, the certainty is that it is exercised. Presidents have involved us in two major wars in Korea and Viet Nam without a declaration, if without the objection of Congress.

Clinton Rossiter labeled the presidency of Franklin Delano Roosevelt, with approbation, a "constitutional dictatorship."[43] He, at least, saw little left of a tripartite division of power in the national government. Another historian, Arthur Schlesinger, saw in the Nixon administration an "imperial presidency,"[44] and it would be hard to argue that power in the White House has ebbed since that time. The point is not that all national government power rests in the executive

41. L. HEREN, THE NEW AMERICAN COMMONWEALTH 8-9 (1968).

42. 453 U.S. 654 (1981).

43. C. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 255-87 (1948).

44. A. SCHLESINGER, THE IMPERIAL PRESIDENCY 187-98 (1973).

branch, but only that as between Congress and the President the latter has become clearly dominant and there is no evidence of a movement of the seesaw in the near future.

In the middle of the nineteenth century, the Supreme Court described itself as "equal in origin and equal in title to the legislative and executive branches of the government."[45] That might have been a bit of braggadocio at the time. It is a claim easily defended today.

Whence comes the explanation? I suppose we can start with Jefferson's early insight that it would be the Supreme Court that would channel state power into federal hands, from which it might follow that the court implicitly lays claim to part of the national power that is largely of its own creation. That is perhaps too subtle an argument. The fact is, however, that the Court, over the years, has been able to make a greater claim to public support than either of the two political branches. It has consistently wielded a wider and wider power of judicial review. After a hesitant start in *Marbury v. Madison,*[46] and a disastrous effort in *Dred Scott v. Sandford,*[47] the Court has been more and more willing to fashion new constitutional rules limiting both national and state action, with less and less reliance on the terms of the Constitution, its origins, or even the Court's own precedents. More and more the Justices seem to be guided by principles of social policy derived from their own innards. So long as both of the other branches of government do not seriously attempt to bring them to book, this judicial arrogance is as unlikely to be abated as is presidential arrogance.

Nor is the accretion of power solely in the constitutional field: it is at least as much to be found in the remedial powers exercised. And it would seem that the people are turning to the courts more and more rather than to the political branches for relief of their individual problems. One of our most eminent federal judges expressed the thought that resort to the judiciary by the citizenry is as much due to lack of faith in the other branches as to faith in the courts. In his 1969 book, *The Organization of Judicial Power in the United States,* Judge Carl McGowan wrote:

> This [resort to the courts] implies a deepening disillusionment with both the efficacy and the speed of achieving reform through direct political action, by appeals to legislators or to executive officeholders backed up by the threat of the vote. The mood seems to be to seek relief immediately in court and not to wait for the next election. Although many thoughtful — and by no means illiberal — persons have sober reserva-

45. Gordon v. United States, 117 U.S. 697, 701 (1864).

46. 5 U.S. (1 Cranch) 137 (1803).

47. 60 U.S. (19 How.) 393 (1857).

> tions about this transfer of political action from the ballot box to the courts, there is little evidence that the ordinary citizen is unduly perturbed about judicial intervention. He rather appears to like the idea that there is one branch of the government which can and will deal quickly and effectively with shortcomings in laws or obtuseness in their administration. This may conceivably not be in the long-range interest of a democratic society organized on the assumptions underlying our own, but the courts are confronted with the short-range problem of skyrocketing dockets and the new and novel issues intruded upon their attention.[48]

In addition to the fact that the courts seem to be the place to go because they tend to give the customer what he wants, making for popularity and power if not sensibility and good judgment, the growth of the courts' authority derives from the same source as that of the executive. An extraordinarily large part of the judiciary's power has been delegated to it by Congress. Legislation that, in effect, leaves its meaning and effect to be determined by the courts is almost as prolific as that delegating authority to the administrative agencies.

Finally, I would suggest, the growth in the stature of the judicial branch derives directly from the failure of the principle of separation of powers to effectuate the objective behind its invocation. The powers of government were to be separated in order to protect the liberty of the people. With the growth of government, the safeguard thought to be inherent in separation of powers has largely failed. The country has fallen back on the specific negatives in the Constitution which, as I have already suggested, are to be found in the Bill of Rights, the provisions of article I, sections 9 and 10, and the clauses of the fourteenth amendment. The enforcement of these restraints has fallen largely to the judiciary; neither the legislature nor the executive seems capable of abiding by these negative commandments without help from the judiciary. Acting as surrogate for the original purpose of the separation of powers concept is enough to enlarge the ego and the image. Indeed, there are times when it seems that there is nothing between the potential tyranny of the political branches and the liberty of the people but a vigilant judicial branch. It is to be hoped if not expected that the judiciary will have the intelligence, good will, and judgment not to go the way of all flesh.

Madison, it will be recalled, sought to assure individual freedom — the catchword was then "liberty" — by the devices of dividing government between nation and states and subdividing federal government among its branches. These divisions were essentially substantive in nature. Federalism and separation of powers as they were known to

48. C. MCGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES 82 (1969).

the Founders have been retained largely in name, if at all. Essentially, we rely on other devices to try to avoid the tyranny at which the two constitutional principles were aimed. Among them have been the origins and development of the national party system and the pretensions of the press to being a fourth branch of government.

In fact, the problems of government power are distinctly different today from what they were in 1787. We have moved from the minimalist form of government to what Felix Frankfurter once euphemistically labeled "the service state." Almost no subject of human behavior or human relationships can now be said to be beyond the ken of government. The last stronghold of individual freedom, the relation of man to his God, is even now becoming a subject for governmental ordering. Moreover, we suffer more and more from what Mr. Justice Brandeis called the "curse of bigness." This was translated by Judge Learned Hand this way:

> As the social group grows too large for mutual contact and appraisal, life quickly begins to lose its flavor and significance. Among multitudes relations must become standardized; to standardize is to generalize, and to generalize is to ignore all those authentic features which mark, and which indeed alone create, an individual. Not only is there no compensation for our losses, but most of our positive ills have directly resulted from great size. With it has indeed come the magic of modern communication and quick transport; but out of these has come the sinister apparatus of mass suggestion and mass production. Such devices, always tending more and more to reduce us to a common model, subject us — our hard-won immunity now gone — to epidemics of hallowed catchword and formula. The herd is regaining its ancient and evil primacy; civilization is being reversed, for it has consisted of exactly the opposite process of individualization — witness the history of law and morals.[49]

Jefferson would have said not that civilization was being reversed but that liberty was being lost.

We are left now not with substantive limitations against government tyranny, but with procedural ones. We have become dependent for what freedoms are left to us on another underlying principle of the Constitution — like federalism and separation of powers not mentioned *in haec verba* in the document — one that is also an inheritance from the English, "the rule of law." The rule of law requires that government not act except according to preestablished rule, that it apply the rule according to preestablished procedure, and that the same rule be applied equally to all. Obviously, like federalism and the sepa-

49. L. HAND, *Mr. Justice Brandeis,* in THE SPIRIT OF LIBERTY 166, 170-71 (I. Dilliard ed. 1960).

ration of powers, the concept of the rule of law is an ideal. It is the last best hope for avoiding the arbitrary tyranny of government.

Bernard Bailyn demonstrated that the essential cause of the American Revolution was the "corruption" of the English Constitution by King George III and his ministry.[50] At its two hundredth anniversary, the American Constitution may well be suffering a similar fate. It may not be amiss to recall the implications of Benjamin Franklin's words when he emerged from the 1787 Convention and was asked what form of government it had given the American people. He replied: "A republic, if you can keep it."[51]

50. *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

51. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 85 (M. Farrand ed. 1911).