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A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?

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Introduction

One of the most important elements in constitutional theory is the principle of separation of powers.¹ We are taught that since we—the people, or in economic analysis language, the principals—cannot all govern, or exercise the entire collective decision-making power that is needed in a society, we ought to deposit the governing power in the hands of representatives, namely, agents. One of the essential tools designed to prevent these agents from abusing this power is its division into different functions, to be exercised by different branches of government with different representation structures that can check and balance each other.²

The perception of a judiciary as a separate branch of government and the call for its independence are an inherent part of the current view of the doctrine of separation of powers and its rationales mentioned above, though they first emerged as a pragmatic result of the power struggles between King and Parliament in 17th-century England and as a natural process of professional specialization.³ Only subsequently did thinkers adopt and advocate the notion of an independent judicial branch of government. Blackstone can be considered the pioneer,⁴ and he was followed by the American Founding Fathers, who saw the judiciary as “the bulwarks of limited constitution against legislative encroachments.”⁵

But does separation of powers really fulfill this task of, in economic terms, lowering agency costs? And if so, why do the current holders of power—the agents—go along with this separation? Does an independent judiciary really carry out the normative tasks it has been assigned? And if it does, why do we, in fact, have such an institution? This paper is intended to address a small portion of these queries, focusing on the judicial branch of government, its interrelations with the legislature, and on the question: Why do we find an independent judiciary as an almost universal phenomenon in democratic countries? I will try to answer this question by offering a positive analysis of the independence of the judiciary, based on the foundations of the Public Choice theory.⁶ The paper will attempt to depart, however, from the mainstream Public Choice literature, which is often tailored to fit a particular legal-political system (usually the American), by trying to capture a phenomenon common to a vast majority of, if not all, democratic regimes.⁷ One consequence of this broad

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