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PRESIDENTIAL VALUES IN PARLIAMENTARY DEMOCRACIES

RICHARD ALBERT[†]

I. INTRODUCTION

Constitutional theory has long held that the separation of powers is unique to presidential systems and incompatible with parliamentary ones. This conventional wisdom has hardened over the years with the proliferation of scholarship debating the merits of presidential or parliamentary systems for emerging democracies or reconstructed states.[1] Yet what remains unexplored within this conventional wisdom in constitutional design is whether the democratic virtues of the separation of powers are achievable in *both* presidential and parliamentary systems. The answer, I believe, is yes.

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[1] *See, e.g.*, JOSE ANTONIO CHEIBUB, PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY (2007); THE FAILURE OF PRESIDENTIAL DEMOCRACY (JUAN J. LINZ & ARTURO VALENZUELA eds., 1994); GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES (1994); PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT (AREND LIJPHARD ed., 1992); ANIRUDH PRADSAD, PRESIDENTIAL GOVERNMENT OR PARLIAMENTARY DEMOCRACY (1981); Terry M. Moe & Michael Caldwell, *The Institutional Foundation of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 171 (1994); Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM AND MARY L. REV. 679 (1993).

For despite its prevalence in the community of nations, the presidential separation of powers is neither constitutive nor descriptive of modern constitutionalism. Indeed, many constitutional democracies contravene the underlying philosophy of separated governmental powers insofar as they exhibit the very opposite of the separation of powers: the fusion of governmental powers.[2] These regimes tend predominantly to be parliamentary systems, whose two defining traits are, first, the reliance of the head of government upon the legislature for its political survival and, second, the executive power to trigger elections by dissolving the legislature.[3] Such powers are generally unavailable to the executive in presidential systems precisely because presidential systems typically adhere to the separation of powers.[4]

The division of labor contemplated by separation of powers theory cannot tolerate fused powers because separating powers endeavors to endow one governmental branch with an intrusive power of oversight over another, all within an interlocking web of mutual distrust. The consequence of organizing government power in this way—so as to cultivate an invasive overlap among government departments—is to prevent any single organ of the state from achieving absolute power. This is a terribly important objective for any democratic state. Yet it is but one of the core values served by the separation of powers. Other values include preventing arbitrary government, defending against legislative supremacy, and promoting governmental efficiency.

Democratic presidential systems aspire to these core democratic values, and they deploy the separation of powers to achieve them. But does it follow that these core values served by the separation of powers cannot be achieved in parliamentary systems? That is the question that will occupy many of the pages to follow. Yet before we can answer this question, we must first pose at least three subsidiary questions: (1) What do we mean by the *values* of the separation of powers?; (2) What are those values?; and (3) Is there more than one kind of parliamentary system? Only once we explore these questions may we then answer whether the values of the separation of powers may be achieved in parliamentary systems.

I will demonstrate that the values of the separation of powers are indeed achievable, at least in part, in parliamentary systems. This conclusion—that parliamentary and presidential systems are comparably receptive to the practical and philosophical strictures of separated powers—carries with it profound implications for the future of separated powers and unlocks several possibilities for rethinking constitutional structure afresh.

In Part II of this paper, I will assess the conventional wisdom that separated powers are integral to democracy. I will also explore the values served by separating governmental powers. Part III will illustrate and distinguish the several existing forms of parliamentary systems, and will moreover probe in a systematic fashion whether the values of separated powers may be achieved in each type of parliamentary system. I will answer this important question in the affirmative, in so doing freeing us from the rigid belief that the separation of powers is a

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[2] *See, e.g.* CONSTITUTION OF AUSTRALIA (1900); CONSTITUTION OF CANADA (British North America Act 1867); GERMAN BASIC LAW (1949); CONSTITUTION OF SPAIN (1978); ISRAEL BASIC LAW (1992); CONSTITUTION OF NEW ZEALAND (Constitution Act 1986).

[3] Alfred Stepan & Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarism Versus Presidentialism*, 46 WORLD POL. 1, 3 (1993).

[4] Rett R. Ludwikowski, *Latin American Hybrid Constitutionalism: The United States Presidentialism in the Civil Law Melting Pot*, 21 B.U. INT`L L.J. 29, 34-39 (2003).

necessary feature of democratic systems. Part IV will draw upon these conclusions to suggest new ways to approach the separation of powers. Part V will conclude with suggestions for further inquiry.

II. DEMOCRACY AND SEPARATED POWERS

Perhaps the most critical observation for our purposes is that constitutional scholarship regards democracy and the separation of powers as virtually synonymous, the latter deemed indispensable to the former. Granted, this is largely an American phenomenon, an unsurprising one given that the United States Constitution separates its powers. But this conventional narrative—holding that democracy demands the separation of powers—extends also to scholarship by American and non-American authors about non-American and non-presidentialist constitutional traditions.[5] And *that* is surprising.

It is equally interesting that the global popular culture also itself conceives of separated powers as fundamental to democracy.[6] I raise this point not to understate the salutary consequences of separating powers in constitutional systems but rather only to note that there appears to be a strong presumption that presidential systems achieve certain standards of governance that rival systems do not. All of which begs the question: why are separated powers thought to be indispensable to democracy?

A. Separation Theory

The separation of powers is a common feature of modern constitutionalism.[7] The concept of separating powers derives from political and philosophical inquiry,[8] Biblical and Near Eastern

[5] *See, e.g.*, Allan R. Brewer-Carias, *Judicial Review in Venezuela*, 45 DUQ. L. REV. 439, 464 (2007); Aharon Barak, *Human Rights in Israel*, 39 ISR. L. REV. 12, 20 (2006); Reynaud N. Daniels & Jason Brickhill, *The Counter-Majoritarian Difficulty and the South African Constitutional Court*, 25 PENN. ST. INT'L L. REV. 371, 378 (2006); Okezie Chukwumerije, *Peer Review and the Promotion of Good Governance in Africa*, 32 N.C. J. INT'L L. & COM. REG. 49, 89 (2006); Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PACIFIC L. & POL'Y J. 180, 239 n.214 (2003) (quoting Deng Xiaoping); Patrick Heller, *Degrees of Democracy: Some Comparative Lessons from India*, 52 WORLD POL. 484, 492 (2000); Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415, 421 (2000); Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 529 (1999).

[6] *See, e.g.*, Naomi Buck, *A Strategic Partnership for Germany and Russia*, SPIEGEL ONLINE (Germany), October 15, 2007, *available at*: http://www.spiegel.de/international/germany/0,1518,511515,00.html (last visited Nov. 1, 2009); Tony Wright, *Parties in Step as they March Over the Judicial System*, THE AGE (Melbourne, Australia), July 17, 2007, at 2; Masha Lipman, *Putin's Sovereign Democracy*, WASHINGTON POST, July 15, 2006, at A21; Brigid Laffan, *Does the Commission Need to be Reined in by the Member-States?*, THE IRISH TIMES, March 20, 2003; Konstantin Zuyev, *Dangerous Democracy*, MOSCOW TIMES, March 1, 1996; Petra Alince, *Slovaks Should Build a Civil Society*, PRAGUE POST (Czech Republic), March 2, 1994.

[7] *See, e.g.*, CONSTITUTION OF ARGENTINA §§ 44, 86, 87, 108 (1994); CONSTITUTION OF THE REPUBLIC OF GHANA, Chapters VIII, X, XI (1992); CONSTITUTION OF MEXICO, art. 49 (1917); CONSTITUTION OF NIGERIA, Chapters V-VII (1992); CONSTITUTION OF ROMANIA, art. 1 (1991); CONSTITUTION OF UKRAINE, art. 6 (1996).

[8] 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, 456-74 (1991); Gerhard Casper, *The American Constitutional Tradition of Shared and Separated Powers*, 30 WM AND MARY L. REV. 211, 213 (1989).

sources,[9] ancient Greek and Roman models of mixed government,[10] and American political theory and advocacy.[11] Its animating purpose is to divide governmental functions in the service of certain values of public administration and governance.

Governmental powers may be separated along three axes: (1) horizontal; (2) vertical; and (3) diagonal. Horizontal separation—which is the focus of this Article—refers to the division of powers among government branches that are part of the same order of government. The leading illustration of horizontally separated powers is the tripartite division of federal powers in the United States Constitution.[12] In contrast, vertical separation refers to the division of powers between two or more orders of government. A useful example is the Canadian federal Constitution, which expressly distinguishes between national and sub-national governmental functions.[13] Governmental powers may also be separated diagonally consistent with the principle of subsidiarity.[14] Subsidiarity requires that a given governmental objective be pursued by the lowest level of government—the one closest to the people—capable of successfully achieving it.[15] It is perhaps most discernible in the European Convention.[16]

The original theory of horizontally separated powers divided powers between the executive and legislative branches.[17] But the modern theory of horizontally separated powers generally divides powers among three branches of government and holds that the legislature should create laws, the executive should enforce those laws, and the judiciary should interpret them. This separation rests in large measure upon the perceived comparative advantages of each branch of government, for instance the ability of the judiciary to apply rules of general application to specific cases, or the capacity of the executive to move swiftly to respond to public needs, or the competence of the legislature in balancing diverse and often contrary interests.[18]

Separated powers reflect the philosophy that governmental functions should be distributed among the organs of the state. This theory relies on three reasonable premises: (1) the government should discharge all law-related functions; (2) those functions can be divided into three coherent categories; and (3) this tripartite division is a rational way to structure the state. But it is not always clear which governmental functions should be assigned to which particular branch of government.[19] Moreover, it is not clear that horizontally separated powers necessarily demand three government departments. Indeed, one could create a governmental structure

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[9] Bernard M. Levinson, *The First Constitution: Rethinking the Origins of Rule of Law and Separation of Powers in Light of Deuteronomy*, 27 CARDOZO L. REV. 1853, 1858 (2006).
[10] M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 23-57 (2d ed. 1998).
[11] *See* THE FEDERALIST Nos. 37-51 (JACOB E. COOKE ed., 1961).
[12] CONSTITUTION OF THE UNITED STATES, arts. 1, 2, 3.
[13] CONSTITUTION OF CANADA (British North America Act 1867) §§ 91, 92.
[14] For more on subsidiarity, *see* Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103 (2001); Nicholas W. Barber, *The Limited Modesty of Subsidiarity*, 11 EUR. L.J. 308 (2005).
[15] George A. Bermann, *Subsidiarity and the European Union*, 17 HASTINGS INT'L & COMP. L. REV. 97, 97 (1993).
[16] TREATY ESTABLISHING THE EUROPEAN COMMUNITY, C 325 (2002) Art. 5.
[17] HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 182 (1989).
[18] THOMAS CAMPBELL, SEPARATION OF POWERS IN PRACTICE 19-26 (2004).
[19] William B. Gwyn, *The American Constitutional Tradition of Shared and Separated Powers: The Indeterminacy of the Separation of Powers in the Age of the Framers*, 20 WM AND MARY L. REV. 263, 267 (1989).

composed of four,[20] five,[21] or even more[22] departments—an arrangement that would nonetheless satisfy the strictures of horizontal separation.

B. The Values of Separated Powers

In his influential article on separating powers, Barendt argues that the separation of powers can serve at least four democratic values: (1) guarding against government tyranny; (2) defending against legislative supremacy; (3) preventing arbitrary government; and (4) promoting governmental efficiency.[23] This is a helpful point of departure for assessing the values of separated powers because constitutional scholars generally argue that the separation of powers advances one or more of these values. In this Part, I will sketch and probe the meaning of each of these four democratic values.

1. Guarding Against Government Tyranny

A state that governs through tyranny cannot claim democratic legitimacy. For Montesquieu, who defined tyranny as an unconstrained coercive authority that retains the power to limit popular choice,[24] tyrannical rule defies the very essence of democracy, which folds into itself the notion of liberty.[25] In turn, liberty, to Montesquieu, demands the capacity to govern one's self, in the sense of having a free soul, and to govern one's state through representative democracy.[26] These two elements of liberty form the nucleus of Montesquieu's defense of the separation of powers as a structural tool that frustrates the tyrannical ambitions of rulers.

Separating powers was Montesquieu's answer to tyranny. In order to achieve liberty, thought Montesquieu, and to achieve the "tranquility of spirit" that comes from the comfort and security of choice, the three governmental powers—legislative, executive and judicial—should reside in different stations.[27] Unless the legislative power is constituted by means of representative democracy and unless this power is separated from others, then tyranny is likely to result: "When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically."[28] Montesquieu therefore deployed

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[20] *See, e.g.* CONSTITUTION OF INDIA, Pt. V, ch. I, art. 53 (1950) (vesting executive power in the President); Pt. V, ch. II, art. 79 (establishing a Parliament); Pt. V, ch. IV, art. 124 (establishing a Supreme Court); Pt. V, ch. V, art. 148 (establishing the office of Comptroller and Auditor-General). The Constitution authorizes the President to exercise limited legislative powers in exceptional circumstances. *See* Pt. V, ch. III, art. 123.

[21] *See, e.g.*, CONSTITUTION OF COSTA RICA, Title VIII, Ch. III, arts. 99-104 (1949) (establishing the Supreme Electoral Tribunal); Title IX (establishing the legislative branch); Title X (establishing the executive branch); Title XI (establishing the judicial branch); Title XIII, Ch. II, arts. 183-84 (establishing Office of the Comptroller General).

[22] *See, e.g.*, CHARTER OF THE UNITED NATIONS, art. 7 (1945) (establishing the six principal organs of the United Nations).

[23] Eric Barendt, *Separation of Powers and Constitutional Government*, 1995 PUBLIC LAW 599, 601-05.

[24] CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS, BOOK 11, CHAPTER 6, 157-59 (ANNE M. COHLER ET AL. eds. 1989).

[25] *Id.* at 157.

[26] *Id.* at 159.

[27] *Id.* at 157.

[28] *Id.* at 157.

the separation of powers as a constitutional structure to foreclose the law-making, law-enforcing and law-interpreting functions from resting in a single seat.

Preventing the concentration of power is regarded today as the principal purpose of separating powers.[29] It should therefore come as no surprise that that fundamental preoccupation of modern statecraft is to diffuse governmental authority across public institutions.[30] And this has been the case ever since the American framers made the separation of powers the keystone of their constitutional architecture,[31] reflecting in large measure the Madison vision of government.[32]

2. Defending Against Legislative Supremacy

The separation of powers also serves a second democratic value: defending against legislative supremacy. The menace of legislative tyranny is somewhat veiled because democratic rule through the legislature carries a certain popular appeal.[33] Although legislative supremacy may be consistent with a crude understanding of procedural democracy, it may in fact conflict with the ideals of substantive democracy. The majoritarianism that characterizes legislative supremacy threatens to trample on fundamental rights when politically expedient or when times of crisis appear to suggest no other alternative. As Gardbaum writes, legislative supremacy raises the problem of legally unlimited majoritarianism, which suffers no limits on legislative authority, be those limits statutory, conventional, cultural, moral or derived from the common law.[34] The appeal of majority rule as a mechanism for mediating preferences is indisputable but its appeal evaporates against the backdrop of pluralist liberal democracy.[35]

This is precisely what convinced the American framers to separate powers as the structural basis for their new confederation. As Madison wrote, citizens should be weary of the legislative ambition to expand its sphere of influence[36] and the legislative predisposition toward self-aggrandizement,[37] something that can be neither controlled nor tamed absent robust institutional arrangements that moderate legislative power.[38] Early American citizens themselves also came to believe that it would be necessary to check the threat of legislative overreaching,[39]

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[29] *See, e.g.*, Robert J. Pushaw, Jr., *Justiciability and the Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 451 (1996); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1802-03 (1996); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1534 (1991); Larry Kramer, *The Constitution as Architecture: A Charette*, 65 IND. L.J. 283, 286 (1990).

[30] Charles M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties*, 55 AM. J. COMP. L. 1, 12-13 (2007).

[31] ANNE M. COHLER, MONTESQUIEU'S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM 167 (1988).

[32] THE FEDERALIST No. 47, at 324 (James Madison) (JACOB E. COOKE ed., 1961).

[33] MICHAEL FOLEY, THE POLITICS OF THE BRITISH CONSTITUTION 14 (1999).

[34] Stephen Gardbaum, *The New Commonwealth of Constitutionalism*, 49 AM. J. COMP. L. 707, 739 (2001).

[35] Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1284 n.4 (1984).

[36] THE FEDERALIST No. 48, at 333 (James Madison) (JACOB E. COOKE ed., 1961).

[37] THE FEDERALIST No. 49, at 341 (James Madison) (JACOB E. COOKE ed., 1961).

[38] THE FEDERALIST No. 78, at 524-25 (Alexander Hamilton) (JACOB E. COOKE ed., 1961).

[39] Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 65-67 (2003).

and consequently conferred upon themselves and their governmental agents several institutional tools to do just that, including a bill of rights and the power of judicial review.[40]

The separation of powers may help foil not only the rise of legislative supremacy but also of judicial[41] and executive supremacy.[42] For it is not only legislative supremacy that citizens should fear. Equally worrisome concerns about the integrity of democratic processes would flow from judicial supremacy[43] and executive supremacy.[44] The separation of powers therefore helps to control the risk of all three supremacies, which is similar to the work that the separation of powers achieves in frustrating the concentration of power discussed above. Going forward, I will therefore group the concentration of power and defending against legislative supremacy under the same heading.

3. Preventing Arbitrary Government

This third democratic value of separated powers is perhaps the least appreciated yet the most important: preventing arbitrary government. American commentators have noted that the separation of powers was developed with this very purpose in mind.[45] Indeed, the framers rejected a proposal to include a bill of rights in the original Constitution precisely because they thought that separated powers were sufficient to protect against the exercise of arbitrary power.[46]

The significance of this third democratic value derives from the fundamental democratic principle of the rule of law, whose two commonly understood features are predictability in the exercise of official power and fairness in the administration of the law.[47] The separation of powers helps achieve these objectives because its design complicates the arbitrary exercise of power. Endowing each branch with its own powers serves as a form of notice-giving. It fosters predictability in the discharge of governmental responsibilities and facilitates popular accountability in the exercise of public duties. As Bellamy explains, the separation of powers

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[40] Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 482 (1986).
[41] Carl Lebeck, Book Review, *Accountability in Supra- and International Organizations: Between Judicialization and Post-National Political Constitutionalism?*, 21 CONN. J. INT'L L. 93 (2005).
[42] Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law is*, 83 GEO. L.J. 217, 300-03 (1994).
[43] *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).
[44] *See, e.g.*, Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137 (1993); Harold Honju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).
[45] *See, e.g.*, Myers v. United States, 272 U.S. 52, 293 (Brandeis, J., dissenting); JESSICA KORN, THE POWER OF SEPARATION 14-26 (1996); CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 4 (1990); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 646 (1996); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1441-51 (1987).
[46] Ron Merkel, *Separation of Powers—A Bulwark for Liberty and a Rights Culture*, 69 SASK. L. REV. 129, 129-30 (2006).
[47] Stephen Holmes, *Lineages of the Rule of Law*, *in* DEMOCRACY AND THE RULE OF LAW 19 (J.M. MARAVALL & A. PRZEWORSKI eds. 2003).

replaces arbitrary government with a more stable state that administers an impartial legal system constituted of prospective laws.[48]

Separated powers therefore establish boundaries between and among the organs of the state. Although those organs enjoy a certain margin of discretion in exercising their powers, that discretion is itself bounded by the rule of law.[49] In this way, the separation of powers is thought to prevent arbitrary government and in turn compel the branches of government to adopt a rational, non-arbitrary, and public-regarding approach to governance.[50] One practical illustration of this relationship is the principle of non-delegation, which springs from separation of powers theory and holds that one branch of government may not delegate its powers to another. What drives the concept of non-delegation is not exclusively the imperative to prevent tyranny or the concentration of power but equally the desire to equip the electorate with the tools to hold each branch accountable for its action or inaction.[51]

4. Promoting Government Efficiency

Separated powers are also said to improve governmental efficiency. The theory here is that the division of labor across governmental departments frees one department of government to conduct its affairs without undue interference from another one. Posner elaborates the theory in greater detail, theorizing that separating powers serves the interest of governmental efficiency by assigning certain public functions to the branches that are best suited to achieve the stated objective of those functions.[52] It is simply a matter of institutional competence.[53]

Perhaps the paradigmatic demonstration of separating powers as a way to achieve governmental efficiency value may be drawn from a seminal United States Supreme Court decision. The Court ruled that requiring the Senate to ratify the President's decision to dismiss United States postmasters would undermine executive efficiency.[54] The President, wrote the Court, ought to retain the authority to make executive choices without the threat of politically-inspired delaying tactics that risk disrupting the delivery of public serves administrated by the executive.

Only a few scholars argue that efficiency is the principal purpose of separated powers.[55] Most cite it in tandem with the prevention of tyranny.[56] Others argue the contrary: that separated

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[48] Richard Bellamy, *The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy*, 44 POLITICAL STUDIES 436, 438 (1996).
[49] Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1143 (2003).
[50] Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 499-500 (2003).
[51] Gregory M. Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 152 (2001).
[52] Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 12 (1987).
[53] *See* Bradley A. Benedict, Note, *Upsetting the Balance: Ignoring the Separation of Powers Doctrine in* Council of New York v. Bloomberg, 72 BROOKLYN L. REV. 1261, 1266-67 (2007); Jeremy Travis, Note, *Rethinking Sovereign Immunity After* Bivens, 57 N.Y.U. L. REV. 597, 661 (1982).
[54] Myers v. United States, 272 U.S. 52 (1926).
[55] *See, e.g.*, Nicholas W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L.J. 59 (2001).
[56] *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 388 (3d ed. 1996); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1185

powers are inefficient because they erect barriers to the legislative process.[57] Yet this inefficiency is precisely what helps to prevent the concentration of power. Separated powers, for instance, mitigate against the dangers of unilateralism by deliberately placing obstructions throughout the legislative process.[58] Recognizing the causal connection between creating inefficiency and thwarting tyranny,[59] the founders were content to sacrifice optimal efficiency for a greater likelihood of liberty.[60]

C. The Appeal of Separated Powers

There is unsurprisingly no agreement on the main purpose of separating governmental powers. Though some argue that we must identify one overriding purpose of separated powers over all others,[61] I am not convinced. The separation of powers serves several valuable purposes in a liberal democracy. Yet constitutional theory presupposes that those purposes may be achieved only by separating governmental powers. On this score, conventional constitutional theory is mistaken.

For example, the political process itself holds promise for achieving important objectives that may otherwise be achieved through the separation of powers. In a recent article that has recast the very foundations of separation of powers theory, Levinson and Pildes argue that the spotlight of separate powers should not shine only on government branches but equally on political parties because political competition is as valuable in the effort to defend against the concentration of power as is the separation of powers.[62] Levinson and Pildes advise democracies to ensure that the necessary conditions exist to enable political parties to effectively discharge their respective roles as government and opposition.

Specifically, Levinson and Pildes recommend a number of institutional designs that might help not only to cultivate and sustain political competition but also to thwart the concentration of powers—without compromising government efficiency. These suggestions include the following: (1) a strong menu of opposition party rights, for instance opposition days and question periods, a role in agenda-setting, and standing committee chair positions; (2) an independent administrative or bureaucratic branch of government whose autonomy would prevents its capture by either government or opposition parties; and among others (3) electoral districts drawn in a non-partisan fashion a non-partisan body.[63] Such institutional designs could conceivably foster a political setting in which the values of the separation of powers are achieved in governmental systems where one party has gained control of all organs of the state, for

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(1999); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 475 (1989); Kevin R. Morrissey, Comment, *Separation of Powers and the Individual*, 55 BROOKLYN L. REV. 965, 978-79 (1989); William C. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 720-23 (1984).

[57] *See, e.g.*, Barbara A. Cherry, *The Telecommunications Economy and Regulation as Coevolving Complex Adaptive Systems: Implications for Federalism*, 59 FED. COMM. L.J. 369, 378 (2007); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 465-66 (1987).

[58] Bruce Ackerman, Response, *This is Not a War*, 113 YALE L.J. 1871, 1878 n.20 (2004).

[59] John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1403-04 (1997).

[60] L. Peter Schultz, Speech, *The Constitution, the Presidency, and the Rule of Law*, 76 KY. L.J. 1, 2-3 (1987).

[61] *See, e.g.*, Barber, *supra* note 55, at 88.

[62] Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

[63] *Id.* at 2368-85.

instance by winning the presidency, holding a majority in both houses of a bicameral legislature, and appointing a majority of the judges on the high court—precisely the scenario that gave rise to the Levinson-Pildes thesis.

Ackerman is right to encourage constitutional theorists to consult the research of Levinson and Pildes because it should indeed be a reference point for future thought on separation of powers theory.[64] Their important article is useful for at least three reasons. First, it has a distinguished lineage insofar as it applies the influential theory of English political theorist William Jennings to the American context of presidentialism.[65] Like Jennings, Levinson and Pildes stress the superceding significance of political parties in waging the battle against tyranny.[66] Under both theories, constitutional or structural safeguards against tyranny are good but not sufficient. Both recognize the fundamental merit of political safeguards to prevent tyranny. In this case, both theories advocate empowering political parties to discharge a checking function similar to the institutional function that the constitution would otherwise require one branch of government to exercise against another.

Second, although political scientists have long theorized that political parties could remedy some of the deficiencies of the separation of powers practice in the United States,[67] Levinson and Pildes now make the argument from the perspective of constitutional theory, a much different lens through which to assess the political dynamics of institutional power. In doing so, Levinson and Pildes have produced a much overdue update to the American project of democracy. Their piece not only marks a fundamental renewal of American constitutional theory but moreover brings American constitutional theory into conformity with modern American constitutional practice.

The third reason why the work of Levinson and Pildes should be required reading for separation of powers theorists concerns a faintly explored question of constitutional theory: the relationship between structure and culture. Whether or not they mean to do so, Levinson and Pildes have elevated separation of powers theory from a question of constitutional structure to one of political culture. Structure of course remains a defining feature of separated powers in Levinson and Pildes' rendering of separation of powers theory, but they implicitly invite readers to redirect their focus and approach the separation of powers toward the political landscape. Whether constitutional structure follows from political culture or whether political culture instead follows from constitutional structure is a useful inquiry because it may help to illuminate another path of inquiry in the continuing conversation among political scientists and legal theorists about the relative virtues of parliamentary and presidential systems. In these respects, Levinson and Pildes help advance the study of the separation of powers.

Nonetheless, the conventional wisdom underpinning the theory of the separation of powers continues to hold that separated powers serves three interrelated purposes. First, separating powers prevents the arbitrary exercise of governmental power. Second, the distribution and allocation of governmental powers is a useful means toward the end of

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[64] Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1809 n.222 (2007).
[65] SIR W. IVOR JENNINGS, THE LAW AND THE CONSTITUTION 303-04 (5th ed. 1959).
[66] *See* Levinson & Pildes, *supra* note 62, at 2314.
[67] *See* Stephen G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1480 (1994).

preventing the governmental tyranny that may arise from the concentration of official power. This includes defending against legislative, executive and judicial supremacy. And third, separating powers is also an effective way to improve government efficiency in administering and managing the state.

III. SEPARATING POWERS IN PARLIAMENTARY SYSTEMS

Having charted the values served by the separation of powers, I now turn to parliamentary systems. This is an important step in answering the question posed above—Is it possible to achieve the values of the separation of powers in a parliamentary system?—because there exist several forms of parliamentary systems, each of which may be receptive to different degrees to the values of separated powers. Though one scholar suggests many secondary forms of parliamentary systems,[68] let us posit that there exist three primary forms of parliamentary systems: (1) British parliamentarism; (2) constrained parliamentarism; and (3) semi-presidentalism. The structural differences among these systems have substantial consequences for the promise of achieving the values of separated powers.

In this Part, I will survey these three forms of parliamentarism and assess whether it is possible to successfully achieve the democratic values advanced by the separation of powers—guarding against government tyranny, preventing arbitrary government and promoting government efficiency—within each of them. If my analysis reveals that parliamentary systems can indeed achieve the values served by the separation of powers, then we can conclude that the conventional wisdom―which holds that separated powers is an indispensable feature of democracy―is misguided. My analysis will in fact demonstrate just that.

A. Unconventional Separation of Powers: British Parliamentarism

There are three major distinctions between presidential and parliamentary systems. In parliamentary systems the government is selected by Parliament, whose members are directly elected by the citizenry, the government is vulnerable to no confidence votes, and executive power is vested in the Cabinet. In contrast, in presidential systems, the executive and legislative branches are selected in separate elections by citizens, the government is not subject to parliamentary votes of no confidence and the executive power is vested in one individual.[69] Two further differences are that, first, presidential systems typically establish fixed terms for the head of government whereas parliamentary systems require the head of government to retain the confidence of a legislative majority and, second, presidential systems forbid the president from sitting in the legislature.[70] (But in the United States, the vice president―a member of the executive branch―is the president of the Senate, one of the two houses of Congress.[71])

[68] Avraham Brichta, *The New Premier-Parliamentary System in Israel*, 555 ANNALS 180, 181 (1998).
[69] Marco Verweij, *Why is the River Rhine Cleaner than the Great Lakes (Despite Looser Regulation)?*, 34 LAW & SOC'Y REV. 1007, 1033 (2000).
[70] Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 164 (1995).
[71] CONSTITUTION OF THE UNITED STATES. art. I, § 3, cl. 4.

British parliamentarism does not separate powers in the conventional sense. Instead it fuses powers between the various branches of government.[72] Perhaps the most illustrative example is the office of the Lord Chancellor, an office that until only recently occupied functions that were not only executive and legislative in nature but also judicial: the Lord Chancellor was, at once, a senior judge and head of the judiciary, a member of the legislature and speaker of the House of Lords, and a senior Cabinet minister in the executive branch.[73] Although the Lord Chancellor no longer exists in that unconventional structure, it remains to be seen just how closely the new British model of constitutionalism will approximate American presidentialism.[74] While the long term may augur a deep structural transformation in the United Kingdom, it is unlikely that the state will manifest the results of those transformative changes in the near term.

A more familiar example of fused powers in the British model is the common blending of executive and legislative powers. The two branches are a *singular approximation*, according to Bagehot's well known description.[75] The head of government is usually drawn from the pool of legislative members, as are Cabinet members, all of whom usually concurrently sit in either the lower or upper house of Parliament.[76] As a consequence, the executive, if it commands a majority, determines the legislative priorities, usually initiates the legislative process,[77] and may pass any Act of Parliament in the legislature, often with nominal opposition.[78] British parliamentarism also exhibits a nuanced appreciation of the difference between legal and political accountability insofar as it divides the administrative function of the executive from the political answerability of the Cabinet.[79] Furthermore, the lynchpin of this system is parliamentary sovereignty,[80] meaning that the will of Parliament is supreme with only a few exceptions.[81] The prevailing view of British parliamentarism is that it is more unified, effective, and accountable than presidential systems characterized by separated powers.[82] But there is evidence to the contrary. For instance, presidential systems with separated powers provide more points of public access to the policymaking process than parliamentary systems, which are themselves more insular and difficult to penetrate.[83]

In the British context, the separation of powers does not exist horizontally among the executive, legislative and judicial branches. It instead exists between the Crown and Parliament.

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[72] F.C. DeCoste, *Political Corruption, Judicial Selection and the Rule of Law*, 38 ALBERTA L. REV. 654, 666 n.61 (2000).
[73] Susanna Frederick Fischer, *Playing Poohsticks with the British Constitution? The Blair Government's Proposal to Abolish the Lord Chancellor*, 24 PENN. ST. INT'L L. REV. 257, 259-60 (2005).
[74] For a discussion of the recent changes to British constitutionalism, *see* VERNON BOGDANOR, THE NEW BRITISH CONSTITUTION (2009); THE CHANGING CONSTITUTION (JEFFREY L. JOWELL & DAWN OLIVER eds., 6th ed. 2007).
[75] WALTER BAGEHOT, THE ENGLISH CONSTITUTION 67 (1977).
[76] Lisa Klein, *On the Brink of Reform: Political Party Funding in Britain*, 31 CASE W. RES. J. INT'L L. 1, 8 (1999).
[77] G.G.T. Williams, *Aspects of Equal Protection in the United Kingdom*, 59 TUL. L. REV. 959, 961 (1985)
[78] William Wade, *Administrative Justice in Great Britain*, *in* ADMINISTRATIVE LAW AND THE PROBLEM OF JUSTICE: ANGLO-AMERICAN AND NORDIC SYSTEMS 5-6 (ALDO PIRAS ed., 1991).
[79] Carl Lebeck, Book Review, *Accountability in Supra- and International Organizations: Between Judicialization and Post-National Political Constitutionalism?*, 21 CONN. J. INT'L L. 105-06 (2005).
[80] A.V. DICEY, THE LAW OF THE CONSTITUTION XXXVI, 4 (8th ed. 1982).
[81] Paul Craig, *Sovereignty of the United Kingdom After* Factortame, 11 YEARBOOK OF EUROPEAN LAW 221, 227, 251 (1991).
[82] Lloyd N. Cutler, *To Form a Government*, 59 FOREIGN AFFAIRS 126, 129 (1980).
[83] Andrew J. Green, *Public Participation, Federalism and Environmental Law*, 6 BUFF. ENVT'L L.J. 169, 179-182 (1999).

This form of separation has at least two origins. First, the Act of Settlement of 1701, which sought to limit the reach of the Crown in parliamentary affairs.[84] And, second, the abuses of the Long Parliament and the restoration of the monarchy and the House of Lords.[85] The framers of the United States Constitution seized upon this separation in crafting presidential war powers.[86] Indeed, the American state was constructed precisely to repudiate the parliamentarism.[87] The Constitution itself reveals this founding intention.[88]

Tomkins has masterfully elaborated this distinction between Parliament and the Crown. Instead of falling to the temptation of struggling to fit the English polity into the Madisonian model of a tripartite division of powers, Tomkins has described the English separation of powers on its own terms.[89] The British model, according to Tomkins, embodies a different theory of the separation of powers, one that does not conform neither to the conventional view of separated powers nor to other models of parliamentarism. In dividing powers between the Crown and Parliament—as opposed to the traditional division among the legislature, executive and judiciary—the English model does the following: (1) requires the Queen to assent to a bill that creates primary legislation because this represents the legal moment when the two sovereign authorities of England reach agreement—a moment without which primary legislation would be impossible; (2) makes ministers responsible to Parliament because they represent the Crown and are vehicles through which Parliament holds the Crown constitutionally and politically accountable; and (3) creates a valuable tension between Parliament and the courts insofar as Parliament is authorized to overrule courts, which themselves derive their constitutional authority from the Crown.[90]

These are the critical elements to the separation of powers theory under British parliamentarism. They demonstrate that the separation of powers exists between Parliament and the Crown and not among government branches, as is otherwise the case in the American presidential model. Under Tomkins' conception of the British polity, this separation serves each of the three democratic values of separated powers. First, by setting the Crown and Parliament in opposition, it prevents one from achieving ascendancy over the populace and therefore guards against tyranny. Second, it prevents arbitrary government because it is consistent with the rule of law and its corresponding essential features of predictability and equality. Finally, it promotes government efficiency because Parliament may pass laws under the watchful yet generally unintrusive gaze of the Crown.

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[84] 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, 432 (2004).
[85] Peter M. Shane, *Reflections in Three Mirrors: Complexities of Representation in a Constitutional Democracy*, 60 OHIO ST. L.J. 693, 700 (1999).
[86] Roger Pilon, *The War Powers in Brief: On the Irreducible Politics of the Matter*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 49, 54-55 (2003); John C. Yoo, *The Constitution of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 217 (1996).
[87] Akhil Reed Amar, *Presidents Without Mandates (With Special Emphasis on Ohio)*, 67 U. CIN. L. REV. 375, 386 (1999).
[88] Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C.L. REV. 1653, 1766 (2002).
[89] Ernest A. Young, Book Review, *English Constitutionalism Circa 2005, or, Some Funny Things Happened After the Revolution*, 21 CONST. COMMENT. 771, 802 (2004).
[90] ADAM TOMKINS, PUBLIC LAW 44-54 (2003).

Therefore, separation of powers theory, as it is generally understood, may not be dominant in British parliamentarism but it is nonetheless influential.[91] As Munro explains, there are admittedly overlaps between the executive, legislative and judicial powers in British parliamentarism. But there also exist self-imposed or statutory restrictions on taking advantage of those intersections. Consider three examples: (1) Law Lords, judicial agents, are endowed with legislative powers but do not freely exercise them; (2) the House of Commons and the House of Lords, both of which are legislative agents, have penal powers but do not typically discharge this executive responsibility; and (3) although all Cabinet ministers must generally be members of either the House of Commons or the House of Lords, there is a statutorily-imposed ceiling on the number of ministers that may sit in the legislature.[92] These and other examples of institutional restraint help move British parliamentarism closer toward achieving the values served by a conventional understanding of separated powers.

Some have nevertheless questioned whether the presidential separation of powers has protected liberty more successfully than parliamentary systems[93] insofar as British parliamentarism raises perhaps one of the greatest dangers of tyrannical rule. Where the legislature is governed by a majority party that is driven by a rigid policy program and whose leader—the prime minister, who is the head of government—is equally unyielding, that is the most precarious context for democratic freedom.[94] As Issacharoff argues, the fusion of executive and legislative powers in parliamentary systems provides a much weaker defense against the abuse of political power than the separation of powers in presidential systems.[95] This is explained, at least in part, by the dominance that the executive can exert on the legislature. Though the legislature must approve the executive's program, the executive, if it holds a majority, effectively enjoys the freedom to pass whatever law it pleases. Members of Parliament from the governing party who threaten to derail the executive's program risk expulsion from the caucus unless the fall in line behind the party line.

However, the countervailing virtue of this concentration of power may be the public's enhanced capacity to hold accountable the abusive branch of government.[96] While the British parliamentary system fuses the executive and legislative personnel, it retains a separation of executive and legislative functions insofar as the executive must keep the confidence of the legislature, which must in turn sanction the executive's plan for governing. This is an important feature of British parliamentarism because it prevents the arbitrary exercise of government powers. It achieves these objectives by clearly identifying the respective responsibilities of the executive and legislative branches in a way that is comprehensible to the citizenry.

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[91] V. Harris, *The Constitutional Future of New Zealand*, 2004 NZ L. REV. 269, 274.
[92] Colin Munro, *The Separation of Powers*, 1981 PUBLIC LAW 19.
[93] J. Gregory Sidak, *The Price of Experience: The Constitution After September 11, 2001*, 19 CONST. COMMENT. 37, 54 (2002).
[94] Minasse Haile, *Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the "Republic's"—Cucullus Non Facit Monachum*, 13 CARDOZO J. INT'L & COMP. L. 1, 22 (2005).
[95] Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1454 (2007).
[96] R, Kent Weaver, *Pension Reform in Canada: Lessons for the United States*, 65 OHIO ST. L.J. 45, 48 (2004).

Perhaps the greatest virtue of British parliamentarism is its capacity to promote efficient government, namely by facilitating quick and decisive action.[97] Unlike presidential systems, parliamentary systems are generally unsusceptible to deadlock situations.[98] Parliamentary systems avoid gridlock because, in a majority context, the leading party will find no encumbrances standing in the way of implementing its governing agenda. It will either push through its legislation or fall on a vote of no confidence if the legislation is of sufficient significance to warrant triggering an election over its defeat.[99] The contrast with presidential systems on this point could not be any sharper: parliamentary systems are more concerned about promoting government efficiency than presidential systems, which are themselves more concerned with curbing the risk of tyrannical government.[100] Paradoxically, presidential systems have often, if not regularly, degenerated into tyranny, almost certainly because of the strong incentives that presidentialism presents to the head of government to act extraconstitutionally.[101] The picture is therefore not as clear as the conventional wisdom would have us believe because British parliamentarism does indeed achieve the values of separated powers, albeit in an unorthodox fashion.

B. Juricentric Separation of Powers: Constrained Parliamentarism

Constrained parliamentarism has been adopted in several western nations, including Canada, Germany and India. Bruce Ackerman coined the term *constrained parliamentarism* to refer to systems that are similar to British parliamentarism with the following noteworthy exceptions: (1) Parliament is not fully sovereign; (2) the lower chamber is preeminent in legislative affairs and is normally the source for selecting Cabinet members; (3) the upper chamber is not the constitutional equivalent of the lower chamber; and (4) legislative powers are constrained by a written constitution, an enshrined bill of rights, and an independent judiciary endowed with the power of constitutional review.[102]

In those modern parliamentary systems, the separation of powers is discernible in ways that defy the traditional understanding of separated powers. First, it is reflected in the role of opposition parties to publicly challenge, confront and critique the ruling party and to present itself as a viable alternative to it.[103] Second, the judiciary occupies a central role in monitoring the actions of the fused executive and legislative departments. This latter element is perhaps the most important feature of constrained parliamentarism. Modern parliamentary democracies possess a strong and independent judiciary[104] whose mission is to serve as a counterweight to the

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[97] David Golove, *Exception and Emergency Powers: Comment On Exception and Emergency Powers*, 21 CARDOZO L. REV. 1895, 1897 (2000).
[98] Yen-Tu Su, *Beyond Nightmare and Hope: Engineering Electoral Proportionality in Presidential Democracies*, 30 J. LEGIS. 205, 231 (2004).
[99] Harold A. McDougall, *Constitutional Form and Civil Society: The Case of Jamaica*, 16 ST. THOMAS L. REV. 423, 432 (2004).
[100] John C. Reitz, *Political Economy and Separation of Powers*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 579, 595 (2006).
[101] Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1126-28 (2004).
[102] Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 635-36 (2000).
[103] Donald P. Kommers, *The Federal Constitutional Court: Guardian of German Democracy*, 603 ANNALS 111, 116 (2006).
[104] Itzhak Galnoor, *THe Judicialization of the Public Sphere in Israel*, 37 ISR. L. REV. 500, 536-37 (2003).

majoritarianism that typifies parliamentarism.[105] Perhaps paradoxically, given their lineage to British parliamentary supremacy, constrained parliamentary systems embrace judicial review as a defensive shield against the rise of tyranny.[106]

Canada is the paradigmatic example of a constrained parliamentary system. Since the advent of the *Charter of Rights and Freedoms* in 1982,[107] Canada no longer adheres to the theory of parliamentary sovereignty.[108] The lower chamber—the House of Commons—is the leading force in legislative affairs whereas the upper chamber—the Senate—is not as significant a player in the legislative process.[109] Moreover, Canada's new bill of rights authorizes courts to exercise the power of judicial review.[110] In view of the central positioning of Parliament in Canadian public policy as well as the increasing influence of the judiciary, Canada straddles the boundary dividing British parliamentarism and American presidentialism.

As it sits in this intermediate site along the spectrum of democratic systems, Canada nonetheless adheres to separation of powers principles. The Supreme Court of Canada has on several occasions not only invoked the separation of powers but relied on it in reaching its decisions. The Court has recognized that although the Constitution does not expressly adopt the separation of powers[111] and although the Constitution does not insist on a strict application of the separation of powers,[112] it is nevertheless accurate to state that "there is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary."[113] The Supreme Court has moreover recognized the separation of powers as one of the "essential features" of Canadian constitutionalism[114] and a "defining feature" of the Canadian constitutional order,[115] one ensuring that "each of the branches of the State is vouchsafed a measure of autonomy from the others."[116]

The Court regards the separation of powers as a necessary precondition for judicial independence.[117] On the Court's reading, the judiciary is the guardian of the Constitution and must be shielded from interference by the other branches in the judicial process.[118] Even so, the Court has held that the permissive theory of separated powers in Canada permits non-judicial bodies to discharge judicial functions, just as the judiciary may itself be vested with non-judicial

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[105] James A. Gardner, *Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior*, 79 ST. JOHN'S L. REV. 293, 315 (2005).
[106] Ran Hirschl, *The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided Polities*, 36 STAN. J. INT'L L. 73, 76-77 (2000).
[107] CONSTITUTION OF CANADA (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).
[108] Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 Tex. L. Rev. 1963, 1965-66 (2004).
[109] Ackerman, *supra* note 102, at 671-72.
[110] CONSTITUTION OF CANADA (Constitution Act, 1982) pt. VII (Canadian Charter of Rights and Freedoms) § 52.
[111] Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, at para. 33.
[112] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 14.
[113] Fraser v. P.S.S.R.B., [1985] 2 S.C.R. 455, at para. 39.
[114] Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441, at para. 104.
[115] Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 S.C.R. 381, at para. 104.
[116] Canada (House of Commons) v. Vaid, [2005] 1 S.C.R. 667, at para. 21.
[117] Application under s.83.28 of the *Criminal Code* (Re), [2004] 2 S.C.R. 248, at para. 179.
[118] Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405, at para. 39.

functions.[119] This does not mean, however, that certain functions cannot be exclusively judicial or executive or legislative in nature and, as a result, non-delegable.[120]

To its credit, the Canadian Supreme Court has been careful not to overlook the critical differences between how the separation of powers operates as a practical matter in parliamentary and presidential systems. For instance, the Court once denied the executive branch's claim that the legislature had frustrated its purposes by passing a law that ran counter to the executive's wishes. The executive had relied on the formal separation of executive and legislative powers to make its argument, but the Court found this argument disingenuous precisely because the executive and legislative branches of government are, in Canada, controlled by the same individuals.[121]

With this helpful context, we are now in a position to assess whether constrained parliamentarism is receptive to the values of separated powers: (1) guarding against government tyranny; (2) preventing arbitrary government; and (3) promoting government efficiency. Constrained parliamentary systems achieve the second and third values for the same reason that the British parliamentary system succeeds in achieving them. But constrained parliamentary systems may also potentially achieve the first value: defending against tyranny, which is something that British parliamentarism does not always achieve. Constrained parliamentary systems are more likely to successfully reach this democratic objective because they subject executive and legislative action to strong judicial oversight. The judiciary is tasked with the responsibility to uphold the written constitution and the entrenched bill of rights—a duty that authorizes the judiciary to invalidate actions of other government departments that run counter to the principles and rules enshrined in those constitutional documents.

But the possible consequence of constrained parliamentarism is judicial tyranny. An independent judiciary possesses determinative authority to resolve disputes on the allocation and distribution of powers. Whether powers are separated vertically, horizontally or diagonally, the judiciary wields an enormous amount of power as the arbiter of jurisdictional disagreements. This form of tyranny—which Hirschl calls juristocracy[122]—poses serious difficulties for popular governance because it invites, and perhaps entitles, the judiciary to decide polycentric issues.

Polycentricity is the quality of a complex policy problem that contains subsidiary problem centers, each of which is connected to the others, which in turn creates the need for a solution to the parent problem that simultaneously addresses the secondary ones.[123] Solving these problems often requires political sensitivity and practical sensibilities that, according to Fuller, may be out of the reach of judicial personnel and their advisors.[124] Such issues, adds Fuller, are better managed by legislatures, which permit interested parties to reach solutions that, at once, accommodate divergent objectives, aggregate interests, and are the result of political

[119] Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854, at paras. 12-13.
[120] Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 S.C.R. 3, at para. 139.
[121] Wells v. Newfoundland, [1999] 3 S.C.R. 199, at paras. 51-54.
[122] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONAILSM (2004).
[123] William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 645 (1982).
[124] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 400 (1978).

dealmaking.[125] Judicial tyranny calls to mind Tocqueville's familiar observation that all political questions ultimately become judicial ones[126] insofar as judicial tyranny pulls all issues, including polycentric ones, into the judicial vortex, even though it may not be advisable for courts to decide them.

C. Executive Separation of Powers: Semi-Presidentialism

Semi-presidentialism traces its origin to the Fifth French Republic.[127] The model appeared in 1958.[128] Today, semi-presidential systems are in vogue, having sprouted in Croatia,[129] the Slovak Republic,[130] Poland,[131] Russia, Hungary and elsewhere since the end of the Cold War.[132] By 1999, roughly 50 nations had adopted semi-presidential systems,[133] consistent with scholarly recommendations that budding democracies adopt this constitutional structure.[134] It was even proposed in the Draft Constitution for Afghanistan in 2004.[135]

The French semi-presidential system sets itself apart from presidential and parliamentary systems on the following bases: (1) citizens elect a president directly, as in presidential systems; (2) the president or the legislature appoints the head of government, usually a prime minister, who must retain the confidence of the Parliament, as in parliamentary systems; (3) the president may trigger elections by dissolving the legislature but only in collaboration with the prime minister; (4) the president cannot veto legislation but can suggest that the legislature take a second look at legislation; (5) the president can legislate by decree if assigned those powers; and among others (6) members of Cabinet do not sit simultaneously in the legislature.[136]

Russia, another example of a semi-presidential state, has made a few noteworthy adjustments to the French model. The principal differences concern presidential powers.[137] For example, the Russian president may both initiate and veto legislation, unlike the French president. The Russian president may also fire the entire government, something that the French president cannot do. One final illustration of the difference between Russian and French semi-

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[125] *Id.*
[126] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 248 (J. Mayer & M. Lerner eds. 1966).
[127] Rett R. Ludwikowski, *"Mixed" Constitutions—Product of an East-Central European Constitutional Melting Pot*, 16 B.U. INT'L L.J. 1, 34 (1998).
[128] Luis Lopez Guerra, *The Application of the Spanish Model in the Constitutional Transitions in Central and Eastern Europe*, 19 CARDOZO L. REV. 1937, 1946 (1998).
[129] Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 464 (1991).
[130] Peter Kresak, *The Government Structure in the New Slovak Republic*, 4 TULSA J. COMP. & INT'L L. 1 (1996).
[131] Hanna Suchocka, *Checks and Balances Under the New Constitution of Poland*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 45.
[132] Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 27 N.9 (1995).
[133] Thomas Weishing Huang, *The President Refuses to Cohabit: Semi-Presidentialism in Taiwan*, 15 PAC. RIM L. & POL'Y 375, 378-79 (2006).
[134] *See, e.g.*, Carlos Santiago Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 U. MIAMI. L. REV. 129, 164 (1989).
[135] Michael Schoiswohl, *Linking the International Legal Framework to Building the Formal Foundations of a "State at Risk": Constitution-Making and International Law in Post-Conflict Afghanistan*, 39 VAND. J. TRANSNAT'L L. 819, 838-39 (2006).
[136] Ludwikowski, *supra* note 4, at 34-37.
[137] Lee Kendall Metcalf, *Presidential Power in the Russian Constitution*, 6 J. TRANSNAT'L L. & POL'Y 125, 137-38 (1996).

presidentialism concerns a parliamentary vote of no-confidence against the prime minister, which, in France results immediately in new legislative elections while in Russia it does not unless the president ratifies that vote or parliament casts a second vote of no-confidence after the president refuses to ratify the first one.[138] Although the Russian Constitution endorses the theory of separation of powers, in practice the Russian president exercises both executive and legislative powers,[139] which may make the officeholder much more powerful than presidents in presidential systems and prime ministers in both British and constrained parliamentary systems.

Semi-presidential presidents are not purely ceremonial politicians. They have broad powers that permit the officeholder to intervene in almost any matter of governance.[140] In France, for instance, the president also exercises administrative rulemaking authority.[141] And in the six postwar Korean republics, public power was largely concentrated in the hands of the president although the separation of powers between the president and prime minister was dynamic and never static.[142]

The dominance of the president in semi-presidential systems is unsurprising given that those systems reflect the presidentialization of parliamentary systems through plebiscitarian leadership.[143] But semi-presidential systems embody a compromise of sorts inasmuch as the president possesses an extraordinary menu of constitutional powers but those powers are in turn circumscribed by the constitutional text.[144]

Yet presidents are not invariably powerful across all forms of semi-presidentialism. While semi-presidential presidents are at the apex of their power when they control the majority party in Parliament (and can therefore operate as presidents in presidential systems), they are considerably weaker when they face an opposing majority party in Parliament (in which case semi-presidential presidents must cede a sizeable measure of both real and perceived authority and popular legitimacy to the prime minister).[145]

Semi-presidentialism, according to one scholar, has at least three structural defects: (1) direct election of the president endows the officeholder with extraordinary powers that are not offset by the checks and balances typical of presidential systems; (2) the dual executive creates an unproductive and undesirable tension; and (3) Parliament is relegated to obscurity behind the

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[138] Ludwikowski, *supra* note 127, at 41.
[139] Christina M. McPherson, Note, *Russia's 193 Constitution: Rule of Law for Russia or Merely a Return to Autocracy?*, 27 HASTINGS CONST. L.Q. 155, 160-63 (1999).
[140] Carlo Dapelo, *The Trends Towards Federalism in Italy*, 15 ST. THOMAS L. REV. 345, 348 (2002).
[141] Dominique Custos, *The Rulemaking Power of Independent Regulatory Agencies*, 54 AM. J. COMP. L. 615, 620 (2006).
[142] Tom Ginsburg, *Dismantling the "Developmental State"? Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585, 591 (2001).
[143] Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341, 1409 (2004).
[144] David Golove, Book Review, *Liberal Revolution, Constitutionalism and the Consolidation of Democracy: A Review of Bruce Ackerman's* The Future of Liberal Revolution, 1993 WIS. L. REV. 1591, 1601-02.
[145] Eugene D. Mazo, *Constitutional Roulette: The Russian Parliament's Battles with the President Over Appointing a Prime Minister*, 41 STAN. J. INT'L L. 123, 135-36 (2005).

omnipotent president and the dominant prime minister.[146] Perhaps the most distinctive feature of semi-presidentialism is its divided executive, which consists of, on the one hand, a president who can claim an electoral mandate from the people of the entire nation and, on the other, a prime minister who enjoys the support of a majority of the legislature.[147] This risks generating a crisis of legitimacy between the head of state and the head of government, each of which has an independent constituency from which to claim legitimacy and legitimate authority to act, as was recently the case in France when the president was compelled to administer the affairs of the state with a prime minister from an opposing political party.[148]

Another instructive illustration is the Polish semi-presidential experiment in its transition to democracy. The dual executive stoked conflict between the president and the prime minister, neither of whom controlled the majority party in Parliament.[149] The ultimate consequence of the inability of these leaders to forge a coalition was public disappointment not only in their leaders but also in the political process because these tensions came at a time when the nation was laboring hopefully toward post-Cold War reconciliation.[150]

Semi-presidentialism, which gives the president a fixed term, also exhibits a further deficiency insofar as it does not necessarily always reflect the pulse of the people.[151] Specifically, unlike parliamentary systems, in which an unpopular prime minister could not survive in office for long without either resigning or signaling through some significant action a willingness to respond to public concerns, semi-presidential systems allow the president to remain in power through the balance of the elected term, even if presidential approval ratings drop to their nadir. This is precisely what happened in Poland. Presidential approval barely registered 20 percent in 1993 yet the president continued to govern through 1995, confident in his belief that he and the citizenry shared a special connection that could not be captured in public opinion polling.[152]

Semi-presidentialism can theoretically achieve two of the three values served by separated powers: (1) preventing the arbitrary exercise of government power; and (2) defending against tyranny. It fails to always achieve the third value—promoting government efficiency—precisely because it succeeds in achieving the other two. Recall that semi-presidential systems are characterized by a split executive: a head of state (usually a president who is directly elected) and a head of government (normally a prime minister who is either appointed or indirectly elected). The division of executive power between these two power centers fosters a disruptive constitutional ambiguity in certain circumstances, particularly given

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[146] Martin A. Rogoff, Book Review, *One, Two, Three, Four, Five, and Counting: A Sixth French Republic?*, 10 COLUM. J. EUR. L. 157, 160-63 (2003).
[147] Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1091 (1994).
[148] Carlos Santiago Nino, *The Debate Over Constitutional Reform in Latin America*, 16 FORDHAM INT'L L.J. 635, 645-50 (1993).
[149] Mark Freeman, *Constitutional Frameworks and Fragile Democracies: Choosing Between Parliamentarism, Presidentialism and Semi-Presidentialism*, 12 PACE INT'L L. REV. 253, 278 (2000).
[150] *Id.*
[151] The same criticism applies to presidential systems. *See* CHARLES O. JONES, SEPARATE BUT EQUAL BRANCHES: CONGRESS AND THE PRESIDENCY 26 (1999).
[152] *Id.* at 279-80.

the constitutional strains it cultivates as to setting and charting the trajectory for the state, developing and implementing policy, presiding over Cabinet meetings and discharging other executive functions.

This executive separation of powers—which is an unmistakable source of potential friction[153]—tilts toward presidential authority because semi-presidential systems tend to confer not only foreign affairs and defense responsibilities on the president but also latent powers that the president may invoke to respond to prime ministerial or parliamentary moves.[154] The result of expanding presidential powers in this way at the expense of prime ministerial ones is to introduce predictability and create the conditions for stability in semi-presidential systems.[155] Nonetheless, semi-presidential systems compromise government efficiency in the interest of preventing tyranny and the arbitrary exercise of official power.

IV. THE PROMISE OF FUSED POWERS

The critical point to seize from the analysis above is that liberal democracies have crafted various mechanisms by which to hold their governmental agents accountable, whether that accountability is understood in terms of guarding against tyranny, preventing arbitrary rule, or promoting efficient government. Indeed, several new democracies have indeed chosen to adopt parliamentary, and not presidential, systems while at the same time importing from parliamentary systems powerful institutions like constitutional courts possessing broad powers of executive and legislative oversight not unlike those common to the presidentialist United States Supreme Court.[156] Nevertheless, democratic states may govern effectively under either parliamentary or presidential systems.[157]

In this concluding Part, I marshal the conclusion reached above—that separated powers are not fundamental to democracy precisely because fused powers may achieve the same values—in order to explore the usefulness of constitutional structures that do not conform to traditional models of separated powers. I do so in the context of reconciliatory constitutionalism, which I use to refer to constitutionalism for emerging, fractious or reconstructive democracies.

A. The Value of Values

I am persuaded by the argument that states should not be confined to choosing between parliamentary and presidential systems, and should instead adopt constitutional structures, unorthodox though they may be, that satisfy the broader, more general fundamental principles of democratic governance.[158] This may entail transforming existing models of either parliamentarinism or presidentialism, or brainstorming and subsequently fashioning entirely new

[153] Bernard Susser, *Toward a Constitution for Israel*, 37 ST. LOUIS L.J. 939, 942-43 (1993).
[154] Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 A.J.I.L. 86, 95 (2001).
[155] Lucio Pegoraro & Angela Rinella, *Le gouvernement au Parlement selon le modèle semi-présidentiel: l'expérience française et les propositions de la Commission parlementaire pour les réformes constitutionnelles en Italie*, 34 R.J.T. 275, 282 (2000).
[156] A.E. Dick Howard, *Constitution-Making in Central and Eastern Europe*, 28 SUFFOLK U. L. REV. 5, 9 (1994).
[157] Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L REV. 801, 879 N.274 (1993).
[158] Stephen J. Schnably, *The OAS and Constitutionalism: Lessons from Recent West African Experience*, 33 SYRACUSE J. INT'L L. & COM. 263, 266 (2005).

constitutional arrangements to respond to the new and evolving social, economic and cultural trends and conditions that states and their people must confront. I am thinking here, for example, of African states that have frequently transplanted western models of constitutionalism but not without adjustments to indigenous tastes.[159]

Yet the choice between parliamentary and presidential systems is only part of the question. Parliamentary systems are often underpinned by principles that are either inconsistent with or run counter to the principle of separated powers. Consider the English model in which its unwritten constitutional traditions would be inconsistent with the presidential practice of enshrining the scope of separate governmental powers in a foundational text, or in which its adherence to parliamentary sovereignty would authorize Parliament to repudiate by statute any practice that had previously been statutorily instituted in the service of separating powers.[160]

The three principal democratic values served by the separation of powers are nevertheless achievable to varying degrees in each of the three forms of parliamentarism that exist in constitutional states. The very constitutional structures that, in one type of parliamentary system, facilitate the fulfillment of a given democratic value may in fact frustrate the possibilities for fulfilling different democratic values in that same parliamentary system. There is consequently a trade-off between and among democratic values, and it remains within the purview of the citizenry and constitutional drafters to weigh the balance of these competing yet paradoxically complementary values. Citizens and their governmental agents must also choose the lens through which they will approach the question of separating powers, specifically whether they will adhere to a formalist, Holmesian or functionalist understanding of the theory: the first stresses the text and intent of the constitutional designers, the second conceives of the issue as a political question, and the third concerns itself with constitutional functions and their structures.[161] These are complex questions of legal and political statecraft that invite heated debate about the purposes of constitutionalism and the use of public power.

This is an important discussion to undertake. Not only because it goes to the very core of what it means to be a people who strike common cause in order to establish a nation and erect the institutions of the state, but moreover because constitutionalism holds promise, in my view, for giving meaning to citizenship. Constitutionalism can crystallize the psychic relation between the citizen and her state to which Kelsen alluded,[162] or the collective moral bond that Under deemed vital to the foundation of a legal system,[163] or the social solidarity, which, for Durkheim, ensured the cohesion of society.[164] That is the promise of constitutionalism. It may also perhaps be the promise of separating powers.

But separated powers are not the solution for the ills of all civil societies aspiring to democratic legitimacy. After all, although the theory of separated powers is indeed sustained by

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[159] Charles Manga Fombad, *The Separation of Powers and Constitutionalism in Africa: The Case of Botswana*, 25 B.C. THIRD WORLD L.J. 301, 318 (2005).
[160] Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 594 (1986).
[161] Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 493-500 (1987).
[162] HANS KELSEN, PURE THEORY OF LAW 288 (M. Knight transl. 1967).
[163] ROBERTO UNGER, LAW IN MODERN SOCIETY: TOWARDS A CRITICISM OF SOCIAL THEORY (1976).
[164] EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 24-27 (W.D. Halls trans. 1984).

the rule of law, the rule of law can exist without separating governmental powers.[165] For as important as it may be to construct a coherent case for the normative appeal of separated powers, there are higher stakes standing in balance. To be sure, it is more important to pursue the democratic values served by the separation of powers and to craft innovative systems that can respond to social and political conditions while perhaps nonetheless defying the traditional purposes of separating powers. Against this backdrop, the American founding fathers remain correct to this very day in at least one critical respect. They recognized very early on in their design of the American constitution both that some intermixture of government functions was necessary for satisfying certain democratic aims, and that separated powers were not necessarily the magic ingredient for ensuring an enduring democratic stability.[166]

B. Creative Constitutionalism

The foremost insight of separation of powers theory is that assigning governmental functions to different organs of the state may help advance important democratic values, including defending against government tyranny, preventing arbitrary government and promoting government efficiency. As I have shown the previous two Parts of this paper, those values are not achievable exclusively in presidential systems. Indeed, the various models of parliamentary systems, none of which reflects the standard conception of separation of powers theory, are receptive in varying degrees to these values and may fulfill them in ways that diverge from—yet still reflect the core values of—presidential systems. This is an important discovery because it unlocks several possibilities for the future of separation theory.

One such possibility is the prospect of designing constitutional systems that depart from the conventional models of presidentialism or parliamentarism. Until now, we have considered two incarnations of democratic constitutional structure: (1) the inter-branch separation of powers in presidential systems; and (2) the inter-branch fusion of powers in parliamentary systems. We have also seen a third incarnation: the inter-branch separation of *parties* in presidential systems.

But we have yet to consider a fourth form of constitutional structure: the intra-branch fusion of parties in either parliamentary or presidential systems. This model holds promise for emerging, fractious or reconstructive democracies that must reconcile disparate factions or bring together rival peoples along the way toward stability and peace. Its vision of constitutionalism is a fundamental part of the nation-building process for new democracies, as opposed to the state-building process, which is unmistakably important as a practical matter but less so than nation-building because state-building is oriented more closely toward designing and establishing the institutions of the state. The constitutional design component of nation-building in emerging, fractious or reconstructive democracies is part of the process that I call reconciliatory constitutionalism.

This model of intra-branch fusion of powers in parliamentary systems currently prevails in Iraq. The intra-branch fusion of parties was first introduced in the *Law of Administration for the State of Iraq for the Transitional Period* in 2004. The intra-branch fusion of parties is

[165] Thomas O. Sargentich, Bowsher v. Synar: *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 449-50 (1987).
[166] *See* THE FEDERALIST No. 66, at 445 (Alexander Hamilton) (JACOB E. COOKE ed., 1961).

embodied in the Presidency Council, which is a three-member group that consists of the president of Iraq and two deputies, and in whom the executive authority of the state of Iraq is vested in part.[167] The National Assembly of Iraq is tasked with the duty to elect the president and the two deputies.[168] The Presidency Council has momentous functions that include representing the sovereignty of Iraq and overseeing the affairs of state.[169] Specifically, the Presidency Council has the power to veto legislation duly passed by the National Assembly.[170] It is also the commander-in-chief of the Iraqi Armed Forces, albeit only for ceremonial purposes.[171] It is also responsible for judicial nominations.[172] Perhaps its two most important constitutionally delegated tasks are, first, the power to name the prime minister[173] and, second, the corollary power to dismiss the prime minister and the Council of Ministers.[174] In discharging its weighty responsibilities, the Presidency Council must make its decisions unanimously and its members cannot deputize others to act in their stead.[175] The more recent Iraqi Constitution, which received popular assent in 2005, has retained the Presidency Council until the end of the next term.[176] The virtue of the Presidency Council is that it joins various competing parties together in the executive branch. It is a form of forced collaboration.

Iraq is home to three major ethnic groups: Kurdish, Shi'ite and Sunni communities. The inaugural Council had the following composition: Kurdish member Jalal Talabani as president, with Shi'ite member Adel Abdul Mahdi and Sunni member Ghazi al-Yawar as deputies.[177] The second Presidency Council was installed after the ratification of the new Iraqi Constitution: Talabani, a Kurd, remained president, Abdul Mahdi was retained as a deputy and the Shi'ite representative, and Tariq Al-Hashimi came onboard as the second deputy and the Sunni representative.[178] Rather than allowing one of the three ethnic groups to possess the full powers of the presidency, the innovation of the Presidency Council gives each of those three groups a representative on this Council. And given that the Presidency Council must make its decisions unanimously, it also gives each of those three groups a voice and a veto in setting the direction of the state.

When measured against the theory of separated powers, the Presidency Council satisfies at least two of the three democratic values served by separation of powers theory. Recall that the three values are defending against government tyranny, preventing arbitrary government, and promoting government efficiency. The internal structure of the Presidency Council obstructs the rise of tyranny and precludes the arbitrary exercise of government power. But it does so at the great cost of government efficiency because it invites deadlock at two points, if not more. First,

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[167] LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD, art. 35 (March 8, 2004).
[168] *Id.* at art. 36A.
[169] *Id*.
[170] *Id.* at art. 36C.
[171] *Id.* at art. 39B.
[172] *Id.* at art. 39C.
[173] *Id.* at art. 38A.
[174] *Id.* at art. 41.
[175] *Id.* at art. 36C.
[176] CONSTITUTION OF IRAQ, art. 134 (2005).
[177] Edward Wong, *A Kurd is Named Iraq's President as Tensions Boil*, N.Y. TIMES, Apr. 7, 2005, at A1, *available at* 2005 WLNR 5415889.
[178] Kirk Semple, *Ending Logjam, Iraq Parliament Fills Key Government Posts as Violence Goes On*, N.Y. TIMES, Apr. 23, 2006, at A14, *available at* 2006 WLNR 6772362.

the National Assembly's selection of Presidency Council members is an intensely partisan and inherently complex project. Consider that it took two months for the National Assembly to pick the members of the Presidency Council in 2005.[179] Second, the Presidency Council, which is responsible for naming a prime minister, may potentially reach an impasse in making a selection, given that each of the three members represent different interests. This was the case in 2005, when it took 10 weeks to name the prime minister.[180] But despite this potential for stalemate and for compromising government efficiency, the Presidency Council generates substantial countervailing advantages, particularly in the context of reconciliatory constitutionalism.

Iraq's current executive constitutional structure will remain in place until 2010, when the Presidency Council will expire and be replaced by a single president and a vice president.[181] The hope animating Iraq's creation of the Presidency Council is that the institutionalized cooperation that the Presidency Council has ushered in among the governing leaders of the nation will filter throughout the entire government apparatus and, more perhaps more importantly, permeate the popular culture. When it is dissolved in 2010, the Presidency Council will have been active for a period of six years. It remains to be seen whether such a short period of time will be sufficient to do anything more than plant the seeds for reconciliation in order to ultimately achieve this laudable but elusive ambition. It also remains to be seen whether the Iraqi people can indeed forge a national identity and collective sense of community and belonging in the current climate. Nevertheless, as a matter of constitutional theory and culture, the important point is that the Presidency Council is an inventive mechanism by which to use constitutional structure to shape political and public culture.

The Presidency Council is an example of consociationalism. Consociationalism, a term coined by Lijphart,[182] is a theory advocating power-sharing among competing ethnicities, groups or blocs in a society that is severely divided in order to work toward a peaceful resolution of political and social disagreements.[183] One interesting formulation describes consociational systems as non-territorial forms of federalism.[184] This model exists in Belgium, Switzerland, Austria, the Netherlands,[185] and also Canada in a more modest manifestation.[186] The Council reflects one of the focal tenets of consociationalism, which is to encourage, or rather to compel, the cooperation of elites.[187] Another central element of this system is granting a veto to each

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[179] Edward Wong, *Iraqi Parties Break a Deadlock on Candidates*, INT'L HERALD TRIBUNE, Apr. 6, 2005, *available at* 2005 WLNR 5359894.
[180] Edmund Sanders, *After Weeks of Arguing, Iraq's New Premier Named*, L.A. TIMES, Apr. 8, 2005, *available at* 2005 WLNR 23354538.
[181] Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 FORDHAM L. REV. 883, 913 (2006).
[182] Chibli Mallat, *On the Specificity of Middle Eastern Constitutionalism*, 38 CASE W. RES. J. INT'L L. 13, 51 n.94 (2006).
[183] *See* Charles E. Ehrlich, *Democratic Alternatives to Ethnic Conflict: Consociationalism and Neo-Separatism*, 26 BROOK. J. INT'L L. 447, 448, 451 (2000).
[184] Graham Walker, *The Mixed Constitution After Liberalism*, 4 CARDOZO J. INT'L & COMP. L. 311, 325 (1996).
[185] Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 AM. J. INT'L L. 86, 97 (2001).
[186] The Canadian model of power-sharing is reflected in a statute requiring that three of the nine Supreme Court justices represent Quebec. *See* Supreme Court Act § 6, R.S., 1985, c. S-10, s.6.
[187] Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247, 265-66 (2006).

group.[188] The result is a form of coalition government that survives only on mutual accommodation,[189] also secures some measure of cultural autonomy for the disparate members of the coalition.[190] Consociational systems usually work better in states where there is no clear majority group that can demand, and also command, a greater representation in executive power-sharing arrangements and consequently dominate the political process.[191]

As suggested above in the discussion of the Presidency Council, consociational arrangements can degenerate into political paralysis, as in Bosnia, where the consociationalist constitution has created gridlock.[192] Consociationalism presents a further concern: formally entrenching ethnic or racial political power may exacerbate the very friction that the system sought to alleviate.[193] These and other limitations of consociationalism have attracted a wide range of criticism about the promise it may hold for emerging, fractious and reconstructive democracies.[194]

But perhaps successful consociational arrangements are possible only where the citizenry and their government agents first manifest a willingness to at least attempt reconciliation. For it is one thing to compel cooperation among groups that have no willingness to do so, yet it is quite another to facilitate cooperation where the parties are evidently prepared to make compromises in the interest of a lasting settlement. This returns us full circle to our earlier discussion about whether structure controls culture. Unable to conclude as a matter of theory which of the two is the independent variable and which is the dependent one, we agreed upon an intermediate construction: constitutional structure and political culture are acutely interconnected insofar as the former derives its legitimacy from the latter, and the latter may be inclined to bend toward the former in certain instances.

In this light, states that might consider variations on the Iraqi model of the Presidency Council in order to inch closer to peace and work toward prosperity include Haiti, where citizens yearn for nothing more than a stable nation in which to raise their children, lead their lives, and find fulfillment.[195] This would of course require some constitutional change, which is nothing if not extraordinarily difficult in the current climate of political uncertainty and government instability. Even assuming that constitutional adjustments were possible in Haiti, other obstacles would intervene to dissuade them. For instance, there are compelling arguments for retaining the basic constitutional structure that Haitians conferred upon themselves in 1987 following their

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[188] William E. Forbath & Lawrence Sager, *Comparative Avenues in Constitutional Law: An Introduction*, 82 TEX. L. REV. 1653, 1660 (2004).
[189] James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237, 1255 (2002).
[190] Adeno Addis, *The Kurdish Issue and Beyond: Territorial Communities Rivaling the State*, 98 AM. SOC'Y INT'L L. PROC. 108, 110 (2004).
[191] Angela M. Banks, *Moderating Politics in Post-Conflict States: An Examination of Bosnia and Herzegovina*, 10 UCLA J. INT'L & FOREIGN AFF. 1, 24 (2005).
[192] David Wippman, *Sharing Power in Iraq*, 39 NEW ENG. L. REV. 29, 37 (2004).
[193] Samuel Issacharoff, *Constitutional Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1892 (2004).
[194] *See, e.g.* DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT (1985). *But see* MICHAEL WALZER, ON TOLERATION 22 (1997) (praising consociationalism).
[195] *See* Ban Ki-Moon, *U.N. Mission in Haiti Must Succeed this Time*, IRISH TIMES, Aug. 10, 2007, at 16, *available at* 2007 WLNR 15429032; Jacqueline Charles, *Haiti Tries to Get a Handle on Violence*, PHILADELPHIA INQUIRER (PA), Dec. 10, 2006, at A8, *available at* 2006 WLNR 21308238.

triumph over dictatorship.[196] These are two powerful claims that seem to suggest the impracticability of adopting a new model of constitutionalism in Haiti. Nonetheless, the promise of the intra-branch fusion of powers may well be worth the cost and effort of undertaking constitutional revision in Haiti, and it may moreover outweigh the symbolic value of those revered constitutional arrangements.

The possibilities for the intra-branch fusion of powers in the context of reconciliatory constitutionalism are both intriguing and problematic. They are intriguing because the intra-branch fusion of powers, if adopted in inviting societal conditions, may help smooth the terrain on which public policy is conceived, drafted and ultimately implemented in an emerging or rebuilding state. It may furthermore prompt collaboration and cooperation among the various ethnic or other groups that constitute the citizenry if those citizens perceive a similar dynamic in the interactions of their respective leaders. On the other hand, the possibilities for the intra-branch fusion of powers are problematic because they may quite simply be unworkable.

The project of designing constitutions so as to fuse parties within a particular branch of government may reflect a certain naïvete about the pursuit and preservation of political power and moreover about the willingness of clashing parties with a long-standing history of conflict or disagreement to set aside the past and wholly invest themselves in an indeterminate future. These are admittedly devastating criticisms that may, perhaps with good reason, discourage such constitutional tinkering and experimentation. Nevertheless, I remain optimistic about the reconciliatory promise of fused powers, particularly if the intra-branch fusion of parties in emerging, fractious or reconstructive democracies is accompanied on a parallel track by something similar to the South African Truth and Reconciliation Commission[197] and also by constitutional design procedures that are attentive to the values of inclusion and popular participation, as was partly the case in the recent Kenyan constitutional drafting process.[198]

V. CONCLUSION

Separated powers were and remain an inventive device to achieve important democratic values in presidential systems. These values include thwarting the rise of government tyranny, preventing the arbitrary exercise of government power, and promoting the efficient administration of the state. But these core values of democracy are likewise achievable, albeit in varying degrees, in parliamentary systems. Whether those parliamentary systems separate powers in an unconventional fashion as in British parliamentarism or in a juricentric fashion in typical of constrained parliamentary systems, or between two independent executives like semi-presidential systems, those three democratic values may indeed be achievable, though perhaps not in all circumstances. This is a profound point because it suggests that the democratic and structural advantages of separated powers are not inherent exclusively in presidential systems but may also be attainable in parliamentary systems. It is even more important because it leads to new possibilities for constitutional design.

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[196] *See, e.g.*, Louis Aucoin, *Haiti's Constitutional Crisis*, 17 B.U. INT'L L.J. 115, 140 (1999).
[197] *See, e.g.*, Justice Albie Sachs, *South Africa's Truth and Reconciliation Commission*, 34 CONN. L. REV. 1037 (2002).
[198] *See* Alicia L. Bannon, Note, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 116 YALE L.J. 1824 (2007).

One such prospective model of constitutional design is the intra-branch fusion of parties, which is perhaps most useful in thinking about constitutional design for emerging, fractious or reconstructive democracies. This form of reconciliatory constitutionalism holds promise for inspiring or instilling a constitutional culture that respects the rule of law, for rejecting divisive political posturing and partisan maneuvering, and also for embracing stability in the service of the larger interests of the state and its people. Although I have cited the Presidency Council as the flagship illustration of the intra-branch fusion of parties, there are certainly other examples of this form of fusion in the global community of states.

This paper is largely, though not exclusively, anchored in the *theory* of constitutionalism and is consequently not as analytically engaged in assessing the *practice* of constitutionalism. It therefore invites further research and study, much of it empirical, in order to test the theoretical claims I have advanced. For instance, I have argued that the values of separated powers are indeed achievable, at least in part, in parliamentary systems. In doing so, I have deployed several modern examples for each of the three parliamentary systems I have discussed. It would be useful to consider whether and how the values of separated powers are achievable in additional examples of each type of parliamentary system: (1) New Zealand, as a manifestation of British parliamentarism; (2) India, as an example of constrained parliamentarism; and (3) Taiwan, which adheres to the structure of semi-presidentialism. Constitutional theory, and indeed the citizens of the democratizing nations of the world, would benefit immensely from close scrutiny of these models and their prospects for fulfilling the promise of democracy.