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Foreword

Antonin Scalia

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I am pleased to see the *Pepperdine Law Review's* dedication of the present issue to problems relating to the principle of separation of powers. Unlike such values as freedom of speech and freedom of religion, the principle of separation of powers does not stir the blood. I am confident that no one has ever proclaimed "Give me separation of powers or give me death." It is merely a mechanism for the achievement of those other, passionately held values of liberty — and one does not fall in love with a machine.

How important the founders of our political system thought this principle to be, however, is attested to by Madison's exorbitant praise in *The Federalist No. 47*: "No political truth," he wrote, "is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty . . . ."[1] The Anti-Federalists did not disagree. "The safety of our constitutional rights," wrote Agrippa in the *Massachusetts Gazette*, "consists in having the business of government lodged in different departments, and in having each part well defined."[2] To judge whether what was thought true in 1789 is true today, one need only consider the state of liberty in many modern nations that have admirable Bills of Rights but one-man, or one-committee, or one-party rule.

Important principles of law ought to have clear rules of application. That is particularly true of the principle of separation of powers, which, since it marks off the boundaries of power between three differently constituted, and hence differently motivated, political institutions, is bound to be the regular battleground of partisan war. If the answer to the question of what constitutes *ultra vires* action, or at least the accepted methodology for determining that answer, is not clear, neither of the two political branches can convincingly be accused before the citizenry of aggrandizing itself unlawfully, and the Third Branch is free, at its option, to be either accomplice or opponent in the enterprise. Nothing imposes limits but the spirit of the times, and perhaps the receptiveness to that spirit of the currently sitting Justices. Do we fear the Imperial Presidency this year? Then questionable congressional limitations of presidential power are all

1. THE FEDERALIST NO. 47, at 324 (J. Madison) (J. Cooke ed. 1961).
2. THE ESSENTIAL ANTIFEDERALIST 236 (W. Allen ed. 1985).

right. Or are we in an era when, to recall the title of Woodrow Wilson's book emphasizing the relative impotence of American executive power,[3] we are exasperated with Congressional Government? Then questionable presidential assumptions of power are fine. The basic nature of our political institutions thus becomes defined (assuming adherence to the doctrine of *stare decisis*) by a series of disconnected judicial decisions whereunder various presidential and congressional *attentats* are good or bad principally because they happened to be brought before the Court during a receptive or unreceptive age.

This is, unfortunately, what seems to have happened — with the possible exception that the assumption of adherence to *stare decisis* is contrary to fact.[4] Indeed, the Court's most recent decisions in the field seem to accept *in principle* the proposition that each separation-of-powers decision is to be governed by an at-large evaluation of whether the powers assumed or taken away strengthen or enfeeble the relevant branch too much.[5] As anyone who has wrestled with these problems can attest, however, it is easier to deplore the current state of affairs than to propose the obvious solution. Madison was enduringly correct in his assessment that "[i]t is not unfrequently a question of real-nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere."[6] But nothing he wrote has aged as badly as his follow-up observation that "the executive power being restrained within a narrower compass, and being more simple in its nature; and the judiciary being described by land marks, still less uncertain, projects of usurpation by either of these departments, would immediately betray and defeat themselves."[7]

I have expressed my views on some separation-of-powers issues in several recent opinions — most, regrettably (I think), dissents.[8] The views expressed in the articles printed in this issue do not reach the same destination I do, but they must head in the same direction. By this I mean that any attempt at analysis of this difficult field — any effort to impose order and principle upon it instead of leaving it to be

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3. *See* W. WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1885).

4. *Compare, e.g.*, Myers v. United States, 272 U.S. 52 (1926), *with* Humphrey's Executor v. United States, 295 U.S. 602, 626 (1935).

5. *See* Mistretta v. United States, 488 U.S. 361, 426 (1988) (Scalia, J., dissenting) (discussing recent cases). *See also* Morrison v. Olson, 487 U.S. 654 (1988); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787 (1987); Bowsher v. Synar, 478 U.S. 714 (1986), which are cited and discussed in the *Mistretta* dissent.

6. THE FEDERALIST NO. 48, at 334 (J. Madison) (J. Cooke ed. 1961).

7. *Id.*

8. *See, e.g.*, *Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting); *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting); *Young*, 481 U.S. at 815 (Scalia, J., concurring).

governed by transitory judicial notions of good political science — is a step towards improvement.

THE HONORABLE ANTONIN SCALIA