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THE NEW SEPARATION OF POWERS

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## THE NEW SEPARATION OF POWERS

*Bruce Ackerman\**

*This essay in comparative constitutional theory considers whether an American-style separation of powers should serve as a model for other countries. Professor Ackerman argues against the export of the American system in favor of an approach based on the constitutional practice of Germany, Italy, Japan, India, Canada, South Africa, and many other nations. According to this model of “constrained parliamentarianism,” the constitution should not create an independently elected presidency to check and balance a popularly elected congress. Instead, it should authorize a prime minister and her cabinet to remain in power as long as they can retain the support of a democratically elected chamber of deputies. Constrained parliamentarianism tries to check the power of the cabinet and the chamber, however, by granting independence to a variety of other checking institutions, including a constitutional court. Professor Ackerman argues that this model offers a more promising path to constitutional development than the American approach. He shows how it can generate a variety of institutional strategies that better serve the three great principles that motivate the modern doctrine of separation of powers — democracy, professionalism, and the protection of fundamental rights.*

[T]he Federalist Constitution has proved to be a brilliant success, which unitary nation states and parliamentary democracies all over the world would do well to copy. I give it most of the credit for the fact that ours is the wealthiest, most technologically advanced, and most socially just society in human history, not to mention the fact that we have with ease become a military superpower . . . . The rest of the world is quite rightly impressed with us, and it is thus no accident that the United States of America has become the biggest single exporter of public law in the history of humankind. Almost wherever one looks, written constitutions, federalism, separation of powers, bills of rights, and judicial review are on the ascendancy all over the world right now — and for a good reason. They work better than any of the alternatives that have been tried.<sup>1</sup>

Perhaps Steven Calabresi’s triumphalism is typical today, but it contrasts sharply with previous American attitudes. A half-century ago this country stood even taller in the world than it does now. As the only great power escaping massive destruction during World War II, America’s moralistic pretensions were at their apogee. Yet its constitutional prescriptions

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<sup>1</sup> Steven G. Calabresi, *An Agenda for Constitutional Reform*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 22, 22 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) [hereinafter CONSTITUTIONAL STUPIDITIES].

were a good deal more discriminating. To be sure, the United States supported written constitutions, bills of rights, judicial review — and, on occasion, federalism.<sup>2</sup> But the separation of powers?

American influence reached its zenith in post-war Japan — with General MacArthur’s legal staff presenting a draft constitution to the Japanese within a ridiculously short space of time.<sup>3</sup> For all the rush, the draftsmen did not propose an American-style separation of powers. In particular, they did not require Japan to embrace an American-style presidency as part of the price of its defeat.<sup>4</sup> There emerged instead a distinctive regime-type: one that I will call “constrained parliamentarism.” As in Great Britain, Japan’s Prime Minister and his Cabinet must retain the confidence of the Diet to remain in office. But, in contrast to the Westminster model, the Japanese Parliament is not fully sovereign. Its legislative powers are limited by a written constitution, a bill of rights, and a supreme court.

Nor did the Americans impose a strongly bicameral legislature — featuring an upper house checking and balancing the lower with full Madisonian vigor. The Japanese House of Representatives plays the dominant role in selecting the Cabinet. Although the upper House of Councillors has significant powers, it is not the constitutional equal of the lower House.<sup>5</sup> Call this the “one-and-a-half house solution.”

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<sup>2</sup> Of the three defeated Axis powers, Japan and Italy became unified nation states, and only Germany was required by the Allies to adopt a federal form of government. See, e.g., PETER H. MERKL, *THE ORIGIN OF THE WEST GERMAN REPUBLIC* 8–11, 19, 121 (1963) (recounting American and Allied insistence that Germany adopt a federal structure).

<sup>3</sup> See JOHN W. DOWER, *EMBRACING DEFEAT* 364–73 (1999).

<sup>4</sup> Indeed, the head of the American drafting team, Colonel Charles Kades, “insisted that the United States Constitution was not given much attention as the drafting committee cobbled together its new charter.” *Id.* at 370. I have found no evidence suggesting that an American-style presidency was even discussed, much less seriously considered — probably because the creation of such an office seemed incompatible with the decision to retain the Emperor as symbolic head of state. For a description of the different traditions woven together to make up the Japanese Constitution, see Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 *CASE W. RES. J. INT’L L.* 3 (1996).

<sup>5</sup> The House of Representatives has the power to choose the Prime Minister unilaterally when the two houses disagree. See JAPAN CONST. art. 67. It also has the exclusive power to remove the government through a vote of no-confidence, see *id.* art. 69, and to pass a budget over the opposition of the House of Councillors, see *id.* art. 60. This is also true of treaty ratification. See *id.* art. 61 (applying the provisions of Article 60 to treaty ratification).

The upper house is not a mere cipher. It has the important power to block legislation passed by the House of Representatives unless the latter can muster a two-thirds majority. See *id.* art. 59. The House of Councillors was relatively unimportant during the long period between 1955 and 1989 when the Liberal Democratic Party (LDP) had large majorities in both houses. See J.A.A. STOCKWIN, *GOVERNING JAPAN: DIVIDED POLITICS IN A MAJOR ECONOMY* 114–115 (3d ed. 1999). In 1989, however, the opposition, led by the Japan Socialist Party, won control of the House of Councillors and used it as a power base against the LDP government. The opposition blocked important legislation, including, most dramatically, the participation of Japanese forces in the buildup to the Gulf War. See *id.* at 75–78. Since the return of serious multi-party politics, the House of Councillors has served as an important weapon of opposition parties. Their use of the upper house’s blocking power was a key factor in the 1993 rise to power of the first non-LDP government since 1955. See *id.*

The story is the same in Germany — though the Americans and other Allies played a less heavy-handed role, letting German jurists and politicians call most of the shots.<sup>6</sup> Fresh from their experience with Adolf Hitler, nobody was in the mood for an elected presidency. Once again the result was constrained parliamentarianism, with a one-and-a-half house solution.<sup>7</sup>

The Italians were still more in control of their constitutional process<sup>8</sup> — and we shall see that they created a very interesting variation on the one-and-a-half house theme. Nonetheless, the Italian variation fits comfortably within the basic framework of constrained parliamentarianism. Like the Germans, the Italians were entirely unprepared to build a presidential platform upon which future Mussolinis might vie for (democratic) preeminence.

But times have changed, as the words of the younger Professor Calabresi remind us. Especially since 1989, American jurists have become big boosters of the American Way at constitutional conventions everywhere.<sup>9</sup> When they arrive at the scene, however, their intellectual preeminence is by no means assured. To the contrary, American jurists regularly encounter vigorous competition from French and German constitutionalists, who also operate as cheerleaders for their native constitutional traditions.<sup>10</sup>

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<sup>6</sup> The complex mix of internal and external forces operating in Germany after WWII is described in MERKL, *supra* note 2.

<sup>7</sup> The Weimar Constitution of 1919 created a strong, directly elected president who was independent of parliamentary control. This came to be regarded as a “major error” after Hindenburg’s appointment of Hitler as Chancellor. DAVID P. CONRADT, *THE GERMAN POLITY* 182–83 (6th ed. 1996). The post-war draftsmen of the German Basic Law established a Bundestag that “no longer had to compete with an executive over which it had no direct control.” *Id.* at 183. The Basic Law was unprecedented in German constitutional history because it “assigned sole control over government and bureaucracy to the parliament.” *Id.*

<sup>8</sup> Although the Italians enjoyed a great deal of autonomy in shaping their post-war constitution, the Americans and the British worked behind the scenes to check Communist Party influence. See JOHN LEWIS GADDIS, *WE NOW KNOW: RETHINKING COLD WAR HISTORY* 44 (1997); JAMES EDWARD MILLER, *THE UNITED STATES AND ITALY, 1940–50: THE POLITICS AND DIPLOMACY OF STABILIZATION* 243–49 (1986); Gianfranco Pasquino, *The Demise of the First Fascist Regime and Italy’s Transition to Democracy: 1943–48*, in *TRANSITIONS FROM AUTHORITARIAN RULE: SOUTHERN EUROPE* 60–61 (Guillermo O’Donnell, Philippe C. Schmitter & Lawrence Whitehead, eds. 1986).

<sup>9</sup> See, e.g., BERNARD H. SIEGAN, *DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM* (2d ed. 1994). Siegan’s book opens with a narration of his 1990 encounters with the Bulgarian prime minister and other national officials — in which he appears to take credit for convincing the framers of the new Bulgarian constitution to adopt a system based on the American model. See *id.* at 2. Siegan’s description of the American system, see *id.* at 7–9, is so uncritical that it might embarrass even the author of a high-school civics text.

<sup>10</sup> The debate has proceeded, at various levels of sophistication, throughout the world over the last two decades. For a comprehensive portrayal of Eastern European outcomes as a distinctive blend of Western and socialist ideas, see Rett R. Ludwikowski, “Mixed” Constitutions — Product of an East-Central European Constitutional Melting Pot, 16 B.U. INT’L L.J. 1 (1998). Spain’s successful adaptation of the German constitutional model in its own transition from Francoism gave German solutions

Political scientists have played a more edifying role. When constitutional conventions have turned to them, modern-day framers have heard something more than triumphalist success stories packaged as the American, French, and German “models” of constitutional government. They have been rewarded with some useful tools for critical reflection on fundamental constitutional choices.

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substantial influence in later transitions. For a description of how the Spanish example reinforced pre-existing Eastern European inclinations toward German ideas, see Luis López Guerra, *The Application of the Spanish Model in the Constitutional Transitions in Central and Eastern Europe*, 19 CARDOZO L. REV. 1937 (1998).

But on a question of central importance to this essay — the separation of lawmaking power between an independently elected president and parliament — France and the United States have proved more influential around the world. The German parliamentary system has been regularly rejected in favor of one or another form of presidentialist democracy. See *infra* note 220 and accompanying text.

Brazil was the site of a particularly self-conscious debate on this issue in the late 1980s — where critics of American-style presidentialism linked it to the rise of military dictatorship in the country and had considerable success in leading the constitutional convention to consider seriously a fundamental break with this system. In the end, however, the reigning President José Sarney blocked the path to a fundamental change, and a later referendum specifically addressing the issue defeated the movement. See JAVIER MARTÍNEZ-LARA, BUILDING DEMOCRACY IN BRAZIL: THE POLITICS OF CONSTITUTIONAL CHANGE, 1985–95, at 125–46 (1996). I discuss these events in Bruce Ackerman, *O Novo Constitucionalismo Mundial, in 1988–1998 UMA DÉCADA DE CONSTITUIÇÃO* 11, 21–23, 28–29 (Magarida Maria Lacombe Camargo ed., 1999).

During the early 1990s in Eastern Europe, Poland was the scene of an especially interesting contest between proponents of rival models. In 1991, the Solidarity-controlled Senate presented a presidentialist draft for a new constitution modeled on the French system, while the Sejm (the lower house), then still controlled by the Communists, advocated a parliamentary model based on the German system. The confrontation between the Senate and the Sejm inaugurated a complex institutional and ideological struggle, resulting in a 1992 “small constitution” and a 1997 permanent constitution that were closer to the French model initially advanced by the Senate. See generally Feature, *The 1997 Polish Constitution*, 6 E. EUR. CONST. REV. 64 (1997) (providing background material on Poland’s 1997 Constitution). In the newly-constituted Russian system, the American model has been invoked to justify grants of power that in many instances far exceed those wielded by the American President. See RETT R. LUDWIKOWSKI, CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE 62–63, 67 (1996). For studies of the separation of powers in the Russian Constitution of 1993, see Isaak I. Dore, *The Distribution of Governmental Power Under the Constitution of Russia*, 2 PARKER SCH. J.E. EUR. L. 673 (1995), and Amy J. Weisman, *Separation of Powers in Post-Communist Government: A Constitutional Case Study of the Russian Federation*, 10 AM. U. J. INT’L L. & POL’Y 1365 (1995). For a useful survey of other post-Soviet constitutions, see LUDWIKOWSKI, *supra*, at 47–110.

Most notably,<sup>11</sup> the choice between the parliamentary and presidential systems of government. While American legal scholars content themselves with pietistic references to Montesquieu and Madison,<sup>12</sup> modern political scientists deign to consider the way alternative systems have actually worked in the world. Their research is a precious resource for anyone who wishes to reflect upon the future of the separation of powers.

Nonetheless, it is inadequate. For starters, the political scientists have largely focused on a single issue: should constitution-writers follow England in concentrating lawmaking power in a single parliamentary institu-

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<sup>11</sup> Political scientists have also contributed greatly to an understanding of the stakes involved in the choice among alternative electoral systems. Alternative examples include: GARY W. COX, MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS (1997); ROBERT A. DAHL, ON DEMOCRACY 130–41 (1998); ELECTORAL SYSTEMS IN COMPARATIVE PERSPECTIVE: THEIR IMPACT ON WOMEN AND MINORITIES (Wilma Rule & Joseph F. Zimmerman eds., 1994); AREND LIJPHART, ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES 1945–1990 (1994); DOUGLAS W. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS (rev. ed. 1971); KENNETH A. SHEPSLE, MODELS OF MULTIPARTY ELECTORAL COMPETITION (1991); REIN TAAGEPERA & MATTHEW SOBERG SHUGART, SEATS AND VOTES: THE EFFECTS AND DETERMINANTS OF ELECTORAL SYSTEMS (1989).

Because even smallish changes in an electoral system can profoundly affect the future course of democratic life, the failure of American constitutionalists to assimilate this research is particularly unfortunate. From this vantage point, the “Lani Guinier Affair” has been an intellectual disaster that affects us all, regardless of our politics — marking the subject of electoral reform off-limits for those scholars who harbor the thought of public service. For a criticism of Guinier’s basic argument, see *infra* note 53.

<sup>12</sup> Since the Supreme Court reorganized its separation of powers jurisprudence along originalist lines, see *INS v. Chadha*, 462 U.S. 919 (1983), American law reviews have been full of commentary, mostly historical, proclaiming the true meaning of the founding construction and its enduring significance. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (attempting to describe the Founders’ original understanding); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (arguing for the enduring significance of founding understandings).

In contrast, there have been few efforts at critical assessment of basic ideas. Bill Eskridge’s and Sandy Levinson’s collection on “constitutional stupidities,” CONSTITUTIONAL STUPIDITIES, *supra* note 1, is largely a collection of minor criticisms by major writers, though Mark Tushnet does devote a page or two to the matters treated in this article, see Mark Tushnet, *The Whole Thing*, in CONSTITUTIONAL STUPIDITIES, *supra* note 1, at 103, 104–05, and political scientist Theodore Lowi makes a more substantial contribution, see Theodore J. Lowi, *Constitutional Merry-Go-Round: The First Time Tragedy, The Second Time Farce*, in CONSTITUTIONAL STUPIDITIES, *supra* note 1, at 187, 189–202. For the exceptional probing inquiry of a legal scholar, see Jonathan Zasloff, *The Tyranny of Madison*, 44 UCLA L. REV. 795 (1997). Two leading Latin-American writers, with intimate connections to the American legal academy, have participated actively in their region’s dynamic debate on the future of the separation of powers, and they have contributed more to the recent critical literature than the rest of the American legal professoriat put together. See, e.g., ROBERTO MANGABEIRA UNGER, POLITICS: THE CENTRAL TEXTS 306–339 (Zhiyuan Cui ed., 1997); Carlos Santiago Nino, *Transition to Democracy, Corporatism, and Presidentialism with Special Reference to Latin America*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 46, 54–60 (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero & Steven Wheatley eds., 1993). As will appear, I am closer in spirit to Nino than to Unger.

To the reader looking beyond the legal academy, Daniel Lazare’s all-out assault on the separation of powers, DANIEL LAZARE, THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY (1996), is a valuable provocation.

tion, or should they follow the United States and France in separating lawmaking authority among democratically elected rivals? This *is* an important question, but it is not the only one. The separation of powers involves not only presidents and parliaments, but also the constitutional status of courts and administrative agencies. As we shall see, the resolution of the first separation issue has non-obvious implications for the others, and vice versa.

I also propose to refine the normative terms of the debate. “Liberal democratic constitutionalism” is not a unitary concept but a placeholder for congeries of different values, coexisting in deep tension. To illuminate these complexities, I shall be navigating between methodological extremes. On the one hand, I appeal to a range of political ideals in assessing alternative forms of separation. Without clear normative orientation, talk of the separation of powers degenerates into facile constitutional engineering. The very idea of institutional “efficiency” is completely empty unless it is linked to more substantive ends.<sup>13</sup> On the other hand, this is not a philosophical essay on the foundations of political legitimacy. My primary concern is to illuminate the complex ways in which institutional arrangements serve as concrete expressions of ultimate ideals, not to philosophize about the ideals themselves. I make only those conceptual distinctions that seem absolutely necessary for thoughtful institutional assessment, thereby begging hosts of philosophical questions. This will (rightly) prove annoying to some readers, but all I can say is Sorry, a single essay can’t do everything.

More concretely, I return repeatedly to three legitimating ideals in answering the question, “Separating power on behalf of what?” The first ideal is democracy. In one way or another, separation may serve (or hinder) the project of popular self-government. The second ideal is professional competence. Democratic laws remain purely symbolic unless courts and bureaucracies can implement them in a relatively impartial way. The

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<sup>13</sup> The classical efficiency criterion of Pareto-superiority is incapable of distinguishing among the political frameworks I consider in this paper — because each framework would predictably make some people worse off than each of its rivals, none is preferable on Paretian grounds. More fundamental principles of legitimacy are necessary to assess the competing claims of alternative frameworks.

There was a time when Richard Posner tried to evade this basic point by elaborating a new efficiency concept based on the idea of wealth-maximization. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 48–115 (1981). But this extraordinary invitation to mammon-worship proved a non-starter in the legal community for a number of compelling moral reasons. For devastating critiques of Posner, see Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner’s The Economics of Justice*, 34 *STAN. L. REV.* 1105 (1982); Ronald M. Dworkin, *Is Wealth A Value?*, 9 *J. LEGAL STUD.* 191 (1980); and Anthony Kronman, *Wealth Maximization as a Normative Principle*, 9 *J. LEGAL STUD.* 227 (1980). Rather than respond to these critiques by rethinking his crudely materialistic moral pronouncements, Judge Posner now tries to persuade the rest of us to repudiate the role of self-conscious normative reflection in legal thought! Compare RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999), with ALAN M. DERSHOWITZ, *CHUTZPAH* (1991).

third ideal is the protection and enhancement of fundamental rights. Without these, democratic rule and professional administration can readily become engines of tyranny.

I take up each of these ideals in turn in the three parts that follow. Part I considers separating the power of democratic lawmaking among different branches and introduces two theses that will recur throughout this essay. The first thesis is negative and cautions against the export to other countries of an American-style separation among house, senate, and presidency. Although this system has worked well enough at home, it has proved nothing less than disastrous abroad. We should reject Professor Calabresi's invitation to transform it into one of the bright lodestars of the new millennium.

My second thesis is more constructive and distinguishes this essay from traditional critiques of American lawmaking arrangements. Generally, English-speaking critics of American separationism have looked to Great Britain as the source of a competing model of democratic government. The modern British Constitution famously concentrates lawmaking power in the House of Commons, giving the Prime Minister and her Cabinet effective control over the legislative agenda. The real-world operation of this "Westminster model" has provided critics with a club to batter American self-confidence. Given the British success in avoiding the inexorable slide into tyranny predicted by Madison and Montesquieu, perhaps we should give up on the very idea of separation of powers?

My message is different. I reject Westminster as well as Washington as my guide and proffer the model of constrained parliamentarianism as the most promising framework for future development of the separation of powers. Not only has this model set the terms of the post-war settlement with the Axis powers, but it also characterizes many of the more successful democratic regimes that have emerged from the dissolution of the British Empire. For all their differences, the constitutions of India, Canada, and South Africa fit within the broad contours of the basic model. Moreover, the success of the German Constitution has inspired other countries, most notably Spain, to use it as a reference point in their own transitions from authoritarianism.

Constrained parliamentarianism, then, is a rising force in the world, and there is much to be learned from its practical operation over the past half-century. There is no reason to suppose, however, that any existing regime has hit upon the best way to constrain parliamentary government. Here is where my title's promise of a "new" separation of powers enters. Although I reject an American-style competition between house, senate, and presidency, I believe we have only begun to tap the separationist potential of constrained parliamentarianism. Part I elaborates this point by considering how the lawmaking powers of parliament may be constrained by other institutions of democratic self-government, including popular referenda on the national level and the representation of provincial governments in federal systems.

Part II takes up the same negative and positive themes in assessing separationism's potential contributions to professionalism in the judiciary and the bureaucracy. On the negative side, American performance again comes under the microscope. Although the American system has been quite successful in fostering an independent and professional judiciary, the same cannot be said of its impact on the bureaucracy. The ongoing competition between House, Senate, and Presidency for control over the administrative apparatus has created an excessively politicized style of bureaucratic government, transforming the executive branch into an enemy of the rule of law.

In contrast, the ongoing interaction between parliamentarianism and public administration holds the promise of a more constructive relationship between democracy and professionalism. But again, I think it is a big mistake to leave the relationship between parliament and the bureaucracy subject entirely to the unwritten constitution. I propose the explicit constitutional construction of two distinct branches to assure that bureaucratic government redeems its central claims to integrity and expertise in regulating for the public interest.

Part III turns to the question of fundamental rights and complicates the conventional wisdom that links American-style separation to their protection. Even for partisans of laissez-faire, there is much to fear from the patterns generated over time by the dynamic interaction of president, house, and senate. On a more constructive note, I urge constitutionalists to transcend their traditional court-centered focus. A supreme court for the protection of fundamental rights is, without question, an essential component of the model of constrained parliamentarianism. But it should be supplemented by separate non-judicial institutions concerned with the more effective protection of rights of democratic participation, on the one hand, and the realization of fundamental commitments to distributive justice, on the other.

By the end of the essay, we shall be moving far beyond the now-standard recipe of one-and-a-half houses, a bill of rights, and a constitutional court. My aim is to show how constitutional framers can elaborate the basic idea of constrained parliamentarianism in a rich variety of ways to achieve a complex set of political objectives. Though particular parts of my scheme have precedents in one or another existing system, my overall proposal is more than the sum of its parts and, when viewed as a whole, may seem quite novel. Much more comparative study, and analytic work, is required before my scheme can become the basis for serious practical proposals.

For the present, I offer it up in a more speculative spirit. I hope to encourage comparative constitutional law to transcend its present condition of naïve boosterism and to engage in genuine transnational conversation about the future of Western constitutionalism. What are its intellectual and institutional resources? How may they combine into different patterns that promise better performance? If my elaboration of constrained parliamen-

tarianism gets the conversational ball rolling, provoking counter-proposals from partisans of different legal traditions, this will be fine with me.

If it also helps American constitutional lawyers place their own tradition in critical perspective, so much the better.<sup>14</sup> Although I will be *very* critical, I should not be misread to suggest that Americans should junk their system of separation of powers as it has evolved over the past two centuries. Even though its pathologies are many and serious, the rituals of confrontation between the President, the House, and the Senate are by now second-nature to Americans, providing a grammar of legitimation that has allowed citizens to define, and sometimes to decide, matters of fundamental importance over the generations. Given its deep roots in American culture, it would be rash to suppose that we can invent a better system out of whole cloth.

But it is one thing for Americans to try to make the best of their evolving scheme of checks and balances, quite another to hold it up as an inspiring beacon for liberal democrats everywhere.

### I. DEMOCRATIC LEGITIMACY

My argument proceeds in three parts. The first attempts a critical exposition of the many disadvantages of presidentialist systems. For ease of exposition, I begin with presidentialism's classic rival at Westminster, but I quickly expand the argument by contrasting American and French styles of presidentialism with English and German styles of parliamentarianism. At the end of the day, I hope that the disadvantages of presidentialism seem formidable enough to motivate a sustained search for alternatives.

The argument then takes a more constructive tack. Despite their many institutional disadvantages, separationist systems can express a distinctive and valuable vision of democratic life — a vision that I have described elsewhere as the ideal of dualistic democracy.<sup>15</sup> The second part of my argument considers whether this ideal might also be accommodated within the framework of parliamentary government. This inquiry leads me to expand the model of constrained parliamentarianism to embrace a new separation of powers designed to express dualistic insights.

The third part complicates the discussion of democratic legitimacy by focusing on the problem of federalism. Are there good reasons why federalism has so often led to a one-and-a-half house solution, in which a federal senate is subordinated to a national chamber of deputies? Why not construct a system, as Australia and Switzerland have done, in which the

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<sup>14</sup> Cf. George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 690 (1998).

<sup>15</sup> See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3–33, 295–322 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 3–8 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*].

federal senate is the equal of the national chamber? How does federalism complicate the arguments for and against presidentialism?

I conclude with some remarks on the status of bicameralism in states that reject federalism on behalf of more nationalistic self-understandings.

#### A. Against Presidentialism

I propose to cut through the philosophical buzz surrounding the word “democracy” by asking a simple question: How many elections should a political movement win before gaining how much lawmaking authority?

The answer presented by the pure doctrine of unseparated powers is well represented by the classical British system of Westminster democracy. It says that a political movement need win only *one* election before gaining *plenary* authority.

In this election, moreover, each voter casts a *single* ballot — he cannot vote, say, for a Labor Member of Parliament and a Tory Prime Minister. The only way a voter can assure his party’s choice for PM is to vote for his party’s choice for MP. This basic point ties each MP’s fate to his party’s leadership in ways that are unknown in separated systems. If the leadership is unpopular with the people, it is hard for individual MPs to escape electoral retribution because the only way the voters can express dissatisfaction is by voting against their local MP. In extreme cases, popular discontent may prompt backbenchers to rise up in rebellion against their party leadership; but ordinarily, individual self-preservation leads most MPs to support the leadership through thick and thin, thereby maximizing the Cabinet’s chances of impressing the voters with the wisdom of their general approach to policy. Given these overwhelming electoral incentives to support the government of the day, the Westminster model is not only constitutionally committed to rule by the last majority in a strictly legal sense. The model also provides the political means to translate this constitutional commitment into everyday life.

Another key feature is the PM’s ability *to determine the time of the next election* (with only a five-year deadline constraining this decision).<sup>16</sup> This means that the PM can do lots of harsh things early if she thinks they will pay off in political support later, without risking electoral retribution

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<sup>16</sup> See Parliament Act of 1911, § 7; see also BILL JONES & DENNIS KAVANAGH, *BRITISH POLITICS TODAY* 170 (5th ed. 1994) (“Since 1945 Prime Ministers have lasted an average of nearly four years. No acting PM (apart from the unusual case of Margaret Thatcher) has been sacked; although there was pressure on Churchill (in 1955), Eden (to 1957) and Macmillan (to 1963) to go, each retired in his own time.”); COLIN TURPIN, *BRITISH GOVERNMENT AND THE CONSTITUTION* 417 (3d ed. 1995).

The Prime Minister’s power to dissolve Parliament can be a double-edged sword, and nobody has more to lose than the PM. “Of the twelve dissolutions since 1945, the incumbent Premier has lost five subsequent elections. . . . Most PMs are now careful to consult colleagues before deciding on the election date.” JONES & KAVANAGH, *supra*, at 168–69.

in the meantime.<sup>17</sup> The majority not only rules, but it also has a fair chance to put its program into action before returning to the people for collective judgment.

*1. The Separationist Response.* — There is much more to be said, but this simple model allows us to frame some basic issues raised by the “separation of powers.” When considered as a doctrine of political legitimacy, its proponents are united around a single key normative proposition. They deny that a single electoral victory is sufficient to vest plenary lawmaking authority in the victorious political movement. This proposition yields one of the most distinctive features of the separation of powers: the fact that the different lawmaking powers often operate on a staggered electoral schedule. Even if party A wins big at time one, it may have to win  $n$  times more before it can gain plenary lawmaking authority.

Within this normative framework many things are possible, and the current American system is very much a special, and specially complicated, case. Consider a simpler system of two lawmaking powers — call them house and president — each elected for a four-year term at two-year intervals.

Even within this stripped-down model, several phenomena emerge that have no analogue in the system of unseparated powers.

*(a) Impasse.* — Most obvious is the problem of impasse: house and president may be dominated by different parties (or different factions of the same party). How to govern until the next election?

There are three scenarios. The first emphasizes accommodation. The rival incumbents don’t want to look like spoiled brats before the voters. They will instead engage in one or another combination of reasoning and bargaining that may result in an attractive set of outcomes — indeed more attractive to more citizens than any set that would have been reached in the winner-take-all Westminster system. Call this the “Madisonian hope.”<sup>18</sup>

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<sup>17</sup> There is a caveat: rank-and-file MPs retain the right to rebel, either by selecting another party leader or by refusing to support the government’s proposals in Parliament. Denying the Cabinet a vote of confidence in Parliament is, of course, very strong medicine, as it will lead to dissolution and a new election under adverse circumstances. Because backbenchers are extremely reluctant to take this step, there is very strong party discipline in a Westminster system. Daniel Diermeier and Timothy Feddersen have formally elaborated this point. See Daniel Diermeier & Timothy J. Feddersen, *Voting Cohesion in Presidential and Parliamentary Legislatures 20–23* (June 1996) (unpublished manuscript, on file with the *Harvard Law Review*).

Although a vote of no confidence generally makes little sense within the Westminster setup, it may well be plausible for backbenchers to support a change in leadership if political prospects look sufficiently dire. For more on this possibility, see pages 657 to 661.

<sup>18</sup> Keith Krehbiel has perceptively treated some stylized conditions under which Madisonian outcomes are likely. See KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* 34–39 (1998). How well the American system has in fact fulfilled the Madisonian hope is a fair question, but one that is far too large for this essay, which asks only how eagerly Americans should seek to export our system to other countries.

The second scenario is constitutional breakdown. In an effort to destroy its competitor, one or another power assaults the constitutional system and installs itself as the single lawmaker, with or without the redeeming grace of a supportive plebiscite.

I call this breakdown the “Linzian nightmare” in ironic tribute to my friend and colleague Juan Linz. One of our foremost students of comparative government, Linz argues that the separation of powers has been one of America’s most dangerous exports, especially south of the border.<sup>19</sup> Generations of Latin liberals have taken Montesquieu’s dicta, together with America’s example, as an inspiration to create constitutional governments that divide lawmaking power between elected presidents and elected congresses — only to see their constitutions exploded by frustrated presidents as they disband intransigent congresses and install themselves as *caudillos* with the aid of the military and/or extraconstitutional plebiscites. From a comparative point of view, the results are quite stunning. There are about thirty countries, mostly in Latin America, that have adopted American-style systems. *All* of them, without exception, have succumbed to the Linzian nightmare at one time or another, often repeatedly. Of course, each breakdown comes associated with a million other variables,<sup>20</sup> but as Gio-

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Because I emphasize the more pathological structural tendencies, I do want to mention two important studies that paint a brighter picture of the American system. In *Divided Government*, Morris Fiorina argues that American voters presently desire divided government because they are uncertain about endorsing any of the ideological directions offered by either major party. See MORRIS FIORINA, *DIVIDED GOVERNMENT* 4–5 (2d ed. 1996). In *Divided We Govern*, David Mayhew argues that divided government has not significantly impeded the enactment of major legislation. See DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–1990*, at 178 (1991); see also Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947–96*, 93 AM. POL. SCI. REV. 519 (1999) (arguing that legislative gridlock does not depend on divided government per se, but rather on the distribution of policy preferences within political parties, between legislative chambers, and across Congress). I find some comfort in the Fiorina-Mayhew arguments because they do suggest that, despite recent spectacular failures in interbranch cooperation, things could be a lot worse. Of course, it is impossible to tell how a parliamentary system would have operated during recent years or whether Americans will be more or less successful in controlling the distinctive challenges of their legislative system in the future.

Although Fiorina and Mayhew do not consider most of the structural pathologies elaborated in this essay, their books provide some support for my present attitude on the American system, which may best be called “watchful waiting”: while we should be reluctant to export the system, its operation does not (yet?) warrant serious consideration of truly radical reforms. Cf. JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* (rev. ed. 1992) (proposing a series of interstitial constitutional reforms).

<sup>19</sup> Linz presents his arguments most comprehensively in Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make A Difference?*, in 1 *THE FAILURE OF PRESIDENTIAL DEMOCRACY* 3 (Juan J. Linz & Arturo Valenzuela eds., 1994).

<sup>20</sup> Statistical work on the empirical causes of presidentialist breakdown is still in its infancy, and it has yet to produce strong positive correlations. See José Antonio Cheibub, *Divided Government, Deadlock and the Survival of Presidents and Presidential Regimes* 27–33 (Sept. 1999) (unpublished manuscript, on file with the *Harvard Law Review*). Nevertheless, Cheibub observes:

[W]e do know that parliamentary democracies tend to last considerably longer than presidential democracies: the probability that a presidential system would die during any particular

vanni Sartori puts it, this dismal record “prompts us to wonder whether their political problem might not be presidentialism itself.”<sup>21</sup>

It is possible, of course, to avoid the Linzian nightmare without redeeming the Madisonian hope. Rather than all out war, president and house may merely indulge a taste for endless backbiting, mutual recrimination, and partisan deadlock. Worse yet, the contending powers may use the constitutional tools at their disposal to make life miserable for each other: the house will harass the executive, and the president will engage in unilateral action whenever he can get away with it. I call this scenario the “crisis in governability.”

Once the crisis begins, it gives rise to a vicious cycle. Presidents break legislative impasses by “solving” pressing problems with unilateral decrees that often go well beyond their formal constitutional authority; rather than protesting, representatives are relieved that they can evade political responsibility for making hard decisions; subsequent presidents use these precedents to expand their decree power further; the emerging practice may even be codified by later constitutional amendments. Increasingly, the house is reduced to a forum for demagogic posturing, while the president

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year between 1950 and 1990 was 0.0477; the probability that a parliamentary system would die was 0.0138. Although apparently small, these probabilities translate into expected lives equal to 73 years for parliamentarism and 21 years for presidentialism.

*Id.* at 18.

<sup>21</sup> Giovanni Sartori, *Neither Presidentialism nor Parliamentarianism*, in 1 THE FAILURE OF PRESIDENTIAL DEMOCRACY, *supra* note 19, at 106, 107. By comparison, at least, parliamentary regimes have had a much better success rate:

[A] source of relevant data concerns the set of countries, ninety-three in all, that became independent between 1945 and 1979. During the ten-year period between 1980 and 1989 only fifteen of the ninety-three merit possible classification as continuous democracies. . . . [W]e are impressed by the fact that no matter what their initial constitutional form, not one of the fifty-two countries in the nonparliamentary categories evolved into a continuous democracy for the 1980–89 sample period, whereas fifteen of the forty-one systems (36 percent) that actually functioned as parliamentary systems in their first year of independence not only evolved into continuous democracies but were the only countries in the entire set to do so.

Alfred Stepan & Cindy Skach, *Presidentialism and Parliamentarianism in Comparative Perspective*, in 1 THE FAILURE OF PRESIDENTIAL DEMOCRACY, *supra* note 19, at 119, 124. Selecting different periods yields different numbers but broadly similar conclusions:

From 1973 to 1989, democratic institutions were introduced in fifty-three countries outside the OECD group of advanced industrial democracies. In almost half (twenty-five countries), a presidential system was installed; in the rest (twenty-eight), a parliamentary system was chosen. Democratic breakdowns were frequent: democratic institutions survived continuously for ten years or more in only twenty-two countries. Of these democratic survivors, however, seventeen, or 61 percent, had pure parliamentary systems; only five, or 20 percent, had presidential systems.

Robert Dahl, *Thinking about Democratic Constitutions: Conclusions from Democratic Experience*, in POLITICAL ORDER: NOMOS XXXVIII 175, 191 (Ian Shapiro & Russell Hardin eds., 1996). Professor Dahl concludes that “[i]n countries where the conditions for democracy are not highly favorable . . . a parliamentary system [is] likely to contribute more than presidential systems to the stability of the basic democratic institutions.” *Id.* at 189. If anyone’s judgment on this matter is entitled to special weight, it is Robert Dahl’s. He has contributed more to our empirical understanding of democratic institutions than any political scientist of the twentieth century.

makes the tough decisions unilaterally without considering the interests and ideologies represented by the leading political parties in congress. This dismal cycle is already visible in countries like Argentina and Brazil, which have only recently emerged from military dictatorships.<sup>22</sup> A less pathological version is visible in the homeland of presidentialism, the United States.<sup>23</sup>

The probability of the three scenarios varies with time and place. But they begin to give a distinctive shape to government by separated powers. To be sure, the Westminster system is no bar to the rise of dictatorship.<sup>24</sup> But there will be many fewer crises in governability during more normal times. And even during moments of Madisonian hope, the Westminster system encourages more coherent programmatic design — though it also permits more frequent changes in program because a single election victory can provoke a quicker changeover in legal realities.

(b) *Full Authority*. — I have been considering separation of powers in its impasse mode, when no political party has won often enough to satisfy the system's criteria for plenary lawmaking power. But there is an obvious alternative: the same party wins enough elections in a row to take control of *all* the relevant powers. I call this the mode of full authority.

(i) *Shifting Gears into Full Authority: France and the United States Compared*. — Constitutions embracing separation may be graded by the degree of difficulty they impose on political movements seeking full authority. Weak systems require a small number of elections that may be conducted in rapid succession; strong ones require a more sustained set of electoral victories. Consider the two systems that today serve as rival models in contemporary debates on constitutional design: France and the United States.

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<sup>22</sup> See Timothy J. Power, *The Pen Is Mightier than the Congress: Presidential Decree Power in Brazil*, in EXECUTIVE DECREE AUTHORITY 197, 220–21 (John M. Carey & Matthew Soberg Shugart eds., 1998); Delia Ferreira Rubio & Matteo Goretti, *When the President Governs Alone: The Decretazo in Argentina, 1989–93*, in EXECUTIVE DECREE AUTHORITY, *supra*, at 33, 33. Although Professors Carey and Shugart have done a great service in organizing a series of case studies on executive unilateralism in a variety of countries, their own essay in the volume teaches a curious lesson. Although they do not deny that executive usurpation occurs, they minimize its importance, blandly stating that they are “unprepared to navigate” the constitutional questions raised in the cases of Argentina, Brazil, and other countries. John M. Carey & Matthew Soberg Shugart, *Calling Out the Tanks or Filling Out the Forms?*, in EXECUTIVE DECREE AUTHORITY, *supra*, at 1, 14. But such legal judgments cannot be suspended by constitutional scholars concerned with the likely dynamics of alternative forms of government.

<sup>23</sup> See Terry Moe & William Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 143–48 (1999) (discussing congressional resistance to presidential power in the United States). Alexis Simendiger has offered an insightful journalistic account of the unilateral power plays of the Clinton White House and the Republican Congress. See Alexis Simendiger, *The Paper Wars*, NAT'L J., July 25, 1998, at 1732.

<sup>24</sup> See *supra* note 21.

Under the French system, the President is directly elected for a fixed term of seven years but is obliged to appoint a Premier who has majority support in the National Assembly.<sup>25</sup> Because the Assembly's electoral mandate must be renewed within a five-year interval, the Constitution contemplates a system of staggered elections — with the relationship between the President and the Premier depending on the outcome of the most recent election to the Assembly. When voters elect an Assembly majority that supports the President, he operates (more or less)<sup>26</sup> in the mode of full authority, and his Premier functions as his principal subordinate. But when the Assembly is dominated by the President's opponents, he confronts a problem broadly analogous to the one prevailing when an American President like Bill Clinton confronts a hostile Speaker of the House like Newt Gingrich or an oppositional Senate Majority Leader like Trent Lott. Up to the present time, the French have managed these tension-filled periods with Madisonian panache. Although the constitutional text is not much help in defining the terms of competition/cooperation between “cohabiting” powers, the two sides have generally cooperated without pathological conflict. Nonetheless, the potential for an ongoing crisis in governability is certainly present.<sup>27</sup>

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<sup>25</sup> See Martin A. Rogoff, *The French (R)evolution of 1958–1998*, 3 COLUM. J. EUR. L. 453, 458 (1997–1998).

<sup>26</sup> When the President's party dominates the governing coalition, his power is at a maximum, as in the cases of Charles de Gaulle between 1962 and 1969, Georges Pompidou between 1969 and 1974, Francois Mitterrand between 1981 and 1986, and Jacques Chirac between 1995 and 1997. If the governing coalition is favorable to the President but the President is not in direct control of the dominant party of the coalition, his Prime Minister exercises greater autonomy, as in the cases of Giscard d'Estaing between 1974 and 1981 and Mitterrand between 1988 and 1989. See John T.S. Keeler & Martin A. Schain, *Presidents, Premiers, and Models of Democracy in France*, in CHIRAC'S CHALLENGE: LIBERALIZATION, EUROPEANIZATION, AND MALAISE IN FRANCE 23, 25 tbl. (John T.S. Keeler & Martin A. Schain eds., 1996) [hereinafter CHIRAC'S CHALLENGE].

<sup>27</sup> There have been three periods of “cohabitation,” as the French call it. The Socialist President Mitterrand shared power with conservative Premiers Chirac (1986–1988) and Balladur (1993–1995). The third period began in 1997, when the Socialist Lionel Jospin was elected Premier. He now shares power with President Chirac. During President Mitterrand's first period of cohabitation, he retained control over national defense and foreign affairs, while ceding most — but not all — domestic policy to the Prime Minister. During his second period, Mitterrand's Socialist Party was much weaker in Parliament, and he was obliged to share power even in the domains of defense and foreign affairs — matters traditionally reserved to the President since the days of de Gaulle. See Keeler & Schain, *supra* note 26, at 37–41. Overall, the French have managed these subtle and dynamic power-sharing arrangements with commendable statesmanship. My casual reading of the newspapers suggests that this is also true of the present period of cohabitation.

These Madisonian forms of engagement are not required by the constitutional text, which allows for much more pronounced forms of institutional conflict than have thus far prevailed. For example, a self-aggrandizing President could read Article 9 — “The President of the Republic shall preside over the Council of Ministers” — to claim general supervisory power over the Prime Minister on all matters. FR. CONST. art. IX. But then again, a self-aggrandizing Prime Minister could use provisions like Article 20 — “The Government shall determine and direct the policy of the nation” — as the textual basis for an equally totalizing claim of authority. FR. CONST. art. XX.

When judged by American standards, French separation seems relatively weak. On the political side, the French President must worry mostly about hostility from the National Assembly, since the French Senate is not very powerful.<sup>28</sup> Moreover, the President can try to regain full authority by calling a new Assembly election at a time of his own choosing.<sup>29</sup> In contrast, the American system of fixed and staggered two-, four-, and six-year terms for House, President, and Senate is much more exigent, requiring more elections before a rising political movement is in solid control of full lawmaking power.

French separationism is also weaker when we turn to the judiciary. Although the French Constitutional Council has been quite fearless in striking down initiatives of a President acting under full political authority,<sup>30</sup> three of its nine members leave office every three years<sup>31</sup> — making it a less formidable source of resistance to a rising political movement than the American Supreme Court.

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Leading French commentators have endowed key, and seemingly clear, provisions with a degree of obscurity worthy of the Anglo-American tradition. Article 8, for example, seems to deny the President the power to demand the resignation of his Prime Minister: “The President of the Republic shall appoint the Premier. He shall terminate the functions of the Premier when the latter presents the resignation of the Government.” FR. CONST. art. VIII.

But as Professor Avril shows in his fine book, constitutional practice reveals that this article “is finally more ambiguous than it seems on first reading.” PIERRE AVRIL, *LES CONVENTIONS DE LA CONSTITUTION 100* (1997) (translation by Bruce Ackerman) (quoting Francis de Baecque with approval). For Avril’s analysis of practice, see *id.* at 100–04.

It is far too early to tell whether these early periods of cohabitation will be characteristic of the *longue durée*.

<sup>28</sup> See Rogoff, *supra* note 25, at 459.

<sup>29</sup> See FR. CONST. art. XII. The new Parliament is guaranteed a life of at least one year before the President may dissolve it. See *id.* If the President tries to break the impasse and fails, the system is obviously threatened by a crisis in governability — but this scenario has not yet come to pass.

<sup>30</sup> There have been important cases in which a holdover Constitutional Council blocked central aspects of the program advanced by a newly empowered government. The Council’s hostile reception to the sweeping initiatives of the early Mitterand Presidency remains the most striking example. See ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* 140–69 (1992) (describing the Council’s reaction to the nationalization of industry); *id.* at 173–91 (describing the Council’s response to the reform of the communications industry). When the political tide began to turn against Mitterand in 1986, he appointed his Justice Minister, Robert Badinter, to the presidency of the Council a month before parliamentary elections that were expected to return a conservative majority to power. Though the decision was sharply criticized at the time, it succeeded in creating a narrow majority on the Council that put up significant resistance to the programs introduced by the conservatives when they returned to power in 1986. See John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1784 (describing the appointment of Badinter); *id.* at 1788–89 (1988) (discussing the closely divided majority). The Council also resisted the initiatives proposed after another political turnover in 1993. See Alec Stone, *Constitutional Politics and Malaise in France*, in CHIRAC’S CHALLENGE, *supra* note 26, at 53, 71–73. See generally MARIE-ANNE COHENDET, *LA COHABITATION: LEÇONS D’UNE EXPÉRIENCE* (1993); LOUIS FAVOREU, *LA POLITIQUE SAISIE PAR LE DROIT: ALTERNANCES, COHABITATION ET CONSEIL CONSTITUTIONNEL* (1988).

<sup>31</sup> See Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21, 79–80 (1997).

All in all, the American system sometimes requires a political movement to keep on winning elections for ten years or more before it can assume full control over all key institutions; the French system is far less onerous. Nevertheless, even the American system has not made it impossible for political movements to exercise full authority — though obviously it makes it less likely.

(ii) *Why Separation Matters under Full Authority.* — I shall bracket the obvious normative question — how weak or strong should separation be? — to focus on one that is equally important, but more behavioral: Is there any reason to suppose that a separated government with full authority will exercise its powers differently from the same government operating under a Westminster system?

Absolutely. The separated government knows that it has been granted a special power unavailable to its Westminster counterpart. This is the power to *entrench* its decisions into the legal framework for a very long time to come. However powerful the Westminsterians may be over their five-year run, they are all too aware that their proud policy initiatives may be swept away at the next election, or the election after that. As a consequence, the Westminster government has an incentive to attend to questions of middle-range efficacy. It wants to get its programs up and running soon enough to impress practical-minded voters at the next election.

The separated government with full authority is in a different position. Although it may lose the house at the next election, this does not imply an immediate loss of the presidency (or the senate or the court). And the incumbents in these offices will continue to defend the laws enacted during plenary authority despite the results of the most recent election. This tendency can lead to a practical entrenchment of these initiatives long after similar enterprises by a Westminster government would have passed from the scene.

These basic points give a distinctive shape to periods of full authority. First, there will be a predictable *race against the constitutional clock*.<sup>32</sup> The government has a guarantee of a rather short time — in American-style systems, only two years — before it may lose its grip on one or another crucial lever of lawmaking power. The challenge is to take maximal advantage of this relatively brief period, which may not return again for a

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<sup>32</sup> For a particularly striking example of this race in American constitutional history, see the discussion of the enactment of the Fourteenth Amendment in ACKERMAN, *TRANSFORMATIONS*, *supra* note 15, at 210–11. The most recent example of an American government operating under full authority occurred during the 1960s. Though the precise beginning and ending dates are open to dispute, the uncontestable core of full authority is the two-year period beginning in 1964 with the landslide victory of Lyndon Johnson over Barry Goldwater (43 million to 27 million), the equally decisive victories of the Democrats in Congress (295 to 140 in the House and 68 to 32 in the Senate), and the ascendancy of the liberal majority on the Warren Court. For a kaleidoscopic overview of the ensuing period of legislative hyperactivity, see JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974*, at 562–92 (1996).

generation. This move toward maximalism may be enhanced by a second effect, resulting from the prior period of impasse. During this — often long — period, the now-ascendant political movement has been in power in one or more of the separated branches. Time and again, it has seen its initiatives blocked — or compromised beyond recognition — by the hostile forces in the opposing branches. During this period of frustration, more ideologically inclined politicians have been endlessly denouncing these compromises, longing for the day when they are no longer necessary.

Then, often quite suddenly, a single election breaks the logjam, and the compromises no longer *are* necessary — at least in the short term. The result is a burst of legislation that seeks to express long-suppressed ideas and ideals.

But in a distinctive fashion. In contrast to the concern with middle-range efficacy characteristic of the Westminster regime, the program will be built to withstand future electoral adversity. Indeed, because the next election may be coming up in only two years, the government may find it difficult to generate any real-world outcomes before the next electoral cycle. This will mean, first, that the government will favor lawmaking initiatives strong in symbolic statement. Because the electorate can't see concrete results before they vote, the government might as well give them something they can see immediately: large symbolic statements.<sup>33</sup>

Second, even when it is in full authority, the government will design programs that take into account the likelihood of future impasse. In particular, it will structure its initiatives in ways that enhance the power of one or another branch, acting individually, to protect entrenched policies against future hostile efforts to destroy them. This emphasis on practical entrenchment may often come at a serious cost in terms of middle-range efficacy.

Especially when, third, the government takes into account that it may not have an equal likelihood of maintaining control over all the separated powers. For example, perhaps the electoral rules give the government a greater long-run advantage in sustaining control over the house than over the presidency. If this is so, its legislation may refuse to give the presidency powers of program execution that might enhance operational efficiency.

I do not mean to suggest that middle-range efficacy will be unimportant, only that it will not be all-important. Instead, there will be a bias toward legalism. Whatever else may be said about the laws promulgated during periods of full authority, they are *laws*. And the laws on the books are to be respected, interpreted, and enforced — despite their inefficiencies

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<sup>33</sup> That modern classic, *The Symbolic Uses of Politics*, describes politics as “a series of pictures in the mind,” separate from “the immediate world in which people make and do things that have directly observable consequences.” MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 5 (1985); see *id.* at 4–5, 22–29.

— until they are repealed. Perhaps they would no longer be enacted during the ensuing period of impasse. But doesn't the rule of law require that they continue to be enforced until they are repealed?

Maybe not. There will always be advocates of a politicized or "realistic" jurisprudence, who will emphasize courts' abilities to manipulate laws during the period of impasse that follows the last period of full authority and the next period of impasse.<sup>34</sup> But it will always be a great advantage to have the rule of law on one's side — and, *ceteris paribus*, one should expect the government of full authority to exploit this advantage in two different ways. On the one hand, statutes will be full of abstract legal principles that invite like-minded courts to continue developing initiatives even in the absence of further legislative support.<sup>35</sup> On the other hand, the statutes will be full of very specific rules that courts might enforce even when the president is unwilling to implement older programs aggressively.

In contrast, statutes in Westminster-style systems will tend to be framed in mid-sized concepts keyed to operational realities: less abstract than high-flying principles, but more abstract than particularized rules. Their draftsmen will recognize that neither principles nor rules will defer the day when the reigning political movement loses its next electoral contest. On that dreaded day, the new majority will simply repeal or modify any statute that it does not like.<sup>36</sup>

Far better, then, to focus on the middle-term, rather than trying in vain to tie the next majority's hand through creative legalisms. The best way to sustain an important initiative in the long run is to make it work so well in the middle run that the next government will choose to keep the program intact.

2. *Beyond the Westminster Tradition.* — I have been using a simplified version of the familiar Westminster system as a foil for an initial foray into the separation of powers. But perhaps I have been using the wrong benchmark. After all, there are many parliamentary systems in which cabinets do not have the staying power of the British type. Between 1945 and 1996, the average Italian Cabinet lasted 1.28 years before it was displaced by the next governing coalition,<sup>37</sup> and Cabinets turned over even

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<sup>34</sup> For a sophisticated version of this argument, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 81–90, 92 (1982).

<sup>35</sup> How enthusiastically courts take up this invitation will depend on many factors, including the extent to which the previously dominant political coalition continues to exercise control over judicial appointments as the system returns to impasse mode.

<sup>36</sup> To my knowledge, Professors Terry Moe and Michael Caldwell are unique in linking this well known difference in legislative style to the separation of powers. For an illuminating survey of suggestive case studies, see Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 *J. INSTITUTIONAL & THEORETICAL ECON.* 171, 182–87 (1994).

<sup>37</sup> See AREND LIJPHART, *PATTERNS OF DEMOCRACY* 132 tbl.7.1 (1999).

more quickly during the last years of the Fourth French Republic.<sup>38</sup> If this Italo-French model had been made the salient point of contrast, wouldn't an American-style system look better?

Yes, but the weakness of the Italo-French model is not due to unseparated power but to the system of proportional representation through which MPs are selected.<sup>39</sup> Some forms of PR can breed a host of small parties in the legislature, and this multiplicity can generate ceaseless change in the cabinet as the costs and benefits of different coalitional opportunities subtly shift.<sup>40</sup>

This underlying dynamic helps to put the absurdly brief lifetimes of the Italian and French cabinets into better perspective. Although individual cabinets may come and go, many of the same ministers and parties remain in government for many years, thereby providing a longer-term perspective on policy.<sup>41</sup> This point ameliorates the problem, but does not resolve it. The ceaseless game of musical chairs inexorably deflects each minister's attention away from policy and toward the pursuit of her next job. If nothing could be done to correct this tendency, it would seriously weaken my argument against separationism.

But something *can* be done. Indeed, the necessary bits of constitutional engineering are now a familiar part of contemporary lore. Within the framework of proportional representation, one obvious step is to deny splinter parties entrance into parliament. Many PR systems require parties to leap over a substantial threshold of popular support — say four or five percent<sup>42</sup> — before they may become cabinet makers or breakers. This requirement reduces cabinet instability by reducing the number of potential bargaining partners who can make offers that disrupt the existing coalition.<sup>43</sup>

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<sup>38</sup> Between 1950 and 1958, the average French government lasted 8.6 months. See Sergio Fabbrini, *Presidents, Parliaments, & Good Government*, J. DEMOCRACY, July 1995, at 128, 129.

<sup>39</sup> See GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* 58–59 (2d ed. 1997).

<sup>40</sup> See MICHAEL LAVER & KENNETH A. SHEPSLE, *MAKING AND BREAKING GOVERNMENTS: CABINETS AND LEGISLATURES IN PARLIAMENTARY DEMOCRACIES* 251–56 (1996) (offering an outstanding analysis of basic problems in the construction and destruction of coalition governments in European-style parliamentary systems).

<sup>41</sup> See LIIPHART, *supra* note 37, at 129–31; SARTORI, *supra* note 39, at 111; see also André Siegfried, *Stable Instability in France*, 34 FOREIGN AFF. 394, 399 (1956) (“[A]s the same ministers hold over from one cabinet to another, they form as it were teams of government.”); Mary L. Volcansek, *Coalition Composition and Legislative Outcomes in Italy*, W. EUR. POL., Jan. 1999, at 95, 96 (noting that Italy, in the postwar years, “had the lowest cabinet turnover rate, but the most short-lived governments of any country in Western Europe and presents a pattern of both stability and instability”).

<sup>42</sup> Among well-established democracies, Sweden and Norway impose a four percent barrier, and Germany and New Zealand impose a five percent threshold. See LIIPHART, *supra* note 37, at 153. In Germany, the five percent barrier may be evaded by minor parties under certain conditions. See *infra* note 48.

<sup>43</sup> The stability of a coalition depends not only on the number of potential bargainers, but also on their relationship to one another in policy space. See MICHAEL LAVER & NORMAN SCHOFIELD,

Another stabilizing measure is the “constructive vote of no confidence.” Under this system, the parliamentary opposition cannot throw out the cabinet simply because it does not like what it is doing. Instead, the opposition must affirmatively select a new government before the old prime minister can be ousted.<sup>44</sup> This is a much tougher job because it is easier for the extreme Left and Right to vote against a centrist cabinet than to agree affirmatively on a successor.<sup>45</sup> This technique is also quite common nowadays.<sup>46</sup>

Constitutions that combine these two techniques have had substantial success in curbing incessant cabinet shuffles.<sup>47</sup> Most notably, the modern German Constitution, which endorses both,<sup>48</sup> has provided the Chancellor and his governing coalition with an average life expectancy of 3.6 years since the war.<sup>49</sup>

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MULTIPARTY GOVERNMENT: THE POLITICS OF COALITION IN EUROPE 144–63 (1990); LAVER & SHEPSLE, *supra* note 40, at 195–222. The existence of a big party at a strategic point in the policy space vastly stabilizes the situation. Speaking broadly, the elimination of splinter parties makes the emergence of a stable coalition more likely, though hardly inevitable. *See id.* at 69 (“[M]ost party configurations with a relatively small number of parties and salient policy dimensions do not generate cabinet cycles. . .”).

<sup>44</sup> When dismissing the Chancellor, the German Bundestag must simultaneously designate a successor by an absolute majority. *See* F.R.G. CONST. art. 67. Professor Carl J. Friedrich designed this constitutional device. *See* MERKL, *supra* note 2, at 81–82.

<sup>45</sup> *See* SARTORI, *supra* note 39, at 106–07; Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 469 (1991).

<sup>46</sup> Among relatively stable democracies, Spain, Papua New Guinea, and Belgium have adopted the technique. *See* LIJPHART, *supra* note 37, at 101. Newly emerging democracies in Hungary and Poland have also adopted it. *See* Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 380 (1995) (discussing Hungary’s adoption of the constructive vote of no confidence); Rett R. Ludwikowski, “Mixed” Constitutions — Product of an East-Central European Melting Pot, 16 B.U. INT’L L.J. 1, 37 (1998) (discussing Poland’s adoption of the same).

<sup>47</sup> The French Constitution of the Fifth Republic also contains a host of devices that governments can use to maintain control over parliament. Indeed, the French Prime Minister probably has too many weapons. Nonetheless, some of these devices should be considered seriously by future constitutional draftsmen concerned with the problem of cabinet stability. For an enumeration of the French techniques, see Keeler & Schain, *supra* note 26, at 26.

<sup>48</sup> Germany’s threshold of five percent can be breached under special conditions:

A party must receive at least 5 percent of the vote in order to be proportionally represented in the parliament . . . [I]f a party wins at least three district (first ballot) seats, the 5 percent clause is waived and the party does participate in the proportional distribution. The former East German Communist party . . . owed its return to the parliament in 1994 to this little-known and seldom-used provision of the law.

CONRADT, *supra* note 7, at 154.

<sup>49</sup> *See* LIJPHART, *supra* note 37, at 132 tbl.7.1. There has been only one case in which a German chancellor was replaced without a new election. In 1982, the Free Democrats defected from the Social-Democrat Helmut Schmidt, bringing the Christian-Democrat Helmut Kohl into power. *See* SARTORI, *supra* note 39, at 118 n.7. For computer simulations that suggest the contribution of the constructive vote of no confidence to cabinet stability in Germany, see LAVER & SHEPSLE, *supra* note 40, at 212. More qualitative assessments of leading experts also support this point. *See* SARTORI, *supra* note 39, at 106–07.

Clever constitutional engineering, then, can create stable cabinets that remain focused on questions of middle-range efficacy, even in systems based on proportional representation. In contrast, the problems of separated power seem hard-wired into the system. As long as voters cast separate ballots for candidates for house and president, there will be periods of impasse and periods of full authority, and pathologies associated with each.

Indeed, a move beyond the Westminster model can easily make the demerits of the American-style system seem more, not less, pronounced. Under the British electoral system, which awards victory to the plurality-winner from single-member districts, there is an overwhelming tendency to reduce third parties to political insignificance — even when, as in the case of the English Liberal Democrats, they have polled 22.6, 17.8, and 16.7 percent in the last three elections.<sup>50</sup> Such a party would be a major player under all the standard Continental methods of incorporating proportional representation into the parliamentary system.

This essay does not aim to describe the best form of parliamentary government, but only to consider the conditions under which a system of more separated powers might be superior. This means that it will not be necessary to canvas the familiar arguments for and against PR.<sup>51</sup> Instead, only one less-familiar point is worth making, and can be offered in the conditional mode: *If* you are attracted by the superior democratic legitimacy of a PR system (constrained by mechanisms assuring cabinet stability), *then* you have found another reason for rejecting an American-style separation between president and congress.

To see why, return to Linz's nightmare and consider the conditions under which it is most likely to occur: a charismatic president, asserting that her election represents a "mandate" from the people for massive change, confronts a squabbling congress that rejects the president's initiatives but cannot get together on its own counterproposals. In response, the president calls out the army to disband the do-nothing parliamentarians and to inaugurate a new era of peace, prosperity, and national solidarity — with a heavy emphasis on the latter.

For obvious reasons, this scenario is most likely to occur when proportional representation generates five or six or more parties in the congress.

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<sup>50</sup> The Liberal Democrats polled 22.6% for 27 parliamentary seats in 1987, 17.8% for 20 seats in 1992, and 16.7% for 46 seats in 1997. In contrast, the Labour Party polled 34.4% in 1992, not quite double the Liberal Democrats' 17.9%, but were rewarded with 271 seats, more than 13 times the Liberal Democrats' 20. In 1997, the Conservatives polled less than twice the Liberal Democrats at 30.6% and earned 165 seats to the Liberal Democrats' 46. See *POLITICAL HANDBOOK OF THE WORLD: 1997*, at 883 (Arthur S. Banks, Alan J. Day & Thomas C. Muller eds., 1997) (providing figures for the 1987 and 1992 elections); Michael Elliot, *Blair's Britain*, *NEWSWEEK*, May 12, 1997, at 34 (providing figures for the 1997 election).

<sup>51</sup> Arend Lijphart introduces a series of articles debating the general question of the pros and cons of PR. See Arend Lijphart, *Constitutional Choices for New Democracies*, *J. DEMOCRACY*, Winter 1991, at 72. For a short but trenchant assessment, see SARTORI, *supra* note 39, at 53–79.

Unlike the situation prevailing in a parliamentary system, these parties do not have powerful incentives to organize themselves into a majority coalition that, with the aid of techniques like the constructive vote of no-confidence, can govern for a substantial period. Instead, their disparate agendas may easily lead them to block all presidential initiatives without coming up with any coherent-seeming alternative.

In contrast, the “first-past-the-post” electoral system practiced in the English-speaking world has a particular virtue under separation of powers. By squeezing out third parties, it makes it easier for the congress to sustain a modicum of political coherence in dealing with the president under conditions of impasse. Members of the majority party in the legislature have a powerful incentive to respond to political challenge either by engaging in some grand compromise with the president, or by coming up with a plausible counterprogram for the next election. With the congress responding with one or another form of constructive politics, it will seem far less legitimate for the president herself to invite military intervention. This is, at any rate, my best stab at making sense of data suggesting that the most toxic form of separation is the constitutional combination of (1) a popularly elected president together with (2) a congress elected by a PR system.<sup>52</sup>

But if this is so, we have come up with the promised conditional argument. If a PR electoral system is desirable, an American separation of powers system is not — because PR’s potential cost in terms of regime stability is much higher under presidentialist systems than under parliamentary ones.<sup>53</sup>

3. *The Cult of Personality.* — The image of the charismatic president has thus far entered the picture as part of Linz’s nightmare of democratic breakdown. But let us put such apocalyptic visions aside and assume the operation of a reasonably stable separationist system along American or

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<sup>52</sup> See Scott Mainwaring, *Presidentialism, Multipartyism, and Democracy: The Difficult Combination*, in *FLYING BLIND: EMERGING DEMOCRACIES IN EAST CENTRAL EUROPE* 55 (Gyorgy Szoboszlai ed., 1992); see also Dahl, *supra* note 21, at 192 (“Of all the major alternatives, presidentialism with PR — the Latin American option — may be the most unstable.”).

<sup>53</sup> This argument suggests a crucial failure in Lani Guinier’s efforts to popularize the idea of proportional representation in the United States. Although she recognizes that the introduction of her reforms would lead to the “balkanization” of congressional power by a multi-party system, she argues that “the specter of balkanization is much less persuasive when considering elections whose only purpose is to determine membership of an exclusively legislative body such as our Congress. . . . Even winner-take-all proponents acknowledge that diversity of viewpoint is what legitimates those bodies and *helps them to function effectively*.” LANI GUINIER, *LIFT EVERY VOICE* 263 (1998) (emphasis added). Professor Guinier is wrong to attribute the italicized concession to proponents of the existing two-party system. They emphatically do not “acknowledge” that the introduction of a multi-party Congress will lead to more effective functioning in an institutional environment containing an independently elected President. Instead, they fear that the introduction of proportional representation in Congress would push the North American system into the Latin American pathologies that gave rise to Linz’s nightmare.

French lines. There is still something disturbing — to me at least — about the kind of politics generated by an independently elected presidency.

Quite simply, an elected presidency predisposes the system to a politics of personality, and especially the politics of a single personality. To be sure, all presidents and prime ministers possess enormous power, making it natural for the public to scrutinize every personality quirk. But a parliamentary system does a better job of keeping these personalistic tendencies in check.

Begin with the downside. All humans who manage to climb their way to the top have their weaknesses, to say nothing of their dark sides; but some shadows get overexposed in the bright light of publicity, to the point at which the public cries, “The guy’s a creep; get him out of there!”

When this happens, political retribution will be swift and unforgiving in a parliamentary system. The key, here as elsewhere, is the PM’s need to sustain an ongoing majority in the house. While his party’s backbenchers normally have an overriding self-interest in supporting the leadership, they will turn with sudden ferocity when the polls reveal that their leader’s personality has become a permanent political liability. Better to dump the guy immediately and replace him with somebody who will present the party’s program with a more pleasing face at the next election. Even so dominating a persona as Margaret Thatcher found that British backbenchers were utterly ruthless once polls revealed that the Iron Lady had become an obstacle to future success.<sup>54</sup>

The plight of a failing persona is even more devastating if the prime minister heads a multi-party coalition. Coalition partners will not think twice about deserting a prime minister whose reputation is smirched by scandal.<sup>55</sup> Why should their party be burdened by association with a tar-

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<sup>54</sup> See ANTHONY H. BIRCH, *THE BRITISH SYSTEM OF GOVERNMENT* 99 (10th ed. 1998) (“By the autumn of 1990 the Conservatives were fifteen points behind the Labour Party in the polls. It was largely because of this that Thatcher was ditched by her colleagues.”); LEONARD FREEDMAN, *POLITICS AND POLICY IN BRITAIN* 107 (1996) (“By 1990, however, the opinion of many of her parliamentary colleagues was that she had become an electoral liability — so much so that their party could win without her . . . as leader. Their judgment appeared to be confirmed when her replacement, John Major, led his party to an unexpected victory.”).

<sup>55</sup> One of West Germany’s most distinguished statesmen, Willy Brandt, was forced to resign as Chancellor in 1973 by his coalition partners, the Free Democrats, when an East German spy, Gunter Guillaume, was discovered amongst his close circle of advisers. As often occurs in such cases, Brandt’s position had been weakened previously by a precipitous decline in public support for his more substantive policies, and public opinion polls plummeted from 76% support in July 1973 to 35% in December 1973, when the scandal broke. See BARBARA MARSHALL, *WILLY BRANDT: A POLITICAL BIOGRAPHY* 91–96 (1997).

A similar fate befell Felipe González, who had served for 13 years as Spain’s Prime Minister, winning four general elections. In the last of these, his Socialist party lost its parliamentary majority and was obliged to form a coalition with the nationalist Catalan Convergence and Union Party. As González’s government became implicated in financial and political scandals, including suspected complicity in setting up the Anti-Terrorism Liberation Group, his coalition partners withdrew their support and rejected a draft budget for 1996. Although the Spanish Constitution does not require the govern-

nished PM when someone new may readily be found whose feet of clay have not yet been exposed to public view?

Presidents, in contrast, are elected by the people for a fixed term, and the separationist constitutions rightly make impeachment and removal a very difficult business — as the Lewinsky affair has taught us all, in case we were in danger of forgetting. One of the oddest features of this affair was the verdict reached by the pundits upon its conclusion. Professor Tribe's assurances to the readers of *The New York Times* were exemplary: "When it ends today with President Clinton's widely anticipated acquittal, the impeachment drama will have yielded few heroes — except the Constitution's Framers, whose wisdom that drama will again have vindicated."<sup>56</sup>

Bill Clinton would not have lasted a month as a prime minister in a parliamentary system. His backbenchers would have revolted, or his coalition partners would have ushered him out the door in a desperate effort to move into the next election with a new face at the head of the old government. In contrast, Americans had to waste a year on the politics of Clinton's personality. Even after the tedious debate came to a formal conclusion, the country was left with a leader whose character seems shabby to most of the public.

I agree with Professor Tribe that, *given the American separation of powers*, Bill Clinton's failings did not provide a constitutionally adequate basis for Congress to override the judgment rendered by the voters in 1996.<sup>57</sup> But compared with the way a parliamentary system would have handled the affair, the separation of powers did a spectacularly bad job in dealing with this minor scandal. Surely Americans had better things to do with their time than to endure an entire year of obsessive conversation devoted to the peculiar foibles of a single human being.

The cult of personality is no less a problem during less pathological moments — though it appears in subtler, if ultimately more important, forms. The difficulty results from the president's capacity to detach himself from other political leaders in the congress and the party system in general. The contemporary United States represents an extreme case.

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ment to resign when it fails to gain approval for a budget, the handwriting was on the wall, and González dissolved parliament and called for an early election, resulting in his defeat. See *González Faces Agonising Dilemma as Poll Looms*, AGENCE FRANCE PRESSE, Dec. 4, 1995, available in LEXIS, News Library; Marlise Simons, *A Little Known Conservative Topples González in Spain*, N.Y. TIMES, Mar. 4, 1996, at A3; *Spanish Leader Is Accused in Killing of Basques in 80's*, N.Y. TIMES, July 21, 1995, at A4.

Other recent scandals forcing the resignation of a Prime Minister arose in Japan in 1989, in the case of Noboru Takeshita, and in Italy in 1994, in the case of Carlo Azeglio Ciampi. See Steven R. Weisman, *Nakasone Seems Ready to Testify*, N.Y. TIMES, May 17, 1989, at A7; Alan Cowell, *Italy's Premier Resigns, Paving Way for National Vote*, N.Y. TIMES, Jan. 14, 1994, at A3.

<sup>56</sup> Laurence H. Tribe, *And the Winner Is . . .*, N.Y. TIMES, Feb. 12, 1999, at A27.

<sup>57</sup> This matter is discussed at greater length in Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2340–47 (1999).

Presidential hopefuls create their own ad hoc campaign organizations, and the Democratic and Republican candidates who emerge from the party primaries are remarkably free to articulate their own positions in blithe disregard of their formal party platforms.<sup>58</sup> There is little wonder, then, that the ultimate victor in the November election is tempted to understand his mandate in personalistic terms: the People have selected *him* as President, and his political party has served merely as a vehicle for the projection of his own personality and ideals.

The personal character of the President's mandate is also expressed in his relationship to the cabinet and to his legislative program. No cabinet secretary ever imagines himself operating on the same plane of legitimacy as his boss: after all, the President was elected by the People, and he was not.

The same personalistic logic operates on the legislative side. In fashioning his initiatives, the President and his assistants are perfectly happy to organize ad hoc coalitions across party lines if this is what it takes to get a bill through congress. Although such "successes" may antagonize party loyalists, their consistent support is not a necessary condition for the President to maintain himself in office. Indeed, the President may readily come to believe that his place in history will be measured by his success in enacting his own program into law. If this project requires him to rise above party, so much the better. Isn't this what greatness is all about?<sup>59</sup>

The prime minister is in a different position. She is ultimately dependent on her party's support in parliament, and it would be political suicide for her to enact a legislative program over its bitter objection. When she hears murmurings (or shouts) of discontent, she will take them seriously — coopting, compromising or suppressing opponents, but in any event, *dealing* with them.

To be sure, the PM's backbenchers will not be eager to rebel too publicly because parliamentary disarray is not a good advertisement to the voting public. Nonetheless, the prime minister is well aware that future crises may arise that will test the loyalty of her party, and its backbenchers, to her continued prominence at the helm. Her overriding aim is therefore to bring her party along with her initiatives: mobilizing her forces at party congresses to change the platform to support her principles, pressing each backbencher to vote the party line at crucial parliamentary turning points.

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<sup>58</sup> The situation has progressed to the point that Bob Dole denied reading the Republican platform in an effort to avoid a confrontation with some of its provisions dealing with abortion, the nomination of conservative judges, and other matters. See Anthony Lewis, *Aesop's Party*, N.Y. TIMES, Aug. 16, 1996, at A33.

<sup>59</sup> For a profound discussion of the extent to which the politics of particular American presidents have been framed by their understanding of their place in historical development, see STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993).

All this activity is self-interested, of course. Nevertheless, it aids in the construction of something that I will call a “party of principle.” Although a president is constantly tempted to view his party in purely instrumental terms, the prime minister is obliged to treat her party as an enduring organization of political activists dedicated to a distinctive set of principles. If she does not like these principles, she must try to persuade her fellow activists to adapt them to further her political ends. Whether she succeeds or fails, there will be a characteristic tendency to project an image of each political party as representing an enduring political project over time.

The prime minister’s relationship with her cabinet is also profoundly different. Rather than bearing a unique personal mandate from the people, she is basically no different from other party leaders whom she encounters at cabinet meetings. Indeed, some of them may have almost as much support in the party as the PM herself. Others may be leaders of coalition parties whose continued support is essential to the government’s existence. As a consequence, European prime ministers invariably treat the cabinet as a far more significant institution than do their presidential counterparts. Although the relative strength of the prime minister varies among European systems, none of them pretends to have the absolute preeminence that an American President takes for granted.<sup>60</sup>

Strong leaders have emerged out of parliamentary systems. Prime Minister Margaret Thatcher and Chancellor Helmut Kohl are contemporary examples. But presidential systems do not merely allow strong leaders to rise above the fray of ordinary politics from time to time. They manufacture them on a regular basis, creating a platform upon which a single leader constantly struts high above the political plane inhabited by ordinary mortals. Is this really healthy?<sup>61</sup>

Revealingly, presidentialist constitutions express doubt on this score. After working so hard to construct a paramount leader, they often limit his

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<sup>60</sup> This fundamental difference in the operation of the cabinet in presidential and parliamentary systems is a truism among political scientists. See LIJPHART, *supra* note 37, at 113–15. The PM’s power within each system undoubtedly varies with her standing within her party, and her party’s relative power in the coalition government, if such exists. Anthony King’s empirical study groups European prime ministers into three broad categories of power: high (Germany, Greece, Ireland, Portugal, Spain, and the United Kingdom), medium (Austria, Belgium, Denmark, and Sweden), and low (Italy, Netherlands, and Norway). See Anthony King, ‘Chief Executives’ in *Western Europe*, in DEVELOPING DEMOCRACY 150, 153 tbl.9.1 (Ian Budge & David McKay eds., 1994).

<sup>61</sup> A secondary, but important, problem arises when the elected president dies, resigns, or is impeached, leaving his office to a vice president. This system of succession has regularly destabilized American politics, see ACKERMAN, TRANSFORMATIONS, *supra* note 15, at 176–77, and has also wreaked havoc in other places. For example, contemporary Brazilian politics has been cursed with mediocre vice presidents’ wielding power for extended periods. See Ackerman, *supra* note 10, at 22. Of course, it is possible to fix this problem in a presidentialist framework by eliminating the office of vice president and providing for irregular succession by conducting a special election — which is why I have consigned this issue to a footnote.

service to one or two terms.<sup>62</sup> This makes good democratic sense — power does corrupt, especially at such heady altitudes.

But the contrasting treatment that prevails in parliamentary systems should lead one to question the very premise upon which presidentialist constitutions are based. Parliamentary constitutions have never found it necessary to limit the prime minister's term in office, and leaders like Prime Minister Thatcher and Chancellor Kohl served much longer than is permitted for the Presidents of Argentina, Brazil, Mexico or the United States.<sup>63</sup> To the naive advocate of the separation of powers, this may seem odd. After all, if concentrated lawmaking power is so dangerous, the English and the Germans should be the people most in need of term limits.

The paradox dissolves when one recalls how powerfully the restraints of political party operate on the parliamentary leader. Despite the appearance of unchecked power, the PM is subject to a continuing plebiscite from both backbenchers in her own party and the competing leaders in coalition parties. However powerful the Kohls and Thatchers may seem, they can never escape the judgment of their peers — who will not hesitate to undermine or overthrow them when the voters begin to yearn for change. Because the PM's preeminence is obtained at the sufferance of her peers, it is far more tolerable than the dominion obtained by a president through constitutional guarantee.

The result of the presidentialist cult of personality cannot help but offend the more efficiency-minded. On the one hand, citizens are stuck with

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<sup>62</sup> For a useful table compiling presidential terms and term limits in 19 countries, see GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* 174 tbl.11.1 (2d ed. 1997). Popular leaders regularly challenge the legitimacy of this constraint. President Carlos Menem of Argentina successfully persuaded a constitutional convention to authorize a second term in office but recently failed in his campaign for a constitutional amendment enabling him to run yet again. See Clifford Krauss, *Argentine Chief Drops Bid for Third Term*, N.Y. TIMES, July 22, 1998, at A10. President Fernando Henrique Cardoso of Brazil spent a great deal of political capital during his first term trying to obtain a constitutional amendment authorizing his reelection. See Diana Jean Schemo, *Brazil's Chief Wins Vote Despite Scandal*, N.Y. TIMES, May 22, 1997, at A3. There are many other recent examples, including President Alberto Fujimori of Peru, who won decisions from courts and Congress allowing him to run for a third term in 2000. See *Two Terms and You're Out*, ECONOMIST, Aug. 22, 1998, at 16. President Ion Iliescu of Romania sought a third term, see *Undermining New Democracies*, N.Y. TIMES, Sept. 7, 1996, at A20, but was defeated, see *Fingers Crossed*, ECONOMIST, Nov. 23, 1996, at 57. Panamanian President Ernesto Perez Balladares sought a second term, see *Latin America's Immovable Rulers*, N.Y. TIMES, Aug. 29, 1998, at A12, but the Panamanians rejected his effort to win a constitutional amendment authorizing reelection, see *No Second Term*, ECONOMIST, Sept. 5, 1998, at 32.

For a recent discussion of the pros and cons of presidential term limits, see Lawrence L. Schack, Note, *A Reconsideration of the Single, Six-Year Presidential Term In Light of Contemporary Electoral Trends*, 12 J.L. & POL. 749, 754–67 (1996).

<sup>63</sup> Thatcher was elected Prime Minister in May 1979 and served for more than eleven years through November 1990. See Dennis Kavanagh, in *THE OXFORD COMPANION TO POLITICS OF THE WORLD* 905 (Joel Krieger ed., 1993). Chancellor Kohl was in power for sixteen years, from October 1982 through September 1998. See *Biographies: Helmut Kohl*, ABC-CLIO, available in LEXIS, Kaleidoscope: Current World Data — Germany Stories; Serge Schmemmann, *Kohl, The Man For The German Movement*, N.Y. TIMES, July 1, 1990, at A1.

presidents in whom they have lost confidence; on the other hand, they are barred from repeatedly choosing the rare leader who manages to sustain popularity over a decade or more. How is that for cutting off your nose to spite your face?

But I myself am more concerned about the way a personalistic presidency undermines bedrock democratic ideals. Whether it takes the form of obsessive fixation on the peccadillos of Warren Harding or Bill Clinton, or the adulatory worship of heroes like Franklin Roosevelt or Ronald Reagan, the cult of presidential personality goes against the grain of republican self-government. It is downright embarrassing for a constitution to ask free and equal citizens to place so much trust in the personal integrity and ideals of a single human being. Far better for the constitution to encourage citizens to engage in a politics of principle — debating which of the existing political parties best expresses their collective ideals, working to revise these ideals to change with the times, and forming sensible coalitions when no single party gains the support of the majority.

To be sure, the result may be disheartening. Cabinet government can degenerate into the politics of a narrow clique interested only in the partition of ministries and the servicing of partisan supporters. Endless arguments over party platforms may be a cynical cover for the pursuit of factional interest and personal advantage. This grim prospect might lead some to view an independent presidency as an acceptable price to pay for bringing energy and vision into the iron cage of modern politics.<sup>64</sup>

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<sup>64</sup> This concern may be at the root of Professor Roberto Unger's attraction to an independently elected presidency, see ROBERTO UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 122, 215–16, 264–65 (1998), though he is more cautious in his earlier, more theoretical writings: "The decisional center of government includes the executive and the legislature foreseen by received constitutional doctrine. It hardly matters whether these are conceived as two distinct branches of government, in the context of a presidential regime, or as something close to a single power, under a parliamentary system." UNGER, *supra* note 12, at 318. Although Professor Unger's open-mindedness is refreshing, I must confess to a certain dogmatic fervor: the decision for or against presidentialism matters a great deal, and it will not do to be wishy-washy on the issue.

But perhaps Professor Giovanni Sartori has found a way to transcend this stark either/or choice. His proposed hybrid regime begins each electoral period as a parliamentary-style democracy, in which a prime minister and her cabinet rule with the support of a majority of MPs. If, however, the prime minister fails to maintain parliamentary support, power shifts to an independently elected president, who can rule by decree during the remainder of the electoral period. With the next election, however, Sartori's system shifts back to a parliamentary model — in which the president is on the sidelines as long as the prime minister can sustain majority support. Sartori calls his proposal "alternating presidentialism." SARTORI, *supra* note 62, at 153; see *id.* at 153–60, 165–69. "So long as the parliamentary system works, it is allowed to remain. But if it fails to meet given standards, then the parliamentary engine is switched off and a presidential engine supplants it." *Id.* at 153.

While "alternating presidentialism" gets high marks for ingenuity, it strikes me as a bad idea. Quite simply, the independently elected president has overwhelming incentives to undermine parliamentary support for the cabinet so that she can gain power. Sartori seeks to eliminate this possibility by barring the president from rewarding MPs by putting them in her cabinet after they have voted to unseat the prime minister. *Id.* at 157. But there are many other indirect ways to reward MPs for abandoning the initial parliamentary government.

But for me, this dark possibility carries a different message. No form of government can obviate the need for public spirit — which, alas, has its downs as well as its ups. The question is how much popular efforts at renewal, when they come, should focus on the putative charisma of a presidential candidate, and how much on the task of building a party of principle capable of setting government on a better course. The great virtue of parliamentary government is that it creates an incentive for the leadership, as well as the followership, to push in the latter direction.

This point seems even more important in a public world dominated by media predisposed to the cult of personality. Dramatic pictures of political leaders make for better television than boring discussions of party principles. As a consequence, even electoral battles in parliamentary systems increasingly emphasize the leader's personality at the expense of the party's principles.<sup>65</sup> Nonetheless, the incentive structure of parliamentary systems cuts against this tendency, while American-style systems exacerbate it.

### B. *Constrained Parliamentarianism*

To put it mildly, the government emerging from the separation of powers doesn't look very attractive. Not only is it marred by (unnecessary) crises of governability, but the exercise of full authority is also full of peril: symbol preferred to substance, long-run legalism to mid-range efficacy. Worse yet, separationism blocks serious consideration of proportional representation, a reform that has many otherwise attractive features. Instead, separationism invites citizens to invest their passions in the personality of a single leader, rather than in the principles that should govern us all.

This conclusion puts me in a bind because I am not inclined to surrender the large political idea that motivates a rejection of pure parliamentary government. As I have explained at length elsewhere, the Westminster model presupposes a false understanding of the relationship between mod-

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Worse yet, once Sartori's president gets into power, she knows that she will lose control to a prime minister after the next election. The prospect of a return to parliamentarianism gives the president an incentive to launch an assault on the constitutional system in an effort to cling to office. Moreover, Sartori's grant to his president of broad powers to issue decree-laws provides the potential usurper with the means to engage in demagogic gestures in an effort to win popularity for her effort to change the system to a purely presidential one.

Sartori is right to suggest that cabinet instability is a problem under parliamentarianism. But there are many more constructive ways of dealing with such instability — among them the “constructive vote of no confidence” and the requirement of a substantial threshold of popular support before a party can enter parliament. *See supra* pp. 654–55.

<sup>65</sup> *See, e.g.*, FREEDMAN, *supra* note 54, at 99 (“The personalization of the campaigns has proceeded apace: the cover of the 1987 [Labour] manifesto was given over to a photo of [Neil] Kinnock, and the Conservatives followed suit in their 1992 manifesto, with a photo of John Major on the cover.”).

ern citizens and their government. Whatever may have been true in Athens, modern citizens generally have better things to do with their time than to debate public issues in the forum (even when the forum is the Internet).<sup>66</sup>

I do not mean to endorse an economistic conception of human nature that grants a reality only to the pursuit of narrow self-interest. All of us remain capable of seriously asking what is good for our country and not only ourselves — and we sometimes devote a great deal of energy to this civic side of our complex identities. But only sometimes. More frequently, we are content with a far more remote relationship to the *res publica*, looking skeptically over our shoulders at the full-time politicians who so eagerly claim to rule in our name. It is wrong, then, to suppose that every electoral victory marks a broad and deep mandate from the People for the leading proposals set out by the victorious party or coalition. The Westminster system cements this mistake into constitutional law by awarding plenary lawmaking authority to the victors regardless of the quality of their electoral majority.

To avoid this mistake, modern constitutions ought to have a dualistic structure that delineates two distinct lawmaking tracks for use in a democracy. The higher law track should be specially designed to identify those rare occasions when a political movement has earned the right to speak for a mobilized and decisive majority on a matter of central political importance. The normal track should instead be designed for use in the more typical case in which such a deep popular mandate does not exist.

There is a question, however, whether an American-style separation of powers provides a good system for distinguishing between the two tracks. To be sure, the system does operate — in a rough and ready way — to separate periods of impasse from periods of full authority. But isn't there a better way to identify those moments of genuine popular engagement when a mobilized majority of the People has seriously sought to hammer out basic principles of political legitimacy?

Consider how a model of constrained parliamentarianism might serve as an alternative. Under this system, normal lawmaking authority is focused in a Westminster-style assembly. But legislative output is constrained by substantive political principles that are legitimated by a higher lawmaking process, which is constructed out of different constitutional materials.

*1. Bringing the People Back In.* — My crucial building block is the popular referendum. I hope to use this device in a relatively novel way, which seeks to learn from our often unhappy experience with the technique. All too frequently, the referendum has been discredited by two very

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<sup>66</sup> See BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 5–24 (1992); ACKERMAN, FOUNDATIONS, *supra* note 15, at 236–40, 308–14.

different abuses. On the one hand, demagogues have used a plebiscite to legitimize their authority at a moment of crisis, giving their opponents a very brief time to organize against their “appeal to the People.”<sup>67</sup> On the other hand, the device has been discredited by over-use and routinization — for example, in California, where voters are overwhelmed by a host of complex ballot initiatives every election day. Since citizens hardly have the time or energy to sort out the implications of these proposals, the outcome has often been determined by misleading advertising campaigns and the capacity of special interests to mobilize their small armies of true believers.<sup>68</sup>

There is a mean between these two extremes.<sup>69</sup> Placing a proposition before the People should not be easy — perhaps the constitution should bar any parliament from proposing more than one such initiative during its tenure, or perhaps it should require a special supermajority.<sup>70</sup> No less important, a carefully spaced series of electoral tests should determine the fate of any popular initiative.

This requirement of multiple balloting is crucial.<sup>71</sup> Most obviously, it will mightily constrain the temptation of the governing coalition to use the

<sup>67</sup> Napoleon initiated the technique, which has been used by countless dictators since. See Vernon Bogdanor, *Western Europe*, in REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY 24, 36, 48 (David Butler & Austin Ranney eds., 1994); David Butler & Austin Ranney, *Practice*, in REFERENDUMS AROUND THE WORLD, *supra*, at 1, 6.

<sup>68</sup> On voter confusion, see THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 70–74 (1989), Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1517–18 (1990), and David B. Magleby, *Let the Voters Decide?: An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 38–39 (1995).

On the role of special interests’ influence, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 676 (1998), and Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 21–23 (1997). *But see* DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 37 (1989).

On the California experience, see *California Constitutional Symposium*, 17 HASTINGS CONST. L.Q. 1 (1989), and *Symposium on the California Initiative Process*, 31 LOY. L.A. L. REV. 1161 (1998).

<sup>69</sup> For an exceptionally thoughtful defense of direct democracy under modern conditions, see IAN BUDGE, THE NEW CHALLENGE OF DIRECT DEMOCRACY 84–132 (1996).

<sup>70</sup> Several states limit the number of amendments that may be submitted to the electorate at a single election, and most require that either a supermajority of the legislature or successive legislative sessions propose an amendment before it may be submitted to the voters. For a summary of provisions governing the amendment of state constitutions, see COUNCIL OF STATE GOVERNMENTS, 32 THE BOOK OF THE STATES 5–6 tbl.1.2 (1998–1999).

<sup>71</sup> Scholars of the referendum process often list multiple balloting as one of several proposed reforms, but they have not explored this idea in great detail. See, e.g., CRONIN, *supra* note 68, at 193; David Kehler & Robert M. Stern, *Initiatives in the 1980s and 1990s*, in COUNCIL OF STATE GOVERNMENTS, 30 THE BOOK OF THE STATES 279, 287–88 (1994–1995); Arne R. Leonard, *In Search of the Deliberative Initiative: A Proposal for a New Method of Constitutional Change*, 69 TEMP. L. REV. 1203, 1223 (1996). During the Progressive Era, reformers often proposed that successive Congresses approve an amendment before submission to the voters. See JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 137–56 (1992). The

referendum for short-run gain. An issue that exploits the opposition's short-run weakness can prove to be a political disaster when it returns to the ballot two or four or six years hence.

Multiple referenda will also deter the drafters from exploiting popular ignorance by framing complex provisions that covertly entrench the position of special interests. Although loopholes may go unnoticed in a single brief campaign, they are more likely to be uncovered and publicized by opponents over the course of long years — leading to the ultimate defeat of the initiative, and hence the failure of a given parliament to place its mark on the nation's evolving higher law. In short, the multiplicity requirement will have an effect on draftsmanship analogous to that induced by John Rawls's famous veil of ignorance in *A Theory of Justice*, encouraging politicians to put short-term self-interest aside and to propose enduring political principles that the community might plausibly adopt as a part of its on-going exercise in self-definition.

The constitution should take affirmative action to enhance the deliberative quality of popular consideration once a proposal goes to the voters. It should guarantee substantial funds for both sides to make their case, enabling a broad-based discussion.<sup>72</sup> If a proposition runs this gamut and gains approval time and time again, its success is the best possible evidence that its enactment is no fluke of political strategy, but that it has *earned* the mobilized support of a deliberative majority.<sup>73</sup>

However rigorous one makes the seriality requirement, it will always be possible for skeptics to point to inadequacies in the process — the unscrupulously demagogic appeals to the masses, the devious machinations

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roots of the idea go back at least as far as the late nineteenth century. See NATHAN CREE, *DIRECT LEGISLATION BY THE PEOPLE* 102 (1892).

Nevada has implemented serial amendment procedures. When an amendment is proposed by initiative, Nevada's constitution requires the electorate's approval in two successive general elections. See COUNCIL OF STATE GOVERNMENTS, 30 *THE BOOK OF THE STATES* 23 tbl.1.3 (1994–1995). Although no state currently requires successive ratification by the voters in order to approve a state constitutional amendment proposed by the legislature, as noted above, *see id.*, several have provisions requiring that more than one session of the legislature approve an amendment before it may be submitted to the voters, *see id.* at 21 tbl.1.2; Bogdanor, *supra* note 67, at 24, 28; *id.* at 29 (discussing the procedures for amending the Swedish Constitution).

<sup>72</sup> James Fishkin has proposed the innovative use of “deliberative polling,” under which a random sample of citizens expresses a considered judgment on a matter of public controversy after gathering together for an extended period of organized debate. JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* 81–104 (1991); JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* 161–76 (1995). Fishkin's proposal has promise in the present context. Proponents and opponents of the proposed referendum should be given the opportunity to debate its merits before randomly selected groups of Americans — whose questions and final judgments would be broadly reported in the mass media. If structured thoughtfully, an ongoing series of such polls might greatly enhance the deliberative quality and overall legitimacy of the final outcome of the referendum process.

<sup>73</sup> I discuss the idea of serial referenda further, comparing it to existing American practices of constitutional revision, in ACKERMAN, *TRANSFORMATIONS*, *supra* note 15, at 403–14.

of the rich behind the scenes. But we are dealing with the real world, not a philosophy seminar. Requiring an overly idealized dialogue as a predicate for higher lawmaking will simply defeat a crucial constitutional objective: to find the best practical means of distinguishing the few basic principles that *are* the product of genuinely broad and mobilized popular support from the countless other decisions made by modern legislators in the normal course of government.

This essay is not the place to consider many of the crucial design questions raised in the construction of a credible referendum system.<sup>74</sup> For the present, it is more important to illuminate the path forward. Rather than dividing lawmaking authority among house, senate, and president, we should seek to divide it between parliament and the people — the former managing routine governmental decisions and the latter expressing its will through a carefully constructed process of serial referenda.

2. *The Court as a Constraint.* — This initial separation of power engenders another. We will require a constitutional court to make the principles enacted by the people into operational realities.<sup>75</sup> Without the institution of judicial review, the reigning parliamentary majority will have overwhelming incentives to ignore prior acts of popular sovereignty whenever it is convenient. This result will only generate cynicism about the very possibility that the people can give marching orders to their governmental representatives and expect these representatives to obey them. Only a strong constitutional court can serve this function.

Creating such a tribunal is a tricky matter. Part of the problem is cultural: Do lawyers and judges take the process of legal interpretation seriously? Have they been utterly demoralized by decades of subordination to the secret police and authoritarian political elites? What role does the rule of law play in the culture as a whole?

Another part of the problem involves constitutional engineering. A court's strength is intimately tied to the manner in which judges are appointed and the terms for which they serve. A comparison of Germany with Japan is suggestive. The German Basic Law requires all nominations to the Constitutional Court to obtain a two-thirds vote from the legislature, and thereby gives veto power to important minority parties.<sup>76</sup> This means

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<sup>74</sup> The larger course of this discussion will, however, lead us to consider how we may adapt the referendum system to the distinctive needs of a federal republic. See *infra* pp. 672–77.

<sup>75</sup> There are two ways of incorporating judicial review into governing arrangements. The Americans grant this function to all courts, with the Supreme Court at the top of the pyramid. In contrast, countries such as France and Germany give a single tribunal, the Conseil Constitutionnel or the Verfassungsgerichtshof, a monopoly over the power to invalidate legislation. This essay does not try to assess the relative merits of these two approaches.

<sup>76</sup> Half of the justices are appointed by the Bundestag and half by the Bundesrat, but in both cases two-thirds support is required. See David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1797, 1827–28 (1988). For an intelli-

that the ruling coalition cannot fill the court with party loyalists who will predictably uphold all the Chancellor's initiatives. Armed with their veto, minority parties have the de facto power to name a substantial number of judges. The German voting rule also affects the character of the judges. If either the majority or minority proposes the nomination of a notorious party hack, the other side can be expected to veto the appointment. There is an institutional incentive to converge on the selection of judges with a reputation for impartiality and relative moderation. Robust judicial independence is encouraged further by a lengthy, but fixed, tenure of twelve years with no possibility of reappointment.<sup>77</sup> Within this setting, it should not be surprising that the Constitutional Court has made a profound contribution to the evolution of German democracy over the past half-century.<sup>78</sup>

In Japan, by contrast, there is no supermajority rule limiting the power of the governing party to make Supreme Court appointments. In addition, all justices are required to retire at the age of seventy regardless when they are appointed. The juxtaposition of these rules has provided the governing Liberal Democratic Party with a simple formula for selecting justices who will not rock the boat: choose men and women at a late stage in their careers, generally in their early sixties. This allows the party to identify potential boat-rockers with great certainty and to refuse them appointment. Once a justice reaches the Court, the compulsory retirement age cuts off his service before he can gain full self-confidence in his new role. Considering this structure of appointment and tenure, the relative passivity of the Japanese Supreme Court is no surprise.<sup>79</sup>

These crucial matters deserve much more attention.<sup>80</sup> But for present purposes, it is more important to emphasize the larger separationist picture that is emerging from these reflections. If one defines a lawmaking institution as a distinct power when its members are selected by a distinct principle, then we have come to a new trinitarian formulation: parliament plus the people plus the court.

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gent discussion of the politics involved in allocating seats on Germany's constitutional court among the various political parties, see BRUN-OTTO BRYDE, *VERFASSUNGS-ENTWICKLUNG* 148–52 (1982).

<sup>77</sup> See Clark, *supra* note 76, at 1827.

<sup>78</sup> For a discussion of some of the cultural factors that also supported the German success, see Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 779–80 (1997).

<sup>79</sup> See J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?* 3 (June 30, 1999) (unpublished manuscript, on file with the author).

<sup>80</sup> Political scientists have shown increasing interest in the effort to locate constitutional courts within a more general framework of comparative politics. See John R. Schmidhauser, *Alternative Conceptual Framework in Comparative Cross-National Legal and Judicial Research*, in *COMPARATIVE JUDICIAL SYSTEMS* 34 (John R. Schmidhauser ed., 1987); Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, 26 COMP. POL. STUD. 397, 404–14 (1994). A sophisticated treatment of this subject would attempt to integrate a conceptual analysis of the meanings of judicial independence, a normative assessment of its desirability, and an empirically informed assessment of the variety of structural mechanisms that have been used to achieve one or another kind of independence. I am not aware of any work that has seriously undertaken this multi-faceted task.

3. *From Theory to Practice.* — To what extent is this schema expressed in contemporary practice?

Looking to the most influential constitutional models, the first building block — parliament — is better represented in Great Britain and Germany than in the United States and France. Germany, however, goes further to embrace a version of constrained parliamentarianism. To simplify somewhat,<sup>81</sup> the modern German system grants broad lawmaking powers to a strong Chancellor who has won the support of a majority of the Bundestag, but the decisions of a powerful constitutional court constrain this power.

The design element missing from this picture is the referendum — which, since the Nazi disaster, the Germans have avoided like the plague. Other countries following the German model have been less fearful of the People. The modern Spanish Constitution provides a notable example. Constructed broadly along German lines, it incorporates a discriminating use of the referendum into the overall system.<sup>82</sup>

The Swiss also have a lot to teach about referenda practice. Of particular interest is their adoption of the principle of serial referenda. The Swiss Constitution requires two separate votes from the People on fundamental, or especially contested, matters.<sup>83</sup> Switzerland is a very special place, with a unique democratic culture and tradition. Just as this essay argues against hasty generalization from the American model, I suggest a similar caution in dealing with the Swiss experience. Nonetheless, their acceptance of serial referenda commends the idea for more general consideration.

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<sup>81</sup> I discuss the operation of the German Bundesrat at a later point in this essay. See *infra* p. 682.

<sup>82</sup> The Spanish are close to seriality as well: a bill proposing a total revision of the Constitution or a partial revision affecting certain basic matters “must be approved by a two-thirds majority of each chamber of the Cortes twice, with a general election intervening.” SPAIN CONST. art. 168 [3]. “The amendment is then put to a referendum, after having been approved for a second time.” Bogdanor, *supra* note 67, at 28 (explaining Article 168 [3]). Thus, the electorate is asked to approve an amendment twice: first via general elections, and later via referendum. Though the series is too condensed in time for my taste, the basic principle is clear enough.

There is a bit of seriality in Swedish amendment procedures as well:

A constitutional amendment of 1988 — chapter 8, Article 15 of the Instrument of Government — provides that any alteration to the Constitution requires approval by two separate Riksdags, separated by a general election. The general election must be called at least nine months after the amendment has been approved for the first time by the single-chamber Riksdag.

*Id.* at 29.

<sup>83</sup> An initiative for a total constitutional revision first requires approval by a majority of the nation; a constituent assembly is then elected; its proposals must then be approved by a “double majority” — both a majority of the voters and a majority of the cantons. This obstacle course proved too onerous on the two occasions it was used: in 1885 and 1935.

A serial referendum also is involved when the legislature rejects a proposal for partial constitutional revision that is framed in general language. In such a case, the initiative must be approved first by a simple majority of all voters in the first referendum and then by a “double majority” in a second round. See Kris W. Kobach, *Switzerland*, in REFERENDUMS AROUND THE WORLD, *supra* note 67, at 98, 103–04.

*C. The One-and-a-Half House Solution*

To introduce the problem of political legitimacy in a simple form, I have eliminated a complicating factor from the equation: federalism. Historically speaking, my omission looks like a serious mistake. Time and again, federalism has proved to be a potent force for separationism throughout the world. The dynamic seems to recur whenever a group of smallish governments join together to form a federal union — as in the case of the American union of 1787, the German Federal Republic of 1949, and the European Union of today. As far as the leaders of these states are concerned, *they* are the very creators of the new union. As a consequence, they have found it “only natural” to cement their view into the structure of the emerging constitution, separating lawmaking power into at least two parts — with a senate, representing the constituent states of the union, sharing this basic function with a popularly elected house.

The regular recurrence of this founding scenario may lead one to suspect that there really is a deep connection between the separation of powers on the level of the union and the vitality of the states on the periphery. But is there?

Maybe not. For one thing, it is easy to find examples of perfectly healthy federalisms operating without a powerful federalist chamber at the center. Canada and India come to mind.<sup>84</sup> These constitutional structures arose through a distinctive founding scenario. They were not generated “from below” by preexisting states moving in the direction of federal union. They evolved out of structures imposed “from above” by constitutional designers convinced of the rational superiority of the Westminster model. On this view, the key to effective federalism in Quebec, say, was to assure Québécois their own House of Commons distinct from the federal parliament sitting in Ottawa. As far as the politics of the Federation was concerned, Québécois were best advised to pursue their interests by the wise selection of their fair share of members to the federal House of Commons; although Canada does possess a Senate, its powers are feeble. All that a robust form of bicameralism would accomplish is a dilution of the virtues of parliamentary government.<sup>85</sup>

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<sup>84</sup> See SARTORI, *supra* note 39, at 183–88. Canada’s second chamber is appointed by the governor-general (with a requirement of balance among provinces) and has only advisory powers. See CONSTITUTIONS OF THE WORLD 37, 40 (Robert L. Maddex ed., 1995). India’s second chamber, the Council of States, cannot effectively stop money bills. See INDIA CONST. art. 109, *in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 53–54 (Gisbert Flanz ed., 1997). Although the Council of States can delay the passage of other bills for six months, continued opposition may lead the President to convene a joint session of both houses to consider the measure, at which the 550 voting members of the House of Peoples naturally play a larger role than the 250 voting members of the Council of States. See *id.* art. 108, at 53–54.

<sup>85</sup> For a useful introduction, see Douglas V. Verney, *Federalism, Federative Systems, and Federations: The United States, Canada, and India*, 25 PUBLIUS 81, 81–95 (1995) — though I reject Professor Verney’s stipulative definition of the American case as paradigmatic of “true federalism.”

The coexistence of two distinct founding scenarios carries with it a larger cautionary tale. Although worship of the American Founders is the rage right now (at least among Americans), we should remember that however wise and publicly spirited founders may (or may not) be, they confront a systematic problem that invariably distorts their vision. As far as any hard-headed founder is concerned, it is most definitely not enough to come up with a constitution that works effectively to fulfill his basic values. A workable constitution is worthless unless he can get it accepted by whoever-is-important-within-the-founding-environment. To put the point aphoristically: acceptability trumps workability. And a good thing too — at least within broad limits, it is more important for a constitution to seem sensible to broad elements in the population than to be so.

Nevertheless, there is also such a thing as scholarship. From this perspective, it is awfully important to discriminate between constitutional solutions that merely fulfill the passing political needs of the founders and those that have enduring value. My musings are organized around two central distinctions. First, is the federalist impulse accommodated by a separation of powers that yields two or three lawmaking institutions? For example, modern Germany contains a federalist Bundesrat along with a nationally elected Bundestag, and the United States situates a federalist Senate within a structure that contains both a House *and* a Presidency. Second, are the members of the federalist institution directly appointed by lower-level governments, as in the case of the German Bundesrat today or the American Senate before 1913, or are they directly elected, as in Japan today or the United States since 1913?

I conclude with the role of bicameralism in non-federal states — arguing, against the conventional wisdom, that it is easier to construct a robust second chamber in this setting than in a federalist setup.

*1. Elected Federalist Chambers.* — I suggest that the price of a truly powerful federal senate is the creation of a truly powerful and independent presidency. Yet the existence of such a presidency endangers the very federalist values motivating the creation of the senate in the first place. As a consequence, it is generally wiser for committed federalists to opt for a modified version of constrained parliamentarianism, under which a dominant house of commons is supplemented by a weak federalist senate, and

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The “top-down” aspect of the Indian and Canadian Foundings is described by a leading Indian text:

[T]he federal union in Canada was not brought about by independent States, having constitutions of their own, coming together to form a Union, because, as pointed out by Dr. Wynes, “. . . the old provinces of Canada, Nova Scotia, and New Brunswick were formed into one Dominion under the name of Canada which was re-divided into new Provinces.” Our constitution also constituted new States which had arisen from the merger of former Native States into the Provinces of India and there were no pre-existing States with constitutions of their own.

H. M. SEERVAI, 1 CONSTITUTIONAL LAW OF INDIA 288 (4th ed. 1991) (citations omitted).

federalist values are incorporated into the higher lawmaking system by requiring referenda to gain the approval of a specified supermajority of the federation's constituent states as well as the federation as a whole.

Let's take this argument one step at a time: Why is it plausible to suppose that an independent presidency is the price of a powerful federalist senate? Consider the alternative. Imagine a *perfectly symmetrical* system that dispensed with a powerful presidency and gave identical powers to two elected chambers that differed only in that senators were elected from state-defined constituencies while representatives were selected from the federation as a whole without respect to state lines. By hypothesis, there is no independent president in the system to serve as the head of the executive branch. Because each house would have an equal claim to form a cabinet worthy of democratic support, what happens if they are dominated by different parties?

Two cabinets are not twice as good as one. A perfectly symmetrical structure threatens the parliamentary system with a distinctive kind of legitimacy crisis. As we have seen, this system aims to select a coherent government based on the support of a majority of popularly elected members of parliament. But if there were two houses with equal powers, the symmetric constitution could readily generate a *legitimacy tie*, with rival parties in competing houses claiming an equal right to form a government in the people's name.

A case study from Australia provides a cautionary tale. The country's constitution is a fascinating hybrid of British and American elements.<sup>86</sup> Australia has no independently elected president, but there are two strong houses of parliament — a House of Representatives and a federal Senate that is generally a full partner in the legislative process. Technically, the Constitution falls short of perfect symmetry because it provides the Prime Minister with cumbersome tools that enable him ultimately to override the opposition of the Senate.<sup>87</sup> But these tools were insufficient to allow Prime Minister Gough Whitlam to avoid a very instructive constitutional crisis in 1975.<sup>88</sup>

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<sup>86</sup> For a useful survey of the relevant constitutional background, see Joan Rydon, *Some Problems of Combining the British and American Elements in the Australian Constitution*, 23 J. COMMONWEALTH & COMP. POL. 67 (1985).

<sup>87</sup> Under the Constitution, the Prime Minister can override the Senate by requiring a joint sitting of the two chambers. Because the Australian House of Representatives is about twice the size of the Senate, see AUSTL. CONST. ch. I, § 24, and each member of parliament casts a single vote, the Prime Minister's majority in the House can generally overwhelm the smaller Senate. Such an override, however, can occur only after the Governor-General dissolves both houses and calls for an election, as actually occurred in 1975. See *id.* art. 57 (providing details of this procedure).

<sup>88</sup> See LABOR AND THE CONSTITUTION: 1972–1975 (Gareth Evans ed., 1977) (providing a selection of essays on this multi-faceted constitutional crisis); GEOFFREY SAWER, FEDERATION UNDER STRAIN: AUSTRALIA 1972–1975, at 8–24 (1977).

Whitlam's initial victory in 1972 marked the return of the Labor Party to power after a quarter century in the wilderness. Within eighteen months, conservative resistance to his leftist legislative program led him to dissolve both houses and call new elections — which returned Labor to office in the lower House but resulted in a virtual tie in the federal Senate,<sup>89</sup> which gave disproportionate voting power to the smaller and more conservative provinces.<sup>90</sup> When one Labor senator died and another resigned, the opposition Liberal-Country coalition gained the upper hand in the upper house.<sup>91</sup> Despite its defeat by Whitlam in the popular elections to the House, the opposition would not give way in the Senate, where it refused to approve any appropriations bills unless Labor agreed to its demand for yet another election.

Whitlam refused to retreat, but the override provisions of the Australian Constitution were too cumbersome to allow him to finance governmental operations by ramming the necessary appropriations bills through the Senate. At this point, the symmetry problem became acute. The Australian Cabinet traditionally governs on the basis of a majority in the House of Representatives, and in demanding a new election, the Senate was seizing one of the Prime Minister's principal prerogatives. But this point had been left, in British style, to the unwritten constitution, and so was open to contest.<sup>92</sup> As a government shut-down loomed, the Senate remained recalcitrant: Didn't it too speak for the Australian electorate?

The crisis was resolved only through the intervention of Australia's stand-in for the Queen: Governor-General Sir John Kerr. Although his authority was constitutionally questionable and politically explosive,<sup>93</sup> Kerr

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<sup>89</sup> Both Labor and the opposing Liberal-Country coalition won 29 seats, with the other two seats held by independents. See Gareth Evans, *Chronology of Constitutionally Significant Events 1972–1975*, in LABOR AND THE CONSTITUTION, *supra* note 88, app. B at 350.

<sup>90</sup> See Gareth Evans, *The Senate's Rights Can Be Wrong*, reprinted in AUSTRALIAN POLITICS: A FOURTH READER 544, 544 (Henry Mayer & Helen Nelson eds., 1976) (“The State electorates vary wildly in size [in senatorial elections]. The vote of a Queenslander is worth twice as much as that of a Victorian or New South Welshman, that of a Western Australian nearly four times as much, and that of a Tasmanian nearly ten times as much.”).

<sup>91</sup> Under the Australian Constitution, the relevant state parliaments fill “casual vacancies” without calling a special election. See AUSTL. CONST. ch. I, § 15. The Liberal-Country opposition controlled the relevant state parliaments and appointed members of their own party, thus breaking a long-standing practice under which parliaments replaced departing senators with members from the same political party that previously controlled the seat. See P.J. Hanks, *Parliamentarians and the Electorate*, in LABOR AND THE CONSTITUTION, *supra* note 88, at 166, 183–90.

<sup>92</sup> For a fine presentation of the historical context generating the constitutional predicament, see Colin Howard & Cheryl Saunders, *The Blocking of the Budget and Dismissal of the Government*, in LABOR AND THE CONSTITUTION, *supra* note 88, at 251, 251–70. As Howard and Saunders explain, the Framers of the Australian Constitution were well aware of the problem of legitimacy ties, see *id.* at 256–61, but they chose to leave the problem “to chance and constitutional developments outside the written text,” *id.* at 259.

<sup>93</sup> See *id.* at 270–87. For a competing view of the events, see R.J. Ellicott, *Commentaries*, in LABOR AND THE CONSTITUTION, *supra* note 88, at 288, 288–96. For Ellicott's role in the constitu-

broke the stalemate by ousting Whitlam, dissolving both houses of Parliament, and calling a new election. The shock waves from Kerr's exercise of the royal prerogative helped to create the current groundswell in Australia for a final break with the Queen and the creation of an independent republic.<sup>94</sup> But for present purposes, the Australian case dramatizes the first point in my argument: A bicameral constitution, without an independent presidency, is simply incapable of resolving the predictable legitimacy ties generated in a federalist system.

Although the Australian case is instructive, constitutional designers generally have the foresight to anticipate and deal with the problem posed by legitimacy ties.<sup>95</sup> As long as the constitution is operating within a two-house structure, framers do not usually give anything like symmetric powers to both houses. The federalist senate is definitively subordinated to the unionist house, which selects the government. Members of the federalist chamber may delay or defeat some measures, but they do not have the power to unseat the prime minister or the cabinet or unduly sabotage the government's program.

If the federalist senators conduct their mission with tact and subtlety, the secondary chamber might well serve federalist values in an important and enduring way. Only let's not get too dewy-eyed about the possibilities. As long as this kind of two-house constitution is functioning well, leading politicians will not voluntarily run for the federalist senate because the focus of national attention will be on the unionist house. And an assembly of superannuated statesmen and assorted minor-leaguers will not typically have the popular legitimacy necessary to launch a sustained assault on important governmental initiatives, even if they threaten federalist prerogatives. I will call this the "one-and-a-half house solution."<sup>96</sup>

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tional crisis, see PAUL KELLY, NOVEMBER 1975: THE INSIDE STORY OF AUSTRALIA'S GREATEST POLITICAL CRISIS 145–51, 318–21 (1995).

<sup>94</sup> See JOHN HIRST, A REPUBLICAN MANIFESTO 64 (1994); KELLY, *supra* note 93, at 312–17.

<sup>95</sup> Professor Lijphart counts 36 countries that have sustained a continuous period of democracy for the 19-year period ending in 1996. See LIJPHART, *supra* note 37, at 49. Of these, four create a perfect symmetry between the two legislative branches. See *id.* at 205. Colombia and the United States are presidential systems. I discuss the other two — Italy and Switzerland — in the text.

<sup>96</sup> In a more elaborate analysis, it would be important to distinguish between a variety of powers that might be given to, or withheld from, the subordinate house. For example, the weaker house might be given the modest power to delay measures passed by the dominant house, or it may be vested with the greater power of suspensive veto — requiring a supermajority of the lower house to override its objections before its initiative may be enacted into law. Or, as in the case of Germany, see *infra* note 111, it may be given an absolute power to veto a restricted class of measures that particularly concern federal interests. See GEORGE TSEBELIS & JEANNETTE MONEY, BICAMERALISM 48–52 tbl.2.1 (1997) (describing how houses of various countries overcome disagreements on bills).

It is wrong to suppose that even a very weak house, which possesses merely the capacity to delay initiatives, is powerless. To the contrary, as Tsebelis and Money show, the power to delay can be consequential. See *id.* at 98–105, 127–44. Indeed, even seemingly minor issues, such as the structure of the process for settling disagreements between the chambers, should be treated as matters of great constitutional significance. See *id.* at 110–18, 176–208.

Which brings me to the second stage of my argument. If federalists want something more than one-and-a-half houses, and insist on a really powerful and independent senate, they must also be willing to accept something else: a really powerful and independent presidency. On a functional level, creating a third branch of government solves the problem of legitimacy ties in the formation of cabinets. A grant of equal power to each house is now tolerable because *neither* is involved in the selection of the executive. As a consequence, constitutional designers no longer need to worry about the prospect of an overly powerful senate's challenge to the authority of the house's choice of government.

The committed federalist thus faces a difficult value trade-off. Although he may like the strong senate made possible by an independent executive, he must pause long and think hard before endorsing an independent presidency. The problem with the presidency is simple enough. Generally speaking, only one person can become president at a time,<sup>97</sup> and this "winner-take-all" feature generates predictable embarrassments in a country with many regions. Most obviously, the winner will often emerge from the political life of only one region, and her administration will be dominated by associates who have earned her trust over a lifetime's political work together. Even if these people make a special effort to adopt a national perspective when they arrive in the nation's capitol, it will be tough to convince "outsiders" that they are taking others' interests into account. Moreover, they may not even try to be broad-minded, but may seek to use their few years of presidential power to enrich their home region at everybody else's expense. Even if victorious presidents emerge from different regions over time, serial depredation is not the best form of federalism.

Compared to this grim prospect, a second sort of presidentialism seems almost idyllic. Under this scenario, the presidency is regularly filled by members of a super-regional elite, whose perspective has been broadened by years of political, diplomatic, or military experience in the service of the federation.<sup>98</sup> Although a cosmopolitan presidency is vastly preferable to a series of regional rip-offs, it contains its own distinctive threat to fed-

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For purposes of the argument presented in the text, these important issues can be decently buried in a footnote.

<sup>97</sup> Switzerland is an exception to this rule. See *infra* pp. 678–80.

<sup>98</sup> The likelihood of this scenario is, of course, a function of the strength of national institutions — particularly, political parties — as well as the structure of voting rules. For some clever proposals, see Donald Horowitz's discussion of various combinations of federalism, party structure, and voting rules in DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA?: CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* 124–238 (1991), and DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 563–652 (1985). Horowitz considers only the use of federalism and electoral rules to control ethnic conflict, but most of his arguments are applicable to other types of conflict as well. For another useful discussion of electoral rules, see DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* 134–44 (1971).

eralist values. After serving the federation for decades at home and abroad, the president and her associates will naturally come to think of the federation as a distinct entity that they will call “the Nation,” with a capital N. By increasing the powers of the Nation, moreover, the president will be increasing her own power to shape the future. Because she is (by definition) relatively free from regional political entanglements, she will have little interest in constraining aggressive nationalism on behalf of localistic interests. Instead, she will regularly claim that her electoral mandate authorizes her to use presidential power to further the Nation’s interests against petty regional parochialisms.

For a convinced federalist, then, an independent presidency offers a choice between a rock and a hard place—one gets either a series of regional rip-offs or a series of pretentious lurches toward national grandeur that ignores regional distinctiveness. This may well be too high a price to pay for a robustly independent federalist senate—especially when the “federalism costs” of an independent presidency are added to all the others enumerated previously.

Perhaps this sharp trade-off might be ameliorated, if not eliminated, by a dose of institutional imagination? This is, at least, suggested by a unique Swiss solution. Rather than blundering into symmetry as in the Australian example, the Swiss make it a point of pride: “the ‘absolute equality’ of the federal senate (the Council of States) and the nationally elected house (the National Council) is nothing less than a ‘sacrosanct rule.’”<sup>99</sup> Instead of solving the problem of legitimacy ties through an independently elected presidency, the Swiss have taken a different route. First, they reject the idea of a single-person executive and make it a collective of seven members (the Federal Council); next, they reject the idea of direct popular election and require each member of the Council to gain the support of both houses for a fixed term of four years; and finally, they make it impossible for the two houses to stage a vote of no confidence during the four-year period: “If a government proposal is defeated by Parliament, it is not necessary for either the member sponsoring this proposal or the Federal Council as a body to resign.”<sup>100</sup>

The resulting structure never ceases to baffle political scientists of a typologizing persuasion. The Swiss system doesn’t seem “parliamentary” because the Council is not dependent on the continuing support of the legislature, but it doesn’t seem “presidential” because the Council is neither unitary nor directly elected.<sup>101</sup> If we move beyond typology, we see a

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<sup>99</sup> WOLF LINDER, *SWISS DEMOCRACY: POSSIBLE SOLUTIONS TO CONFLICT IN MULTICULTURAL SOCIETIES* 46–47 (1994).

<sup>100</sup> JÜRIG STEINER, *AMICABLE AGREEMENT VERSUS MAJORITY RULE: CONFLICT RESOLUTION IN SWITZERLAND* 43 (1974).

<sup>101</sup> See LIJPHART, *supra* note 37, at 119 (“This hybrid is parliamentary in two respects and presidential in one: the Swiss ‘cabinet,’ the collegial Federal Council, is elected by parliament, but the seven

creative effort by a federal system to solve the problem of the legitimacy tie: the Council's independence from parliament makes governmental stability possible even when the dominant parties in either house would be inclined to sack the government; at the same time, the Council's plurality allows for a variety of different regions and opinions to coexist; and above all, the equal status of the cantons and the nation is both preserved and expressed by the symmetric powers of the two houses.

To be sure, the Swiss solution to the symmetry problem comes at a heavy cost. The Council's fixed term liberates it from the day-to-day need to sustain majority support in parliament, and yet its members lack the visibility and authority of a popularly elected presidency. This would be especially serious if public opinion were volatile and the Council found itself out of step with dominant political tendencies.<sup>102</sup> Turning from legitimacy to efficiency, the plural character of the executive invariably raises questions for admirers of energetic government.<sup>103</sup>

Apparently, the Swiss have managed these difficulties well enough.<sup>104</sup> But for most countries, the prospect of an endless series of lackluster cabinets, diddling interminably over legislative and bureaucratic initiatives, is too high a price to pay for the Swiss-style solution to the problem of legitimacy ties generated by a federal system.<sup>105</sup>

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councillors stay in office for a fixed four-year term and cannot be dismissed by a legislative vote of no confidence.”).

<sup>102</sup> The remarkable degree of stability in Switzerland's party system is gradually eroding. In 1959, the four leading parties agreed on a “magic formula” for distributing the seven seats on the Council, under which three parties each received two seats and the fourth party received one seat. *See* STEINER, *supra* note 100, at 17. Although this formula remains intact, the four major parties no longer play such a dominant role. Their share of the vote has declined from 85% in 1959 to 70% in 1991. As a consequence, recent commentators have begun to suggest: “[The] seemingly permanent seat distribution on the Federal Council may not represent the final stage of Swiss political development. . . . In fact, the seeds of transformation may already be taking root.” Kris W. Kobach, *Switzerland*, in REFERENDUMS AROUND THE WORLD, *supra* note 67, at 98, 150.

<sup>103</sup> Here is Hamilton's classic statement:

Energy in the executive is a leading character in the definition of good government. . . . Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

The Federalist No. 70, at 471–72 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>104</sup> Switzerland's distinctive political culture is obviously important. The country's remarkably deep democratic traditions allow it to overcome many institutional difficulties. Similarly, its robust tradition of direct democracy — exemplified by its frequent use of referenda and voter initiatives — places the hesitations of its representative government in a different light. Rather than being a sign of weakness, these hesitations suggest an appropriate degree of deference by representative institutions to the Swiss practice of direct democracy. For a sensitive account of the tradition, see BENJAMIN R. BARBER, *THE DEATH OF COMMUNAL LIBERTY: A HISTORY OF FREEDOM IN A SWISS MOUNTAIN CANTON* 172–203 (1974). For a brief but perceptive discussion of the relationship between Swiss representative government and its practice of direct democracy, see NICHOLAS GILLETT, *THE SWISS CONSTITUTION: CAN IT BE EXPORTED?* 24–25 (1989).

<sup>105</sup> As Gillett writes: “Party politics are very obvious in some of the cantons but they are so subdued in the Cabinet and to some extent in Parliament that it is reasonable to pose the question whether Swit-

Subject to some future exercise in constitutional creativity, we are left with our hard choice: independently elected president or one-and-a-half houses. As should be obvious, I tend toward the latter: even a strong federalist would be well advised to accept some stringent limitations upon the powers of the federalist senate to avoid the perils of an independent presidency.

This compromise does not prevent the constitution from pursuing federalist values in other ways. For starters, it is quite possible to design electoral systems for the house of commons that give candidates and parties relatively strong incentives to represent localist interests. It also remains possible to protect federalist values by writing them into the constitutional text and authorizing their enforcement through judicial review.

Finally, a constitutional republic would be well advised to express its federalist commitments through an appropriate modification of its referendum system. The distribution of the popular vote among the states should count in determining the outcome of serial referenda required for constitutional amendment. It should not be possible for a national supermajority to pass a measure unless it has substantial support in most of the constituent states.<sup>106</sup>

I suspect that constrained parliamentarianism, with these modifications, should stack up rather well against American-style separationism in many concrete contexts.

2. *Ambassadorial Chambers.* — There is another way for states to insert themselves into central governing arrangements. Rather than leaving the choice of federal senators to the voters, the constitution may authorize state governments to appoint their representatives directly to seats in one or another federal institution. I call this the “ambassadorial option,” because senators will typically have overwhelming incentives to consult with government leaders back home and to follow their instructions on important issues. If this strategy is taken to its conceptual limit, the constitution may authorize key state officials to serve *ex officio* on federal bodies. Rather than voting through ambassadors, these officials can simply travel to the capitol of the federation from time to time, and cast votes themselves on behalf of their state governments. This is present practice, for

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zerland holds a position midway between a one-party state and a multi-party state.” GILLET, *supra* note 104, at 24.

<sup>106</sup> For example, the Swiss and Australian constitutions require double majorities on constitutional referenda — from a majority of states and from a majority of the nation as a whole. See AUSTL. CONST. ch. VIII, § 128; SWITZ. CONST. art. 121. Article 121 provides that a majority of voters may force the legislature to draft a constitutional revision along general lines. Once the specific wording of the amendment is proposed (by either voters, the legislature, or a legislative counterproposal), a majority of voters and cantons is required. See Alexander H. Trechsel & Hanspeter Kriesi, *Switzerland: The Referendum and Initiative as a Centerpiece of the Political System*, in THE REFERENDUM EXPERIENCE IN EUROPE 185, 187 tbl.12.1 (Michael Gallagher & Pier Uleri eds., 1996).

example, both in the German federal Senate and in the Council of the European Union.<sup>107</sup>

Given the central place of voting in the legitimation of democratic government, ambassadorial institutions are anomalies in modern life. Indeed, their very existence may suggest a deep uncertainty about the status of the federation itself. This is certainly true, for example, in the case of the European Union. Although the Union's directly elected parliament has accumulated a good deal of power over the years, it still plays second fiddle to the Council in the Union's overall governing arrangements.<sup>108</sup> The fact that cabinet ministers of the member states cast the decisive votes on the Council suggests that the Union's parliament is *less* legitimate than are the ministers who derive their authority from their respective national electorates.<sup>109</sup>

But when the central government is endowed with a robust sense of political identity, the existence of an ambassadorial chamber can readily generate paradoxical results. On the surface, such a senate seems to promote federal values to their maximum by allowing, say, the governor of an important state to take the floor of the federal senate and to voice his opinions on national legislation. But it may actually have the opposite consequence, undermining the autonomy of political life on the state level.

Germany provides an illuminating example. When the Germans wrote their Basic Law in the late 1940s, the future status of their central government was uncertain. Both at home and abroad, important voices were demanding an end to Nazi centralism and a return to the very loose federation that had prevailed during most of German history.<sup>110</sup> The Basic Law rejected these demands but sought to mollify critics by creating an elaborate federal structure, including an ambassadorial federal senate or Bundesrat. The voters do not independently elect members of the Bundesrat. Its members are representatives of each Land government and strictly follow its instructions. This means that voters in Land elections cannot concern themselves only with the competing parties' performance at the Land level. They must also bear in mind that their votes in Land elections can shift the balance of *national* power by changing the party balance in the Bundesrat.

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<sup>107</sup> See F.R.G. CONST. art. 51(1) (establishing the Bundesrat); Treaty of Amsterdam, Oct. 2, 1997, art. 214, 37 I.L.M. 56, 123 (1998) (establishing the process for appointment of members of the Council).

<sup>108</sup> The recent Treaty of Amsterdam has, if anything, heightened the centrality of the ambassadorial Council in EU arrangements. See CHRISTOPHE CROMBEZ, *THE TREATY OF AMSTERDAM AND THE CODECISION PROCEDURE* 19–21 (Catholic University of Leuven: Oederzoeksrapport Nr. 9827) (1998).

<sup>109</sup> For a sustained development of this claim, see Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628 (1999).

<sup>110</sup> See MERKL, *supra* note 2, at 20–24.

To be sure, the German Bundesrat is not the full constitutional equal of the popularly elected Bundestag. For example, the Bundesrat plays no role in the selection of the Chancellor and cannot veto the government's budget to precipitate an Australian-style legitimacy crisis. Nonetheless, it remains a formidable institution, with the power to block a broad range of measures emerging from the Bundestag. When the Chancellor's governing coalition loses control of the Bundesrat, it suffers a serious setback in its law-making capacities, as has occurred repeatedly in the history of the Federal Republic.<sup>111</sup>

The result has been the nationalization of state politics. National politicians and parties cannot look upon the fate of state elections with relative indifference. They make them part of the national political game, seeking to transform state elections into votes of confidence on the Chancellor and his initiatives. Voters in state elections do not focus only on the promises and performance of their state governments. They tend to use their votes to send a message to Berlin about their satisfaction with the ruling coalition on the national level.<sup>112</sup>

Genuine federalists cannot help but find this outcome disappointing. Their entire ambition is to decentralize the megastate into more manageable units of self-government. This aim is undermined when, thanks to inept constitutional design, voters refuse to use local elections to hold local governors accountable, but transform them into modes of national political expression.

Paradoxically, federalist values are better served by removing local officials from any direct role in central institutions. If there is to be a federal senate, it should consist of members elected *directly* by each state's voters. This allows the voters to hold members of their own state governments ac-

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<sup>111</sup> For a nice study detailing the capacity of the minority party in the Bundestag to use its Bundesrat majority to great effect, see Susanne Lohmann, *Federalism and Central Bank Independence: The Politics of German Monetary Policy, 1957–92*, 50 *WORLD POL.* 401, 416–41, 444 (1998). Lohmann finds that the Bundesrat's veto over monetary policy "varies over time as a function of divided versus unified party control [of the two chambers]." For a recent commentary about the scope of the Bundesrat's powers to block the Bundestag, see Dieter Grimm, *Blockade Kann Nötig Sein*, *DIE ZEIT*, Oct. 10, 1997, at 14.

<sup>112</sup> See Christopher J. Anderson, *Barometer Elections in Comparative Perspective*, 15 *ELECTORAL STUD.* 447, 448 (1996) (treating German Land elections as statistically comparable to English by-elections); Reiner Dinkel, *Der Zusammenhang Zwischen Bundes und Landtags-wahlergebnissen*, 18 *POLITISCHE VIERTELJAHRESSCHRIFT* 348, 348 (1977) (rejecting the hypothesis that Land elections are "ein Resultat rein landespolitisch motivierter Entscheidungen" — or, in my translation, "a result of decisions motivated by political factors arising purely on the Land level"); Susanne Lohmann, David W. Brady & Douglas Rivers, *Party Identification, Retrospective Voting, and Moderating Elections in a Federal System: West Germany, 1961–1989*, 30 *COMP. POL. STUD.* 420, 428 (1997) ("A steady theme runs through descriptions of Land election campaigns, holding that the opposition party at the national level may gain influence on national legislation if it wins a sufficiently large number of Land elections so as to gain control of the Bundesrat. This theme is of particular importance when the national opposition party is close to gaining the majority in the Bundesrat and an upcoming Land election is pivotal in determining majority control of the Bundesrat." (internal citation omitted)).

countable at the ballot box without unnecessary distraction by national political questions.

Rather than serving as a powerful counterexample to my thesis, the German Bundesrat resembles other misplaced federalist institutions such as the American Electoral College. The evolution of national politics has outstripped the formal power of both of these institutions.<sup>113</sup> Just as the most triumphalist American scholar would blanch at the thought of offering our Electoral College as a model to the world, so too German constitutionalists should hesitate before offering the Bundesrat up for emulation. I offer instead the more modest federalist variations on constrained parliamentarianism as a better basis for constitutional reflection.

3. *Bicameralism without Federalism.* — I have focused on federalism for a simple reason: it has in fact served as the most important political justification for bicameralism in the modern world. Unitary states have often managed quite nicely with unicameral assemblies.<sup>114</sup> If, by hypothesis, there is no need for a second chamber to represent the constituent members of the federation, why do nation-states need a senate at all?

The traditional answer was clear enough — to protect the upper classes.<sup>115</sup> But as the impending fate of the British House of Lords suggests, even vestigial forms of class veneration are no longer acceptable. Modern theoretical efforts to justify a second house suggest a certain amount of intellectual desperation — offering strained rationalizations for an institution that may have lost its *raison d'être*.<sup>116</sup> For example, some commentators defend bicameralism as a way of requiring supermajority support for legislative measures. But if supermajority rule is desirable, the construction of a second chamber seems a cumbersome instrument for its attainment. The same end can be achieved in a unicameral body by imposing a constitutional decision rule requiring supermajorities in appropri-

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<sup>113</sup> The analogy between the Electoral College and the Bundesrat is closer than it may first appear. Just as the American Framers failed to anticipate the impact of national political parties on the operation of the Electoral College, the German Framers thought the Bundesrat would somehow be insulated from national party politics. This view might have made more sense at the German founding because the Framers supposed that the Bundesrat would be a relatively unimportant body, concerned principally with matters of administrative efficiency. Subsequent decisions of the Constitutional Court, however, greatly expanded the Bundesrat's legislative powers, making it a significant prize in national politics. See GERHARD LEHMBRUCH, *PARTEIEN-WETTBEWERB IM BUNDESTAAT* 66–71 (1976).

<sup>114</sup> In Professor Lijphart's study of stable democracies, "the nine formally federal systems among the thirty-six democracies all have bicameral legislatures, whereas, as of 1996, the twenty-seven formally unitary systems . . . are evenly divided between unicameralism and bicameralism." LIJPHART, *supra* note 37, at 203; see *id.* at 213–15.

<sup>115</sup> See TSEBELIS & MONEY, *supra* note 96, at 15–43 (noting that, other than federalism, the traditional rationale for a second chamber is the representation of privileged classes).

<sup>116</sup> See *id.* at 214–16 (presenting a brisk refutation of a number of ingenious defenses of bicameralism offered by the past generation of social choice theorists). Because Tsebelis and Money are social choice theorists themselves, their discussion consists of rigorous demonstrations of the points at which prior writers either exaggerated or failed to think through their claims. See *id.*

ate cases.<sup>117</sup> Nonetheless, I am not willing to accept Jeremy Bentham's judgment that a second chamber is "needless, useless, worse than useless."<sup>118</sup> Although the constitutional engineering may be tricky, a second chamber may enhance the deliberative character of political life. Talking over a measure twice may well expose serious difficulties and generate useful reformulations of ill-considered initiatives. The two-step process provides a breathing space in which to reconsider the nature of our civic obligations to one another.

All of this may sound platitudinous, but it isn't. There will always be powerful schools of thought — yesterday's Marxism, today's rational choice — seeking to expose this rationalistic clap-trap to reveal the scheming self-interest that lies beneath. This is not the place, though, to take up such matters. This essay is about the structure of institutions, not ultimate ideals, and so a simple reference to other writings should attest my commitment to the principles of deliberative democracy.<sup>119</sup>

These principles have been in evidence already in the design of constrained parliamentarianism. One of the distinctive features of the model is its challenge to the practice of popular referenda as this practice has evolved over the past two centuries. It should not be enough to go to the people and gain their consent to a constitutional change in a one-shot plebiscite. Voters should be given the opportunity to talk over a fundamental proposal for a period of years before they make their final judgment. The serial referendum is, in short, an effort to apply the deliberative principle to the design of higher lawmaking institutions.

Nevertheless, there is an obvious problem involved in translating these same principles for day-to-day application in parliament. Quite simply, introducing a powerful senate into the model inevitably raises the prospect of a legitimacy tie. If we responded to this problem in the federalism case by

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<sup>117</sup> See DENNIS C. MUELLER, *CONSTITUTIONAL DEMOCRACY* 193–95 (1996). It is also theoretically possible for bicameralism to eliminate voting cycles in certain cases. See TSEBELIS & MONEY, *supra* note 96, at 39–40. But, as Mueller notes, it does not seem "in practice feasible to divide the electorate into disjoint preference groups" in the manner that would be required. MUELLER, *supra*, at 195; accord TSEBELIS & MONEY, *supra* note 96, at 211.

To be sure, bicameralism does, in general, make it harder to change the status quo, see TSEBELIS & MONEY, *supra* note 96, at 74–75, and this fact alone might commend it to laissez-faire liberals who place a high value on the protection of the status quo (as long as it reflects their underlying ideals). I will address their concerns more directly when I turn to the third rationale for the separation of powers: the protection of individual rights. See *infra* pp. 722–27.

<sup>118</sup> Jeremy Bentham to his Fellow-Citizens of France on Houses of Peers and Senates, in 4 *THE WORKS OF JEREMY BENTHAM* 420–21 (John Bowring ed., 1843). The wonderful dictum of Abbé Sièyes reflects this as well: "If the second chamber agrees with the first, it is useless, and if not, it is bad." TSEBELIS & MONEY, *supra* note 96, at 1 (quoting Sièyes).

<sup>119</sup> See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980) [hereinafter, ACKERMAN, *SOCIAL JUSTICE*; ACKERMAN, *FOUNDATIONS*, *supra* note 15, at 197–98, 272–74; Bruce Ackerman, *Why Dialogue?*, 86 *J. PHIL.* 5 (1989).

weakening the second chamber, shouldn't we do the same thing in the case of the unitary national state?

Surprisingly, the answer is no, as the example of the Italian Senate suggests. Not only is the Senate the perfect equal of the Chamber of Deputies in legislative powers, but the Cabinet must also obtain the support of majorities in *both* houses.<sup>120</sup> How, then, have the Italians escaped the danger of a legitimacy tie and the ensuing impasse?

They have squared the circle by creating a virtual symmetry in the system through which deputies and senators are elected. If Party A wins ten percent of the seats in the Italian Chamber of Deputies, then it will win about the same percentage of the Senate, and so forth.<sup>121</sup> This means that a Cabinet that gains majority support in the Chamber can normally gain a

<sup>120</sup> See COST. art. 94 (Italy); Claudio Lodici, *Parliamentary Autonomy: The Italian Senate*, in SENATES: BICAMERALISM IN THE CONTEMPORARY WORLD 225 (Samuel C. Patterson & Anthony Mughan eds., 1999) (“The two parliamentary chambers are coequal in legislative powers and in their role in approving the appointments of prime minister and cabinet ministers.”).

<sup>121</sup> Jean Grangé, *Italie: Le Sénat de la République*, in LES SECONDES CHAMBRES DU PARLEMENT EN EUROPE OCCIDENTALE 317, 332–33 tbl.1-2 (Jean Mastias & Jean Grangé eds., 1987) (comparing party strength in the two houses between 1948 and 1983). There are several differences in the electoral systems that prevent perfect symmetry. First, Italians can vote for deputy from the age of 18, see COST. art. 56 (Italy), but they must wait until 25 before voting for senator, see COST. art. 58 (Italy). Second, the Senate contains several (currently eleven) distinguished unelected senators-for-life, including all former Presidents of the Republic, but there are no analogues in the Chamber. See COST. art. 59 (Italy).

These differences can yield minor variations in party representation in the two chambers, especially under the voting system that came into force after the reform of 1993. Before that time, both chambers were elected entirely through a proportional representation system, even though senators were elected by name and deputies by rank within a party list. See Decree of the President of the Republic, March 30, 1957, at n.361, and subsequent modifications. Since 1993, three-quarters of the seats in both chambers are filled by a first-past-the-post system, with the remaining one-quarter filled through a proportional system. See Law of August 4, 1993, at n.277 (regulating the elections in the Deputies Chamber); *id.* at n.276 (regulating the process in the Senate). These laws have been codified and adopted by legislative decree. See Decree of December 20, 1993, at n.533. Details vary for the Senate and the Chamber in ways that could add extra variance to the result: electors select senators through a single ballot but give two votes for members of the Chamber of Deputies — one for individual deputies and one for their list. See Alessandro Pizzarusso, *I Nuovi Sistemi Elettorali per la Camera dei Deputati e per il Senato della Repubblica*, in RIFORME ELETTORALI 123, 131 (Massimo Luciani & Mauro Volpi eds., 1995). In the deputies' election, only parties that have received more than four percent of the votes at the national level are eligible for proportional seats. In the senatorial election, there is no specified cut-off point, and the distribution is done on a regional level. See *id.*

Before 1963, there was another potentially significant difference between the chambers: the Senate could endure for six years while the Chamber could endure only for five — unless there was a dissolution before the legal expiration date. See COST. art. 60 (Italy); Grangé, *supra*, at 335. As it turned out, elections for both Houses always took place simultaneously “to avoid all political discordance between the two assemblies.” *Id.* (translation by Bruce Ackerman).

Despite its formal powers, the Senate has not tried to unseat Italian governments, leaving this fundamental function to the Chamber. There has been only one exception, involving the Andreotti government in 1979, and this did not cause much of a stir, perhaps because of the rough political symmetry between the two chambers. See PAUL GINSBORG, *A HISTORY OF CONTEMPORARY ITALY: SOCIETY AND POLITICS, 1943–1988*, at 402 (1990).

majority in the Senate as well.<sup>122</sup> In short, the symmetry in the electoral system eliminates the legitimacy tie threatened by fully symmetrical bicamerality.

This “law of off-setting symmetries” explains our surprising conclusion. After all, the entire point of a *federal* senate is to allow the potentially distinctive political interests and parties of each of the constituent states to express themselves in national politics. It would defeat this point to create a system of electoral rules that makes it impossible for the party balance in the federalist senate to deviate from the balance in the chamber of deputies. Hence, the problem of legitimacy ties must be solved by other means — either by introducing an independent presidency or by weakening the second chamber, as contemplated by the one-and-a-half-house solution.

By contrast, the Italian solution in a unitary state does not seem at all odd. Because, by hypothesis, the only relevant unit is the nation, it is perfectly appropriate for both chambers to represent the distribution of national political forces. The only question is whether the added gain in deliberation is worth the added complexity of a second chamber. This is a matter open to good-faith disagreement — both in terms of its basic principle and the particularities of cultural context.

If the symmetric system operates as hoped, then the passage of a bill through one house might provoke a broader debate in society that would lead members of the second house to reject the bill, or to propose its modification, by the time it reaches the floor. Because the governing coalition is roughly equivalent in both houses, this rejection can happen without necessarily suggesting deep-seated political antagonism between the two branches. Instead, it would simply provide a face-saving mechanism through which the governing coalition itself could reconsider the policies behind its initiative. And what is wrong with that?

Nothing, but it is also possible for an Italian-style senate to degenerate into a pointless extra wheel — adding complexity and opacity without providing much in the way of extra deliberative engagement.<sup>123</sup> This

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<sup>122</sup> The 1996 elections gave the governing left-center coalition a stronger majority in the Senate than they had in the Chamber of Deputies — where they required the support of the Refounded Communists to maintain control. See Volcansek, *supra* note 41, at 95, 104.

<sup>123</sup> The Italian Senate has often played to critical reviews, but many of “the sternest criticisms of bicameralism have stemmed from its having come to be identified as one of the major causes of the malfunctioning of the whole institutional system, whereas the real roots of the institutional problem are in the country’s extreme multipartism.” Lodici, *supra* note 120, at 254. Nonetheless, as Tsebelis and Money note:

[S]ome disagreements between the two chambers have lasted for years. Allum describes a “kind of shuttle between the Houses [that] can continue for years and lead to a bill being ‘killed’ by a dissolution, which has the effect of annulling all uncompleted legislation. Thus, for example, the legislation setting up the Constitutional Court was shuttled between both Houses for eighteen months.” And Sassoon refers to a “communist political scientist, Giuseppe Cotturri, [who] has pointed out that there are other reasons for the abolition of one

seems to have been the judgment made in the 1950s by both Denmark and Sweden, which abolished politically symmetric second chambers in that decade.<sup>124</sup> Nevertheless, and in contrast to the federalist situation, one may at least entertain the idea that a fully symmetric bicameralism can function effectively without the intervention of a strong and independent presidency.

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We have thus far been considering the separation of powers as a doctrine of democratic legitimacy: How many elections must a movement win before gaining full lawmaking authority? In what ways should a federalist constitution organize the democratic institutions at the center to express the constituent interests of member states on the periphery?

Our answers have redeemed the basic separationist idea, but not in the familiar American way. Within the scheme of constrained parliamentarism, no single institution is granted a monopoly over lawmaking power. Rather than concentrating power in the Westminster style, my model constitution seeks to immunize a series of different institutional actors from direct parliamentary control. Our separate powers thus far include: the people acting through serial referenda, a constitutional court, and a weak federal, or more powerful national, senate.

This is not a closed list. Other candidates for separated power would doubtless emerge after a more extended exploration of democratic theory. There are many rival understandings of the nature of democratic self-rule, and each understanding may suggest distinctive forms of institutional separation. For now, it is enough to suggest the potential fruitfulness of such explorations and to move on to consider the separationist potential of other legitimating rationales of modern government.

## II. FUNCTIONAL SPECIALIZATION

The first great theme of modern constitutionalism is democracy; the second is its limitation. Two restrictionist rationales are relevant, and I shall take them up in turn. This Part considers the claims of professionalism: should we carve out a space, insulated from direct political intervention, in which judges and bureaucrats may deploy their professional judgment in the service of legislative objectives? The next Part considers separationism's promise as a safeguard for fundamental rights.

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of the two chambers: the incessant negotiations which occur between the Chamber and the Senate over every piece of legislation works to the advantage of the DC [Christian Democrats]. The time it takes for a bill to go from one chamber to the other enables the DC to make deals between its various factions and lobbies."

TSEBELIS & MONEY, *supra* note 96, at 53–54 (internal citations omitted).

<sup>124</sup> See TSEBELIS & MONEY, *supra* note 96, at 35.

Once again, there will be a positive and a negative side to my argument. This Part begins on a constructive note, proposing new forms of separation that may help to realize the promise of a professional judiciary and civil service to fair and effective government. I then place these proposals into the larger framework of the previous discussion: how does the professionalist rationale for separation fit into the broader debate between presidentialism and parliamentarianism that we have been rehearsing?

Enter my negative thesis: If an American-style presidency looks like a bad idea at this stage in the argument, then it will look even worse once its deleterious consequences on impartial and professional public administration are factored into the equation. I hope that, by the end of the Part, constrained parliamentarianism will seem an even stronger foundation for the new separation of powers.

But first things first. To assess my positive thesis, you do not have to accept my indictment of American-style presidentialism. Even if you reject constrained parliamentarianism for the Westminster or American approaches to legislation, you still must confront an obvious question: Supposing that democratic politicians have placed a new law on the books, what happens next?

Maybe nothing. Some laws are passed merely for symbolic gratification. But not many. And with the effort at implementation comes a host of new uses for the separation of powers.

The guiding theme is a realistic understanding of the strengths and weaknesses of democratic politicians. A good politician is skilled at expressing the basic normative orientations of large groups of voters, and this skill is a crucial resource in any functioning democracy. But with every human virtue comes associated human vices. Precisely because our hypothetical politician is a democrat, she is extremely interested in winning the next election — and consequently she will be tempted to bend the law in favor of her particular supporters, especially those with resources crucial for her reelection campaign. Apart from these predictable partisan motivations, politicians simply lack the time to sift the relevant facts; insofar as they are concerned with the merits of an issue, they are much more likely to consider how the facts appear to the general public than the way they look after disciplined and sustained investigation.

Unfettered political intervention will, then, have predictably toxic effects on the rule of law. However pretty the statute may look on the books, the reality will be awful. Victory in the real world will go to those interests that can enlist the most powerful politician with the best bureaucratic and judicial connections. The power to make laws must be separated from the power to implement them. If politicians are allowed to breach this barrier, the result will be tyranny.

Although we may pretty this conclusion up with a citation from Madison or Montesquieu, it is simple common sense. But note that this new rationale for the separation of powers does not rest *at all* on the theories of democratic legitimacy developed in the preceding section. It is perfectly

possible to reject the democratic need to separate lawmaking power between president, senate, and house, as I have done, and yet to embrace this second doctrine of separation based on an entirely different logic.

Call it functional specialization, and its elaboration comes in three parts. The first emphasizes the congenital weaknesses of directly elected politicians. The more they intervene in the implementation of the laws, the less impartial, and the more ignorant, the implementation will become. Worse yet, the more time politicians spend on bureaucratic politics, the less they will devote to the lawmaking function that only they can legitimately exercise: the elaboration of basic values.

This said, I do not deny that some concrete questions are so important, and so difficult to regulate in advance, that they should be reserved for direct decision by high-visibility politicians — a declaration of war can serve as the paradigm. Although we may prize the practical wisdom of statesmen in such cases, constitutional designers must recognize that direct decisionmaking is a very scarce commodity, easily devalued by overuse. If politicians are constantly involved in concrete disputes, they will respond by creating their own hyperpoliticized mini-bureaucracies. The result will be the worst of all possible worlds: decisions will be made not by seasoned statesmen or knowledgeable bureaucrats, but by callow flunkies eager to curry favor with their bosses and the special interests that support them.

It follows, then, that the elaboration of this second separationist doctrine should begin by cordoning off vast areas of concrete decisionmaking from those few questions that imperatively require the attention of democratic statesmen. Although politicians love to show powerful constituents that they can deliver the goods by wresting special advantages out of the administrative system, the constitutional order should push them in a different direction. The politicians will have more than enough to do if they take the time to confront squarely and deliberately the basic questions of legislative policy constantly generated by the dynamics of social life.

The second step in my argument requires a candid assessment of a nation's cultural and human resources. Before functional separation can make sense, there must be the makings of something I shall call a "Weberian culture."<sup>125</sup> At least some talented people must find inspiration in the prospect of professional service to the state. Otherwise, the functional separation of powers will serve merely as a fig leaf for corruption and clientelism. On the human side, functional specialization presupposes the availability of well-trained specialists. Public-spirited specialists are, of course, in short supply in many parts of the world — in which case there will be many more important things to worry about than the functional

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<sup>125</sup> For a fascinating study of the roots of Weberian culture in its bewildering varieties, see BERNARD S. SILBERMAN, *CAGES OF REASON: THE RISE OF THE RATIONAL STATE IN FRANCE, JAPAN, THE UNITED STATES, AND GREAT BRITAIN* (1993).

separation of powers. But even if functional separation has significant cultural and human roots, it will not flourish without lots of institutional imagination.

It is here, at this third stage of the argument, where the creative potential for constitutional law has been egregiously underappreciated — though, speaking broadly, the sources of this failure have been different in America and in Europe.

#### A. *The Intellectual Challenge*

The study of public law means different things in America and in Europe. Perhaps this is a place where scholars can help one another transcend their own parochialisms?

1. *America.* — Americans recognize the central importance of political independence and professional impartiality only when it comes to the courts. If politicians try to get judges to bend the law for their buddies, this is universally recognized as a fundamental breach of the separation of powers — and is not, I believe, terribly common in the United States today.

But American scholars have a harder time identifying other threats to the rule of law. Although a presidential phone call to a judge about a pending case is treated as a crime against the Constitution, a similar call to a middle-level bureaucrat is dealt with more tentatively. Constitutionalists have difficulty recognizing that the President, as the most powerful politician in the land, is a principal threat to the separation of powers when considered as a doctrine of functional specialization. After all, doesn't the Constitution vest the President with all "executive power," and doesn't that give him the broadest discretion in managing the bureaucracy any way he likes?

But at the time they were writing the Constitution in 1787, the Founders did not have the slightest idea that the American government would one day employ millions of officials exercising a bewildering variety of functions. One statistic is worth a million words: in 1802, the number of nonmilitary officials working for the federal government was precisely 2,597;<sup>126</sup> in 1997, it was 1,872,000.<sup>127</sup> This seems like a difference worth noting.

And yet, sad to say, under the intellectual leadership of Justice Scalia, American constitutional lawyers are increasingly impatient with such mun-

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<sup>126</sup> See JAMES STERLING YOUNG, *THE WASHINGTON COMMUNITY, 1800–1828*, at 29 tbl.1 (1966). I exclude from this tally the President, the 161 members of the Congress, and the Supreme Court.

<sup>127</sup> See *Trend of Federal Civilian Employment, 1982–1997* (visited Oct. 15, 1999) <<http://www.opm.gov/feddata/98factbk.pdf>>. This number does not include employees of the United States Postal Service.

dane differences and are prone to resolve the matter at a painfully naïve level of textual exegesis:

*Premise One:* The President is vested with all “executive” power.

*Premise Two:* The Constitution divides federal power into only three branches — legislative, executive, and judicial.

*Premise Three:* Power over the bureaucracy is neither legislative nor judicial.

*Conclusion:* Therefore, this power must vest in the Executive.

The defective premise is number two. Granted, the Framers put a high value on the separation of powers *conceived as a doctrine of democratic responsibility*. But it hardly follows that they would have ignored the virtues of the separation of powers *conceived as a doctrine of functional specialization* if they had thought that they were writing a constitution for a bureaucratic state. Their failure explicitly to address this matter (except as it concerned the courts) is merely a consequence of their failure to take the bureaucratic state seriously. But this silence should not be used as an excuse for modern constitutional lawyers to ignore the problem or, worse yet, to imagine that the Founders resolved a problem that they did not know they had. Constitutionalists should, therefore, extend their thinking to embrace the distinctive structural problems involved in controlling the fourth branch of government: the bureaucracy.

This is perfectly obvious to professors of administrative law, who bitterly resent the dominance of constitutional lawyers in the pecking order of legal academics. While their rivals are constantly prating about the meaning of 1787 and 1868, it is they — they endlessly tell themselves — who are dealing with the fundamental problems posed by the organization of power in the modern state. And yet they are treated as second class citizens — as if their reflections on the Administrative Procedures Act and the like were of secondary importance compared to, say, Marshall’s majestic vision, in *McCulloch v. Maryland*,<sup>128</sup> of the scope of national power!

They are right to be annoyed. Their accumulating body of reflections is, I think, a precious resource in the construction of a new doctrine of the separation of powers for the twenty-first century. But for now, I want to emphasize the dark side of their ghettoization. Even the most intellectually ambitious administrative lawyers have not entirely escaped the consequences of their consignment to second-class citizenship. However much they speak of a “fourth branch of government,” they do not take this metaphor seriously enough to consider how a modern *constitution*, as opposed to statutes like the Administrative Procedures Act, should be designed to insulate certain fundamental bureaucratic structures from ad hoc intervention by politicians and to force the politicians to focus their energies on the

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<sup>128</sup> 17 U.S. (4 Wheat.) 316 (1819).

things that only they can legitimately undertake in a modern democracy: passing statutes and making (a very few) particular decisions of high visibility that genuinely require the exercise of statesmanship and practical wisdom.

2. *Europe.* — Certainly Europeans cannot be accused of a similar blindness. As early as the eighteenth century, Frederick the Great was declaring himself his nation's leading civil servant and was struggling — with mixed results — to bring his bureaucracy under control. And one of the great triumphs of legality over the last century has been the relatively successful effort by the Conseil d'État in France (and after the Nazi catastrophe, by the German Bundesverwaltungsgericht as well) to protect citizens against state wrongdoing. When A.V. Dicey famously warned the Anglo-Saxon world away from the European example of special administrative courts in the 1880s,<sup>129</sup> perhaps it was not quite clear how constructively these courts would respond to the problem of bureaucratic power.<sup>130</sup> A century later, there is no excuse for American lawyers to remain ignorant of these Franco-German achievements. Dicey's anxieties notwithstanding, it is the Anglo-Saxon world that remains in thrall to such royalist ideas as "sovereign immunity," while the French Conseil d'État long ago liberated itself from such primitive notions.<sup>131</sup>

Nonetheless, the Europeans have also largely failed to integrate the bureaucracy into their reflections on the potential uses of constitutional law. In an ironic reversal of the American pattern, it was the constitutionalists — not the administrative lawyers — who were traditionally consigned to a subordinate position in the study of public law. Although this has been changing since World War II, legal thought is always slow to adapt.<sup>132</sup>

<sup>129</sup> See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 213–67 (8th ed. Liberty Classics 1982) (1915). See especially pages 265 to 267 of this work, which was first published in 1885.

<sup>130</sup> Even in Dicey's time, there were many indications that the administrative courts of the Third Republic were determined to subject the bureaucracy to the rule of law. See Trib. conflits, Feb. 8, 1873, Blanco, Rec. 1er suppl. 61, concl. David, in LES GRAND ARRETS DE LA JURISPRUDENCE ADMINISTRATIVE 15, 15–21 (Marceau Long et al. eds., 9th ed. 1990); Conseil d'Etat, Feb. 19, 1875, Prince Napoleon, Rec. 155, concl. David, in LES GRAND ARRETS, *supra*, at 29–38. For a discussion of these cases, among others, see FRANÇOIS BURDEAU, HISTOIRE DU DROIT ADMINISTRATIF 199–254 (1995) (surveying the last thirty years of the nineteenth century); JOHN A. ROHR, FOUNDING REPUBLICS IN FRANCE AND AMERICA: A STUDY IN CONSTITUTIONAL GOVERNANCE 208–11, 217–21 (1995) (Prince Napoleon and Blanco).

<sup>131</sup> The contrast is briefly, but intelligently, discussed in ROHR, *supra* note 130, at 242–45. The Supreme Court has recently executed a grand lurch backward in cases like *Alden v. Maine*, 119 S. Ct. 2240 (1999), and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999). Note Justice Breyer's dissenting quip that the majority's decision is "more akin to the thought of James I than of James Madison." *Id.* at 2240 (Breyer, J., dissenting).

<sup>132</sup> Already, though, there are some fascinating experiments. Under the Constitution of the French Fifth Republic, for example, the government is obliged to consult (in secret) with the Conseil d'État before draft laws are officially proposed — thereby gaining an opportunity to restructure its initiatives with an understanding of potential implementation problems.

More recently, however, a growing group of scholars has begun to recognize that the challenge for the next century in Europe, as in America, is to construct a new doctrine of separation of powers for the bureaucratic state.<sup>133</sup>

### B. Two Modest Proposals

Easier said than done. So forgive me if I content myself with a sketch of two directions for serious constitutional exploration.

1. *The Integrity Branch.* — I begin with a proposition so obvious that it almost rises to the dignity of a truism: Bureaucracy cannot work if bureaucratic decisions are up for sale to the highest bidder.

Nor can elected politicians be trusted to get serious about corruption. Even when they themselves do not share directly in the loot, a slush fund can often serve to grease the wheels of their electoral coalitions.

But if this is so, shouldn't a modern constitution devote a special article to creating a separate institution that seeks to check and balance these corrosive tendencies?

Maybe not. A constitution, after all, is not an all-purpose tool for the solution of any and all problems on the constituent assembly's wish list. Nonetheless, it is a mistake to view corruption as if it were just another social problem. A failure to control it undermines the very legitimacy of democratic government. If payoffs are a routine part of life, ordinary people will despair of the very idea that they, together with their fellow citizens, can control their destinies through the democratic rule of law. This situation prevails, of course, in vast areas of the world. But the pervasiveness of corruption does not mean that constitutional law should turn a blind eye. To the contrary, it suggests that the struggle for *genuine* constitutionalism is still in its infancy.

The credible construction of a separate "integrity branch" should be a top priority for drafters of modern constitutions. The new branch should be armed with powers and incentives to engage in ongoing oversight.

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<sup>133</sup> The most interesting, if controversial, work has been undertaken by students of the European Union, most notably Professors Giandomenico Majone and Christian Joerges. See Christian Joerges and Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 EUR. L.J. 105 (1997); Giandomenico Majone, *The European Community: An "Independent Fourth Branch of Government?"*, in VERFASSUNGEN FÜR EIN ZIVILES EUROPA 23 (Gert Brüggemeier ed., 1994); Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77 (1994); Giandomenico Majone, *Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions* (1996) (visited Dec. 9, 1996) <[http://www.iue.it/RSC/WP-Texts/96\\_57.html](http://www.iue.it/RSC/WP-Texts/96_57.html)>; see also P.P. Craig, *Democracy and Rule-making Within the EC: An Empirical and Normative Assessment*, 3 EUR. L.J. 105, 129 (1997) (discussing a revised republicanism as a model for European democracy); Michelle Everson, *Independent Agencies: Hierarchy Beaters?*, 1 EUR. L.J. 180, 189–92 (1995) (suggesting that the American constitutional experience may be useful to European countries attempting to establish effective oversight of government agencies). For a comparative assessment of American and European law, see Martin Shapiro, *Codification of Administrative Law: The US and the Union*, 2 EUR. L.J. 26 (1996).

Members of the integrity branch should be guaranteed very high salaries, protected against legislative reduction. They should be guaranteed career paths that permit them to avoid serving later under officials whose probity they are charged with investigating. The constitution should also guarantee the branch a minimum budget of  $x$  percent of total government revenues because politicians may otherwise respond to the threat of exposure by reducing the agency to a token number of high-paid help.

Once we have created our constitutional watchdogs, we must take steps to keep them under control — as the recent fishing expeditions of the American Special Prosecutor suggest. Indeed, it is a fair question whether the integrity branch should be allowed to target top-level elected officials. Perhaps it is impossible to structure the investigatory power to avoid the obvious dangers of partisan abuse and the overcriminalization of politics — though I doubt it. Even if elected officials and their immediate aides are exempted, there remains a compelling constitutional case for the separation of powers here.

This need is also recognized in the practice of developed democracies. The British case is particularly enlightening given Westminster's instinctive aversion to most forms of separationism. Since 1861, Parliament has established standing committees on public accounts, which have been chaired by leading members of the opposition, to establish credibility in determining that public monies are spent with integrity.<sup>134</sup> Within the executive branch, the British Audit Commission also provides oversight over local government and the National Health Service.<sup>135</sup> Again, Parliament takes steps to insulate the Commission from the institutions that it surveys.<sup>136</sup> Similar institutions are in place in the United States.<sup>137</sup> Endowing this effort with constitutional dignity is more than a symbolic gesture. If there is ever a moment when a country can get institutionally serious

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<sup>134</sup> See COLIN TURPIN, *BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT, CASES AND MATERIALS* 483–85 (2d ed. 1990); Alan Doig, *Politics and Public Sector Ethics: The Impact of Change in the United Kingdom*, in *POLITICAL CORRUPTION IN EUROPE AND LATIN AMERICA* 173, 174 (Walter Little & Eduardo Posada-Carbó eds., 1996) (referring to reports issued by the Royal Commission on Standards in Conduct in Public Life and by the Public Accounts Committee).

<sup>135</sup> The Commission's functions are described at the site <http://www.audit-commission.gov.uk/ac2/ICfirst.htm>, which was visited on September 26, 1999.

<sup>136</sup> See SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 163 (1999).

<sup>137</sup> Like the British standing committee, the General Accounting Office is based in the legislative branch and plays an important oversight role. Curiously, the American separation of powers doctrine is relatively uncongenial to the GAO, based on a fear of excessive encroachment on the powers of the executive branch. See, e.g., Kevin T. Abikoff, Note, *The Role of the Comptroller General in Light of Bowsher v. Synar*, 87 COLUM. L. REV. 1539, 1540–41 (1987).

The concern for integrity is also expressed in the special office of the inspector general that has been installed in each major executive agency. See generally William S. Fields & Thomas E. Robinson, *Legal and Functional Influences on the Objectivity of the Inspector General Audit Process*, 2 GEO. MASON INDEP. L. REV. 97 (1993) (describing the Inspector General Act and the audit process).

about corruption, it is at a constitutional convention where long-run structural considerations may win a rare moment of public attention. Moreover, there is some experience, most notably in Hong Kong and Singapore, suggesting that a separate integrity branch can actually work with great success if it is insulated properly.<sup>138</sup> The mere fact that the integrity branch is not one of the traditional Holy Trinity should not be enough to deprive it of its place in the modern separation of powers.

Once this branch is established, it may be plausible to define its concerns more broadly to include other pathologies beyond outright corruption. Consider, for example, the use of the tax authorities as a tool of partisan political warfare. Perhaps this abuse might be effectively curbed by authorizing the integrity branch to investigate complaints by aggrieved parties and to call bureaucratic wrongdoers to account. But there are obvious dangers involved in authorizing the branch to roam too widely. The broader its jurisdiction, the more it can disrupt the operations of the politically responsible authorities, and the more it will itself be a tempting target for politicized vendettas.

2. *The Regulatory Branch.* — It is time to transcend the pathological perspective and to confront the larger constitutional challenges raised by the expansive regulatory ambitions of the modern state. We have, I take it, long ago moved beyond an understanding of bureaucratic regulation based on the “transmission belt” theory of democratic legitimacy, under which bureaucratic “experts” merely specify legislative norms found in the statute.<sup>139</sup> Regulators *make* law, and we would not want it any other way. Consider, for example, the regulatory problems posed by environmental protection. Although democratic legislation can provide guiding principles, parliaments have neither the time nor the expertise to sift the changing scientific data in search of responsible regulatory solutions. Indeed, when parliaments have tried to make specific environmental decisions, the results have sometimes been egregiously counterproductive.<sup>140</sup> What is required is a constitutional design that accepts the need for supplementary

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<sup>138</sup> I do not want to draw too much from these two cases. Both Hong Kong and Singapore were autocracies at the time of their successful anticorruption campaigns, and in neither case were the special anticorruption agencies made independent of the will of the chief autocrat himself. Instead, they reported directly to the Governor General or Prime Minister and hence were entirely dependent upon the corruption-fighting zeal exhibited by these heads of state — which proved very considerable. The challenge is to create by constitutional means a similar degree of determination and institutional insulation within the framework of a democratic constitution. For more on these two cases, see ROBERT KLITGAARD, *CONTROLLING CORRUPTION* 101–33 (1988); ROSE-ACKERMAN, *supra* note 136, at 159–62; Jon S.T. Quah, *Singapore's Experience in Curbing Corruption*, in *POLITICAL CORRUPTION: A HANDBOOK* 841 (Arnold J. Heidenheimer, Michael Johnston & Victor T. LeVine eds., 1989).

<sup>139</sup> For the classic elaboration of this point, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667, 1671–88 (1975).

<sup>140</sup> For a case study revealing the pathologies that can follow upon such efforts, see BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981).

bureaucratic lawmaking in the ongoing regulatory enterprise but that self-consciously confronts the serious legitimation problems involved.

To begin, there is the simple question of bureaucratic competence. As we have seen, the case for functional separation presupposes the value of scientific knowledge and professional experience in the modern regulatory effort. But in fact there are tons of bureaucratic documents produced each year throughout the world that reveal an appalling ignorance of the complex social and economic relationships they purport to regulate. A serious constitution for the modern state should take aggressive steps to assure that bureaucratic pretensions to expertise are not merely legitimating myths, but hard-earned achievements.

A second legitimating myth requires a similar response. According to this familiar fantasy, the bureaucracy serves as a mere transmission belt for the normative judgments made by parliamentary legislation. It is not enough to expose this myth. Modern constitutions must take constructive steps to lay bare the crucial dimensions of normative bureaucratic judgment and to discipline its exercise by a host of techniques ranging from public participation to judicial oversight.

This is, as I have suggested, one area where American law is way out in front. The German Administrative Procedures Act, for example, focuses exclusively upon the dangers of bureaucratic abuse of individual rights — ignoring almost entirely the distinctive problems involved in legitimating bureaucratic rule-making. Whatever the weaknesses of the American Administrative Procedure Act — and they are serious — the statute recognizes that regulatory decisionmaking needs special forms of legitimation that enhance popular participation, provide ongoing tests for bureaucratic claims of knowledge, and encourage serious normative reflection upon the policy choices inevitably concealed in abstract statutory guidelines.<sup>141</sup>

The trouble is that American constitutional and administrative lawyers have failed to engage in a serious conversation about translating the American experience into concrete suggestions for the world's constituent assemblies. What should the structure of a regulatory branch look like? How should the democratic legitimacy of ministers and the professional expertise of the bureaucracy be harnessed into a credible system of public participation and judicial review?<sup>142</sup>

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<sup>141</sup> See SUSAN ROSE-ACKERMAN, *CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES* 13–15 (1995); Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1279–80 (1994).

<sup>142</sup> For important resources for reflection, see JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997), as well as the writings of Professors Majone and Joerges, *supra* note 133, and Professor Rose-Ackerman, *supra* note 141.

### C. *Warring Separationisms*

We are at the beginning of what should be a vast effort to integrate the bureaucracy into our constitutional vision of the liberal democratic state. But I hope I have said enough to motivate my larger thesis: rather than treating the “separation of powers” as if it pointed toward a single unifying concern, it is more profitable to break down the label into several parts. Having done so, we may discover that traditional “separation of powers” thinking is both overextended and underdeveloped at the same time. When considered as a doctrine of democratic legitimacy, the case for an American-style separation of lawmaking power between a president, house, and senate looks quite weak. But when considered as a doctrine of functional specialization, the doctrine’s potential seems considerable.

If this is so, perhaps we can take the argument to a higher level and consider whether there is a relationship between the bad kind of separation and the good kind. In particular, does an American-style separation provide a congenial institutional matrix for the elaboration of a separation of powers based on the logic of functional specialization?

If the answer is yes, we will have to modify our initial harsh judgment of American-style separation. Although this system may have the negative features we have enumerated, it has the positive feature of enabling the future development of the good kind of separation. If the answer is no, that will be another big strike against American-style separation.

The answer is no.

*1. Theoretical Linkages.* — If a parliamentary system is operating well, the PM and her cabinet ministers have their eyes firmly fixed on the next election. If they lose, then the fate of all their precious legislative initiatives is at the mercy of their political opponents. As a consequence, they want knowledgeable and effective implementation from the bureaucracy, and they want it fast.

Professional bureaucrats have a different time-horizon. They are interested in life-time service and recognize that they will be serving many different political masters over their careers. Therefore, they will suffer a long-term cost if they become overtly partisan and attach themselves passionately to the present cabinet’s goals. At some indeterminate time in the future, the cabinet will lose an election, and the next bunch of reigning politicians will exact retribution on bureaucrats who have ostentatiously committed themselves to the ideology of the previous regime.

This does not imply that long-term officials will respond to their present masters with “bureaucratic obstructionism.” To the contrary, they have every reason to expect that foot-dragging will exact ferocious short-term costs, as the present bunch of politicians respond with outrage if they detect a threat to their own reelection prospects. If the bureaucrat is to avoid these sanctions, she must cultivate a reputation for neutral competence. Whatever goals have been established by the cabinet, the senior civil servant stands ready and eager to implement them.

There is, in short, a deep link between parliamentarianism and professionalism. The cabinet is happy to embrace the professional mystique — as long as the bureaucrats deliver the goods knowledgeably and efficaciously, the politicians have no compelling need for their professions of faith. The bureaucrats, in turn, can embrace the Weberian ethic of bureaucratic neutrality as a vital insurance policy. This way they need not apologize to each new cabinet for their aggressive and effective efforts on behalf of its predecessors. To the contrary, the bureaucrats can hope that the Weberian ethic will allow them to turn a potential debit into a major credit: “I will serve you and your goals, Mr. Minister, with the same energy and devotion with which I tried to fulfill your predecessor’s objectives.”

Viewers of the television show *Yes, Minister* have been taught to scoff at such protestations of faithful obedience as they observe the clueless politico Jim Hacker outmaneuvered weekly by that wily civil servant, Sir Humphrey. As we shall see, television may not be the best source of insight into the operation of the contemporary British bureaucracy.<sup>143</sup> For the present, it is enough to contrast the professionalist pressures of the parliamentary system with the very different incentives generated by American-style separationism.<sup>144</sup>

With the presidency separated from congress, high-level bureaucrats must learn to survive in a force-field dominated by rival political leaders. Because both the president and congressional barons brandish powerful weapons for disciplining disobedient servants, only the most naïve bureaucrat would suppose that the ethic of “neutral competence” can serve as the best survival strategy. If she and her agency are to thrive, it is no longer enough to satisfy her cabinet minister of her professional competence, as in the parliamentary system. It is now essential to play her competing masters in the presidency and congress against one another in an ongoing effort to maximize overall support. Rather than delivering the goods demanded by her minister, the bureaucrat’s first priority is to articulate a political mission that will attract the support of the contending powers responsible for legislative and funding decisions.

This political mission, in turn, will propel the bureaucrat into the business of interest-group mobilization on a grand scale. Within the parliamentary system, cabinet ministers will react negatively when civil servants “go behind their back” and organize political constituencies for programs that threaten cabinet priorities. Within an American-style system, the ongoing struggle between the executive and congress gives the high-level bureaucrat little choice: if her agency is to achieve its mission, it must con-

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<sup>143</sup> See *infra* p. 705.

<sup>144</sup> For broadly compatible arguments reaching the same conclusion, see Moe & Caldwell, *supra* note 36, at 173–82.

tinually mobilize friendly interest groups in the ongoing struggle to influence critical actors in the house, senate, and the executive branch.

The politicization of the bureaucracy is enhanced by a second feature of the separationist system. As we have seen, one of its hallmarks is the possibility of entrenching legislation beyond the next electoral cycle. Although it may be tough to pass a law, it is also hard to change it. As an enacting coalition searches to protect its initiative from easy revision, personnel policy will be high on its list of entrenching devices. If the coalition can appoint ideological soul-mates to leading positions in the infant agency, these civil servants will be in a strategic position to fight a two-front war against future congresses and presidents. As one or another branch shifts against the program, the ideological bureaucrat can seek to exploit remaining areas of political strength in the agency's struggle for survival — shaping and reshaping program initiatives in ways that sustain support for the program among interest groups, congressional committees, and presidential staffers. The first generation of ideological bureaucrats, moreover, will work hard to select a bunch of like-minded successors.<sup>145</sup>

This means that newly elected presidents and prime ministers confront vastly different bureaucratic realities on their first day in office. The latter are confronted with a high-level cadre eager to establish its claims to neutral competence; the former survey an unruly empire of bureaucratically entrenched ideologues skilled in the political art of strategic alliance with congressional friends and interest groups.

Nevertheless, as head of the executive branch, the president is well aware that she will be held accountable for the overall performance of the bureaucratic establishment. How then is she to establish that her “administration” exists as more than a constitutional metaphor?

By embarking on yet another campaign to politicize the bureaucracy — seeding it this time with her own personal loyalists. The campaign will proceed along two fronts. First, the president will construct a special executive agency controlled entirely by loyalists, and then she will seek to establish its expansive authority to review and reshape decisions made throughout the vast bureaucratic empire. The neutral label justifying this activity will be the need to provide “central coordination” for the jumble of independent missions established in different statutes at different times by different political majorities. But this label will serve only as a veneer for the ongoing struggle between the president's loyalists at the center and the entrenched ideological entrepreneurs in the sprawling periphery.

Here is where the second strategy enters, as the president seeks to consolidate her empire by increasing the number of loyalists in unruly bureaucratic fiefdoms. The overriding criteria in making these appointments will

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<sup>145</sup> Whether they succeed, of course, is a different matter. For an insightful exploration, see ANTHONY DOWNS, *INSIDE BUREAUCRACY* 5–23 (1967).

be loyalty to the president and her program, whose ideological coherence will, of course, depend on the particular president in question. The great danger is that the president's emissaries will "go native" and succumb to the pressures of the entrenched ideologues to sustain the preexisting mission of the agency even when it deviates from "the administration's" agenda.

Within this highly charged setting, the claims of substantive knowledge and executive competence will not be entirely ignored. Knowledge is power, and command of professional lore will, of course, be constantly on display — but often in an adversarial spirit, with great skepticism regarding the possibility of reaching a professional consensus. To state my conclusion in a single line: parliamentarianism breeds neutral competence, separationism fosters politicized professionalism. As a consequence, the president's mandate from the voters is diffused and undermined by an endless war on countless bureaucratic fronts.

To be sure, the prime minister and her cabinet will also confront serious problems in dealing with their bureaucracy, but of a different sort. There is a fundamental difficulty with officialdom's eagerness to make good on its claims to neutral competence. In the end, there is no such thing as a perfectly neutral way of understanding reality. Every "expert" construction of the world contains a host of controversial presuppositions — although "conventional wisdom" undoubtedly exists in every professional field, it sustains itself in the minds of professional practitioners only by suppressing an awareness of its many problematic features.

Bureaucratic close-mindedness is, up to a point, a good thing. Practicing professionals are not academics. They are paid to decide things, not to engage in ambitious programs of frontier research. However inadequate the "conventional wisdom" may turn out to be in fifty years' time, professional bureaucrats live in the here-and-now and should not be encouraged to agonize unduly over the limits of their comprehension. A realistic ideal of "neutral competence" requires only that bureaucrats do the best they can with the best conventional wisdom available.

Therein lies the rub. Bureaucracies are intellectually conservative creatures — full of old-timers who have invested heavily in obsolete conventional wisdom.<sup>146</sup> For all their good-faith protestations of "neutral competence," top bureaucrats may often be trapped by old-fashioned paradigms and fail to appreciate that better ideas are available in universities, private industry, and other cutting-edge institutions. It is one thing for electorally responsible politicians to demand the impossible from their bureaucrats; it is quite another for politicians to be defeated by bureaucratic failure to keep abreast of contemporary thought.

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<sup>146</sup> See *id.* at 158–66 (discussing the ossification of bureaucracies in a chapter entitled "The Rigidity Cycle").

This is a serious problem, though one should not exaggerate its significance in the overall scheme of things — on many occasions, bureaucrats may be right in resisting the political search for a miracle cure. Nevertheless, without down-playing its genuine importance, I suggest that this problem of parliamentary bureaucracy seems more amenable to intelligent management than does its separationist counterpart. Ministers can respond to particularly egregious forms of bureaucratic closed-mindedness by convening ad hoc “blue-ribbon commissions” of outside experts. Or they may institutionalize a host of feedback loops between bureaucrats and the outside world — sending rising officials for mid-career refresher courses at universities or organizing advisory committees that embrace a broad range of opinion on subjects of ongoing concern. Or they may appoint a small personal planning staff to engage in a creative exchange with the permanent civil service.

None of these tools will work all the time, and sometimes bureaucratic narrowmindedness will reach pathological proportions. But scandalous incidents should not deflect us from the underlying pattern of bureaucratic incentives. Civil servants operating under a parliamentary system have powerful incentives to listen to the new minister when she describes her programmatic objectives and to adapt preexisting professional wisdom to ascendant political imperatives. When lawmaking power is separated between president and congress, the civil service becomes a battleground between entrenched ideological bureaucrats and presidential loyalists struggling endlessly for political support.

#### *D. From Theory to Practice*

There are, then, some pretty fundamental reasons for associating an American-style separation of powers with unattractive forms of bureaucratic governance. Worse yet, these theoretical connections are abundantly confirmed in practice.

*1. The Costs of Politicized Professionalism.* — My first basic prediction, again, is that elite American bureaucrats will exhibit a profoundly different understanding of their role than their counterparts in parliamentary systems. This is, remarkably enough, one of the principal findings of a groundbreaking study of comparative bureaucratic culture led by Professors Joel Aberbach, Robert Putnam, and Bert Rockman, and an army of interviewers in the United States and six European countries.<sup>147</sup> After

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<sup>147</sup> See JOEL D. ABERBACH, ROBERT D. PUTNAM & BERT A. ROCKMAN, *BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES* 94–95 (1981) (arguing that a distinctive American understanding applies both to short-term political appointees and to long-term civil servants). The six European countries were Britain, France, Germany, Italy, the Netherlands, and Sweden — with the exception of France, all possessed parliamentary systems. As indicated below in note 150, the French data may also suggest that the Fifth Republic’s weaker version of separationism has an American-style impact on bureaucratic self-understanding.

conducting carefully controlled interviews with substantial numbers of leading parliamentarians and bureaucrats in each of these countries, these scholars found that “American exceptionalism dogs our quest for uniformity and uninhibited generalization.”<sup>148</sup>

In sharp contrast to their European counterparts, American bureaucrats did not understand their role as involving a function distinct from those discharged by politicians. Calling this lack of role differentiation “startling,”<sup>149</sup> the authors unequivocally identify the separation of powers as a principal cause of “American aberration”:

American bureaucrats, to a degree unmatched elsewhere, are responsible for shoring up their own bases of political support. Fragmented accountability forces American bureaucrats to be risk takers and forceful advocates for positions they hold privately. . . . [N]either protected by anonymity nor clearly serving a single master, American bureaucrats must find allies where they can. . . . To be sure, bureaucratic politics, properly understood, exists everywhere. But outside the United States the game typically is played with a narrower range of actors and a far more determinate, if not wholly definitive, set of rules. Bureaucratic politics in Europe typically is episodic; in the United States it is ceaseless.<sup>150</sup>

My second principal prediction involves the way in which presidents and prime ministers respond to their very different bureaucratic realities. The familiar comparison between America and Britain remains profoundly instructive on this matter.<sup>151</sup> When a new party enters into government in

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The Aberbach study is now a generation out of date, and it would be wonderful to have a new one. A follow-up national study in Germany suggests that the basic difference between European and American bureaucratic self-understanding remains. See Renate Mayntz & Hans-Ulrich Derlien, *Party Patronage and Politicization of the West German Administrative Elite 1970–1987 — Toward Hybridization?*, 2 GOVERNANCE 384, 394 (1989) (“[C]ivil servants today distinguish their role from that of politicians even more than they did in 1970 . . .”) (emphasis omitted).

<sup>148</sup> ABERBACH, PUTNAM & ROCKMAN, *supra* note 147, at 94.

<sup>149</sup> See *id.* at 95.

<sup>150</sup> *Id.* at 95–96. In the paragraph that immediately follows the quotation in the text, the authors explicitly note the constitutional basis of the institutional differences that they emphasize.

Interestingly, the only Western European country that remotely resembles America in this regard is France — which is, of course, the only one that has an independently elected Presidency: “Members of the higher levels of the Gaullist bureaucracy are exceptionally biased in social terms and were probably recruited with special attention to their political affiliations and partisan tendencies. In this respect they probably resemble to some degree the American political executives of the Nixon administration . . .” *Id.* at 77–78. Because there are so many other confounding variables, I do not want to make much of this point. But at least it suggests the utility of more serious research. See Ezra N. Suleiman, *Presidentialism and Political Stability in France*, in THE FAILURE OF PRESIDENTIAL DEMOCRACY, *supra* note 19, at 137, 150–59 (examining the consequences of the shift to a presidential system in France).

<sup>151</sup> A more elaborate comparison would include Germany, which provides an illuminating variation on the theme of parliamentary government. As in the English system, the German Cabinet relies heavily on its permanent civil service, but a newly elected government in Germany can more readily remove high-level bureaucrats whom it finds ideologically uncongenial, and it can also appoint outsiders to high positions. Hans-Ulrich Derlien explains the system and assesses its practical operation during the two major changes in party government that occurred in 1969 and 1982. See Hans-Ulrich Derlien, *Re-*

Britain, the new Prime Minister “appoints about a hundred members of the government and a small number of policy advisors and consultants to the prime minister’s office. In addition, cabinet ministers may each hire one or two political advisers.”<sup>152</sup> The American President, by contrast, has the power to make about four thousand appointments.<sup>153</sup> Yet, despite the President’s overwhelming numerical advantage, it is the Prime Minister who has the superior bureaucratic leverage.

In an essay that should be required reading for all comparative constitutionalists, political scientists Terry Moe and Michael Caldwell describe the British scene:

Britain does indeed have the kind of system presidents can only dream of. It is built around two central bureaus: the Cabinet Office, directly responsible to the Prime Minister, and the Treasury, under the Chancellor of the Exchequer (the second figure in the Cabinet). The bureaus work closely together, as do their principals, and are staffed by civil servants with reputations for honesty, expertise, and neutral competence. Despite their small size, they wield enormous power over the bureaucracy.

Episodic notions of creating competitors to these central bureaus have had little impact. For instance, the Central Policy Review Staff, created in 1970 to provide an alternate source of information for the Prime Minister, was quickly absorbed by the Cabinet Office and eventually abolished by the Thatcher government. The reason prime ministers do not make more use of bodies like these was neatly stated by Prime Minister Harold Wilson: “Everything [a Prime Minister] could expect to create is already there . . . in the Cabinet Office.”<sup>154</sup>

Recent British experience is particularly instructive. Margaret Thatcher came to power with an enormous distrust of the senior civil service. Viewing it as a potential obstruction to her neoliberal vision, she took an unprecedented interest in matters of bureaucratic promotion: “Although

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*percussions of Government Change on the Career Civil Service in West Germany: The Cases of 1969 and 1982*, 1 GOVERNANCE 50 (1988). The top administrative elite, composed of about 150 positions, *see id.* at 56 tbl.1, experienced relatively rapid turnover in the aftermath of both political changes, with 49 new appointments made shortly after the first, and 58 after the second, *see id.* at 63 tbl.6. Only a few of these positions — 10 and 12, respectively — were filled by people entirely outside the civil service system, though the new governments probably promoted a few civil servants who would not have otherwise made it into the upper reaches of the bureaucracy. *See id.*

The German approach might well appeal to some readers who are dismayed by the churning and hyperpoliticization of the American system but are skeptical of British pretensions to Weberian neutrality.

<sup>152</sup> FREEDMAN, *supra* note 54, at 151.

<sup>153</sup> *See* James P. Pfiffner, *Strangers in a Strange Land: Orienting New Presidential Appointees*, in THE IN-AND-OUTERS: PRESIDENTIAL APPOINTEES AND TRANSIENT GOVERNMENT IN WASHINGTON 141, 141 (G. Calvin Mackenzie ed., 1987) (“This [number] includes the White House staff (200), the heads of major departments and agencies (15-25), the subcabinet (400-500), and ambassadors (150). In addition, department and agency heads can appoint noncareer members of the Senior Executive Service (600-800) and special aides in Schedule C positions (1,700).”).

<sup>154</sup> Moe & Caldwell, *supra* note 36, at 188 (internal citations omitted).

charges of ‘politicisation’ in the sense of favouring Conservatives were dismissed at the time and seem on the basis of our own interviews to be unfounded,” concludes a thoughtful British study, “Thatcher certainly did favour civil servants whose definition of their role made them more committed to implementing and less likely to question government [sic] policy.”<sup>155</sup> Indeed, the authors believe that she may have been too successful and that senior bureaucrats’ “willingness to make tough, detached criticisms of politicians’ favourite schemes might have diminished.”<sup>156</sup> For good or for ill, the Sir Humphrey of *Yes, Minister* does not represent the wave of the future in Whitehall. To the contrary, “it is not fanciful to say that the constitutional text books are truer now [in their depiction of the relationship between civil servants and ministers] than they have been for some time.”<sup>157</sup>

Nothing similar has happened in America. To be sure, recent Presidents have waged an unceasing struggle to increase the capacity of both the Executive Office and the Office of Management and Budget, to wrest key decisions away from “‘outsiders’ in the permanent bureaucracy, whom they clearly do not trust.”<sup>158</sup> At the same time, Presidents have greatly increased the number of their political appointees in the standing bureaucracy.<sup>159</sup> Despite this massive politicization, the President cannot expect anything resembling the professional implementation that his British counterpart takes for granted.

Not, mind you, that things would be better if the President were stripped of his power to politicize the bureaucracy. To the contrary, his effective control would then approach zero because members of Congress and concerned interest groups would predictably refuse to engage in unilateral disarmament. Instead of achieving a British-style civil service, the President would simply be handing over political control to rival politicians in Congress and their associated interest groups.<sup>160</sup>

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<sup>155</sup> Graham K. Wilson & Anthony Barker, *The End of the Whitehall Model?*, W. EUR. POL., Oct. 1995, at 130, 137.

<sup>156</sup> *Id.* at 143.

<sup>157</sup> *Id.* at 146 (alteration in original) (quoting Hugo Young with approval).

<sup>158</sup> Moe & Caldwell, *supra* note 36, at 190.

<sup>159</sup> See PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 7–13 (1995). Specifically, the author notes:

Between 1960 and 1992, the number of department secretaries increased from 10 to 14, the number of deputy secretaries from 6 to 21, under secretaries from 14 to 32, deputy under secretaries from just 9 to 52, assistant secretaries from 81 to 212, deputy assistant secretaries from 77 to 507 . . . .

*Id.* at 8.

<sup>160</sup> See Pablo T. Spiller & Santiago Urbiztondo, *Political Appointees vs. Career Civil Servants: A Multiple Principals Theory of Political Bureaucracies*, 10 EUR. J. POL. ECON. 465 (1994) (contrasting presidential and parliamentary systems and concluding that, in presidential systems, the president will prefer short-term political appointees to long-term civil servants).

Indeed, the President's constitutional authority to politicize his administration is implicitly recognized even by his worst enemies. During most of the last generation, Republican Presidents have confronted Democratic Congresses, and vice versa. Although the congressional opposition has engaged in a variety of sniping operations, it has allowed the President to colonize the higher reaches of the bureaucracy with more and more political loyalists. All involved would dismiss the adoption of a British approach as utterly naive. Given the remorseless pressures that Congress imposes on deputy assistant secretaries, the President would be signing the Administration's death warrant if he did not try to have *his people* manning the administrative barricades.<sup>161</sup>

The costs of this system have been profound. I do not suggest that political appointees are either party hacks or utterly inexperienced in the art of government. To the contrary, the overwhelming majority of them have substantial governmental experience, and many have worked previously in the agencies in which they receive their political appointments.<sup>162</sup> Nonetheless, political appointees do not stay in office long enough to operate productively. The median tenure of a political

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<sup>161</sup> The relative power of the President and Congress (and particular congressional committees) over federal bureaucracies is a subject of endless discussion. For a brisk summary of the debate, with citations to the literature, see B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY* 29–31 (1994). Wood and Waterman also provide a nice series of case studies, which (unsurprisingly) suggest a complex interaction of presidential and congressional influence. *See id.* at 32–76.

<sup>162</sup> About 80% of high-level appointees between 1964 and 1984 had prior experience in the federal government. *See* Carl Brauer, *Tenure, Turnover, and Postgovernment Employment Trends of Presidential Appointees*, in *THE IN-AND-OUTERS*, *supra* note 153, at 174, 177. Although some commentators have asserted that there has been a recent decline in the quality of high-level administrators, an outstanding recent study suggests that these allegations lack substantial empirical support. *See* Joel D. Aberbach & Bert A. Rockman, *In the Web of Politics: Three Decades of the U.S. Federal Executive*, ch. 4, at 6–10 (1999) (unpublished manuscript, on file with the author).

appointee has been going down for some time and is now about two years.<sup>163</sup> One third serve for less than one and a half years!<sup>164</sup>

These numbers introduce a very depressing, albeit prosaic, story. Most appointees must move to Washington, and they are inevitably distracted by the humdrum tasks of finding housing, caring for children and spouses, and the like — or commuting constantly to their hometowns.<sup>165</sup> Because appointees to the same agency typically do not know one another beforehand, their first months on the job are inevitably spent learning each other's biases and idiosyncrasies. And the constant turnover makes this a never-ending enterprise. The result is a devastating lack of the teamwork that is essential for coherent policy development.<sup>166</sup>

Moreover, a series of short-term appointments yields a remorselessly short-term policy focus and a constantly shifting search for new panaceas. Here is a description of the pathology by a civil servant who himself became a political appointee:

<sup>163</sup> Between 1981 and 1991, the median tenure of officials requiring Senate confirmation was 2.1 years, with greater turnover in Cabinet departments and less in the “independent” agencies. *See* General Accounting Office, Fact Sheet, Political Appointees, Turnover Rates in Executive Schedule Positions Requiring Senate Confirmation, GAO GDD-94-115, at 2–3 (April 1994).

The average tenure during recent presidencies was:

PRESIDENT	TENURE (YEARS)
Johnson	2.8
Nixon	2.6
Ford	1.9
Carter	2.5
Reagan	2.0

*See* Brauer, *supra* note 162, at 175.

<sup>164</sup> *See* Brauer, *supra* note 162, at 175. Brauer's analysis derives from a study by the National Academy of Public Administration of presidential appointees from 1964 to 1984. *See id.* at xvi.

<sup>165</sup> The percentage of presidential appointees reporting stress in their private lives is large and increasing — from 52% during the Johnson Administration to 73% in the Reagan Administration. *See* Dom Bonafede, *Presidential Appointees: The Human Dimension*, in *THE IN-AND-OUTERS*, *supra* note 153, at 120, 138 tbl.6.3.

<sup>166</sup> Hugh Heclo explains:

In many ways what matters most is not so much an individual's job tenure as the duration of his executive relationships. Those in superior positions need to assess the capacities of their subordinates; subordinates need to learn what is expected of them. Political appointees at the same hierarchical level need to learn each other's strengths, weaknesses, priorities, and ways of communicating. Normally the opportunity to develop these working relationships is even shorter than the time span for learning a particular job . . . [D]uring the Kennedy, Johnson, and Nixon administrations, almost two-thirds of the undersecretaries and four-fifths of the assistant secretaries worked two years or less for the same immediate political superiors . . .

HUGH HECLLO, *A GOVERNMENT OF STRANGERS* 104–05 (1977). There is every reason to suppose that Heclo would find even less continuity in working relationships in more recent administrations.

I don't know how many assistant secretaries I have helped break in. And you just divert an awful lot of time. And there is always a propensity for a new guy to come in and discover the wheel all over again. And then you have the classic case of a political officer who is going to make a name for himself, and therefore he is going to identify one golden chalice he is going after, and he will take the whole goddamn energy of an organization to go after that golden chalice. He leaves after eighteen months, a new guy comes in, and his golden chalice is over here. "Hey guys, everybody, this way."<sup>167</sup>

Short-run, disjointed, ever-changing: this disheartening managerial pattern is confirmed by survey data suggesting that only twenty-eight percent of senior civil servants think of political appointees as possessing "good management skills." Many political appointees agree — only fifty-five percent think of *themselves* as good managers.<sup>168</sup>

Worse yet, there is no obvious way to induce political appointees to extend their stay in government. By definition, they cannot retain their jobs indefinitely — this would convert them into senior civil servants. It is only natural for them to view their positions as launching pads for acquiring more secure jobs. Moreover, it has become increasingly rare for political appointees to make a mini-career for themselves by linking jobs together into an extended stay in government — spending two years as an assistant secretary and then moving up for two more years as a deputy secretary. The revolving door now operates with relentless speed — two years in government, then out the door into the private sector.<sup>169</sup>

This constant churning brings new problems in its wake. Recurring vacancies take time to fill, averaging from six to twenty months at eight major agencies selected for study by the General Accounting Office.<sup>170</sup> During all this time, necessary decisions pile up in administrative limbo as stand-ins wait for the presidential appointee finally to arrive — perhaps only to learn that a crucial collaborator or superior has just announced her departure.

What is more, the ongoing rush to the private sector generates an ongoing problem for the President: how is he to prevent his loyalists from selling out his programs in their effort to maximize their post-governmental

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<sup>167</sup> Brauer, *supra* note 162, at 178–79 (quoting the testimony of Robert Thalon Hall, a long-time civil servant who served as assistant secretary of commerce for economic development in the Carter Administration).

<sup>168</sup> See Aberbach & Rockman, *supra* note 162, at tbl.6-9.

<sup>169</sup> Less than 10% of political appointees between 1964 and 1984 remained in the public sector. See Linda L. Fisher, *Fifty Years of Presidential Appointments*, in *THE IN-AND-OUTERS*, *supra* note 153, at 1, 27; see also Brauer, *supra* note 162, at 182 (“[T]he general rule among presidential appointees is ‘in and out and never in again.’”).

<sup>170</sup> In 1994, the GAO selected eight agencies for a study of vacancies during the decade between 1981 and 1991: the Departments of Agriculture, Air Force, Commerce, Education, Health and Human Services, Navy, State, and the Environmental Protection Agency. See General Accounting Office, *supra* note 163, at 8 tbl.3.

income?<sup>171</sup> The obvious solution: impose rules of ethics that prohibit departing appointees from cashing in too quickly and obviously on their pre-existing connections. Putting aside the possibilities of evasion and the inevitable exploitation of loopholes, such initiatives can at best reduce, and not eliminate, the sellout incentive.<sup>172</sup> Nevertheless, there is no reason to suppose that any President will try to change things anytime soon. Although his political loyalists may have bad incentives, at least they are *his* appointees — and that is a lot better than dealing with bureaucrats who look to his rivals in Congress for all their cues.

It would be one thing, of course, to tolerate such a system if it had been reached through conscious choice. But as Hugh Hecló, perhaps our most perceptive modern commentator, emphasizes:

There is no document of state, no great debate or major decision of public record available which uncovers the foundations of our current in-and-outer system. . . .

. . . .

. . . Presidents and their supporters had enough trouble coping with the controversies of the moment without worrying about any larger design that would be of use mainly to their successors. Members of Congress and congressional committees maintained leverage most easily by dealing piecemeal with those fragments of the executive branch of most direct interest to them. The in-and-outer “system” — a misleading term if it is taken to mean a work of conscious design — emerged as a by-product of these microcalculations of political advantage.<sup>173</sup>

The muddle extends back in time to 1787. When Madison & Co. came up with American-style separationism, they had not the slightest inkling of the pathological patterns it would engender two centuries down the line. Given this fact, we should hesitate long before commending our revolving-door “system” to other aspiring democracies — which is precisely what we are doing in offering up an American-style separation of lawmaking power for more general admiration.

2. *From Macro to Micro.* — I have been painting with a broad brush, seeking to isolate central tendencies, not inexorable patterns. Undoubtedly, a close comparison of particular areas of policymaking would yield much complexity and provoke a host of much-needed refinements. Unfortunately, comparative public administration is not a well worked field, and most of the outstanding studies fail to focus on the relationship between different constitutional structures and divergent policymaking styles and

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<sup>171</sup> Linda Fisher sums up the situation this way: “The political appointment, then, is not so much the crown of a long career in public service as it is a ticket to the greater financial rewards available in the private sector.” Fisher, *supra* note 169, at 29.

<sup>172</sup> See G. Calvin Mackenzie, “If You Want to Play, You’ve Got to Pay”: Ethics Regulation and the Presidential Appointments System, 1964–1984, in THE IN-AND-OUTERS, *supra* note 153, at 77, 77–99.

<sup>173</sup> Hugh Hecló, *The In-and-Outer System: A Critical Assessment*, in THE IN-AND-OUTERS, *supra* note 153, at 195, 196–97.

outcomes. A classic work by Samuel Huntington, however, may serve as a model for future work.<sup>174</sup>

On Huntington's telling, the American separation of powers has had a profoundly corrosive impact on the professional character of the military high command. To see his point, consider the operation of an institution like the Joint Chiefs within a Westminster-style government. Within such a system of unseparated lawmaking power, the Joint Chiefs know that the Prime Minister is their boss, and that there is no point in trying to make an end-run around his authority by appealing to his critics in Parliament. The best way for them to maximize their authority is by gaining a reputation for the professional soundness of their advice. The better this reputation, the more the Prime Minister will think twice before overruling the advice.

American-style separation generates a different set of incentives. Not only can the Joint Chiefs club together with the relevant congressional committees to impose their agenda upon the President. In making this effort, they may also sacrifice their professional judgment to valorize useful symbols that will energize their political allies.

But there is more, and worse, to come. The President is no dope and has every reason to take steps to prevent the defection of his Joint Chiefs. In nominating military leaders to these positions, political loyalty, not professional excellence, will be of paramount concern. Up-and-coming generals can be expected to take notice and act accordingly, using their spare time to read up on the latest Dale Carnegie<sup>175</sup> rather than searching out the teachings of a high-tech Carl von Clausewitz.<sup>176</sup>

I am no expert in military affairs and leave Huntington's substantive proposals to others. But his book performs a great service in suggesting the potential pervasiveness of separationism's destructive impact on governmental operation. Precisely because most case studies are so context-specific, it is easy to miss the extent to which different fields may suffer from similar structural pathologies.<sup>177</sup>

I do not suggest that American-style separation makes functional specialization absolutely impossible. From time to time, the politicization of public administration can get *so* bad for *so* long that it may prompt energetic counterreaction and quasi-constitutional efforts to insulate a decisional center from day-to-day political pressures. A leading case is the Federal Reserve Board — an enduring Progressive response to a century of tragicomical and super-politicized mismanagement of the money supply.<sup>178</sup>

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<sup>174</sup> SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 222–70, 400–28 (1957).

<sup>175</sup> DALE CARNEGIE, *HOW TO WIN FRIENDS AND INFLUENCE PEOPLE* (rev. ed. 1981).

<sup>176</sup> CARL VON CLAUSEWITZ, *VOM KRIEGE* (Ferd. Dummlers Verlag 1980).

<sup>177</sup> For a suggestive review of the case study literature that attempts to tease out the structural pathologies attributable to the separation of powers, see Moe & Caldwell, *supra* note 36, at 182–92.

<sup>178</sup> The nineteenth-century story can be pieced together from several sources. See BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA* (1957) (covering the pre-Civil War era); JAMES

Although the Fed has made its share of mistakes, at least it does take facts seriously, its Governors do not turn over every two years,<sup>179</sup> and it refuses to bend to every breeze from the White House or Capitol Hill. The Fed is not entirely insulated from political influence — nor should it be. But political guidance operates over the long term: a series of new appointments can have profound effects, and if performance remains unsatisfactory, Congress and the President are free to change the Fed's governing statute. Short-term expertise is constrained by longer run political supervision.

Of course, it is a fair question whether the existing mix is the right one for this policy area.<sup>180</sup> But it does suggest that American-style systems *can* break out of their hyperpolitical pathologies and affirmatively embrace the logic of functional specialization when things get bad enough.

At least sometimes. After all, the Fed does involve big money, and big money talks in America. But if we turn to other policy areas where functional specialization could yield large returns, one does not find an equally enthusiastic embrace of separation of powers. Environmental regulation provides a case in point. There are few issue areas where long-run perspective and scientific knowledge are more essential for sound policy. But this functional imperative has not motivated a serious effort to structure the Environmental Protection Agency in a way that rewards professional decisionmaking. Carol Browner, for example, did not reach the top of the EPA after a long career of professional accomplishment. She got there at the age of 36 because of her loyalty to Al Gore,<sup>181</sup> and because Bill Clinton did not care enough to put his own loyalist in command. Will it take a century or two of mismanagement before Americans design a separation of powers structure for environmental protection that will enable them to surmount the standard dynamic of their system?

To be sure, bureaucracy-bashing has deep roots in the American psyche. Even without the separation of powers, lots of Americans would believe that “pointy heads” have little or nothing constructive to contribute to the art of government. At the very least, the system certainly enhances this native know-nothingism by encouraging the politicization of professionalism in the management of the administrative state.

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LIVINGSTON, ORIGINS OF THE FEDERAL RESERVE SYSTEM: MONEY, CLASS, AND CORPORATE CAPITALISM, 1890–1913 (1986); IRWIN UNGER, THE GREENBACK ERA: A SOCIAL & POLITICAL HISTORY OF AMERICAN FINANCE, 1865–1879 (1964).

<sup>179</sup> Between 1981 and 1991, the median length of service for a Federal Reserve Governor was 5.3 years. See General Accounting Office, *supra* note 163, app.V at 30.

<sup>180</sup> For a comparative study affirming the value of independence in central banking, see SYLVIA MAXFIELD, GATEKEEPERS OF GROWTH (1997).

<sup>181</sup> See Gwen Ifill, *Clinton Widens His Circle, Naming 4 Social Activists*, N.Y. TIMES, Dec. 12, 1992, at A1 (describing Browner as “a protégée of Vice President-elect Al Gore”). I have documented some of the pathologies of the present hyperpoliticized system in ACKERMAN & HASSLER, *supra* note 140, at 26–58.

*E. Separationism and the Rule of Law*

But there is more than coherent and professional administration at stake. American-style separation poses very serious dangers to the rule of law itself. Although the constitutional text may solemnly require the president to “take Care that the Laws be faithfully executed,”<sup>182</sup> the president’s role in the lawmaking process creates conflicting incentives.

Whenever the president wishes to launch an initiative, he has two choices: propose legislative changes to congress, or implement the changes immediately on the basis of existing legislative authority. Sometimes the costs of taking the legislative tack may be relatively modest. For example, when the president is operating in the mode of full authority, he may find it quite easy to persuade the legislature to codify his initiatives into new law. But when the system is operating in impasse mode, legislative change may be very costly or impossible.

The more congress frustrates the president’s desire to enact his political program into law, the more he will be tempted to achieve his objectives by politicizing the administration of whatever-laws-happen-to-be-on-the-books. To be sure, an impartial reading of these statutes might imply that his initiative falls far beyond the limits of legal authority; but with his political partisans in charge of the administration,<sup>183</sup> why shouldn’t the president encourage them to bend the law to fulfill the administration’s program?

The prime minister and her cabinet never confront this question. By definition, they are in power because they command the support of a majority in parliament. In my jargon, they never operate in the impasse mode, but are always in the mode of full authority (constrained only by the constitutional principles enforced by the supreme court). As a consequence, the costs of choosing the legislative option are much lower: if the cabinet is willing to defend its initiative in the court of public opinion, it will be able to push it through parliament. From time to time, there may well be political costs in going public. Perhaps key members of the governing party or coalition will tolerate low-visibility action on the administrative level but will desert the government if it proposes a high-profile initiative. But these costs will generally be much lower than those prevailing in an American-style system operating in impasse mode.

Further, the costs of pushing the bureaucracy beyond its statutory authority are far greater in a Westminster-style system than they are in an American-style government. As we have seen, the prime minister and her cabinet deal with a different kind of bureaucracy. It is one thing for the president to encourage his far-flung network of short-term political loyalists to read statutes “creatively”; it is quite another for the prime minister

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<sup>182</sup> U.S. CONST. art. II, § 3.

<sup>183</sup> See *supra* p. 711.

to force long-term officials, steeped in the ethic of neutrality, to play fast and loose with statutes.

In short, the parliamentary incentive structure looks better on both sides of the “rule of law” equation: the costs of changing the law are lower, and the costs of overriding it by bureaucratic fiat are higher. So the pressure on the rule of law will be greater in an American-style system. Q.E.D.

This tendency toward lawlessness expresses itself in different ways at different levels of the bureaucracy. The worst pathologies occur at the center. The critical mass of presidential partisans in and around the White House can readily create an environment in which loyalty to the President trumps the rule of law. Recent crises like Watergate and Iran-Contra do not merely represent regrettable lapses in the President’s responsibility to “take Care that the Laws be faithfully executed.”<sup>184</sup> They are systemic features of a system in which the President *must* surround himself with a large band of loyalists if he hopes to steer the bureaucracy effectively. During periods of acute tension between Congress and the President, it is no surprise that some presidential loyalists will be tempted to take the law into their own hands.<sup>185</sup> It is also clear that the threat of presidential impeachment is a very blunt instrument for controlling these recurring crises.

There is more reason to be optimistic about lower-level pathologies. As I have explained, presidential loyalists in the agencies are often tempted to undertake new regulatory initiatives far beyond their statutory mandate. If the situation becomes sufficiently outrageous, there is always the hope that administrative overreaching may be corrected by an independent judiciary, acting under something like the American Administrative Procedure Act.

But the possibility of judicial review should not prevent us from identifying an independently elected presidency as the rule of law’s Public Enemy Number One. Even if the courts stop some of the worst presidential abuses after a year or two or ten, it hardly follows that the system’s bad bureaucratic dynamics are trivial.

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<sup>184</sup> U.S. CONST. art. II, § 3.

<sup>185</sup> This is hardly the place to review the vast literature on Watergate and subsequent presidential abuses of power. For a useful survey, see Ruth P. Morgan, *Nixon, Watergate, and the Study of the Presidency*, 26 *PRESIDENTIAL STUD. Q.* 217 (1996).

My structural analysis comes closest to concerns expressed in the literature by Philip Kurland and Aaron Wildavsky. Kurland rightly notes that it was “not only the President but the presidency that was at fault in the Watergate affair.” PHILIP B. KURLAND, *WATERGATE AND THE CONSTITUTION* 170 (1978). He emphasizes that many of the most egregious Watergate offenders worked in the White House Office, an organization that “originated as a means for the President to check the activities of the bureaucracy.” *Id.* at 177. Wildavsky likewise contends that Watergate arose in part because of presidential efforts to assert ever greater control over the bureaucracy. See Aaron Wildavsky, *System Is to Politics as Morality Is to Man: A Sermon on Watergate and the Nixon Presidency*, in *THE BELEAGUERED PRESIDENCY* 165, 173, 175–77 (1991). Wildavsky concludes that (relatively) independent bureaucrats “are an essential part of the balances that guard our liberties.” *Id.* at 179.

To the contrary, a better solution would marry an American-style APA to the parliamentary system, thereby obtaining the best of both worlds. On the one hand, the parliamentary system reduces the number of bureaucratic assaults on the rule of law; on the other, the American mechanism for judicial review reduces the number further. This is, at any rate, the deeper logic that led me previously to propose American-style judicial review of bureaucratic rulemaking in my model of constrained parliamentarianism.<sup>186</sup>

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We have come, then, to a discouraging conclusion. The separation of powers between house, senate, and president not only encourages crises in governability in times of impasse and desperate struggles against the constitutional clock at moments of full authority. It not only militates against proportional representation and encourages the cult of personality. It also undermines the good form of separation, which seeks to exploit the logic of functional specialization. Rather than encouraging the creative constitutional combination of political responsibility and professional expertise, it overpoliticizes public administration and erodes the rule of law.

At this point, I suppose, defenders of American-style separation may respond by challenging the philosophical premises of my argument. Taking a page from more extreme versions of American Legal Realism and Critical Legal Studies, defenders may challenge the very idea that an “impartial interpretation of the law” is a coherent possibility. On this view, there can be no tension between American-style separation and the rule of law, because the rule of law is a myth.

Similarly, one may try to dissolve the tension between professionalism and American-style separation through a second form of reductionism deriding the “myth of expertise” that serves as a principal justification for bureaucratic regulation. According to the extreme reductionist version, the folks at the Kennedy School are engaged in criminal fraud when they charge outrageous tuition for a degree in public administration — there is simply no such subject that can be taught. And because it’s all politics anyway, there isn’t anything wrong with revolving-door politicians’ using their presidentially approved intuitions as they take their turn at the bureaucratic helm.

But surely these *are* extreme views. What is more troubling is the perceptible drift in mainstream circles toward a view of public administration that assumes presidential politicization to be the norm, rather than the exception.<sup>187</sup> Indeed, this tendency only serves as further evidence for my

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<sup>186</sup> Recall the regulatory branch, discussed above on pages 696 to 697.

<sup>187</sup> For sensitive discussions of this tendency, see Lessig & Sunstein, *supra* note 12, at 99–101, and Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 750–72 (1996).

hypothesis: the hyperpoliticization of administration, generated by an American-style separation of powers, makes it increasingly difficult for many thoughtful observers to consider alternatives seriously.

### III. FUNDAMENTAL RIGHTS

We have been viewing the separation of powers from the vantage point of democratic legitimacy (Part I) and functional specialization (Part II). Our third vantage point takes a more individualistic view. How does the separation of powers protect fundamental rights?

I have reserved this question for last because it raises the most fundamental challenge to the role of democratically elected politicians. Although the dualist doctrine of democratic legitimacy denied politicians full lawmaking authority on the basis of a single election, it did not deny them full authority forever. It simply required them to struggle onward during a period of impasse before gaining their final victory. Similarly, the federalist case for the separation of powers did not challenge the role of democracy, but merely asked how different sets of elected politicians might best be related to one another.

By the same token, the doctrine of functional specialization presumed that politicians might legitimately pass any laws they liked. It focused instead on their predictable tendency to pursue their ends by undermining impartial and informed administration. The challenge was to define the conditions under which the claims of functional specialization by judges and bureaucrats deserved constitutional protection against these predictable efforts to erode the rule of law.

The third doctrine, based on fundamental rights, cuts deeper and seeks to impose ultimate limits on the legislative authority of democratically elected politicians. I organize the discussion by distinguishing between two different rationales for imposing such limitations. When viewed through the lens of political theory, both are familiar enough. However, these two rationales have different institutional implications for the separation of powers, and so it is best to keep them distinct.

#### *A. The Democracy Branch*

The first rationale for fundamental rights derives from the concept of democracy itself. Having won an election, the lawmaking majority may notoriously seek to insulate itself from further electoral tests — by suspending elections, restricting free speech, or fiddling with electoral laws to stack the deck against regions full of disaffected voters. Thanks most notably to the work of John Ely, the need for a check against this sort of

abuse is broadly acknowledged in constitutional circles.<sup>188</sup> But it is a fair question whether we should entrust this function, which Ely calls representational reinforcement, solely to a constitutional court, or whether some aspects of this mission deserve the attention of a special branch of government.

This is, at any rate, the question raised by the common use of independent, but non-judicial, agencies throughout the world to supervise crucial elements of the electoral process. The functions of these agencies have been quite diverse. Sometimes they are called upon to redraw electoral districts to conform with changing populations;<sup>189</sup> at other times, they seek to enforce and interpret campaign finance laws;<sup>190</sup> most often, they simply try to assure an honest count on election day.<sup>191</sup>

I applaud these movements toward independence. Unfortunately, this will not be the universal opinion among established politicians. Because their own electoral fate may hang in the balance, these politicians will be profoundly reluctant to cede control over the electoral process to truly independent authorities. Who knows when a friend might be needed to place a protective shield around a dishonest vote count or an illegal campaign contribution?

As the operation of the American commission on campaign finance demonstrates, this tendency is at work in established democracies no less than in aspiring ones. In the aftermath of Watergate, Congress created the Federal Election Commission as an “independent” agency but provided it with a structure that virtually guaranteed administrative failure<sup>192</sup> — “with

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<sup>188</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1–104 (1980).

<sup>189</sup> The United Kingdom is especially instructive in this respect, given its hostility to any form of separation of powers that threatens to erode parliamentary sovereignty. This entrenched hostility has not stopped the British from entrusting the task of defining parliamentary districts to “four permanent Boundary Commissions, one each for England, Scotland, Wales and Northern Ireland.” COLIN TURPIN, *BRITISH GOVERNMENT AND THE CONSTITUTION* 418 (3d ed. 1995). Turpin writes:

The Commissions are so constituted as to ensure their freedom from political pressure. The Speaker of the House of Commons is *ex officio* chairman of each Boundary Commission; although she does not take part in the work of the Commissions, their independent status is reinforced by the authority and neutrality of her office. A High Court judge (or, in Scotland, a judge of the Court of Session) is the deputy chairman of each Commission and supervises its work. Two other members are appointed by ministers but, *following an assurance given to the House of Commons in 1958, these appointments are always made after consultation with opposition parties.*

*Id.* (emphasis added).

<sup>190</sup> The Federal Election Commission in the United States provides a familiar example. See *infra* notes 192–195.

<sup>191</sup> On the Internet, one can find links to the sites of more than 70 electoral commissions throughout the world. See *National Election Commissions and Other Election Management Bodies* (visited Sept. 7, 1999) <<http://www.ifes.org/links.htm>>.

<sup>192</sup> See BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 1–2 (1990) (“The problem is that as an enforcer, the FEC is a captive of the members of Congress and the two major political parties, the very ones it was supposed to regulate.”); Amanda S. La

no constituency, little money and few friends . . . [it is] an agency whose administrative decisions are vilified by politicians, ridiculed by lawyers and overturned by courts.”<sup>193</sup> The FEC has even failed to convince the Supreme Court to allow it to file a petition for a writ of certiorari without the permission of the Solicitor General,<sup>194</sup> leaving its access to the Court up to the unchecked discretion of a presidential appointee.<sup>195</sup>

Such judicial decisions attest to the bankruptcy of traditional separationist thought. Granted, the function of representational reinforcement does not find an easy home within the standard legislative/executive/judicial trichotomy. But so much the worse for the trichotomy! A better understanding of the separation of powers would recognize that agencies like the FEC deserve special recognition as a distinct part of the system of checks and balances.

Call it the “democracy branch.” The powers delegated to this branch will depend, of course, on the particular conception of democracy embraced at the constitutional convention. A majority may content itself with a very thin view of fair process: as long as the ballots are counted honestly, nothing more should be constitutionally required. Or the convention may commit itself to a much more robust notion, requiring fairness in defining legislative districts and justice in the distribution of financial resources during political campaigns. However the governing ideal is defined, it only makes sense for the constitution to provide a mechanism to ensure the continuing force of its ideal of democracy despite the predictable efforts by reigning politicians to entrench themselves against popular reversals at the polls.

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Forge, *The Toothless Tiger — Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 ADMIN. L.J. AM. U. 351, 358–65 (1996). The FEC has six commissioners, three from each political party, and a voting rule that requires four votes for affirmative action, giving the representatives of each party a veto. “[This] structure makes it possibly the weakest of all federal agencies.” JACKSON, *supra*, at 63.

<sup>193</sup> *Campaign Practices Reports*, CONG. Q., Feb. 11, 1985, at 1.

<sup>194</sup> See *Federal Election Comm’n v. NRA Political Victory Fund*, 513 U.S. 88, 99 (1994). Chief Justice Rehnquist, writing for the Court, acknowledged that “sound policy reasons may exist for providing the FEC with independent litigating authority,” such as the concern that “the Justice Department, headed by a Presidential [sic] appointee, might choose to ignore infractions committed by members of the President’s own political party.” *Id.* at 95–96. But these “policy reasons” were not sufficient, apparently, to lead the Court to interpret ambiguous statutory provisions to support the Commission’s effort to free itself from presidential authority. *Id.*

<sup>195</sup> See generally George F. Fraley III, Note, *Is the Fox Watching the Henhouse: The Administration’s Control of FEC Litigation Through the Solicitor General*, 9 ADMIN. L.J. AM. U. 1215 (1996) (arguing for independent litigating authority for the FEC); Alane Tempchin, Note, *Fall from Grace: Federal Election Commission v. NRA Political Victory Fund and the Demise of the FEC’s Independent Litigating Authority*, 10 ADMIN. L.J. AM. U. 385 (1996) (discussing the effects of *Victory Fund* on the FEC).

The Indian Constitution provides an instructive case study.<sup>196</sup> It explicitly establishes an Election Commission<sup>197</sup> and takes self-conscious steps to safeguard the independence of the democracy branch from partisan pressures.<sup>198</sup> For example, the Chief Election Commissioner is not selected by the Prime Minister, but by the President (who in this parliamentary system is a respected senior statesman).<sup>199</sup> The Commissioner serves a six-year term, with the salary and privileges of a Supreme Court Justice, and can be removed only through impeachment.<sup>200</sup> He presides over a Secretariat of 300 officials in New Delhi that is the nerve center of a national administrative effort.<sup>201</sup> Despite India's well-deserved reputation for corruption,<sup>202</sup> the Commission has been a vital force in sustaining the credible operation of the electoral process.<sup>203</sup>

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<sup>196</sup> Two other important success stories include (1) the French Constitutional Council, which possesses the express constitutional authority to decide contested elections and has done a much better job than the parliament, which made highly partisan decisions under the constitutions of the Third and Fourth Republics, see DOMINIQUE TURPIN, *CONTENTIEUX CONSTITUTIONNEL* 265–82 (1986); John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1781–1792; and (2) the recent operations of South Africa's electoral commission, which has a solid basis in the text of Section 9 of the country's new constitution, see Joel D. Barkan, *African Elections in Comparative Perspective*, in *ELECTIONS: PERSPECTIVES ON ESTABLISHING DEMOCRATIC PRACTICES* 2, 17–18 (United Nations ed., 1997).

<sup>197</sup> See INDIA CONST. art. 324.

<sup>198</sup> See THE FRAMING OF INDIA'S CONSTITUTION 459–60 (B. Shiva Rao ed., 1968) (reporting the Constituent Assembly's conclusion "that the right to vote should be treated as a fundamental right of the citizen and that, in order to enable him to exercise this right freely, an independent machinery to control elections should be set up, free from local pressures and political influences").

<sup>199</sup> The President does consult with the Prime Minister before making this appointment, a practice that some have criticized as threatening the Commissioner's impartiality. See T.K. TOPE, *CONSTITUTIONAL LAW OF INDIA* 905 (2d ed. 1992).

<sup>200</sup> See *Electoral Commission of India: Appointment & Tenure of Commissioners* (visited Sept. 9, 1999) <[http://www.eci.gov.in/infoeci/about\\_eci/index.htm](http://www.eci.gov.in/infoeci/about_eci/index.htm)>. The President may remove the two other members of the Commission only on recommendation of the Chief Election Commissioner. See TOPE, *supra* note 199, at 904.

<sup>201</sup> See *Electoral Commission of India: Commission Secretariat & Election Machinery* (visited Sept. 9, 1999) <[http://www.eci.gov.in/infoeci/about\\_eci/index.htm](http://www.eci.gov.in/infoeci/about_eci/index.htm)>. Note also that "[t]he Secretariat of the Commission has an independent budget, which is finalised directly in consultation between the Commission and the Finance Ministry of the Union Government. The latter generally accepts the recommendations of the Commission for its budgets." *Electoral Commission of India: Budget & Expenditure* (visited Sept. 9, 1999) <[http://www.eci.gov.in/infoeci/about\\_eci/index.htm](http://www.eci.gov.in/infoeci/about_eci/index.htm)>.

<sup>202</sup> The country ranks among the world's most corrupt nations in Transparency International's "Corruption Perceptions Index" — placing in the bottom quarter of the countries listed in the 1998 version of the survey. See Transparency International, *The Corruption Perceptions Index* (visited Sept. 15, 1999) <<http://www.transparency.de/documents/cpi/index.html>>.

<sup>203</sup> According to Professor Walter Hauser at the University of Virginia, "[t]here is no electoral system in the world that is more sophisticated in terms of having an Election Commission concerned with electoral reform and with regularizing the process. The present Election Commissioner has been more vigorous in pushing for electoral reform than anybody in India's history." *Walter Hauser: Historian of Modern India* (visited Sept. 15, 1999) <[http://minerva.acc.virginia.edu/~soasia/newsletter/s\\_95/whi\\_view.html](http://minerva.acc.virginia.edu/~soasia/newsletter/s_95/whi_view.html)> (part one of a two-part series based on an interview with Leah Zahler on Feb. 21, 1995); see V.A. Pai Panandiker, Presentation at the National Endowment for Democracy's Conference

Although the Commission has taken on other important tasks,<sup>204</sup> its core constitutional function is the “superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections” to both the federal and state parliaments.<sup>205</sup> In contrast, the United Kingdom is currently considering the construction of a democracy branch with a much more ambitious mandate. As part of a remarkable constitutional revolution presently underway, the Blair government has expressly endorsed the creation of an independent and authoritative Electoral Commission with exceptionally broad powers, including the regulation of donations to political parties and the limitation of campaign spending:<sup>206</sup>

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on “India’s Democracy at Fifty,” (Sept. 24, 1998), available at *India’s Democracy at Fifty* (visited Sept. 8, 1999) <[http://www.ned.org/page\\_6/in-dia/report.html#Session1](http://www.ned.org/page_6/in-dia/report.html#Session1)>. According to Panandiker:

[T]he electoral system is being revived by the rise in power of the Election Commission. After two bloody elections in 1989 and 1991, there was widespread concern about the electoral process. Since then, the Election Commission has cleaned up the electoral process remarkably through several means. First, it has restricted election expenditures. Second, it has insured that elections are not stolen or rigged . . . .

*Id.* A survey of Indian attitudes about governance conducted by the Centre for the Study of Developing Societies (CSDS) found “that they trusted the election commission and judiciary of the country more than the politicians . . . .” *Id.*

A recent survey by *The Economist* reports:

[A] study by the Election Commission found that in the past 11 parliaments an MP had on average only a 25% chance of being re-elected to the lower house. According to Yogendra Yadav, a political scientist at the Centre for the Study of Developing Societies in Delhi, India experienced a ‘second democratic upsurge’ in the 1990s, with a sharp increase in voting and other forms of political participation by *dalits* (formerly untouchables) and members of tribes and other economically and socially deprived groups. India may be the only country in the world, says Mr. Yadav, where the lower down the social scale people are, the more likely they are to vote.

*Creative Chaos — India’s Democracy Is a Work in Progress*, THE ECONOMIST, May 22–28, 1999, at 16. This resurgence of confidence in the electoral process is the best indication of the Commission’s success.

<sup>204</sup> M.S. Gill, the Chief Election Commissioner, recently described some of the Commission’s emerging priorities:

The question of state funding of elections, like the related question of how to eliminate illegal money from political campaigns, is engaging our serious attention. Since Indian television and radio are mostly state-owned, the Commission is also considering the establishment of a fair mechanism for allotting air time to political parties and candidates during election campaigns. Given free, this time will also amount to indirect state funding for campaigns. With campaign periods as a rule just two or three weeks long, and with each parliamentary constituency containing an average of 1.5 million voters, broadcast media play a crucial role.

M.S. Gill, *India: Running the World’s Biggest Elections*, J. DEMOCRACY, Jan. 1998, at 164, 167–68. In *A.C. Jose v. Sivan Pillai*, A.I.R. 1984 S.C. 921, 925, the Supreme Court of India read the Constitution as granting the Commission authority to supplement, but not to displace, parliamentary legislation. As long as this decision stands, the Commission’s expansionary steps are ultimately subject to parliamentary restriction.

<sup>205</sup> INDIA CONST. art. 324(1). M.P. Jain has developed a more detailed account of the Commission’s powers. See M.P. JAIN, INDIAN CONSTITUTIONAL LAW 452–53 (4th ed. 1987).

<sup>206</sup> See THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM: THE GOVERNMENT’S PROPOSALS FOR LEGISLATION IN RESPONSE TO THE FIFTH REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE, 1999, Cmnd. 4413 [hereinafter GOVERNMENT’S PROPOSALS] (available at <<http://www.official-documents.co.uk/document/cm44/4413/4413-it.htm>>). The government’s

The functions of the Electoral Commission are crucial to maintaining public confidence in our democratic institutions. It is vital, therefore, that the Commission is wholly independent of the government of the day, and is seen to be scrupulously impartial in its dealings with political parties. To ensure that this is the case, the Commission will not be a non-departmental public body on normal lines but will be directly accountable to Parliament. The Bill provides for distinctive machinery for appointing the members of the Electoral Commission and for setting the Commission's budget, which will help reinforce its independent status.<sup>207</sup>

proposals were based on the recommendations of a committee chaired by Lord Neill. *See STANDARDS IN PUBLIC LIFE: THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM, 1998, Cmnd. 4057, at 4–6, 9–13* [hereinafter NEILL COMMITTEE REPORT] (available at <<http://www.officialdocuments.co.uk/docu-ment/cm40/4057/4057.htm>>). The Electoral Commission summarized its mandate as follows:

To supervise the restrictions on spending by and donations to the political parties (and third parties), the Neill Committee proposed the establishment of an independent Electoral Commission. The Government accepts this recommendation. . . . The Government's proposals would give the Electoral Commission a somewhat broader remit than the one proposed by the Neill Committee, to include a responsibility for promoting participation in the democratic process and to assume, after an interval, the functions of the Parliamentary Boundary Commissions . . . . The Electoral Commission is also, as recommended by the Neill Committee, to assume the role of registrar of political parties. It is to have the function of receiving accounts and reports of disclosable donations from the parties (and third parties), and a duty to investigate discrepancies (but not to mount criminal prosecutions). But it is also to have the wider role of reporting on the conduct of elections and referendums and of advising the Government on any necessary changes to the law. It would take over a number of functions from the Home Office and act as a general reference point for advice for the parties, the broadcasting organisations and others on the conduct of elections and referendums.

GOVERNMENT'S PROPOSALS, *supra*, at ch. 1, § 1.8.

Because the provision of an honest vote count is not a serious problem in Britain, the Government does not propose to change the present system, so the new Commission will not be involved in the discharge of a function that is classically at the core of similar agencies in other nations. *See id.* at ch. 2, § 2.14.

<sup>207</sup> GOVERNMENT'S PROPOSALS, *supra* note 206, at ch. 2, § 2.3. The provisions for budgetary independence are especially worthy of note:

The independence of the Electoral Commission will be further buttressed by the arrangements for setting its budget, which will not be controlled by a Departmental Minister. The Commission's budget will be examined by the Speaker's Committee, which will then lay the budget, with any modifications it thinks fit, before the House of Commons . . . . The Speaker's Committee will also approve, by the same process, a five-year corporate plan drawn up by the Electoral Commission.

. . . The [Speaker's] Committee will consist of nine Members of Parliament. Three of the members will be ex-officio appointments, that is the Chairman of the Home Affairs Select Committee, the Home Secretary and a Minister responsible for local government in England. . . . The other six members will be Members of the House of Commons appointed by the Speaker, none of whom will be a Minister (clause 2(4)).

To provide assurance that the absence of Ministerial or Departmental oversight will not result in runaway expenditure, it is proposed that the Bill should contain a number of safeguards. In approving the Commission's budget, the Speaker's Committee will be required to have regard to any advice from the Treasury . . . .

*Id.* at ch. 2, §§ 2.32–2.34.

Although the Speaker is a member of the majority party, he or she has traditionally adopted an especially nonpartisan position in British constitutional arrangements.

As presently contemplated, the House of Commons will specially confirm Commission members,<sup>208</sup> who will serve for up to ten years.<sup>209</sup> Their independence is further guaranteed by provisions that will make them removable only for cause and with the explicit approval of the House.<sup>210</sup>

From beginning to end, the sad American experience with its Federal Election Commission has served as a negative precedent.<sup>211</sup> After acting as the world's great skeptics about separationism during the past two centuries, will the British take the lead in developing the new separation of powers during its coming renaissance?

### *B. Safeguarding Fundamental Rights*

As we all know, the assurance of free and fair elections hardly exhausts the liberal demand for individual rights. Although this single objective is far more difficult to achieve in practice than is generally supposed, it is hardly the crowning aspiration of the liberal's rationale for the separation of powers. On this view, democratically elected politicians should never be allowed to abridge a wide range of fundamental rights even if their repressive program is endorsed repeatedly, and after sober deliberation, by the reigning majority.

This strong form of liberalism has often been contested by a democratic strand of thought within the Western tradition. For strong democrats, it is more important to uphold the right of the People to rule themselves even at the cost of abridging fundamental individual rights. This tension is familiar to all students of constitutional theory, and I shall not try to contribute to its analysis, let alone to its resolution. For present purposes, it is enough to consider how one might view the separation of powers if one were persuaded (as I am)<sup>212</sup> that a constitution ought to constrain the exercise of democratic self-rule by protecting fundamental individual rights.

Unsurprisingly, it all depends on how one defines the fundamental.

1. *Laissez-Faire Liberalism.* — The laissez-faire liberal supposes that the status quo provides an acceptable baseline for the elaboration of fundamental rights and looks upon hyperactive government as the only serious threat to liberty. As a consequence, he should have little trouble endorsing

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<sup>208</sup> See *id.* at ch. 2, § 2.29. Moreover, before making appointments, “the Prime Minister will be required to consult the leaders of those political parties to which two or more sitting Members of the House of Commons belong at that time.” *Id.*

<sup>209</sup> See *id.* at ch. 2, § 2.30.

<sup>210</sup> See *id.*

<sup>211</sup> See, e.g., Peter Riddell, *Balanced Package That Must Be Adopted Whole*, TIMES (London), Oct. 14, 1998, at 10 (“The overall success of the reforms will depend on the election commission, to monitor parties and elections. But it will have to demonstrate its independence and teeth, unlike the Federal Elections [sic] Commission in Washington.”).

<sup>212</sup> For my own position, see ACKERMAN, FOUNDATIONS, *supra* note 15, at 319–22, and ACKERMAN, SOCIAL JUSTICE, *supra* note 119, at 273–324.

the logic of functional specialization as far as both the courts and the bureaucracy are concerned.

But he will pause long and hard over the proposal of an American- or French-style separation of lawmaking powers. On the one hand, he might well rejoice in the governmental impasses that such a system invites. What others call crises in governability may look pretty good to him. If the president and congress spend their time exploiting each other's sexual peccadillos for partisan advantage or blaming one another for some policy fiasco, at least they are not disturbing the status quo.<sup>213</sup>

On the other hand, laissez-faire adherents may well be appalled by other structural features of the system. As we have seen, when the separation of powers moves into the mode of full authority, the victors tend to lurch forward at breakneck speed and may violate fundamental rights as they rush to entrench their program before the next election. Once they have enacted their rights-destroying initiatives into law, it may not be so easy to repeal them even if their oppressive program generates a backlash at the next election. Moreover, the separation of lawmaking power tends to undermine the logic of functional separation — threatening the impartial application of the rule of law by hyperpoliticized courts and bureaucrats.

And then there is always Linz's nightmare: the rival powers may try to solve their impasse in the manner of President Fujimori's assault on Parliament, leading to the very tyranny that the laissez-faire liberal fears the most.

Perhaps, then, the best hope for the laissez-faire liberal is constrained parliamentarianism?<sup>214</sup> After all, this model authorizes a constitutional court to operate as a front-line guardian of fundamental rights through the exercise of judicial review. Although the court may fail in this job, is it not wisest to leave it to the voters to rebuke the aspiring tyrants at the next election? If this appeal to the people is successful, the new government will be in a position to sweep out the embryonic tyranny without encoun-

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<sup>213</sup> Characteristically, laissez-faire constitutional theorists emphasize the virtues of impasse, failing to notice the other side of the equation. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 233–48 (1967) (analyzing the extent to which bicameralism serves to protect the status quo against modification by simple majority rule); William H. Riker, *The Justification of Bicameralism*, 13 *INT'L POL. SCI. REV.* 101, 101 (1992) (“The traditional liberal justification of bicameralism is that it slows down the legislative process, renders abrupt change difficult, forces myopic legislators to have second thoughts, and thereby minimizes arbitrariness and injustice in governmental action. My argument, *of course*, accepts this traditional justification but I also strengthen it . . . .” (emphasis added)).

<sup>214</sup> There is, however, a feature of constrained parliamentarianism that may be less attractive to the laissez-faire liberal. This is its specification of a referendum power that allows for a structured appeal to the people. The status of such a power will depend on the details of the particular laissez-faire theory — in particular, the extent to which the theory is committed to popular sovereignty on those matters that are not resolved by its conception of liberal rights. Perhaps the most emphatic recent rejection of referenda-like devices has been written by William Riker. See WILLIAM RIKER, *LIBERALISM AGAINST POPULISM* 238–41 (1982).

tering the resistances generated by the checks and balances of an American-style constitution. At the same time, constrained parliamentarianism promises to avoid Linz's nightmare, the erosion of the rule of law by hyperpoliticized bureaucracies, and the sporadic lunges characteristic of separated government operating under full authority.

To be sure, the laissez-faire liberal will lose the protections that the impasse mode affords. But maybe the rewards are worth the risks of constrained parliamentarianism?

2. *Activist Liberalism: The Distributive Justice Branch.* — Activist liberals answer this question by putting different weights into the equation. They recognize, as the partisans of laissez-faire do not, that government has no monopoly on tyranny and that citizens may be just as easily deprived of their birthright to freedom by ignorance, poverty, and prejudice. Because governmental do-nothingism can threaten these fundamental interests, the activist liberal will take an even dimmer view of the systematic impasses generated by an American-style separation of powers between president and congress.

He will not, however, find the model of constrained parliamentarianism altogether satisfactory. His problem will be quite different from that of the partisan of laissez-faire. Rather than celebrating the virtues of legislative impasse, the activist is concerned about the uncanny ability of elected legislatures to tolerate the entrenched injustices of the status quo and will consider some new uses of the separation of powers as a potential remedy.<sup>215</sup>

The problem is a vicious cycle in which injustice breeds political weakness. Because democratic politicians are interested in winning elections, they will be the first to notice that the victims of ignorance, poverty, and prejudice generally have a hard time mobilizing themselves for effective political action. Indeed, one of Marxism's clearest mistakes was to offer us a scenario in which the invisible hand of the marketplace miraculously leads the proletariat to rise up and revolutionize the system.

This scenario is pure pie in the sky. Although it may prove possible, from time to time, to organize successful popular movements for social justice, most politicians will usually maximize their reelection chances by giving greater weight to the interests of the rich and the educated. This obvious point leads the activist liberal to consider a new use for the separation of powers. During those rare moments of popular mobilization, he should urge the construction of a "distributive justice branch" organized to withstand the predictable backsliding of normal democratic politics.

Unfortunately, traditional separationist thinking has blocked the constructive consideration of this possibility. On this trinitarian line, the only

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<sup>215</sup> See ROBERTO MANGABEIRA UNGER, *POLITICS: THE CENTRAL TEXTS* 312–14 (1997) (describing a system of governmental interventions into areas of unjust social domination).

branches worth talking about are big chunky objects called the legislature, the executive, and the judiciary. Within this familiar framework, the constitutional creation of so-called “positive rights” to economic and social welfare threatens to become an exercise in futility. Because the poor and uneducated will rarely be in a position to express their political interests with great effect, a democratically elected legislature and executive will often turn deaf ears to the constitutional call for distributive justice — leaving the enforcement of any textual mandate for “positive rights” to the tender mercies of the judiciary. Even if a constitutional court were disposed to take such textual guarantees seriously, the judges would lack the remedial capacity to order the big budgetary appropriations necessary to transform “positive rights” into social realities. At the end of the day, constitutional “guarantees” of social welfare would not be worth the paper on which they were written.

Worse yet, the judges’ failure to enforce positive rights may demoralize their efforts to protect more traditional rights of negative liberty. Once some parts of the written constitution have been denigrated as serving merely aspirational purposes, it becomes far easier for tough-minded jurists to dismiss the entire effort to protect individual rights as utopian. Under this scenario, the proud activist effort to constitutionalize positive liberty may actually prove counterproductive, legitimating a whole-scale abandonment of the project of liberal rights protection. Given this danger, isn’t it more sensible for activist liberals to join with their laissez-faire colleagues in restricting the constitution’s guarantees to an appropriate set of negative liberties?

Perhaps.<sup>216</sup> But it is far more profitable to challenge the traditional trinitarianism that has thus far structured this debate. Rather than leaving the matter of positive rights to the courts, the activist liberal constitution should construct a “distributive justice branch” designed with the distinctive problems of implementation in mind. We should, for starters, guarantee our newly separated branch a specific share of the net domestic product. The constitution should formally provide that  $x$  percent of the net domestic product go to this branch before any other function receives funding. We can count on the rich and powerful to lobby effectively for national defense, criminal justice, and many other public enterprises, but we cannot expect a similar commitment on behalf of the victims of entrenched injustice. Of course, this is only the first step. How can we ensure that the members of the branch do not use the money to line their own pockets or divert the funds for other purposes?

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<sup>216</sup> Compare Cass Sunstein, *Against Positive Rights: Why Social and Economic Rights Don’t Belong in the Constitutions of Post-Communist Europe*, E. EUR. CONST. REV., Winter 1993, at 35, 35–38, with Herman Schwartz, *Economic and Social Rights*, 8 AM. U. J. INT’L L. & POL’Y 551 (1993), and Herman Schwartz, *In Defense of Aiming High: Why Economic and Social Rights Belong in the New Post-Communist Constitutions of Europe*, E. EUR. CONST. REV., Fall 1992, at 25.

This clear and present danger should encourage a cautious approach to defining the constitutional mission of the branch. Rather than giving it a free-wheeling mandate to deliver complicated goods and services, we should charge it with the narrow, but fundamental, task of providing a minimum cash grant to the target population. The reasons for this restriction are prudential, but no less important for that.

Broadly speaking, we have had rather good success in designing programs, like Social Security retirement pensions, that have delivered substantial cash benefits on an impartial basis.<sup>217</sup> In contrast, government success in delivering other crucial services to victims of injustice has been much more uneven. If we are to give the branch substantial independence from day-to-day control by politicians, simple prudence suggests that it should focus on the tasks that have already been reliably achieved by functionally differentiated bureaucracies in the past — and that can be most easily reviewed by an outside board of impartial experts in accounting and bureaucratic management.<sup>218</sup> I do not suggest that the activist constitution should be indifferent to the provision of crucial goods like education and health care. But given the ease with which bureaucracies charged with these tasks can go astray, it is only sensible to leave them much more open to day-to-day political oversight. In contrast, designing a separate branch to deliver cash grants reliably is unlikely to overtax our institutional imagination. Although cash will hardly solve all its problems of ignorance, poverty, and prejudice, something is better than nothing. A distributive justice branch that can *credibly* deliver on its constitutional commitment to social justice will vastly enhance the overall legitimacy of the system.

Even with the branch functioning in a reliable fashion, much more will be required to achieve a reasonably just society. But this vast gap reveals

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<sup>217</sup> Although retirement pensions serve as the most familiar example, a system of cash grants may be used for a far more ambitious assault on the problem of unequal opportunity that increasingly erodes the political legitimacy of post-industrial societies. See BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 4–5, 8–12 (1999) (arguing that a system of cash grants would enable citizens to claim a greater economic and political stake in American society); PHILIPPE VAN PARIJIS, *REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM?* 32–35 (1995) (proposing the payment of a “basic income” from the government to each member of society). This is not the place to consider the merits of particular proposals, and so a more conditional assessment must suffice: the more it makes sense to depend heavily on the aggressive use of cash grants to remedy the grinding inequalities generated by a free-market system, the more it makes sense to construct a constitutional foundation for a distributive justice branch.

<sup>218</sup> Roberto Unger takes a different view. See ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 30–33 (1996) (proposing the use of structural complex enforcement to protect vulnerable minorities). Building on American judicial practice, Unger would empower a separate branch for the more ambitious function of challenging and rooting out especially egregious cases of institutional domination over the weak and vulnerable. See *id.*

I do not deny the need for such interventions into morally bankrupt institutions, but for the reasons suggested in the text, I question the extent to which interventions and institutions should be insulated from the control of the parliament and the constitutional court.

only that the liberal doctrine of separation, like every other legal technique, has serious limitations. By urging the creation of separate branches devoted to democratic rights and distributive justice, the activist liberal hardly wishes to deny the central importance of democratic politics (doctrine one) and functional specialization (doctrine two). He merely suggests that, given the complex ambitions of liberal democratic government, we may build a better structure with three doctrines rather than two.

#### IV. THE SHAPE OF THE NEW SEPARATIONISM

This is an explanatory essay on a big subject, and it will serve its purpose if it jogs us out of ritualistic incantations of Madison and Montesquieu. The separation of powers is a good idea, but there is no reason to suppose that the classical writers have exhausted its goodness. To the contrary. As we explored each of separationism's three rationales, we found plenty of reasons to question received American wisdom.

I have been raising my doubts one at a time, without suggesting that all my revisionist proposals must stand or fall together. Undoubtedly, some of my ideas are more sensible than others, and they can be mixed with, and matched to, other initiatives in lots of different ways. At this early stage, it seems wiser to operate at retail rather than wholesale, allowing a new understanding of the whole to emerge from the sum of the parts that survive collective scrutiny.

This said, a distinctive pattern *does* emerge. At the centerpiece of my model of constrained parliamentarianism is a democratically elected house in charge of selecting a government and enacting ordinary legislation. The power of this center is checked and balanced by a host of special-purpose branches, each motivated by one or more of the three basic concerns of separationist theory.

From the side of democratic legitimacy, the center is constrained by the previous decisions of the people rendered through serial referenda and enforced by a constitutional court. It may also be checked by a subordinate federal senate or a more powerful second chamber organized on national lines.

From the side of functional specialization, the center is constrained not only by an independent court system, but also by an integrity branch scrutinizing the government for corruption and similar abuses, as well as a regulatory branch forcing the bureaucracy to explain how its supplemental rulemaking will actually improve upon the results generated by the invisible hand.

From the side of liberal rights, the center is constrained by a democracy branch seeking to safeguard each citizen's participatory rights, a distributive justice branch focusing on minimum economic provision for those citizens least able to defend their rights politically, and a constitutional court dedicated to the protection of fundamental human rights for all.

At first glance, this may seem like an overly complicated structure. But is this first impression merely a product of the scheme's novelty? After all, the American system contains (at least) five branches: House, Senate, President, Court, and independent agencies such as the Federal Reserve Board. Complexity is compounded by the bewildering institutional dynamics of the American federal system. The crucial question is not complexity, but whether we Americans are separating power for the right reasons.

Indeed, there is an important sense in which American-style separationism generates a far more complex institutional pattern than does my model of constrained parliamentarianism. By separating power among President, House, and Senate, the Madisonian pattern not only generates a host of lawmaking pathologies, but also disrupts the coherence of professional public administration. In contrast, my model hives off a number of special functions from direct parliamentary control without generating the pervasive bureaucratic disruptions characteristic of the American system. Of course, there will come a point at which the number of constraining branches will itself generate increasingly pathological dynamics. Yet is there *any* good reason to suppose that a sensible modern government should divide power among only three or four branches?

And the conversation has only just begun!

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But is it worth continuing? I anticipate many sorts of skepticism. Historicists will insist that my abstractifying style of constitutional engineering is worthless without a deep understanding of the Volk and its Geist. Economic determinists will insist that I have been shadow-boxing with epiphenomena and that constitutionalists should be fixing their attention on the internal dynamics of class structure or the paramount imperatives of the world economic system.

And so forth.

I remain unrepentant. Not, mind you, that Geist and Class are unimportant. Some societies are so divided that it would be fatuous to seek salvation through constitutional engineering. In all cases, constitutional engineering must be combined with cultural sensitivity and economic realism. I do not suppose, for example, that my arguments should lead Americans to abandon their historical commitment to the separation of powers between House, Senate, and President. Although American history is replete with both the pathologies of impasse and of full authority, this separation has now become second nature for us. We would find it extraordinarily difficult to trade the current model in for a new one — though who

can say what kinds of agonizing reappraisal will be forced upon us during the next American century?<sup>219</sup>

For now, it is more important to recognize that America really is exceptional in its relatively benign experience with its familiar forms of separation. Despite our present military and cultural hegemony, we should be very reluctant to hold the American system up as an ideal for aspiring democracies throughout the world. Yet this is just what seems to be going on: “[I]n the 1980s and 1990s, all the new aspirant democracies in Latin America and Asia (Korea and the Philippines) have chosen pure presidentialism. . . . [O]f the approximately twenty-five countries that now constitute Eastern Europe and the former Soviet Union, only three — Hungary, the new Czech Republic, and Slovakia — have chosen pure parliamentarism.”<sup>220</sup>

Rather than praising this development as a latter-day vindication of the eternal truths first glimpsed by Montesquieu and the American Founders, we should view it with anxious concern. Are we beginning yet another round of Latin America’s disastrous nineteenth century experience with the North American model, but this time on a global scale?

Although we should be restrained in exporting our peculiar institutional system, Americans should be audacious in imagining new modes of separation. We are only at an early stage in coping with three great challenges of the modern age: to make the ideal of popular sovereignty a credible reality in modern government, to redeem the ideal of bureaucratic expertise and integrity on an ongoing basis, and to safeguard fundamental liberal rights by guaranteeing basic resources for self-development to each and every citizen. We honor Montesquieu and Madison best by seeking new constitutional forms to master these challenges, even at the cost of transcending familiar trinitarian formulations.

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<sup>219</sup> James L. Sundquist has written a thoughtful reformist essay. See JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* (1992). Rather than trying to rip up the existing system by the roots, he proposes a series of piecemeal reforms which, taken cumulatively, would represent a significant response to the pathologies of the present regime. See *id.* at 18–20, 322–34.

<sup>220</sup> Alfred Stepan & Cindy Skach, *Presidentialism and Parliamentarism in Comparative Perspective*, in 1 *THE FAILURE OF PRESIDENTIAL DEMOCRACY*, *supra* note 19, at 119, 120. Of course, there are many different ways of injecting an independent presidency into governing arrangements, some more toxic than others. See generally MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* (1992) (discussing and contrasting the forms and methods of implementing presidential power). And the new democracies of Eastern Europe have, in sharp contrast to those of the former Soviet Union, given their presidents relatively few formal powers. Nevertheless, a recent study of Eastern Europe concludes that “presidents are far more influential political players than . . . in most West European states, and seem likely to remain so for some time.” Thomas Baylis, *East Central European Presidents Ten Years On*, Address at the 1999 Annual Meeting of the American Political Science Association (Sept. 1999) (emphasis omitted).