

DEMOCRACY WITHOUT A NET? SEPARATION OF POWERS AND THE IDEA OF SELF-SUSTAINING CONSTITUTIONAL CONSTRAINTS ON UNDEMOCRATIC BEHAVIOR

JAMES A. GARDNER*

I. STRUCTURAL BACKUP SYSTEMS IN A DEMOCRATIC CONSTITUTION

A basic design premise of the United States Constitution is that the main constitutional mechanism for assuring good governance is democratic accountability through elections. As Madison put it, “[a] dependence on the people is, no doubt, the primary control on the government.”¹ These primary systems, when they work properly, are expected to produce good government through the installation in power of good rulers who will rule for the common benefit of all. Democratic systems will thus produce “a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”²

A second design premise of the Constitution, however, is that the primary system may fail: “the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs,

* Professor of Law and William J. Magavern Faculty Scholar, State University of New York, University at Buffalo Law School. A draft of this paper was presented to the faculty of St. John’s University School of Law on September 27, 2004 as part of the *St. John’s Law Review* Distinguished Scholars Series. An earlier version was also presented at the University at Buffalo Law School as part of a Faculty Seminar on Institutional Analysis, held under the auspices of the Christopher Baldy Center for Law and Social Policy. My thanks to the participants in both workshops for their comments, especially Lynn Mather. I additionally wish to thank Neal Devins and Bob Goodin for comments on an early draft, and Devon Runyan for research assistance.

¹ THE FEDERALIST No. 51, at 322 (James Madison) (Arlington House 1966).

² *Id.* No. 10, at 82 (James Madison).

may . . . first obtain the suffrages, and then betray the interests of the people.”³ This possibility, along with hard experience, “has taught mankind the necessity of auxiliary precautions.”⁴ Consequently, the Constitution contains, in addition to the primary mechanisms of democratic accountability, a set of backup systems designed to limit the ability of bad rulers to do serious harm to the public good. These backup systems include the horizontal separation of powers, federalism, the protection of specific individual liberties in the Bill of Rights, and an independent judiciary.

To perform properly under the conditions for which they are designed—conditions which are, by definition, unpromising for the general good—these backup systems must be robust. That is, such systems cannot depend for their success on political actors complying with constitutional norms, for the very situations in which backup systems are called upon to operate are those in which the actors in question are by hypothesis willing to violate prevailing constitutional norms. This means that a constitutional backup system, if it is to be effective, must be self-sustaining: it must be able to survive and to operate, without significant degradation, in the face of strategic behavior by political actors designed to evade the constraints it imposes on bad behavior. Effective backup systems must therefore operate independently of primary democratic systems; because they are needed precisely when democratic mechanisms have failed, they cannot depend for their success on democratic modes of behavior, but must operate instead on different principles.

A key premise of this kind of dual structural arrangement—and the one I wish to examine in this paper—is that the function of democracy consists mainly in the selection of officials. On this model, democratic mechanisms provide system inputs in the form of officials who either are good—wise, virtuous, patriotic—or not. This input then gets fed into the governance mechanism, producing good government in one of two ways. If the democratic subsystem works well and the democratically chosen officials are good, constitutional governance mechanisms produce good governance affirmatively, by enabling well-selected officials to take good actions purposefully, in accordance with their

³ *Id.*

⁴ *Id.* No. 51, at 322 (James Madison).

character.⁵ If, on the other hand, the democratic subsystem works poorly, and the democratically chosen officials are bad, constitutional governance mechanisms still produce good governance negatively (or at least negate the possibility of bad governance) by operation of the backup system, which disables badly selected officials from taking actions, again consistent with their character, that are harmful to the public good.

I shall argue below that this view of the role of democracy in the constitutional structure is too narrow, and that the effect of democracy on the operation of constitutional systems cannot plausibly be confined to those specific subsystems intended to operate by overtly democratic means. Democracy is much more powerful than this view gives it credit for: it is capable of shaping the institutional environment in ways that affect the operation not only of those systems designed to operate democratically, but also the operation of systems, such as structural backup mechanisms, that are designed to operate independently of democratic influences. At least this has been the case with the purportedly self-sustaining backup systems of the U.S. Constitution, most notably the separation of powers, which will be my focus here.

More specifically, my thesis is that the U.S. Constitution's structural backup systems have never worked as originally contemplated, and a significant reason is that democratic institutional norms, and the associated modalities of democratic politics, have crowded out the behavior on which the stability of such structural systems by design depends. Democratic norms, in other words, have seeped into portions of the constitutional mechanism that were designed to operate in their absence,

⁵ The problem of how to design institutions so as to best assure that they are populated by individuals who possess certain specifically desired characteristics has not been much discussed in the literature of institutional design. Much of the institutional design literature begins from Hume's premise of human knavery—that "in contriving any system of government . . . every man ought to be supposed a *knave*, and to have no other end, in all his actions, than private interest." David Hume, *Of the Independency of Parliament*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 42, 42 (rev. ed. 1987). Some recent useful exceptions are Geoffrey Brennan, *Selection and the Currency of Reward*, in *THE THEORY OF INSTITUTIONAL DESIGN* 257–58 (Robert E. Goodin ed., 1996), Philip Pettit, *Institutional Design and Rational Choice*, in *THE THEORY OF INSTITUTIONAL DESIGN* 55 (Robert E. Goodin ed., 1996), and ADRIAN VERMEULE, *SELECTION EFFECTS IN CONSTITUTIONAL LAW* 2–3 (U. Chi. Pub. L. & Legal Theory, Working Paper No. 60, 2004), at <http://www.law.uchicago.edu/academics/publiclaw/resources/60-Vermule.pdf>.

significantly altering their manner of operation, and to a great degree, subverting their effectiveness. Our backup systems, that is to say, have broken down and we cannot depend on them to work as originally intended. The bad news is that we are thus far more dependent on the success of democratic processes than the constitutional design plan suggests. The good news, however, is that democratic norms are, or at least can be, much more robust than the constitutional plan contemplates, and that we probably need not fear as strongly as did the founders that a failure of democracy will degenerate so quickly or so certainly into tyranny.

II. SEPARATION OF POWERS AS A SELF-SUSTAINING CONSTITUTIONAL SYSTEM

A. *The Claim of Systemic Self-Perpetuation*

A highly desirable feature of a constitution is durability, so it is not surprising that one of the more common claims made on behalf of constitutions is that they are self-perpetuating, and will therefore last indefinitely. Certainly, the U.S. Constitution prominently makes such a claim about itself: it declares its purposes to include “secur[ing] the Blessings of Liberty to ourselves and our Posterity.”⁶ This claim is remarkably ambitious. Unlike, say, the Ten Commandments, which purport to provide a blueprint for a good life only so long as we obey them, the U.S. Constitution claims something stronger: that collective submission to its regime activates a system that will continue permanently, by some process of self-perpetuation, whether or not we live up to the obligations it asks of us—it is “a machine that would go of itself.”⁷ Consequently, to receive its benefits, we need not continually and self-consciously obey its injunctions to good behavior, but instead need only submit to and remain under its authority—a much easier task.

As strongly as these claims of self-perpetuation are made on behalf of constitutions as integrated systems, they are typically made with even greater force for certain constitutional subsystems, most notably the separation of powers. Because

⁶ U.S. CONST. pmb1.

⁷ MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986).

“[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny,”⁸ it is imperative that power be divided not merely at the inception of a constitutional regime, but throughout its life. The separation of powers established by the U.S. Constitution is said to deploy “a single, finely wrought and exhaustively considered, procedure”⁹ in which power is so carefully—one might even say scientifically¹⁰—divided and balanced that it will remain so divided permanently.¹¹

Strangely, the claim that separation of powers is self-perpetuating is almost never seriously questioned in the field of constitutional law, either by scholars or by actors in the system. Occasionally, questions have been raised about whether judicial intervention in interbranch disputes is advisable,¹² but such questions ask only whether separation of powers is fully self-sustaining, or only partially so in that it requires occasional judicial tweaking to keep the machinery of self-sustainment in good working condition; such questions accept, that is to say, the underlying claim of self-sustainment.¹³ Yet to claim that a

⁸ THE FEDERALIST, *supra* note 1, No. 47, at 301 (James Madison).

⁹ INS v. Chadha, 462 U.S. 919, 951 (1983).

¹⁰ On the Framers’ belief in science as a guiding principle, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, 593–615 (1969). See also PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1992), at 12 and ch. 1 generally.

¹¹ See Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 483 (1996) (“Madison believed that the system would be largely self-regulating, that any department that sought openly to steal another’s power would be met with swift reprisals.”).

¹² Compare JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 275 (1980) (“[P]articipation of the Supreme Court is unnecessary to police constitutional violations by one political department against the other. Each branch . . . has tremendous incentives jealously to guard its constitutional boundaries . . . against invasion by the other.”), with Martin H. Redish & Elizabeth J. Cisar, *“If Angels Were to Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 487 (1991) (arguing that at least in certain situations “the only means of assuring the prevention of branch usurpation is by judicial enforcement of separation of powers”).

¹³ A different view appears in some recent work on constitutional design. See, e.g., MIKHAIL FILIPPOV, PETER C. ORDESHOOK & OLGA SHVETSOVA, DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS 335 (2004) (“Even if design succeeds in having ambition counter ambition so that the internal dynamics of the federal government maintain the balance we build into its design, a constitutional document needs a source of global enforcement so that it can resist the varied winds that tear at its fabric.”). The authors do not, however, look

constitutional mechanism is really capable of sustaining itself, even against attempts to overthrow it, is to claim something quite remarkable. What can it actually mean? Is such a thing possible, and if so, how?

B. The Mechanics of a Self-Sustaining Separation of Powers

The basic mechanism by which the separation of powers is said to sustain itself is so well known that it has become a favorite bromide of constitutional law: "Ambition must be made to counteract ambition."¹⁴ In such a system, says Madison, "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."¹⁵ Separation of powers, then, works by equipping the various actors in the governance system in such a way that any attempt by actors in one branch to accumulate a dangerous amount of power will be immediately resisted and, it is hoped, successfully beaten back by actors in other branches defending their own authority. But though the general account is familiar, it is extremely abstract. Leaving aside the difficulty in attempting to discern the boundaries of each branch's power, this account leaves open many important questions. Why, precisely, and under what circumstances, might actors in one branch seek to expand their power by appropriating powers exercised by other branches? How, and by what means, might one branch seek to exercise authority allocated formally to another? By what means do branches subjected to such an attack repel it? What persuades a branch whose attempted encroachment has been resisted to give up the effort? Can no usurpation ever succeed, and if not, why not?

Answering these questions is complicated by the fact that the separation of powers may contribute by several different routes to the ultimate constitutional goal of good governance. In

necessarily to the judiciary as a source of such enforcement on the ground that a judicial branch created by a constitution is itself a player in "the *political* game in which a constitution is embedded." See *id.*; see also *id.* at 151–57. Instead, they argue that good constitutional design will create constitutional institutions that have a self-reinforcing relationship with preexisting social and political institutions in the society to be governed. *Id.* at 142–50.

¹⁴ THE FEDERALIST, *supra* note 1, No. 51, at 322 (James Madison).

¹⁵ *Id.* at 321–22.

the narrowest sense, the separation of powers contributes to good governance only indirectly, by blocking the fulfillment of one especially potent condition for the emergence of tyranny—the concentration of government power.¹⁶ On this view, divided government does not necessarily produce good government in the sense of good measures; it produces at most non-tyrannical government, a situation by no means inconsistent with governmental ineptitude, or worse. On the other hand, the separation of powers may be capable of contributing much more directly to good governance. For example, by giving each branch the authority to veto measures sought by the others, the separation of powers may serve as a kind of filtration mechanism guaranteeing that only measures which unequivocally serve the general good will be enacted.¹⁷ An even stronger view holds that the dispersion of government authority creates a path-dependent governmental decision-making structure that, by requiring any significant action to be preceded by interbranch consultation and deliberation, inevitably improves the quality of decisions.¹⁸ Because these more expansive understandings of separation of powers greatly complicate any attempt to analyze its workings, I shall confine myself here to considering it in the first and narrower sense: as accomplishing nothing more than securing a precondition for non-tyranny.

By what mechanism, then, does the separation of powers, so understood, sustain itself? Clearly, if separation of powers is to sustain itself, then powers divided must stay divided. But how? Unfortunately, the picture painted by the Framers is rather short on specifics.¹⁹ Power, Madison tells us, “is of an

¹⁶ See *id.* No. 47, at 301 (James Madison).

¹⁷ See *id.* No. 73, at 443 (Alexander Hamilton) (stating that executive veto power “furnishes an additional security against the enactment of improper laws” and its effect is “to increase the chances in favor of the community against the passing of bad laws”); cf. JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT* 20 (C. Gordon Post ed., Bobbs-Merrill Co. 1953) (1853) (arguing that the only effective way to prevent governmental tyranny is “by dividing and distributing the powers of government, [to] give to each division or interest, through its appropriate organ, either a concurrent voice in making and executing the laws or a veto on their execution”).

¹⁸ See JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* 29–30, 232–33 (1994); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 22–24 (1993).

¹⁹ The Framers’ vagueness concerning how the separation of powers would actually operate has been much commented upon. See generally Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005);

encroaching nature,”²⁰ and cannot be confined by “parchment barriers.”²¹ The legislature is “everywhere extending the sphere of its activity and drawing all power into its impetuous vortex,”²² while the executive pursues an “all-grasping prerogative.”²³ Hamilton expected interbranch relations to be a “trial of strength”²⁴ in which the legislature will “attack” the executive.²⁵ If nothing else, this language indicates that the Framers anticipated interbranch relations to be conducted on something approaching a war footing, at least on occasion. But how was such a war to be carried out?

The closest Madison comes to providing any details is a reference he makes in *Federalist 48* to a 1783 report of the Pennsylvania Council of Censors, a body charged under the Pennsylvania Constitution with meeting every seven years to review the compliance of government organs with the constitution and to recommend amendments.²⁶ Madison relies on this report to support his contention that the branches of government, if left unrestrained, will not observe the constitutional boundaries of their respective powers, so it may provide some insight into how he thought interbranch warfare might occur. According to Madison, the report shows that in Pennsylvania “[e]xecutive powers had been usurped.”²⁷ Although Madison does not specify what evidence shows usurpation, the Censors’ report lists several incidents that might qualify. For example, on a few occasions the legislature statutorily reassigned executive duties to other government actors; appointed officers that the constitution required to be appointed by the executive; exercised the executive pardoning power; and expended money directly, without first appropriating it from the treasury, a function that the Censors characterized as clearly executive under the state constitution.²⁸ In these instances, then, one

M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000); Nourse, *supra* note 11.

²⁰ THE FEDERALIST, *supra* note 1, No. 48, at 308 (James Madison).

²¹ *Id.*

²² *Id.* at 309.

²³ *Id.*

²⁴ *Id.* No. 73, at 444 (Alexander Hamilton).

²⁵ *Id.* at 445.

²⁶ PA. CONST. § 47 (1776).

²⁷ THE FEDERALIST, *supra* note 1, No. 48, at 312 (James Madison).

²⁸ THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND

branch usurped powers allocated to another simply by proceeding to exercise them and, apparently, hoping for, or insisting upon, compliance.

The Pennsylvania Censors' account, and Madison and Hamilton's description of interbranch relations, contain obvious echoes of an earlier series of events well known to the colonists: the English Civil War. In a bitter conflict between the Crown and Parliament, each in turn attempted to acquire and exercise powers traditionally held by the other. For over a decade, for example, Charles I did not convene a parliament,²⁹ an extraordinary measure for English kings, who needed parliamentary authorization to obtain revenue.³⁰ Charles attempted to get around this problem by imposing new kinds of taxes on his own authority, without parliamentary approval.³¹ When the Long Parliament met in 1640, it retaliated by declaring itself the supreme political authority, demanded the power to appoint royal ministers, and eventually fielded and commanded its own army.³² This led eventually to interbranch warfare in the most literal sense, with the king and parliament commanding rival armies engaged in a struggle for control over the state.³³

Although it is unclear whether the Framers actually contemplated a military clash between the President and Congress, they clearly did contemplate the possibility of armed conflict as a method of resolving disputes between actors in the Constitution's other main structural backup system, federalism. In *Federalist 46*, Madison went so far as to estimate the size of a

1790: THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776, AND THE COUNCIL OF CENSORS, at 100–06 (1825).

²⁹ Charles dissolved Parliament in 1629, and did not reconvene it until 1640. MAURICE ASHLEY, *THE ENGLISH CIVIL WAR: A CONCISE HISTORY* 14, 35–44 (1974).

³⁰ See G.L. Harriss, *The Formation of Parliament, 1272–1377*, in *THE ENGLISH PARLIAMENT IN THE MIDDLE AGES* 29, 41 (R.G. Davies & J.H. Denton eds., 1981); 2 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 248–52 (W.S. Hein & Co. 3d ed. 1987) (1880).

³¹ See ASHLEY, *supra* note 29, at 14, 35.

³² See *id.* at 63–64 (“Parliament sought ultimate sovereignty.”); C.V. WEDGWOOD, *THE KING’S WAR, 1641–1647*, at 31, 41–42, 70–72 (1958).

³³ An exceedingly thorough account may be found in the four volumes of SAMUEL R. GARDINER, *HISTORY OF THE GREAT CIVIL WAR 1642–1649* (AMS Press 1965) (1893). A more recent and concise account appears in WEDGWOOD, *supra* note 32.

military force the national government might plausibly field, arguing that it would be a small fraction of the armed militia forces available to the states.³⁴ Hamilton went even further, arguing that the states would have important tactical advantages over any national army called up to suppress them:

If the federal army should be able to quell the resistance of one State, the distant States would be able to make head with fresh forces. The advantages obtained in one place must be abandoned to subdue the opposition in others; and the moment the part which had been reduced to submission was left to itself, its efforts would be renewed, and its resistance revive.³⁵

Not surprisingly, then, the Framers conceived of the use of power in terms that were familiar to them from their experience and from their theoretical understanding of political relations. For them, holders of great political power existed with respect to one another in something like the state of nature, a state of nature that was distinctly Hobbesian—a constant war of all against all in which those with considerable power seek to obtain more, and those with less power attempt to hang on to what they have.³⁶ The Framers' political psychology thus resembled a kind of imperial expansionism,³⁷ based on the model of political relations they knew best. If you seize my possession in Minorca, I will not only attempt to regain it, but will retaliate by attacking your possessions in Toronto and Niagara. If you attack me off the British coast, I will repel you, and immediately invade your possessions in the Caribbean.³⁸ Power, in this formulation, is conceived territorially, and disputes over power are conducted like turf wars.

In developing and applying this model to the design of constitutional backup mechanisms, the Framers apparently saw

³⁴ THE FEDERALIST, *supra* note 1, No. 46 (James Madison), at 299 (noting that reasonable assumptions about the ability of a nation to raise an army suggest that such efforts “would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia [in the several states] amounting to near half a million of citizens with arms in their hands”).

³⁵ *Id.* No. 28, at 181 (Alexander Hamilton).

³⁶ See THOMAS HOBBES, LEVIATHAN 104–09 (Herbert W. Schneider ed., The Liberal Arts Press 1958) (1651).

³⁷ Daryl Levinson has aptly termed this “empire-building.” Levinson, *supra* note 19.

³⁸ These are events from the Seven Years War from 1756 to 1763, in which many American revolutionaries had personally participated. See generally WILLIAM R. NESTER, THE FIRST GLOBAL WAR (2000).

little difference between the structure they were designing, which involved dividing power internally within a single political society, and the structure of power relations among independent nations, such as rival European great powers. In each case, a sphere of power was conceived territorially, as something political actors would attempt to invade or defend. That is why, according to Madison, internally divided powers could never remain divided unless “[t]he interest of the man [is] connected with the constitutional rights of the place.”³⁹ In other words, political actors must be given the same kind of stake in defending their allotted plot of power as monarchs have in defending their realms. When that is done, the behavior of a Congress or a President becomes just as predictable as the behavior of a prince, and therefore just as susceptible to containment through a careful initial allocation and balancing of power.

III. THE SEPARATION OF POWERS IN ACTUAL OPERATION

In fact, the separation of powers never worked in the way the Framers contemplated: their assumptions about how political actors would behave were falsified from the very inception of an operational American republicanism. Contrary to design assumptions, presidents have not routinely made brazen attempts to usurp legislative power, and congresses have not willy-nilly enacted laws appropriating for their own use powers that properly belong to the executive or judicial branches. The turf-encroaching and turf-defending skirmishes on which the self-sustaining aspect of the separation of powers system depends never materialized. In the words of one leading expert on American executive-legislative relations, “[d]espite the heavy traffic, head-on collisions are rare. Instead, individual drivers merge safely at high speeds.”⁴⁰ This is not to say that the branches of the federal government have never clashed; they have. But these clashes have been on the whole relatively minor and restrained disagreements at the margins of interbranch relations, which have been overwhelmingly cooperative rather than conflictual.⁴¹

³⁹ THE FEDERALIST, *supra* note 1, No. 51, at 322 (James Madison).

⁴⁰ LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE, at xi (Tex. A&M Univ. Press 4th ed. 1998).

⁴¹ For a description of late twentieth-century “norms of inter-branch cooperation within the national government,” see Peter M. Shane, *When Inter-Branch Norms*

This tone was set early. The relations between President Washington and the first Congresses were characterized by a punctilious observance of the boundaries of divided power, even as those boundaries were being explored and defined for the first time.⁴² President Jefferson went so far as to urge Congress to be more specific in its appropriations so as to curtail the scope of executive discretion,⁴³ and began a practice of delivering his annual state of the union message to Congress in writing rather than in person, lest the personal presence of the President exert undue influence on legislative independence.⁴⁴ Even actions of indeterminate constitutionality, such as Jefferson's unilateral agreement to purchase the Louisiana Territory, were undertaken amicably, and with subsequent congressional acquiescence.⁴⁵

This pattern has persisted. For example, President Truman's 1952 seizure of the steel industry, later found by the Supreme Court to be an unconstitutional usurpation of legislative power, was accomplished with the knowledge and apparent acquiescence of Congress.⁴⁶ Even what was perhaps the most bitter executive-legislative confrontation in American history, President Andrew Johnson's administration of Reconstruction, was conducted using constitutional tools, up to and including impeachment, that were indubitably within the authority of the political actors involved.⁴⁷ None of the other

Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups," 12 CORNELL J.L. & PUB. POL'Y 503, 505-13 (2003). Shane goes on to argue that these norms have, in the last two decades, showed signs of strain. *Id.* at 514-33.

⁴² See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 224-33 (1989).

⁴³ See Gerhard Casper, *Executive-Congressional Separation of Power During the Presidency of Thomas Jefferson*, 47 STAN. L. REV. 473, 484 (1995).

⁴⁴ See *id.* at 478-80.

⁴⁵ For an account of the course of events leading to the purchase, see MARSHALL SPRAGUE, *SO VAST AND BEAUTIFUL A LAND: LOUISIANA AND THE PURCHASE* ch. 19 (1974). A thorough account of contemporary doubts about the constitutionality of the acquisition, and Congress's decision to ratify the purchase in spite of those doubts, may be found in EVERETT S. BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803-1812*, at 62-65 (1920).

⁴⁶ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952). When President Truman issued a seizure order, however, Congress did not act. See MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE* 94-99 (1977) (discussing congressional inaction following Truman's seizure order); HARRY S. TRUMAN, *MEMOIRS BY HARRY S. TRUMAN: YEARS OF TRIAL AND HOPE* 472-74 (1956) (recalling the shutdown of the steel mills and his desires for congressional action).

⁴⁷ According to one leading authority, throughout the Johnson impeachment

conflicts between the branches that we think of as major—the national bank controversy during the Jackson Administration, Roosevelt’s court-packing plan, the impoundment controversy during the Nixon presidency—look much like the bald-faced seizures of authority for which the Framers so carefully designed.

The lack of evidence of imperial expansionism by any of the branches over such a long period of time might be taken as a sign that the primary constitutional system for achieving good government—a democratic electoral system—has worked exceedingly well; that is, the people have by and large tended to choose the right kind of individuals to exercise public power, so that structural backup mechanisms have rarely or never been called into play. Overt provocation of other power holders is probably not, after all, the hallmark of enlightened statesmanship. While it is conceivable that this explanation might have something to do with the way interbranch relations have been conducted, it overlooks what is perhaps a much more important point: American government officials generally have not been required to engage in interbranch warfare to achieve their objectives because interbranch boundaries have been routinely ignored as a matter of convenience by all concerned. Power has not been invaded, or seized, or appropriated, or fought over, because the President and Congress have been quite willing to share and swap powers, and to rearrange the constitutional allocations to suit themselves. They have cooperated, but their cooperation has as often been in colluding to efface interbranch boundaries as in working together to respect them.⁴⁸

proceedings Congress displayed a commendable awareness of and concern for the appropriate limits of its own powers. MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 55–56 (Univ. of Chi. Press 2d ed. 2000).

⁴⁸ The process of government officials trading powers in order to achieve their objectives has been likened to a Coasean trade of property entitlements. See Michael A. Fitts, *The Foibles of Formalism: Applying a Political “Transaction Cost” Analysis to Separation of Powers*, 47 CASE W. RES. L. REV. 1643, 1646–47 (1997); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 63–73 (1991); Donald Wittman, *The Constitution as an Optimal Social Contract: A Transaction Cost Analysis of The Federalist Papers*, in *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* 73, 75 (Bernard Grofman & Donald Wittman eds., 1989); see also Elisabeth R. Gerber & Ken Kollman, *Authority Migration: Defining an Emerging Research Agenda*, PS: POL. SCI. & POL. 397, 397–401 (2004) (defining the migration of political authority within non-unitary regimes as a new field of study). According to this analogy, treating the constitutional allocation of powers as merely a provisional allocation of entitlements that their “owners” may later trade is efficient in that it allows the

Today, the actual distribution of powers in our system looks little like the one the Framers must have contemplated, and all the major changes have been accomplished with the agreement and participation of all the branches of government. The rise of the administrative state, to name the most important example, gave the President immense and previously unknown power.⁴⁹

various powers of government to end up in the hands of those who value them most. Presumably, government officials value specific powers for their utility in facilitating the achievement of desired policy objectives. Of course, as Sidak makes clear, the analogy to the Coase Theorem is imperfect in that the public is an important third-party beneficiary of the Constitution's structural arrangements. Sidak, *supra*, at 67. Still, if we were confident that the preferences of government officials closely matched those of the general public, as a pure economic theory of democracy might suggest, *see generally* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957), the trading of powers might not pose a troubling problem. On the other hand, a foundational behavioral premise of the system of separated powers is that government officials will pursue their own personal self-interest at the expense of the public good. *See* THE FEDERALIST, *supra* note 1, No. 10 (James Madison).

⁴⁹ *See* John Ferejohn, *Madisonian Separation of Powers*, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 126, 149 (Samuel Kernell ed., 2003) ("[T]he congressional creation of executive agencies rapidly shifted legislative advantages in the direction of the president and his henchmen."); *see also* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973) (documenting the twentieth-century rise of presidential power). According to Justice Jackson, the rise of the administrative sector "has deranged our three-branch legal theories." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). Indeed, it has been argued that there is simply no way to reconcile the modern administrative state with the original constitutional plan of divided powers. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.") (citations omitted).

There is, to be sure, some disagreement about the extent to which the growth of the administrative state has actually given the President the upper hand in his relation with Congress. On one hand, simply because Congress has created numerous administrative agencies in the executive branch does not necessarily mean it has surrendered *ultimate* power to the President. Some scholars argue that Congress has managed to retain a meaningful power of administrative oversight, notwithstanding the great proliferation and activity of administrative agencies. *See, e.g.*, DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 236–39 (1999); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165 (1984); Thomas Schwartz, *Checks, Balances, and Bureaucratic Usurpation of Congressional Power*, in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM, *supra* note 48, at 150–51. On the other hand, it has been frequently suggested that the administrative bureaucracy is no more under the actual control of the President than it is of Congress. *See, e.g.*, M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 399 (2d ed. 1998) ("[T]he so-called executive, the political leaders nominally responsible to the legislature for the conduct of government, may

Yet this power was not seized, but handed over. Legislation creating and regulating the federal civil service drastically curtailed presidential power by eliminating the President's discretion to dispense patronage.⁵⁰ The creation of independent agencies similarly restricted presidential power.⁵¹ Congress has for all intents and purposes voluntarily handed over to the President its power to declare war.⁵² The President routinely by executive order issues commands that are legislative in character.⁵³ Federal courts ratified congressional creation of Article I courts, an action that transferred power from the judicial branch to the executive.⁵⁴ Congress created hundreds of legislative veto provisions with presidential approval.⁵⁵ Later, it could scarcely contain its zeal to give the President a line-item veto, an action that might have significantly altered the balance of legislative and executive power.⁵⁶ All of these actions were undertaken cooperatively by Congress and the President, even those that later were held by the courts to constitute usurpations forbidden by the Constitution.

Why has this happened? Why haven't presidents and legislatures plotted adversarially to capture broad swaths of

in practice have little real control over the government machine.”). But such disputes are really characterizations of the impact of the administrative state at the margins of democratic oversight. Surely there can be no question but that the growth of the administrative state created substantial new opportunities for presidential influence over public policy that had not previously existed, regardless of the course of legislative-executive contests for ultimate control of government policy decisions.

⁵⁰ See generally PAUL P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* (1958) (discussing the history of American civil service reform).

⁵¹ See FISHER, *supra* note 40, at 146–76.

⁵² See *id.* at 191 (“The war power, originally grounded in Congress as the representative branch, has in recent times gravitated more and more to the executive branch.”); see also JOHN HART ELY, *WAR AND RESPONSIBILITY*, at ix, 50–52 (1993); SCHLESINGER, *supra* note 49, at 127–207.

⁵³ See FISHER, *supra* note 40, at 34–36.

⁵⁴ See Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 198–201 (1983).

⁵⁵ See LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 117–20 (3d ed. 2001) (describing grudging presidential acquiescence in legislation containing legislative veto provisions); FISHER, *supra* note 40, at 91–96 (same).

⁵⁶ For a brief account, see FISHER & DEVINS, *supra* note 55, at 131–34. Devins, however, argued that a presidential item veto was “not likely to significantly alter the balance of power between Congress and the White House.” Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RES. L. REV. 1605, 1608 (1997).

power exercised by other branches? And why have political actors not only failed to resist incursions on their power, but frequently acquiesced in a diminution of their own authority? Government officers seemingly had at their disposal all the tools necessary to fight off depredations committed by other branches, yet they chose to cooperate rather than to resist. Clearly, the “interest of the man” never became sufficiently connected to “the constitutional rights of the place” to permit the system to work as intended.⁵⁷

Probably no more devastating blow can befall a plan of institutional design than the failure of the designers correctly to predict the behavior of those who will staff the institution. If political actors in the federal government were not motivated by a desire to retain and expand their own spheres of power, then what did motivate them? I argue in the next section that the Framers, understandably enough, failed to anticipate a critical effect of the introduction of republican government into the constitutional design. The successful introduction of democracy worked a dramatic transformation in the way power was conceived, and thus in the way it was used. Simply put, power in a democracy does not exist for its own sake, or as an attribute of status, but for the achievement of objectives. In a democracy, power is not something to be held or acquired, but to be used, and the way to retain it lies not through further acquisitions, but in its successful use to achieve specific objectives. Consequently, political actors became, at a stroke, uninterested in the boundaries of their own power; instead they became interested in compiling a record of successful accomplishments, and if constitutional allocations of power thwarted the accomplishment of desired goals, then the boundaries would have to go. Or, to put it differently, constitutional actors in a democracy are no less interested in self-aggrandizement than the Framers believed; it is just that they must aggrandize themselves very differently in a democratic form of government than in a monarchical one.

⁵⁷ THE FEDERALIST, *supra* note 1, No. 51, at 322 (James Madison). Indeed, the actual exigencies of interbranch politics have occasionally induced government officials to rid themselves of power so as to escape responsibility for its exercise—precisely the opposite of what Madison predicted. See Fitts, *supra* note 48, at 1654–55; Devins, *supra* note 56, at 1615–16. In the federalism context, the Supreme Court has objected, in the anti-commandeering cases, to what it sees as attempts to blur the lines of intergovernmental responsibility. See *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 149 (1992).

IV. POWER, KINGLY AND REPUBLICAN

The Framers' ideas of government power, and of the institutional mechanisms suitable to contain it, were informed by a conception of power that I shall call "kingly." This conception, which, as colonial subjects of an imperial world power, the Framers naturally enough inherited, was quickly rendered obsolete by the introduction of republican government, a change that dramatically altered the institutional environment in at least three unforeseen ways. First, the establishment of representative democracy introduced a set of new democratic norms that quickly eclipsed the social background norms against which political life had previously been conducted. Second, the brute mechanics of representative democracy altered the way in which power could be successfully used, and thus the way in which it could realistically be conceived. Third, the introduction of democratic politics led to the creation of new institutional structures, mainly associated with party politics, that, because they had been unforeseen, operated outside of, and altered the operation of, formal constitutional mechanisms.

Before the Revolution, Americans had lived a life that was in most ways typically British. They were subjects of the king, and thus a species of political children in a hierarchical society of status, patriarchal dependence, and patronage. In such a system, political stability "depended on the social authority of the political leaders being visible and incontestable."⁵⁸ Power in this system was thus an attribute of sovereignty and its associated social status, either directly in the case of the royal family, or indirectly, through a web of patronage and dependence with the monarch at its source.⁵⁹

⁵⁸ GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 86 (1991).

⁵⁹ *See id.* at 77–92; *see also* FORREST McDONALD, *NOVUS ORDO SECLORUM* 83 (1985). In a recent article, Daryl Levinson makes an argument similar to the one presented here. *See* Levinson, *supra* note 19. He argues that the success of the constitutional separation of powers depends upon an assumption that federal office holders would engage in "empire-building," but that an economic analysis of the actual institutional incentives of government officials shows that their incentives do not match up well with the design premise of institutional aggrandizement, thus accounting for the collapse of the system. This analysis, however, leaves Levinson no tools with which to explain why the Framers might have made such behavioral assumptions in the first place. In my view, the explanation provided in the text answers this question, and at the same time vividly demonstrates how poorly the behavioral assumptions of contemporary economic analysis map onto the socio-

The Revolution called this arrangement into question. Legitimate pre-revolutionary claims to deference based on status were now dismissed as aristocratic pretensions. Political deference eroded, and government began to be conceived less as a prerogative of a particular class of gentlemen and more as a collectively operated business enterprise.⁶⁰ Although the first generation of independent American leaders disagreed on whether government power should be used exclusively for disinterested public purposes or whether it might also be used for the pursuit of private interest, they agreed that power was something to be used for a purpose rather than held as an attribute of social status.⁶¹

In addition to this social dimension, the introduction of representative democracy also taught lessons of political morality destructive of the previous order. An electoral politics, as George Kateb has argued, “demystifie[s] or desacralize[s]”⁶² political authority; by its very existence, it induces skepticism about the received political order, and “signifies a radical chastening of political authority.”⁶³ Constitutional representative democracy thus encourages an independence of spirit; expands the boundaries of what is conceived as political; and inspires a sense of fairness and “[c]onstitutional delicacy”⁶⁴—all characteristics inconsistent with an understanding of power as a static entitlement of socially vested authority.

These abstract norms of republican government found concrete expression in a significant shift in understanding of what power was for, and how it could legitimately be used. In monarchical systems, kingly power was an attribute of the monarch's status as the symbol and sole embodiment of national sovereignty. Monarchs attempted to expand their territory, whether by marriage, war, or colonization, to enhance their status; to take power successfully from another was, indeed, to demonstrate performatively that one was entitled to it.⁶⁵ This

political landscape of the eighteenth century.

⁶⁰ See WOOD, *supra* note 58, at 145–68.

⁶¹ See *id.* at 243–70.

⁶² George Kateb, *The Moral Distinctiveness of Representative Democracy*, 91 ETHICS 357, 357 (1981).

⁶³ *Id.* at 358.

⁶⁴ *Id.* at 362.

⁶⁵ Finer describes this as an enduring and commonplace characteristic of imperial rule, and traces it as far back as the formation of the Chinese state three

narcissistic outlook acknowledges no obvious stopping point: “Consumed themselves by their own grandiosity, [monarchs] rapaciously extract value from other people, in the form of adoration or tribute.”⁶⁶

Power in a republican form of government necessarily stands on a different footing. In a republic, ultimate sovereignty is located in the people collectively rather than in any official or collection of officials.⁶⁷ While it is surely possible for a democratic popular sovereign to harbor imperial ambitions with respect to the external world, any internal relationship between the status of public officials and the extent of their power is formally severed. Indeed, because all officials in a republic are radically demoted to the status of mere public servants,⁶⁸ no accumulation of official power could meaningfully enhance their status, whatever benefits it might bring to their private interests. As a result, it became pointless for officials to attempt to enhance their status by accumulating power; their status would remain formally subordinate and inglorious no matter how many other public officials they vanquished in intra-governmental power struggles.

With the holding of power detached from status, the central issue for those who held official power in the new republic became instead: what would they do with it? A superior performance in an institutionally defined role could, as before, enhance one’s public standing, but the nature of the institutional

thousand years ago: “This doctrine [that rulers drew their entitlement to rule from the Mandate of Heaven] was a rod in pickle for all future rulers. The proof that Heaven had withdrawn its mandate was the overthrow of a ruler. So, rebellion was justified—provided it succeeded.” 1 S.E. FINER, *THE HISTORY OF GOVERNMENT FROM THE EARLIEST TIMES* 449 (1999). A similar conception of political legitimacy prevailed much later under the Byzantine Empire under a “self-defeating political formula which, effectively, maintained that *whoever* held the throne did so by just and indeed divine title.” 2 *id.* at 663. As a result, “[o]f the 107 sovereigns that occupied the throne between 395 and 1453, only 34 died in their beds.” 2 *id.* at 636 (quoting CHARLES DIEHL, *BYZANTIUM: GREATNESS AND DECLINE* 128 (Naomi Walford trans., 1957)).

⁶⁶ Peter Hammond Schwartz, “*His Majesty the Baby*”: *Narcissism and Royal Authority*, 17 *POL. THEORY* 266, 279 (1989).

⁶⁷ This conception of popular sovereignty is found throughout the canonical texts of American constitutional law. *See, e.g.*, U.S. CONST. pmbl.; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *McCulloch v. Maryland*, 17 U.S. 316, 435 (1819).

⁶⁸ *See THE FEDERALIST*, *supra* note 1, No. 46, at 294 (James Madison) (“The federal and State governments are in fact but different agents and trustees of the people.”).

roles had changed, altering the character of the required performance. A public servant in a democracy could never hope to rival the social status of the popular sovereign, but even a servant may profit by demonstrating publicly a certain kind of mastery. In a republic, that mastery involves not accumulating power, but using it effectively for popular purposes, a shift in emphasis well captured by the phrase "measures, not men." This slogan, which emerged during the British post-Civil War experience of attempting to legitimate and routinize minoritarian political opposition, signified to its adherents that the common good was to be achieved by supporting good measures and opposing bad ones, regardless of their source, rather than through the traditional royalist pattern of cultivating and relying upon personal allegiances and patronage.⁶⁹ Opposition to power was legitimate, on this view, when it arose from opposition to public measures on the merits instead of from a bare desire to oust, and then to replace, incumbent power holders in order to exercise their privileges and enjoy their status. By the same token, those who held power were increasingly obliged to defend their entitlement to it by using it well.

Finally, this fundamental change in the public conception of power was itself reinforced by the emerging practice of democratic politics. If power-holding in a representative democracy was justifiable mainly on the basis of how well it was used, then those who held power would have to publicly account for themselves on the basis of some record of sound achievement. Achievement under the structure of the U.S. Constitution, however, required securing action from both houses of Congress and the President, and it quickly became apparent, to the dismay of many of the founders, that the organizational structure of political parties was by far the most effective way to produce results.⁷⁰

This development, perhaps more than any other, delivered a severe blow to the integrity of the Constitution's structural backup systems: party organizations provided an avenue by

⁶⁹ See JOHN BREWER, PARTY IDEOLOGY AND POPULAR POLITICS AT THE ACCESSION OF GEORGE III 68–69 (1976).

⁷⁰ See generally JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA (1995); RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840 (1969).

which the activity of many government officials, holding different offices and exercising different formal powers, could be coordinated for the achievement of common goals.⁷¹ As the political scientist E.E. Schattschneider wrote:

The parties are able to compel public officers to behave in ways that the law does not contemplate, by methods of which the law is ignorant, without in any way affecting the validity of their official acts. What goes on behind the formal act, the official seals, and public documents the law refuses to know. Since the parties operate in a legal no man's land they are able to produce startling effects: in effect they may empty an office of its contents, transfer the authority of one magistrate to another magistrate or to persons unknown to the constitution and laws of the land.⁷²

Parties were thus able, by exercising informal and extralegal control over office holders, not only to alter the Framers' careful balancing and blending of formal political authority, but to defeat the basic design premise of the separation of powers—that power available within the system would be used conflictually rather than cooperatively. As a result, if the separation of powers still exists today, it has been sustained less by the anticipated dynamics of the original design than by sufferance of the political parties.⁷³

It may still be true, as Madison argued, that the accumulation of all powers in the same set of hands is “the very definition of tyranny,”⁷⁴ but the way in which power is accumulated today has little to do with breaches of the separation of powers. In the contemporary American republic, the power necessary to act tyrannically is assembled not by

⁷¹ See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 216–19 (2000).

⁷² E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 12 (1942).

⁷³ Another strand of thought in the political science literature questions whether parties really have the “capacity . . . [to] overcome the separation of powers by bringing together under informal arrangements what the founders were at pains to divide by formal ones.” James Q. Wilson, *Political Parties and the Separation of Powers*, in *SEPARATION OF POWERS—DOES IT STILL WORK?* 18, 18 (Robert A. Goldwin & Art Kaufman eds., 1986). The argument here is that the well-documented decline in partisan loyalty among members of Congress may rob parties of the discipline necessary to engage in the kind of coordinated interbranch action that would evade the coordination limitations presupposed by the constitutional division of powers. See generally DAVID S. BRODER, *THE PARTY'S OVER* (1972); MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES: 1952–1988* (1990).

⁷⁴ THE FEDERALIST, *supra* note 1, No. 47, at 301 (James Madison).

centralizing it in the hands of a single branch, but by achieving partisan control of all three branches of government, separate though they may be. On some level, the public seems to have recognized this change in the source of the danger. For the most part, today's American public is not worried simply by the fact that one branch exercises a power formally assigned to another. A democratic public is interested in results, and if Congress, say, cannot produce the desired results then the public seems more than happy to let the President get the job done, even if this entrenches in the presidency a power that is in some sense better left elsewhere.⁷⁵ Instead, the kind of entrenchment that seems nowadays to offend the public's sense of political justice is entrenchment of partisan control over government offices, often undertaken through gerrymandering or manipulation of the rules of campaign finance. It has even been suggested that the voting public has responded to the possibility of this kind of entrenchment by deliberately dividing partisan control over the organs of the federal government to recreate, under today's altered circumstances, the original spirit of the separation of powers design format.⁷⁶

V. STRUCTURAL BACKUP SYSTEMS IN A DEMOCRACY

If the introduction of democracy fundamentally subverted the very constitutional systems designed to protect the public from failures of democracy, what conclusions can we draw for constitutional design in democratic systems? Perhaps the most pressing question is whether democracy is such a powerful

⁷⁵ Politicians have not been above cynically exploiting, for political gain, the public's impatience with formal constitutional divisions of authority. Readers of this journal may well remember that New York Senator Alphonse D'Amato (1981–1999) proudly referred to himself as “Senator Pothole,” inviting the public to call upon him to handle problems that were entirely outside the scope of his official duties as a U.S. Senator.

⁷⁶ See MORRIS FIORINA, *DIVIDED GOVERNMENT* 63–81 (Allyn & Bacon 2d ed. 1996) (1992). For a considerably stronger view, see Theodore J. Lowi, *President v. Congress: What the Two-Party Duopoly Has Done to the American Separation of Powers*, 47 *CASE W. RES. L. REV.* 1219, 1224–27 (1997). Lowi argues that we now have a system of “dual-party government *with each party nested in one of the Branches*,” a system that encourages the branches to attempt as much as possible to operate independently of one another. *Id.* at 1225, 1229. Although this produces “the consequences [the Framers] had hoped [separation of powers] would produce,” it “has rendered the national government virtually incapable of governing.” *Id.* at 1224, 1226.

influence on the institutional environment that we must simply abandon as unworkable the otherwise appealing Madisonian conception of protecting liberty automatically, through a structurally self-sustaining, non-democratic backup system. We must confront, in other words, the possibility that democracy is an act that must be performed without a net.

One possible way out of this difficulty might lie in greater resort to the judiciary. With separation of powers largely disabled as a self-sustaining, liberty-protective mechanism, perhaps we ought to place a correspondingly greater emphasis on the enumeration of liberties in a bill of rights, subject to enforcement by an impartial and independent judiciary. Certainly this seems to be the dominant model around the world. Most democracies do not favor an American-style presidential system with a strict separation of powers, but tend instead to use a Westminster-style parliamentary system that lacks a formal separation of executive and legislative functions.⁷⁷ At the same time, parliamentary democracies have tended increasingly to rely on elaborate enumerations of individual rights accompanied by strong and independent judicial enforcement of those rights against democratically authorized incursions.⁷⁸

The main recommendation for judicial review as a backup system for protecting liberty in a democracy is of course its independence from democratic mechanisms. Unlike executives and legislatures, courts owe their primary allegiance not to a democratic public, but to professional norms of judging that are for the most part free from democratic control. Although this independence makes judicial review a potentially robust mechanism for policing social problems arising from democratic failures, its defect from the Madisonian point of view is that its independence is not self-sustaining, but rather depends upon continuing voluntary compliance by judges with professional judicial norms. The advantage of a self-sustaining system, as the Framers conceived it, is that it continues to operate, and thus to

⁷⁷ Among the thirty-six oldest and most stable democracies identified in a recent study by Lijphart, see AREND LIJPHART, *PATTERNS OF DEMOCRACY* 50–55 (1999), all but five are presently considered parliamentary democracies under widely used criteria employed by the World Bank. See <http://www.worldbank.org>.

⁷⁸ RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004). For a recent attempt to demonstrate empirically the benefits of independent judicial review, see Rafael La Porta et al., *Judicial Checks and Balances*, 112 *J. POL. ECON.* 445 (2004).

protect the public good, even when political actors stop self-consciously obeying prevailing norms. Judicial review does not possess this characteristic to any great degree—it loses its effectiveness the moment judges stop following professional norms and start responding to other influences, such as public opinion or private self-interest.

Is it possible, then, to create a self-sustaining constitutional backup mechanism in an environment where democratic norms so powerfully shape political behavior? Given the strength of democratic norms throughout the system, perhaps a more promising approach would be to take a different leaf from Madison's book and attempt to design "a republican remedy for the diseases most incident to republican government"⁷⁹ by assuming that democratic incentives will continue to structure official behavior at most stages of the political process.

If, as I argued above, the main objections to the exercise of power in a democracy are likely to focus not on its distribution but on the specific purposes for which it is used, then the best way to prevent bad measures from being implemented is to assure the presence somewhere within the government of individuals who are likely to object to, and be in a position to obstruct, specific bad uses of governmental power. However, because it is impossible to know in advance which measures will be good and which will be bad, and thus who will be in the best position to recognize and to object to bad measures, the best strategy seems to be one that will result in populating government offices with the widest possible diversity of individuals. A strategy of inclusion, then, may be the modern democratic equivalent of the kingly balance of power conceived by the Framers.

Inclusion, of course, has long been a goal of democratic design for a multitude of reasons,⁸⁰ and many methods have been suggested for achieving it. Madison himself argued that a large

⁷⁹ THE FEDERALIST, *supra* note 1, No. 10, at 84 (James Madison).

⁸⁰ Many recent arguments for inclusion stress the social benefits that follow when a wide variety of voices are heard in public and in legislative councils. *See, e.g.*, ANNE PHILLIPS, THE POLITICS OF PRESENCE (1995); IRIS MARION YOUNG, INCLUSION AND DEMOCRACY (2000). But even under long-standing theories, such as interest pluralism and social choice, systematic exclusion stands as an obstacle to achievement of the ultimate goal of maximizing social utility by preventing a complete aggregation of all social interests. *See, e.g.*, RICHARD S. KATZ, DEMOCRACY AND ELECTIONS 42–44, 128 (1997).

republic, by its sheer size, would thwart the formation in Congress of efficacious majority factions by assuring a membership with a wide diversity of interests.⁸¹ Consociational systems sometimes assure a diversity of interests among government officials by requiring offices to rotate among members of major social groups, or by establishing quotas for legislative and cabinet positions.⁸² Proportional representation has long been conceived as a way to bring an appropriate diversity of viewpoints into the halls of government.⁸³

In the American case, a deeply entrenched social aversion to enforced proportionality may make some of these solutions impracticable.⁸⁴ Alternatively, given the important role of American political parties in controlling the behavior of elected officials, measures to assure the inclusiveness of political parties seem advisable. Such measures might include requirements of easy voter access to and mobility among political parties, internal party democracy, and transparency in party deliberative processes. The national Democratic Party, for example, already fosters internal diversity on a roughly proportional model by requiring delegates to the national convention to be split evenly by gender, and by instituting an affirmative action program to promote adequate representation at the convention of racial and ethnic groups.⁸⁵ Ultimately, measures such as these may hold the greatest promise for recreating the kind of backup protection against democratic failure that the Framers were so keen to include in the U.S. Constitution.

⁸¹ See THE FEDERALIST, *supra* note 1, No. 10, at 81–82 (James Madison).

⁸² See AREND LIJPHART, DEMOCRACIES 24–25 (1984); AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES 38–41 (1977).

⁸³ See, e.g., LANI GUINIER, THE TYRANNY OF THE MAJORITY 81–82 (1994) (criticizing racially disproportionate influence of whites in the American non-proportional system of representation); John Stuart Mill, *Considerations on Representative Government*, in ON LIBERTY AND OTHER ESSAYS 303 (John Gray ed., Oxford Univ. Press 1991) (“In a really equal democracy, every or any section would be represented, not disproportionately, but proportionately.”).

⁸⁴ For an account of the brief life and quick death of proportional representation in the United States, see KATHLEEN L. BARBER, A RIGHT TO REPRESENTATION (2000).

⁸⁵ See DEMOCRATIC NATIONAL COMMITTEE, THE CHARTER AND THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES (2003), art. 2, § 4, art. 8, §§ 3, 4, available at <http://www.democrats.org/pdfs/charter.pdf>.