

5-2014

American Exceptionalism and Government Shutdowns: A Comparative Constitutional Reflection on the 2013 Lapse in Appropriations

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Recommended Citation

Katharine G. Young. "American Exceptionalism and Government Shutdowns: A Comparative Constitutional Reflection on the 2013 Lapse in Appropriations." *Boston University Law Review* (2014).

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**AMERICAN EXCEPTIONALISM AND GOVERNMENT
SHUTDOWNS: A COMPARATIVE CONSTITUTIONAL
REFLECTION ON THE 2013 LAPSE IN APPROPRIATIONS**

KATHARINE G. YOUNG*

INTRODUCTION	991
I. THE U.S. SHUTDOWN AND POLITICAL DYSFUNCTION.....	993
II. COMPARATIVE PERSPECTIVES ON LEGISLATIVE FINANCIAL IMPASSE.....	998
III. BEHIND CONSTITUTIONAL DESIGN: AUSTRALIA’S FINANCIAL IMPASSE.....	1007
IV. CONSTITUTIONAL RESPONSE TO FINANCIAL IMPASSE: THREE FRAMES	1018
CONCLUSION.....	1024

INTRODUCTION

The shutdown of the United States government for sixteen days in October 2013 symbolized a distinctively American version of political failure. Failure is, of course, not uncommon in the lifecycles of modern constitutional government. Between 2010 and 2011, Belgium spent more than 530 days without an elected government, due to a political gridlock between politicians from the Flemish-speaking North and the French-speaking South.¹ And between 2006 and 2013, Canada’s Parliament was suspended four times at the Prime Minister’s request, amounting to a stoppage of 181 days.² The United States, Belgium, and Canada are mature constitutional democracies, not the transitional democracies whose susceptibility to failure might be a more predictable and obvious concern.³ But the U.S. government shutdown was itself exceptional. The institutional impasse experienced in the United States

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¹ *Belgium’s New Government: An End to Waffle?*, *ECONOMIST*, Dec. 3, 2011, at 66.

² Steven Chase, *Harper Delays Commons by a Month*, *GLOBE & MAIL* (Can.), Sept. 13, 2013, at A11. *See generally* *PARLIAMENTARY DEMOCRACY IN CRISIS* (Peter H. Russell & Lorne Sossin eds., 2009).

³ For an attempt to categorize the relevant differences, see Ran Hirschl, *Dysfunctional? Dissonant? Démodé? America’s Constitutional Woes in Comparative Perspective*, 94 *B.U. L. REV.* 939, 939-40 (2014) (arguing that while the United States may have constitutional problems, such problems pale in comparison to the constitutional problems the majority of states face).

did not cause the legislature itself to shut down – such as occurred in Ottawa – or give rise to a caretaker government – such as in Brussels. Instead the U.S. deadlock resulted in a shutdown of all government services deemed “nonessential”;⁴ the suspension of certain government contracts; and a merry-go-round of standoffs between the House of Representatives and the Senate, and the President and the House Speaker.

In this Article, I focus on the U.S. shutdown as a notable – and peculiarly American – version of political dysfunction. In part this is because what makes the shutdown noteworthy is the precarious line between fiscal competence and fiscal peril – and between political leverage and political blackmail – that became apparent in October 2013. These lines were crossed, as a result of political impasse, for a number of vulnerable groups, who were unable to access government services when Congress refused to pass an appropriations bill for the 2014 fiscal year. Of course precariousness would have been all the more prevalent had Congress not passed legislation to raise the debt ceiling when it was due.⁵ The two threats were (deliberately) related,⁶ although my focus here is the shutdown itself. The refusal of the Republican-controlled House to pass appropriations legislation reveals a tendency towards financial impasse that is quite unique to the United States. In both presidential and parliamentary systems abroad, governments do not generally stop functioning despite the difficulties of passing revenue bills. Yet a version of government shutdown by congressional deadlock has occurred repeatedly in recent U.S. history.⁷ This willingness to end government services and court financial peril – by congressional representatives of both parties – is distinctive to the United States and would alone justify a comparative study.

But there is another and (from the perspective of constitutional law) more compelling reason to examine the U.S. government shutdown. It points to a deep tension between the responsibility of Congress to make laws for the people and its function of providing checks and balances, which is inseparable from the U.S. constitutional structure. The unfavorable political winds produced by a Republican-controlled House and a Democrat-controlled Senate – within the context of the extreme polarization of those parties – pressed on a particularly destructive tendency within the U.S. version of the separation of powers, against which the U.S. Constitution has few resources to marshal. This destructiveness plays out acutely in the context of budgetary legislation, where the effect of checks-and-balances deadlock is not simply a continuation of the status quo, as occurs in other areas of legislative impasse, but rather the active

⁴ For the current distinction between essential and nonessential services, see *infra* note 11 and accompanying text.

⁵ See, e.g., Eric Morath & Sudeep Reddy, *Budget Battle: Debt Ceiling Lurks as Bigger Threat*, WALL ST. J., Oct. 2, 2013, at A5.

⁶ See *infra* note 29 and accompanying text (discussing the Republican strategy to end the U.S. shutdown).

⁷ See *infra* note 36 and accompanying text.

shuttering of certain government operations. This can be compared with a series of other constitutional systems that avert financial impasse through constitutional design, constitutional culture, and a combination of the two.

In this Article, I document a series of express provisions that act to forestall or resolve such impasse, across both presidential and parliamentary systems. At the risk of presenting too simplistic a catalogue of comparative constitutional design, I provide a more extensive focus on one system that did not prevent deadlock – the Australian constitutional crisis of 1975. Since most examinations of deadlock focus on presidentialism and the often unwieldy separation of powers between President and Congress, I draw on this case study to complicate an easy story of parliamentary functionality compared with presidential deadlock, and to highlight the availability of prorepresentative deadlock responses to financial impasse in bicameral institutions. Finally, I provide a brief analysis of three constitutional frames from which to think about constitutions, shutdowns, and political deadlock. While these frames help to clarify the advantages and disadvantages of what I term constitutional silence, default passage, or prorepresentative solutions, none of these frames can be assessed in isolation of politics: a problem with which I conclude.

I. THE U.S. SHUTDOWN AND POLITICAL DYSFUNCTION

Between October 1 and October 16, 2013, the U.S. government was shut down for general business.⁸ Due to a lapse in appropriations,⁹ all nonessential services were suspended – from the Environmental Protection Agency’s environmental monitoring, to the Food and Drug Administration’s drug and device approvals, to the National Parks Service’s maintenance of national parks services.¹⁰ Government employees were furloughed and government contracts were halted. Services were deemed “nonessential” if their delay would not compromise the safety of human life or property “in some degree.”¹¹

⁸ EXEC. OFFICE OF THE PRESIDENT, IMPACTS AND COSTS OF THE OCTOBER 2013 FEDERAL GOVERNMENT SHUTDOWN 4-6 (2013), *archived at* <http://perma.cc/NH6P-LMHA>.

⁹ U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).

¹⁰ EPA, CONTINGENCY PLAN FOR SHUTDOWN (2013), *archived at* <http://perma.cc/H5M6-JGMA>; U.S. DEP’T OF HEALTH & HUMAN SERVS., CONTINGENCY STAFFING PLAN FOR OPERATIONS IN THE ABSENCE OF ENACTED ANNUAL APPROPRIATIONS (2013), *archived at* <http://perma.cc/S9ZX-GJ6H>; U.S. DEP’T OF THE INTERIOR, NATIONAL PARKS SERVICES CONTINGENCY PLAN (2013), *archived at* <http://perma.cc/DJ4S-F2S2>; *see also* Memorandum from Audrey Rowe, Adm’r, U.S. Dep’t of Agric., to Kevin Concannon, Under Sec’y for Food, Nutrition, & Consumer Servs., U.S. Dep’t of Agric. (Oct. 1, 2013), *archived at* <http://perma.cc/5CTY-63MV>.

¹¹ Auth. for the Continuance of Gov’t Functions During a Temp. Lapse in Appropriations, 5 Op. O.L.C. 1, 7-8 (1981) (codified as amended at 31 U.S.C. § 1342 (2012)) (providing the opinions of Attorney General Civiletti on the implications of the Antideficiency Act); *see also* Antideficiency Act, Pub. L. No. 97-258, 96 Stat. 877 (1982) (codified as amended in scattered sections of 31 U.S.C.).

This test is governed by executive opinion¹² and favors only emergency support for the classically defined liberties of life and property. Critically, the test ignores other government functions that are necessary to support a more positive conception of modern liberties, and which are arguably just as essential.¹³ Nonetheless describing the event as a “shutdown” is something of a misnomer – providers of “essential” services, such as the military and Social Security Administration, remained open.¹⁴ Yet many vulnerable groups and others relying on critical services, such as veterans with disability claims, children that benefit from the Head Start program, or those at risk of environmental harms, were left without recourse.¹⁵ The activities of a host of other groups, including national scientists, private-sector lenders, and government contractors, were also suspended.¹⁶

The shutdown occurred after Congress failed to enact legislation appropriating funds for the 2014 fiscal year, as either a continuing resolution or

¹² Memorandum Opinion from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, to Dir. of Office of Mgmt. & Budget (Aug. 16, 1995), *archived at* <http://perma.cc/RVY9-WPFS> (interpreting the 1990 amendments to the Antideficiency Act and emphasizing the need for “a reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property, and when there is some reasonable likelihood that either or both would be compromised in some significant degree by the delay in the performance of the function in question”). The Office of Management and Budget provides agencies with instructions on how to prepare for and operate during a funding gap according to the Antideficiency Act. CLINTON T. BRASS, CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS (2011), *archived at* <http://perma.cc/9MP-JDD4>.

¹³ For a critique of the assumptions behind the classical conception of rights and freedom, see STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 39-43 (1999); KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 2-6 (2012).

¹⁴ This is also due to the different sources of funding for “mandatory” or “entitlement” programs on the one hand, and “discretionary” or “appropriations” programs on the other. One analysis indicates that discretionary spending represents thirty percent, and mandatory spending sixty-four percent, of the projected federal spending for 2014. *See Federal Spending: Where Does the Money Go?*, NAT’L PRIORITIES PROJECT, <http://nationalpriorities.org/budget-basics/federal-budget-101/spending> (last visited Mar. 20, 2014), *archived at* <http://perma.cc/Z63N-NCFR>. For an analysis of the attempt to integrate entitlements with appropriations, itself a cause of the 1995–1996 shutdowns, see Charles Tiefer, “Budgetized” Health Entitlements and the Fiscal Constitution in Congress’s 1995-1996 Budget Battle, 33 HARV. J. ON LEGIS. 411 (1996).

¹⁵ *See* EXEC. OFFICE OF THE PRESIDENT, *supra* note 8, at 4-6 (acknowledging among various administrative services disruptions, the backlog in 20,000 veterans’ disability claims, the closure of Head Start services for 6300 children for nine days, and the “[h]alted Environmental Protection Agency (EPA) inspections at about 1200 sites, including hazardous waste facilities, chemical facilities, and drinking water systems” (emphasis omitted)).

¹⁶ *Id.* at 5-10.

a final measure. It is well documented that this failure occurred due to the political standoff generated by disagreement over the implementation of the Patient Protection and Affordable Care Act of 2010.¹⁷ The Act, which seeks to extend health insurance to all but a few million Americans through a complex system of expanding Medicaid, prohibiting discrimination against individuals with preexisting health conditions, providing health insurance subsidies for low-income individuals and families, and requiring individuals to purchase health insurance or pay a tax, attracted massive controversy along partisan lines. Democrats hailed it as “a health bill . . . [but] also a jobs bill, an economic recovery bill, . . . a deficit-reduction bill, . . . [and] an antidiscrimination bill”;¹⁸ Republicans described it as “a stunning assault on liberty.”¹⁹ After fierce contestation in Congress, the legislation passed in the Senate in December 2009 by a vote of sixty to thirty-nine, and passed the House in March 2010 by a vote of 219 to 212; Republicans were unanimously opposed in both chambers.²⁰ The controversy then entered the courts as Florida and twelve other Republican-led states filed constitutional lawsuits within “minutes after the President signed” the Act into law, and thirteen additional Republican-led states followed shortly thereafter.²¹ The Supreme Court’s narrow and divided holding that the legislation was constitutional²² similarly galvanized a hostile partisan response, although the most vitriolic reactions came from a small, though vocal and well-funded minority.²³ After the

¹⁷ Pub. L. No. 111-48, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

¹⁸ David M. Herszenhorn & Robert Pear, *Final Votes in Congress Cap Battle over Health*, N.Y. TIMES, Mar. 26, 2010, at A17 (reporting the remarks of Senate Majority Leader Harry Reid of Nevada).

¹⁹ *Open Executive Session to Consider an Original Bill Providing for Health Care Reform: Hearing Before the S. Comm. on Finance*, 111th Cong. 65 (2009) (statement of Sen. Jon Kyl); Greg Hitt & Janet Adamy, *GOP Assails Health-Plan Mandate*, WALL ST. J., Sept. 23, 2009, at A6 (reporting remarks of Senator Jon Kyl of Arizona).

²⁰ 156 CONG. REC. H2153 (daily ed. Mar. 21, 2010) (providing the House voting results on the healthcare bill); 155 CONG. REC. 33,169-70 (Dec. 24, 2009) (providing the Senate voting results on the healthcare bill).

²¹ *E.g.*, Florida *ex rel.* Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1256, 1263 (N.D. Fla. 2011), *aff’d in part, rev’d in part*, Florida *ex rel.* Attorney Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *aff’d in part, rev’d in part sub nom.*, Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012). Later, thirteen more states, as well as the National Federation of Independent Business (NFIB) and several individual complainants, joined the original plaintiffs. *NFIB*, 132 S. Ct. at 2580.

²² *NFIB*, 132 S. Ct. 2566.

²³ See Sheryl Gay Stolberg & Mike McIntire, *A Crisis Months in the Planning*, N.Y. TIMES, Oct. 6, 2013, at A1 (describing a loose knit conservative coalition as having formed from groups including Heritage Action, the Tea Party movement, and the Koch-funded Americans for Prosperity).

Supreme Court's decision in June 2012, the controversy dovetailed into the November 2012 presidential campaign, which returned the President to a second term.²⁴ Congressional Republicans continued to push for repeal of the Affordable Care Act, acting pursuant to a perceived mandate from the American people, that led Congress to the threat of financial impasse in October 2013.

By 2013, while moneys for the rollout of the new healthcare system had been secured by direct spending, appropriations for 2014 were not.²⁵ During late September, as the deadline of passage for the 2014 fiscal budget loomed, the Republican-led House of Representatives conditioned its support for continuing resolutions on the delaying or defunding of the Affordable Care Act.²⁶ The Democrat-led Senate passed several resolutions that refused these conditions.²⁷ By September 30, 2013, no agreement had been reached between the chambers. On October 1, federal government activities were substantially restricted, due to the lack of appropriated funds.

The failure to pass the appropriations legislation was strategically linked to the impending need for debt ceiling legislation, despite the qualitative differences between the two. The statutory debt limit, which controls the amount that the federal government can borrow, does not prevent the government from incurring obligations, but instead acts to limit the government's ability to pay for obligations already incurred.²⁸ Appropriations legislation acts in reverse. Nonetheless, one Republican strategist of the impasse, House Budget Committee Chairman Paul Ryan, expressly sought to combine the leverage of the shutdown with the debt ceiling limit.²⁹ And indeed the standoff climaxed just before the debt limit was to be reached.³⁰ Regular

²⁴ FEC, FEDERAL ELECTIONS 2012: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 3, 6 (2013), *archived at* <http://perma.cc/Z6KF-82D9>.

²⁵ 159 CONG. REC. S6838-01 (daily ed. Sept. 24, 2013) (statements of Sen. Coats, Sen. Cornyn & Sen. Ayotte) (referencing a Congressional Research Service report).

²⁶ 159 CONG. REC. H5775 (daily ed. Sept. 20, 2013).

²⁷ *H.J. Res. 59 – Continuing Appropriations Resolution*, U.S. CONGRESS, <http://beta.congress.gov/bill/113th-congress/house-joint-resolution/59/all-actions> (last visited Dec. 11, 2013), *archived at* <http://perma.cc/CW74-8X8H> (summarizing eighty-three actions on the appropriations bill taken by the House and Senate).

²⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-203, DEBT LIMIT: DELAYS CREATE DEBT MANAGEMENT CHALLENGES AND INCREASE UNCERTAINTY IN THE TREASURY MARKET 1 (2011).

²⁹ Jonathan Strong, *Paul Ryan: CR Fight Will Inevitably 'Roll into' Debt Ceiling Fight*, *The Corner*, NAT'L REV. ONLINE (Sept. 28, 2013, 3:37 PM), <http://www.nationalreview.com/corner/359818/paul-ryan-cr-fight-will-inevitably-roll-debt-ceiling-fight-jonathan-strong>, *archived at* <http://perma.cc/DS7B-HWLX>.

³⁰ D. ANDREW AUSTIN & MINDY R. LEVIT, CONG. RESEARCH SERV., RL31967, THE DEBT LIMIT: HISTORY AND RECENT INCREASES 1 (2013), *archived at* <http://perma.cc/AF76-Q87L> (stating that the Treasury expected the government to exhaust its borrowing capacity on

government operations did not resume until October 17, after negotiations between President Obama and House Speaker Boehner led to the enactment of an interim appropriations bill.³¹ As a result, appropriations were guaranteed through January 15, 2014 on a pro rata basis and at the same funding level that applied to the 2013 fiscal year.³² The debt ceiling was suspended until February 7, 2014.³³ The Act also authorized back payment to the (approximately 850,000³⁴) government workers who were furloughed during the sixteen-day government shutdown.³⁵ Estimates put the cost of the shutdown between two and six billion dollars in lost output, as well as a range of other costs.³⁶

On one view the shutdown itself was not unusual in light of the more general current experience of congressional wrangling, despite the massive disruption caused to government services. Including this most recent example, shutdown of the U.S. government has occurred eighteen times, all since the modern congressional budget process took effect in 1976.³⁷ Nonetheless, “[t]he October 2013 Federal government shutdown was the second longest in duration since 1980 and the most significant on record, measured in terms of employee furlough days.”³⁸ Polls recorded that Americans themselves viewed the 2013 shutdown as far more serious than previous instances.³⁹ This trend

approximately October 17, 2014).

³¹ Continuing Appropriations Act, 2014, Pub. L. No. 113-46, 2013 U.S.C.C.A.N (127 Stat. 555) (explaining how government funds will be appropriated retroactively to September 30, 2013); 159 CONG. REC. S7532 (daily ed. Oct. 16, 2013); 159 CONG. REC. H6625-26 (daily ed. Oct. 16, 2013).

³² See Continuing Appropriations Act § 106.

³³ *Id.* § 1002(c)(1).

³⁴ EXEC. OFFICE OF THE PRESIDENT, *supra* note 8, at 13 (“Federal agencies furloughed roughly 850,000 employees per day in the immediate aftermath of the lapse in appropriations, or roughly 40 percent of the entire civilian Federal workforce.”). This number varied over the sixteen-day period. *Id.* at 13-14.

³⁵ Continuing Appropriations Act §§ 115-116.

³⁶ EXEC. OFFICE OF THE PRESIDENT, *supra* note 8, at 8 (“Leading independent forecasters estimate that the shutdown will lower fourth quarter real GDP growth by 0.2-0.6 percentage points or more, or \$2-\$6 billion in lost output.”).

³⁷ See BRASS, *supra* note 12, at 2-3.

³⁸ EXEC. OFFICE OF THE PRESIDENT, *supra* note 8, at 2. In 1995 to 1996, when President Bill Clinton and the House of Representatives (and its speaker, Newt Gingrich) failed to agree on a budget to fund federal services, the government was shutdown for twenty-six days over two stages. BRASS, *supra* note 12, at 2-3. In the 1980s, shutdowns occurred more regularly, but usually for a few days, and over weekends. During the six instances of impasse prior to 1980, government employees continued to work during a shutdown. See JESSICA TOLLESTRUP, CONG. RESEARCH SERV., RS20348, FEDERAL FUNDING GAPS: A BRIEF OVERVIEW 1-2 (2013), *archived at* <http://perma.cc/D6TD-XYFY>.

³⁹ See Art Swift, *Americans See Current Shutdown as More Serious than in '95*, GALLUP (Oct. 4, 2013), <http://www.gallup.com/poll/165260/americans-current-shutdown-serious>

towards more frequent, longer, and more burdensome shutdowns is itself a peculiarity of the United States, even more so than the single instance of shutdown in October 2013. This singularity is not because other political systems lack the deep contestation, even polarization, that marks the current U.S. political climate.⁴⁰ Nor is it because other democracies do not exhibit regular acts of brinkmanship, horse trading, leveraging, and the extraction of concessions for one item by threatening another.⁴¹ Yet the stakes of the leverage – of sabotaging the running of government – is a particularly American phenomenon. Comparative constitutional design provides a partial explanation.

II. COMPARATIVE PERSPECTIVES ON LEGISLATIVE FINANCIAL IMPASSE

The global response to the U.S. shutdown was bafflement and concern.⁴² A former finance minister of Colombia, José Antonio Ocampo, opined: “I had to negotiate budgets and debt ceilings in Colombia, and this situation is frankly unreal.”⁴³ The disjuncture between apparent domestic composure in the United States and expressed international consternation was demonstrated in Germany’s *Süddeutsche Zeitung*, which reported: “What has already been apparent in America for a few years now is the self-destruction of one of the world’s oldest democracies.”⁴⁴ Of course each jurisdiction has its own political problems and failures, but the shutdown of government though the obstruction of an appropriations bill is not one of them. Why is this so?

It is tempting to answer by pointing to the exceptionalism of U.S. political culture. Certainly there is a willingness among members of the U.S. legislature to tolerate the possibility of a government shutdown, or at the very least the

.aspx, archived at <http://perma.cc/QDK8-T2BR>.

⁴⁰ See, e.g., Sanford Levinson, Foreword, “I Read the News Today, Oh Boy”: *The Increasing Centrality of Constitutional Design*, 87 TEX. L. REV. 1265, 1266-68 (2009) (offering a comparative reflection of constitutional problems); Richard Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 276 (2011) (describing three causes for current U.S. hyperpolarized political conditions); see also DAVID HELD, *MODELS OF DEMOCRACY* 185-216 (3d ed. 2006) (explaining the general decline from the highpoint of consensus in the fifteen years following World War II, in advanced democracies).

⁴¹ For a classic summary, see Philippe C. Schmitter, *Dangers and Dilemmas of Democracy*, 5 J. DEMOCRACY 58 (1994). For the link in constitutional practice, see Günter Frankenberg, *Democracy*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 250, 256-64 (Michel Rosenfeld & Andrés Sajó eds., 2012).

⁴² Kevin Sullivan, *Some Scratch Their Heads, Others Smirk*, WASH. POST, Oct. 1, 2013, at A11.

⁴³ *Id.*

⁴⁴ *Shutdown Spectacle: ‘America Is Already Politically Bankrupt,’* SPIEGEL ONLINE (Oct. 2, 2013, 3:07 PM), <http://www.spiegel.de/international/germany/german-press-review-on-us-government-shutdown-a-925768.html>, archived at <http://perma.cc/TZQ6-XW9F> (summarizing German public commentary and quoting *Süddeutsche Zeitung*).

disabling of certain government services, that is not found elsewhere.⁴⁵ Such willingness appears to sit comfortably with an ideology of negative constitutionalism – or in its most forceful guise, libertarianism – that endures in the United States.⁴⁶ The cessation of services gives implicit support to the strident anti-tax, antigovernment rhetoric that is a feature of America’s conservative politics. This rhetoric goes beyond the pocket-book preferences against taxation increases that are common in other countries’ politics, to issues of patriotism and national character,⁴⁷ from which the manifestation in the Tea Party movement is only its most recent version.⁴⁸ A similar attribution of distrust of government is said to count for American exceptionalism against the more positive conception of constitutionalism,⁴⁹ a conception that would suggest that government shutdown is itself unconstitutional, for many other constitutional democracies.

Nonetheless this response offers a very restrictive understanding of American political culture.⁵⁰ While influential, the antigovernment ideology is not necessarily dominant, even among Republicans, due in no small part to its inherent incongruity with many of the accepted tenets of the modern administrative state.⁵¹ The assumption of a widespread American tolerance for shutdowns also underrates the deep-seated commitments in the U.S. polity that

⁴⁵ See, e.g., 2 OFFICE OF GEN. COUNSEL, U.S. GOV’T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 6, at 146 (3d ed. 2006) (“[F]unding gaps are perhaps an inevitable reflection of the political process.”).

⁴⁶ See, e.g., Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 30, 46 (Michael Ignatieff ed., 2005).

⁴⁷ Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 824 (2002).

⁴⁸ Vanessa Williamson et al., *The Tea Party and the Remaking of Republican Conservatism*, 9 PERSP. ON POL. 25, 26 (2011) (describing the emergence in 2009 of the Tea Party as “a new incarnation of long-standing strands in US conservatism”).

⁴⁹ See Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 46, at 147, 164-65 (“The aversion to state intervention is a distinctively American trait as compared to the political cultures of other advanced industrial democracies . . .”).

⁵⁰ See EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS 9 (2013) (describing the “new waves of research” that demonstrate “that Americans have long embraced government and that American political culture cannot be described as simply anti-statist or exclusively liberal”). On the dangers of “reading-back” from legal-doctrinal differences to socio-cultural ones, see Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question*, in EUROPEAN AND US CONSTITUTIONALISM (Georg Nolte ed., 2005).

⁵¹ See ALAN WOLFE, DOES AMERICAN DEMOCRACY STILL WORK? 19 (2006) (observing the split within the Republican Party between advocates of small government and those of a powerful executive).

sustain a more positive conception of government.⁵² A more complex answer about political culture points to its bedrock in U.S. constitutional theory, where assumptions are made about constitutional practice that are themselves contradictory of modern government. This theory informs both current constitutional culture and original constitutional design.

Thus we turn to the Madisonian system of separated powers, with its question of “whether ‘checks and balances sufficient for the purposes of order justice and the general good,’ might be created by dividing and distributing power among ‘different bodies, differently constituted, but all deriving their existence from the elective principle and all bound by a responsible tenure of their trusts.’”⁵³ In this system the President may be forced to govern without a guaranteed majority in either the House of Representatives or the Senate. The inevitable interbranch deadlocks that result is a design feature of the U.S. political system, rather than a bug. This feature entrenches the eighteenth-century theory – venerably associated with *The Federalist Papers* – that a government checked and balanced against itself is the best guarantee of political liberty.⁵⁴ The resulting veto points between the chambers and branches, along with fixed legislative and executive terms and elections at separate and different intervals, are designed to slow government down and minimize its activity. This theory is based on a suspicion of government process, rather than the promotion of its active duties: because “[e]nlighthened statesmen will not always be at the helm,”⁵⁵ a divided power allows “ambition to counteract ambition.”⁵⁶

The theoretical elegance of separated power was lost, however, to practical developments. The levers of political competition and cooperation envisaged by the system were soon channeled, not through the separated branches, but through political parties.⁵⁷ As these parties became more disciplined and polarized over time, very different systems of separated powers applied during different partisan configurations: namely those operating in times of either divided or unified government.⁵⁸ Only under divided government – where

⁵² See, e.g., CASS R. SUNSTEIN, A SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 61-95 (2004) (acknowledging the significant importance attested by Franklin D. Roosevelt to rights to housing, medical care, unemployment support, and food); William E. Forbath, *Social and Economic Rights in the American Grain*, in THE CONSTITUTION IN 2020, at 55, 58 (Jack M. Balkin & Reva B. Siegel eds., 2009).

⁵³ Letter from James Madison to John Adams (1817), *quoted in* John Ferejohn, *Madisonian Separation of Powers*, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 126, 127 (Samuel Kernell ed., 2003).

⁵⁴ See THE FEDERALIST NOS. 10, 51 (James Madison).

⁵⁵ THE FEDERALIST NO. 10, at 75 (James Madison) (Clinton Rossiter ed., 2003).

⁵⁶ THE FEDERALIST NO. 51, *supra* note 55, at 319 (James Madison).

⁵⁷ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006).

⁵⁸ *Id.* at 2330-47.

different parties control the different branches – does financial impasse become likely.⁵⁹ And, given that divided government has become the more common alternative since 1954,⁶⁰ and that party leadership has become central to budgetary negotiations since the 1980s,⁶¹ the distance between the Framers' vision and current practice becomes obvious. Moreover, in the particular partisan configurations in the United States, where belief in the value of government programs is not equal between the parties, one party – the Republican Party – is more tolerant of shutdowns, and thus enjoys a bargaining advantage in budgetary negotiations.⁶² The proliberty ideals of checks and balances, and the separation of powers, play out very differently in practice.

Moreover, the theoretical conflation of the principles of the separation of powers and the system of checks and balances may itself be unwarranted.⁶³ As Jeremy Waldron has suggested, the separation of powers principle stands for an ideal of governance in which the distinct institutions – the executive, the legislature, and the judiciary – enjoy a distinct integrity.⁶⁴ The checks and balances principle, on the other hand, “hold[s] that the exercise of power by any one power-holder needs to be balanced and checked by the exercise of power by other power-holders.”⁶⁵ Once isolated in this way, the two principles have very different implications for the practice of lawmaking and for the justifications of checks or vetoes. The role of the legislature involves much more than what it can do to hold the executive in check. There are active responsibilities of lawmaking at stake, which apply particularly to the prevention of financial impasse.

The attitude of checks and balances as the separation of power serves the modern-day legislative burden of America, and other constitutional systems, even less than it served the needs of the founding era.⁶⁶ The resulting

⁵⁹ *Cf. id.* at 2342-43, 2348 (highlighting the normative concerns with unified, rather than divided, government according to separation of powers ideals).

⁶⁰ Tiefer, *supra* note 14, at 438.

⁶¹ Anita S. Krishnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget “Train Wreck,”* 35 HARV. J. ON LEGIS. 589, 594-96 (1998).

⁶² David Gamage & David Louk, *Government Shutdowns, the New Fiscal Politics, and the Case for Default Budgets* 44 (Univ. of Cal. Pub. Law, Research Paper No. 2339314, 2013), archived at <http://perma.cc/9VSR-GH2S> (“[G]overnment shutdowns are more harmful to Democratic Party priorities than to Republican Party priorities. This bargaining advantage enjoyed by Republicans can potentially distort the democratic budgeting process away from reflecting the desires of the median voter.”).

⁶³ See Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 442, 467 (2013) (“[A]ll that Checks and Balances cares about is that power checks power or be required to concur in another power’s exercise; again what the powers are that counterpoise each other in this balance is of incidental interest.” *Id.* at 442.).

⁶⁴ *Id.*

⁶⁵ *Id.* at 433.

⁶⁶ See Jonathan Zasloff, *The Tyranny of Madison*, 44 UCLA L. REV. 795, 798, 800 (1997). For a presentation of Madison’s own expectations to the adjustments of the

deadlocks are one of the reasons checks-and-balances presidentialism has earned a bad name, in America no less than in other presidential systems, despite this venerable Madisonian pedigree.⁶⁷ Ambition may check ambition, but rival claims of a representative mandate can create deadlock without a machinery of resolution.

Yet the experience of other constitutional democracies – presidential as well as parliamentary – has been different. One way of preventing financial impasse is to rethink the applicability of separation of powers principles, or of checks and balances. Another is to implement such principles with very different design features of budgetary passage. Here, comparative study reveals a range of resolutions to the threat and occurrence of financial impasse. In fact over half of presidential constitutions stipulate a course of action if a budget is not approved.⁶⁸ In parliamentary systems, too, the impasse is often resolved, as one would expect, through the very different conception of separated powers. Of course the heterogeneity within these categories complicates an easy story of resolution, as described in the following discussion.

A basic division between presidential and parliamentary systems is often thought integral to the understanding of government deadlock.⁶⁹ Presidential constitutions emphasize the separation of powers between the two branches, and hence the legislative oversight of the executive, and vice versa. In this way they are said to be distinctive from parliamentary constitutions, where the ministerial executive is drawn from the elected members of the legislature (and its lower house in bicameral systems).⁷⁰ The fixed terms of those elected under presidential constitutions are said to afford different opportunities for the legislature to initiate legislative proposals, and to prevent an easy resolution of the inevitable interbranch deadlocks that occur.⁷¹ Two very different procedures for legislation in general, and for appropriations legislation in particular, are therefore assumed to apply in presidential and parliamentary systems.⁷² Yet such characterizations can be misleading.⁷³ Fixed terms now

principle, see Ferejohn, *supra* note 53, at 126.

⁶⁷ For the classic criticism, see Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51 (1990).

⁶⁸ José Antonio Cheibub et al., *Latin American Presidentialism in Comparative and Historical Perspective*, 89 TEX. L. REV. 1707, 1726-27 (2011).

⁶⁹ See Richard Albert, *Presidential Values in Parliamentary Democracies*, 8 INT'L J. CONST. L. 207, 221 (2010) (“Unlike presidential systems, parliamentary systems are generally unsusceptible to deadlock situations.”).

⁷⁰ MATTHEW SOBERG SHUGART & JOHN M. CAREY, PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS 18-19, 76 (1992) (distinguishing presidential separation from the legislature by their “origin” in direct elections, and their “survival” through fixed terms).

⁷¹ See George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289, 325 (1995).

⁷² For an application of this division by the U.S. Government Accountability Office (then

apply in parliamentary systems, even the archetype model of the United Kingdom.⁷⁴ And as discussed below, modern presidential constitutions allow the executive to initiate or bypass legislative processes around budget bills, in a way that confounds the traditional categorization between presidentialism and parliamentarianism, leading to noteworthy institutional mechanisms for the resolution of the financial impasse.

The presidential constitutions in Latin America (the region with the decisive majority of such systems) demonstrate a series of design options.⁷⁵ In Colombia, for example, the constitution provides for the aversion of a government shutdown through a default provision that simply applies the previous year's budget if a resolution is not reached.⁷⁶ A similar continuation operates in Honduras, Paraguay, and Venezuela, if the budget has not yet been

the U.S. General Accounting Office), see U.S. GEN. ACCOUNTING OFFICE, GAO/AMFMD-86-16, APPROPRIATIONS: CONTINUING RESOLUTIONS AND AN ASSESSMENT OF AUTOMATIC FUNDING APPROACHES 26-27 (1986), *archived at* <http://perma.cc/QT64-3PHV> (suggesting that parliamentary systems have little need for automatic or temporary funding, and are thus "not fully relatable" to U.S. budgetary impasse experience).

⁷³ José Antonio Cheibub et al., *Beyond Presidentialism and Parliamentarism*, BRIT. J. POL. SCI. FIRSTVIEW 1, 3 (Nov. 14, 2013), <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=9072592&fulltextType=RA&fileId=S000712341300032X>.

⁷⁴ For example the U.K. prototypical parliamentary system now operates under the Fixed Term Parliaments Act 2011, thus removing the prime minister's power to call an election at will. See Fixed Terms Parliamentary Act 2011, c. 14, § 1 (U.K.) (establishing a specific recurring date for future parliamentary elections in the United Kingdom). In Norway, too, the Parliament (*Storting*) is subject to fixed four-year terms. CONSTITUTION OF NORWAY 1814, art. 71, *translated in The Constitution – Complete Text*, STORTINGET, <https://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution> (last visited Mar. 25, 2014), *archived at* <http://perma.cc/UQV4-ZT9U>; see also Lov om valg til Stortinget, fylkesting og kommunestyre (valgloven) [Representation of the People Act], 2002, §§ 9-1(1), 9-2(1) (Nor.) (establishing a recurring date every four years for parliamentary elections). The *Storting* has functioned as a purely unicameral body since 2009. 43 INTER-PARLIAMENTARY UNION, CHRONICLE OF PARLIAMENTARY ELECTIONS: 2009, at 192 (2010), *archived at* <http://perma.cc/9L79-DDNA>.

⁷⁵ The primary data from this section is taken from the innovative new constitutional research tool. CONSTITUTE, <https://www.constituteproject.org> (last visited Feb. 9, 2014). The accessibility of this data opens the way for a significant update and revision of previous landmark findings by political scientists on the comparative operation of legislative-executive and bicameral relations. See AREND LIJPHART, PATTERNS OF DEMOCRACY, at xii (1999) (assessing data from 1945–1996 and from 1971–1996); GEORGE TSEBELIS & JEANNETTE MONEY, BICAMERALISM 64-68 (1997) (providing data from 1986–1995). Analysis of this data also updates the U.S. Government Accountability Office's comparative assessment of automatic continuing resolutions, which it undertook in 1986. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 72.

⁷⁶ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 348, *translated in* CONSTITUTE, COLOMBIA'S CONSTITUTION OF 1991 WITH AMENDMENTS THROUGH 2005, at 80 (n.d.), *archived at* <http://perma.cc/XLB6-8W5Q>.

voted on by the beginning of a new fiscal year;⁷⁷ or has not been presented to, or has been rejected by, the legislature.⁷⁸ In Bolivia the budget must be approved by the legislature within sixty days; if it is not, it is automatically approved.⁷⁹ So too in Chile, the budget is rendered effective after sixty days in Congress.⁸⁰ The constitution of Panama also makes explicit provision for an extension of the previous budget in the event of a rejected budget, as well as for the automatic approval of payment for the public investments, contractual obligations, and public debt that might be affected.⁸¹ Brazil's constitution, which does not provide explicitly for such a default option, requires that budget legislation not be tied to any other provisions, thereby forestalling some element of horse-trading.⁸² These constitutional systems all borrowed from the U.S. presidential model,⁸³ which served the basic structure for both original and recent Latin American constitutions,⁸⁴ but their express departure from the U.S. Constitution's permissiveness of financial impasse suggests that, in this respect, the latter may have served as a negative model to avoid.⁸⁵ And in turn

⁷⁷ See CONSTITUCIÓN POLÍTICA DE HONDURAS [C.P.] art. 368, *translated in* CONSTITUTE, HONDURAS' CONSTITUTION OF 1982 WITH AMENDMENTS THROUGH 2012, at 61 (n.d.), *archived at* <http://perma.cc/JJ7S-ZJ5Y>.

⁷⁸ See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL PARAGUAY [C.P.] art. 217, *translated in* CONSTITUTE, PARAGUAY'S CONSTITUTION OF 1992 WITH AMENDMENTS THROUGH 2011, at 38 (n.d.), *archived at* <http://perma.cc/6MZJ-ERYK>; *see also* CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [C.P.] art. 313, *translated in* CONSTITUTE, VENEZUELA'S CONSTITUTION OF 1999 WITH AMENDMENTS THROUGH 2009, at 63 (n.d.), *archived at* <http://perma.cc/GY97-PH7M>.

⁷⁹ CONSTITUCIÓN POLÍTICA DE BOLIVIA [C.P.] art. 158, § I, cl. 11, *translated in* CONSTITUTE, BOLIVIA'S CONSTITUTION FROM 2009, at 41 (n.d.), *archived at* <http://perma.cc/L4FG-WXMT>.

⁸⁰ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 67, *translated in* CONSTITUTE, CHILE'S CONSTITUTION OF 1980 WITH AMENDMENTS THROUGH 2012, at 30 (n.d.), *archived at* <http://perma.cc/7468-MJM5>.

⁸¹ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMA [C.P.] arts. 272, 273, *translated in* CONSTITUTE, PANAMA'S CONSTITUTION OF 1972 WITH AMENDMENTS THROUGH 2004, at 46 (n.d.), *archived at* <http://perma.cc/Q9QG-PY73>.

⁸² CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 165, § 8 (Braz.), *translated in* CONSTITUTE, BRAZIL'S CONSTITUTION OF 1988 WITH AMENDMENTS THROUGH 2005, at 92 (n.d.), *archived at* <http://perma.cc/5R8G-5TQ8>.

⁸³ *See* Cheibub et al., *supra* note 68, at 1713 (examining the basic influence of the U.S. presidential model, but observing that U.S. presidentialism was not adopted as "a package deal").

⁸⁴ Scott Mainwaring & Matthew Soberg Shugart, *Introduction*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 1, 2 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997) (summarizing the debates in Argentina, Brazil, Bolivia, Chile, and Colombia, to depart from a presidential form of government, after the transitions to democracy that occurred in the region from the mid-1980s onwards).

⁸⁵ *Id.* at 3 ("[P]residentialism comes in different varieties and . . . these variations can be as important as the broad differences between parliamentarism and presidentialism."). For

many of the design options presented by Latin American constitutions have been replicated in new presidential constitutions in other regions of the world, reinforcing the departure from U.S. experience.⁸⁶

A constitutional rule for the prevention of financial impasse (and of the threat of it occurring) is not unique to presidential systems. In parliamentary systems, the Prime Minister's status as a member of parliament makes deadlocks between the branches less likely but, as we see in the Australian case study, not impossible. The executive and legislative branches exist in a relation of mutual independence, not separation. Governments in parliamentary systems therefore maintain control over the legislative agenda, and a vote of no confidence by the parliament results in the immediate defeat of the government (an outcome itself minimized by party discipline, pursuant to which members of parliament who propose or vote for such a motion risk either expulsion from the caucus or removal via election).⁸⁷ There is variety between Westminster

further discussion of the distinctive veto powers in different constitutions, see Matthew Soberg Shugart & Scott Mainwaring, *Presidentialism and Democracy in Latin America: Rethinking the Terms of the Debate*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA*, *supra* note 84, at 12, 41-44. For a description of negative models of constitutional influence, see Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 *INT'L J. CONST. L.* 296, 300 (2003).

⁸⁶ See, e.g., AFG. CONST. ch. 5, art. 98, *translated in* CONSTITUTE, AFGHANISTAN'S CONSTITUTION OF 2004, at 17 (n.d.), *archived at* <http://perma.cc/VK6J-VD78> (automatically applying the previous year's budget); CONSTITUTION DE LA RÉPUBLIQUE DU BÉNIN art. 110, *translated in* CONSTITUTE, BENIN'S CONSTITUTION OF 1990, at 20 (n.d.), *archived at* <http://perma.cc/5W6H-G4HC> (establishing that provisions of an appropriations bill may be enforced by edict); CONSTITUTION DE LA RÉPUBLIQUE DU BURUNDI art. 177, *translated in* CONSTITUTE, BURUNDI'S CONSTITUTION OF 2005, at 26 (n.d.), *archived at* <http://perma.cc/U76B-R86L> (granting power to establish a budget by decree); CONSTITUTION DE L'UNION DES COMORES art. 27 (Comoros), *translated in* CONSTITUTE, COMOROS' CONSTITUTION OF 2001 WITH AMENDMENTS THROUGH 2009, at 11 (n.d.), *archived at* <http://perma.cc/5ERK-AHJR> (granting power to establish a budget by ordinance after sixty days); CONSTITUTION DE LA COTE D'IVOIRE art. 80, *translated in* CONSTITUTE, COTE D'IVOIRE'S CONSTITUTION OF 2000, at 13 (n.d.), *archived at* <http://perma.cc/9S8G-AWBF> (granting power to establish the budget by ordinance after seventy days). Latin America does not serve as the only series of models for these nations. For example, there are also parallels with the semipresidential constitution of France. See 1958 CONST. 47 (Fr.) (granting the power to use funds by decree). For a general description of the phenomenon of borrowing in constitutional design, see Vlad F. Perju, *Constitutional Transplants, Borrowing, and Migrations*, in *OXFORD HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW* 1304 (Michel Rosenfeld & Andrés Sajó eds., 2012).

⁸⁷ Such votes are therefore rare in two-party democracies, but more common for multiparty systems in which a minority party must form a coalition government. For disturbing manifestations of this latter tendency as presenting a significant disadvantage to parliamentarianism, see Samuel Issacharoff, *Fragile Democracies*, 120 *HARV. L. REV.* 1405, 1420 (2007). For the recent blocking of the attempt in Canada, see Gary Levy, *A Crisis Not Made in a Day*, in *PARLIAMENTARY DEMOCRACY IN CRISIS*, *supra* note 2, at 19, 26.

and consensus models within these systems,⁸⁸ and between those with two chambers of parliament and those with one.⁸⁹ In bicameral parliamentary systems a tendency for impasse can result when the lower and upper houses are unable to agree, with upper house refusal more likely, given the executive's majority in the lower house.⁹⁰ In many constitutions special procedures nonetheless exist to resolve this process for legislation in general and sometimes expressly for financial legislation in particular.

In the prototypical Westminster parliamentary system of the United Kingdom, for example, supply bills are presented to the House of Commons for passage (and their defeat there, if only a theoretical possibility, would present a no confidence motion); yet the (unelected) House of Lords has no power to reject such a bill, and can only delay it by one month.⁹¹ Similarly, in Australia's parliamentary system, such bills originate in the House of Representatives, but Australia departs from the U.K. model insofar as the Senate may defer or reject supply bills, thus creating the conditions for financial impasse.⁹² In the unicameral parliament of Israel, a failure to pass the budget within three months may be grounds for early election.⁹³ In unicameral Sweden, on the other hand, the constitution provides that the most recent national budget applies until a new budget is adopted.⁹⁴ In India, the (lower) House of the People need not accept the recommendations of the (upper) Council of States on the budget: the budget is deemed passed by both houses if amendments are not accepted or if fourteen days have passed.⁹⁵ In Japan, the constitution provides an elaborate procedure for reaching consensus on the budget between the two houses, but if consensus is not reached within thirty sitting days, the decision of the House of Representatives is final.⁹⁶ And in

⁸⁸ See generally LIJPHART, *supra* note 75, at 9-47.

⁸⁹ See *id.* at 200-15; TSEBELIS & MONEY, *supra* note 75, at 44-70.

⁹⁰ Again, coalition governments whose majority does not rest on a single party can introduce dissensus in the lower house as well.

⁹¹ Parliament Act 1911, 1 & 2 Geo. 5, c. 13, § 1(1). The composition of the House of Lords has been the subject of several reform proposals. See, e.g., House of Lords Reform Bill 2012-13, H.L. Bill [52] cl. 2 (U.K.) (proposing to increase the electoral credentials of the second chamber).

⁹² AUSTRALIAN CONSTITUTION s 53; see *infra* Part III.

⁹³ Section 36A Amendment to the Basic Law, 5761-2001, SH No. 1780 p. 166 (Isr.), translated in CONSTITUTE, ISRAEL'S CONSTITUTION OF 1958 WITH AMENDMENTS THROUGH 2013, at 10 (n.d.), archived at <http://perma.cc/SCH6-PDC7>.

⁹⁴ REFERINGSFORMEN [RF] [CONSTITUTION] 9:5, translated in CONSTITUTE, SWEDEN'S CONSTITUTION OF 1974 WITH AMENDMENTS THROUGH 2012, at 20 (n.d.), archived at <http://perma.cc/QY6V-PBFV>.

⁹⁵ INDIA CONST. art. 109, cl. 4, 5, translated in CONSTITUTE, INDIA'S CONSTITUTION OF 1949 WITH AMENDMENTS THROUGH 2004, at 37 (n.d.), archived at <http://perma.cc/QW6P-TEBM>.

⁹⁶ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 60, translated in CONSTITUTE, JAPAN'S CONSTITUTION OF 1946, at 10 (n.d.), archived at <http://perma.cc/3GLU-BFTU>.

Germany if the budget is not approved after simultaneous presentation to the Bundestag and Bundesrat, the constitution immediately guarantees a temporary budget for meeting public debts and contractual obligations.⁹⁷

Of course, this comparison does not take into account actual constitutional practice in each system; which procedures are spelled out in constitutional text may tell us little about how they are observed and how they relate to other constitutional rules and practices. Nor does it canvas the numerous statutory and administrative rules that determine budgetary process, of what we might call each country's true "fiscal constitution."⁹⁸ In particular, one might want to examine how the distinction between appropriations and mandatory spending plays out in each locale. Nonetheless the above survey does suggest that the better comparison, when examining the resolution of financial impasse, is not between parliamentary and presidential systems, but between three main types of constitutional resolution for any impasse created about financial legislation (with much variety within each category). The first is for a default rule that applies to continue the provisions of the previous budget, or to pass automatically the provisions of the proposed current budget, after a stipulated period. This applies to overcome congressional dissent in presidential systems, or upper house dissent in parliamentary ones. The second form of resolution is a constitutional rule that creates a prorepresentative resolution for immediate election in the light of impasse. This resolution is further complicated by the fact that it may be triggered not simply by dissent in a single chamber or in the lower house of a bicameral parliament, as traditional parliamentary sovereignty would require, but also by a upper house dissent umpired by an independent arbiter, as occurred in Australia. The third form of resolution is constitutional silence, and the toleration of a government shutdown as simply one more feature in the difficulties of modern government, and one that must be resolved purely by political negotiation and compromise. I example these features more fully in the final Part of this Article, after detailing the case study of financial impasse in Australia in Part III.

III. BEHIND CONSTITUTIONAL DESIGN: AUSTRALIA'S FINANCIAL IMPASSE

The shutdown of government in a constitutional democracy is thus often constitutionally prevented in both presidential and parliamentary systems. It is also exceedingly rare. One exceptional example comes from Australia, where the Parliament experienced legislative deadlock and the failure to pass an appropriations bill in 1975, in what has been described as "the most dramatic and controversial single incident in Australian political and constitutional

⁹⁷ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. III (Ger.), *translated in* CONSTITUTE, GERMAN FEDERAL REPUBLIC'S CONSTITUTION OF 1949 WITH AMENDMENTS THROUGH 2012, at 53, *archived at* <http://perma.cc/32U7-2ZXXN>.

⁹⁸ For the original concept of the fiscal constitution, as applied to America, see Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 272, 278-82 (1977).

history.”⁹⁹ In some ways, the political preconditions for the crisis were somewhat analogous to the American scenario of 2013, although heightened in different ways. In December 1972, the Australian Labor Party had been elected after twenty-three years in opposition.¹⁰⁰ This party originated in the Australian labor movement and came to power on a platform of social reform, which included greater federal involvement in education, a workers’ compensation scheme, consumer protection laws, urban infrastructure projects, Aboriginal land rights, and – strikingly relevant to the current U.S. counterpoint – the creation of a universal system of health insurance.¹⁰¹ These reforms, far-reaching in their vision of welfare as well as their new vision of federalism, were adamantly opposed by the Liberal Party and National Country Party¹⁰² – the two parties that comprise the Liberal-National Party Coalition currently in government in Australia.¹⁰³ It was a deeply polarized, and deeply hostile, partisan environment.¹⁰⁴

The source of the bicameral deadlock that occurred was the inverse of the tensions in the 2013 U.S. shutdown context. The 1972 election had given the Australian Labor Party a majority in the House of Representatives, but no Senate majority.¹⁰⁵ During Prime Minister Gough Whitlam’s first year and a half of office, many of his reforms were defeated in the Senate.¹⁰⁶ The bill for universal health insurance, for example, failed to pass the Senate in 1973.¹⁰⁷ In

⁹⁹ Michael Coper & George Williams, *Preface*, in *POWER, PARLIAMENT AND THE PEOPLE*, at v, v (Michael Coper & George Williams eds., 1997); see also Paul Kelly, *The Dismissal and Australian Democracy*, in *POWER, PARLIAMENT AND THE PEOPLE*, *supra*, at 126, 126.

¹⁰⁰ 1 THE EUROPA WORLD YEAR BOOK 2003, at 549 (Joanne Maher & Phillip McIntyre eds., 44th ed. 2003).

¹⁰¹ Gough Whitlam, Leader of the Australian Labor Party, *It’s Time for Leadership: Australian Labor Party Policy Speech* (Nov. 13, 1972), *archived at* <http://perma.cc/Z3W7-WH38> (putting forth the Australian Labor Party’s policy platform positions for the coming year).

¹⁰² GEOFFREY SAWER, *FEDERATION UNDER STRAIN: AUSTRALIA 1972–1975* (1977).

¹⁰³ The Coalition government was elected on September 7, 2013. See *Your Prime Minister*, PRIME MINISTER OF AUSTL., <https://www.pm.gov.au/your-pm> (last visited Mar. 25, 2014), *archived at* <http://perma.cc/3LDG-229T>.

¹⁰⁴ As an Independent Senator described at the time, in language not unfamiliar to current observers in the United States: “One can sort of smell this atmosphere of hate which is pervading this chamber and emanating from certain members on the Opposition benches.” Cth, Parliamentary Debates, Senate, 5 Apr. 1973, 915 (Reginald Turnbull, Senator, Austl.).

¹⁰⁵ SAWER, *supra* note 102, at 8. Compare this to the United States, which has a Democratic President, a Democrat-controlled Senate and a Republican-controlled House. See *supra* note 24 and accompanying text.

¹⁰⁶ See George Winterton, *1975: The Dismissal of the Whitlam Government*, in *AUSTRALIAN CONSTITUTIONAL LANDMARKS* 229, 231 (H.P. Lee & George Winterton eds., 2003).

¹⁰⁷ Cth, Senate, 12 Dec. 1973, 2737, 2768-9 (Senator Rae) (showing that Senator Rae’s amendment requiring that the Health Insurance Bill be withdrawn received a majority of

April 1974, Whitlam sought to dissolve both Houses under section 57 of the Australian Constitution, an antideadlock clause triggered by repeated failure to pass legislation.¹⁰⁸ At the time, members of the Senate had signaled that they would act to defer a money bill,¹⁰⁹ but it was their general obstruction of Whitlam's legislative program that grounded the recourse to immediate election. This option of "double dissolution," feasible in the confidence-of-the-assembly terms of parliamentary systems, would be inconceivable under a presidential system because it would violate the principle of separation of powers as locally understood. It is an antideadlock device that turns to the people, and specifically to their votes, thus relying on the device of election as the best mode of resolution. Hence this measure allows the Prime Minister to call for a new election on the basis of deadlock, after which a successfully returned Prime Minister can seek a joint sitting of both houses to pass any legislation that has been stymied for at least three months. The request for dissolution must be approved by the Governor-General, the Queen's representative in Australia. Such approval was granted in April 1974.¹¹⁰ An election in May returned the Australian Labor Party to power, again with a majority in the House – a prerequisite for government in the Westminster parliamentary system – but again without a Senate majority, now lacking by nine rather than five Senators.¹¹¹ The opposition members in the Australian Senate interpreted the result of the 1974 elections as having given them "a mandate to oppose of equivalent magnitude to that of the House of Representatives' mandate to propose."¹¹²

votes).

¹⁰⁸ AUSTRALIAN CONSTITUTION s 57 (granting the Governor-General power to dissolve both houses if the House repeatedly passes a bill that the Senate rejects); see Leslie Zines, *The Double Dissolution and Joint Sitting*, in *LABOR AND THE CONSTITUTION 1972-1975*, at 217, 217 (Gareth Evans ed., 1977).

¹⁰⁹ Zines, *supra* note 108, at 217; see Cth, Parliamentary Debates, Senate, 10 Apr. 1974, 887, 889. The Annual Appropriations Acts provide, like the U.S. congressional appropriations process, annual funding for government operations. They are introduced into Parliament on a fixed date and, when passed, fund approximately twenty-five percent of all federal government expenditure for the year. Similar to the distinction between mandatory and discretionary funding in the United States, a framework for special appropriations establishes that the authority for particular funding, such as Social Security, may be provided in special Acts. See, e.g., *The Commonwealth's Appropriation Framework - An Introduction*, AUSTRALIAN DEP'T OF FIN., <http://www.finance.gov.au/budget/budget-process/appropriation-bills.html> (last visited Mar. 20, 2014), archived at <http://perma.cc/L6PJ-WQ3W>. Compare *id.*, with *supra* note 14 and accompanying text.

¹¹⁰ Zines, *supra* note 108, at 217.

¹¹¹ See SAWER, *supra* note 102, at 43.

¹¹² PAUL KELLY, *NOVEMBER 1975: THE INSIDE STORY OF AUSTRALIA'S GREATEST POLITICAL CRISIS* 61 (1995) (quoting statements of Senators Reg Withers and Ivor Greenwood).

In the long history of constitution making since the U.S. Constitution of 1789, Australia's Constitution of 1901 is old enough to count as enduring, but young enough to have borrowed from the U.S. constitutional example. Almost as difficult to amend as its American counterpart,¹¹³ the constitution remains distanced from the modern constitutions of the post-World War II and post-Cold War eras. The constitutional structure itself is a combination of British parliamentarism and American federalism in a system known colloquially as Washminster – a Washington/Westminster hybrid.¹¹⁴ This means that Australia has a parliamentary system with the executive drawn from the House of Representatives (and thus no corporal separation of powers between the executive and legislative branches), and a division of powers between the federal and state governments. Moreover the Senate (the elected “State’s House”¹¹⁵) is given power to amend legislation, apart from money bills. The Madisonian idea of “checks and balances” sits uncomfortably with the more positive responsibilities of the executive and legislature to govern responsibly. Such tensions were not lost on the Australian founders, one of whom predicted that “either responsible government will kill federation, or federation in the form in which we shall, I hope, be prepared to accept it, will kill responsible government.”¹¹⁶ The search for an adequate antideadlock provision took more time during the constitutional debates of 1897–1898 than any other subject, taking up 400 of the 1100 pages of the official record.¹¹⁷

The “joint sitting” is an antideadlock technique designed for the purpose of resolving disagreements between the two chambers, but it was a procedure that had not been used before in Australia, and has not been used since 1974.¹¹⁸ It

¹¹³ Compare AUSTRALIAN CONSTITUTION s 128, with U.S. CONST. art. V. Of forty-two amendment proposals put to the Australian people, only eight have been carried. JOHN McMILLAN, PAPERS ON PARLIAMENT NO. 13, CONSTITUTIONAL REFORM IN AUSTRALIA (1991), archived at <http://perma.cc/UVZ8-ZJZ3>.

¹¹⁴ Elaine Thompson, *The “Washminster” Mutation*, in RESPONSIBLE GOVERNMENT IN AUSTRALIA 32, 32-40 (Patrick Weller & Dean Jaensch eds., 1980). But see Elaine Thompson, *The Constitution and the Australian System of Limited Government, Responsible Government and Representative Democracy: Revisiting the Washminster Mutation*, 24 U.N.S.W. L.J. 657, 661-63 (2001).

¹¹⁵ This concept is attributed to Edmund Barton, leader of the Constitutional Convention in 1897, reflecting a certain obliviousness on the part of the founders to the rise of political parties as dominant forces in each chamber.

¹¹⁶ OFFICIAL REPORT OF THE NATIONAL AUSTRALASIAN CONVENTION DEBATES: SYDNEY 2, MARCH TO 9, APRIL, 1891, at 280 (1891) [hereinafter AUSTRALASIAN CONVENTION DEBATES] (quoting Senator Hackett).

¹¹⁷ CONSULTATIVE GRP. ON CONSTITUTIONAL CHANGE, COMMONWEALTH OF AUSTR., RESOLVING DEADLOCKS: THE PUBLIC RESPONSE: REPORT OF THE CONSULTATIVE GROUP ON CONSTITUTIONAL CHANGE 12 (2004) (canvassing the Sydney Convention of 1897–1898).

¹¹⁸ *Double Dissolution, Fact Sheets*, PARLIAMENTARY EDUC. OFFICE, <http://www.peo.gov.au/learning/fact-sheets/double-dissolution.html> (last visited Feb. 14, 2014), archived at <http://perma.cc/6VQD-HM7N>. For an exploration of the proposal to increase the use of this

allows for an exceptional unicameral process within a constitution that sets out bicameral machinery¹¹⁹ (one might imagine the joint session of the American State of the Union Address being used to pass contentious legislation). A prerequisite to employing the joint sitting is two attempts to pass the contentious legislation through both chambers, with an interval of three months in between.¹²⁰ The required interval makes the provision inapt to deal with the blockage of appropriations legislation.¹²¹ During the August 1974 joint sitting, the two chambers passed legislation establishing the system of universal health insurance – the basis of which still endures, with current partisan debate reduced to particular features.¹²² The proceedings of the joint sitting of Parliament were televised to the nation, also a first.¹²³ The Senate, with its seventy-six members compared to the House of Representatives' 150 members was for the moment disarmed. Four of the six pieces of legislation passed were later challenged in the High Court, which held section 57 to be a justiciable procedure, and all but one were held to have satisfied the procedural requirements.¹²⁴

Nonetheless the problems for the Whitlam government were not to end there – and in fact, were to grow much worse. In October 1975, the Senate made a second threat to defer a money bill – and this time acted on it. It refused to pass

provision by allowing its use without a preceding election or straight after an election, see CONSULTATIVE GRP. ON CONSTITUTIONAL CHANGE, *supra* note 117, at 7-8. The dissolution provision of section 57 has been proposed six times. *Id.*

¹¹⁹ See Zines, *supra* note 108, at 225 (suggesting that the issue of how exceptional such a process is has not been resolved).

¹²⁰ AUSTRALIAN CONSTITUTION s 57.

¹²¹ This incompatibility was noted by Australian Governor-General Sir John Kerr in justification of his controversial decisionmaking below. See Sir John R. Kerr, Governor-Gen., Austl., Public Statement (Nov. 11, 1975), *reprinted in Current Topics*, 49 AUSTL. L.J. 645, 648 (1975) (explaining that section 57 “necessarily entails a considerable time lag which is quite inappropriate to a speedy resolution of the fundamental problems posed by the refusal of supply”).

¹²² *Health Insurance Act 1973* (Cth) (“An Act providing for Payments by way of Medical Benefits and Payments for Hospital Services and for other purposes . . .”). Nonetheless, one of the first acts to dismantle the legislation began a year after Whitlam’s dismissal, with the universal 1.35% levy on taxable income replaced by an optional 2.5% levy and the establishment of Medibank Private. UNDERSTANDING THE AUSTRALIAN HEALTH CARE SYSTEM 9 (Eileen Willis et al. eds., 2008).

¹²³ COMMONWEALTH OF AUSTR., ODGERS AUSTRALIAN SENATE PRACTICE 739 (13th ed. 2012).

¹²⁴ *W. Austl. v Commonwealth* (1975) 134 CLR 201, 295-96 (holding that the three statutes being challenged, the Commonwealth Electoral Act 1973, the Senate (Representation of Territories) Act 1973, and the Representation Act 1973, were all valid laws and within the legislative powers of the House and Senate); *Victoria v Commonwealth* (1975) 134 CLR 81 (*Petroleum and Minerals Auth. Case*) (holding the passage of the Petroleum and Minerals Authority Act 1973 (Cth) through the Joint Sitting to be invalid); *Cormack v Cope* (1974) 131 CLR 432.

budget legislation until the government called another election, which the Whitlam government declined to do.¹²⁵ The government at the time was rocked by scandals unrelated to its legislative program.¹²⁶ On an influential interpretation of Senate powers under the constitution, the Senate had the constitutional power to reject or defer – or defer conditionally – appropriations bills.¹²⁷ Nonetheless the government argued that a convention applied – that is, an obligatory practice derived from practice itself – that a House of Review should not reject financial legislation.¹²⁸ At the time evidence of the convention was presented by “the fact that on 139 previous occasions money bills have been passed by a Senate in which the Government of the day lacked a majority, and none has been previously rejected.”¹²⁹ Citing unsuccessful attempts to refuse supply in Australian state parliaments and a “duty to resist” the recalcitrance of upper houses, the same commentator observed: “It is the Lower House which, in the Westminster parliamentary system, has always made the Government of the day and it is only the Lower House which should be able to break it.”¹³⁰

The Whitlam government scrambled to keep the government running, coming up with a (rather questionable) plan to meet its creditors in a different way.¹³¹ The Senate would not be moved, deferring the appropriations bills by a

¹²⁵ Winterton, *supra* note 106, at 236.

¹²⁶ For a discussion of the government’s controversial proposal for international borrowing, known as the “loans affair” as well as other scandals, see, for example, 2 JENNY HOCKING, GOUGH WHITLAM 202-08, 231-36 (2012).

¹²⁷ The Australian Constitution prohibits the Senate from proposing or amending revenue, money, or taxation bills. AUSTRALIAN CONSTITUTION s 53. Nevertheless, the Senate relied on previous interpretations of the constitution in order to reject or defer the appropriations bill. See CONSULTATIVE GRP. ON CONSTITUTIONAL CHANGE, *supra* note 117, at 12-13. This can be contrasted with the view expressed at the Convention that this was “a new-fangled proposition, entirely un-English, and utterly opposed to the development of constitutional government.” AUSTRALASIAN CONVENTION DEBATES, *supra* note 116, at 320 (quoting Sir Henry Parkes).

¹²⁸ See Winterton, *supra* note 106, at 229, 237 (pointing out the government’s proclaimed need to uphold the principle of responsible government, whereby the entitlement to govern is supported by the confidence of the House of Representatives alone).

¹²⁹ Gareth Evans, *The Senate’s Rights Can Be Wrong*, AUSTRALIAN, Oct. 29, 1975, at 11.

¹³⁰ *Id.* (citing the unsuccessful attempt to block the budget by the Legislative Council, the upper house of the legislature of Victoria, in 1877, and another blockage by the upper house in Victoria, which in fact did result in an election, in 1947).

¹³¹ Whitlam would probably have breached the constitution at the point at which he began to spend money without parliamentary approval. AUSTRALIAN CONSTITUTION s 83 (“No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.”); see also *id.* s 81 (establishing the Consolidated Revenue Fund). For contending views on its legality, see Winterton, *supra* note 106, at 238. *Contra* SAWER, *supra* note 102, at 162.

majority of one vote on October 16, October 22, and November 6, 1975.¹³² And by November 11, 1975 – when it was estimated that the government would have sixteen days left to run before the money ran out – the Governor-General Sir John Kerr took matters into his own hands.¹³³ On the basis that Mr. Whitlam could not guarantee the running of government, Kerr dismissed the Prime Minister and appointed Opposition Leader Malcolm Fraser as caretaker to pass the financial legislation. Kerr did so in purported exercise of his constitutional powers,¹³⁴ defending what he termed “a democratic and constitutional solution to the current crisis which will permit the people of Australia to decide as soon as possible what should be the outcome of the deadlock.”¹³⁵ He then dissolved both Houses under section 57 of the constitution, under conditions met by other deadlocked legislation, and at the election in December, the Australian Labor Party was defeated in both Houses, and a Liberal-National Country Party coalition came to power.¹³⁶

The 1975 crisis is rightly famous – or notorious – for this drastic end result. The galling insult of an unelected Governor-General dismissing an elected Prime Minister is said to have galvanized the movement to dispense with monarchy in Australia¹³⁷ (the movement is as yet unsuccessful, in part due to distrust of the presidential powers that any successor to the Governor-General would enjoy in the new republic).¹³⁸ Such action was unprecedented: the

¹³² Winterton, *supra* note 106, at 236. The delayed appropriations bills amounted to about one-eighth of the monthly formation of gross domestic product. KELLY, *supra* note 112, at 176. For its potential implications on the economy in general, and particular sectors, see *id.* at 153.

¹³³ It is worth noting the supporting advice issued by a Liberal member of Parliament and former Commonwealth Solicitor-General, Robert Ellicott, and supported by the Chief Justice Sir Garfield Barwick, who Kerr had consulted without the Prime Minister’s approval. See Winterton, *supra* note 106, at 237.

¹³⁴ See Letter from Sir John R. Kerr, Governor-Gen., Austl., to Gough Whitlam, Prime Minister, Austl. (Nov. 11, 1975), reprinted in *Current Topics*, *supra* note 121, at 646.

¹³⁵ Kerr, *supra* note 121, at 646.

¹³⁶ The election resulted in fact in a landslide win for the Liberal-National Country Party coalition. Malcolm Mackerras, *Double Dissolution Election, 1975: Results*, in AUSTRALIAN POLITICS: A FOURTH READER, *supra* note 129, at 528, 528 tbl.2. This was despite the fact that, during the blockage itself, polls pointed to majority of support (70.4%) for the Senate passing supply; and polls taken on November 1–2 and 8–9 showed that sixty-seven percent were opposed to a rejection and sixty-three percent to a deferral of the Budget. Henry Mayer, *Issues in the Polls, 1975 Election: A Preliminary Sketch*, in AUSTRALIAN POLITICS: A FOURTH READER, *supra* note 129, at 525, 527.

¹³⁷ Winterton, *supra* note 106, at 252 (“[T]he most significant legacy of the Dismissal has been the growth of republicanism.”). *But see* MARK MCKENNA, *THE CAPTIVE REPUBLIC: A HISTORY OF REPUBLICANISM IN AUSTRALIA 1788-1996*, at 241-43 (1996) (disputing the influence of 1975 on any movement, or lack thereof, toward republicanism).

¹³⁸ On November 6, 1999, Australians rejected a proposed amendment of the constitution that would establish the Commonwealth of Australia as a republic. For an analysis of the legal, rather than identity-based, obstacles to the republic, see Brendan Lim, *Crisis and the*

Crown had last dismissed a (British) Prime Minister under King George III in 1783.¹³⁹ Although Kerr's actions were supported in some quarters,¹⁴⁰ the more general opprobrium that Whitlam's dismissal attracted has ensured every Governor-General since that time has maintained a carefully ceremonial, rather than interventionist, role.¹⁴¹ More recent criticisms focus on the way the Governor-General deployed his powers, rather than their existence.¹⁴² Notably Kerr acted both prematurely and in questionable good faith, by "fail[ing] to warn Whitlam that he [would] face dismissal if he did not resign or advise a dissolution of Parliament by a specified date,"¹⁴³ and by exercising his reserve powers when a political solution might still have been found.¹⁴⁴

But the backstory of deadlock is an important, if less recognized, part of this legacy. There were political causes of the crisis, to be sure, but the constitutional system also shaped the political choices available to voters. The different party alignment in the two houses was more likely because of the different electoral procedures and staggered intervals designed for each: the latter feature also prominent in the United States electoral system.¹⁴⁵ Indeed,

Canon: Australia's Constitution After Whitlam (Sept. 2013) (unpublished J.S.D. dissertation, Yale University) (on file with author).

¹³⁹ This occurred in the dismissal of Lord North. See Colin Howard & Cheryl Saunders, *The Blocking of the Budget and the Dismissal of the Government*, in LABOR AND THE CONSTITUTION 1972-1975, *supra* note 108, at 272, 272 (recounting the difficulty in finding English precedent for the Governor-General's actions and recounting other occurrences such as the resignation of Prime Minister Peel under Queen Victoria in 1839, and the exchanges between William IV and Lord Melbourne in 1834). For a description of the inevitable loss or yielding of monarch powers over time, see Adam Przeworski et al., *The Origins of Parliamentary Responsibility*, in COMPARATIVE CONSTITUTIONAL DESIGN 101, 107 (Tom Ginsburg ed., 2012).

¹⁴⁰ See, e.g., R.J. Ellicott, *Commentaries*, in LABOR AND THE CONSTITUTION: 1972-1975, *supra* note 108, at 288, 288-96.

¹⁴¹ JOHN HIRST, A REPUBLICAN MANIFESTO 64-72 (1994).

¹⁴² See SAWER, *supra* note 102, at 150.

¹⁴³ Winterton, *supra* note 106, at 248.

¹⁴⁴ See *id.* at 247-48. For the view that a Prime Minister may be entitled to a fair hearing prior to dismissal, see SAWER, *supra* note 102, at 148.

¹⁴⁵ Unlike the maximum terms of approximately three years that members of the House of Representatives serve, the Australian Senate enjoys fixed six-year terms with half retiring every three years. See AUSTRALIAN CONSTITUTION s 7. At federation there were six senators for each state; now there are twelve, including Tasmania, which still has only five members in the House of Representatives. See *id.* s 7; *Representation Act 1983* (Cth) s 3. In contrast, the members of the U.S. House of Representatives and Senate serve terms of two and six years respectively. U.S. CONST. art. I, § 2, cl. 1; *id.* art. I, § 3, cl. 2. The differences in composition between the House of Representatives and the Australian Senate have been exacerbated by the formal equality of states, so that citizens of underpopulated states enjoy far greater access to the Senate. "The vote of a Queenslander is worth twice as much as that of a Victorian or a New South Welshman, that of a WA nearly four times as much, and that of a Tasmanian nearly ten times as much." Evans, *supra* note 129, at 544. For a critique of

the government of the day has not enjoyed a majority in the Australian Senate for the majority of its constitutional life,¹⁴⁶ an effect exacerbated by the electoral system of proportional representation (within states) in place in the Senate since 1948,¹⁴⁷ against the preferential, single-winner system that sends members to the House of Representatives. Members of the two chambers now report to very different constituencies, making disagreement more likely, and giving the same political parties distinctive political leverage in each.¹⁴⁸ Again like the United States this is compounded by the fact that the two chambers enjoy equal powers (except to a limited extent dealing with financial matters), which makes rival claims of representative mandates potentially unresolvable.

In both the United States and Australia, deadlock is intrinsically connected to the separation of powers principle and compounded by the notion of checks and balances. Although the architecture of presidentialism and parliamentarianism divides these systems, as well as other relevant differences,¹⁴⁹ the principle of separation of powers is shared through the institution of bicameralism.¹⁵⁰ Moreover, presidentialism and bicameralism have in common the characteristic of veto players in decisionmaking.¹⁵¹ And if bicameralism has “an implicit supermajoritarian effect,”¹⁵² its application to money bills makes recourse to shutdown less inconceivable than one would

the U.S. disparities in the Senate, see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 29, 51-62 (2006) (discussing the “equal voting power [given] to Wyoming and California alike,” *id.* at 29).

¹⁴⁶ See CONSULTATIVE GRP. ON CONSTITUTIONAL CHANGE, *supra* note 117, at 14 (“As the then Leader of the Opposition, the Hon Simon Crean MP, observed in parliament on 8 October 2003, for 37 of the last 42 years the government of the day has not had a majority in the Senate.”).

¹⁴⁷ *Id.* at 13 (“Governments have invoked the [antideadlock clause of section 57] on six occasions, five of them occurring since the introduction of proportional representation for the election of senators in 1948.”).

¹⁴⁸ Recently, the Senate has housed a greater number of independents and “microparties,” in part because of electoral rules quite unlike other proportional representation systems. Antony Green, *Senate Preference Deals Put the Joke on Us*, AGE (Austl.) (Sept. 10, 2013), <http://www.theage.com.au/comment/senate-preference-deals-put-the-joke-on-us-20130909-2tg64.html>, archived at <http://perma.cc/WXL4-MDJX> (documenting the preference deals between parties that have resulted in the election of parties with less than 0.5% of the vote).

¹⁴⁹ Most obviously, the Australian Constitution lacks a Bill of Rights, although it does contain certain guarantees. See, e.g., AUSTRALIAN CONSTITUTION s 80 (trial by jury); *id.* s 90 (freedom of interstate trade and commerce); *id.* s 116 (religious freedom); *id.* s 117 (residents’ rights against other state discrimination).

¹⁵⁰ That bicameralism and the separation of powers can be defended on similar grounds, see Adrian Vermeule, *Second Opinions and Constitutional Design*, 97 VA. L. REV. 1435, 1436-37 (2011).

¹⁵¹ Tsebelis, *supra* note 71, at 292.

¹⁵² Vermeule, *supra* note 150, at 1470.

expect.¹⁵³ Thus it is no surprise that the bicameral deadlock that attenuates U.S. congressional gridlock was also experienced in Australia. This feature complicates any prescription of parliamentarianism as a response to presidentialist impasse, especially in federal systems.¹⁵⁴

Nonetheless while some causes of deadlock might be comparable in Australia and the United States, the solutions are not. In Australia such problems could be avoided by the simple removal of the Senate's supply blocking power,¹⁵⁵ or by constitutional or legislative measures that would permit the government to continue to spend money at the previously approved level until the impasse has ended,¹⁵⁶ or alternatively a demotion of the "checks and balances" principle in the Senate system.¹⁵⁷ Although the first institutional alternative is not politically viable for federal constitutional reform in Australia,¹⁵⁸ the automatic passage of supply through the upper house has been institutionalized in certain bicameral Australian state parliaments.¹⁵⁹ This default option appears to favor government functionality over the (other) virtues of bicameralism,¹⁶⁰ at least where appropriations are at risk. In the United States, however, the removal of Senate involvement in the passage of appropriations would not have forestalled the impasse of October 2013, when blockage came from the (more polarized) House.¹⁶¹ A default rule like that

¹⁵³ Consider the dysfunction attributed to the supermajority rules (requiring two-thirds majority in both houses) for California's budget legislation *and* its taxation increase legislation. See Levinson, *supra* note 40, at 1265.

¹⁵⁴ WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 150-51 (Dover Publications, Inc., 2006) (1886). In registering support for a constrained separation, Professor Ackerman acknowledges the "cautionary tale" of Australia in 1975. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 674 (2000).

¹⁵⁵ See *generally* CONSULTATIVE GRP. ON CONSTITUTIONAL CHANGE, *supra* note 117, at 18 (commenting that the submission of the Australian Labor Party that policy proposals to resolve parliamentary deadlock "should be accompanied by the removal of the power of the Senate to block supply and the introduction of fixed four year terms for both houses").

¹⁵⁶ Nicholas Aroney, *Four Reasons for an Upper House: Representative Democracy, Public Deliberation, Legislative Outputs and Executive Accountability*, 29 ADELAIDE L. REV. 205, 231-32 (2008).

¹⁵⁷ See SAWER, *supra* note 102, at 191.

¹⁵⁸ See CONSULTATIVE GRP. ON CONSTITUTIONAL CHANGE, *supra* note 117, at 8 (finding "no reasonable prospect of gaining sufficient community support for either of the options for change advanced in the discussion paper to warrant the holding of a referendum"). The issue has been considered on four separate occasions between 1950 and 1988. *Id.* at 5.

¹⁵⁹ The New South Wales and Victorian Constitutions allow an appropriations bill to be deemed to have passed after one month. *Constitution Act 1902* (NSW) s 5A; *Constitution Act 1975* (Vic) s 65.

¹⁶⁰ See TSEBELIS & MONEY, *supra* note 75, at 16 (acknowledging that bicameralism has efficiency advantages when both houses have common interests, but political disadvantages when the houses have competing interests); Vermeule, *supra* note 150, at 1466.

¹⁶¹ For accounts as to why the House, rather than the Senate, exacts more polarization,

seen in other presidential systems would thus be a more effective solution for confronting American congressional impasse overall. Nonetheless a rethinking of the “checks and balances” principle, and its supplementation with the more active responsibilities of Congress, may also be relevant, as is outlined below.¹⁶²

Turning back to the substance behind the shutdown in the United States, it is worth pausing on the healthcare (and other social welfare) controversies behind the 1975 deadlock in Australia, and the 2013 deadlock in the United States.¹⁶³ While the comparative parallels are striking, they do not necessarily prove an ideological bias in the use of the threat of shutdown. Nonetheless, U.S. trends alone suggest that, in this country at least, the more conservative party has a higher tolerance of financial impasse. It is no coincidence that the most noteworthy examples of government shutdowns have occurred when Democrats controlled the executive branch and Republicans controlled at least one legislative chamber.¹⁶⁴ Moreover, the introduction of a universal system of health insurance has flared powerful political sentiments in the United States, just as it did in Australia in 1973. Polarized parties – and a polarized polity – existed in each.

In the story of financial impasses in the United States and Australia, polarization is both a driver and an effect.¹⁶⁵ It has many causes, and constitutional lawyers are good at emphasizing the institutional ones.¹⁶⁶ But when political scientists seek to identify causes of polarization, many

see Pildes, *supra* note 40, at 323-24.

¹⁶² See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011) (arguing that a system of prods and pleas is just as vital as checks and balances). For an opposing emphasis on the importance of checks, by limited government, in the context of appropriations, see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1348 (1988).

¹⁶³ Arguably, the issue of healthcare entitlements and funding was at the heart of the 1995–1996 U.S. government shutdown, as well. See Tiefer, *supra* note 14; cf. Krishnakumar, *supra* note 61, at 590.

¹⁶⁴ See Memorandum from Jessica Tollestrup, Co-Coordinator, Analyst on Cong. & the Legislative Process, Cong. Research Serv., Jared Nagel, Co-Coordinator, Info. Research Specialist, Cong. Research Serv. (Oct. 7, 2013), *archived at* <http://perma.cc/KL8F-CSJM> (discussing the causes of previous U.S. government shutdowns).

¹⁶⁵ Cf. Yasmin Dawood, *Democratic Dysfunction and Constitutional Design*, 94 B.U. L. REV. 913, 930-35 (2014) (suggesting that the same political and institutional features in a parliamentary democracy would not likely cause government dysfunction because of the differences in the decisionmaking process). Professor Dawood is right if we focus on the return to stability in Australian politics after the 1975 crisis and discount its negative effect on political morality. For a summary of the latter prognosis, see Winterton, *supra* note 106, at 251. This may also be true of the United States.

¹⁶⁶ For an expansive study that emphasizes institutional, but also historical and personality-driven factors, see Pildes, *supra* note 40, at 297-325 (observing the design of primaries, electoral districts, and internal House and Senate rules, as significant causes of polarization).

emphasize the powerful and even dominant role of the economic inequality variable.¹⁶⁷ If this hypothesis is true, then interventions to end inequality – and end polarization – may be stymied by the very forces that they are trying to confront. The introduction of equalizing measures may simply generate more shutdowns, and one might forecast an ever-increasing threat and use of budgetary impasse in coming years.¹⁶⁸ Such a result adds further complexity to the three design options – of default passage, representation, or silence – that I now turn to evaluate.

IV. CONSTITUTIONAL RESPONSE TO FINANCIAL IMPASSE: THREE FRAMES

The comparisons presented in this Article reveal three frames under which one may understand the constitutional resolution of financial impasse: a constitutional default rule that automatically passes contentious budgetary legislation; a prorepresentative procedure available to the government and/or an independent arbiter that turns to election; and the alternative constitutional silence and toleration of deadlock, with the expectation of political resolution. The frames are not exhaustive – for example, some constitutions exceptionally provide for judicial resolution.¹⁶⁹ Moreover the frames tell us little in isolation about the ways other aspects of constitutional design might increase (or decrease) the likelihood of polarization and deadlock, through, for example, sustaining or creating perversities in electoral design, or intransigence in legislative processes. Nonetheless, these three alternatives allow us to expand beyond mere presidential/parliamentary comparisons, and press us to examine the assumptions behind the current U.S. model.

It is worth pausing on the distinctive virtues of and problems posed by each frame, which provide a useful outline for empirical testing. The first frame, the default rule, takes from Congress the opportunity to make conditions or threats to the passage or operation of specific legislation on the basis of withholding support for the budget. This rule is widely used in presidential systems outside of the United States, and in resolving bicameral conflicts in nations with

¹⁶⁷ See NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 71-113 (2006) (finding that between 1956 and 1996 partisanship became more stratified by income); KAY LEHMAN SCHLOZMAN ET AL., THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY 232, 259 (2012). *But see* Pildes, *supra* note 40, at 295-97 (endorsing the importance of the McCarty et al. thesis, but questioning its application after the 2008 presidential election).

¹⁶⁸ Gamage & Louk, *supra* note 62, at 4 (“The key aspects of the new fiscal politics include: the rise of conservative anti-tax sentiment; increasing party polarization; more safe and gerrymandered districts and fewer moderate legislators; and a voting public characterized by often-contradictory and asymmetric preferences about fiscal policy.”). For responses to polarization, see *infra* Part IV; *infra* notes 183-92 and accompanying text.

¹⁶⁹ For example, the recent constitution of Congo, drafted by a range of international experts, exceptionally refers a failure to pass budgetary legislation to the Constitutional Court if an extraordinary session does not resolve the deadlock within fifteen days. CONSTITUTION DE LA RÉPUBLIQUE DU CONGO art. 127.

parliamentary constitutions, and has the advantage of automatic application. It therefore has the potential to stand above the political winds of the day in order to ensure that general government services, which may be critical to different constituencies and unrelated to current disagreements, are not held hostage to political maneuvering. While there remain other ways for Congress to express its disapproval with specific legislation, such as its refusal to pass that legislation, the threat of subsequent government shutdown is not one of them. Such an option does not inevitably threaten the other agenda setting, deliberative, scrutiny, and resolution-seeking tasks of the legislature.

This option is neither foreign nor new to the United States.¹⁷⁰ In 1997, for example, the 105th Congress supported a default rule in the form of automatic continuing resolutions for supplemental appropriations for the 1997 fiscal year. The provision was initially capped at ninety-eight percent, then increased to 100% of the prior year's funding level, and was passed by both the House and the Senate on June 5, 1997. President Clinton, however, vetoed the legislation on June 9, 1997, with an objection that the funding levels would be eighteen billion dollars below levels contained in an earlier agreement.¹⁷¹ Later, in 1999, the 106th Congress considered a permanent automatic continuing resolution proposal, which would have provided funding at the prior year's level.¹⁷² The House proposal was sponsored by a bipartisan coalition of members, but failed to pass.¹⁷³ The Senate proposal was accompanied by a joint hearing.¹⁷⁴ This proposal was considered along with a two-year budgetary cycle, and, if passed, would have continued the funding for government services in the event that legislators were unable to reach a compromise, yet at a lower level.¹⁷⁵ This, too, failed to pass.

Nonetheless, U.S. states – which are themselves no strangers to government shutdowns¹⁷⁶ – also represent a partial embrace of default budget procedures.

¹⁷⁰ Indeed, since the late 1980s, Republican Representative George Gekas of Pennsylvania regularly introduced a bill that would provide a default federal budget if no budget were enacted by September 30. *See, e.g.*, 104 CONG. REC. 18,896 (July 24, 1996) (statement of Rep. Gekas).

¹⁷¹ ROBERT KEITH, CONG. RESEARCH SERV., RL30339, PREVENTING FEDERAL GOVERNMENT SHUTDOWNS: PROPOSALS FOR AN AUTOMATIC CONTINUING RESOLUTION 8 (2000), *archived at* <http://perma.cc/3HZ4-CZMJ>.

¹⁷² *Revenue Raising Proposals in the Administration's Fiscal Year 2000 Budget: Hearing Before the S. Comm. on Finance*, 106th Cong. 106-24 (1999).

¹⁷³ Comprehensive Budget Process Reform Act of 1999, H.R. 853, 106th Cong. (1999); *see* KEITH, *supra* note 171, at 10.

¹⁷⁴ S. REP. NO. 106-15 (1999); *see* KEITH, *supra* note 171, at 10.

¹⁷⁵ S. REP. NO. 106-15, at 2 (1999).

¹⁷⁶ Gamage & Louk, *supra* note 62, at 32-37 (detailing budget crises in California between 2008 and 2012 and the government shutdown in Minnesota); *see Late State Budgets*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 27, 2010), <http://www.ncsl.org/research/fiscal-policy/late-state-budgets.aspx>, *archived at* <http://perma.cc/4GSG-VMSQ> (documenting Michigan, Minnesota, New Jersey, Pennsylvania, and Tennessee as the five

For example, both Wisconsin and Rhode Island have partial default budget procedures, which allow an automatic budget to pass in the event of negotiation failure.¹⁷⁷ Contrary to the concerns that the absence of a significant threat of government shutdown may make compromise harder to achieve, David Gamage and David Louk report that these procedures have not resulted in significantly delayed budgets, nor in the chronic long-term implementation of default budgets.¹⁷⁸ While one should not read too much into the U.S. state comparisons, the fact that as many as twelve state constitutions contain a form of default unsettles the claim to exceptionalism of U.S. shutdown experience to a degree.¹⁷⁹ Moreover, their existence suggests, as do other national constitutions, that the oft-cited drawbacks of the default option may require further examination.

Nonetheless, insofar as deadlock might result between the Congress and the President (in presidential systems), or between chambers (in both presidential and parliamentary systems), such a default rule arguably transfers significant power to the President or Prime Minister in systems that already contain many deferrals to executive rule. While I argue that there is something distinctive about financial legislation as compared to other examples of interchamber and interbranch back-and-forth, there is no doubt that legislative control over the budget remains an important way to limit the executive.¹⁸⁰ The legislature's ability to refuse supply without any other assurance of government functioning might indeed be considered too venerable a principle of constitutionalism to reform.¹⁸¹ Empirical research is needed on how comparative legislatures are nevertheless able to participate in systems with the default rules of passage described above – how they retain their quintessential “power of the purse”

states that have experienced partial government shutdowns since 2002).

¹⁷⁷ Gamage & Louk, *supra* note 62, at 46-48. Research by the National Conference of State Legislatures suggests that twelve states have constitutional provisions to allow for the continuous operation of budget. *Late State Budgets*, *supra* note 176.

¹⁷⁸ Gamage & Louk, *supra* note 62, at 51.

¹⁷⁹ *Late State Budgets*, *supra* note 176 (observing twelve examples, as well as the more general problem of late budgets for state legislatures). For an analysis of the similarities of U.S. state constitutions and national constitutions elsewhere, see Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416300.

¹⁸⁰ For critique of executive power as the most poignant failure of separation of powers theory, see BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 67 (2010).

¹⁸¹ *E.g.*, Winterton, *supra* note 106, at 244 (“The ultimate power of Parliament to control the executive by denying it money . . . is a much older principle of British constitutionalism than responsible government.”); *see also* AUSTRALIAN CONSTITUTION s 83; U.S. CONST. art. I, § 9, cl. 7; Stith, *supra* note 162, at 1344 (“Among the duties—and among the rights, too—of this House, there is perhaps none so important as the control which it constitutionally possesses over the public purse.” (quoting 19 ANNALS OF CONG. 1330 (1809) (remarks of Rep. J. Randolph))).

when they no longer enjoy the ability to manage the purse as a real-time threat to government functioning. This may uncover important internal rules for legislative committees, other budget processes, or indeed background interactions among broader institutions, that support legislative participation in financial decisionmaking without a veto power. We might call for the design of other “compromise-forcing devices” in budgetary negotiations; if they are, in fact, considered necessary.¹⁸²

There are other questions to consider in this first option of default passage. For example, there are significant differences in a default rule that automatically passes the previous year’s budget, and one that guarantees passage of the current proposal.¹⁸³ The former heightens the pressure against fiscal increases and can thus defund an important part of a government’s agenda, especially one that seeks to increase spending.¹⁸⁴ If there is an election in between the previous budget and the present proposal, and the earlier budget belongs to a different government with different political preferences, the problem may become more acute. Default budgets may also misallocate resources simply by virtue of changing circumstances, thus affecting voters and interest groups further.¹⁸⁵ This may be remedied by a predetermined formula for adjustment,¹⁸⁶ yet it might be impossible to design such a formula without giving a structural advantage to the tax and spending preferences of either Republicans or Democrats.¹⁸⁷ And the prospect that every budget may become a future default might increase the difficulties of budgetary negotiations. Of course all of these potential problems with the default rule of passage of budget – especially the problem of transfer of power to the executive – must be weighed against those that arise from deadlock itself.¹⁸⁸

¹⁸² Gamage & Louk, *supra* note 62, at 50-51.

¹⁸³ See *supra* notes 76-82, 86, 95-97. Compare CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMA [C.P.] art. 273 (requiring that the preceding year’s budget will automatically take effect if no consensus is reached), with CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 67 (requiring that the budget proposed by the lower house will take effect if no consensus is reached).

¹⁸⁴ In this way, there may be useful comparisons between such a default rule of passage and the proposed constitutional requirement for a balanced budget. For commentary on the latter, see, for example, LARRY J. SABATO, *A MORE PERFECT CONSTITUTION* 55-69 (2007).

¹⁸⁵ Gamage & Louk, *supra* note 62, at 51.

¹⁸⁶ David Gamage, *Preventing State Budget Crises: Managing the Fiscal Volatility Problem*, 98 CALIF. L. REV. 749 (2010) (discussing options to balance default budgets).

¹⁸⁷ Gamage & Louk, *supra* note 62, at 49 n.204 (“[A] default budget could, for example, both raise taxes (which would be unpopular with conservatives) and cut social spending (likely unpopular with liberals).”). The failure to pass automatic continuing resolutions would suggest that disagreement on the default may be the decisive objection. See KEITH, *supra* note 171.

¹⁸⁸ Thus the pressure to act outside of a deadlocked Congress produces its own opportunities for transfer of power to the executive. See Linz, *supra* note 67, at 53. Closer to home, even recent comments by President Obama reflect such possibility. See President

The second, prorepresentative, solution has the advantage of returning any stalemate immediately to the people. For example, this solution has governed budgetary negotiations in Israel since 2003 (and it may be a signal in favor of this option that the refusal of a budget – and hence an early election – has not yet resulted).¹⁸⁹ Yet the prorepresentative option is complicated by bicameralism, as it goes beyond the vote-of-no-confidence procedure familiar to parliamentary systems. The “aberrational”¹⁹⁰ events in Australia in 1975 suggest that financial impasse may lead to an automatic election upon the request by the Prime Minister, if certain conditions are met, or upon the unilateral decision of the Governor-General.¹⁹¹ Such a drastic option may apply a significant disciplining effect on the members of a warring legislature (both incumbents and opposition members), who may be reluctant to accept the political risk that their actions will be reprimanded by a negative vote at the polls. In contemporary Australian politics, the refusal of supply is now described as “political insanity.”¹⁹²

But the prorepresentative option also has its drawbacks. As a blanket transplant, it is inapt for presidentialist systems, like that in the United States, or other parliamentary systems that have fixed election schedules. Nonetheless, some parliamentary systems have devised special procedures to work together fixed terms and early elections.¹⁹³ From another perspective, the idea that the election is “representative” of the people is a complicated one. In Australia’s case, for example, the elections that have followed double dissolutions have not been fought on the basis of the bills that have triggered the deadlock.¹⁹⁴ Moreover, insofar as the choice to turn to election is to be

Barack Obama, Address Before a Joint Session of the Congress on the State of the Union, 2014 DAILY COMP. PRES. DOC. 50, at 2 (Jan. 28, 2014) (stating in response to congressional obstruction that “America does not stand still, and neither will I. So wherever and whenever I can take steps without legislation to expand opportunity for more Americans families, that is what I am going to do”).

¹⁸⁹ Section 36A of Basic Law: The Knesset, was passed on Mar. 18, 2001 and came into effect on Feb. 28 2003. See Section 36A Amendment to the Basic Law, 5761–2001, SH No. 1780 p. 166 (Isr.). Nonetheless, budgetary brinksmanship has not been avoided. See Jonathon Lis, *Knesset Passes Contentious Budget, After Netanyahu Reaches Deal with Opposition*, HAARETZ (July 29, 2013, 8:45 AM), <http://www.haaretz.com/news/national/1.538623>, archived at <http://perma.cc/6GG4-6ZLU>.

¹⁹⁰ I use this word advisedly. Cf. Lim, *supra* note 138, at 7.

¹⁹¹ See AUSTRALIAN CONSTITUTION s 57.

¹⁹² Winterton, *supra* note 106, at 251.

¹⁹³ Many parliamentary systems with fixed election terms, such as Canada, Germany, the United Kingdom, and the Australian states of Victoria and New South Wales do, however, allow for an early election if the government loses the confidence of the House; others, such as Switzerland, cannot remove the executive government in mid term. See ANDREW REYNOLDS ET AL., INT’L INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK 129-30 (2005).

¹⁹⁴ For a presentation of this history in Australia, see CONSULTATIVE GRP. ON

made by an electorally strong executive, this option would still result in the transfer of power to that branch, as in the default option.¹⁹⁵ Insofar as the choice to turn to election is made by an independent arbiter, such as a Governor-General (or conceivably a different head of state or other appointed Commission¹⁹⁶), the Australian case study indicates that the polarization – or perhaps the political opportunism¹⁹⁷ – that is affecting the political parties may also affect the arbiter, and that such a significant “countermajoritarian,” but “prorepresentative” power may never be above disrepute.

The third option, constitutional silence on what occurs in the event of financial deadlock is, of course, the situation in America. Constitutional silence implies a political resolution only. For example, we know there were political causes of the 2013 government shutdown, and that there was a political resolution when the shutdown ended, and ultimately – if the GOP suffers at the polls for its decision to obstruct – there will be a political solution to guard against a repeat. Nonetheless, the political consequences of failed budgetary negotiations may be insufficient – or too indeterminate – to limit the costs of shutdown, which may be considerable. As well as the individuals that rely on the suspended services deemed inessential, and the government employees who are furloughed, the threat and/or occurrence of government shutdowns creates fiscal uncertainty that harms the public at large. As the consequences of the 2013 shutdown make clear, instability in government taxing and spending can undermine investor confidence, economic growth, America’s reputation abroad, and the public’s trust in government more generally.¹⁹⁸

Such a result makes more urgent the requirement of other, more indirect measures to prevent financial impasse under conditions of constitutional silence. These reflect the more general options that exist to prevent deadlock in government. There are constitutional structures that can be tweaked to dampen the ideational polarization that creates and entrenches such problems. These would include changes to partisan gerrymandering, or at least partisan

CONSTITUTIONAL CHANGE, *supra* note 117, at 14.

¹⁹⁵ An alternative proposal, preferred by then-Prime Minister John Howard in 2004, that deadlocks should trigger a joint sitting without election, looks even more like a default rule. *See id.* at 4.

¹⁹⁶ This Article does not explore the parallels with semipresidential systems, such as that in France, where the president has no direct responsibility to the Parliament, and significant powers, and yet the cabinet is still responsible to Parliament. For the implications of these systems in Australia, see Winterton, *supra* note 106, at 247.

¹⁹⁷ *See* Cartoon by Tandberg, *reprinted in* Winterton, *supra* note 106, at 230. The cartoon includes the following exchange between Sir John R. Kerr and Opposition Leader Malcolm Fraser:

Kerr: If he stays we both go.

Fraser: If he goes we both stay.

Kerr: My decision will be what’s best for the majority.

Id.

¹⁹⁸ *See, e.g.*, EXEC. OFFICE OF THE PRESIDENT, *supra* note 8.

districting, which is said to favor extremist candidates, and other procedural reforms.¹⁹⁹ More broadly conceived reforms would include changes to civic education and broadcasting,²⁰⁰ and finding ways to overcome the democratic distortions created by the way we finance and conduct campaigning,²⁰¹ and how we construct opinion polls.²⁰² Small-scale reforms to the budget process, such as delaying disclosure in the earliest stages of negotiations, and maximizing publicity in the latter stages, might also promote agreement, and bring with it other advantages.²⁰³ But, more intrinsically, the prevention of deadlock would also include the reassertion of the idea that the legislature has a duty to actively govern, and not just to provide checks and balances on power.²⁰⁴ This implies a duty to compromise before the shuttering of government. At least this latter proposal need not be a capital “C” constitutional amendment, but rather a small “c” change in American governance.²⁰⁵

CONCLUSION

The space in which American exceptionalism joins American constitutionalism is both large and contested. It usually lies at the junctures of where the constitution meets foreign policy, or where it meets social policy. At the first juncture, America retains the paradox of both leadership and outlier status in international law and the globalization of constitutional law.²⁰⁶ At the

¹⁹⁹ See LEVINSON, *supra* note 145, at 29 (asserting that partisan gerrymandering is “a true disease, threatening the very notion of representative democracy”); Stephen Macedo, *Toward a More Democratic Congress? Our Imperfect Democratic Constitution: The Critics Examined*, 89 B.U. L. REV. 609, 621-23 (2009) (acknowledging the effect of partisan districting, but attributing polarization to party realignment and demographics).

²⁰⁰ See RONALD DWORIN, *IS DEMOCRACY POSSIBLE HERE?* 129 (2006).

²⁰¹ See WOLFE, *supra* note 51, at 80, 92; Pildes, *supra* note 40, at 326.

²⁰² Compare a counterproposal from the current practice of deferring to unreflective polls. See JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* 14-15 (2011).

²⁰³ See ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY* 194-205 (2007) (stating the advantages for accountability, bargaining, and the defeat of the “bridges to nowhere” problem of budgetary compromises). The disclosure of the earliest stages should be made, Vermeule suggests, before Election Day. *Id.* at 206.

²⁰⁴ See Ewing & Kysar, *supra* note 162, at 350; Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148, 148 (2007), <http://www.yalelawjournal.org/forum/political-avoidance-constitutional-theory-and-the-vra> (“[T]he flight from political responsibility – the problem of political abdication – is at least as serious a threat [as tyranny].”); Waldron, *supra* note 63, at 460 (“Instead the legislature should do its kind of work – legislative work . . .”).

²⁰⁵ It is worth noting that to designate a principle as constitutional is neither to imply that courts must be the interpreters or enforcers of the principle, nor that written text must be its sole repository. For application to the fiscal context, see Dam, *supra* note 98, at 294.

²⁰⁶ See Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in

second juncture, America represents a distinctively venerable democracy, but one which fails to make good on social guarantees considered unremarkable – indeed central – to the commitments of other advanced democracies.²⁰⁷ These aspects of constitutional exceptionalism, presented in this Article as a problem to examine, rather than as an ideology to dispel,²⁰⁸ cast an important light on the contemporary experience of government shutdowns in the United States, including their constitutionality, tolerance and increasing occurrence.

In bringing a comparative perspective to the phenomenon of government shutdowns, this Article indicates the uniqueness that is part of this aspect of American's constitutional experience. Funding gaps, or the shuttering of government services after a failure to agree on the budget, are avoided elsewhere, through constitutional design and through the cultural commitments that makes such designs operational. In examining both presidential and parliamentary systems, and in focusing on the veto elements of the separated branches of presidentialism and the separated chambers of bicameralism that make impasse more likely, this Article suggests three frames from which to approach the resolution of budgetary impasse. These are important in understanding how the costs of financial impasse can be prevented. I suggest that these costs are qualitatively different from other forms of legislative gridlock, which may simply leave the status quo in place,²⁰⁹ rather than actively shuttering government and placing an immediate burden on already vulnerable and politically weak groups. A failure to pass appropriations, even when entitlements are secure, may also have a larger impact on the fiscal stability of the government, and the trust of the larger public in it, than failures to pass other forms of legislation.

AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 46, at 1 (describing practices of U.S. exceptionalism in foreign policy, double standards in human rights, and judicial isolationism); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012) (inferring declining constitutional influence from an analysis of textual difference).

²⁰⁷ Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663 (2008); Moravcsik, *supra* note 49, at 164-65. For an attempt to reduce the space deemed exceptionalist, by reference to the textual parallels between U.S. state constitutions and other national constitutions, see Stephen Gardbaum, *The Myth and the Reality of American Exceptionalism*, 107 MICH. L. REV. 391, 446-53 (2008); Versteeg & Zackin, *supra* note 179.

²⁰⁸ Dorothy Ross, *American Exceptionalism*, in A COMPANION TO AMERICAN THOUGHT 22, 22 (Richard Wightman Fox & James T. Kloppenberg eds., 1995) (distinguishing between American exceptionalism as an “edifying myth, as calculated mystification, and as chauvinism,” on the one hand, and as a “critical discussion of . . . difference,” on the other).

²⁰⁹ Of course, the status quo may itself be costly. See, e.g., Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2112 (2013) (“[G]ridlock might actually allow certain factions to preserve their privileged status as well as certain minorities to continue to be subjected to inequitable or unfair treatment.”).

In the first frame, the constitution may rule that default budgets must pass when proposed budgets have been stalled, in order to keep government services in place and government contracts in effect. These defaults differ in terms of whether the previous year's budget, or the proposed budget, is passed. Further empirical work is needed to test the constraints that remain as part of legislative control on the appropriations power, and those that can continue to force compromise in the many constitutions – both presidentialist and parliamentary – that have adopted this option. In the second frame, the constitution may outline the procedure for a prorepresentative solution, in the form of allowing for an early election to bring about a new balance of power (in either branch) and hence a new attempt to reach budgetary compromise. On its face, this solution would appear to give an extraordinary leverage power to an executive (or to a numerically majoritarian opposition in another branch or chamber). In presenting a closer case study of the Australian version of this option, this Article shows its implications in practice. In particular, a return to election may result in a constitutional crisis of such extreme scale, that its legacy may itself act to prevent negotiation failures for future budgets. It thereby shares the tools of political discipline, present in the third frame of constitutional silence. This frame, in which the constitution permits financial impasse, and relies on political resolution only to limit its use, is that which exists in the United States. As American experience has shown, however, the disciplining strength of politics is contingent. A polarized partisan politics, especially one in which the voter repercussions of government shutdowns may appear unequal to different parties, may point to a conclusion that political discipline can do little to avert financial impasse in fact.

But the purpose of presenting these frames is not to draw conclusions about their pros and cons, or about what would ultimately be the best constitutional model for surmounting America's current political problems. It is rather to remind us of the exceptionalism – indeed, marginality – of current U.S. congressional practices in relation to the delay of appropriations bills and the generation of government shutdowns. Admittedly this goal constrains the ambitions of comparative constitutional study and the active enterprise of comparative constitutional design and redesign. And it risks ceding to the obduracy of the amendment of the written U.S. Constitution the ability to think critically and diagnostically about the Constitution, constitutional practices, and broader legislative and administrative mechanisms of America's own fiscal constitution. Constitutions come in many forms, and their texts reflect different aspects of their national history, especially as that (real and perceived) history has been translated through political culture, previous institutions, and the choices between what to preserve and what (and how) to transform. Comparative experience informs these choices, but is no less messy and ambiguous. A catalogue of written constitutional rules for the prevention of shutdowns – and a closer investigation of a single comparative practice in Australia's parliamentary system – presents not only this ambiguity but also its

2014]

GOVERNMENT SHUTDOWNS

1027

potential to help us rethink the range of responses to contemporary U.S. political dysfunction.