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THE UNIVERSITY OF **ALABAMA** --- SCHOOL OF LAW

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Working Paper

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The Perplexing U.S. Preoccupation with Executive/Legislative Separation of Powers,
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Pluralism to the Perceived Legitimacy of Government Institutions

by

Prof. R.J. Krotoszynski, Jr.¹

I. Introduction

The United States has been both an importer and an exporter of constitutional structure at least since the Federal Convention, in 1787, at which the Framers considered a variety of foreign constitutional models, both contemporary and ancient, when fashioning the Constitution of 1787.² Although Great Britain's unwritten constitution provided the most obvious template, it was by no means the only available model. By 1787, most states had extensive experience with constitutional design.³ The adoption of the Declaration of Independence, in 1776, led to a spate

¹ John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. I wish to acknowledge the very helpful comments and suggestions offered by the participants at the 2008 Administrative Law Discussion Group meeting, hosted by the University of Montpellier Faculty of Law, in Montpellier, France. In particular, I want to thank Michael Asimow and Peter Strauss for particularly thoughtful and constructive suggestions on how to develop my thesis. A University of Alabama Law Foundation Summer Research Grant supported my work on this project. In addition, I am grateful to the Lewis & Clark Law School for hosting me as a visiting scholar in residence while I was working on this Article. As always, any and all errors and omissions are my responsibility alone.

² See, e.g., Federalist No. 38, at 231, 232-33 (James Madison) (Clinton Rossiter ed. 1961) (citing and discussing the constitutions of Athens, Sparta, and Rome); Federalist No. 39, at 240, 240-41 (James Madison) (Clinton Rossiter ed. 1961) (citing and discussing the constitutions of Holland, Venice, Poland, and England). On the Framers' familiarity and reliance on foreign and historical constitutions, see William A. Galston, *The Use and Abuse of the Classics in American Constitutionalism*, 66 CHI-KENT L. REV. 47, 47-55 (1990); see also Akhil Reed Amar, *Architexture* +, 77 IND. L.J. 671, 672-73 (2002); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 714-18 (2001); Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 68-70 (2002).

³ A state of affairs that advocates of ratification of the new Constitution expressly admitted – along with acknowledging that the draft federal constitution reflected some reliance on these preexisting state constitutional models. See Federalist No. 39, *supra* note __, at 240, 242 (Alexander Hamilton) (Clinton Rossiter ed. 1961); Federalist No. 47, at 300, 303-07 (James Madison) (Clinton Rossiter ed. 1961); see also Paul D. Carrington, *Writing Other Peoples' Constitutions*, 33 N.C. J. INT'L & COM. REG. 167, 169-70 (2007).

of new constitution making at the state level, as the newly independent former colonies felt it necessary to establish new constitutions for their independent republics.⁴ The Articles of Confederation, drafted in 1776-1777, ratified in 1781, and now largely forgotten, also served as the first blueprint for federal governance.⁵ Thus, as Professor Paul Carrington correctly states the matter, “[w]hile the idea of a written constitution enforced by national courts was an American novelty, it was less novel than many may suppose.”⁶

Of course, the Framers did not completely abandon the British model of constitutional structure. Congress, a bicameral institution, is loosely modeled on the British Parliament, which was (and still is) comprised of two chambers, the House of Commons and the House of Lords.⁷ Although the manner of selection and underlying purposes differ,⁸ the adoption of a bicameral legislature plainly reflects an homage to the British model. Similarly, specific provisions of the Constitution reflect longstanding British constitutional practices; the Speech and Debate Clause⁹

⁴ See Carrington, *supra* note ___, at 168-69.

⁵ See ALFRED H. KELLY, WINFRED A. HARBISON, & HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 79-85 (6th ed. 1983).

⁶ Carrington, *supra* note ___, at 169.

⁷ See Vicki C. Jackson & Mark Tusnet, *COMPARATIVE CONSTITUTIONAL LAW* 358-63 (1st ed. 1999); see also James Hyre, Comment, *The United Kingdom's Declaration of Judicial Independence: Creating a Supreme Court to Secure Individual Rights Under the Human Rights Act of 1998*, 73 *FORDHAM L. REV.* 423, 428-35 (2004).

⁸ The Framers intended the Senate, with its equal representation of all states regardless of population, to provide a means for smaller states to protect their interests against the potential depredations of the larger, more populous states. The House of Lords, by way of contrast, existed to ensure that the commons would not disregard the institutional powers and prerogatives of the British hereditary aristocracy and the those of the ecclesiastical hierarchy. In both cases, however, the upper chamber existed to temper the potential excesses of the lower, more democratic, house.

⁹ See U.S. Const., art. I, § 6, cl. 1 (“The Senators and Representatives shall . . . be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.”).

provides a good example, as does the Jury Trial Clause in the original Constitution.¹⁰

To be sure, the Framers departed from the British model and did so in significant ways. The Framers' major structural innovations include a written constitution (as opposed to the unwritten, or only partially written, British Constitution), a judiciary vested with the power to review legislative and executive acts for consistency with the Constitution, federalism featuring shared sovereignty between the states and the national government, and the separation of powers between the legislative, executive, and judicial branches of government. To this list one could add, by way of amendments quickly adopted by the very first Congress and ratified by the states shortly thereafter, a written Bill of Rights.

Most of these innovations in constitutional design have become commonplace; when other nations turn to the task of constitution making, the resulting product often includes one or more of these elements. The Spanish Constitution, for example, adopted a federalist principle in order to overcome persistent difficulties with the status of Catalunya and the Basque Region.¹¹

¹⁰ See U.S. Const., art. III, § 2, cl. 3 ("The Trial of all Crimes, except in cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."). The Sixth Amendment restates the right to a jury trial and extends the scope of the right by expressly requiring "a speedy and public trial," "by an impartial jury," with the defendant "to be informed of the nature and cause of accusation," and "to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const., amend. VI. The right to trial by jury preexisted U.S. independence from Great Britain and was simply incorporated into the new domestic legal regime as a continuation of this preexisting right.

¹¹ See CONSTITUCION [CE] art. 2 (Spain); see also Charles E. Ehrlich, *Ethno-cultural Minorities and Federal Constitutionalism: Is Spain Instructive?*, 24 S. ILL. U. L.J. 291 (2000); Michel Rosenfeld, *Constitution-making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired By the Spanish Example*, 19 CARDOZO L. REV. 1891, 1902-14 (1998); see generally James Leonard, *Title VII and the Protection of Minority Languages in the University Workplace: The Search for a Justification*, 72 MO. L. REV. 745, 780-81 (2007) ("The feeling among multiculturalists is that such cultures deserve protection both because they represent fully functioning cultures that provide meaningful lives to their adherents and because members of national minorities should not be assimilated against their will. The mechanics of protecting national subcultures are conceptually (though not politically) simple: a nation cedes sufficient autonomy to the national minority to establish or maintain a societal culture. Spain, for example, has constituted 'autonomous communities' with co-official languages for six regions, including the Catalonians and the Basques.").

The South African Constitution vests the judiciary with a power of judicial review and a duty to enforce entrenched human rights against the more democratically accountable branches of government.¹² Moreover, even common law jurisdictions that long maintained the principle of parliamentary supremacy have moved closer to the U.S. model of entrenched, judicially enforceable human rights.¹³ Canada, for example, adopted its Charter of Rights and Freedoms in 1982, and vested the Canadian judiciary with a qualified power of judicial review.¹⁴ Even in the United Kingdom itself, adoption of the Human Rights Act of 1998 reflects a decision to move closer to the U.S. model of entrenched, judicially enforceable human rights.¹⁵

Thus, the U.S. Constitution has provided a persuasive model for other nations engaged in the task of writing a constitution. Judicial review and entrenched human rights are, if not a universal aspect of constitutions adopted after World War II, quite nearly so.¹⁶ As Robert

¹² See S. AFR. CONST. ch. 8, §§ 165(2), 167(5); *see also* ch. 2, § 39, para. 1.b & c (authorizing and requiring the domestic courts to “consider international law” and authorizing the domestic courts to consider “foreign law” when interpreting the South African Bill of Rights); *see also* Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 562 (2005) (noting that “U.S. courts, unlike the South African Constitutional Court, do not have explicit constitutional authorization to consider foreign and international sources” and suggesting that “[a]ccordingly, the South African court’s fairly aggressive approach to importing international norms into domestic law may be inappropriate for U.S. courts.”).

¹³ See JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 3, 25-50 (2004) (Robert Badinter & Stephen G. Breyer, eds.).

¹⁴ See ; *see also* Ronald J. Krotoszynski, Jr., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS 26-28, 38-47 (2006).

¹⁵ See *id.* at 183-88.

¹⁶ Australia and New Zealand provide instructive counterexamples – the exceptions that prove the general rule. Israel’s constitution, which consists of constitutive acts, adopted over many years, provides another counterexample. Even in Australia, however, the federal courts have found that securing certain rights essential to the constitutional design, such as the freedom of speech incident to the electoral process, justifies a limited power of judicial review. See *Lange v. Australian Broad. Corp.*, 189 C.L.R. 520, 556 (1997) (Austl.); *Australian Capital Tele. v. Commonwealth*, 177 C.L.R. 106 (1992) (Austl.); *see also* Arthur Glass, *Australian Capital Television and the Application of Constitutional Rights*, 17 SYDNEY L. REV. 29 (1995); Adrienne Stone, *Australia’s Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYDNEY L. REV. 29, 31-34 (2005).

Badinter, former President of the French Conseil Constitutionnel, has aptly observed, “today almost all Western democracies have come to believe that independent judiciaries can help to protect fundamental human rights through judicial interpretation and application of written documents containing guarantees of individual freedom.”¹⁷ Thus, the U.S. constitutional model has proven to be a very successful legal export in many important respects. In one significant respect, however, the U.S. template has not garnered many takers: separation of legislative and executive powers and strict judicial definition and enforcement of the boundaries between executive and legislative power.

II. The Rigorous U.S. Commitment to Executive/Legislative Separation of Powers

In the United States, a strong commitment to separating and dividing legislative and executive power exists at the federal level (it exists in most state constitutions as well). This separation of powers commitment appears front and center in recent opinions of the Supreme Court of the United States; it reflects concerns appearing in bold relief in the legislative history of the Constitution; and, perhaps most importantly, the text of the Constitution itself commands a strong form of legislative/executive separation of powers. This form of structural separation of powers is, if not unique, highly unusual, at least when viewed from a comparative law perspective.

A. The Supreme Court of the United States and Executive/Legislative Separation of Powers.

The Supreme Court of the United States has rigorously enforced the separation of powers, disallowing a number of novel institutional innovations that the Congress and the President adopted in order to facilitate good governance. As Justice Powell observed in *Buckley*, “[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of

¹⁷ JUDGES IN CONTEMPORARY DEMOCRACY, *supra* note ___, at 3.

1787.”¹⁸ Accordingly, “[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”¹⁹ Professor Marty Redish accurately has noted that “[a]lthough one may of course debate the scope or meaning of particular constitutional provisions, it would be difficult to deny that in establishing their complex structure, the Framers were virtually obsessed with a fear—bordering on what some might uncharitably describe as paranoia—of the concentration of political power.”²⁰

The consistency of the Supreme Court’s efforts at enforcing separation of powers principles is open to criticism, however. As Redish notes, “[i]n the separation of powers area, however, the modern Court has evinced something of a split personality, seemingly wavering from resort to judicial enforcement with a formalistic vengeance to use of a so-called ‘functional’ approach that appears to be designed to do little more than rationalize incursions by one branch of the federal government into the domain of another.”²¹ That said, in the area of policing the blending of executive and legislative functions, the Supreme Court has been relatively strict in enforcing separation of powers limits, disallowing both encroachments on one branch by the other and attempts by one branch to aggrandize itself at the expense of the other.

In *Chadha*, for example, the Supreme Court invalidated the use of so-called legislative vetoes, a procedure whereby Congress delegates authority to the President, but reserves for itself, via a single house or a committee of a single house, the power to oversee, and even to disallow, the President’s use of this delegated authority.²² Writing for the *Chadha* Court, Chief Justice

¹⁸ Buckely v. Valeo, 424 U.S. 1, 124 (1976).

¹⁹ *Id.* at 123.

²⁰ Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 451 (1991).

²¹ *Id.* at 450.

²² *See* INS v. Chadha, 462 U.S. 919 (1985).

Burger explained that in order to modify a law, a bill must be enacted by both houses of Congress and presented to the President for signature or veto; as the Court put the matter, “[t]hese provisions of Article I are integral parts of the constitutional design for the separation of powers.” Because Congress cannot execute laws and because bicameral action and presentment is necessary to modify an existing law (for example, to disallow the President’s use of previously delegated authority), a one house or one committee “legislative veto” represents an unconstitutional aggrandizement of Congress at the expense of the President.²³

Similarly, in *Bowsher v. Synar*,²⁴ the Supreme Court invalidated the Balanced Budget and Emergency Deficit Control Act of 1985, also known as the Gramm-Rudman-Hollings Act, because it vested execution of the law with the Comptroller General, a government officer only nominally appointed by the President (from a list devised by Congress) and an officer subject to removal by Congress without resort to impeachment. The Court explained that “[t]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto.”²⁵ Because “[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.”²⁶

Other major U.S. Supreme Court decisions involve strong efforts to enforce the structural

²³ See *id.* at 945-57. Congress could delegate power to the President, with a duty to report on how he exercises it, and provide for accelerated consideration of legislation disallowing the President’s action – but such legislation would have to be enacted by both houses of Congress and presented to the President for a probable veto. Moreover, Congress could require the President to wait for a prescribed period of time before implementing his plan. Thus, so-called “report and wait” provisions do not fall afoul of *Chadha*’s rule against legislative vetoes.

²⁴ 478 U.S. 714 (1986).

²⁵ *Id.* at 726.

²⁶ *Id.*

separation of executive and legislative powers, including cases such as *Buckley v. Valeo*²⁷ and *Clinton v. City of New York*.²⁸ Thus, the Supreme Court has repeatedly rejected efforts to blend executive and legislative powers in novel ways, even if Congress and the President mutually agreed to such power sharing, and even if concrete benefits might be associated with the novel power sharing arrangements.²⁹ “It is more than a little ironic that the Supreme Court has deployed formalist reasoning to strike down novel power-sharing arrangements between Congress and the President, but has relied on functional reasoning to permit the transfer of legislative and executive duties to Article III personnel.”³⁰

One should be careful, of course, not to overstate the point; contrary evidence and trends exist, and one must acknowledge them. For example, the Supreme Court has largely abandoned efforts to enforce the nondelegation doctrine,³¹ which purportedly limits the scope of delegated

²⁷ 424 U.S. 1 (1976) (holding that Congress may not appoint members of a commission charged with enforcing the Federal Election Campaign Act of 1971, as amended, because legislative appointment to an executive office does not comport with the Appointments Clause of Article II, § 2, cl. 2); *see also* *United States v. Germaine*, 99 U.S. 508-09 (1879) (“That all persons said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment [direct appointment by the President with the advice and consent of the Senate or appointment of “inferior officers” by “the President alone, the Courts of Law, or the Heads of Departments”] there can be but little doubt.”).

²⁸ 524 U.S. 417 (1998) (invalidating the Line Item Veto Act, a statutory effort to vest the President with the power to cancel “any dollar amount of discretionary budget authority,” “any new item of direct spending” or “any limited tax benefit” after having signed the law authorizing the appropriation or creating the limited tax benefit because only Congress can repeal a statute once a statute has been enacted and by the exercise of a line item veto “[i]n both legal and practical effect, the President has amended two Act of Congress by repealing a portion of each”).

²⁹ *See* Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 Wm. & Mary L. Rev. 417, 475-81 (1997) (arguing that the federal courts should be vigilant in policing efforts to engage judges in legislative or executive tasks, but that the federal courts have in practice been much more aggressive at enforcing the separation of powers in the context of novel legislative/executive power sharing arrangements).

³⁰ *Id.* at 480.

³¹ *See* Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 264-67 (2005).

authority that Congress may grant to the executive branch.³² In theory, unless Congress provides an “intelligible principle” that limits the scope of delegated authority, the delegation violates the separation of powers by vesting the President with core legislative powers;³³ in practice, however, virtually any statutory mandate meets the “intelligible principle” standard.³⁴ Were the Supreme Court to enforce the separation of powers doctrine as aggressively in this context as in the legislative veto and appointments cases, far more federal laws would be invalidated for violating the nondelegation doctrine. Thus, the Supreme Court’s efforts to enforce the separation of executive and legislative powers is not all-encompassing or unyielding. Even with this caveat, however, the fact remains that the Supreme Court has not simply left Congress and the President free to referee the appropriate metes and bounds of their respective institutional authority.³⁵

B. The Original Understanding and Legislative/Executive Separation of Powers

It would be easy to assume that the contemporary commitment to formalism in enforcing the separation of powers is a modern innovation; such an assumption would not be warranted. To be sure, the structural separation of legislative,³⁶ executive,³⁷ and judicial³⁸ powers into three distinct branches does not, of its own force, preclude the voluntary redistribution of such powers

³² See *id.* at 260-68.

³³ See *id.* at 260, 264-65.

³⁴ *Id.* at 265-68.

³⁵ See Redish & Cisar, *supra* note ___, at 450-51.

³⁶ See U.S. Const., art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”).

³⁷ See *id.* at art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

³⁸ See *id.* at art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.”).

among and between the branches going forward. However, the Federalist Papers seem to confirm the view that the initial allocation of powers between the three branches was meant to be more than simply an initial starting point.

In Federalist No. 47, James Madison emphasized the importance of establishing and maintaining the separation of powers:

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. “When the legislative and executive powers are united in the same person or body,” says he, “there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.” Again: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.” Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.³⁹

Thus, for Madison, the division of legislative and executive power represented an essential bulwark against tyranny.⁴⁰ And, in turn, the Framers carefully separated and divided legislative and executive power, placing legislative power in the hands of Congress and executive power squarely in the hands of the President.⁴¹

The aim was to divide power, in hopes of better controlling it. In particular, the Framers believed that rather than finding virtuous and wise rulers, the better course was to create a carefully calibrated system of government that would create strong institutional incentives to resist encroachments by the other branches of the federal government.⁴² “We see [this principle]

³⁹ Federalist No. 47, at 300, 303 (James Madison) (Clinton Rossiter ed. 1961).

⁴⁰ See The Federalist No. 48, at 308, 309-10 (James Madison) (Clinton Rossiter ed. 1961); see also The Federalist No. 49, at 313, 315-16 (James Madison) (“We have seen that the tendency of republican governments is to aggrandizement of the legislative at the expense of the other departments.”).

⁴¹ See *Buckley v. Valeo*, 424 U.S. 1, 120 (1976) (noting that “the Constitution was nonetheless true to Montesquieu’s well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct”).

⁴² See Federalist No. 51, at 320, 320-22 (James Madison) (Clinton Rossiter ed. 1961); see also Redish & Cisar, *supra* note ___, at 505.

particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other – that the private interest of every individual may be a sentinel over the public rights.”⁴³

The Framers’ thinking on these questions was undoubtedly influenced significantly by the writings of Enlightenment political philosophers who strongly advocated the separation of executive, legislative, and judicial powers, such as John Locke⁴⁴ and Montesquieu.⁴⁵ As Madison himself noted, in Federalist No. 47, “[t]he oracle who is always consulted and cited on this subject [the separation of powers] is the celebrated Montesquieu.”⁴⁶ Thus, even if existing British constitutional arrangements did not incorporate the separation powers,⁴⁷ the Framers certainly would have been familiar with the concept and the arguments in favor of structuring government institutions to incorporate it. The Framers’ innovation was not so much the creation or articulation of the concept, but rather a strong commitment to implementing the principle in the Constitution of 1787.⁴⁸

C. The Constitutional Text and Legislative/Executive Separation of Powers

⁴³ See Federalist No. 51, *supra* note ___, at 322.

⁴⁴ John Locke, Two Treatises on Government, The Second Treatise of Government, §§ 146-48; see Redish & Cisar, *supra* note ___, at 456-60.

⁴⁵ Montesquieu, The Spirit of the Laws, bk. XI, ch. 6, para. 1-2, 60-62; see Redish & Cisar, *supra* note ___, at 461-62.

⁴⁶ Federalist No. 47, *supra* note ___, at 301.

⁴⁷ The United Kingdom, then and now, maintains a “balance of powers” rather than a “separation of powers.” See Hyre, *supra* note ___, at 430-35; see also Michael Skold, Note, *The Reform Act’s Supreme Court: A Missed Opportunity for Judicial Review in the United Kingdom?*, 39 CONN. L. REV. 2149, 2154-55 (2007) (“In contrast to the American system based on a clear separation of powers and effective checks and balances, the British system traditionally has fused the three branches of government together, creating more of a balance of powers than a separation.”).

⁴⁸ See M.J.C. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 58-61 (1967); see also Redish & Cisar, *supra* note ___, at 456-65; John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of the War Powers*, 84 CAL. L. REV. 167, 198-02 (1996).

The Supreme Court has not developed its concern with the separation of legislative and executive powers based solely on its concerns or those of the Framers. Instead, the text of the Constitution itself contains a strong wall of separation between the Legislative and Executive Branches: the Incompatibility Clause. The Incompatibility Clause provides that:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and *no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.*⁴⁹

The Incompatibility Clause effectively prevents a sitting member of the House or Senate from serving as a cabinet secretary without resigning her seat in Congress.⁵⁰ Of course, members of Congress have served – and do serve – in the Executive Branch after resigning from Congress before receiving a formal appointment to an Executive Branch office.⁵¹

James Madison, one of the principal architects of the Constitution, firmly believed that legislative service in the executive branch was not merely a prescription for legislative featherbedding, but also an affirmatively dangerous practice. Writing on the subject to Thomas Jefferson, Madison observed that:

The power of the Legislature to appoint any other than their own officers departs too far from the Theory which requires a separation of the great Departments of Government. One of the best securities against the creation of unnecessary offices or tyrannical powers is an exclusion of the authors from all share in filling the one, or influence in the

⁴⁹ U.S. Const., art. I, § 6, cl. 2 (emphasis added).

⁵⁰ See *Freytag v. Comm’r*, 501 U.S. 868, 904 (1991) (Scalia, J., concurring) (“The Framers’ experience with postrevolutionary self-government had taught them that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption. The foremost danger was that legislators would create offices with the expectancy of occupying them themselves. This was guarded against by the Incompatibility and Ineligibility Clauses, Article I, 6, cl. 2.”). The Supreme Court has assiduously avoided deciding whether the Incompatibility Clause prohibits sitting members of Congress from holding military commissions in the armed forces reserves, holding that taxpayers lack standing to sue to enforce the Incompatibility Clause. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217-18, 220-222, 228 (1974).

⁵¹ See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045, 1032, 1038-39, 1141-46 (1994).

execution of the other.⁵²

Thus, the basis for the Incompatibility and Ineligibility Clauses are both highly practical (in the absence of such a clause the legislature will create unnecessary sinecures for its members at the public's expense) and highly theoretical (merger of the legislative and executive powers is conducive to "tyranny," even if bad results do not actually occur).⁵³

The Constitution itself thus prevents the adoption of the common practice in parliamentary democracies of staffing senior executive branch posts with sitting legislators;⁵⁴ the Framers designed and "We the People" ratified a document that squarely rejects a very common institutional design that marries legislative expertise with responsibility for oversight over an executive department. In the United States, those drafting the Constitution perceived the division of legislative and executive power to be an essential component of a just government, an imperative no less pressing than a written constitution, the creation of an independent judiciary with the power of judicial review, or the retention of states as a kind of vertical federalism check on possible overreaching by the central government.⁵⁵

⁵² Madison's Observations on Jefferson's Draft of a Constitution for Virginia, *reprinted in* 6 PAPERS OF THOMAS JEFFERSON 308, 311 (J. Boyd ed. 1952).

⁵³ Interestingly, no formal bar exists on judicial personnel serving in the Executive Branch and, from time to time, federal judges have served in the Executive Branch concurrently with their Article III judicial service. *See* *Mistretta v. United States*, 488 U.S. 361, 397-98 (1989); *see also* Krotoszynski, *supra* note ___, at 462-68 (canvassing historical examples of joint service, as well as refusals by Article III judges to undertake extra-judicial duties within the Executive Branch); *see generally* Calabresi & Larsen, *supra* note ___, at 1141-1146 (same). Even so, a de facto constitutional custom against such joint service has developed. As Professors Calabresi and Larsen put the matter, "it is fair to say that a tradition has evolved that very nearly replicates the situation that would exist if [the Constitution contained] a judicial-executive incompatibility clause." *Id.* at 1139. On the other hand, neither the Constitution nor the contemporary practices of the Framers establish any prohibition on joint federal/state officeholding; a member of Congress is free to serve in a state government post concurrently with her federal service. *See* *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 282-83 (1991) (White, J., dissenting).

⁵⁴ *See* Jackson & Tushnet, *supra* note ___, at 361-62, 710-11.

⁵⁵ On the last point, the Second Amendment is quite instructive. The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend.

At the Federal Convention, the Incompatibility Clause did not receive much, if any debate. Instead, debate among the delegates focused exclusively on the scope of the Ineligibility Clause, which flatly bars members of Congress from appointment to certain executive or judicial offices.⁵⁶ The Committee of Eleven proposed a complete ineligibility for members of Congress to any federal office during the period for which a member was elected to Congress (meaning a six year bar for newly elected members of the Senate).⁵⁷ The delegates weakened the Committee of Eleven's draft of the Ineligibility Clause to prohibit appointment only to newly created offices, not to offices that existed prior to the election of a member of the House or Senate, and to any office for which the current Congress had increased the salary.⁵⁸ It bears noting that some delegates, such as Elbridge Gerry of Massachusetts, strenuously argued for a complete and total ineligibility barring members of Congress from appointment to executive or judicial federal offices during their terms of office.⁵⁹

Moreover, one also should note that some of the delegates plainly recognized that the Incompatibility and Ineligibility Clauses represented a stark break with existing separation of powers practices in other nations. Nathaniel Gorham, of Massachusetts, strongly supported weakening the Ineligibility Clause because without such amendment "we go further than has

II. Anti-Federalist leaders, like Thomas Jefferson, feared that the central government possessed too much power and would, by force of arms if necessary, expand its power at the expense of the states. In their view, the states would have to possess, quite literally, a military check on the federal government in order to keep the federal government from disregarding constitutional limitations on the scope of its power.

⁵⁶ See James Madison, NOTES OF DEBATES IN THE FEDERAL CONVENTION 571-73 (Adrienne Koch ed. 1965) (Sept. 3, 1787).

⁵⁷ The draft provided that "The members of each House shall be ineligible to any civil office under the authority of the U.S. during the time for which they shall respectively be elected, and no person holding an office under the U.S. shall be a member of either House during his continuance in office." *Id.* at 569 (Sept. 1, 1787).

⁵⁸ *Id.* at 571-72.

⁵⁹ *Id.* at 572 ("Mr. Gerry. thought the eligibility of members would have the effect of opening batteries agst good officers, in order to drive them out & make way for members of the Legislature.").

been done in any of the States, or indeed any other Country.”⁶⁰ Significantly, however, no delegate argued in favor of permitting a sitting member of the House or Senate to also serve in an executive or judicial office; the debate focused solely on how broadly to write the proscription against appointment of incumbent members of Congress to newly created federal offices or to existing offices with recent salary enhancements.

Given the strength of the Framers’ concerns about the danger of mixing executive and legislative functions, and the salience of these concerns up to the present day, at least in the pages of the *U.S. Reports*, one would think that the concern would have found some measure of traction in other nations. To state the matter simply, if merging legislative and executive functions is conducive to tyranny,⁶¹ one would predict that persons drafting new constitutions would assiduously avoid merging legislative and executive powers. This has not, however, proven to be the case.

III. The Rejection of Legislative/Executive Separation of Powers in the Larger World

For a concept of such sweeping importance to the Framers and, more recently, to the Supreme Court, the utter absence of concern in most other democracies about placing legislative and executive functions in the same hands should come as something of a surprise to persons steeped in the U.S. constitutional tradition. If dividing and separating legislative and executive power really represents an essential attribute of a well ordered government, most national governments in the larger world come up short.

Although certain aspects of the U.S. constitutional system, such as a written constitution, including a bill of rights, judicial review by an independent judiciary, and federalism, have all proven to be wildly successful legal exports,⁶² the U.S. model of strict formalist separation of legislative and executive powers simply has not. Moreover, the rejection of legislative/executive

⁶⁰ *Id.*

⁶¹ See Redish & Cisar, *supra* note ___, at 476-78, 505-06.

⁶² See Badinter & Breyer, *supra* note ___, at 3, 18-19, 26-50.

separation of powers concerns completely bridges the common law and civil law world; both common law and civil law jurisdictions feature parliamentary systems of government in which the highest executive officers also serve as sitting members of the national legislature.⁶³ Indeed, these arrangements do not seem particularly bothersome to persons, including lawyers and legal academics, living in these nations.

Accordingly, in the United Kingdom, Canada, and Australia, all common law jurisdictions, the national parliament also selects the principle executive officers, usually drawn from within its own ranks.⁶⁴ Cabinet level ministers are invariably incumbent members of the legislature. To be sure, an independent “executive branch” exists that features lower level bureaucrats who work entirely independently of the national legislature. Thus, even in parliamentary democracies using the common law, a weak form of separation of powers works below the highest offices within the ministries.⁶⁵ The fact remains, however, that persons with substantial responsibility for writing and revising the laws also enjoy principal responsibility for enforcing the laws as well.

Civil law nations, like France, Germany, and Japan also feature constitutional arrangements that tend to blend, rather than strictly separate, legislative and executive power. France is instructive in this regard because the President enjoys some measure of lawmaking authority – in this sense, then, the Executive Branch enjoys the power to legislate, at least with respect to certain subject matter.⁶⁶ And, in Germany, the Chancellor is also a member of the

⁶³ See Jackson & Tushnet, *supra* note ___, at 36–63, 710–11; see also John Henry Merryman & Rogelio Pérez-Perdomo, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 20–24 (3rd ed. 2007).

⁶⁴ See Jackson & Tushnet, *supra* note ___, at 360–64.

⁶⁵ See David P. Currie, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 173 (1994).

⁶⁶ Constitution of the Fifth French Republic, art. 34; see Jackson & Tushnet, *supra* note ___, at 498–500, 711–12.

federal parliament, as are virtually all of the heads of the various executive departments.⁶⁷ The same holds true in Japan. As in most common law nations, the notion that legislative service is incompatible with executive service simply does not seem to register as an important structural constitutional consideration.⁶⁸

The question that demands to be asked and answered, obviously enough, is: Why do other nations find the conflation of legislative and executive policy making power to be entirely unproblematic? The Framers of the U.S. Constitution, and contemporary federal judges, appear to view the merging of legislative and executive powers as creating a potentially dangerous concentration of power. From the perspective of the rest of the world, such dual roles provoke yawns, rather than dire predictions of “tyranny.”⁶⁹

IV. Explaining U.S. Separation of Powers Exceptionalism

The foregoing considerations raise some interesting, important, and difficult questions about precisely why the United States has adopted a strong separation of legislative and executive powers. Why does the concept of the separation of powers have such resonance in the United States, but fall so flat in the rest of the world? A comprehensive answer to this question lies beyond the scope of this short article, but some preliminary thoughts on the matter seem both necessary and appropriate. First, just as one must not overstate the U.S. commitment to enforcing legislative/executive separation of powers,⁷⁰ one must not overstate the degree to which the rest of the world has rejected the doctrine of the separation of powers (as opposed to

⁶⁷ See Currie, *supra* note ___, at 134-49, 172-73.

⁶⁸ See *id.* at 172 (“A parliamentary system, which Germany shares with most other successful democracies, necessarily entails a sacrifice of separation to better coordination of official policy and more effective safeguards against the abuse of executive authority.”). With respect to the latter point – avoiding abuse of executive authority – the matter could be framed in favor of separation of powers, i.e., an independent legislative branch would seem to have more power, and more incentive, to ferret out wrongdoing than a majority party would possess in embarrassing the party’s leader (*viz.*, the prime minister or chancellor).

⁶⁹ See Redish & Cisar, *supra* note ___, at 463-65, 476-78.

⁷⁰ See *supra* text and accompanying notes ___ to ___.

its specific application in the context of mixed legislative/executive functions). Second, with respect to the United States, there must be something different about the citizenry's attitude toward merged legislative/executive functions, or about government more generally, that leads to continuing widespread support for the concept, even to the present day. Third, and finally, there must be some offsetting costs and benefits to adopting and enforcing legislative/executive separation of powers; the costs are plainly too high and the benefits too low for nations observing a parliamentary system of government, but not for the United States. The balance of this section explores each of these themes.

A. Global Rejection of U.S. Separation of Powers Concerns Is Only Partial.

The broader world's rejection of U.S. concerns about vesting legislative and executive powers in the same hands should not be taken as a marker for a more general rejection of U.S. separation of powers notions more generally. In particular, the idea that judges should not have a vested interest in the outcome of the cases that come before them appears to be an idea that has gained universal acceptance. Thus, even in places like the United Kingdom or France, that do not feature carefully separated legislative and executive powers, one finds that judicial duties, and specifically the power of judicial review, do not rest with the legislature or the head of the executive branch (whether styled a prime minister or a president).⁷¹

In the United Kingdom, for example, the Appellate Committee of the House of Lords historically has exercised the judicial powers, serving as the highest domestic appellate court. Since 1883,⁷² and arguably since 1844,⁷³ however, the House of Lords has not permitted

⁷¹ See Hyre, *supra* note ___, at 428-43.

⁷² Jackson & Tushnet, *supra* note ___, at 365-66 ("In theory, any peer may sit, uninvited, to hear an appeal. This last happened in 1883, when the intrusive lay peer's opinion was superciliously ignored by the lawyers.").

⁷³ See John V. Orth, *Review*, 54 TUL. L. REV. 798, 802-03 (1980) ("First, the handling of the appeal of Daniel O'Connell, the Irish Liberator, in 1844, established the distinction between the House of Lords as a judicial body and the House as a political body. When lords 'unlearned in the law' tried to register their votes against O'Connell, they were firmly told that the law lords alone constituted the court."). For a history of the House of Lords

hereditary peers to vote on appeals; the Appellate Committee, staffed entirely with persons learned in the law, and usually former lower court judges and legal academics, exercised the judicial functions of the chamber.⁷⁴ Thus, although at a formal level, the Parliament enjoyed plenary judicial power, in practice the United Kingdom recognized the need to insulate the business of the judiciary from the business of the legislature or the executive branch.

More recently, Parliament approved the creation of a “Supreme Court of the United Kingdom” that, after becoming operational in October 2009, will exercise the judicial power of the United Kingdom.⁷⁵ The European Court of Human Rights found the British approach to the separation of powers to be an insufficient protection of judicial independence in the context of local office that merged executive and judicial duties; the same structure exists, at least *de jure*, within the House of Lords.⁷⁶ In practice, the Supreme Court of the United Kingdom, which will be entirely separate and distinct from the House of Lords, will simply take over the functions of the Appellate Committee of the House of Lords.⁷⁷ Whether formal or *de facto*, however, the United Kingdom has recognized and respected the need for an independent judiciary since at least the late 19th century.⁷⁸

and the separation of its legislative and judicial roles, with the professionalization of the judicial duties, *see* Robert Stevens, *LAW & POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800-1976* (1978).

⁷⁴ P.S. Atiyah & Robert Summers, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* 269 (1987).

⁷⁵ *See* Constitution Reform Act, 2005, ch. 4; *see also* Krotoszynski, *supra* note ___, at 186-87.

⁷⁶ *See* *McGonnell v. United Kingdom*, 30 Eur. H.R. Rep. 289, 308-09 (2000); *see also* Hyre, *supra* note ___, at 439-40 (discussing *McGonnell* and how the decision motivated Parliament to transfer of the workload of the Appellate Committee of the House of Lords to the soon-to-be operational Supreme Court of the United Kingdom).

⁷⁷ *See id.*; *see also* Tyre, *supra* note ___, at 442-59; Skold, *supra* note ___, at 2151-53, 2157-60.

⁷⁸ *See* Jackson & Tushnet, *supra* note ___, at 365-66; *see also supra* notes ___ & ___.

France provides another instructive example of the persuasive force of separation of powers concerns in the context of judicial review to ensure compliance with the French Constitution. The Conseil Constitutionnel, although not formally part of the French judiciary, is not an office of the National Assembly or Senate either.⁷⁹ If the Conseil Constitutionnel is not a court, neither is it a legislative body; it exists outside both the judiciary and the legislature, exercising a power of post-enactment, pre-enforcement review of new legislation.⁸⁰

In the 1980s, former President Robert Badinter attempted to have the Conseil Constitutionnel reconstituted as a formal court, whether as a “Constitutional Court” or a “Supreme Court,” with responsibility for hearing constitutional complaints from members of the legislature, but with an enhanced jurisdiction that would encompass the ability to provide constitutional review on the basis of citizen complaints or judicial references of already promulgated laws.⁸¹ Although the French government did not adopt Badinter’s reform proposals, the Conseil Constitutionnel retains a significant role in ensuring that new laws do not transgress constitutional norms.⁸² And, because since the early 1970s minority party members of the National Assembly and Senate can invoke the review process,⁸³ the Conseil Constitutionnel maintains an active docket.

The German Federal Constitutional Court provides perhaps the best model of the structural separation of judicial power from legislative and executive powers, in a system that otherwise observes a parliamentary form of government that permits dual service in legislative

⁷⁹ See Jackson & Tushnet, *supra* note ___, at 498-516.

⁸⁰ *Id.* at 508-10.

⁸¹ *Id.* at 515-16.

⁸² *Id.*

⁸³ See *id.* at 506, 515.

and executive offices, at least at the federal level of government.⁸⁴ Even though the principal officers of the executive branch of government also serve in the federal legislature, the Federal Constitutional Court exercises the power of judicial review under the Basic Law free and clear of any legislative or executive control, and without any dual members serving both on the Constitutional Court and in the federal legislature.⁸⁵ As Professor David Currie puts the matter, “[u]nlike the executive, the German courts are entirely independent” and “in general respects their power to act as a check on abuses of authority by other organs of government is better protected than that of courts in the United States.”⁸⁶

Clearly, then, the world’s rejection of the U.S. model of the proper separation of powers is far from total; instead, only the U.S. obsession with prohibiting joint legislative/executive appointments has found an indifferent audience. Rather than resolving the question, however, it only makes the problem more confounding: even though U.S. concerns with separation of powers are widely shared in other democratic republics, the specific U.S. concern with the conflation of legislative and executive power has failed to gain any traction, not only in places like France or Germany, but also in neighboring common law jurisdictions like Canada. It is difficult to offer any firm answers for the failure of legislative/executive separation of powers to catch the imagination of other polities. That said, I can offer a few preliminary observations about why legislative/executive separation of powers, a concern with such salience in the United States, has generated collective yawns abroad.

B. U.S. Citizens Reflexively Distrust Government.

The U.S., to this day, features a skepticism towards government and governmental institutions that is not widely shared in other nations. As Professor Michael Asimow has stated

⁸⁴ See Donald P. Kommers, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 8-28, 115-18 (2nd ed. 1997); Currie, *supra* note ___, at 134-49, 172-73.

⁸⁵ Kommers, *supra* note ___, at 15-16, 131-32; Currie, *supra* note ___, at 149-72.

⁸⁶ Currie, *supra* note ___, at 149-50.

the proposition, “[a] generalized distrust of government officials and government power is a recurrent strain in American history.”⁸⁷ To a remarkable degree, Americans tend to be hostile toward government and its motives.⁸⁸ Running for an elected office in the United States on a platform that “Government Is Good!” would be a prescription for electoral disaster in most jurisdictions. Indeed, not since Franklin Roosevelt has a national politician succeeded in forging a national electoral majority on the proposition that more government, not less government, is needed. And, FDR had the backdrop of the Great Depression to frame his arguments! Both before and after the Great Depression, and certainly in the modern era since the election of Ronald Reagan as President in 1980, the rhetoric of U.S. politics has reflected a shared assumption that government is the problem, not the solution.⁸⁹ Recall that even the most recent Democratic Party President, Bill Clinton, famously declared that “the era of big government is over” and worked assiduously to unravel the social safety net through legislation like the 1996 Welfare Reform Act.

To a remarkable degree, U.S. citizens mistrust government and seek to minimize its ability to impact their daily lives. The unwieldy design of the federal government, replicated in all of the states save Nebraska, which has a unicameral legislature, incorporates the idea that slowing down the ability of government to act is a good, not bad, idea. For reasons having to do with an idiosyncratic political culture, “government” in the contemporary United States is something of a four letter word. I do not wish to essentialize the attitudes of citizens of Canada, France, Germany, or Japan, but my strong impression is that citizens in these nations do not view government with the same level of skepticism, if not outright hostility, that U.S. citizens

⁸⁷ Michael Asimow, *Access to Justice: Law and Popular Culture*, 40 LOYOLA L.A. L. REV. 653, 662 (2007).

⁸⁸ See *id.* at 662-63 (“A substantial number of Americans suspect government officials and agencies of meddlesomeness, incompetence, or corruption.”).

⁸⁹ See *id.* at 663 & 663 n. 45 (noting the broad decline of trust in government by most citizens in recent years and describing mean level of trust in government as “at a low ebb for the last generation”).

manifest toward their own governing institutions.⁹⁰

The U.S. obsession with impeding the ability of government to act is entirely rational if one views government as a problem, rather than as the provider of solutions. And, a more efficient, streamlined model of governance, one that empowers rather than impedes the ability of government to act, makes perfect sense in a polity where citizens repose faith in the ability of the government to make wise decisions on a predictable basis.⁹¹ One still needs to inquire into the source of U.S. hostility toward government and its institutions.

My own view is that U.S. hostility toward government is a feature of the pluralistic nature of the United States; the U.S. was, in large measure, a nation built not on ties of religion, ethnic kinship, or even geography, but rather on immigration. In such a cultural jambalaya, is it at all surprising to find that members of one ethnic group might view with suspicion and hostility the motives and actions of government officials who happen to be members of another ethnic group?⁹² Should Irish citizens of Chicago feel sanguine about the prospects of fair treatment if persons of Polish ancestry currently control City Hall? Will Irish neighborhoods receive the same level of city services, the same access to city employment, the same level of funding for local schools as the Polish neighborhoods? Certainly problems of unequal division of government benefits have been substantially reduced as the federal and state courts have

⁹⁰ See Jacob Hacker, *THE ROAD TO NOWHERE* 86 (1997) (noting traditional distrust of government by U.S. citizens); Alan F. Westin, *The United States Bill of Rights and the Canadian Charter: A Socio-Political Analysis*, in *THE U.S. BILL OF RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 31 (1983) (“Americans are inordinately distrustful of government, and are, for the most part, suspicious of all authority, religious, economic or otherwise.”); *but cf.* Justice Claire L’Heureux-Dube, *Outsiders on the Bench: The Continuing Struggle for Equality*, 16 WIS. WOMEN’S L.J. 15, 18 (2001) (“Whereas Americans have always distrusted government, Canadians seem to have inherited from Great Britain a certain faith in both the role and the nature of the state.”).

⁹¹ See L’Heureux-Dube, *supra* note ___, at 16-19; *see also* Currie, *supra* note ___, at 172.

⁹² See Juan Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992).

aggressively enforced the mandate of the Equal Protection Clause.⁹³ The political history of the United States, however, is one of deep seated suspicion that one group is trying to use government to its own unfair advantage.

The division lines are hardly limited to those based on ethnicity or race. Religious differences, for better or worse, have played a major role in U.S. politics. There is no national church and U.S. voters have not always been open to electing persons who belong to unfamiliar (or unpopular) religious groups. In 1960, John Kennedy faced skepticism from many voters because of his Roman Catholic faith. In 2008, Mitt Romney also faced substantial skepticism associated with his lifelong membership in the Church of Jesus Christ of Latter Day Saints, commonly known as the Mormons. The actor Tom Cruise has been openly mocked on major mass media outlets because of his aggressive and public support of the Church of Scientology.

Although the election of a Roman Catholic to public office is no longer a novelty, the election of a Mormon to the presidency would be a major development towards religious equality, and the election of a Scientologist would be, mostly for discreditable reasons, entirely implausible in the contemporary United States. Indeed, Barack Obama has faced persistent, and false, rumors that he is a follower of Islam, precisely because it is widely assumed that U.S. voters would never elect a Muslim to the presidency.

These “us/them” divisions have other vectors – regional concerns, urban/rural concerns, and cultural concerns. Residents of Massachusetts do not wish to be governed by the Mississippi state legislature, and the feeling is mutual. Going back to the time of the framing of the U.S. Constitution, strong factions, whether defined by race, ethnicity, religion, region, or urbanization have been a persistent feature of domestic politics. These divisions create suspicion of those drawn from outsider groups and, ultimately, of government itself because members of outsider groups might well enjoy a majority in the city council, the state legislature, or the Congress.

In a nation sharing a common ethnic, religious, and cultural heritage, trust in government

⁹³

See Brown v. Board of Education, 347 U.S. 483 (1957).

might well come more naturally, and be held more readily, than in a nation built of immigrants that still features significant divisions based on race, ethnicity, religion, region, urbanization, and culture.⁹⁴ Thus, that the citizens of France or Germany do not fear “tyranny” from a central government in which members of the national legislature also head the major executive departments of the government should not be particularly surprising. When government features people drawn from a common national culture, who share longstanding ties of language, religion, and kinship, it is not at all surprising that citizens would repose more trust, more reflexively, than when institutions of government are staffed by persons viewed in important respects as outsiders.

There is, in all of this, a potential cautionary tale: as the nations of Europe become less homogeneous due to immigration from Africa and Asia, will these newcomers accept the legitimacy of the existing governmental institutions as readily as those who have longer temporal, cultural, and genealogical ties to the polity? In other words, if humans are naturally suspicious when governed by persons who have significant differences, perceived as salient, from them, will newcomers accept the proposition that “government is good” as readily as those whose families have older ties? Or will the newcomers, like most U.S. citizens, tend to view government skeptically?

To be clear, I am not predicting a mass wave toward adoption of measures to separate legislative and executive powers. The merger of these powers in parliamentary systems is unlikely to disappear any time soon. I would suggest, however, that the adoption of this form of separation of powers in the United States is not a mere accident of history, but instead represents

⁹⁴ See Frank B. Cross, *Law and Trust*, 93 Geo. L.J. 1457, 1532-43 (2005); see also L’Heureux-Dube, *supra* note ___, at 28-29 (noting that pluralism both requires trust in government but makes trust more difficult and noting importance of respect for mutual differences in a justly ordered society); Redish & Cisar, *supra* note ___, at 468-70 (suggesting that the success of the British parliamentary system rests, at least in part, on “the existence of a cohesive political parties” and because “England, for the most part, has a relatively small, homogeneous culture” and noting that although the U.S. system has not accommodated difference perfectly “more representation is permitted by a system of separation of powers”).

a logical response by people who feared the consequence of being a political, cultural, religious, or regional minority.

C. An Alternative (But Complimentary) Explanation: U.S. Citizens Demand an Independent Political Check, as Well as a Judicial Check, on Legislative Majorities.

A distinct, but undoubtedly related, explanation for the U.S. enthusiasm for enforcing legislative/executive separation of powers relates to a desire to provide not merely a legal or constitutional check on legislative policymaking, but a *political* check as well.⁹⁵ Judicial review of legislative work product provides an important, indeed crucial, check on arbitrary or fundamentally unjust legislative actions. But judicial review should not serve as a generic policy or political review of the wisdom of legislative action.⁹⁶ Separating legislative and executive power has the salutary effect of facilitating an independent political check on the exercise of legislative power.

By vesting the President, and the President alone, with a veto, the Framers ensured that an independent review of legislation would occur prior to a bill becoming a law, and vested that power of review in a person uniquely accountable to the whole citizenry. In the absence of a legislative/executive separation of powers, one would lose the benefit of bringing an independent political judgment to bear on legislation. In addition, the merger of legislative and executive offices also denies, or at least mutes, independent political judgment being brought to bear in the implementation of legislation.⁹⁷

⁹⁵ See Peter Strauss, ____ ADMIN. L. REV. ____ (2008) [ALR symposium submission].

⁹⁶ See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 864-66 (1984).

⁹⁷ In fact, the whole notion of implied delegations to administrative agencies to fill statutory gaps represents an extension of the U.S. effort to separate and divide legislative and executive power. See *id.* at ____; see also Strauss, *supra* note ____, at _____. In the United Kingdom, by way of contrast, if a statute requires more than merely technical implementing regulations, so-called “secondary legislation” is the norm rather than the exception, and Parliament retains a significant oversight role in the enactment of such “secondary legislation.” See Atiyah & Summers, *supra* note ____, at 322-32. For a discussion of the legislative process in the United Kingdom, see *id.* at 298-335.

Providing an independent political check on government action also ensures that capture of the legislature by a particular group or faction would not inexorably lead to the adoption of self-serving, but poorly conceived, policies; the President, and the independent Executive Branch, can and would provide a check against legislative excesses (or simple cases of poor judgment). Thus, those unhappy with the outcome of the legislative process can and do seek redress either within the Executive Branch or from the federal courts.⁹⁸

In sum, from an American perspective, the kind of check provided by the judiciary, and the kind of check provided by an independent, unitary Executive Branch, are fundamentally different in nature and *not* fungible. A judicial review should not assess the wisdom or prudence of legislative policies, but rather only their legality or constitutionality. The President, by way of contrast, can consider a much broader range of potential objections to a new law prior to its taking effect. Moreover, this independent political judgment comes to bear both when the President decides whether to sign or veto a bill and also when determining how to implement the new law. Judicial review is simply not a functional equivalent,⁹⁹ precisely because its proper scope is so limited.

V. Conclusion

The United States Constitution of 1787 has provided a very influential blueprint for those drafting constitutions in other nations. In one important respect, however, the Constitution has not proven influential: the world largely has rejected the Framers concerns with separating and dividing legislative and executive power. Although the parliamentary model of government remains commonplace, it might be worth considering the possible relationship between a strong

⁹⁸ See Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1319-25, 1328-29 (1992) (noting the importance distinction between a political settlement of a problem and the impact of judicial review that ignores the political role in reaching a highly structured compromise to a difficult policy problem).

⁹⁹ Nor should it be. See Strauss, *supra* note ___, at 1252-53 (arguing that “judges should recognize the potential workability of political controls over administrative action when interpreting statutes that structure the resolution of essentially political disputes”).

commitment to separation of powers and political, ethnic, racial, religious, and cultural pluralism within a body politic. The drafters of the U.S. Constitution clearly believed that separating and limiting powers would enhance the perceived legitimacy of the institutions of government, by making unilateral action more difficult. In a nation featuring myriad self-perceived minorities, making government action more difficult might well correspond with a greater sense of security.

At the same time, however, the fact that nations with multicultural populations, like Canada, enjoy broad public confidence notwithstanding the absence of legislative/executive separation of powers provides strong evidence that this particular protection is not essential to the creation or maintenance of a legitimate government. Indeed, if one contrasts the adoption of legislative/executive separation of powers with the widespread, indeed almost universal, adoption of written constitutions, providing written bills of rights, enforceable by an independent judiciary vested with the power of judicial review, it becomes obvious that entrenched human rights are more important to securing legitimacy than separating legislative and executive powers. Thus, if citizens may seek recourse to courts to protect their basic human rights from government abridgement or abrogation, the vesting of legislative and executive powers in the same hands does not seem to present a major concern for most citizens. To state the matter a bit differently: so long as *some* independent check on legislative power exists, the fact that the Executive Branch does not provide a check on the Legislative Branch is not utterly fatal to the perceived legitimacy of a constitutional order.

The U.S. commitment to maintaining a political check on legislative powers via a separate and independent Executive Branch reflects and incorporates an assumption that Congress will get matters wrong with some frequency and that the judiciary's proper role cannot extend to serving as a generic council of revision. At the end of the day, then, skepticism about government in general, and legislatures in particular, ultimately explains the U.S. approach to separating and dividing legislative and executive powers.