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I. INTRODUCTION

The separation of powers principle has been a success in at least one respect: It remains a doctrine with continuing force in public law and public policy. The Supreme Court still has enough confidence in the principle to invoke it to strike down acts of Congress, as occurred recently in *Bowsher v. Synar*,[1] where a somewhat arcane application of the principle was invoked to strike down portions of the then popular Gramm-Rudman Deficit Control Act. Politicians still take the principle seriously, as was illustrated by the public soul-searching over Senate prerogatives in the Rehnquist confirmation proceedings. The continuing force of the principle is also vividly illustrated by the way contemporary foreign policy controversies tend to get sidetracked into legalistic disputes about congressional versus presidential prerogatives, often to the extent of overshadowing the underlying questions of American national interest in Central America, in the Middle East, or in arms control negotiations with the Soviets.

The fact that this respect for the separation of powers has endured to this extent is certainly worthy of notice, especially when considering the different fate of other constitutional principles. For example, the principle of federalism once seemed as fundamental to the American constitutional order as the separation of powers, and in the nineteenth century federalism re-

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1. 106 S. Ct. 3181 (1986) (The Court held that the Balanced Budget and Emergency Deficit Control Act's (Gramm-Rudman-Hollings Act) "reporting provisions" were constitutionally invalid because the Comptroller General's powers violated the constitutional command that Congress play no direct role in the execution of the laws.).

ceived far more attention from courts and commentators. The bloody carnage of the Civil War arose, in part, over disputes about the constitutional significance of federalism. While significant disputes about separation of powers have arisen, none have come close to ravaging our constitutional order. Yet, today the Supreme Court has abandoned any claim to enforce limits on Congress in the name of federalism—as the Court made painfully clear in *Garcia v. San Antonio Metropolitan Transit Authority*,[2] where it disclaimed any power to invoke the tenth amendment against direct federal intrusions into the internal affairs of actual state entities, even where no serious national interests (let alone enumerated federal powers) were involved. Politicians, too, seem to regard federalism as a fighting banner with no more inspirational force than wet laundry. As recent debates over the national 55 m.p.h. speed limit suggest, federalism is not a principle that can be invoked against popular policies but is at best a rhetorical throw-away in explanations of why unpopular policies are unpopular.

Cynics may say that the separation of powers has proved hardier than federalism because it is less of a hindrance to the expansion of government, especially in an era when the judiciary has been very favorably disposed to "big government." Or they may say that the Supreme Court has been favorably disposed to the separation of powers because when limiting Congress on behalf of the executive the Court strengthens its own claims to autonomy from Congress, while if the Court sought to constrain congressional domination of the states it would be undermining its own claims to dominate the states. There is, no doubt, more than a grain of truth in both these cynical suggestions. There is also much truth in the claim that politicians would take federalism more seriously if the Court gave them more constitutional arguments for doing so.

One might also suspect that the separation of powers has proved more enduring as a constitutional counter because it is, in fact, derived from principles more fundamental than federalism. Every Western democracy preserves some basic constitutional lines between legislative, executive, and judicial powers. For example, no Western democracy regards bills of attainder as legitimate, nor does any executive impose imprisonments without recourse to the criminal courts. But only a few other democ-

2. 496 U.S. 528, 545-55 (1985).

racies, including the United States, maintain a federal system or treat issues of geographical decentralization as issues of constitutional status.

The more fundamental character of the separation of powers seems to have been tacitly acknowledged in various ways by the Constitution and its Framers. The Constitution speaks of "the executive power" and "the judicial power" as if their meaning were more or less obvious, drawn from evident or natural models. By contrast, the Constitution enumerates the "legislative Powers herein granted"[3] in some detail,[4] on the evident assumption that the distinct legislative powers of Congress must be spelled out in order to distinguish them from the legislative powers of the states, because *this* division is not at all obvious or natural. James Madison in *The Federalist No. 48* speaks of "the nature" of each "power" at the federal level, stating that it is only after "discriminating . . . in theory, the several classes of power, as they may *in their nature* be legislative, executive, or judiciary . . . ."[5] Madison explained that constitution-makers can approach the problem of how "to provide some practical security for each, against the invasion of the others."[6] Madison agreed with the Constitution's critics that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty"[7] than the "political maxim, that the legislative, executive and judiciary departments ought to be separate and distinct."[8] By contrast, Madison disdained "inquiring into the accuracy of the distinction"[9] urged by these same critics between a "*federal* form, which regards the Union as a *Confederacy* of sovereign states"[10] and a "*national* government, which regards the Union as a *consolidation* of the States,"[11] and Madison in the end concedes that the Constitution is "in strictness, neither a national nor a federal Constitution, but a composition"[12]—that is, an artificial mixture—"of

3. U.S. CONST. art. I, § 1.

4. *See* U.S. CONST. art. I, § 8.

5. THE FEDERALIST No. 48, at 321 (J. Madison) (S. Mittell ed. 1938) (emphasis added).

6. *Id.*

7. THE FEDERALIST No. 47, at 313 (J. Madison) (S. Mittell ed. 1938).

8. *Id.* at 312.

9. THE FEDERALIST No. 39, at 246 (J. Madison) (S. Mittell ed. 1938).

10. *Id.* at 245 (emphasis in original).

11. *Id.* (emphasis in original).

12. *Id.* at 250.

both."[13] From the outset, then, the authoritative defense of the Constitution suggested that federalism was neither so natural nor so fundamental as the separation of powers.

Madison, of course, goes on to defend the particular distribution and arrangement of the three powers in the federal Constitution in recognition of the fact that these do not finally adhere to an obvious or natural model. Madison added that it is not "sufficient to mark, with precision, the boundaries"[14] of the three great powers and then simply "trust to these parchment barriers."[15] The Framers of the Constitution sometimes deliberately departed from simple models, for "by so *contriving* the interior structure of the government . . . its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[16] These contrivances involve the sharing and redistributing of particular powers that might be "discriminating . . . in theory" or "in their nature"[17] as properly lodged in only one branch of the government; such "auxiliary precautions" might have been arranged quite differently on the basis of a different set of practical judgments. The parliamentary systems in Western Europe present a rather different model of the separation of powers precisely because they do rest on a different set of "auxiliary" variations on the underlying principles of tripartite division.

The variations on the theme, however, have tended to obscure the principles underlying the doctrine of separation of powers as they were conceived by the Framers. This makes it hard to evaluate the success of the separation of powers in our constitutional order by any criterion more fundamental than its rhetorical or formal endurance. Plainly, we cannot say whether the separation of powers has succeeded in any larger sense without thinking through its intended purpose.

The Supreme Court, while often bold about asserting the principle, has not been equally reflective in defending it. Confusing the auxiliary precautions with the underlying principles, the Court continually emphasizes that the Framers wanted the various powers to check each other, to provide friction in the ma-

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13. *Id.*

14. THE FEDERALIST No. 48, at 321 (J. Madison) (S. Mittell ed. 1938).

15. *Id.*

16. THE FEDERALIST No. 51, at 336 (A. Hamilton or J. Madison) (S. Mittell ed. 1938) (emphasis added).

17. THE FEDERALIST No. 48, at 321 (J. Madison) (S. Mittell ed. 1938).

chinery of government in the interest of liberty. This opens the Court to the charge that it is being formalistic or dogmatic because the Court's rationales seem so far removed from real-world results. Can it really be that protecting executive decisions from a legislative veto serves the interest of "liberty," as the *Chadha*[18] decision argued? Can liberty really be endangered if the Comptroller General, as opposed to the president's own budget advisors, has the last word on the budget cuts that would be required by the Gramm-Rudman Act?[19] Indeed, why associate "friction" with "liberty" in any event? There was plenty of institutional friction in the Ottoman Empire, as there is plenty of friction today between the Red Army, the KGB and the various civil and party bureaucracies in the Soviet empire, but precious little liberty in either. If friction is all we need, we might safely entrust the entire federal government to our chaotic bicameral legislature and save ourselves a good deal of trouble.

Plainly, the structure underlying the separation of powers doctrine bequeathed to us by the Framers can only be defended—or found wanting and perfected—if we force ourselves to think more seriously about its purposes and objectives. However, it is hardly surprising that the Supreme Court has not stirred itself to think more carefully about this question. On the whole, the federal judiciary has thrived on this intellectual neglect; its powers expanding as the logic of the system that created it has been forgotten.

II. What is "Natural" in the Separation of Powers?

Every Western democracy maintains some version of the tri-partite separation of powers. However, this is certainly not true of all governments in the world today, nor even of most governments that have existed through the course of history. This fact alone will induce people burdened with certain contemporary assumptions to scoff at the notion that our familiar tripartite division of powers can at all be discriminated in nature. The division could have seemed natural to the Framers of

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18. INS v. Chadha, 462 U.S. 919, 949-50 (1983) (The Supreme Court struck down as unconstitutional section 244(c)(2) of the Immigration and Nationality Act which authorized Congress to invalidate a decision of the Executive Branch. Specifically the Court cited the constitutional doctrine of separation of powers and the "need to divide and disperse power in order to protect liberty . . . .").

19. Bowsher v. Synar, 106 S. Ct. 3181 (1986).

our Constitution because they thought that constitutional government was, in a certain sense, grounded in nature.

According to James Madison, "the great object"[20] in designing the Constitution was "[t]o secure the public good and private rights . . . and at the same time to preserve the spirit and the form of popular government . . . ."[21] This formulation captures almost the entire original theory behind the separation of powers. The fundamental division lying behind the separation of powers is the division between the public good and private rights, and all the complications of the Framers' scheme derive from the difficulty of respecting both sides of this division while maintaining "the spirit and the form of popular government."[22]

The most fundamental aspect of the separation of powers doctrine is that there be a separation between the judiciary and the other two "political" branches. This is the division most fully respected in the Constitution because the president may veto congressional enactments and Congress in turn may override the president's veto, but neither of these branches may directly override a judicial decision. The fundamental character of this division between judicial and political powers is again illustrated in the way we think about the parliamentary systems of Western Europe. We do not really think that the extensive fusion of executive and legislative powers in these systems makes them any less constitutional or liberal governments, but we would certainly question their claim to be considered in this light if their judiciaries were not as independent as our own.

The independence of the judiciary means that it is not politically accountable for its decisions as illustrated by the life tenure granted to judges. The judiciary is set apart from the "spirit and the form of popular government"[23] precisely to secure private rights. The public good cannot similarly be divorced from the "spirit and the form of popular government" because the public good is a matter of results, which are assessed differently by the multitude of affected people. This was Madison's argument at the Constitutional Convention for denying the same life tenure to the chief executive as was given to the judges. Thus, in spite of the fact that there is

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20. THE FEDERALIST No. 10, at 58 (J. Madison) (S. Mittell ed. 1938).
21. *Id.* at 57-58.
22. *Id.* at 58.
23. *Id.*

> an analogy between the Executive [and] Judiciary departments [in as much as] the former expounded [and] applied [the laws] in certain purposes, as the latter did for others . . . .
>
> 1. the collective interest [and] security were much more in the power belonging to the Executive than to the Judiciary department.
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> 2. in the administration of the former much greater latitude is left to opinion and discretion than in the administration of the latter . . . . the [second] consideration . . . forms an objection to the same tenure of office. . . .[24]

The judiciary, responsible for securing private rights rather than the collective interest and security, was expected to be rule-bound and largely indifferent to results. That is what we mean by a right—a claim that has to be respected, regardless of awkward results or inconvenient consequences in any particular case. Maintaining room for "the spirit and the form of popular government" requires that the authority of the judiciary be restricted to the enforcement of private rights. This was indeed taken for granted in Chief Justice Marshall's celebrated and daring opinion in *Marbury v. Madison*:

> 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.[25]

Justice Joseph Story, one of the most learned and respected jurists of the nineteenth century, thought it clear that the judiciary was restricted to questions concerning rights by the express terms of the Constitution. Article III provides that "[t]he judicial Power shall extend to all Cases. . . ."[26] According to Story's *Commentaries on the Constitution of the United States*, "[a] case, then, in the sense of this clause . . . arises, [only] when some subject . . . is submitted to the courts by a party, who asserts his rights in the form prescribed by law."[27]

Judicial power can only remain restricted, however, and the powers and concerns of the other branches given adequate

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24. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 34 (1966).

25. 5 U.S. (1 Cranch) 137, 170 (1803).

26. U.S. CONST. art. III, § 2.

27. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 609 (reprinted ed. 1987).

scope—if rights have a relatively restricted significance. What did the Framers, or the judges who came after them, understand by a right? Essentially, the rights of individuals were those rights for which the Constitution guaranteed due process: life, liberty and property, which, as Blackstone had written on the eve of the American Revolution, are "the absolute *rights* of individuals . . . such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it."[28] Madison did not hesitate to sum up the whole doctrine of rights with the term property when he wrote that "to protect property of every sort . . . [is] the end of government [and] that alone is a *just* government, which *impartially* secures to every man, whatever is his *own.*"[29]

What is distinctive about property is that it is subject to the exclusive control of the owner, who can decide for himself whether to sell, save, improve, or leave it idle. It is this notion of personal control which allows Madison to use the term property to comprehend not only "a man's land, or merchandize, or money," but also the "equal property [a man has] in the free use of his faculties and free choice of the objects on which to employ them."[30] Calling property a natural right—or saying that individuals are entitled to enjoy it "whether out of society or in it"[31]—is merely a way of saying that control over others' possessions is not natural, but can only be established by the consent of those others. Individuals have a natural claim to be left alone or unharmed with what they own. Whatever rights they claim against others beyond this initial natural right to be left alone must be established by agreement or positive convention.

None of the American Founders ever doubted that property or natural rights had to be defined and constrained by positive law. They did not doubt that government is essential for the secure enjoyment of rights. But a "just government," as Madison put it, is one "which *impartially* secures to every man, whatever is his *own.*"[32] That means that the laws which constrain rights must be reasonably general in purpose and form. The popular or

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28. 1 W. BLACKSTONE, BLACKSTONE'S COMMENTARIES 123 (Colley's 3d ed. rev. 1884).

29. Madison, *Property,* Nat'l Gazette, Mar. 29, 1792, at 174, col. 4, *reprinted in* THE MIND OF THE FOUNDER, SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 186-87 (M. Meyers rev. ed. 1981) (emphasis in original).

30. *Id.*

31. 1 W. BLACKSTONE, supra note 28, at 123.

32. Madison, *supra* note 29.

representative character of the legislature is meant to secure this demand for general and impartial laws. So, too, is the constitutional division between legislative and executive power. Prohibited from enacting bills of attainder or ex post facto laws, the legislature is constrained to declare laws somewhat prospectively. The executive, however, which sees clearly the individual cases against which it applies the law, can only apply the laws already existing; i.e., laws it has not itself declared. To be sure, this is far from an unfailing guarantee of impartial or just government. But the principal justification for popular government is that the public good will usually remain subject to dispute because it cannot be readily defined by mechanical formulas. Consent to government would not be necessary if just government could be determined by unassailable reasoning from definitions.

Thus, the rights which due process guarantees may, in practice, be guaranteed by little more than due process, i.e. advance notice of the general law by which these rights will be constrained and the opportunity for a hearing before an impartial judge to ensure that the law is not improperly applied. Still, the term used in English courts for due process--"natural justice"[33]—is particularly apt, for the rights secured by due process are the civil counterpart of natural rights. Within the bounds defined by law, these rights remain under the personal or private control of those who possess them. They are private rights because, in contrast to the powers and resources under the control of the executive, they are not accountable to the public for the way they are used. That is why these rights are protected by the courts—by the one branch of government that is not supposed to be accountable to the public.

Viewing this relationship from the other side takes us back to where we began: The courts could not remain separate from the "spirit and the form of popular government" if they were expected to share the responsibility of the executive for serving the public good. The entire tripartite division of powers thus has a certain element of logic if one looks to the primary goal of constitutional government: The protection of private rights against the claims made for the public good.

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33. 2 JOWITT'S DICTIONARY OF ENGLISH LAW 1221 (2d ed. 1977).

III. Why Today's Judicial Power is Unnaturally Bloated

The remarkable expansion of federal judicial power over the past three decades has been explained and excused by commentators of differing political perspectives. The fact that Congress has tolerated and often encouraged this expansion—contrary to the expectation of the writers of *The Federalist No. 51* that "[a]mbition [would] be made to counteract ambition"[34] in the constitutional scheme—does not excuse what has happened, but may help to explain how it has happened. For present purposes, however, it is less important to review the possible causes of this expansion than to notice its underlying character and the character of the new constitutional perspective that has accompanied it.

The expansion of judicial power in recent decades can be described most simply as an increasing involvement of courts in questions that do not involve rights or do not, at least, involve private rights or property in the extended sense. This is most evident in the law of standing, but it is not a matter of technical forms. To obtain a court decision on a disputed point of law, it was once necessary to show that one had received a direct injury to one's own legal rights resulting from the misconstruction or disregard of the law. This was true even for challenges to the construction of constitutional provisions: "Nor will a court listen," according to Cooley's *Constitutional Limitations*, "to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it."[35] The political interest of citizens was not enough to engage a court, even when it concerned the constitutionality of a public measure. Since the early 1970s, however, it has been possible to gain standing in federal court simply on a showing of concrete "injury in fact"; and in practice the injury need not be very concrete nor the fact of harm very seriously demonstrated.[36] The Supreme Court added a few restrictive refinements to this new standard in the mid-1970s, but they have

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34. The Federalist No. 51, at 337 (A. Hamilton or J. Madison) (S. Mittell ed. 1938).

35. T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 232 (7th ed. 1903).

36. *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686 (1972); Association of Data Processing Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970).

proved—as was surely intended—little serious barrier to the hearing of cases the courts want to hear.[37]

The relaxation of standing requirements has allowed a whole new range of constitutional and statutory questions to come before the courts which in itself, naturally, has brought a considerable expansion of judicial power. For example, federal courts now routinely determine the constitutionality of federal, state, or local funding measures charged with violating the first amendment prohibition on laws "respecting an establishment of religion"[38] charged by plaintiffs whose own property is not at all affected (because their tax burdens would not be noticeably lightened by the invalidation of such laws), and who therefore would not have been able to bring such charges to the courts under the traditional law of standing. The same pattern has emerged in administrative law where public interest groups are allowed to bring challenges to environmental or safety regulations which they claim would harm them—or constituencies they represent—because the regulations are not sufficiently rigorous or comprehensive, though the public interest can not claim a "right" to any particular level of regulatory protection.

The relaxation of standing requirements does not simply cause more cases to come before the courts, but it also causes cases to take on a different character because the cases do not concern the rights of individuals. In traditional cases, the law appears as the protective boundary around the plaintiff's (or the criminal defendant's) own right: The judge may cast a glance at the demands of public policy or interest, but he could uphold the rights of the plaintiff even if this did not seem to be good policy from the standpoint of the general public. This is the meaning of a right. Once the plaintiff is no longer arguing his own rights, it is hard to conceive what else the judge could consider in formulating his legal interpretation beyond the claims of good public policy. At best, the judge is left to weigh the political interests of competing constituencies in the manner of a legislature or an executive agency.

Moreover, by the logic of traditional cases, the judge does not have to question whether it would really benefit the plaintiff to gain the legal interpretation he seeks—that is the plaintiff's

37. *See, e.g.*, Eastern Ky. Welfare Rights Org. v. Simon, 426 U.S. 26 (1976); Sierra Club v. Morton, 405 U.S. 727 (1972). *But see* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978).

38. U.S. CONST. amend. I.

own affair. Even if the plaintiff loses, he has gained something because greater clarity now exists about the bounds of his private control. In a case where no individual rights are really at stake, the plaintiff, or rather the political interests or constituencies represented by the party bringing the suit, may well turn out to be worse off in the long run by the very legal construction being urged by counsel for the plaintiff. The judge cannot in this situation take a detached, formalistic view of the law: If he is entering the policy arena to protect or benefit certain interests, then he must try to see that his interests are helped and not harmed by what he does.

The relaxation of standing barriers has proven to be only one aspect of a larger pattern in public law litigation, as cases not involving individual rights have come to be called. The dramatic expansion in the scale and intrusiveness of equitable remedies is equally part of the pattern, as is the relaxation of traditional limitations on class action suits. To cite the most notorious example, it does not matter in school desegregation litigation that the victims of the injury being remedied by the litigation have long since graduated; nor does it matter, in fashioning the remedies, that a judge exercises equitable powers on so large a scale that he is as deeply involved in budgeting as a legislative committee and as deeply involved in administrative detail as an executive agency. A claim to be free of arbitrary government restrictions can be readily conceptualized in the traditional analytic framework of individual rights and racial restrictions can certainly be treated as arbitrary by definition. This was the approach taken in *Bolling v. Sharpe*,[39] which was essentially an old-fashioned substantive due process case. The busing cases that have also occupied so much judicial energy since the early 1920s have concerned rights in only the most distant metaphorical sense.

What lies behind these new kinds of cases is a vague notion that certain kinds of claims are, like actual rights, too important to be left to the established political and institutional channels of decision making. These claims have come to be viewed as entitlements; as benefits that people simply should be able to enjoy. They are not claims to a legal boundary of personal control, but claims to a satisfying situation or environment, whether it is clean air, integrated schools, or a safe work place. They are, in

39. 347 U.S. 497 (1954).

the nature of things, claims that cannot be individualized or treated in the rather formalistic or legalistic manner of traditional rights. They may indeed be claims to things that people *should* have, but that does not make them any less inappropriate, incongruous, or unnatural for the courts to try to secure. Peace is also something that people should have, but no one has yet suggested that courts should bestir themselves to consider whether our foreign policy or defense policy is making adequate progress toward securing this objective.

Yet, for all its inherent absurdities, the entitlements philosophy was not dreamed up by distracted judges and has certainly not made its sole or even its primary appearance in the judiciary. The entitlements philosophy has been a major thread in American political discourse, at least since the end of the New Deal when President Roosevelt spoke of the government's obligation to assure "freedom from want"[40] and its obligation to respect a new "second Bill of Rights." This new "Bill of Rights" included such particulars as "the right to a useful and remunerative job" and "the right of every family to a decent home" and the "right . . . to trade in an atmosphere of freedom from unfair competition . . . ."[41] Roosevelt surely did not expect that the courts would secure these rights, but perhaps it is not so surprising that the courts eventually felt obliged to help defend these kinds of rights when the other government branches failed to deliver on such promises. In the larger scheme of things, the emergence of the public law judiciary is only one symptom of the way this outlook has deranged our constitutional order.

IV. The Denaturing of the Executive

If the entitlements philosophy has eroded many lines between judicial power and the constitutional authority of the other branches, it has also exerted great distorting pressures on the relations between Congress and the executive and on the separate character of legislative and executive power in our constitutional system. Once we leave the realm of the judiciary, however, we are dealing even less with readily defined changes in legal standards or official doctrine. Rather, changes in the constitutional character of the other branches are reflected in an

40. State of the Union Address by President Franklin D. Roosevelt, H.R. Doc. No. 377, 78th Cong., 2d Sess. 2 (1944).

41. *Id.* at 7.

accumulation of smaller and more diffuse changes, carried along by broader currents of opinion. However, the net effect of these changes has been quite substantial.

The most obvious example illustrating how constitutional perspectives have changed our institutions is the dramatic growth since the early 1970s in those federal spending programs most often described as entitlements. These programs, particularly Social Security, are frequently characterized as uncontrollable spending commitments, as if they involved private property that could not be "taken for public use without just compensation."[42] That is not, in fact, their constitutional status, for even now Congress still retains the power to eliminate all of these programs at one stroke if it so chooses. The fact that Congress regards these programs as uncontrollable commitments even in years of immense fiscal distress (for example, the fact that Congress has chosen to make benefit increases automatic and finds it enormously difficult even to defer promised increases in these programs for a short period) testifies to the extraordinary power of the entitlements outlook. What this means is that Congress has great difficulty addressing the public good or even acknowledging that there is a public good apart from the private claims of a multitude of current program beneficiaries. The competition of factions, which the writers of *The Federalist* expected to check legislative partiality, still works to frustrate legislative innovation; but, with existing spending programs on automatic pilot, a stalemate means the extension of programs and policies that are harder and harder to conceive as simple contributions to the public good.

The changes in the character of the executive are more subtle and somewhat more confused, but may be equally consequential. The entitlements philosophy suggests that administrative programs ought to be removed from presidential direction and control because they are too important for politics, or too vital for the immediate beneficiaries to be subject to the pressures and constraints of the president's larger agenda. This outlook was much in evidence during the 1930s when Congress repeatedly resorted to lodging new regulatory programs in independent commissions, a practice which it returned in the 1960s and 1970s despite a good deal of thoughtful criticism of this institutional form by successive reorganization and manage-

42. U.S. CONST. amend. V.

ment studies in the intervening years. The same outlook was evident by the inclusion of "citizen standing" provisions in almost all the major environmental statutes enacted in the 1970s as a means of ensuring that administrators would not be distracted by the White House from pursuing the most effective or most ambitious approach to implementing these programs. The same outlook was also at least partly responsible for the development during the 1970s (again with congressional encouragement) of elaborate, formal rule-making procedures for many new agencies as a means of limiting presidential influence and facilitating more intense judicial review. Finally, this outlook has helped to fuel bitter attacks in Congress—and in some law reviews[43]—on the system of central clearance for new agency regulations at the Office of Management and Budget.[44]

In addition to these demands for insulating administrative agencies from presidential influence—and for new institutional mechanisms to ensure this—there have also continued to be calls for larger constitutional or political reforms making it easier for presidents to push their legislative programs through Congress. To some extent these have been countering phases in a cycle of liberal frustrations over the past quarter century. Calls for constitutional reform to strengthen the president's capacity for legislative leadership were at their height when liberal commentators and academics were exasperated by congressional balking at the liberal agendas of President Kennedy in the early 1960s and President Carter in the late 1970s.[45] Calls for institutional reforms to insulate administrative agencies from presidential interference were at their height when commentators of a similar outlook were fearful of conservative presidential management initiatives under President Nixon in the early 1970s and under President Reagan in the early 1980s.

There is, in fact, an underlying theme in these seemingly contradictory reform impulses that is not simply tied to the rhythms of partisan politics. At the turn of this century, the young Woodrow Wilson, in his popular and academic writings,

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43. *See, e.g.*, Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986).

44. The Office of Management and Budget has developed considerable momentum under the Reagan Administration as an institutional forum for coordinating regulatory policies among different agencies and forcing agencies to assess more carefully the costs imposed by their requirements.

45. J. BURNS, THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA (1963); Cutler, *To Form a Government*, 59 FOREIGN AFF. 126 (1980).

gave a considerable intellectual push to both these themes: (1) the idea that politics should be separated from administration; and (2) the concept that the president should be a legislative leader focusing public opinion on the great issues of the day. In Wilson's writings, these ideas seem to fit together quite naturally, as complementary aspects of the same effort to make democracy more edifying and efficient—as he perceived the British parliamentary system to be. Wilson plainly tried to implement both themes in his presidency: He was the first president since John Adams to address Congress in person; the first president to popularize his legislative program with an uplifting, overall slogan, "The New Freedom"; and he was instrumental in the establishment of the Federal Trade Commission, the Federal Reserve Board, and the United States Shipping Board—all organized in such a way as to minimize White House influence on their operations. President Franklin Roosevelt, in many ways Wilson's disciple, subsequently institutionalized the notion of a presidential legislative program, and indeed, by attaching the name of this program to a whole era of American history—"the New Deal years"—created a level of expectations for presidential leadership which has left every subsequent president in his shadow. While Roosevelt later sought means to strengthen presidential control over the sprawling bureaucracies that sprang up to implement many new programs, much New Deal rhetoric also exalted the moral authority and technical capacity of "administrative expertise" and "administrative professionalism."

What both sides of the equation have in common is a common disdain for the Framers' conception of executive power—less grandiose, but perhaps more attainable. The Constitutional Convention went to great trouble to make the president independent, that is unbeholden to Congress, primarily because experience under the Articles of Confederation had convinced them that administrators too dependent on Congress would be too weak and distracted to competently manage their departments. However, in *The Federalist* Alexander Hamilton was quite emphatic that all the heads of the executive departments and agencies "ought to be considered as the assistants or deputies of the chief magistrate, and on this account, they ought to . . . be subject to his superintendence."[46] In fact, most of the papers on the executive celebrate the energy and the "[d]ecision,

46. THE FEDERALIST No. 72, at 469 (A. Hamilton) (S. Mittell ed. 1938).

activity, secrecy and despatch"[47] of the Executive as if an entire branch of the government were simply one man. Indeed, Hamilton emphasizes that by providing a single chief executive, the Constitution seeks to focus responsibility on one, clearly visible, set of shoulders.[48]

But these characterizations would make no sense if the Executive were a detached, expert, professional administrator beyond all politics or maneuver. It is precisely because *The Federalist* authors recognized the necessarily large range of choice and discretion in executive decision-making that it so emphatically emphasizes responsibility. This responsibility cannot be for the overall happiness, progress, and prosperity of the entire nation—the president is not given remotely enough power for that. He does, to be sure, have a role in the legislative process, but the Framers seem to have regarded this as simply a means of influencing the details of particular legislative measures in the interest of smoother execution later on. The veto is best understood as the institutional vestige of the proposal for a Council of Revision, a proposal much discussed at the Constitutional Convention, which would have combined the president with the justices of the Supreme Court in a "council" empowered to recommend changes in new legislation. But even this more ambitious scheme involved only legislative measures already enacted by Congress. The Framers never spoke of the president's own legislative program, neither at the Constitutional Convention nor in their subsequent defenses of the Constitution, surely because they did not conceive that the country would need to be reformed, overhauled, or uplifted with an entire new program every four years.

As treasury secretary under President Washington, Hamilton worked energetically to secure congressional enactment of an interlocking set of measures to place the national finances on sound footing. However, he seems to have taken for granted that his successors would not have to expand this much *legislative* energy. The amount of energy and legislative leadership the president displayed in the 1790s aroused tremendous resentment and suspicion and may have been the major factor to provoke the creation of the nation's first opposition party in Congress—a party led by no less a constitutional authority than James Madison. In fact, the alarm raised by this republican opposition

47. THE FEDERALIST No. 70, at 455 (A. Hamilton) (S. Mittell ed. 1938).
48. *Id.*

against executive direction of legislative deliberations was not altogether out of keeping with the spirit of the Constitution. The Framers had deliberately inserted a direct prohibition in the Constitution against the holding of executive offices by members of Congress; a prohibition intended to ensure that the president could not seduce influential members of Congress into easy compliance with his legislative proposals.

Without doubt, we have come to expect much more of twentieth century presidents because we have come to expect so much more of the federal government altogether. It is well to remember that executive-legislative relations involved a great deal of suspicion, recrimination, and instability, even in the vastly smaller federal establishment of the nineteenth century. Jefferson thought that Hamilton's influence on Congress threatened the emergence of a monarchy in the United States, and some forty years later Justice Story thought he discerned the potential for a tyrannical dictatorship in President Jackson's manipulation of post office patronage.[49] Thereafter, many thoughtful observers wondered whether the presidency and the executive as a whole were not so overwhelmed by congressional factions as to make any sort of coherent governmental action impossible. Some accounts of the administration of Calvin Coolidge, during which the Bureau of the Budget first began to play an active role in managing executive operations, suggest an admirable balance between internal vigor and a prudent sense of proportion in overall objectives. But it was his experience in this administration that inspired Coolidge's Solicitor General, James Beck, to write that unrivaled tirade, *Our Wonderland of Bureaucracy*, a 1932 exposé of the horrors of big government which was decades ahead of its time.[50]

Still, the Framers did not expect that the Constitution itself could provide all the necessary limits and incentives to make the scheme of separated powers work as well as might be hoped. James Madison was frank in acknowledging that "[e]nergy in government is essential . . . to that prompt and salutary execution of the laws which enter into the very definition of good government,"[51] while "[s]tability in government is essential . . . to that repose and confidence in the minds of the people, which are

49. *See* STORY, *supra* note 27, at 567-70.

50. J. BECK, OUR WONDERLAND OF BUREAUCRACY (1932).

51. THE FEDERALIST No. 37, at 227 (J. Madison) (S. Mittell ed. 1938).

among the chief blessings of civil society."[52] However, "combining the requisite stability and energy in government, with the inviolable attention due to liberty and to the republican form"[53] is a challenge filled with "difficulties."[54]

V. Conclusion

Most of the changes that would now be helpful, such as major institutional reforms in the budget process, cannot be imposed by the Supreme Court as a matter of constitutional fiat. We will not, in any case, begin to face the real "difficulties" in making our version of the separation of powers a successful system unless we look beyond the Supreme Court's celebration of "friction" as a good thing in itself. The Court might help to stimulate better thinking about the necessary character of executive energy, as well as restoring a better sense of what judicial power is about, if it forthrightly declared that "citizen standing" provisions are unconstitutional delegations of executive power to private citizens or unaccountable judges. For all we know, Justice Scalia may yet demonstrate that the Court has much more to contribute in the revitalization of the separation of powers. But revitalizing our thinking about its underlying aims would be a good start.

52. *Id.*
53. *Id.*
54. *Id.* at 226.