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Separation, Politics and Judicial Activism

WALLACE MENDELSON*

It takes a united country to run a divided government. . . .
—Clinton Rossiter

American government was conceived in fear. Haunted by the concentrated power of kings, we fractured¹ the power of popular government. Fractured power of course means fractured responsibility—a vexing element in the American political system. To put it differently, the same Separation of Powers with its corollary “checks and balances” that was designed to impede evil government must *pari passu* impede good government (however these moralistic terms may be defined). Separation and democracy then have this in common: both are concerned with the use and misuse of power; both are precautionary. The one, however, is purely negative, overbroad, and non-selective. It blocks or hinders any use of power, however exercised, for whatever end or purpose, wise or unwise, good or bad. The other is principled and selective. It affirms and legitimizes some uses of power, repudiating others. Separation and democracy thus are mutually harmonious in some degree, beyond that they are in tension.

The parliamentary system handles the riddle of governmental power quite differently and, some insist, with more sophistication. It does not seek safety in a mechanistic clash of separated forces. Rather it concentrates power for effective action and holds that power closely and democratically accountable. This largely eliminates what for us is a perennial quandary: which of several shells hides the peas of power and responsibility? The result, one suggests, is that parliamentary electorates have more confidence in, and understanding of the governmental process than is customary in this country even in good times. Perhaps in the long view we have relied too much on self-operating, external mechanisms and too little on ourselves—enjoying as we have a wide margin for error and inefficiency thanks to great natural wealth and our protective ocean moats. Expecting the public sector to take care of itself, participating little more than nominally in the democratic process, finding our chief satisfactions in the

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¹Were we not here concerned only with the Separation of Powers, “splintered” would be a more accurate term. For in addition to separating, we also bicameralized and federalized. Accordingly we now have just over 200 major governmental power centers—to say nothing of thousands of “home-rule” (and other) counties, municipalities, school, and other special districts.

private sector, we are generally disappointed and cynical with respect to government. Typically we "know" there must be deceit and venality in any gap between what public men profess and what they produce. The fact is the checks and balances of Separation were designed to make professed programs difficult to implement. For to speak of checking and balancing—the terminology we learned as children to revere—is a sympathetic way of referring to frustration and deadlock. It comes perhaps to this: the Founders rejected "efficient" government with, so it seemed, a greater risk of tyranny in favor of inefficient government (checked and balanced against itself) with a better promise of safety and freedom. For the small, simple, slow-moving, agrarian society of 1789, the choice was easy. Such a society required very little government. Its needs could be served by machinery which at best worked slowly, and even then perhaps only when supported by a massive consensus of opinion so overwhelming as to neutralize the built-in impediments. Though the simple world our Fathers knew has long since passed away, their basic plan of government is still with us. We have avoided tyranny and we have prospered: we have also made some changes.

SEPARATION AND POLITICAL PARTIES

Not so long ago a scholar who would become President Woodrow Wilson warned with respect to checks and balances:

The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life. No living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. Government is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day of specialization but with a common task and purpose. Their cooperation is indispensable, their warfare fatal. There can be no successful government without leadership or without the intimate, almost instinctive, coordination of the organs of life and action.²

The coordinating device that Wilson seems to have contemplated was a responsible party system. Early in our national history Alexander Hamilton, who thought our scheme of government far too impotent, discovered that an extra-constitutional political party superimposed upon the constitutional structure could in large measure circumvent Separation,

²W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56-57 (1911).

and thus transform what Woodrow Wilson called an unworkable Newtonian machine into an effective Darwinian organism.³ By bridging the separated branches a strong political party, we learned, could hope to harmonize and coordinate their sundered operations. Later we also learned, that even the dominant party is not always a reliably strong and effective coordinator.⁴ When it is not, we lapse back to the frustration of checks and the deadlock of balances. Thus it is that in the long view the history of American government seems a history of spasms. In weak party eras (absent a crisis), *i.e.* when the Founder's Newtonian machine prevails, Congress and the President are apt to be at loggerheads. Little then is to be expected from them. In strong party eras (and usually in time of crisis) the built-in friction diminishes. Then Congress and President generally respond to accumulated problems with vigorous legislative programs. There have been three such episodes in the twentieth century: the early Wilson, the F.D.R., and the L.B.J. administrations. Wilson's bulging reform program was the fruit of the Panic of 1907 and the high tide of the Progressive Movement which, for a brief time, invigorated large segments of both major parties. Years later the Great Depression gave Roosevelt the leverage to create a potent *new* Democratic Party dedicated to reform. The result of course was a massive New Deal. Yet by the 1950's F.D.R.'s party had lost its vitality, as had the Republican Party long before.⁵ A period of torpidity followed in domestic affairs. Even the bright, new Kennedy Administration failed miserably in Congress. Then the shock of the assassination plus the enormous congressional majorities (including many dedicated young men) that the Goldwater campaign gave the Democrats enabled L.B.J. to push a massive reform program through Congress⁶—many elements of which President Kennedy had vainly urged. The period of harmony lasted hardly two years. Since then it has been a matter of Separation. As of now we have not even been able to adopt a viable response to the energy crisis, the short run interests of the consumer apparently prevailing in Congress check and balance what the White House deems to be the long run needs of the nation.

Of course the Founding Fathers are only partially responsible for the internal friction that plagues American government from time to time. The growth of urbanism has magnified the problem. For in large measure a modern President's constituency is urban; that of Congress is significantly more oriented toward rural and small town interests. The reason for those "two majorities" is plain. It begins with the unit rule that gives a state's

³See P. ODEGARD & E. HELMS, *AMERICAN POLITICS* 30-36 (1947).

⁴See notes 12 & 24 *infra*.

⁵See text accompanying notes 24-25 *infra*.

⁶The Vietnam War caused many to forget President Johnson's early legislative triumphs. See R. HOFSTADTER, W. MILLER & D. AARON, *THE UNITED STATES* 846-53 (3rd ed. 1972).

total electoral vote for president to the candidate who gets a majority of the popular votes.

Thus the populous states with large electoral votes are particularly important. The candidate who wins most or all of them, even by a hair, will probably win the Presidency. Both parties realize this is so, and shape their strategies of nomination and electioneering accordingly. They tend to nominate men who come from the larger states, and who, in the progression of their own careers, have made alliances with urban interest groups and their representatives, such as labor unions, Negroes, and other ethnic blocs. These are, by and large, groups that in their policy preferences are conventionally described as "liberal": welfare minded, favoring civil rights legislation, and demanding of governmental services.⁷

Thus, a presidential candidate who has substantial support in some fifteen or twenty major metropolitan areas is virtually assured of victory. One who fails to carry most of them has little, if any, chance of winning.

Many men of Congress on the other hand must answer largely or exclusively to rural and small town America. But that is only the beginning of the matter. The non-urban element in Congress has been greatly magnified by congressional organization and procedure, especially the committee and seniority systems, the unique role of the House Rules Committee, and perhaps the filibuster. The leaders of Congress of course are committee chairmen who traditionally have been selected by mere seniority without regard for merit, party loyalty or concern for presidential policy. Since seniority is most readily attained by those from "safe districts," chairmanships have gone very disproportionately to Democrats from the South or Republicans from the rural Midwest.⁸ So favored, non urban interests have long enjoyed a position not unlike the old English "rotten boroughs." Thus, we have long had in effect a double gerrymander: rural interests being overrepresented in Congress; urban concerns in the White House. The tensions thus generated are increased by other phenomena. A President presumably, far more than members of Congress, is conscious of his role in history. Thus generally, it seems in "domestic affairs, he tends to take the broad and progressive . . . view; in world affairs, the adventurous and cooperative. In the former, Congress tends to be more parochial and desultory; in the latter, more cautious and nationalistic."⁹ Indeed perhaps, with respect to the one we tend to vote our national ideals; with respect to the other, our more immediate and mundane needs and biases.

In any event as a matter of historical experience, the congressional-executive relationship is less than fully harmonious. A famous historian recently referred to it as "permanent guerrilla warfare" which to be sure

⁷N. POLSBY, *CONGRESS AND THE PRESIDENCY* 11 (1964).

⁸See note 28 *infra* & text accompanying.

⁹C. ROSSITER, *President and Congress in the 1960's*, in *CONTINUING CRISIS IN AMERICAN POLITICS* 105 (M.D. Irish ed. 1963).

heats and cools periodically. The result of all these constitutional and extra-constitutional stumble blocks is reminiscent of Calhoun's concurrent majority system. For almost any well led, determined and not insignificant minority *in normal times* can find one or more of many available checks and balances to kill, maim, or delay virtually anything it finds seriously objectionable.

Those who like uncluttered, logical lines of power and responsibility, and especially those who are impatient for a new social order, find all this at least close to unbearable. Their judgments typically rest, as is now fashionable, not on comparison with any system known on earth, but vis-a-vis some never-never land in an ideal world. Others, perhaps more aware of mankind's sad experience with government, find that among the world's few free nations ours does not suffer by comparison; that history gives promise of congressional and presidential cooperation often enough to meet pressing needs; that the lulls between such creative episodes are in fact healthful periods of gestation; that our tradition of government by concurrent, *i.e.* extraordinary, majorities has not prevented experimentation or discussion. It has at most only slowed the process of change in the interest of insuring a viable consensus behind public policy.¹⁰ Or more broadly, as Robert Dahl suggests, our political.

. . . institutions, then, offer organized minorities innumerable sites in which to fight, perhaps to defeat, at any rate to damage an opposing coalition. Consequently, the institutions place a high premium on strategies of compromise and conciliation, on a search for consensus. They inhibit and delay change until there is wide support; they render comprehensive change unlikely; they foster incremental adjustments. They generate politicians who learn how to deal gently with opponents, who struggle endlessly in building and holding coalitions together, who doubt the possibilities of great change, who seek compromises.¹¹

THE JUDICIARY

We turn now to that other separated organ, the Supreme Court, in the context of splintered political power and responsibility. It is clear that in no other democratic system do judges play anything approaching the governing role they play in the United States. Perhaps one cannot prove, yet one surely may suspect, that this indecisive, fractured political system invites the unique role of the American judiciary. It is said that power goes to those who can use it. What follows here is a survey of some post-bellum evidence to support these thoughts.

The Civil War and the "bloody shirt" thereafter virtually eliminated the Democratic Party and the South as important forces in national

¹⁰See S. Bailey, *Our National Political Parties*, in *POLITICAL PARTIES*, U.S.A. 4 (R.A. Goldwin ed. 1964).

¹¹R. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES* 329 (1967).

politics. This left the Republican Party, initially a northern "anti-slavery" alliance of East and Midwest, in nominal control. But that sectional combination was far from stable as the successive Granger, Greenback, Alliance, Free Silver and Populist movements indicated. For these were largely Midwestern agrarian revolts against the Eastern "money power." In short East and West, at odds economically, were frozen in a "dominant" political alliance. So constituted of incompatibles, the Republican Party was hardly a dynamic instrument of government. Indeed a major part of the litigation that reached the Supreme Court in this era reflected clashes between businessmen and farmers (later labor), the chief allies in the Republican coalition. The defeat of the great revolt that Bryan led in 1896 confirmed the inability of the Democratic Party to tear the unhappy West from its sectional accord with the East and reestablish the ante-bellum West-South Democratic coalition.¹² It may have been this special weakness of the party system, combined with the normal contretemps of the separated political branches that invited the judicial activism, once called government by the judiciary, which began in 1890's.

The Supreme Court had resisted for a time under the leadership of Chief Justice Waite in the face of persistent dissents.¹³ Then it fell to with vigor in 1895-1896. In a matter of months it killed the national income tax,¹⁴ emasculated the Sherman Antitrust Act¹⁵ as well as the Interstate Commerce Commission,¹⁶ and it approved the labor injunction¹⁷ as well as Separate-But-Equal.¹⁸ This old fashioned, largely economic activism continued through 1935-1936, when it destroyed virtually the entire early New Deal legislative program.¹⁹

The election of 1936, however, brought a major change in the nature of the party system. The traditional, and long moribund, politics of sections gave way to what was then called urban politics.²⁰ The election of 1932 was the last in which sectionalism played the dominant role. By 1936 voters had learned what the New Deal was. Ethnic and class-conscious urbanism replaced "acreage" in the alignment of political party forces. Many rural voters returned to the G.O.P. Most of the Midwestern wheat counties, for example, were on their way back. But urbanites more than made up the loss. Every city of 100,000 or more inhabitants turned to the new Democratic Party, and with the sole exception of Grand Rapids,

¹²As to the agrarian rebellion and Bryan's efforts, see P. ODEGARD & E. HELMS, *AMERICAN POLITICS* 93-101 (1947).

¹³See generally C. MAGRATH, MORRISON R. WAITE: *THE TRIUMPH OF CHARACTER* (1963).

¹⁴*Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429 (1895).

¹⁵*United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

¹⁶*ICC v. Alabama Midland Ry. Co.*, 168 U.S. 144 (1897).

¹⁷*In re Debs*, 158 U.S. 564 (1895).

¹⁸*Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁹For a listing of the cases since those cited in notes 14-18 *supra*, see *THE CONSTITUTION OF THE UNITED STATES*, S. DOC. NO. 82, 92d Cong., 2d Sess. 1597-1768 (1973).

²⁰See A. HOLCOMBE, *THE NEW PARTY POLITICS* (1933).

remained there until the Eisenhower years.²¹ The city masses had found a political tool responsive to their needs!

The blatantly activist role that the Supreme Court had achieved under moribund sectional politics apparently could not be maintained in the face of a potent new party system. The "nine old men" surrendered. And in short order the new Roosevelt Court repudiated all the activist innovations of the 1890-1936 era, including, for example, liberty-of-contract, substantive due process, the fair value doctrine, the labor injunction, dual federalism and Separate-But-Equal.²² In a word, laissez-faire and racial segregation lost their constitutional status. What new doctrines that were devised by the Roosevelt Court were essentially doctrines of judicial restraint.²³

*Mapp v. Ohio*²⁴, in 1961, seems appropriate to mark the advent of a new judicial era, reflecting another political party impasse. By the time *Mapp* was decided the G.O.P. had declined to abiding minority status. Since 1928 it had not, and still has not, elected a President together with a majority in both houses of Congress. By 1970 there were at least as many Independents as Republicans. Meanwhile F.D.R.'s Democratic coalition was disintegrating. The urban tension between "hard hat" labor on the one side and blacks and intellectuals on the other was crucial. Indeed it was a major source of George Wallace's strength and of G.O.P. survival. Yet these groups, the Blacks, labor, and intellectuals, had been the core of F.D.R.'s Democratic Party. Another phase of the same disintegration process was black immigration to, and white flight from, the central cities. This so polarized urban areas for a time that some suggested the major element of future politics would be a conflict between suburbs and core-cities. The South moreover was becoming less and less solidly Democratic.²⁵

As of 1960 troubles had been building for years, many of them quickened by war. President Eisenhower's well know tranquilizing effect had provided a brief, much needed, respite after a generation of crises: the worst depression, the worst hot war, the worst cold war, the worst limited war in American history. But the healing era, which James Reston called the "era of prosperity and good feeling," could not last long. As Reston put it when President Eisenhower retired:

He was popular because he was in tune with the spirit of the nation, which, during his eight years in office, was generous and optimistic, but not militant or experimental. He was criticized because he was not in tune with the world-wide spirit of the age which was convulsive and revolu-

²¹See S. LUBELL, *THE FUTURE OF AMERICAN POLITICS* 49-63 (1965).

²²See text accompanying notes 13-20 *supra*.

²³See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Prudential Life Ins. Co. v. Benjamin*, 328 U.S. 408 (1946); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939).

²⁴367 U.S. 643 (1961). See also note 34 *infra* & text accompanying.

²⁵Much of the material in this paragraph comes from W. KEEFE, *PARTIES, POLITICS, AND PUBLIC POLICY IN AMERICA* 143-58 (1972).

tionary. This contrast between the spirit of the nation (which he helped to create) and the spirit of the world is the heart of the Eisenhower story.²⁶

By the time of *Mapp*, America had joined the rest of the world. A mass of accumulating problems could no longer be ignored. Galbraith's exposure of poverty in *The Affluent Society* (1958) was followed by the Joint Economic Committee's report on *The Low Income Population and Economic Growth* (1959). Harrington's *The Other America* would soon appear. The year preceding *Mapp* had brought the "sit-ins" and the "freedom rides." CORE, SNICK, the White Citizens' Councils, and S.D.S. had begun to organize. The first student demonstration has just occurred, by accident, at Berkeley; the "silent generation" had passed into history. President Kennedy had just been elected. His campaign had focused on nine industrial states (New York, California, Pennsylvania, Ohio, Illinois, Michigan, Texas, Massachusetts and New Jersey) casting 237 of the 269 electoral votes necessary for election. His approach accordingly had stressed the interests of urban voters. The pattern of his electoral victory reflected the pattern of his campaign.²⁷ Yet the leaders of the 87th Congress with whom Kennedy had to work focused in a different direction. No Senate committee chairman came from any of the ten largest northern industrial states, though these states had more than half our total population. Nine of the sixteen chairmen came from the South. In the House, four of the twenty chairmen came from safe urban districts. Nine of the others were from the South; a tenth from the near South, Oklahoma, and others were from small, largely non-urban states such as Montana, Nevada, Arizona and New Mexico.²⁸ It could hardly be surprising that most of President Kennedy's program to resolve long smoldering problems of an urban-industrial nation was blocked in Congress, a humiliating defeat for Camelot. It was in this era that some observers began talking about "the deadlock of democracy."²⁹ If for the unique circumstances already mentioned, President Johnson enjoyed a period of stunning legislative success, it did not last long. Meanwhile, the Vietnam War was bringing what eventually would be close to the full disruption of the political system. Indeed, reviewing the 1960's, Samuel Lubell suggests America had lost its capacity for self government. Reasoned argument, compromise and accommodation, he thought, were increasingly "shoved aside" in favor of polarization, confrontation, violence and a raw struggle for power. Lubell, a careful political observer, could see "no party coalition in command of a sufficiently stable majority to advance a unifying set of policies."³⁰ Many on the left were convinced

²⁶Quoted in 2 T. WILLIAMS, R. CURRENT & F. FRIEDEL, A. HISTORY OF THE UNITED STATES 771 (1964).

²⁷L. KOENIG, CONGRESS AND THE PRESIDENT 67 (1965).

²⁸F. GREENSTEIN, THE AMERICAN PARTY SYSTEM AND THE AMERICAN PEOPLE 84 (1963).

²⁹See J. BURNS, THE DEADLOCK OF DEMOCRACY (1963).

³⁰S. LUBELL, THE HIDDEN CRISIS IN AMERICAN POLITICS 25, 266 (1970).

of the "irrelevance of American politics."³¹ George Wallace on the far right charged there was not a dime's worth of difference between the two major parties, meaning presumably what the left meant: the parties were not focusing on the crucial issues of the day. As Walter Lippmann, old and conservative, saw the problem:

To many, it does not seem right that in this time of crisis our political system should be failing to register and reflect the issues which torment our people. What has happened, it would seem, is that the American political system, which works so well in normal times, is operating regardless of and apart from the bitter war and the urban and racial crises at home.³²

How little confidence voters had in either party, *i.e.* how out of touch with reality the parties seemed, was reflected in an unprecedented increase in the number of Independent voters and in ticket splitting.³³

And so again, by the time *Mapp* came down in the early 1960's, as in the post-bellum era, a once useful political party alignment seems to have lost touch with the times. Again we needed a restructuring of party forces. Meanwhile the Newtonian disease, as in the 1890's, seems to have invited larger scale judicial policy making: the phenomenon called Warren Court activism.³⁴

ADDENDUM

Those with a taste for jurimetrics may want to consider the relative frequency of Supreme Court vetoes of both state and federal legislation in the four periods blocked out in the foregoing essay: The Waite Era, 1874-

³¹See Brownfield, *The Irrelevance of American Politics*, in CONTEMPORARY SOCIETY (J. Perry & M. Seidler eds. 1971).

³²*Id.* at 640.

³³W. KEEFE, PARTIES, POLITICS, AND PUBLIC POLICY IN AMERICA 143-58 (1972).

³⁴The phenomenon called "Warren Court activism" did not begin in the complacent 1950's when Earl Warren became Chief Justice (1953). Rather, one suggests, it was part and parcel of the flaming 1960's. Admirers of the Warren Court like to credit it with *Brown v. Board of Education*, 347 U.S. 483 (1954), treating that decision as an aspect of the later activist upheaval. That will not do! *Brown* was decided by eight members of the "old" Court plus the new Chief Justice only months after he took office. It has been *plainly* foreshadowed in a unanimous opinion in *Sweatt v. Painter*, 339 U.S. 629 (1950). Moreover *Brown*, unlike *Miranda v. Arizona*, 384 U.S. 436 (1966), for example, was hardly an activist addition to the Constitution; it was rather a return to the central, anti-racist, purpose of the Fourteenth Amendment as originally recognized in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Strauder v. West Virginia*, 100 U.S. 303 (1880); and *Ex parte Virginia*, 100 U.S. 339 (1880). The difference between the Warren Court of the 1950's and the Warren Court of the 1960's is stupendous. See the statistics provided in the ADDENDUM, *infra*. Note also that on at least eleven occasions the later Warren Court overruled the earlier one. See THE CONSTITUTION OF THE UNITED STATES, S. DOC. NO. 82, 92d Cong., 2d Sess. 1795-6 (1973). In this article the term "Warren Court" refers to the quintessential, "mature" Warren Court as we knew it after 1960.

1889; the Laissez-Faire Activist Era, 1890-1936; the Frankfurter Era,³⁵ 1937-1960; and the mature Warren Court Era,³⁶ 1961-1969.

Era	Acts Invalidated ³⁷		Average
	State	Federal	Invalidation Per Year
Waite Restraint (1874-1889)	61	8	4.3
Laissez-Faire Activism (1890-1936)	359	45	8.6
Frankfurter Restraint (1937-1960)	120	9	5.4
Mature Warren Court Activism (1961-1969)	132	14	16.2

³⁵Surely Mr. Justice Frankfurter fought harder and longer for judicial restraint than any other member of the Court at least since 1938. He was persistently opposed by a strong, activist minority which sometimes attracted enough side votes to carry the day.

³⁶See note 34 *supra*.

³⁷These figures are derived from data in THE CONSTITUTION OF THE UNITED STATES, S. Doc. No. 82, 92d Cong. 2d Sess. 1597-1768 (1963).