choice with respect to religion. The design of the First Amendment is not to create a "secular society," any more than it is to create a "Christian nation." It is to create the widest possible latitude for religious choice (including the choice not to be religious), with a minimum of government interference.

The Lemon test has come to interfere with this ideal. Under many circumstances, allowing maximum scope for religious choice will "advance" religion. If parents are free to choose whether to send their children to religious school, without fear that the religious choice will deprive them of remedial education, more parents will choose the religious alternative.

If state laws protecting workers' rights to take their day off on their sabbath were upheld (the Court held this was an "establishment"), more workers could practice their faith. If high school students were permitted to meet together for religious purposes on the same basis as other extracurricular clubs (most courts of appeals have held this to be an "endorsement of religion"), more would do so. To say that these arrangements "advance religion" is merely to say that religious freedom advances religion.

The key question should not be whether government action "advances religion," but whether it advances religious choice.

Under this view, the Court's School Prayer Cases were correctly decided, but should not be extended to moments of silence, voluntary extracurricular clubs, or other wholly voluntary opportunities for students to practice their faith within the confines of the public school. Under this view, most of the parochial school aid cases were incorrect and should be reversed. And under this view, the Court should recognize the need of religious persons in some circumstances for exemptions from general rules, where the exemptions will not undermine important governmental interests. Poignant recent examples are the military's refusal to allow Orthodox Jews to wear the skullcap, or yarmulke, while on duty; and the refusal by some states to allow Roman Catholic hospitals to decline to participate in abortions or euthanasia.

The Court's inconsistency is its most conspicuous failing. Its use of wooden doctrine to stifle religious choice is the deeper problem.

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Michael McConnell, J.D. 1979, is Assistant Professor of Law

Checks and Balances in the Twenty-First Century

Geoffrey P. Miller

One of the more remarkable features of our remarkable Constitution is the consensus that, at least until recently, has prevailed throughout the political spectrum on the efficacy and value of dividing the government into departments and vesting each department with authority to check the others. Separation of powers was common ground among federalists and antifederalists alike, although there was intense debate about the proper placement of specific powers and immunities. Both factions cited Montesquieu, the great oracle on the subject, with roughly the same degree of veneration that Aristotle received during the Middle Ages. And although John Adams could twit his old friend and political rival, Thomas Jefferson, for having ridiculed "checks and balances", the fact was that all major national leaders during the Nation's formative years were scrupulous about maintaining the structure of divided government established by the Constitution of 1787.

The American system of separation of powers was grounded in the philosophy of the Enlightenment, which had been absorbed root and branch by Madison and many of his peers. Ernst Cassirer, in his great work of intellectual history1, describes how Newton's scientific method epitomized the spirit of that age. Newton showed that the motion of planets resulted from the interplay between two fundamental laws: the law of freely falling bodies and the law of centrifugal force. The former, if it operated independently, would cause the planets to collapse into the sun; the latter would spin them off into the depths of space. The problem of celestial mechanics could be solved, and the orbits of planets explained, only through a theory that took account of both opposing forces.

The system of separated powers established by the Framers in 1787 was Newtonian to its core. The Federalist Papers epitomized ambition as the fundamental force driving the phenomena of political mechanics. But ambition, if left unchecked, would eventually result in the accumulation of all powers in the same hands, a condition that "may justly be pronounced the very definition of tyranny." The essential problem of political theory was therefore to design a government in which individual ambition would not result in tyranny. In the case of politics there was no countervailing force to the impetus of ambition similar to that which existed for celestial mechanics, where the centrifugal force prevented collapse into the sun. Mere "parchment barriers" would never be sufficient to prevent a department from "drawing all power into its impetuous vortex." The Framers' solution, brilliantly expounded in

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Federalist No. 51, was to set the will to power against itself, to make “ambition ... counteract ambition” by separating the government into branches and giving the heads of the branches “the necessary constitutional means and personal motives to resist encroachments of the others.”

The result would be a “constitutional equilibrium” in which each of the branches continued to revolve around the others, as it were, in a state of dynamic tension, just as the planets continue to revolve around the sun in an exquisite equilibrium of physical forces.

It was a solution both elegant and practical, and one with deep influence on political practice and theory over the past two hundred years. The system set in motion by the Framers has survived and flourished. Yet today questions are beginning to be raised about the efficacy of separation of powers. Newtonian mechanics has been subsumed in general relativity; the Enlightenment and its faith in Reason have given way to other philosophies. There is a real question as to whether the consensus in favor of checks and balances, which has been such a bulwark of American political faith, will survive the next hundred years as it has the past two hundred.

A leading modern skeptic about separation of powers is Lloyd Cutler, Washington lawyer and former counsel to President Carter. Cutler, in a 1980 article in *Foreign Affairs*, expressed grave concerns about the degree to which the system of checks and balances interferes with the President’s ability to govern effectively. “The separation of powers between the legislative and executive branches,” Cutler wrote, “has become a structure that almost guarantees stalemate”; in parliamentary terms, “it is not now feasible to ‘form a Government.’” Cutler called for constitutional amendments that would move the United States closer to a parliamentary system, in which the elected majority is able to carry out its program and be held accountable for its success or failure.

There are signs that the government of the bureaucratic state is beginning to be clarified. The Supreme Court has entered the picture in a dramatic way, resolving important questions regarding the appointment power, the legislative veto, and the removal power. In each of these cases the decision went to the executive. Yet Congress is increasingly restive about the limitations on its constitutional powers. It is not even clear that the battle will be over if the Executive Branch wins every case in the Supreme Court. Congress will continue to seek ways to influence the bureaucracy, and if necessary may circumvent the Supreme Court. The parchment compact may be severely challenged in the coming years. Whether it survives intact will depend, in part, on the relevance of the Framers’ wisdom to a society far larger, more complex, more diverse, and, possibly, less governable than the group of several millions who came together into a nation under the Constitution of 1787.

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*Cutler, To Form a Government, 59 Foreign Affairs* 126 (1980).

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*Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).*

*INS v. Chadha, 462 U.S. 919 (1983).*

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