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1993

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### Recommended Citation

Philip B. Kurland, "Structuring the Separation of Powers," 8 American University Journal of International Law and Policy 483 (1993).

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# STRUCTURING THE SEPARATION OF POWERS

Philip B. Kurland\*

What I propose to do is to reiterate the ideas — or some of them — of previous speakers and commentators thus, in the vernacular, giving a slightly different spin to issues on which we seem to be largely in agreement.

I join with Professor Sam Dash<sup>1</sup> in emphasizing that a constitution is not made solely of words or doctrines but of the individuals and personalities that gave and give life and meaning to the constitutional terminology. Or to use the late Professor Paul Freund's meaningful metaphor, the American Constitution has been and still is both a "structure and an organism"; it therefore cannot be treated simply as an "upper-case" statute<sup>2</sup> nor, as Judge Learned Hand might have described it, as a "mere counsel of moderation."<sup>3</sup> Parts of our Constitution, like every constitution, use words and phrases that resonate with meanings derived from our political and social history and almost all bear the imprint of formulation of meaning by common-law judges. Parts of the Constitution can necessarily be understood only through comprehension of the contexts which gave birth to them.

For these reasons and others, no constitution, however, well it may have served one nation in one era, can simply be lifted bodily and adapted for use by another nation in another era, unless there is a mechanism for adaptation of the old words to the new or different circumstances. Mimicry of the United States Constitution is not likely to get South Africa a useable constitution, however, much may be learned

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1. Sam Dash is a Professor at Georgetown University Law Center, Chairman of the ABA Task Force On Criminal Justice, and member of the ABA Standing Committee On Ethics and Professionalism.

2. Philip B. Kurland, *The Rise and Fall of The "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 592 (1986).

3. Learned Hand, *The Contribution Of An Independent Judiciary To Civilization*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 119 (Vintage Books ed., 1959).

from an understanding of our experience, which is all we can give you. In short, we can offer no *vade mecum* for a South African Constitution, we can only report on our own experiences in attempting to develop one that will further the goals of a democratic republic dedicated to freedom for all.

Let me, if you will, rehearse in the most desultory of fashions the creation of our own Constitution some two hundred and fifteen years ago. As the birth of the American Constitution fades into a distant past, we become more and more bemused by the mythical and heroic aspects of the creation rather than its realities. More and more we tend to think of the Founders as Platonic designers of a utopian model, an abstract idealization of what a perfect government should look like. We read into their efforts the ideas and concepts of political philosophers whose work necessarily smells of the lamp, thinkers rather than toilers, scholars rather than statesmen, romantics rather than realists.

Certainly it is true that the 1787 conventioners were, on the whole, learned men. Most of them had an education — long on learning even where short on schooling. Surely their ideas at the Convention were influenced by Locke and Aristotle; Harrington, Hobbes, and Plato; Hume and Montesquieu and Rousseau. I think it is a fair reading of the record, however, to say that the Founders took their lessons more from history than from philosophy, as they sought to create a government strong enough to assure its citizens protection for their lives, liberty, and property against foreign and domestic enemies, but not so strong as itself to threaten the freedoms for which the American Revolution was fought.

The history that proved most relevant to them was the history that was most recent. Some lessons had been taught by an English monarchy and aristocracy, where the people had to rely on *noblesse oblige* to secure their liberties. The experiments in self-government, in which the new States had engaged in the preceding decade, provided even more important lessons. And so most of the provisions of the 1787 Constitution were adapted from the Constitutions of the States, in turn largely based on the amorphous English "constitution," but with due concern to avoid the evils, many of which were catalogued in the Declaration of 1776. If we are to try to understand what the Framers promulgated, we should look more closely at what they did than at the ideas of those we have labelled their mentors.

Indeed, if there was a guiding spirit at the Convention, it was not so much that of Locke or Hobbes or Hume or Harrington or Montesquieu, none of whom — to coin a phrase — ever tried to balance a government budget. That is to say that none was a politician. It was the spirit

of a politician, George Savile, Lord Halifax, the "Trimmer," who sought to educe through compromise practical answers to very practical problems of statecraft. The Founders were hard-headed men, experienced in government as well as revolution, learned in history as well as philosophy, but as far from the French *philosophes* as from Napoleon.

The Constitution was what constitutions are supposed to be, a frame of government, creating a structure and assigning and limiting powers to be exercised by various offices and officers in the national government and, to a more limited extent, affecting the powers of the various State governments as well. The Constitution was not, as it has since been thought to be, a catalogue of individual rights. The new government did not create new rights in the people — not even by the addition of the so-called Bill of Rights, all but one of which were known to the common law even if these rights were not yet fully developed.<sup>4</sup> It confirmed rights that the people of the new nation already had and had claimed, and it provided machinery for the protection and enforcement of some of those rights, but not limited to those mentioned in the fundamental documents or to the scope they had yet realized.

The watchword of the Framers was liberty and the machinery of government was created for the purpose of assuring that liberty. Three devices sought to secure the Constitution's objectives: first, by establishing a government of the people, by the people, and for the people, *i.e.*, a republican government; second, by dissemination and limitation of powers of governance, generally if not always appropriately labeled federalism and separation of powers. The third leg of the tripod was created implicitly if not explicitly, by affording machinery for the effectuation of the rule of law. Such a rubric that was not to come into constitutional language for sometime, but its substance was patent in the debates of the period, and not least in the total rejection of the hated concept of the royal prerogative.

Before I go further, I would remind you that while we can be certain about the language that emerged from the 1787 Convention, we have no objective record of what occurred on the floor, and less of the bargaining and arguments between and among delegates not directly a part of the parliamentary proceedings. The Convention met from May 25th to September 17th, 1787 in secret session. And we probably owe the existence of the Constitution to the observance of the vows of secrecy that

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4. See generally Philip B. Kurland, *Religion and the Constitution*, 20 U.C. DAVIS L. REV. 705 (1987) (describing the ideas behind the freedom of religion clauses and the separation of church and state).

the delegates took and kept. For the rifts and schisms that divided the Convention might never have been repaired, as they were, if positions once assumed had become irreversible because of the glare of publicity. We know from Madison's notes, first published in 1840, that the Convention almost foundered several times. The words of the document, then, are solid bases for argument; inferences from other recorded stances of individuals or groups as to the true meaning of those words are necessarily less cogent.

As to the first leg of the constitutional tripod, its commitment to self-government through representative government, there are certain things about which we can be certain. Aristotle's three alternatives, democracy, aristocracy, and monarchy,<sup>5</sup> were all anathema. The goal was a republic: its principal organ was a representative assembly.<sup>6</sup> It was argued that no true republic could exist in a large nation, certainly not in one of continental dimensions. That was but one of the teachings of Montesquieu<sup>7</sup> rejected by the Convention. Hamilton and Madison, among others, successfully argued otherwise. Hamilton asserted that the defects in Montesquieu's historic examples of failed republics derived not from greatness of size but from their diminutive nature, citing "the petty republics of Greece and Italy."<sup>8</sup> Madison demonstrated his political genius in THE FEDERALIST Nos. 10 and 51,<sup>9</sup> where he persuasively argued that the safeguard of a republic is to be found in the defeat of faction which could be accomplished by extensive diversity of interests among the people, a sufficient diversity being possible only in a domain of extensive dimensions.

Again, it must be recalled that in opting for a representative assembly as the keystone of the new government, the delegates at Philadelphia were adhering to a structure which they already knew. The entire government under the Articles of Confederation consisted of the Continental Congress. It was one thing, however, to reach agreement on a represen-

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5. ARISTOTLE, NICOMACHEAN ETHICS, reprinted in THE COMPLETE WORKS OF ARISTOTLE 1729 (Jonathan Barnes ed., 1984).

6. See generally Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679 (describing the goals of the Framers of the Constitution).

7. See generally Matthew P. Bergman, *Montesquieu's Theory of Government and The Framing of The American Constitution*, 18 PEPP. L. REV. 1 (1990) (outlining the influence that the theories of Montesquieu had on the Constitution).

8. THE FEDERALIST No. 9, at 50-53 (Alexander Hamilton) (Jacob Cooke ed., 1961).

9. THE FEDERALIST No. 10, at 64-65 (James Madison) (Jacob Cooke ed., 1961); THE FEDERALIST No. 51, at 347-48 (James Madison) (Jacob Cooke ed., 1961).

tative assembly as the central feature in the framing of the new republic. It was quite another to forge agreement on a system of representation. The simplicities of the conceptions of universal suffrage or of the slogan of "one-man, one vote," were still waiting to be born. They were not to be found in any of the States. Nothing roiled the Convention more often or for longer periods of time than the controversies over representation.

The issue whether representation in the legislature should be measured by population or property, on the one hand, or by States on the other, created a principal contest that almost ended the Convention early. Both positions rested on arguments labeled "equality." Representation in the Continental Congress had been by State, as it was in the Convention itself. On the other hand, it was clear that the burden of conducting the Revolution and the attempts at salvaging a nation from the depredations of war had fallen primarily on the large States with their larger populations and greater wealth. And if the Confederation were to dissolve, only the larger States could be independently viable. Here as elsewhere, the practicalities of compromise subordinated arguments of principle. The "great compromise" of the Convention bifurcated the national assembly, with the House of Representatives apportioned among the States approximately by population, while the States were to be represented equally in the Senate.

Insofar as the "corruption" of the English Constitution was in no small measure attributed to the rotten borough system of representation in the House of Commons and as the aristocratic nature of the House of Lords, the "great compromise" was a sell-out of the Revolution's principles. From the beginning, proportionality of representation in the American Congress has been skewed by allowing two Senators even for States that later lacked sufficient population to qualify for a single representative. Another hard-fought battle resulted in a similar compromise skewing the proportionality of representation. Article I, section 2, clause 3 of the Constitution provided that "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons."<sup>10</sup> Counting a slave as three-fifths of a person either overweighed or underweighed the representation of the slave states depending on whether slaves were, constitutionally, persons or property.

Apportionment of representatives among the States was not the only basic compromise in devising a republican form of government. Al-

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10. U.S. CONST. art. I, § 2, cl. 3.

though controversy raged over what qualifications should be required of those who were to hold elective office, the Convention agreed to limit access to office by prescribing only three conditions: a minimum age, a term of citizenship, and residence in the State when elected.<sup>11</sup> But agreement was not so easily secured regarding the qualifications that should be imposed for those who could vote for the office holders. Some thought that representation should mirror the population. For some, only the propertied had enough demonstrable interest to justify their participation in the franchise. Others would insist on long term residence in the community whose representative they were to choose. The terms of office also created a source of conflict. Tying the representatives closely to the people they were to represent was an axiom that few contested. Biannual elections were grudgingly conceded against the very strong assertion that annual elections were the only way to keep the people in control. A demand that elected officials not be permitted to serve consecutive terms was tabled but lost.

There was also persistent controversy over the proper ratio between population and representatives. As Madison suggested in THE FEDERALIST No. 10: "however small the Republic may be, the Representatives must be raised to a certain number to guard against the Cabals of a few; . . . however large it may be, it must be limited to a certain number to guard against the confusion of a multitude."<sup>12</sup> In No. 32, Alexander Hamilton added, that a large number may make "the countenance of the government . . . more democratic; but the soul that animated it will become more oligarchic."<sup>13</sup> On the ultimate question of who should choose the representatives, the Convention bucked the question to the States by providing in Article I, section 2: "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."<sup>14</sup> The Convention ambiguously left some power of oversight in Congress, by providing in Article I, section 4: "The Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof; but the

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11. *Id.* at cl. 2.

12. THE FEDERALIST No. 10, at 64-65 (James Madison) (Jacob Cooke ed., 1961).

13. THE FEDERALIST No. 32, at 201 (Alexander Hamilton) (Jacob Cooke ed., 1961).

14. U.S. CONST. art. I, § 2, cl. 1. The individual states at the time, and for some time to come, often adopted "pauper exclusions," whereby propertyless citizens were disenfranchised. See generally Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989).

Congress may at any time by Law make or alter such Regulations.”<sup>15</sup> We have not yet discovered how elastic the word “manner” was intended to be.

The experimental nature of the Founders’ effort to create a government of the people, by the people, and for the people is evident from the process of creation. They proceeded by way of adaptations of the structures of the House of Commons and the legislatures of States. The English experience taught them, they thought, the necessity of barring legislators from holding other government offices and from being allowed to create or enhance offices which they could then themselves fill. This form of corruption of the English Constitution under the Georges — multiple office holding by members of Parliament — caused the nation deliberately to avoid cabinet government.

The Founders recognized a republican government founded on popular election as a necessary, if not a sufficient, condition for the political liberty that was their goal. They should be credited with building a republican government as well as they could. The deficiencies of representative government cannot be said to have been caused by the Constitution. The eighteenth-century politicians understood, probably better than we, that responsible self-government requires an electorate that is both interested and knowledgeable and representatives that are both competent and virtuous. If we, the people, lack the necessary interest about government business or adequate education in self-government, or if we choose incompetent or venal delegates, “the fault, dear Brutus, lies” not in the Constitution, “but in ourselves.”<sup>16</sup> As John Stuart Mill once said:

Government consists of acts done by human beings; and if the agents, or those who choose the agents, or those to whom the agents are responsible, or lookers-on whose opinions ought to influence and check these, are mere masses of stupidity, and baleful prejudice, every operation of government will go wrong.<sup>17</sup>

The division of governmental authority is the second of the three principal bases on which the Constitution of 1787 stands. To the Founders, history testified that concentration of power was necessarily corrosive of the people’s liberty. It was an axiom of the Convention that

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15. U.S. CONST. art. I, § 4, cl. 1.

16. WILLIAM SHAKESPEARE, *THE TRAGEDY OF JULIUS CAESAR* act 1, sc. 2.

17. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 171 (Curran V. Shields ed., 1956) (1861).



authority had to be divided if its abuses were to be contained.

The American Constitution called for division of governmental power in two distinct ways. It divided governmental authority over the people between the government of the new nation and the governments of the States. The central government was proposed as a government of limited, delegated powers, almost all of which were given to Congress and listed in Article I, section 8. The residue of governing authority was, as the Tenth Amendment sought to make pellucid, "reserved to the States respectively, or to the people."<sup>18</sup> The second form of division of government authority is labelled separation of powers within the national government. While both ideas, that of federalism and that of separation of powers had lengthy histories, each was given a novel form under the new Constitution. Most, if not all, federal states known to history to the time of the adoption of the Constitution were, like the government under the Articles of Confederation, leagues of sovereign states which delegated certain powers, mostly external ones, for execution by the central power. These leagues dealt with the people within their domain only through the governments joined in the confederation. This was the nature of the national government under the Articles of Confederation; it had no direct authority over the people.

The new Constitution changed this. The representation in the national government was of the people, not of the States;<sup>19</sup> the national government was authorized to impose taxes on the people;<sup>20</sup> the power over military and naval forces was to be national to the extent that the national government, *i.e.*, the Congress, wanted it that way.<sup>21</sup> All sorts of purely domestic activities were placed within the ken of the central government, from maintaining post offices and post roads,<sup>22</sup> through control over patent and copyright monopolies,<sup>23</sup> the naturalization of citizens,<sup>24</sup> bankruptcy,<sup>25</sup> and not least, the power over commerce with

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18. U.S. CONST. amend. X.

19. U.S. CONST. pmb. ("We the People . . . establish this Constitution for the United States of America"); U.S. CONST. art. I, § 2 (requiring Representatives to be elected by popular vote); U.S. CONST. amend. XVII (requiring Senators to be elected by popular vote).

20. U.S. CONST. art. I, § 8, cl. 1.

21. U.S. CONST. art. I, § 8, cl. 14.

22. U.S. CONST. art. I, § 8, cl. 7.

23. U.S. CONST. art. I, § 8, cl. 8.

24. U.S. CONST. art. I, § 8, cl. 4.

25. *Id.*

foreign nations and among the several States.<sup>26</sup> And Article III authorized the creation of an extensive federal judicial system which, in fact, would later play the most important role in subordinating the States to the national government.

The American conception of federalism has now substantially replaced the old notion of a mere alliance. Professor K.C. Wheare's authoritative twentieth century British text on federalism states: "What is necessary for the federal principle is . . . that the general government, like the regional governments, should operate directly upon the people."<sup>27</sup> It was not the original plan, however much some may have worried about it, that the central government should displace the State governments. It was planned rather that they would counterbalance each other, so that neither could establish hegemony over the people. It turned out, as many anti-Federalists predicted at the time, to be a short-lived hope.

There was strong feeling in and out of the 1787 Convention and the State ratifying conventions that the closer the government was to the people, the greater the control over the government that the people could exercise. Jefferson would have had major governmental operations at the ward level; what could not be properly dealt with locally might require county government or even state rule.<sup>28</sup> National government would function only in those few areas where it alone was capable of functioning. Thus would liberty be preserved. Madison, on the other hand, argued that local governments would create a centrifugal force that would tear the nation apart.<sup>29</sup> Hamilton was a true nationalist who sanguinely contemplated the ascension of the central government and the withering of the States.<sup>30</sup>

Looking back over two hundred years, it is easy to recognize that

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26. U.S. CONST. art. I, § 8, cl. 3.

27. K.C. WHEARE, *FEDERAL GOVERNMENT* 14 (4th ed. 1964).

28. C. PATTERSON, *THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON* 106-07 (1953) (discussing Jefferson's belief that a strong national government would rule irresponsibly and create an expensive bureaucracy).

29. *THE PAPERS OF JAMES MADISON* (Robert A. Rutland, Charles F. Hobson eds., 1977) (noting that such confederacies had demonstrated "the greater tendency for anarchy than to tyranny; to a disobedience of the members than to usurpation of the federal head").

30. See generally E. Earle, *Introduction to THE FEDERALIST* x-xiii (1976) (noting that Hamilton advocated the idea that the federal government should have all powers not expressly denied to it); see also Alpheus T. Mason, *The Federalist — A Split Personality*, 57 AM. HIST. REV. 623 (1952) (detailing differences between Madison's and Hamilton's Federalist Papers).

federalism as contemplated by the Founders has long since expired. It is not that there is no realm left in which State Governments can operate, for surely we are today as overburdened by state and local regulations and bureaucracies as by national ones. But there is today no longer any substantial power that the States can call their own. Almost every power that the States now exercise requires either the acquiescence or subsidy of the national government. Lip service is still paid by politicians to the idea of federalism; but the stark reality is that we are a single nation with substantive governmental powers concentrated in Washington. Federalism, as a device for preserving liberty by dividing power, has failed.

What has paraded for two centuries in the United States as separation of powers, describing a division of authority within the national government, is instead a novel phenomenon as established by the Constitution. In fact, the critics of the Constitution, as Madison noticed in *THE FEDERALIST* No. 47, asserted that the Constitution was defective because it did not provide for separation of powers.<sup>31</sup> And John Adams, author of the Massachusetts Constitution wherein that doctrine took pride of place, lamented throughout his life — frequently to Jefferson — that the essential weakness of the Constitution was its failure to embody the notion of separation of powers.<sup>32</sup>

The basic document did assign different functions to different branches and offices, but it refused to create unmitigated monopolies. Thus, the legislative power was inhibited by the veto authority,<sup>33</sup> presidential appointments and treaties required Senatorial acquiescence,<sup>34</sup> and the judiciary — except for the Supreme Court — would not exist except with legislative authorization,<sup>35</sup> while all national court jurisdiction was subjected to congressional exceptions.<sup>36</sup> Checks and balances, as provided by the Constitution, meant not monopolies of power within a branch or office, which was implied by the notion of separation of powers, but the necessity for joint action between two or more branches before government power could become untethered. In *THE FEDERALIST* No.

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31. *THE FEDERALIST* No. 47 (James Madison) (Clinton Rossiter ed., 1961).

32. See, e.g., JOHN ADAMS, 4 *WORKS OF JOHN ADAMS* 488, 582 (Charles F. Adams ed., 1851) (arguing in favor of separation of powers to temper the strength of the executive branch); Malcolm Sharp, *The Classical American Doctrine of Separation of Powers*, 2 *U. CHI. L. REV.* 385, 396-98 (1935) (arguing that Adams believed separation of powers necessary to protect against tyrannical rule).

33. U.S. CONST. art. I, § 7, cl. 2.

34. U.S. CONST. art. II, § 2, cl. 2.

35. U.S. CONST. art. I, § 8, cl. 9.

36. U.S. CONST. art. III, § 2, cl. 1.

51, Madison described the constitutional program as "so contriving the interior structure of the government as that its several constituent parts may, in their mutual relations, be the means of keeping each other in their proper places."<sup>37</sup>

It must be remembered that fundamental differences divided the Framers that were never mediated at the Convention. One such difference 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 from tyranny of the majority, a democratic legislature that threatened to absorb all government power.<sup>38</sup> Another group saw the danger of tyranny in a singular executive, an attitude that has 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 led the army could use it to subjugate the people. The concept of separation of powers sought, as its objective, to prevent 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 for auxiliary precautions."<sup>39</sup>

Thus, Madison, purportedly no friend of factions, nevertheless reduced 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 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 that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.<sup>40</sup>

Even the most informed of the Founding Fathers did not then antic-

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37. THE FEDERALIST No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

38. THE FEDERALIST No. 10, at 57 (James Madison) (E. Earle ed., 1978) (stating that the majority may "sacrifice to its ruling passion or interest both the public good and the rights of other citizens"); THE FEDERALIST No. 78, at 579-80 (Alexander Hamilton) (Jacob Cooke ed., 1961) (arguing that an independent judiciary is necessary to protect minorities from majority oppression).

39. THE FEDERALIST No. 51, at 355-56 (James Madison) (Clinton Rossiter ed., 1961).

40. *Id.* at 324-25.

ipate the rise of national political parties and their capacity to join a multiplicity of interests into a tyrannical faction. I should also note that the underlying, if unstated, premise of all theories of separation of powers, seems to have been a minimalist government. The doctrine has become less and less adequate a protection for the individual as American government has grown into the Leviathan it has become.

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, with the result 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 stated in the *Steel Seizure Case*:<sup>41</sup> “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.”<sup>42</sup>

If the Founding Fathers had been right, the constitutional concept of separation of powers should have limited the growth of each branch lest any of them become dominant. 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 “90-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 see-saw: as one rises, the other declines. It is equally true that the balance has not remained constant, so that during much of our earlier history, legislative power was the more dominant. But for the last-half century, the executive has been up and the legislature down.

Explanations are not hard to come by. The first is the growth of national government power, so that almost nothing is beyond its scope. 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

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41. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring).

42. *Youngstown*, 343 U.S. at 655.

not originate within Congress but is a response to demands or instructions from executive authorities. Too much congressional time is spent as agents of constituents 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 disorganized Lilliputians readily comes to mind.

The executive branch, on the other hand, has burgeoned. It grows stronger all the time. Part of the cause for the discrepancy was again 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 communication. 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 . . .<sup>43</sup>

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 was a well-accepted lesson. But who, today, would gainsay the words of Louis Heren of THE TIMES of London in his 1968 book THE NEW AMERICAN COMMONWEALTH, where he observed:

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 backwards.<sup>44</sup>

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.

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43. *Id.* at 654.

44. LOUIS HEREN, THE NEW AMERICAN COMMONWEALTH 8-9 (1968).

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 marshalling the forces of the nation towards 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.

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. Federalism and separation of powers as they were known to 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 — now itself a disease rather than a cure — and the pretensions of the press to being a fourth branch of government, itself more self-righteous than righteous.

The problems of government power are distinctly different today from what they were in 1787. We suffer essentially more and more in and out of government from what Mr. Justice Brandeis called the “curse of bigness.”<sup>45</sup> Yet most Americans seem to prefer quantity to quality: “Big Brother” to “Little Brother.”

The third leg of the tripod on which the new constitution sought to base a government that would secure liberty is less delineated than assumed by the 1787 document. John Adams' 1780 Massachusetts Constitution specifically provided at the end of the section calling for a strict tripartite division of authority among the three branches, the words: “To the end it may be a government of laws and not of men.”<sup>46</sup> But a government of laws rested on more than separation of powers. As Mr. Justice Frankfurter stated in 1947: “The conception of a government

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45. LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS* 316, 325 (Osmand K. Fraenket ed., 1934) (attacking the oppressive effects of large corporations, bureaucracies, and monopolies).

46. MASS. CONST. 1780, art. XXX; 1 PHILIP B. KURLAND & RALPH LERNER, *THE FOUNDERS' CONSTITUTION* 14 (1987).

by laws dominated the thoughts of those who founded the Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men.<sup>747</sup>

The tradition of freedom, of the rights of Englishmen, on which the new nation would rely was spelled out in no small part in the common law, which the States inherited in detail, and whose principles afforded the basis for much of the Constitution itself. It is thus that Blackstone, Coke, Hale, and Hawkins, Burlamaqui and Vattel, earned their places alongside Harrington and Locke, Montesquieu and Rousseau as godfathers of the American Constitution.

It is often noted that the principal difference between the American and French Revolutions lay in the fact that the purpose of the American Revolution was to reduce government to the control of society, while the French was for the purpose of changing society through control by government. Another way of putting it would be that the American Revolution was concerned with the means of governance and the French with the ends. The consequence was that in the French Revolution, like almost all revolutions that have followed, the ends have been allowed to justify the means. From Robespierre through every totalitarian regime of the twentieth century, the objective to be secured has provided the justification for the methods to be used.

Not so with the Revolution of 1776. The Declaration of Independence in its indictment of the Crown for depriving the colonists of their just rights as Englishmen charged a denial of rule by the processes demanded by the common law: namely, laws established in advance, applicable to all, governors and governed alike, and beyond the arbitrary will of anyone. The Declaration may have provided a catalogue of wrongs, it did not purport to provide a catalogue of rights. Even the rights to life, liberty, and the pursuit of happiness, extensive as they may be, were stated by the Declaration to be only "among" the "unalienable rights" of Englishmen turned American. Whether attributable to "the laws of nature and of Nature's God" or of man's "Creator," it is clear that these rights were not created by the Declaration of Independence but were regarded as antecedent thereto.

So, too, with the American Constitution. It did not purport to grant rights to the American people. It would have been an act of supererogation for "We, the People," to confer rights on "Us, the People."

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47. *United States v. United Mine Workers*, 330 U.S. 258, 308 (1947) (Frankfurter, J., concurring).



Whatever rights the Americans were to have against the new government, they brought with them to the Convention and took away with them from the Convention. What the Convention did was to provide a machinery by which those rights would be protected, whether by the provisions for self governance, by the distribution of powers between nation and States, or by the allocation of authority to various divisions of the national government. Such rights of the people as the Convention addressed were already germinating in English common law. Their continued existence and growth was presumed. Some of them were specifically guaranteed by the Constitution. None was diminished.

Historians and lawyers argue whether these rights that are protected by, but not mentioned in, the Constitution should be deemed to have their origins in something called "natural law" or are, indeed, no more than creatures of English common law, writ large by history. For myself, I know not where to discover "natural law," except perhaps in holy scripture or by Ciceronian definition. The rights of Englishmen for which the Americans fought are not visible to me through either source. On the other hand, I can and have found their origins and growth in the common law and parliamentary law and the customs of the realm of England and the American Republic. Being a mere lawyer lacking divine inspiration, I rest my claims to constitutional rights on the limited perspective of well-established legal and statutory precedents to which the English and the Americans have given special status.

The difficulty with finding the third pole of the American constitutional tripod in the interstices of the Constitution rather than in its text, and in the common law rather than in holy writ, is that it requires the improvisation of an authoritative interpreter. Certainly there is nothing in the language of the document itself that justifies the judiciary as ultimate arbiter of the Constitution. While I think that the discussion at the 1787 Convention and in the State ratifying conventions, as well as "out of doors," supports the claim of the judiciary to the power of judicial review, once again we are dependent totally on inference.

While Marshall's rationalization in *Marbury v. Madison*<sup>48</sup> may be adequate to justify Supreme Court review of state statutes, it is not persuasive about national laws. The argument that the Court is best charged with the task because, in Hamilton's words, it is "the least dangerous" branch, has proved false. Learned Hand's defense, if it can be called that, is probably the more persuasive. Some check on governmental transgression of constitutional boundaries is necessary: none is

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48. 5 U.S. (1 Cranch) 137 (1803).

better equipped to perform the task in an apolitical, legal, judicious manner than the courts. Cynicism suggests that the best, in this case, is none too good.

Nevertheless, it may be said that, in terms of the protection of the liberties of the citizen, the concept of the rule of law, for all its deficiencies, has probably proved to be the most important. Certainly, however, we ought not to dispense with any of the others. We should hope for the revival of those that have lost their vigor. And, most important, we must, as citizens, pay closer attention and be better informed about governmental behavior if these liberties are to survive. The tasks of the executive, of the legislator, of the judge are all difficult ones. No less challenging is the task of the citizen interested in keeping his freedoms. That was the challenge by the Founders in 1787. It is the challenge to America in 1992. It is the challenge to those who would frame constitutions for South Africa.

