Separation of Powers in Comparative Perspective: How Much Protection for the Rule of Law?

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SEPARATION OF POWERS IN COMPARATIVE PERSPECTIVE:
HOW MUCH PROTECTION FOR THE RULE OF LAW?¹

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The necessary brevity of this comparative view of separation of powers suggests beginning by sending the reader to scholarly studies of particular systems that can provide greater depth: Aziz Huq (2018) and Josh Chafetz (2017) are excellent recent American accounts; Bruce Ackerman (2000) adds to it an extensive comparative analysis (although more recent retrenchments from democracy apparent around the globe may have shadowed his optimism for “constrained parliamentarianism”), and John Rohr (1986) an earlier study, historically informed and grounded in the discipline of public administration. Peter Cane (2016) looks closely at past and present provisions for governmental structure and control in Britain and Australia as well as the United States. Christoph Moellers (2013) provides a view particularly valuable for understanding the German perspective. Another work of Rohr’s (1995) analyzes the French Fifth Republic in comparison with the United States. Helle Krunke and Bjorg Thorarensen (2018) consider five Nordic governments (Denmark, Finland, Iceland, Norway, Sweden) diverse in form but relatively homogenous in population, with strong traditions and all, to date, remarkably successful in preserving democratic institutions. The point about traditions, or shared social norms, is a central one for this essay; at a time of growing pessimism about the fate of democracy world-wide, adherence to norms of political behavior may have an importance transcending formal provisions for the allocation of governmental power.

Invoking “separation of powers” to describe governmental structures is traceable at least as far back as Aristotle. That courts and judges would not be political actors, that governments would have structures of distinct elements performing distinct functions, is as readily ascribed to the Roman Empire as to contemporary governments. For Americans, the writings of John Locke and Baron de Montesquieu gave the idea of separation normative force, as a prescription for government organization capable of offering protection against tyrannical rule and for human rights, and some assurance of an open, accountable and responsive government. And so one finds these words in the Massachusetts Constitution of 1780:

¹ This essay was drafted while in residence at the European University Institute, and reflects its strong support and many helpful conversations with its faculty and resident fellows. My thanks are owing as well to Columbia colleagues participating in a workshop on the paper and to the invaluable research support of Patrick Waldrop, ’19. Any errors or omissions are entirely my own doing.
XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Yet a contemporary account of “separation of powers” building on this normative commitment to support for the rule of law, and against autocracy, must reflect the transformations in governments and their institutions that have occurred since that time. Writing when courts were subordinate institutions, neither Montesquieu nor Locke made them central to the separations on which they proposed to rely. Montesquieu addressed how governing power was distributed in France and England among separate estates (monarch, aristocracy, commoners) controlling distinctive institutions (the Monarchy, the House of Lords, the House of Commons). (Stewart 2004) Locke’s three powers requiring separation were legislative, executive and federative (external relations). (Moellers 2013). Their attention focused on a separation of political authorities one can find in many parliamentary democracies today – a power-constrained “chief executive” (President or Monarch), a lower “people’s” house, and an upper house differently chosen.

America discovered the co-equal, constitutional court, and other nations have more recently followed. The prevalence of “constitutional courts” in parliamentary democracies, and of the higher law that a written constitution may establish, reflect today’s “separation of powers.” Consider, as well, these other changes from Montesquieu’s times:

1. Eighteenth century national governments were small, their control distributed between monarch and parliament; civil servants today may number in the millions, performing a range of technically challenging tasks unimaginable then and inappropriate for resolution simply by acts of political will, legislative or executive. “Although democratic legislation can provide guiding principles, parliaments have neither the time nor the expertise to sift the changing scientific data in search of responsible regulatory solutions.” (Ackerman 695; Moellers 115) The relation of these governments to political and judicial controls can itself be seen in “separation of power” terms. (Katyal 2006; Sunstein 2016; Metzger, 2009, 2017)

2. The designers of America’s Constitution thought the “branch” most in need of control to be the people’s house of the legislature – its likely malaise, choices that would be made by the lower classes if insufficiently constrained by institutions of the elite. “Populism” is indeed a contemporary phenomenon around the globe, but today (perhaps in consequence, as well of the changes in governments’ size and ambition) executives inhabit the most dangerous branch.

3. “Controlling the controllers,” as Professor Cane well puts it, is the common aim of those who would avoid autocracy; doing so requires institutions external to the dominant political actor, whether President or Parliament.
4. Vertical “checks and balances” are common and may be as important as horizontal ones. In both presidential and parliamentary systems, one may find a federal state (perhaps with its own distinct representation in one house of the legislature) or, increasingly, an international institution (such as the European Union) itself committed to defending against autocracy.

Thus, the following discussion emphasizes executive authority, judicial matters, and constraints arising out of vertical relations or from civil service behaviors; legislatures, now rarely the power-centers most to be feared, may prompt executive overreach in support of populist movements or (as now in the United States) by being rendered dysfunctional by political division.

Moreover, associating “separation of powers” exclusively with presidential systems like the American is mistaken. Its meaning today is cloudy and variable across political systems and contexts. “[J]udges and scholars have no common sense what the phrase ‘separation of powers’ means.” (Huq 1526) “Instead of being seen as a fixed concept, separation of powers is better viewed as a ‘continuum’ which embraces a wide range of forms of governance, including parliamentary as well as presidential systems.” (Gittings 113) American presidentialism and Westminster parliamentarianism strikingly differ, the former relying chiefly on “diffusion” of authority among competing institutions, “checks and balances” that may defend against autocracy; and the latter relying chiefly on “accountability,” structures of immediate responsibility within a cabinet, political party, parliament, and populace. Yet parliamentary supremacy has ceased to be absolute in any nation subscribing to a judicially enforceable written constitution, (Goss 2018) or to enforceable external constraints, such membership in the European Union or the European Convention on Human Rights enforceable through the European Court of Human rights; and parliamentary government, too, relies on interrelationships (“checks and balances”) amongst a variety of governmental bodies. “Although there are still some who deny the existence of separation of powers under a parliamentary system, … Lord Diplock’s famous pronouncement that the British constitution ‘is firmly based on the separation of powers’ has increasingly become accepted orthodoxy, with official British government publications describing the separation of powers as a fundamental constitutional principle.” (Gittings 115)

The following pages present, first, a necessarily brief account of “separation of powers” under American presidentialism; then the contrasting system of Westminster parliamentarianism; third, the increasingly prevalent mixed regimes, often semi-presidential, that Professor Ackerman has described as “constrained parliamentarism; and, finally, a few words about international institutions. As will be seen, in this most real of all possible worlds, the words of constitutions, written or implicit, matter considerably less than the actual distribution of effective power within a polity.

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2 Citing (Lutz 2006); see also (Alpert 2009).

Separation of Powers in the United States

Although devoting separate articles to the Congress (I), the President (II) and the judiciary (III), America’s 1787 Constitution replaced Massachusetts’ radical separation with acceptance of some interpenetration – “checks and balances” diffusing public power among competing elements of government -- as well as distinct vertical controls. As the influential James Madison argued in its support, Montesquieu “did not mean that these departments ought to have no partial agency in, or no control over, thee acts of the other … [but] no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.” (Federalist Papers 47) Congress, President and Supreme Court each participate in some way in the others’ business, as a means of preserving its own authority against encroachment and preventing the aggrandizement of the authority of the other. The President’s veto power, for example, provides a defense against legislative measures that might encroach upon his executive responsibilities – but he needs Congress to shape and fund his government and to define his authority over civil servants. Vertical separations between the federal government and the states had great importance as well. Powers not affirmatively granted the federal government were reserved to the states (and expansive understandings of those federal grants were a century and a half in the making). Moved by fears both of populist (majoritarian) tyranny, and of larger states taking advantage of the small, the Constitution created a Senate in which states (not the people) would be directly and equally represented (Metzger). Such arrangements remain an important checking element in some parliamentary democracies, such as Australia, Canada and Germany. And the Senate’s functions are readily seen to involve the executive (appointments, treaties) and judicial (impeachment, then regarded as a matter of considerable importance) as well as the legislative. (Rohr 1986).

The creation of a bicameral legislature separately representing states (Senate) and voters (House) reflected the models inspiring Montesquieu. That the Constitution assigns distinct authorities to the three particular actors at the federal government’s head (Congress, President, Supreme

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4 This essay considers “separation of powers” on the American federal level, characterized by a single elected figure at the head of executive government. American states have typically chosen multiple elected executives – an Attorney General, a public auditor, and perhaps others, in addition to their governor and his lieutenant, creating diffusion and opportunities for control within as well as without their executive authorities.

5 James Madison’s Federalist 51, written to persuade the people to ratify the new Constitution, famously explained how this would work:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others… Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government.
Court) does reflect the conventional horizontal, three-power understanding of what must be separated. Yet the Constitution does not define the government as such. It leaves to Congress statutory creation of all subordinate government bodies – including specification of their relationships to the three constitutional actors (Strauss 1984). As American civilian government grew from under three thousand to over two million actors, Congress created a remarkable variety of forms and authorities to deal with the challenges of contemporary governance. (Lewis and Selin 2013; Datia and Revesz 2013) And, although transformed, the vertical constraints of federalism remain important. Although senators, now popularly elected, may today be less directly tied to state interests, law-execution now frequently requires state cooperation; relations between federal and state bureaucracies can provide important elements of constraint. (Bulman-Pozen 2012, 2014, 2016). It is, then, hard to describe American government in the simplest of separation-of-powers terms.

Perhaps the most important contrast to parliamentary systems is that Americans choose a unified government only by coincidence, and use (with rare-exceptions) first-past-the-post elections that discourage the emergence of more than two political parties. Voters choose a candidate for the House of Representatives each two years, for the presidency each four, and a Senator (for a six-year term) in only two thirds of the national elections; they can divide their votes, as in recent years they most frequently have. That is, Americans elect not a government, but particular candidates for office; should their choices happen to confer control of all three political institutions on the same party, it can only be assured of keeping that control for two years. The other party may gain control of the House, the Senate, or both, in the next election. Professor Ackerman has argued that these constitutional arrangements are disadvantageous. A party knowing that it may holding unified power for as little as two years has incentives to embed extreme measures a parliamentary government might hesitate to enact. Knowing that “the American system sometimes requires a political movement to keep on winning elections for ten years or more before it can assume full control over all key institutions” (Ackerman 650), it may be able to entrench its legislation for years to come; for parliamentary governments, full control – won or lost – comes with a single election. Moreover, without norms of bipartisan cooperation, strikingly absent in recent years, different parties controlling the presidency and Congress can lead Presidents to executive overreach by producing legislative deadlock (Mann and Orenstein 2006).7

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7 Ross Douhat, “The Two-Emperor Problem,” The New York Times, November 25, 2018 SR-11, describing the President and Chief Justice as the competing emperors, evokes this problem, famously foreseen by Justice Jackson concurring in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 654 (1952): “...I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. ... If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."
When Congress’s choices underly American separation of powers disputes, they generally are framed in terms of “aggrandizement” and “encroachment.” Has Congress empowered itself or (much less frequently) the President or the Supreme Court to act outside its proper sphere of authority? Congress cannot confer on itself (or a body it creates under its sole control) responsibilities for executing the law or adjudicating disputes or for executive or judicial appointments; nor may it legislate except in ways the Constitution specifies. Do Congress’s legislative actions have the effect of encroaching presidential or federal judicial authority? Some legislation structuring adjudications (notably, concerning bankruptcy) has failed this test, but not adjudications by executive agencies, even those imposing substantial fines, so long as they are subject to appropriate judicial review.

If legislative, executive and judicial actors must always be different, typical administrative actors such as the Environmental Protection Agency defy that proposition. Each, in its own sphere, may act as “separation of powers” appears to prohibit – adopting regulations (legislation), seeing to their enforcement (execution) and resolving disputes about their application to particular circumstances (adjudication). The Constitution’s drafters knew John Locke’s proposition that legislators are entitled to create only legislation, and not subordinate legislators; hence, one finds arguments that authorizing agency creation of secondary legislation (regulations) violates separation of power principles. (Hamburger, Schonbrod, Lawson) Yet the earliest American Congresses authorized executive branch actors to adopt regulations (Mashaw 2012), as executives do throughout the world, with courts reviewing them for legality – perhaps interpreting authorizing statutes narrowly but not rejecting the authority. The American Supreme Court has found such authorizations invalid only twice, in the ‘1930’s.8

Administrative agencies do not present a case “where the whole power of one department is exercised by the same hands which possess the whole power of another department.” (Rohr 1986). The agencies Congress legislatively creates (like civil service institutions in parliamentary democracies) are distinct from the political executive, and overseen by each of the branches the Constitution names, Congress, President, and Court. (Strauss 1984, 2007) Possessor of only one “whole power,” President, Congress and Court are omni-competent, able to act on any matter with which government might be concerned. (Rakoff 1992) Congress may only legislate; the President may only see to the faithful execution of the laws; and federal courts may only adjudicate. Even apparently empowered to legislate, execute, and adjudicate, each agency is both subordinate to all three constitutional branches and constrained in its actions to the particular sphere Congress has assigned to it. None possesses “the whole power of one department.”

For Professor Cane, the fact of competing overseers creates room for agency “shirking” from strict obedience (“service”) to any one of them, within the scope of discretion its authorizing

8 Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). Both were decided at a time of apprehension about rising executive power, in the U.S. and abroad.
statute creates. These relations, then, are ones of “agency,” not “service.” (Cane 483 ff) Judicial controls are constrained by respect for an agency’s informed judgment, acting within uncertainties created by imprecise or ambiguous statutory that can be understood to confer on it the primary responsibility for decision.9 Congressional relations, too, support effective discretion, providing political and institutional pressures that can be independent of the White House. (Chafetz). The constitutional requirement of Senate confirmation for important presidential nominations to executive office (understood by the Framers as participation in executive decision) creates possible political limits on presidential choice that can be present even in a unified administration. The confirmation process itself can create undertakings to the Senate that the appointee, once confirmed, may feel constrained to honor. In contrast to parliamentary governments that fill a limited number of political positions immediately upon their formation, the American system can take months to fill important offices upon a change of administration, or a predecessor’s resignation. (O’Connell 2015)

If the Constitution’s drafters most feared a runaway Congress (hence, its two houses and differing modes of representation), today’s threat of insufficiently controlled power lies, as elsewhere in the world, with the presidency. In 1952, outgoing President Harry Truman is reported to have remarked about his successor, General Eisenhower, “He’ll sit there all day saying do this, do that, and nothing will happen. Poor Ike, it won’t be a bit like the military. He’ll find it very frustrating.” (Neustadt 1960). But since then the view that the President’s role is that of persuasion, not command, has steadily fallen out of favor, despite the striking contrast between the Constitution’s characterization of the President’s power over the military as “commander in chief,” and its only words granting him power over the domestic government Congress would create – the right to “require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices.”

The Supreme Court has clarified that “executive departments” includes all governmental agencies responsible for law administration.11 All must be subject to some degree of presidential oversight. Contrary to common understanding, then, Congress’s creation of multi-member “independent regulatory commissions” has not succeeded in putting them beyond presidential oversight. For all government regulators, the issue is just how intense that oversight must be – what degree suffices to permit the President to assure, as the Constitution instructs him to, that the laws are

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9 The Supreme Court decision establishing this proposition, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), has engendered considerable dispute on separation of powers grounds, some asserting that it encroaches on judicial authority, aggrandizing the executive. (Strauss 2018; Sunstein 2018)

10 U.S. Const. Art. II, Sec. 2.

being “faithfully execute[d].” (Straus 2011) In some contexts, like the Department of State’s execution of foreign policy, actions “in their nature political,” presidential control must be absolute (and judicial review absent). But ordinary regulatory behaviors cannot be described in this way, and Congress’s capacity to define the presidential oversight relation is correspondingly the greater. Any agency’s effective capacity to vary administration from what the President might personally prefer is greatest when the political branches are not controlled by a single political party, or when Congress has limited the President’s capacity to discipline agency leadership, as by restrictions on their removal to proper “cause.” Yet since removing any agency official can carry a political cost, and the President’s resources for effective oversight are limited, “shirking” may always be possible.

Some analysts evoke the government’s civil service as an element apart from the political executive and capable of checking its ambition. (Katyal 2006, Metzger 2017, Nou 2019) But recent years have seen considerable civil service politicization, in the service of the presidency. (Barron 2008) The fact that lesser political appointees may not face confirmation also helps explain both the thickness of the American political layer, as compared with parliamentary systems, and the substantial size of the Executive Office of the President – in which “service” and not “agency” is the expected relationship. The result is a significant impairment in the delivery of professional, apolitical competence in implementing democratically adopted laws. “If an American-style presidency looks like a bad idea [after considering its risks of degeneration into tyranny], then it will look even worse once its deleterious consequences on impartial and professional public administration are factored into the equation.” (Ackerman 688).

Particularly in the context of rulemaking, self-generated presidential controls have steadily increased (Kagan 2007), effectively transferring to the White House authority that Congress had bestowed on particular administrative agencies (Metzger 2009). Such a transfer undercuts the argument that agency subordination reconciles separation of powers with executive rulemaking authority. Important rulemakings generate large volumes of information and, in the paper age, agencies had a virtual monopoly of that information. “Information is power.” Today, the information that they would uniquely have possessed and controlled is shared with the White House on the government’s “cloud,” further enhancing White House control. The public, significantly-transparent rulemaking procedure Congress required of administrative agencies has to a significant degree been replaced by a covert White House process. The presidential self-aggrandizement arguably thus reflected has not been tested in the Supreme Court and perhaps cannot be.

“Separation of powers” considerations within the judiciary have animated sharp debate in recent years. Although many legal systems expect judges to interpret statutes as contemporary instruments, in the light of contemporary understandings and expectations, conservative American voices argue that proper interpretation requires reliance on the meanings that would have been understood by the enacting legislature. This “faithful agent” position is both activist (in its willingness to defeat what may have become settled contemporary understandings) and subordinate.

(Strauss 1994) Following on the litigation that ended legal segregation, American courts undertook remedial supervision of conditions in prisons and mental institutions readily characterized as “executive” in nature. Non-governmental organizations, challenging the legality of governmental program administration under expanded views of legal standing to do so, sought judicial controls in contexts where one might think only political, not legal, controls appropriate. Conservative Justices of the Supreme Court have argued forcefully that preventing judicial encroachment on the executive function requires eschewing engagement with governmental actions absent particular, concrete, immediate injuries that judicial decision would be susceptible of remedying.13

The effectiveness of “checks and balances” from a judicial perspective depends significantly on who judges are, how they are named. Unlike many countries, the United States now lacks institutions capable of subduing the politicization of judicial appointments. With decisions open to influence by policy as well as strictly legal considerations, Supreme Court appointments, especially, are politically influenced. Presidents understandably nominate judges friendly to their views. Although the American Constitution provides safeguards of independence (once appointed, federal judges enjoy life tenure (absent the remote possibility of impeachment) and irreducible compensation levels), the prospect of life tenure can arm as well as disarm judicial politicization. Now that a simple Senate majority vote can assure confirmation,14 incentives to appointment moderation disappear when one party controls both the Senate and the presidency. This graphic suggesting the political distribution of American federal judges appeared recently in the New York Times:

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14 Until quite recently, moderation was encouraged by Senate rules that in effect required a super-majority for confirmation and (for other than Supreme Court appointments) acceptance by the Senators in whose state the nominee would sit. Norm violations in the use of these provisions led to their abandonment, resulting in the situation described in the text.
Few American scholars would challenge its general shape. Its valley at “moderate” lies precisely where one would hope to find the peak of a normal, apolitical distribution of judicial temperaments.

Looking more broadly at democracies’ governmental choices, Ackerman counseled against the presidential model. “Diffusion,” he observed, threatens stalemates in legislating when voters’ choices do not create a unified government. Presidents unable to secure actions they desire through legislation may be tempted, as recent American Presidents have been, to act on their own. Outside the United States, the resulting frustrations have often led presidential systems to descend into autocracy.

“Generations of Latin liberals have taken … America's example, as an inspiration to create constitutional governments that divide lawmaking power between elected presidents and elected congresses - only to see their constitutions exploded by frustrated presidents as they disband intransigent congresses and install themselves as caudillos with the aid of the military and/or extraconstitutional plebiscites. … There are about thirty countries, mostly in Latin America, that have adopted American-style systems. All of them, without exception, have succumbed …, often repeatedly.”(Ackerman 646)

Separation of Powers in the United Kingdom

Professor Cane’s monograph characterizes the United Kingdom and Australia as governments with high “concentration” of power, parliamentary supremacy constrained chiefly by “accountability” rather than checks and balances. Since Australia’s federal character, written constitution, and possibilities for “cohabitation” are among the considerations that give its government characteristics of Professor Ackerman’s “constrained parliamentarianism,” however, (Gerangelos 2018, Goss 2018), the following paragraphs will consider only Westminster parliamentarianism in England.

One can construct “accountability” control in at least three senses, well-illustrated in the run-up to Brexit. (Rose-Ackerman 2019) Accountability to voters rests in periodic elections that will either continue the present government in power or replace it. No less often than once each five years, the whole of the House of Commons must stand for an election whose outcome will determine the future government. Although who might become prime minister may be widely known and influential, a voter gets to vote only for one person, her own voting district’s (‘constituency’s) representative. The monarch then appoints as prime minister a person who appears able to command parliamentary support, and she immediately takes office with a cabinet that will have been selected to assure that command, and a quite thin layer of other political figures. Accountability to the Parliament rests both in the Ministers’ obligations to answer its members’ questions

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15 Citing Linz 1994; see also Prado 2017 (Brazil) and García-Mansilla 2004 (Argentina).
about their conduct of government, and in the possibility that at any moment during its expected term of office, it can vote a loss of confidence in the government, resulting in an immediate new election. And accountability within the cabinet and the prime minister’s political party rests on the understanding that each minister remains in office on the sufferance, as it were, of her fellows. The cabinet is a collective body, each member possessing some voting controls over its membership and actions; the American cabinet lacks collective authority over either particular decisions or, as a political matter, the Presidency. The possibility of party discipline of the prime minister, well-illustrated during Brexit negotiations, contrasts with the cult of personality a sole, fixed-term President can attract; and she is unlikely to survive in office (as American Presidents have) after revelations of personal failures. (Ackerman). Yet, absent a written constitution, these arrangements rely on a statute supported by norms of political behavior. A supreme Parliament has the power to remove the assurance of a new election within the prescribed interval, and if it did, that “accountability” would be lost, the controller uncontrolled. Parliamentarians understand that something within their formal power is just not to be done.

Although, nominally, “executive” power rests with the Monarch, she has rarely used the prerogative powers of unilateral action she still technically possesses. Actual control over governmental administration (that is, what is normally called the exercise of executive power) lies with the prime minister and her ministers, subject to the accountability constraints just discussed. In this way, parliamentary systems appear to merge legislative and executive function. Nominally, it is Parliament that enacts legislation, and civil servants instructed by relevant ministers who see to its execution. Yet (a) The prime minister and his cabinet “must be able to control” legislative outputs. (Cane 480); (b) legislation, again, occurs principally if not exclusively on the basis of government proposals the prime minister and his cabinet control; (c) a great deal of activity that looks like legislation emerges from the ministries in the form of regulations subject to only the barest of parliamentary attention; (d) the government’s organization is determined by the executive, without (in contrast to the United States) any requirement of legislation, and that organization is “designed for coordinated activity … responsible government and ministerial responsibility” and not the checks-and-balances model “driven by competition and conflict” (Cane 472); and (e) although the cadre of politicians atop the ministries is quite limited, the permanent civil service is expected to understand its role as a professional one of “service,” not ”agency.”

An influential article comparing presidential and parliamentary systems concluded that the latter were equally effective in achieving regulatory ends, but with far less formality and friction in dealing with the regulated. (Moe and Caldwell 1994) Professor Ackerman, as well, sharply

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16 The 25th Amendment to the American Constitution provides a procedure for cabinet displacement of the President limited to issues of physical or mental incapacity.

contrasted the professionalism characteristic of European civil servants and American bureaucrats who do “not understand their role as serving a function distinct from those discharged by politicians.” (Ackerman 703)¹⁸ Yet although the “service”/“agency” distinction rationalizes the thinner cadre of political overseers in parliamentary administrations, the demands of contemporary governance challenge that distinction. The growth in the size and ambition of government inevitably places effective discretion in the hands of civil servants whom ministers cannot completely control; “although democratic legislation can provide guiding principles, parliaments have neither the time nor the expertise to sift the changing scientific data in search of responsible regulatory solutions.” (Ackerman 695) In parliamentary systems too, then, the civil service may constitute an element of diffusion that could be characterized in “checks and balances” terms – and (as has happened in America) this creates incentives to its politicization. To the extent ministers find means of evading “the job security that traditionally underpinned the serial partnership of the Civil Service,” both the apoliticality of the civil service, and ministerial responsibility for the actions of the bureaucracy under their watch may be damaged. (Cane 156). And, since, cooperation is generally to be expected in both presidential and parliamentary systems, the distinction between them in this respect “often seen as central, … [is] overestimated.” (Moellers 113-14)

Parliamentary practices and somewhat independent institutions, by serving to reinforce accountability, act as important measures of control. Ministers’ obligation to respond publicly to members’ questions fits “accountability”; but attention to the diffusion of power may better fit independent Auditors-General with unfettered discretion what they will investigate, who serve terms of office from which they can be removed only on the concurrence of both houses of Parliament,¹⁹ a similarly independent Parliamentary Ombudsman, and election commissions that oversee elections (Cane 162-65). European Union law and the European Court of Human Rights [ECtHR] (whose influence will survive Brexit) offer, as it were, federalist constraints.

The independence of judicial controls may have particular significance for the UK, as parliamentary supremacy has acquired qualifications. “[T]he last four decades of the twentieth Century witnessed a broadening, deepening, and strengthening by the judiciary itself of judicial control of the executive.” (Cane 162) These developments included the conversion into the judiciary of administrative tribunals previously reviewing administrative actions as executive bodies. Acceptance of the European Human Rights Convention and membership in the European Union entailed accepting laws having superior authority to acts of Parliament; even if Brexit cancels the EU effect (Bradford 2019), likely only if Brexit occurs without a negotiated agreement, judgments of

¹⁸ Drawing also on Aberbach, Putnam and Rockman, 1981.

¹⁹ The Government Accountability Office in the United States, a sizeable bureaucracy headed by a Comptroller with a lengthy single term who serves Congress, not the President, can have similar impact on executive agency functioning, as the author observed first-hand when serving as General Counsel to an important government agency. Commissioners paid exquisite attention to its reports on the agency’s possible inefficiencies in the use of appropriated funds, and administration generally.
the European Court of Human Rights will continue to govern unless the UK also repudiates the Convention. Moreover, even if its courts regard their domestic powers as limited to interpretation of legislation, and not (as in America occasionally) its repudiation, “separate power” status seems entailed by a relatively effective removal of governmental control over judicial appointments. Judicial independence had long been a central value in UK politics, even when appointments were government-made. Since the Constitutional Reform Act of 2005, itself a response to the European Convention on Human Rights, recommendations for judicial appointments have been the responsibility of a Judicial Appointments Commission or, in the case of vacancies on the Supreme Court created to replace the House of Lords, an ad hoc selection commission. Both are impartial bodies outside the government. Although a cabinet member, the Lord Chancellor, can disapprove these recommendations, he would pay a political cost in doing so. To be sure, future Parliaments could undo these arrangements—again underscoring the importance to “accountability” of a political culture with norms it is committed to defend.

**A Third Way, Constrained Parliamentarianism?**

Constrained parliamentarianism, Professor Ackerman’s third model, brings diffusion of governmental authority amongst discrete elements exercising unique functions—that is, “separation of powers”—even more fully into governments that seemingly meld legislative and executive powers and depend on “accountability” to control them. Central elements are a written constitution creating governmental institutions (such as a maximum interval for parliamentary elections) that legislation cannot alter and judicial institutions (typically a special constitutional court) responsible to enforce it. How judicial appointments are made, and how governmental controls over judicial tenure and jurisdiction are exercised—perhaps especially in relation to constitutional courts—may contribute to their strength or weakness. The people themselves may enjoy authority, to the extent referenda are required for important measures such as constitutional amendments. States in federal unions may enjoy sovereign authority in some respects and/or, as initially in the United States, directly control the membership of an upper legislative house with significant ability to influence or even block legislation that a lower house representing the national population would prefer. Although a prime minister and cabinet accountable to the parliament may be primarily responsible for law administration, the constitution may designate a holder of limited elements of executive power, a President or Governor General, to act in moments of fundamental importance.

There may be international institutions like the EU, whose law (like a constitution) can govern and restrain; The following paragraphs very briefly sketch five governmental systems that appear to fit this intermediate model, marrying accountability and diffusion: Australia, France, Germany, Hungary and Poland—the first three thus far successful in maintaining balanced governments, the
last two apparently not. In the literature one can find much about the model’s workings elsewhere, as in states both federal (e.g., Canada\textsuperscript{20} and India\textsuperscript{21}) and unified (e.g., Japan\textsuperscript{22} and South Africa\textsuperscript{23}).

\textit{Australia:} As Professor Peter Gerangelos and Ryan Goss have recently written, both the federal character of the government, and the fact of a written Constitution modeled to a degree on the American, give “separation of powers” commitments to “checks and balances” more purchase as a concept in Australia than it has in England. “While parliamentary supremacy was tempered by its subjection to the Constitution — and hence, virtually axiomatically, to judicial review — responsible government, which tends to fusion and hierarchy with parliament supreme, could not be so easily accommodated with the separation of powers which tends to separation and branch equality. Because of these countervailing tendencies, a layer of complexity is added to the determination of the relevantly applicable separation of powers principles.” (Gerangelos 2017)\textsuperscript{24}

Like the American constitution, Australia’s written constitution creates a Supreme Court, leaves to Parliament the empowerment of lower courts, and strongly protects judicial tenure and compensation. Australia like England, then, has a distinctly separate judicial branch; yet it is one whose membership (as no longer in England) is constituted by the government, in a process that is “informal and ‘consultative,’ unregulated and opaque” – lacking even a requirement of parliamentary participation. “[I]t is acknowledged that governments have an incentive to allow ‘political


\textsuperscript{21} Shubhankar Dam, Presidential Legislation in India (CUP 2014); Nick Robinson, Expanding Judiciaries: India and the Rise of the Good Governance Court, 8 Wash. U. Global Stud. L. Rev. 1 (2009); Ackerman, Note Error! Bookmark not defined. above, 100 Harv. L.,Rev, at 718-20 (impact of institutionally safeguarded Election Commission).

\textsuperscript{22} Professor Ackerman extensively discusses Japanese parliamentarianism and its constraints, with comparisons to Germany, note Error! Bookmark not defined. above, 100 Harv. L. Rev. at 635 and 669-670, with particular attention to the differences in their constitutional tribunals; see also Shigenori Matsui, Why is the Japanese Supreme Court So Conservative?, 88 Wash. U. L. Rev. 1375 (2011); Tokujin Matsudaira, Judicialization of Politics and the Japanese Supreme Court, 88 Wash. U. L. Rev. 1559 (2011).


considerations' and the political affiliations or views of candidates to affect appointments, especially to the High Court.” (Cane 136-37) Given the fact of a written constitution, Australian courts enjoy powers of constitutional as well as statutory interpretation; yet, unlike the American courts, they must accommodate to principles of responsible government, and thus will consider only issues of legality, and not the reasonableness or merits, of governmental action. (Goss 2018) (The Australian tribunals available to review merits are, as in France, executive organs.) By this means, Professor Cane believes, Australia has largely avoided the politicization of American courts. (Cane 139, 496-501).

Reflecting the nation’s federal character, Australia’s constitution created an upper house with representation apportioned on a state not population basis and (like the American) privileging the interests of less populated states. The use of proportional representation voting measures to elect Senators, moreover, can create a divided government, in ways that have complicated Australia’s political history. Thus, its Senate enjoys “greater leverage than the House of Lords, both as a legislative chamber and in holding the government to account for the exercise of executive power.” (Cane 483). And the shared administrative responsibilities of Australian states also contribute to a form of executive federalism that works to constrain the national executive. (Bulman-Pozen 2016).

France: The France of Montesquieu (who wrote half a century before its Revolution) has over the centuries alternated between governments dominated by strong executives and ones in which legislatures built a rule of law. As a legal principle by which its governments have sometimes been defined, “separation of powers,” has not consistently assured distributed political authority; the French have either chosen, or at least tolerated, executive authorities who thoroughly dominated the work of government – if not as tyrants in the strongest pejorative sense, nonetheless as single ultimate authorities.

France’s Fifth Republic, established by written constitution on the initiative of a strong executive (Charles de Gaulle) six decades ago, mixes presidential and parliamentary characteristics, requiring national referenda on constitutional amendments and other important matters (e.g., European Union initiatives). (Rohr 1995; Ackerman 648-50) In successive votes, its President and National Assembly are separately elected to five-year terms; thus, unitary party control of the legislature and the presidency is not assured. The upper chamber of the French parliament, the Senat, has (like the House of Lords) limited power over legislation; it is not directly elected, its members serving six-year terms. The Prime Minister and his cabinet, responsible to the National Assembly,

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substantially control both legislative outputs and, through the ministries, the greater part of “exec-
utive” authority as well; yet they act under presidential supervision, who can require new elections, if he so chooses. While this power can generate both public and presidential acceptance of the dangers that “cohabitation” governments present, “the president who regularly has the right to dissolve parliament will use this instrument to destabilize the parliamentary political process,” (Moellers 112) suggesting once again the importance of adherence to norms, as well as law, in avoiding the emergence of autocracy.

Issues of governmental legality have long been determined in France by a professional judiciary, the Conseil D’Etat, responsible for advising on the permissibility of regulations (second-
ary legislation) as well as hearing citizen complaints of governmental action. Its integrity has been an enduring and stabilizing force in French politics for centuries. (Rohr 1995) The Constitution of the Fifth Republic established a new Constitutional Council responsible for supervising elections and control of the constitutionality of legislation at the behest of an expanding cadre of potential actors – now including 60 members from either house of Parliament, and reference of questions by other judicial bodies. Members are former presidents who wish to sit and abstain from politics, and nine others who serve for single nine-year terms, appointed in groups of three at three-year intervals, one each by the President, the National Assembly, and the Senat, subject to a limited possibility of parliamentary disapproval. The members’ limited terms may, in Professor Ackerman’s terms, make the Council “a less formidable source of resistance to rising political movement than the American Supreme Court,” (Ackerman 650) yet their limited terms also impair the troubling capacity America’s often short-lived unitary governments have, to project their po-
litical preferences far into the future by selecting young judges who will serve for decades. One might thus see what Professor Ackerman regards as a weakness, as a strength – even as, unquestionably, it at least temporarily constrains parliamentary supremacy.26

Germany: Understandably eschewing a strong executive when creating its constitution after World War II, Germany chose all the elements of Professor Ackerman’s third model save – perhaps for similar reasons – a constitutional commitment to national referenda on subjects of great importance, such as constitutional amendments. Rather, among its restraints on classical parlamentarianism, it created a strong federal structure in which supermajorities at both national and state (“Länder”) level would be required for amendment; numerous provisions, protective of hu-
man rights, were made unamendable. The President who is the nominal chief executive has limited powers, more like the Australian Governor General than the French President; the upper house of its Parliament, the Bundesrat is comprised of representatives of the states (Länder) appointed by its government, their number varying in minor ways with population; each Länder’s Senators must vote unanimously on legislative matters. Both because they represent state, not national interests, and because the distribution of Länder governments may not be the same as controls the lower

26 With some variation in detail, the Italian constitution has comparable provisions for its judicial system, including distributed rights of appointment to its constitutional court, and limited terms of office.
house (Bundestag), if the government’s legislative initiatives have financial or administrative consequences for the Länder, the result can effectively veto them; otherwise, it provokes a form of reconsideration. Elections to the Bundestag are quadrennial, effectively selecting a Prime Minister (Chancellor) who with her cabinet is responsible for legislative proposals and for the oversight of a government almost wholly composed of civil servants. In an unusual provision, reflecting lessons learned at the end of the Weimar Republic, a vote of confidence that will replace the Chancellor can occur only if a majority agrees on her replacement – hard to accomplish in a body to which proportional representation provisions²⁷ have sent parliamentarians from numerous smaller parties.

Most German courts – those with authority to oversee governmental actions but not legislative validity or other constitutional issues – are, in the civilian tradition, professionally staffed, wholly outside politics. The Federal Constitutional Court ((Bundesverfassungsgericht), like many others, is politically selected, but with safeguards (half selected by each House, with a two-thirds majority required for approval) and norms in place that have resulted in general acceptance of its judgments across the extraordinary range of issues that may be put before it by citizens, ordinary courts, Länder, and others – including the constitutionality of proposed amendments to the constitution that might offend its several prohibitions on amendment. If judges were outside the concerns leading Montesquieu and Locke to seek powers’ separation, the constraints they offer to political adventurism and the protections they promise individual liberties give them a particularly important place in “separation of powers” thinking today.

Hungary and Poland. The centrality today of both judicial controls and norm observance to successful control of the controllers might be illustrated by considering the backsliding into autocracy apparent in Hungary and Poland. Countries that succeeded in leaving the shadow of Soviet domination and securing membership in the European Union adopted democratic constitutions, some (Hungary, the Czech Republic, Slovakia) parliamentary and others (e.g., Poland) a form of presidentialism. Obtaining that membership in effect required their adoption of Professor Ackerman’s preferred third approach, with a strong independent judiciary capable of protecting human rights and checking governmental excess. The recent coming into power of populist governments in Hungary and Poland, however, suggest this structural protection’s weaknesses in the face of a unitary government able to change the rules protecting that independence. When Poland’s governing coalition faced loss of the presidency and parliamentary control to the opposing PiS party, it emulated the American Federalists of 1800, seeking to pack Poland’s Constitutional Court with sympathizers; PiS, on securing control, purported a total reversal of this move that subsequently was found to have been only partially successful. Subsequently, it adopted legislation reducing the mandatory retirement age and in other way appearing to secure control of Poland’s

²⁷ Like other nations employing proportional representation in any of its various modes, Germany has thresholds of popularity a party must achieve to be rewarded with any representation not directly won in first-past-the-post competition.
Supreme Court; European bodies responded in a variety of ways Poland largely ignored; most recently, however, the European Commission initiated an action before the CJEU that at least temporarily has suspended the new laws’ effects.\(^{28}\) When Hungary’s new government won the two-thirds majority necessary under its constitution to effect substantial change, it too transformed its judiciary and took other measures that strongly entrenched the new government against democratic rejection.\(^{29}\)

**International Bodies and Their Influence**

Just as the distribution of governmental power between nation and state or province in a federal union can contribute to the diffusion of authority separation of powers reasoning invokes, a national government’s subordination to an international body’s determinations can have a similar effect. (Williamson and Böhm 2013) A nation’s accession to the European Convention on Human Rights, enforced by the ECtHR, can arm its courts (constitutional courts perhaps especially) with the capacity to act, if willing, as the Westminster parliamentary model ostensibly forbids, overcoming parliamentary supremacy. Within the European Union, the possibility of enforcement of its treaties and legislation can operate to control a nation’s parliamentary choices and administration. (Bulman-Pozen 2016) Yet the most fundamental of those principles may be the hardest to enforce. (Sadurski 2010) Faced with budget choices entailing a deficit level Italy’s populist gov-

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ernment made in defiance of EU fiscal principles, the EU has threatened substantial fines – jeopardizing, then, the financial stability of an economy that already faces considerable difficulty, but to date without moving Italy towards compliance. In numerous ways, as in their contemporary disputes with Hungary and Poland over their “judicial reform” measures, European institutions have insisted in “separation of powers” terms on the fundamental necessity of preserving judicial independence. Yet the potential for enforcing this declared requirement of member states appears to be limited.30

The separation of powers issue has been discussed in relation to the European Union itself, more when the EU might have been seen as an executive-dominated bureaucracy, acting through a thoroughly European Commission and a Council of ministers of the member states.(Hofmann 2019) As the complexities and interactions of its institutions have grown,31 it has been understood that it has a more ‘functional’ than ‘organic’ separation of powers. Over the decades, responding to demands for greater EU transparency and for accountability directly to Europe’s people, the European Parliament has acquired steadily increasing voice – if not yet to the point of “accountability,” certainly to the point that one could describe it as a meaningful separation of powers legislative participant, diffusing authority within the EU. One could say that movement has been in the direction of a more responsible parliament and a more politicized Commission, away from a system with presidential elements to a system with more parliamentary characteristics. Thus, today’s generally applicable ordinary legislative procedure (Article 294 TFEU) provides for the bicameral adoption of legislative acts (Article 289 TFEU) on the basis of Commission initiatives. Still, the EU has not reached the point, and perhaps cannot, at which it could be regarded in “national” terms. (Lindseth 2019).

The Court of Justice of the European Union, its members selected by means offering significant safeguards against the Court’s politicization, sits to resolve legal disputes about the meaning and application of European law. Its determinations are inevitably influenced by consideration of the Lisbon Treaty and other constitutive documents, and on occasion it has acted like a national constitutional court, willing to invalidate a directive if interpretation in compliance with higher ranking law is not possible.32 The result, along the lines suggested by Professor Ackerman’s

30 Thus far, Hungary has effectively escaped discipline despite its clear departures from the EU requirement to maintain an independent judiciary, given the extraordinary support TEU Article 7(2) requires for sanctions actually to be effected..

31 The institutions of the European Union today are listed in Article 13(2) of the Treaty on European Union (TEU) as the European Parliament (directly elected by universal suffrage), the European Council (heads of State or Government of the Member States), the Council (representative of each Member State at the ministerial level), the Commission (the prime executive body of the EU), the Court of Justice of the European Union (CJEU), the European Central Bank and the Court of Auditors.

32 For one telling example see C-362/14 Schrems v DPC, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0362

Electronic copy available at: https://ssrn.com/abstract=3308207
preferred third way, is not simple parliamentarianism but deference to legislative discretion only within limits.

**Conclusion**

As in America today, the success of any governmental design for controlling the controllers can depend both on popular will to maintain it, and on politicians’ observance of social norms that are not law. Their failure to do so has generated many past autocracies, even ones that had their genesis in popular support that may have continued for years after the people’s authority had effectively been usurped. A pair of respected American political scientists have seen in such failures a troubling indicator.

American politicians now treat their rivals as enemies, intimidate the free press, and threaten to reject the results of elections. They try to weaken the institutional buffers of our democracy, including the courts, intelligence services, and ethics offices. … This is how elected autocrats subvert democracy—packing and “weaponizing” the courts and other neutral agencies, buying off the media and the private sector (or bullying them into silence), and rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox of the electoral route to authoritarianism is that democracy’s assassins use the very institutions of democracy—gradually, subtly, and even legally—to kill it.33

Levitsky and Ziblatt 7. Readers considering any democracy’s potential for success in controlling the controllers might bear this in mind.

More broadly, “controlling the controllers” remains an essential challenge of democratic government. Whether understood in terms of legislature-executive-judiciary or of a contest among competing “estates,” Montesquieu’s prescription of a “separation of powers” to accomplish this appeared when the tasks of government were far simpler, and governments much smaller. In considering “separation of powers” in a work about administrative law, one sees that the extraordinary growth in the complexity and ambitions of government since he wrote challenges the sufficiency of any analysis simply in terms of political and judicial leadership. The civil service responsible for the workings of the administrative state must figure in considering the distribution of governmental authority amongst competing elements. There is also the perhaps consequent global trend

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33 See also Ginsburg and Huq, less alarmed about the immediate future of autocracy in the United States, but cataloging the same phenomena at work elsewhere in the world. In the United States, these phenomena ended a period of political mutual respect among Democrats and Republicans that essentially rested on the legal subordination of African-Americans; an unraveling that could be thought to have begun with the desegregation movement, the forced resignation of President Nixon and the defeat of President Reagan’s nomination of Robert Bork to the Supreme Court, became evident with the political rise of Newt Gingrich late in the 20th Century. The unprecedented Republican refusal even to consider President Obama’s nomination of Merrick Garland to the Supreme Court, and the election and subsequent norm-shattering behaviors of President Trump, mark the progression of the disease, not its onset. Levitsky & Ziblatt, Chs. 6 and 7.
to enhanced executive control of national governments, as well as the general disappearance of the “estates” on whose workings Montesquieu relied. As supranational structures emerge – the EU, the WTO, even the United Nations – one might possibly claim for today’s nations the power-distributing virtues of the estates, or of states in American federalism. The stronger supranational structures become, of course, the more relevant it will be to ask how these tensions are reflected in their own internal structures. Controlling the controllers in the service of individual freedoms can only become the more important as the data revolution enhances the controllers’ own means for controlling their populations, and as power is consolidated in fewer governments. (Harari 2018, Orwell, 1949).
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