

## What Separation of Powers Means for Constitutional Government

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Judging from their conduct in recent years, the branches of our national government seem to be suffering a prolonged identity crisis. It used to be expected, roughly speaking, that the Congress would pass laws, the President would execute them, and the Supreme Court would interpret them in individual cases. This was the political framework established by the Constitution and adhered to for the greater part of our political history. Increasingly, however, it is not the way the federal government operates. And as departures from the Constitution's plan grow more common, a permanent derangement of the American political system becomes more probable.

While the formal separation of powers promulgated in the Constitution and explained in the *Federalist* remains, and in some respects continues to function well, the actual distribution of powers has changed dramatically. Like square dancers who miss a call and end the dance with the wrong partners, the branches of the federal government find themselves in strange company making awkward excuses. Congress has become increasingly energetic and administrative, the judiciary willful and legislative, and the executive (in its institutional, not electoral, connection) tentative and judicial. Under these conditions, it is the Congress's and the Supreme Court's power that have grown at the net expense of the President's. But more important than the balance of power between the branches is the maldistribution of pow-

ers, the mixing and confusing of governmental functions, which has resulted.

### THE CURRENT STATE OF AFFAIRS

Increasingly, the bills that Congress passes are ill-digested, little more than vague charges to the executive agencies to accomplish some general and ill-defined purpose. But the statutes' very vagueness is the license with which committee and, more significantly, subcommittee chairmen are armed to threaten and cajole the executive departments. In one sense, this is nothing new. Congress has always looked over the executive's shoulder, sometimes more, sometimes less gloweringly; and imprecise grants of power to regulatory agencies have been common since the late nineteenth century. What is new is the extent to which Congress's role as legislator is being subordinated to its role as overseer of the executive branch. With a vast array of federal programs to be overseen and a multiplicity of subcommittees to do the overseeing, congressional intervention in administrative affairs has increased substantially. As a result, Congress today invests more energy and exerts more influence in playing ombudsman, investigator, and regulator than in discharging its duty as lawmaker.

This newfound emphasis on administering the executive branch, combined with the Congress's old-fashioned delight at delivering benefits and services

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to home districts and states, leaves congressmen little time or appetite for public stands on highly partisan issues. House members, in particular, find it advantageous when running for reelection to emphasize not their partisan affiliation, but their ability to deliver goods and services to their districts. And their districts, in gratitude for their good offices, have reelected House incumbents at astonishing rates.

Serious lawmaking, the kind involving divisive moral and constitutional questions, is more and more left to the judiciary. It is the Supreme Court that has in effect legislated on abortion, obscenity, school prayer, the death penalty, and countless other issues touching the welfare and morals of society; even as the Court has arrogated to itself the right to have final say on the most important constitutional questions determining how Americans govern themselves—for example, the one-man, one-vote standard of representation. But in truth, Congress has been eager to foist the responsibility for making difficult political choices upon the Court, if for no better reason than that it allows incumbents to have their cake and eat it too.

With the contemporary executive the case is different. Beset by both Congress and the Court, the President has found it difficult to defend his institutional prerogatives. This is partly a confession of the enormous political power now wielded by the other branches, Congress in particular. On the whole, the executive branch is torn between the search for a national electoral mandate to legitimize and empower it against the Congress and Court, and the knowledge that the means to capitalize on such a mandate are ultimately elusive, given the executive agencies' dependence on congressional subcommittees and their various clients.

This quick sketch of the politics of American national government is not meant to be exhaustive, of course, but it does convey the salient facts about the current situation in Washington. Those facts point to the following conclusion: The chief constitutional basis of our politics, the separation of powers, is under severe

pressure from the institutions and practices of the administrative state. Paradoxically, the principal beneficiary of the growth of the executive bureaucracy has been Congress, not the President, who sees his responsibilities (as head of the executive branch) continually enlarged but his power steady diminished. Even so, not all congressmen equally have seen and approved of the growth in the federal government's authority, or have cheered Congress on in its own superintendence of the executive. For almost a century a faction has existed within the national legislature in favor of the administrative state as the emblem and vehicle of national progress. This faction has included both Democrats and Republicans but, since 1912, predominantly Democrats.

#### THE FRAMERS' CASE FOR SEPARATED POWERS

Separation of powers was an idea accepted by all sides in the American founding, though its precise meaning remained unclear—at least until its famous exposition in the *Federalist*, the defense of the Constitution written by “Publius,” the pen name of Alexander Hamilton, James Madison, and John Jay. The confusion over the meaning of separation of powers arose mainly from the status of the executive power: If the executive were subordinate to the legislature, as its name implies it should be, would not the legislature quickly overpower the executive? And in that event, how could the powers long remain separated? The initial context of this problem was the English Civil War, when the idea of separated powers first appeared in the pamphlets and essays of parliamentary writers who distinguished between legislative and executive powers in order to subordinate the executive to the legislative. The aim of such republicans as John Milton and Philip Hunton was to establish the rule of law by guaranteeing that those who made the law could not execute it and that those who executed it could not make it for the sake of their private advantage. In effect, of course, the doctrine was anti-monarchical, inasmuch as it reduced the King to the status of an

“executive” (that is, someone who carries out the will of another).<sup>1</sup>

### *Balancing Executive and Legislative Power*

Such a weak executive could hardly balance the power of the legislature, however. John Locke, addressing this difficulty in his *Second Treatise* (c. 1688), added a third power to the balance to strengthen the executive. The “federative” power, as he called it, concerned foreign relations (the ability to federate or ally with other countries). While this federative power was theoretically distinguishable from the executive, in practice it was inseparable from the executive, because it, like the executive, presupposed the united power of society. Circumstances would frequently demand that these two powers be exercised for the common good, but in the absence of a standing law and sometimes even against the law. Locke’s justification for this extra-legal but prudent action was described as the “prerogative” power, which was necessarily executive. In this fashion, Locke acknowledged what was reasonable in the claims of each side in the English Civil War—the rule of law for the Whigs and of prerogative for the Tories. But he combined them in the idea of a liberal regime freed of both excessive jealousy of the executive power and the pretensions of divine right.<sup>2</sup>

His doctrines lived on in the thought of the so-called Commonwealthmen, a circle of eighteenth-century republican radicals who resisted the “corruption” of the House of Commons by the King and his ministers. Through their patronage power, the ministers could confer pensions and sinecures on complacent members of Parliament, compromising the legislature’s independence. The practice was denounced on this side of the Atlantic as well, and figured promi-

nently in the Americans’ criticisms of the British in the 1770s and in their distrust of the colonial governors appointed by the crown. This distrust was later embodied in the weak executives formulated by the new state constitutions after the Revolution. Thus the separation of powers as Americans thought of it in the early 1780s harked back to the Commonwealthmen’s fear of corruption and the seventeenth-century republicans’ preference for a weak executive.

The Framers of the Constitution of 1787 solved the problem of reconciling a strong, durable separation of powers with republican government by means of a new doctrine of constitutionalism. The most authoritative account of their achievement may be found in the *Federalist*, which provides two justifications for the separation of powers—liberty and good government.

### *Preserving Liberty*

The argument from liberty holds that separation is needed in order to prevent tyranny. According to Publius’s famous definition, “The accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>3</sup> Tyranny is a danger because man’s passions and reason are not perfectly harmonious; his reason may be distorted by desire. Although each man has by nature the rights to life, liberty, and the pursuit of happiness, he cannot secure these rights without joining together with other men to form a civil society, a people. Despite the legal unity of this people, it is composed of individuals whose impassioned opinions and interests divide them into majorities and minorities. As a precaution against injustice, therefore, the powers of government must be so divided that no man or group of men may wield all of them at once. This precaution would not be necessary

<sup>1</sup>See, in general, W. B. Gwyn, *The Meaning of the Separation of Powers* (New Orleans: Tulane University Press, 1965), and M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967).

<sup>2</sup>See the excellent discussion in Harvey C. Mansfield, Jr., *Taming the Prince* (New York: The Free Press, 1989).

<sup>3</sup>Alexander Hamilton, James Madison, John Jay [Publius], *The Federalist Papers* (New York: New American Library, 1961), 47, p. 301.

if reason and passion were utterly harmonious, and if the whole comprising such reason and passion were *a priori* unitary rather than synthetic. These conditions, however, are unique to God, who alone justly unites the legislative, judicial, and executive powers in the same hands. The Declaration of Independence affirms this by appealing at once to “the laws of Nature and of Nature’s God,” “the Supreme Judge of the world,” and “the Protection of Divine Providence.”<sup>4</sup>

But men are prone to seek power, which has an “encroaching” nature, and the *Federalist* insists that if the people’s liberty is to be secure, they must take precautions against the oppressions of their governors. The republican form of government, the elective principle itself, is the main defense. But Publius also proposes “auxiliary precautions,” chief among which is the separation of powers. This separation will be enforced not by “parchment barriers” but by reciprocal checks—the President’s veto, for example, and the Senate’s confirmation power—requiring that the powers be partially mixed in order to be kept independent. “Ambition must be made to counteract ambition,” in the words of *Federalist* 51. This “policy of supplying, by opposite and rival interests, the defect of better motives,” is designed to reinforce the people’s distrust of their representatives, but, simultaneously and ironically, to increase the people’s confidence in the Constitution.<sup>5</sup>

The last step is crucial, inasmuch as the people’s jealousy for their liberty must be directed more against the legislature, the branch ostensibly closest to them, than against any other. In every form of government, the *Federalist* cautions, the most powerful branch is always the most dangerous to the people’s freedom. In a monarchy, it is the executive that ought to be feared. But in a republic, it is the legislative. In the state governments, for example, with their weak executives, it is the legislative department that is “everywhere extend-

ing the sphere of its activity and drawing all power into its impetuous vortex.” Therefore, Publius admonishes, “it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.” To protect their rights and liberties the people must insist on limited national government, but that means the people must limit Congress more effectually than they had the state legislatures; and the *Federalist* argues that the Constitution’s improved separation of powers (along with bicameralism) will do just that.<sup>6</sup>

### *Promoting Good Government*

The people should feel, then, not that the Congress is peculiarly theirs, as if the other branches belonged to someone else or to another class; but that what is theirs is the Constitution. In the course of the *Federalist*’s argument, this opinion that the Constitution is good because it is theirs is gradually transformed into the opinion that it is theirs because it is good. Publius’s second, positive argument for the separation of powers is responsible for this transformation. For in addition to the negative function of preventing tyranny, the separation of powers actively promotes good government. That is to say, it allows the branches of the federal government to perform their respective functions well or at least better than they otherwise could. In the first argument, “power” is treated as a generic thing, abstracted from any ends for which it might be used, regarded as a dangerous end in itself (hence its “encroaching” nature). But in the second, “power” is divided into “powers,” acknowledging that each has a “nature” that aims at the excellent performance of certain definite functions.<sup>7</sup>

Contrary to Woodrow Wilson and more recent critics of the separation of powers such as James MacGregor Burns and Robert Dahl, the purpose of separation was not to produce governmental “deadlock” but

<sup>4</sup>See Harry V. Jaffa, *How to Think About the American Revolution* (Durham: Carolina Academic Press, 1978), pp. 131–132; George Anastaplo, “The Declaration of Independence,” *St. Louis University Law Journal*, Vol. 9 (1965), p. 390.

<sup>5</sup>*Federalist* 48, p. 308; 51, p. 322.

<sup>6</sup>*Federalist* 48, pp. 308–310.

<sup>7</sup>*Federalist* 48, p. 308; cf. 37, p. 227; 39, p. 241; and see Aristotle, *Politics* IV. 14–16.

to produce good government, which is not the same thing as simply popular or majoritarian government. These critics reduce the separation of powers to its negative role, equating separation with “checks and balances.” While insisting that each department must have a will of its own to preserve its independence, the *Federalist* considers “the regular distribution of power into distinct departments” to be something quite different from “legislative balances and checks.” In fact, the term “balances and checks” is used only with reference to the relation between the House and Senate.<sup>8</sup> The separation of powers, though it does help to check governmental tyranny and to balance the Constitution, is primarily designed to elicit sound and deliberate legislation, a firm and energetic executive, and an independent judiciary faithful to the Constitution.

These qualities are treated by the *Federalist* as the consequences of certain carefully ordered quantities. The ability of the national legislature to deliberate well is traced to the relatively small size and two-year term of the House of Representatives (allowing congressmen to learn their job and to discover the common interests that make general legislation possible) and to the smaller size and longer term of the Senate (making it a force for stability, moderation, and wisdom). The executive will be energetic because it is one rather than plural, and will have a “moral certainty” or at least a “constant probability” of being occupied by “characters preeminent for ability and virtue” because of the President’s mode of appointment (the electoral college), his four-year term of office, and his indefinite eligibility for reelection.<sup>9</sup> The independence and fidelity of the judiciary (the critical third power of government first hailed by Montesquieu) are guaranteed by

<sup>8</sup> *Federalist* 9, p. 72. For examples of the “deadlock” thesis, see Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908); James MacGregor Burns, *The Deadlock of Democracy: Four-Party Politics in America* (Englewood Cliffs, N.J.: Prentice-Hall, 1963); and Robert Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956).

<sup>9</sup> *Federalist* 68, p. 414.

the judiciary’s indirect mode of appointment and good behavior tenure.

In each case, “fit characters” are summoned to the office by virtue of its formal characteristics—its job description, if you will—and the task of the people or their representatives is to select the best man for the job. If the negative function of the separation of powers depends on connecting “the interest of the man” with “the constitutional rights of the place,” as Publius argues in *Federalist* 51, then the positive function requires that the virtue of the man be linked to the constitutional duties of the place. As the *Federalist* discusses each of the branches, it gradually brings the positive function of separated powers to the fore, describing the special contribution that each can make to good government. From this viewpoint, even the negative or checking function of separation is reinterpreted as something positive: for example, the President’s veto is shown to be not merely a defensive tool but a means of improving the deliberations of the legislature by slowing, moderating, and correcting them.<sup>10</sup>

### *The Constitution as Supreme Authority*

Although “parchment barriers” are unreliable, the Constitution can be relied on because the people’s—and in a different way, their representatives’—passions and interests will be tied to their opinion of the Constitution’s importance for good government. As such, the Constitution underlies both the positive and negative functions of the separation of powers. For without some idea of what the branches’ duties are, it is impossible to know when and how to defend their rights and their independence.

This argument is not disproved by subsequent developments in American politics, in particular the rise of political parties. It is true that the Constitution of 1787 had to be amended to accommodate the practice of presidential and vice presidential candidates running for office on the same party ticket. The Twelfth Amendment, ratified in 1804, changed the method of

<sup>10</sup> *Federalist* 10, p. 82; 73, pp. 442–446.

voting in the Electoral College by requiring the electors to cast separate ballots for President and Vice President. (Originally, the electors voted for two candidates for President, with the runner-up becoming Vice President.) But the point of the amendment was to make party competition compatible with the separation of powers by securing the President's independence from Congress. Without that change in the Constitution, the power of electing the President effectively would have devolved from the people (represented indirectly in the Electoral College) to the House of Representatives, where ties between presidential and vice presidential candidates would be decided (as in 1800), and where all sorts of electoral mischief was possible.

Present-day political and constitutional reformers, again following the lead of Wilson and other Progressive political scientists, argue that political parties evolved in America in order to *overcome* the separation of powers, to bring the executive and legislative together in a party program. Undoubtedly, political parties did foster some cooperation between the branches on questions of public policy. But the overriding consideration for Jefferson and his contemporaries was to ensure that parties and their public policies were shaped by and kept subordinate to the general principles of the Constitution. This was the purpose of the Twelfth Amendment. With that subordination firmly established, the system of party government could operate safely and benignly. So rather than the party system being designed to overcome the "deadlock" resulting from separated powers, it quickly became an additional safeguard of separation, with the parties' own vitality and respectability depending on their integration within the constitutional system.

The existence of parties did show, however, that the constitutionality (not to mention the wisdom) of specific policies was disputable. But the condition of their civil disputation was, of course, that the comprehensive goodness of the Constitution was considered indisputable. Here, too, the party system was dependent on the constitutionalism most clearly articulated in the *Federalist*. The doctrine of constitutionalism holds

not only that the people's rights are best secured in a written constitution structured around the separation of powers, but that the people have correlative duties to (and under) that constitution. In the final analysis, indeed, those duties become the ground for the people's rights—that the people are able to live up to their rights, to vindicate them, reveals that the people are worthy of being free.

The supreme achievement of the Framers' constitutionalism was to elicit what Publius in *Federalist* 49 calls "veneration" or "reverence" for the Constitution. By identifying the people's sovereign will not with its latest but its oldest expression, the Framers succeeded in identifying the people's authority with the Constitution, not with the statutory law made by their representatives. In this manner, republicanism in America came to be constitutionalized, and the people whose choice had authorized the Constitution in the first place came to regard *it* as the lofty authority that should guide their own choices and those of their posterity.<sup>11</sup>

It was the separation of powers that made possible this identification of the Constitution with the awesome stature of the moral law, for separation of powers helped to keep the Constitution inviolate by elevating it above momentary popular whims. That is why political disputes among the branches of government are never decided by direct, extraconstitutional appeals to the people. In effect, the people have no existence outside of the Constitution, or more precisely, outside of the moral law embodied in the Constitution.<sup>12</sup> It is only by elections and by political competition among the branches, therefore, taking place *under* the provisions of the Constitution, that the people's rational will may be expressed.

### THE PROGRESSIVES' ASSAULT ON THE CONSTITUTION

Nothing could be further removed from the reverence for the Constitution recommended by the Framers

<sup>11</sup> *Federalist* 49, pp. 314–315.

<sup>12</sup> *Federalist* 49, p. 317.

and encouraged by the separation of powers than the tone adopted by the chief architect of the administrative state, Woodrow Wilson. In his first book, *Congressional Government*, published in 1885, he acknowledged that “opposition to the Constitution as a constitution, and even hostile criticisms of its provisions, ceased almost immediately upon its adoption; and not only ceased, but gave place to an indiscriminating and almost blind worship of its principles...” Reverence for the Constitution would be “blind worship” only if reason’s say in political life had been gravely underestimated by the Framers, and the Constitution’s rationality greatly overestimated. This was exactly Wilson’s position. He attributed “the charm of our constitutional ideal” to a kind of “political witchcraft,” and advised his countrymen to undertake an unsentimental and “fearless criticism” of the Constitution. “The more open-eyed we become, as a nation, to its defects, and the prompter we grow in applying with the unhesitating courage of conviction all thoroughly tested or well-considered expedients necessary to make self-government among us a straightforward thing of simple method, single, unstinted power, and clear responsibility,” he counseled, “the better.”<sup>13</sup>

### *Rejecting the Separation of Powers*

Wilson’s political thought, like that of many of the leading American political scientists and reformers in the Progressive era, rejected the separation of powers in favor of the allegedly more fundamental and modern separation between politics and administration. Separation of powers, in his view, was the product of an outmoded theory of politics. At the time of the founding, men thought of politics on the model of Newtonian physics, imagining that the departments of government could be held in place by the countervailing forces of interest and ambition, even as the stars and planets were kept in their orbits by the force of

gravity. The “theory of checks and balances” was at bottom “a sort of unconscious copy of the Newtonian theory of the universe.”<sup>14</sup>

A century or so later; however, the limitations of this eighteenth-century world view were apparent. Government is “not a machine, but a living thing,” wrote Wilson, in lines that he would incorporate into his presidential campaign speeches in 1912. “It is accountable to Darwin, not to Newton.” Consequently, government must constantly adjust to changes in its environment; its purposes and structure are not ordained by “the laws of Nature and of Nature’s God” (as the Declaration of Independence states) or limited by a written constitution.<sup>15</sup> In particular, government has no use for separated powers. “No living thing can have its organs offset against each other as checks, and live,” he declared. “There can be no successful government without leadership or without the intimate, almost instinctive, coordination of the organs of life and action.”<sup>16</sup>

Wilson’s efforts to overcome the separation of powers occupied his entire life, from his student days at Princeton through his career as a professor to his years in politics. Concerning the specific reforms that would be necessary to achieve this “coordination of the organs of life and action,” his own thought underwent an evolution. As a young man, he favored a series of constitutional amendments designed to make Congressmen, Senators, and the President serve roughly concurrent terms, so as to increase the probability that one political party would gain control of the whole elective part of the government. In addition, he proposed that the President be required to choose his cabinet from the leaders of the majority party in Congress, who would be authorized to introduce legislation on the Hill, thus obviating the committee system. These are essentially the same proposals as those advanced recently by Lloyd Cutler and the Committee on the

<sup>13</sup> Woodrow Wilson, *Congressional Government: A Study in American Politics* (Baltimore: John Hopkins University Press, 1981; orig. ed., 1885), pp. 27, 215.

<sup>14</sup> *Constitutional Government*, pp. 54–56.

<sup>15</sup> *Constitutional Government*, pp. 56–57.

<sup>16</sup> *Ibid.*

Constitutional System, though their view of the costs and consequences of superimposing them on American government is not so clear as Wilson's.

In any event, later in his career Wilson decided that there was an easier way. Strong presidential leadership combined with a highly developed and centralized administrative apparatus would succeed in liberating the national government from the straitjacket of separated powers. Today's constitutional reformers have had a similar change of mind but in reverse order, starting out with an enthusiastic embrace of strong presidential leadership (Roosevelt, Truman, Kennedy, Johnson), but eventually deciding that progress will not come to America without far-reaching constitutional change. Whatever the strategy, the goal of these political reforms is the same: to deliver up American government to the salutary currents of progress, rather than allowing a superannuated Constitution to keep the country drydocked.

### *Redefining the Role of the Executive*

In rejecting separation of powers in favor of the separation of politics and administration, Wilson reformulated the terms of political debate. "Democracy" now meant the last and most perfect stage in the evolution of the state, in which the people's will was directly responsible for setting public policy. But the immediate expression of their will could be whimsical, and so was not to be taken as authentic, as conveying their permanent instinct for progress—the Darwinian impulse. Therefore, the people's will had to be mediated by leadership, a word that assumed a new prominence and respectability in the vocabulary of American politics. As compared to the masses, leaders were more closely attuned to the spirit of the age; they were able to distinguish the faint but swelling notes of progress from the background noise of history. Their task was to prepare the people for the future, to act as interpreters and spokesmen for the spirit of the age; and, of course, actually to lead the way. But they went only where the "common thought" and "common impulse" were destined eventually to take the people. The lead-

ers' function was to mediate between the people and the future, not to educate or elevate the people's will to a rational or trans-historical, much less a constitutional, standard.<sup>17</sup>

What did this mean for American politics? Whereas "energy" in the executive had come mainly from the President's position in the constitutional order, leadership in the executive would depend entirely on the President's personal traits—his charisma, as we say today. Around his personal appeal to the voters and his "vision" of the future, he would build a political movement, perhaps even a "Reagan Revolution." But the important point for our purposes is that his principal role in office would be the same as in campaigning for office: he would be first and foremost a political or party leader, not the country's chief executive. The constitutional function of chief executive officer, which in Wilson's scheme falls under the rubric of administration, would be largely transferred to the Congress.

The reason for this, in Wilson's blunt words, is that the President "cannot execute laws." In practice, it now takes a dozen or so departments and millions of executive branch employees to execute the laws. "It is therefore becoming more and more true, as the business of the government becomes more and more complex and extended," Wilson wrote, "that the President is becoming more and more a political and less and less an executive officer." His executive powers drain away into the bureaucracy while "his political powers more and more centre and accumulate upon him and are in their very nature personal and inalienable."<sup>18</sup> In the new dispensation, it is not our rights but our charisma that is inalienable. Even as, in Wilson's considered view, it is inevitable for society to become more complex and in need of governmental regulation, so it is inevitable that the President must

<sup>17</sup> See Woodrow Wilson, "Leaders of Men," in *The Papers of Woodrow Wilson*, ed. Arthur S. Link, 43 vols. (Princeton: Princeton University Press, 1966-83), Vol. 6, pp. 644-671.

<sup>18</sup> *Constitutional Government*, pp. 66-67.



take more and more of the responsibility for leading the country into the future, and less and less for executing the laws.

Presidential leadership has therefore a certain holiness to it, of which Wilson was well aware. The President is the only truly national leader, chosen by the whole people; and if he rightly interprets the people's inchoate desire for progress, "he is irresistible," for the people's "instinct is for unified action, and it craves a single leader." Therefore, in Wilson's famous phrase, the President's office "is anything he has the sagacity and force to make it."<sup>19</sup>

But this means that in ordinary times, with ordinary men in the Oval Office, the presidency will not be the center of affairs and the dictator of events. Largely bereft of constitutional rights and duties, the office will be as small as the men who occupy it. And even on those occasions when the President is a man of great "personal force," his leadership will depend absolutely on his connection to the people, on his ability to read their thoughts and stir them to action. Far from being the energetic and independent executive the Framers sought, the President in the routine operations of his office will be a hostage to popular opinion.<sup>20</sup>

### *The Rise of Administrative Lawmaking*

However, perhaps the deeper reason why, for the Progressives, the President cannot execute the laws is that few laws in the old sense—general rules and measures directing action toward the common good—would be necessary. The assumption of the Progressives is that history ultimately will direct human action toward the common good. To put it differently, the Darwinian imperative does not require human legislation to see to it that the fittest will survive. That outcome is guaranteed; those who survive are by definition the fittest. The task of law, in Wilson's view, is only to see to it that the inevitable growth of society be as evenly distributed as possible among classes and sections of

the nation. Thus, law regulates and redistributes the inevitable; it is not based on a choice between competing opinions of the common good or clashing views of justice. In this sense, law is not political but administrative; the main purpose of law in modern times is not to defend the country, punish wrongdoing, and inculcate principles of justice. It is to administer progress—in short, to create the administrative state.

"Legislation is but the oil of government," as Wilson put it. "It is that which lubricates its channels and speeds its wheels; that which lessens the friction and so eases the movement." What becomes important about law for the Progressives is not so much its purpose or claim to justice but its execution or implementation, its effect on the process of government. "It is even more important to know how the house is being built than to know how the plans of the architect were conceived and how his specifications were calculated. It is better to have skillful work...than a drawing on paper which is the admiration of all the practical artists in the country."<sup>21</sup> Yet how is it possible to know whether a house is being well built without comparing it, implicitly or explicitly, to the idea of a well-built house? Although Wilson implicitly rejected Aristotle's claim that politics is the architectonic art, he could not abolish the need for a "literary theory" or a model to act as a guide for skillful craftsmen. He simply replaced prudence or practical wisdom as that guide with the notion of a leader's "vision," the revelation that history vouchsafes to him.

### *Replacing Traditional Notions of Good Government*

To regulate or administer progress, not to secure men's inalienable rights, is therefore the basic function of the modern state. Such regulation is necessary because progress brings with it problems, or more precisely, progress exposes as "problems" what had once been regarded as unhappy aspects of the human condition. Selfishness, poverty, war, as well as many

<sup>19</sup> *Constitutional Government*, pp. 68–69.

<sup>20</sup> Consider in this connection *Constitutional Government*, pp. 80–81.

<sup>21</sup> *Congressional Government*, p. 203.

lesser evils—these became social problems in the modern sense when the assumption was made that they could be solved, that man did not have to content himself with alleviating or enduring them. What made their designation as social problems plausible, in turn, was the assumption that the future would be very different from and much better than the past. From that tenet it was easy to conclude that the distinction between “progressive” and “reactionary” ought to replace the distinction between good and evil, because the former distinction was not only the functional equivalent of the latter but was historically demonstrable, hence unassailable.

The dichotomy between politics and administration, which Wilson did as much as anyone to popularize, meant ostensibly that the ends of government ought to change easily with the changing sentiment of the majority, and that the means to those ends ought to be efficiently, scientifically determined by a specially trained class of nonpartisan civil servants. But underlying and bridging the dichotomy was his faith that history was progressive. Both politics and administration served the cause of progress—the one through leadership, sounding the trumpet of advance; the other through pacifying and reorganizing the newly won territory. For that reason, administration was not as “value-free” or “value-neutral” as Wilson and the reformers let on. In truth, the administrative class was intrinsically hostile to anyone who did not accept the rationale of its own existence, namely, the progressive theory of history.

Publius had stated in *Federalist* 68 that,

Though we cannot acquiesce in the political heresy of the poet who says: “For forms of government let fools contest—That which is best administered is best,”—yet we may safely pronounce that the true test of a good government is its aptitude and tendency to produce a good administration.<sup>22</sup>

<sup>22</sup> *Federalist* 68, p. 414.

The difference between Publius’s and Wilson’s positions could not be more significant. For Publius, the poet utters a heresy because there is a connection between a properly constituted republic and good administration: republican government under the Constitution will have a greater “aptitude and tendency” to produce good administration than would any other form of government. But what is good administration? Certainly it comprises energy in the executive and all those other means to the public good of which Publius speaks. The crucial point, however, is that the Constitution is part of the public good, according to Publius. Whereas Wilson treats public policies abstractly, as ends in themselves to be determined by a progressive people, Publius emphasizes that public policies and laws are themselves only means to the ends set out in the Constitution. Therefore the people can err, and the powers of government ought to be separated both to protect against governmental—or popular, that is, legislative—tyranny, and to provide the time and institutions necessary to decoct “the cool and deliberate sense of the community” from its “transient impulse[s]” and “temporary delusion[s].”<sup>23</sup>

For Wilson, however, the people always (not “commonly”) express the historical forces working for good, and the leader’s task is only sifting the timely from the untimely impulses at work in them. In practice this means that all popular impulses are regarded as ultimately rational, that neither popular nor governmental tyranny is seen as a fundamental danger anymore, that separation of powers may safely be dispensed with, and in particular that the Congress may be—must be—entrusted with “complete and convenient” author-

<sup>23</sup> *Federalist* 63, p. 384; 71, p. 432. See Paul Eidelberg, *A Discourse on Statesmanship* (Urbana, Ill.: University of Illinois Press, 1974), pp. 296–304. On the people’s goodness, cf. *Federalist* 71, p. 432: “It is a just observation that the people commonly *intend* the PUBLIC GOOD,” he writes in *Federalist* 71. “This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always *reason right* about the *means* of promoting it.”

ity over the executive agencies.<sup>24</sup> “Complete” is not the same as “exclusive,” of course, and Wilson did not envision the executive surrendering all executive authority. But with the advent of the administrative state, whatever power the executive retained over the agencies was bound to atrophy. To this development Wilson could not imagine an ethical or political objection, for the principle governing the distribution of powers within the administrative state, like the Darwinian ethic as a whole, admitted no appeal from the order of things determined by the triumphant forces of history.

### *The Demise of Constitutional Government*

The administrative state was born to replace an outmoded constitution with a new one, organized around a powerful centralized government retaining, at most, only the independent judiciary as a holdover from a principled separation of powers. The new government would feature a closely integrated executive and legislative, dominated in partisan matters by a President who could influence Congress through his leadership of public opinion, and dominated on the administrative side by a Congress whose committees could control the executive agencies. On many levels, this is a description of American national government today. From the Framers’ point of view, this picture represents a critical breakdown in the separation of powers. From the viewpoint of Woodrow Wilson and the advocates of the administrative state, it represents a stupendous breakthrough for enlightened political theory and practice.

The Constitution defended in the *Federalist* presumed that in order to be respectable, republican government had to be good government. It had, that is,

<sup>24</sup> *Congressional Government*, p. 203.

to secure private rights and the public good, rather than simply obey the majority’s will. Furthermore, it presumed that man, as a creature of passions as well as reason, would often act rashly and unjustly if he were not taught or habituated to respect the moral law superior to his own will, the law embodied in the Constitution.

But the Progressive architects of the new order assumed that history itself would guarantee the victory of reason in politics. Granted, this victory would not be direct but dialectical, employing men’s passions as the vehicle by which reason would progress. Actually, however, the doctrine encouraged the belief that in political life there is no compelling need for self-restraint, for the moderation of political passions, for the accommodation of prejudices to reason. Practically speaking, no respect is owed to anything except the future—that became the new meaning of idealism, in whose name leaders and experts of all sorts were (in effect) to claim the right to rule ordinary citizens.

The success of the politics of progress was, on its own terms, the token of reason’s ascendancy over passion. Man seemed, so to speak, to be reducing the distance between himself and God, as his reason worked itself out in the life of the administrative state. This is a strange, impious justification for bureaucratic rule, but perhaps, in the final analysis, it is the only compelling one.

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