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# ESSAY

## SEPARATION OF POWERS AND FEDERALISM: THEIR IMPACT ON INDIVIDUAL LIBERTY AND THE FUNCTIONING OF OUR GOVERNMENT\*

During the 200-year history of the American Constitution, the United States has evolved from thirteen disunited states into the most powerful and productive country in the world. Under the framework of government designed in 1787, the United States has not merely survived but prevailed despite a revolutionary birth, a civil war, two world wars, a great depression, and more than one constitutional crisis. All the while, the United States has maintained a democratic republic in which the rights of the people have been not only preserved but increased.

Fundamental components of the successful governmental framework formulated by the Founders are the twin pillars of American constitutionalism: separation of powers<sup>1</sup> and federalism. It must be emphasized, however, that these are not perfect doctrines. They have been a source of folly and frustration and have created problems for officials at all levels and in every branch of government. They have rendered the American government less than efficient and at times have permitted abuse of individual liberties.

Opposition to the separation of powers has a long and distinguished history. For two centuries, critics have pointed out that the system results in stalemate and confrontation, denies accountability, and inhibits the government in formulating and sustaining

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\* This essay won the Fourth Circuit and the national prizes in the Law School Essay Competition cosponsored by the Commission on the Bicentennial of the United States Constitution and West Publishing Company. The topic of the competition was: "Does the allocation of power between the federal and state governments and among the branches of the federal government contribute to the preservation of individual liberty and the functioning of our government?" The winning essay, originally restricted to 5000 words, is reprinted here with minor clarifications that may cause it to exceed its original length.

1. Although separation of powers and checks and balances are not necessarily the same doctrine, for the sake of brevity, they are treated somewhat synonymously in this essay.

coherent policy. Skeptics of separated powers included early American giants such as Benjamin Franklin, Patrick Henry, and Thomas Paine.<sup>2</sup>

At the turn of the twentieth century, Woodrow Wilson questioned the system. He charged that separated powers had led to congressional supremacy, and the distribution of congressional power among committees had resulted in government by committee.<sup>3</sup> Wilson also challenged the basic premise of the doctrine because it pitted the branches of government against each other. "No living thing can have its organs offset against each other as checks, and live," he wrote.<sup>4</sup>

Wilson was typical of many political observers of his time. In 1920, a commentator noted that his contemporaries "dispute the value and even the reality of the theoretical division of governmental functions upon which it rests. . . . [I]t has become 'an unworkable and unapplicable rule of law.'"<sup>5</sup> Recently, Lloyd Cutler has called for a restructuring of the American political system along the lines of the British parliamentary system. He charges that because the system of separated powers fractionalizes power, it constitutes a structural weakness in government.<sup>6</sup>

Federalism, too, has been a source of confusion and problems. Because federalism reserves to the states the powers not granted to the federal government, there has always been the question of who has what power. For nearly four score and seven years after the founding of the nation, this problem produced one crisis after another, as witnessed by the Virginia and Kentucky Resolutions,<sup>7</sup> the Hartford Convention,<sup>8</sup> and the Nullification Crisis.<sup>9</sup> The Civil War

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2. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 394-96 (1935).

3. W. WILSON, CONGRESSIONAL GOVERNMENT 55-56 (1913). See J. ROHR, TO RUN A CONSTITUTION 60-65 (1986).

4. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 6 (1900).

5. Green, *Separation of Governmental Powers*, 29 YALE L.J. 369, 369-70 (1920).

6. Cutler, *To Form a Government*, 59 FOREIGN AFF. 126 (1980).

7. In 1789 and 1799, the legislatures of Virginia and Kentucky passed resolutions declaring that states had the right to void acts (Alien and Sedition Acts) of the federal government.

8. In 1814 and 1815, representatives from several New England states met in Hartford, Connecticut. They issued a report urging states to resist unconstitutional acts of Congress, called for states' rights, and discussed the right of secession from the Union.

9. In 1832, a South Carolina state convention passed the Ordinance of Nullification that declared null and void acts of the federal government (the tariff acts of 1828 and 1832). The

determined that the national government was supreme, but the precise boundaries of state and national powers remained in dispute. For the next hundred years, the supremacy of the national government, particularly in the area of civil rights, was guaranteed only by federal troops.<sup>10</sup>

The Supreme Court's decisions in *National League of Cities v. Usery*<sup>11</sup> and *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>12</sup> which dealt with the question of whether state sovereignty restricts Congress in exercising its power under the commerce clause, reveal the current difficulties in determining which government has what power. The decision in *Garcia* reveals the distance the American government has traveled since the day Alexander Hamilton wrote: "It will always be far more easy for the State governments to encroach upon the national authorities, than for the National government to encroach upon the State authorities."<sup>13</sup> In fact, *Garcia* provoked one scholar to write of the "demise of a misguided doctrine"<sup>14</sup> and another to pronounce the "second death of federalism."<sup>15</sup>

Despite the problems of both separation of powers and federalism, however, these constitutionally ordained doctrines should be praised, not buried. Many of the features of these doctrines that have been so criticized were not merely foreseen by the Founders, they were intended. The framers meant these doctrines, and hence the American government, to work in the nature that they have.<sup>16</sup> What the framers feared was a government that would work too effectively, so that changes in law would be easy and swift.

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convention threatened secession if the federal government used force to enforce the measures.

10. Federal troops were used to desegregate Central High School in Little Rock, Arkansas, in 1957, the University of Mississippi in 1962, and the University of Alabama in 1963.

11. 426 U.S. 833 (1976).

12. 469 U.S. 528 (1985).

13. THE FEDERALIST No. 17, at 106 (A. Hamilton) (J. Cooke ed. 1961).

14. Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985).

15. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

16. For a discussion of the framers' intention to build efficiency into the system, see Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113 (1971).

To understand these doctrines, it must be understood that although the Constitution is the “wonderful work” that Gladstone proclaimed it to be, it is misleading to think of it as being “struck off at a given time” by the mind of man.<sup>17</sup> This brilliantly formulated document was the product of history, not visionary dreams.<sup>18</sup> The Founders were aware that governments collapsed as well as rose. Gibbon’s classic, *The Decline and Fall of the Roman Empire*, was published in 1776—the year it all began. Across the ocean, a government based on the goodness of man was degenerating into a Reign of Terror. “Experience must be our only guide. Reason may mislead us,” warned John Dickinson at the Constitutional Convention.<sup>19</sup>

World history as well as the failings of the states under the Articles of Confederation gave the framers no unrealistic expectations about the goodness of man. “*We have, probably, had too good an opinion of human nature in forming our confederation,*” noted George Washington in 1786.<sup>20</sup> “If men were angels, no government would be necessary,” explained Madison.<sup>21</sup>

The Founders were not antidemocratic. They were realistic and aware of man’s cruder nature, and therefore could not trust direct democracy. Consequently, they filtered the peoples’ potentially destructive passions through elected officials. Knowing that liberty also could be threatened by the officials the people elected, the Founders distrusted elites as well. History shows that those in power often grow too bold and overreach, and that power often becomes concentrated in a single class or group. Therefore, the framers opposed a system in which all authority could become concentrated in a single branch. “The accumulation of all powers leg-

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17. Gladstone, *Kin Beyond Sea*, 127 N. AM. REV. 185 (1878) (describing the Constitution as “the most wonderful work ever struck off at a given time by the brain and purpose of man”).

18. For a discussion of the framers’ use of history to develop and defend the Constitution, see THE FEDERALIST NOS. 18 and 19 (A. Hamilton).

19. L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 4 (1985).

20. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 472 (1969) (emphasis in original).

21. THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 961).

islative, executive and judiciary in the same hands may justly be pronounced the very definition of tyranny," Madison declared.<sup>22</sup>

The framers understood the oppressive nature of governments, even those operating under written guarantees of rights. They had just fought a revolution because King George had usurped power and abused individual liberties. To insure that the government they were creating would not end up oppressing the people it was to serve, the framers placed ultimate power in the electorate. They were unwilling, however, to trust the judgment of the people alone. After acknowledging that governments were needed because men were not angels, Madison proceeded to explain: "You must first enable the government to control the governed; and in the next place, oblige it to control itself. . . . [E]xperience has taught mankind the necessity of auxiliary precautions."<sup>23</sup>

Thus, they designed a system to block the overreach—a system of government that would safeguard liberty by avoiding the entrapments of tyranny. The framers dispersed constitutional authority among the three branches of government and between the national and state governments. To further control power, they made the different national and state officials answerable to different constituencies.

After splitting constitutional authority into pieces, they balanced the pieces against each other. "Ambition must be made to counteract ambition," wrote Madison.<sup>24</sup> Thus, the Founders designed a system in which those passions would check each other, rather than a system that would collapse under uncontrolled ambitions. Legislative power is balanced by an executive veto. The executive power of appointment is balanced by the congressional obligation to advise and consent. The judiciary checks both the legislative and the executive branch with its ability to nullify acts of either branch. These "precautions" serve to block the adoption or continuation of unwise policy. Today, there is talk of the presidency and the Supreme Court having become "imperialistic." The fact is that throughout American history, each branch of government has alarmed different sections of the people. Some Founders most

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22. THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 961).

23. THE FEDERALIST No. 51, *supra* note 21, at 349.

24. *Id.*

feared legislative despotism.<sup>25</sup> In the 1930s, liberals wanted more power in the executive branch; today, they are concerned with an "imperial presidency."<sup>26</sup> In the early 1930s, the Supreme Court was the conservatives' best friend; in the 1950s, they came to oppose the Court's authority. The truth is that no branch of government is imperialistic. Thanks to the framers' foresight, no branch can override any other.

Although this is a system of separated institutions checking each other, it is also one of "separated institutions sharing powers."<sup>27</sup> These shares of power were not distributed casually; they were "carefully related to the capacities of each branch, to its constituency, and to its intended role in the system."<sup>28</sup> The size and committee structure of Congress assure that the people have an institutional voice in the daily functioning of the national government. The presidency places national leadership in a single individual, and this insures that government can heed the dictates of that voice more aggressively and efficiently. The bicameral and committee structures of Congress insure that legislation will be derived openly and that involved interests will be consulted. The executive branch gives the government the ability to act energetically, directly, and, if need be, unilaterally.

By balancing one branch against another, the framers slowed the operation of government. They frustrated the machinery of government so that foolish or sinister schemes would be exposed and defeated, so that innovation or departure would be difficult without deep and broad consensus, so that the accumulation of power in a single branch or by a single interest would be difficult, if not impossible, and so that the goals of those in government would be modest. Two branches of government must cooperate before laws destructive of liberty can be enacted, and two branches of government must cooperate in the enforcement of the law.

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25. Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 RUTGERS L. REV. 449, 460 (1958).

26. A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

27. R. NEUSTADT, *PRESIDENTIAL POWER* 33 (1960) (emphasis in original).

28. Robinson, *The Renewal of American Constitutionalism*, in *SEPARATION OF POWERS—DOES IT STILL WORK?* 41 (1986).

The "Madisonian clockwork," as Laurence Tribe describes it,<sup>29</sup> guarantees friction in the workings of the government. Indeed, the relationship between the executive and legislative branches has been so combative that it has been characterized as "guerrilla warfare."<sup>30</sup> This warfare has involved the judiciary as well as the executive and legislative branches. Presidents and congressmen have assailed the judiciary. "[W]e must take action to save the Constitution from the Court and the Court from itself," declared President Franklin Roosevelt.<sup>31</sup> In reference to *Consumer Energy Council of America v. FERC*,<sup>32</sup> Senator Schmitt lashed out that the United States Court of Appeals for the District of Columbia had "an idealized conception of the separation of powers that is neither historically accurate nor has, until now, been actually applied to overturn an act of Congress."<sup>33</sup> On the other hand, Judge Mikva of the D.C. Circuit has attacked Congress for "pass[ing] over the constitutional questions, leaving the hard decisions to the courts. Such behavior by Congress," he writes, "is . . . an abnegation of its duty of responsible lawmaking."<sup>34</sup>

These conflicts between the branches of government and the national and state governments, however, should be viewed as positive, not negative. The cooperation in government theoretically desired by so many does not, in reality, constitute the makings of safe government. One scholar has explained:

The notion that check and balance should involve thwarting, hampering, interfering, criticizing, opposing, will naturally seem to many a little perverse and wrong-headed. But the whole point is that it is the making of mistakes which may thus be hampered, the commission of errors thwarted, the imposition of one-

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29. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 15 (1978).

30. A. SCHLESINGER, JR. & A. GRAZIA, *CONGRESS AND THE PRESIDENCY: THEIR ROLE IN MODERN TIMES* 4 (1967).

31. 1937 F. ROOSEVELT, *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 126 (1941).

32. 673 F.2d 425 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983) (declaring unconstitutional, as violative of the separation of powers doctrine, a provision in the National Gas Policy Act of 1978 providing for a one-house veto of "incremental pricing" program ruling by Federal Energy Regulatory Commission).

33. 128 CONG. REC. 5089 (1982).

34. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609-10 (1983).

sided and unfair decisions interfered with, the adoption of wrong policy opposed.<sup>35</sup>

In other words, the friction between the branches is conducive, not destructive, to good government. Justice Brandeis wrote, "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but . . . to save the people from autocracy."<sup>36</sup> Thirty years later, in *Bowsher v. Synar*,<sup>37</sup> Chief Justice Burger noted that the division of powers "produces conflicts, confusion, and discordance at times . . . but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of government power."<sup>38</sup>

The Supreme Court's shift in approving New Deal legislation demonstrates Chief Justice Burger's point. Although this reversal is commonly viewed as the Court's succumbing to political pressure, it was a more complex, constructive affair that involved "full, vigorous, and open debate" on a great issue, and the nation benefitted. The change involved an intellectual as well as a political challenge to the high court's interpretation of the commerce clause. No less a constitutional scholar than Corwin warned that the country faced a "constitutional crisis of unpredictable gravity. . . [T]he Court . . . will have to enlarge its conception of public power to include economic power."<sup>39</sup>

The New Dealers delivered their own intellectual assault. In the *Harvard Law Review*, Justice Department Solicitor General Robert L. Stern challenged the Court's basis for its interpretation of the commerce clause.<sup>40</sup> Going back to the framers for guidance, he argued that in the commerce clause the Founders had provided the

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35. Dexter, *Checks and Balances Today*, in CONGRESS, THE FIRST BRANCH OF GOVERNMENT 83 (1967).

36. *Myers v. United States*, 272 U.S. 52, 293 (1926)(Brandeis, J., dissenting).

37. 478 U.S. 714 (1986).

38. *Id.* at 3187.

39. Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071, 1084-85 (1936) (emphasis in original).

40. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934).

national government with the power it needed to resolve the problems of trade that the states could not solve on their own.<sup>41</sup> Therefore, the New Deal was consistent with the constitutional order established in 1787.<sup>42</sup> In speeches and government briefs, New Dealers cited Stern's argument as they challenged the Court for a broader interpretation of the commerce clause.<sup>43</sup>

Although the "switch in time that saved nine" did come, it was a positive, not a negative one. The switch involved a constitutional confrontation of the first order that brought forth the best creative instincts of the administration and the best judgment of the high court.

The New Dealers' confrontation with the Court also illustrated the farmers' wisdom in staggering the time periods for which the members of each branch hold office: the president for four years, senators for six years, representatives for two years, Supreme Court Justices for life. Franklin D. Roosevelt accumulated more power and held it for a longer time than any other person in American history. In 1932 and 1936, he was overwhelmingly elected and reelected president, and his political party gained significant majorities in both Houses of Congress. Roosevelt and his party controlled two branches of government, but the third branch, the Supreme Court, composed of appointees of previous administrations, provided a check on swift, sweeping legislation. By the time the Court had converted to the New Deal line of thinking, another congressional election had taken place and Roosevelt's opponents in Congress had rallied, thus preventing the New Deal juggernaut from running out of control.

The "Madisonian clockwork" allowed New Deal reforms, but curbed the potential for legislation that may well have transformed American government and society. The system permitted Roosevelt to implement New Deal legislation, but it blocked him when he tried to pack the Court.

Separation of powers has not always been successful in stopping abuse of power and protecting individual liberty. The system, for example, enabled Senator Joe McCarthy to trample on the execu-

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41. *Id.* at 1340.

42. *Id.* at 1362-66.

43. J. ROHR, *supra* note 3, at 117-20.

tive branch as well as on the rights of individual Americans. For the most part, however, the system has controlled abuse. In *Kilbourn v. Thompson*,<sup>44</sup> the Court restricted congressional investigatory abilities by limiting its power to delve into the lives of private individuals, and in *Watkins v. United States*<sup>45</sup> it held that Congress may not "expose the affairs of private individuals without justification in terms of the functions of the Congress."<sup>46</sup> In *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>47</sup> the Court stopped the executive branch from usurping legislative authority, and in *Immigration and Naturalization Service v. Chadha*,<sup>48</sup> the Court prevented Congress from usurping executive authority.

During the most serious constitutional crisis of recent decades, even countries with democratic heritages, such as those of Western Europe, could not understand American concerns with the Nixon Administration's transgressions of power. But Americans were alarmed, and the checks and balances locomotive went into high gear. Congress investigated the activities, the courts interpreted the law, and the press, protected by the first amendment, reported the developments that resulted in the downfall of an administration.

Despite the warfare, the genius of the American separation of powers is that it does, in fact, allow cooperation among the branches of government. The different branches work together far more than is commonly assumed. Stephen Stathis amply documents the cooperation between the President, Congress, and the Court in investigatory matters. "One of the most significant characteristics of our constitutional system," he writes, "is that genu-

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44. 103 U.S. 168 (1881) (Congress may not punish a witness for contempt in an inquiry into the private affairs of a citizen).

45. 354 U.S. 178, 199 (1957) (Congress may not convict a witness for refusing to answer a question "pertinent to the question under inquiry" when the "question under inquiry" is unclear).

46. *Id.* at 187.

47. 343 U.S. 579 (1952) (an Executive Order directing the Secretary of Commerce to seize and operate steel mills is unconstitutional, although issued to avert a strike that could have jeopardized national defense).

48. 462 U.S. 919 (1983) (holding unconstitutional, as violative of the presentment clauses, a provision of the Immigration and Nationality Act authorizing either house of Congress to invalidate a decision of the Attorney General to allow a particular deportable alien to remain in the United States).

inely workable decisions are often reached only after inquiry, consultation, and compromise."<sup>49</sup> In the realm of foreign policy, Peter Schultz points out that "congressional and presidential power supplement and complement each other in a way too little appreciated."<sup>50</sup> Much of the "history of the separation-of-powers doctrine is also a history of accommodation," wrote Justice White in his dissent in *Chadha*.<sup>51</sup>

Federalism, like separation of powers, plays a valuable role in the workings of the American government and the protection of liberty. Although the decision in *Garcia* prompted one scholar to announce its "second death,"<sup>52</sup> the fact is that federalism has had a number of obituaries.<sup>53</sup> But as Mark Twain remarked, rumors of deaths can be exaggerated.<sup>54</sup> President Carter's anti-Washington theme and President Reagan and the "Sagebrush Rebellion" have shown that federalism, although perhaps momentarily comatose as a constitutional issue, is alive and well as a political one.

In the 1840s, Alexis de Tocqueville lauded federalism for reasons that are taken for granted today, but which weighed heavily on world history. He explained that small nations have "always been the cradle of political liberty,"<sup>55</sup> and that liberty is lost as they grow in size, strength, and wealth. He wrote, "The history of the world affords no instance of a great nation retaining the form of republican government. . . . All the passions that are most fatal to republican institutions increase with an increasing territory. . . ."<sup>56</sup> But, under the "most perfect federal constitution that ever existed,"<sup>57</sup> as he called it, the United States had found a way to grow in size and power without succumbing to the deadly passions because federalism preserved the virtues of the smaller state. Conse-

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49. Stathis, *Executive Cooperation*, 3 *Law & Pol.* 187, 292 (1986).

50. Schultz, *Separation of Powers and Foreign Affairs*, in *SEPARATION OF POWERS—DOES IT STILL WORK?*, *supra* note 28, at 121.

51. *Chadha*, 462 U.S. 919, 999 (1983) (White, J., dissenting).

52. Van Alstyne, *supra* note 15, at 1709.

53. For previous announcements of the death of federalism, see *L. TRIBE*, *supra* note 29, at 17 n.9.

54. Cable from Mark Twain in London to the Associated Press (1897).

55. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 160 (P. Bradley ed. 1945).

56. *Id.* at 160-61 (footnote omitted).

57. *Id.* at 166.

quently, "[t]he Union is happy and free as a small people, and glorious and strong as a great nation."<sup>58</sup>

So much of what the French observer wrote still holds true today, for reasons he cited, and others. Like separation of powers, federalism obliges government to control itself. Under federalism, local majorities curb the power of national majorities, thus making seizure of power by a national majority difficult. States, John Roche explains, "provide political obstacles to centralization that are far more effective than their constitutional position might indicate."<sup>59</sup>

Federalism provides an effective framework for harmonizing majority power and minority rights.<sup>60</sup> "The genius of this double system," according to James Burns, is "its ability to morselize sectional and economic and other conflicts before they bec[o]me flammable . . . . [It] keep[s] the great mobiles of ideological, regional, and other political energies in balance" until accommodation is achieved.<sup>61</sup> Therefore, the essence of federalism has been balances and compromises, and this is vintage American politics. The system did collapse in the 1850s and 1860s, but over moral, not political or constitutional issues. Federalism constitutes what Justice Brennan has termed a "double source of protection"<sup>62</sup> for the rights of American citizens. Each level of government must heed the injunction that no person may be deprived of life, liberty or property "without due process of law,"<sup>63</sup> he points out. This "double protection" was revealed with the increased activism of state courts in the 1960s. Early in the decade, according to Justice Brennan, the Supreme Court enhanced individual rights and liberties as the Warren Court imposed tougher standards on states in criminal procedures, reapportionment, and civil liberties.<sup>64</sup> But as the high court began to "pull back from . . . the enforcement of the

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58. *Id.* at 165.

59. J. Roche, *Constitutional Law: Distribution of Powers*, in 3 INT'L ENCYC. SOC. SCI. 300, 304 (1968).

60. *Id.* at 302.

61. J. BURNS, *THE VINEYARD OF LIBERTY* 598 (1981).

62. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 498, 503 (1977).

63. U.S. CONST. amend. V.

64. Brennan, *supra* note 62, at 495.

*Boyd* principle," state courts began extending the protections provided in their own state constitutions.<sup>65</sup>

Because the national government has constantly intruded into the internal affairs of states, federalism cannot be considered an equal partnership. For the most part, however, the institutions have been in the interest of enhancing liberty. "Historically, most limitations on personal liberties have come from the states," and the national government has constantly striven to eliminate these denials.<sup>66</sup> *Brown v. Board of Education*<sup>67</sup> and *Baker v. Carr*<sup>68</sup> are well-known examples of how the national government, via the Supreme Court, has guaranteed constitutional rights for minorities. The national government also has exercised its authority to abolish child labor and sweatshops, and to strengthen the freedoms of the first and fourteenth amendments.

By virtue of their own sovereign power, the states still control many of the choices that immediately and directly affect the lives of its citizens. They control municipal and local governments, charter corporations, administer civil and criminal law, and direct the education, health, safety, and welfare of the people.

With this emphasis on local rule, federalism encourages political experimentation. States serve as "laboratories" of democracy<sup>69</sup> because reforms can be attempted locally before becoming national policy, thereby reducing the cost of political reform. Failures are confined to local impact. Successes, such as expansion of voting rights and labor law and regulatory reforms, become national policy. "It is one of the happy incidents of the federal system that a single courageous State may . . . try novel social and economic experiments without risk to the rest of the country," Justice Brandeis explained in *New State Ice Co. v. Liebmann*.<sup>70</sup>

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65. *Id.* at 494. The principle of *Boyd v. United States* discussed by Justice Brennan is that "constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

66. 2 S. MORISON, H. COMMAGER & W. LEUCHTENBURG, *THE GROWTH OF THE AMERICAN REPUBLIC* 517 (6th ed. 1969).

67. 349 U.S. 294 (1955).

68. 369 U.S. 186 (1962).

69. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

70. *Id.*

This emphasis on local rule gives different interests stronger voices in how their lives are governed than would be possible strictly at the national level. Furthermore, it allows for local policy in areas where uniform national policy would be disastrous, if not tyrannical. "If there is any fixed star in our constitutional constellation," wrote Justice Jackson in *West Virginia State Board of Education v. Barnette*,<sup>71</sup> "it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."<sup>72</sup> As long as federalism is alive and well—which it is—there will be no national orthodoxy.

The keystone of the constitutional process is the judiciary. The Supreme Court's role was deemed so important that the Founders gave the Justices life tenure, thus insuring the high court's independence, although it has no separate constituency. The Court insures that the Constitution, and hence the doctrines of separated powers and federalism, are properly construed.

The Court provides a valuable check on government by giving citizens power over the laws that govern them. Since *Marbury v. Madison*,<sup>73</sup> when the Court became the final interpreters of the Constitution, an individual citizen has the power, through a lawsuit, to check a law passed by Congress and approved by the President. Before becoming a Supreme Court Justice, Robert Jackson noted: "[L]awsuits are the chief instrument of power in our system. Struggles over power that in Europe call out regiments of troops, in America call out battalions of lawyers."<sup>74</sup>

This instrument of power has enhanced liberty for all Americans. From the 1940s to the 1960s, black Americans found the courts to be the one branch of government willing to force America to live up to its promises to all of its citizens. Likewise, unsuccessful with the other government branches, environmental, consumer, and labor groups have turned to the courts for relief.

In the United States, the three branches of government, with the Supreme Court leading the way, have shown that individual liberty and economic security need not be incompatible. Although much

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71. 319 U.S. 624, 642 (1943).

72. *Id.*

73. 5 U.S. (1 Cranch) 137 (1803).

74. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* xi (1941).

attention has been given to the Court's role in economic matters during the Roosevelt era, less attention has been paid to its role in preserving individual liberties, and this is unfortunate. During that turbulent decade, the American government met the economic crisis without tossing aside the Constitution and the liberties it guarantees. The Court, during Roosevelt's presidency, strengthened the dicta of *Gitlow v. New York*, which extended the Bill of Rights to the states.<sup>75</sup> In *DeJonge v. Oregon*<sup>76</sup> it expanded the right of assembly; in *Herndon v. Lowry*<sup>77</sup> and *Thornhill v. Alabama*<sup>78</sup> it enhanced free speech; in *Chambers v. Florida*<sup>79</sup> it helped guarantee fair trials to black Americans; in *Grosjean v. American Press Co.*<sup>80</sup> it broadened the guarantee of the free press. "[T]he Constitution is what the judges say it is," Chief Justice Hughes explained in his immortal phrase, "and the judiciary is the safeguard of our liberty . . . under the Constitution."<sup>81</sup>

The emphasis on individual rights displayed by the Court during the Roosevelt years has been typical of the American government since 1787. The people, said Jefferson, "are the only sure reliance for the preservation of our liberty."<sup>82</sup> "A dependence on the people is, no doubt, the primary control on the government," wrote Madison.<sup>83</sup> This characteristic has separated the United States from much of the world. During periods of social convulsions or political turmoil, when so many other countries move in the direction of restricting democracy (for example, banning elections and closing presses), the United States has moved in the direction of expanding democracy. To Americans, the ills of democracy are best cured by more democracy, not less. This is what the Founders intended, for the Constitution begins: "We the People . . . in Order

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75. 268 U.S. 642, 666 (1925) (assuming that freedom of speech and press are among the rights protected by the due process clause of the fourteenth amendment).

76. 299 U.S. 353 (1937).

77. 301 U.S. 242 (1937).

78. 310 U.S. 88 (1940).

79. 309 U.S. 227 (1940).

80. 297 U.S. 233 (1936).

81. R. JACKSON, *supra* note 74, at 3 (quoting ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES 185-86 (2d ed. 1916)) (emphasis omitted).

82. T. JEFFERSON, *Letter to John Adams*, in 6 THE WRITINGS OF THOMAS JEFFERSON 392 (1904).

83. THE FEDERALIST No. 51, *supra* note 21, at 355.

to form a more perfect Union . . . ."<sup>84</sup> The people, not institutions or states, are sovereign.

In this sense, *Baker v. Carr*<sup>85</sup> is the Warren Court's decision of greatest consequence for all Americans.<sup>86</sup> Based on the equal protection clause, this landmark case further insured that each American is armed with the means to make his or her view felt. Chief Justice Warren was typical of the Supreme Court, which in recent decades has abolished "white primaries,"<sup>87</sup> racial gerrymandering,<sup>88</sup> and poll taxes<sup>89</sup> as conditions for political participation. The Court has been typical of the United States, in general. Through constitutional amendments, suffrage has been extended to include those without property, blacks, women, and eighteen year olds. By the 1950s and 1960s, Congress was on board with the passage of legislation strengthening statutes protecting the right to vote. By 1965, the executive branch was fully on board as President Johnson appealed for federal action to guarantee every American the right to vote and hold office.

Despite their distrust of popular democracy, the framers never questioned that government should be accountable to the people, for the people constitute the most important "precaution" against the abuse of power. The people select who will govern and throw out of office those who betray that trust. Through elections, the people evaluate and check the so-called power elite, and provide the greatest protection of their own liberties.

We the people, through separation of powers and federalism, have prevailed. The doctrines have their faults, but they have successfully performed their most valuable tasks. Recent events have again demonstrated the framers' sagacity in recognizing that "men are not angels" and constructing a framework of government saturated with "precautions." For 200 years, the doctrines have been

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84. U.S. CONST. preamble.

85. 369 U.S. 186 (1962).

86. Brennan, *supra* note 62, at 493.

87. *Smith v. Allwright*, 321 U.S. 649 (1944) (resolution by a political party excluding blacks from voting in the primary election violated the fifteenth amendment).

88. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (change in boundary lines of a city that had a discriminatory effect on black voters violated the fifteenth amendment).

89. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (state poll tax violated the equal protection clause of the fourteenth amendment).

instrumental components of a Constitution that has allowed Americans to enjoy “life, liberty, and the pursuit of happiness”<sup>90</sup> by providing a safe, stable government that not only guards against tyranny but promotes liberty.

The American ship of state has sailed through some mighty rough storms and it undoubtedly will have to weather many more. But it has a solid structure, thanks to the Constitution writers of 1787. The crew may get out of hand at times, but the sturdy vessel keeps them out of the water.

*Candace H. Beckett*

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90. The Declaration of Independence para. 2 (U.S. 1776).