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## THE SEPARATION OF POWERS IN A POST-APARTHEID SOUTH AFRICA

Stephen Ellmann\*

My task this afternoon is a large one: to describe the lessons of the United States' experience with the separation of powers and suggest what relevance those lessons might have to the shaping of a South African government. This is not a project that will produce a short, simple set of answers. The fact is that scholars and citizens in this country continue to debate the nature and the value of our system of separation of powers, and so many of the lessons one observer may draw will be considered errors by another.<sup>1</sup> More importantly, our constitutional structure works, or does not work, as part of our nation—a particular country with a particular history and culture, none of it identical by any means to South Africa's. Thus, the question of what you can learn from us is inevitably a contestable one. Finally, just as we debate the value of our own system of government, and disagree in part because we have differing political perspectives on what we want our government to do, so the lessons you may draw from our experience will no doubt depend on the priorities you hold in designing your new nation. Yet none of this should discourage us completely: the Framers of the United States Constitution, like you, acted in a quasi-revolutionary context; acted with imperfect knowledge; and acted with good inten-

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1. Debate continues in this country over such issues as whether our existing governmental arrangements separate powers too thoroughly, or not thoroughly enough; whether the constitutional role of the president is being undermined by Congress, or the other way around; whether the primary mission of the courts in adjudicating separation of powers cases should be to adjust our venerable constitution to modern realities, or instead to rescue the insights of the founders from the distortions of modern governmental maneuvering; and whether the courts should intervene in separation of powers cases at all, or should rather leave the political branches of the government to resolve their conflicts through political struggle. The resolution of these American debates is not my concern here, but I will explore certain elements of these ongoing arguments in the course of this essay.

tions, sober reasoning, political priorities and even prejudices. Nonetheless, what they wrought has lasted 200 years. I wish you equal good fortune, and I am very pleased to have the opportunity to assist you with my perception of the lessons of the American experience.

Let me begin with a lesson that may scarcely need repeating: *structure is important*. Those who framed our Constitution believed that liberty could be adequately guaranteed against the possible depredations of the federal government by structure alone—by specifying the government's powers and properly shaping the processes by which it could exercise them.<sup>2</sup> To that end, they divided the powers of government among the legislative, executive, and judicial branches. But, in certain respects, they also blended these powers together; the result can be seen in one light as a "separation of powers," and in another as a system of "checks and balances" whereby each branch of the government constrains, and is constrained by, the others.<sup>3</sup> Many citizens of the

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2. See DANIEL A. FARBER AND SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 221-22 (1990) (noting that the delegates at the constitutional convention specifically rejected a proposal to create a committee to prepare a bill of rights). In addition, the constitution, as submitted by the convention to the nation, contained only scattered provisions that directly protected individual rights.

3. As is well known, the separation of powers allocates legislative authority to Congress, executive responsibility to the President, and the judicial power of the United States to the federal courts. U.S. CONST. art. I, § 1 (legislative power); U.S. CONST. art. II, § 1 (executive power); U.S. CONST. art. III, § 1 (judicial power).

In many important respects the Constitution expressly blends powers rather than prying them apart. See U.S. CONST. art. I, § 7 (outlining the president's power to veto legislation, a grant of a form of legislative power to the executive branch); U.S. CONST. art. II, § 2 (establishing the Senate's power of "advice and consent" with respect to the president's appointments of other executive officials, arguably an instance of executive power in the hands of one house of the legislature); U.S. CONST. art. III, § 2 (specifying Congress' power to make exceptions from the Supreme Court's appellate jurisdiction, an authorization for Congress to limit, though not itself to wield, the judicial power).

To James Madison, a particularly influential participant in the framing of our Constitution and in its early years of operation, the strategies of separating powers and blending them together were not opposed but mutually supporting. As he wrote, the maxim of separation of powers:

does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake . . . to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed. 1961).

new United States lacked the Framers' confidence that this system by itself would preserve their liberties, and their insistence on a Bill of Rights led to its speedy adoption in the first years of the Constitution's life. But the principles of the separation of powers, and of checks and balances, have remained important themes of American constitutionalism. It has never been our constitutional strategy to protect liberty simply by relying on a Bill of Rights and an independent judiciary to block the wrongdoing of politicians.

Our experience offers good reason to believe in the importance of judicial enforcement of a Bill of Rights, but it confirms the Framers' belief that structural restraints are also needed. Even in a constitutional state, lawmakers have tremendous discretion. Our Bill of Rights is largely a negative one, forbidding certain government actions while requiring few and authorizing many—but the point would be essentially the same even if South Africa were to adopt the kinds of affirmative socioeconomic rights that the ANC's draft bill of rights proposes. How the government acts within the immense zone of the "permissible but not required" is extremely important to human liberty broadly understood. Lawmakers who escape the perils of judicial statutory interpretation (roughly as potent a source of judicial authority in this country as in yours) are free to act in this zone without constitutional constraint. In this country, for example, Congress is largely free to decide that welfare benefits will not be increased in proportion to the increasing number of children in a family receiving those benefits—or to decide the opposite.<sup>4</sup> What Congress decides makes a great difference to the families receiving those benefits, and perhaps to other people as well, but the Constitution as currently read will not normally prescribe an answer.<sup>5</sup>

In addition, the dimensions of what is or is not unconstitutional will not be subject to wholly apolitical adjudication. The decisions of the United States Supreme Court, or of South Africa's Appellate Division, offer ample evidence of the breadth of the judges' discretion and the degree to which the judges' perspectives on their world affect their decisions.<sup>6</sup> This is not to disparage the ideal of an impartial judiciary, but

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4. See *Dandridge v. Williams*, 397 U.S. 471, 482 (1970) (holding that a state welfare regulation limiting the maximum family grant does not violate the Equal Protection Clause of the Fourteenth Amendment, so long as it is "rationally based and free from invidious discrimination"). A comparable standard would apply to *federal* action, which would be evaluated in this respect under the Fifth Amendment.

5. *Id.*

6. See STEPHEN ELLMANN, IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY (1992) (discussing the influences on the

to recognize the limits on its attainability. It is difficult even to imagine a judge so "impartial" as to have no views on fundamental issues affecting his or her society. Moreover, we must recognize limits on impartiality's desirability as well. It is possible to imagine a judge who profoundly disagrees with the basic premises of the state in which he or she serves, but those who believe their state is a decent one will not be likely to select its adversaries, however talented, as its judges. (The Weimar republic in Germany provides a grim example of the consequences of ignoring this rule.)<sup>7</sup> Even if South Africa adheres to a substantially depoliticized system of judicial appointments, judges' own politics and perspectives will matter. In addition, the more the system of appointments becomes responsive to political criteria, as has happened widely in this country and to a significant extent in South Africa, the more the meaning of the Constitution will tend to resemble the preferences of the party holding the appointment power.

What our Constitution prescribes to guide the resolution of questions not governed by the Bill of Rights is a structure. The structure is not by any means completely spelled out in the Constitution, and it has changed over time. Nonetheless, I believe the system shaped by the Framers continues to profoundly influence our politics and our governmental decisions. As a result, perhaps unlike my panel colleague Professor Kurland, I believe the separation of powers continues to play a role in protecting liberty in America.<sup>8</sup> It is not a precision tool for this

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South African Appellate Division's decisions in cases dealing with the state of emergency).

7. Ingo Müller, in his fierce history of German law under the Nazis, notes that the judges of the German Empire "whose conscience would not permit them to serve the republic instead of the kaiser were offered early retirement by the government, with full consideration of their material needs. Less than 0.15 percent of judges took advantage of this opportunity, however." INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 10 (Deborah Lucas Schneider trans. 1991). Even though the remaining judges swore their loyalty to the nation, Müller maintains that the judges "kept their distance from the republic and continued to take what remained of the old values as their point of orientation." *Id.* Müller also argues that as the Nazis rose to prominence during the Weimar republic years, "[i]n many trials . . . the courts continued to take the Nazi side of the ongoing political struggle, sometimes openly, sometimes behind the façade of legal maneuvers." *Id.* at 17. *See also* David A.J. Richards, *Terror and the Law*, 5 HUM. RTS. Q. 171, 179 (1983) (discussing the "authoritarian bias" of the Weimar judiciary, including its opposition to "legal action against . . . the Nazi authoritarian terror of the right").

8. *See* Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 604-13 (1986). Kurland argues that "[w]ith the

purpose, however, for it does not prevent bad governmental action by identifying it as such, but by impeding all governmental action. In the process it undoubtedly also impedes some desirable governmental action that might enhance liberty. But with all its imprecisions and costs, the separation of powers is still a supplement to the Bill of Rights as a limit on the danger of tyranny.

What I have just said is an argument for imposing limits on power that go beyond those generated by judicial enforcement of a bill of rights. The next lesson, however, is that power can be *too* limited, or too compromised. Our history provides painful examples of the consequences of unwise restraints on governmental authority. The Constitution itself is in large measure a product of the failure—or so the Framers saw it—of the Articles of Confederation, under which our nation was governed for the first years of its existence.<sup>9</sup> The Articles bound the former colonies, now states, together, but by no means very tightly. It was difficult for the national government to act, for it had very little coercive authority over its constituent states,<sup>10</sup> and the Articles established no separate executive branch.<sup>11</sup> The Constitution we have was the result of the conviction that the Articles did not work.

But the Constitution we have did not work either, and in a fundamental way: it foundered on the issue of slavery. The Constitution was a

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growth of government, the safeguard thought to be inherent in separation of powers has largely failed." *Id.* at 612.

9. See Farber & Sherry, *supra* note 2, at 23-26.

10. *Id.* The Articles also specifically deprived the national government ("the United States in Congress assembled") of power to make a wide range of critically important decisions, from engaging in war to borrowing or appropriating money, without the consent of nine of the thirteen states. ARTICLES OF CONFEDERATION, art. IX.

11. The Articles envisaged government very much under the control of the legislature. The Continental Congress, or the "United States in Congress assembled," had not only legislative but also some judicial authority. *Id.* It also had executive authority; the Articles empowered it to establish a "Committee of the States," consisting of one delegate from each state, with power "to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction." *Id.*

While the Articles did not themselves establish an executive branch, the Continental Congress did take steps in this direction. Geoffrey Miller writes that "the pattern was one of movement from congressional towards executive government. Congress, although loath to cede any of its powers to an executive, was compelled by the exigencies of war and the needs of government to do so." Geoffrey Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 69. It seems very likely, as Miller suggests, that this pattern "inform[ed]" the Framers' subsequent deliberations on the constitution we now have. See *id.* at 68.

compromise between the slave states and the free, or freer, states, and this compromise proved untenable.<sup>12</sup> The nation could not hold together while the institution of slavery divided it. The resolution of this issue led the nation through secession and civil war to a revised Constitution which declared the abolition of slavery, commanded the states no longer to deny to their people, black and white alike, the equal protection of the laws, and laid the groundwork for the federal government's enforcement of these principles.<sup>13</sup> I do not mention this piece of history in order to attribute our Civil War to particular defects in the allocation of power, though I suspect the elements of our separation of powers did play their part in shaping the politics of the antebellum years. Rather, my point is a larger one: a society with intolerable injustices enshrined or protected by its constitution will not survive. Put more bluntly, unless a new South African government has the constitutional power to right the wrongs of apartheid, there will be little reason for optimism about South African stability or freedom.<sup>14</sup>

These are very broad lessons indeed: that checks on power besides a bill of rights are needed, and that ineffectual or unjust government must be avoided. But they do have concrete relevance to South Africa. They counsel against a system of government in which the only constraints on majority will are those of the bill of rights as interpreted by the courts. They also counsel against a government so hamstrung by the need for consensus among people of sharply different views that it is unable to respond to the problems South Africa faces. Put more concretely still, they counsel against both pure majoritarianism and thoroughgoing

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12. See DON FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 26-27 (1978) (noting that though the Constitution never uses the word "slavery," it nonetheless plainly "acknowledg[es] the legitimate presence of slavery in American life"). Perhaps the most notorious of its euphemistic acknowledgements was the "three-fifths clause," which provided for the apportionment of congressional representation and of direct taxes among the states based on figures determined by the states' free population and "three fifths of all other Persons." U.S. CONST. art. I, § 2.

13. These guarantees are the promise of the Thirteenth and Fourteenth Amendments.

14. Herman Cohen, then Assistant Secretary of State, made a similar point when he reported to a congressional subcommittee that a future South African constitution "should avoid overly complex arrangements intended to guarantee a share of power to particular groups which will frustrate effective governance. Minorities have the right to safeguards. . . . They cannot expect a veto." Jim Lobe, *South Africa: U.S. Against White Veto in New Government*, INTER PRESS SERV., July 23, 1992, available in LEXIS, Nexis Library, Wires File.

consociationalism. What they counsel in favor of, broadly, is splitting the difference, so as to enable the government to govern but prevent it from riding roughshod over opposing views and opposing citizens. How to split this difference remains a matter of debate, here and elsewhere, and this is a debate to which I hope South Africa will contribute its own answers. But the American answer, which I believe contains some part of the truth on this score, lies in good measure in our system of separation of powers and checks and balances. Let us look more closely at what American experience argues for and against, by examining four more specific points: first, the structure of the legislature; second, the separation of the executive and legislative branches; third, the structure of the executive branch; and, fourth, the challenges of preserving in practice whatever system you agree upon on paper.

1. *The Structure of the Legislature*: Today the phrase "separation of powers" calls to mind for Americans the divisions between the three branches of our government, the executive, legislative, and judicial branches. But the separation of powers can, and does, operate in the United States not only between, but also within, branches. Because South Africans are now considering the possibility of a bicameral legislature, a legislature within which power is in some measure separated or divided between the two houses, it is important to look at American experience on this score. I want to focus here on two aspects of congressional structure. The first is bicameralism *per se*; the second is the system of allocating representation in each House. The Framers of the United States Constitution chose bicameralism, and decided as well to give the states equal representation in the Senate, while making representation in the House proportional to population. But there is no intrinsic link between the choice of bicameralism and the decision to select one house of the legislature in a way that is not based on population. Indeed, every American state has its own legislature, and all but one of these are bicameral, but in these bicameral state legislatures today *both* houses are selected by methods that make representation proportionate to population.<sup>15</sup>

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15. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding "that, as a basic constitutional standard, the [Fourteenth Amendment's] Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis"). That representation in bicameral legislatures is proportional to population is probably more the result of the series of Supreme Court reapportionment decisions beginning with *Reynolds* than it is the product of decisions initiated by the states themselves. Nonetheless, the judicial imposition of a duty of equal representation has not triggered any movement among the states to abandon bicameralism.



The National Party has endorsed bicameralism, while the ANC is plainly open to the idea.<sup>16</sup> There are several reasons for adopting a bicameral system. First, it can encourage greater reflection on governmental action.<sup>17</sup> The sheer fact that two houses, rather than one, must consider each piece of legislation can generate greater reflection. Second, it can modestly increase the barriers to governmental action of any sort. If the consent of both houses is required for legislation to be enacted (as it is in the United States),<sup>18</sup> then the possibility always exists that for whatever reason a majority in one house will not be accompanied by a majority in the other. Third, it can give citizens greater access to the lawmaking process. This is not simply, or even primarily, because it multiplies the number of legislators and so the number of interactions that citizens can have with their legislators. Citizen access is also enhanced if the electoral scheme assures that the members of the two houses will hear public opinions most piercingly at different moments; in the United States Congress, for example, representatives are elected every two years while senators, one third of them at a time, are elected for six-year terms. If, as is also the case in the United States Congress, senators are elected state-wide while representatives are elected from districts within the states, the result is that the two houses will reflect different bodies of voters as well. The chance that an individual voter's opinions will be taken seriously goes up when that voter gets to vote for more than one legislator, and does so at more than one time and

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16. See CONSTITUTIONAL RULE IN A PARTICIPATORY DEMOCRACY: THE NATIONAL PARTY'S FRAMEWORK FOR A NEW DEMOCRATIC SOUTH AFRICA 11-12 (Sept. 4, 1991) [hereinafter cited as NATIONAL PARTY FRAMEWORK]; AFRICAN NATIONAL CONGRESS CONSTITUTIONAL COMMITTEE, DISCUSSION DOCUMENT: CONSTITUTIONAL PRINCIPLES AND STRUCTURES FOR A DEMOCRATIC SOUTH AFRICA 4, 22-23 (Apr. 8, 1991) [hereinafter cited as ANC PRINCIPLES].

17. See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983) (emphasizing that "[t]he division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings").

18. See *id.* at 951 (ruling that every exercise of "the legislative power of the Federal government" must rest on bicameral approval of the legislation in question). It is of course possible to establish a bicameral legislature in which one House alone can enact legislation, while the other House can only insist on reconsideration or delay. The British House of Lords today generally exercises only such subordinate authority, although until as late as 1911 its power was much greater. See James G. Wilson, *Altered States: A Comparison of Separation of Powers in the United States and in the United Kingdom*, 18 HASTINGS CON. L. Q. 125, 135-36 (1990) (discussing the legislative power of the House of Lords).

with more than one set of fellow voters.

These, it seems to me, are useful functions. Yet it might be argued that the result of this multiplication of voices, and of opportunities for reflection, delay, and dissensus, is to undermine the government's ability to carry out its program. I do not want to ignore that point, but I want to postpone it until I take up the issue of the separation of the legislature and the executive, a context in which this danger of hamstringing the government is even more squarely posed.

Instead, let us turn from bicameralism in the abstract to the particular bicameralism of the United States Constitution, in which one house, the Senate, gives every state the same number of senators (two). As a consequence, small states enjoy a level of representation wildly out of proportion to their populations. This system is, undeniably, a form of minority protection. Half the population of the United States lives in the nine largest states, represented by 18 senators out of the total of 100.<sup>19</sup> Meanwhile, the seventeen smallest states, in which well under a tenth of the population lives, are represented by 34 senators—mathematically enough to control the outcome of any vote in which a two-thirds majority is required.<sup>20</sup> On some issues, such as the ratification of treaties, only the Senate and not the House of Representatives is entitled to participate, and so the blow to the voice of the citizens of the larger states is all the greater.<sup>21</sup> Yet this feature of our system does not generate public outcry, and although it surely does give disproportionate power to some citizens as against others, it would be hard to say that as a result the United States is not a democracy. There is at least some room for unequal representation in democracy, for the protection of relatively smaller interests—here, the smaller states—against the will of the whole, and for the protection of subdivisions of the government—the states, large or small—against the central, national government.

It is important, however, not to romanticize this system. It was not inevitable. In fact, James Madison, sometimes called the Father of our

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19. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 20 (1991).

20. *Id.* A two-thirds majority in each House is required to override a Presidential veto. U.S. CONST. art. I, § 7. In addition, a two-thirds majority in the Senate is required to ratify a treaty. U.S. CONST. art. II, § 2.

21. U.S. CONST. art. II, § 2. The Senate is also the only House with authority to block a Presidential appointment. *Id.* The Constitution assigns one function exclusively to the House of Representatives, namely the authority to originate bills for raising revenue. *Id.* art. I, § 7. The Senate, however, has the same power to amend or reject such bills as it would with any other proposed legislation.

Constitution, vigorously opposed it, as did others at the Constitutional Convention.<sup>22</sup> Madison even resisted compromise proposals, which would have resulted in some, but less, disproportionality.<sup>23</sup> The states have two senators each because the delegates from the small states at the Convention dug in their heels, and forced a compromise on this point.<sup>24</sup> Moreover, this compromise has had its costs. The extraordinary power of Southern senators, who tended to serve many terms and accumulate seniority, and who were deeply opposed to equal rights for blacks, contributed to the slow response of the political branches of the national government to the civil rights revolution of the 1950s and thereafter. Equal representation for the states in the Senate is not integral to bicameralism, nor to the structure of checks and balances as James Madison first envisaged it. Rather, equal representation is the result of sheer political conflict. In South Africa, the prices of compromise, for any side, may be similar departures from cherished principles.

Finally, it is important not to confuse this system with the system proposed by the National Party in September, 1991 in its pamphlet, *Constitutional Rule in a Participatory Democracy*.<sup>25</sup> This proposal envisaged a bicameral parliament, in which each region would have equal representation in the upper ("Second") house.<sup>26</sup> But it also envisaged that "[e]ach political party which . . . gained a specified amount of

22. See Farber & Sherry, *supra* note 2, at 112-34 (tracing and offering excerpts from the Convention debates on this issue).

23. Farber & Sherry, *supra* note 2, at 119.

24. The framers' debates on this score depart dramatically from the image of gentlemanly colloquy which Americans often take to have been the reality of the Constitutional Convention. In particular, George Bedford, a delegate from the small state of Delaware, declared that:

[The large states] insist that although the powers of the general government will be increased, yet it will be for the good of the whole; and although the three great States form nearly a majority of the people of America they never will hurt or injure the lesser states. *I do not, gentlemen, trust you.* If you possess the power, the abuse of it could not be checked; and what then would prevent you from exercising it to our destruction?

*Id.* at 125 (quoting Bedford, as reported in the notes of fellow delegate Robert Yates) (emphasis in original). Perhaps the lowest point was reached when Bedford moved from distrust to threats:

The Large States dare not dissolve the Confederation. If they do the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice.

*Id.*

25. NATIONAL PARTY FRAMEWORK, *supra* note 16.

26. NATIONAL PARTY FRAMEWORK, *supra* note 16, at 11.

support in the election in the region's legislative body will be allocated an equal number of the seats for that region" in this House.<sup>27</sup> This rule does not empower states but rather parties within states. Depending on where the threshold is set, the disproportionate empowerment of minority parties could be dramatic.<sup>28</sup> American government sets the winners of elections in various jurisdictions, and at various moments, against each other; it does not, characteristically, give seats to the losers. Our government, as distrustful as it is of unchecked majority power, is much less distrustful than the National Party's proposal, which is, I take it, not modeled on American separation of powers but on the theories of consociationalism. It is hard not to fear that this proposal would generate precisely the sort of minority veto that consociationalism endorses.<sup>29</sup> It is also difficult not to fear that such a veto will operate to thwart the attainment of democratic rule in South Africa.<sup>30</sup>

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27. NATIONAL PARTY FRAMEWORK, *supra* note 16, at 11-12.

28. ARTHUR CHASKALSON, THE NATIONAL PARTY'S CONSTITUTIONAL PROPOSALS 2 (1991). Chaskalson, a member of the ANC's delegation in the constitutional negotiations at the Convention for a Democratic South Africa (CODESA), points out that the impact of this idea is compounded by the National Party's proposal that legislation amending the constitution, relating to the interests of minorities or regions, or dealing with matters entrenched in the constitution, would require a "weighted majority" in this House for approval. *Id.* at 2-3; *see also* NATIONAL PARTY FRAMEWORK, *supra* note 16, at 12.

29. AREND LIJPHART, POWER-SHARING IN SOUTH AFRICA 6 (1985) (identifying "[t]he four basic elements of consociational democracy" as: "(1) Executive power-sharing among the representatives of all significant groups; (2) A high degree of internal autonomy for groups that wish to have it; (3) Proportional representation and proportional allocation of civil service positions and public funds; and (4) A minority veto on the most vital issues"). The National Party, however, disclaims any intention to achieve a minority veto. *See, e.g.,* British Broadcasting Corporation, Summary of World Broadcasts, *Official Transcript of Remarks and Answers to Questions by President de Klerk*, Aug. 5, 1992, available in LEXIS, Nexis Library, Wires File.

30. Ideally, the minority veto works not as a cudgel with which to bludgeon the majority but as a fallback device buttressing cooperation among the leaders of diverse and potentially conflicting groups, cooperation on which consociationalism relies). *See* Lijphart, *supra* note 29, at 8. But such cooperation is not inevitable, as Lijphart recognizes. *Id.* at 100-01. It may not even be likely. *See* DONALD L. HOROWITZ, A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY 139-43 (1991) [hereinafter HOROWITZ, A DEMOCRATIC SOUTH AFRICA?]; DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 571-76 (1985). In South Africa, arrangements that appear to insulate white power and privilege seem particularly unlikely to win popular support. *See* HOROWITZ, A DEMOCRATIC SOUTH AFRICA? at 143 (citing a survey in which only one percent of Black respondents approved of "special White voting privileges").

2. *The Separation of the Executive and Legislative Branches*: It is a central claim of American constitutionalism that preventing tyranny requires a substantial separation of powers. Madison wrote "the very definition of tyranny" consisted in "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many."<sup>31</sup> In particular, the Framers were at pains to separate the legislative and executive branches. This separation was not absolute, for each branch has various powers over the other. These powers over each other, however, were not meant to merge the two branches but rather to give each, in Madison's words, "the necessary constitutional means and personal motives to resist encroachments of the other[] . . . . Ambition," as he put it, "must be made to counteract ambition."<sup>32</sup>

The Convention for a Democratic South Africa (CODESA) Declaration of Intent expresses its signatories' agreement "[t]hat there shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances."<sup>33</sup> But this broad endorsement leaves much room for argument about the details, as our Framers' attachment to separation of powers ideas left much room for argument here.<sup>34</sup> The ANC leaves open the question of whether the President should be directly elected by the people or "elected by and answerable to Parliament."<sup>35</sup> The National Party proposes to make the Presidency "consist of the leaders of the three largest parties" in the lower, more representative, House of Parliament, and would empower Parliament to pass a motion of no confidence which would presumably bring down the Presidency.<sup>36</sup> The structure the United States has adopted firmly endorses more separation than that. To understand our structure, and the possibilities it offers for South Africa, it will be helpful first to contrast

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31. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

32. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

33. CONVENTION FOR A DEMOCRATIC SOUTH AFRICA, DECLARATION OF INTENT ¶ 5(d) (adopted at the first meeting of CODESA, Dec. 20-21, 1991), *reprinted in* NEGOTIATION NEWS, Apr. 24, 1992, at 16 [hereinafter CODESA DECLARATION].

34. *See* THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (commenting that during the debates over ratification of our Constitution, "[o]ne of the principal objections inculcated by the more respectable adversaries to the Constitution [was] its supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct").

35. ANC PRINCIPLES, *supra* note 16, ¶ 3.2, at 21.

36. NATIONAL PARTY FRAMEWORK, *supra* note 16, at 13.

a very different form of government, British parliamentary rule, with the system we have adopted.<sup>37</sup>

The British Prime Minister is the leader of the majority party in the House of Commons.<sup>38</sup> A member of that House himself (or herself), the Prime Minister appoints the rest of the Cabinet from the ranks of the other Members of this House (the "M.P.s" or Members of Parliament) and to some extent from the House of Lords.<sup>39</sup> Armed with tremendous authority to insist on the voting support of the backbench M.P.'s,<sup>40</sup> the Prime Minister is in a position to enact his or her program into law—more or less without regard to what the opposition may have to say about it.<sup>41</sup> If the Prime Minister ceases to be able to do this, in particular if he or she loses a vote of no confidence, then executive and legislative branches are both likely to fall at once,<sup>42</sup> and a new executive will emerge from the new Parliament subsequently elected. This is the British system; at least until the adoption of the 1983 constitution, South Africa too had such a "Westminster system."<sup>43</sup> Even now, the National Party and the State President are constitutionally capable of wielding comparably decisive governmental authority.<sup>44</sup> So far as this

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37. For a detailed analysis of the British system (an analysis on which I rely here), see Wilson *supra* note 18.

38. That is, the Prime Minister is "the person best able to form and maintain a majority in the House of Commons,"—the leader of the majority party when, as is the case today, a single party does hold a majority.

39. Wilson, *supra* note 18.

40. Constitutional convention obliges Ministers to "publicly maintain complete loyalty to the government's policies," and binds the other majority party Members of Parliament (the "backbenchers") "to comply with their leaders' wishes on specific votes." *Id.* Lest these conventions be violated (as can happen, *id.* at 138 n. 78), the Prime Minister enjoys, *inter alia*, "enormous powers of patronage" with which to bend resistant party members to his or her will. *Id.* at 141-42.

41. See Wilson, *supra* note 18, at 140-41; Lloyd M. Cutler, *To Form a Government*, reprinted in *REFORMING AMERICAN GOVERNMENT: THE BICENTENNIAL PAPERS OF THE COMMITTEE ON THE CONSTITUTIONAL SYSTEM* 11, 14 (Donald L. Robinson ed., 1985) [hereinafter *REFORMING AMERICAN GOVERNMENT*].

42. See Wilson, *supra* note 18, at 139 (explaining that "upon a vote of no confidence, the backbenchers can force the Prime Minister to resign or dissolve Parliament"). The latter course, the dissolution of parliament, results in the election of a new Parliament. *Id.*

43. See GRETCHEN CARPENTER, *INTRODUCTION TO SOUTH AFRICAN CONSTITUTIONAL LAW* 74 (1987).

44. The 1983 Constitution created a tricameral Parliament for South Africa, in which whites, "Coloureds," and Indians—but not Africans—each have a House). See Republic of South Africa Constitution Act of 1983, §§ 37, 52. Whites, however, and

description goes, this is a formula for effective, but also unchecked, majority rule.

In contrast, the American President is not normally elected by Congress or by the majority party in Congress.<sup>45</sup> Cabinet officials also are not members of Congress; such dual office-holding is explicitly forbidden by the constitution.<sup>46</sup> Nor does the President share a term with Congress; Representatives are elected for two-year terms, and must face re-election in the middle of the President's four-year term, while Senators are elected for staggered six-year terms, so that only one-third face election campaigns in any Presidential election year.<sup>47</sup> Thus, the President's electoral fortunes are quite independent of those of the legislators. In fact, during the past 25 years, the White House has almost always been in the hands of the Republicans, while at least one, and usually both, houses of Congress have had Democratic Party majorities. The President has no authority to dissolve a Congress dominated by the

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in particular the National Party as the majority party in the white "House of Assembly," remain preeminent. National Party discipline has historically been strong, *see* HERMANN GILIOMEE, *Afrikaner Politics: How the System Works*, in HERIBERT ADAM & HERMANN GILIOMEE, *ETHNIC POWER MOBILIZED: CAN SOUTH AFRICA CHANGE?* 200-01 (1979), and so this party controls the results of votes in the House of Assembly. Even without the members it has recently gained in the other houses, the National Party's control over the whites' house has been enough to insure its control over the government as a whole. If the Coloured house (the "House of Representatives") or the Indian house (the "House of Delegates") rejects proposed legislation which the House of Assembly has approved (or vice-versa), then the State President may choose to submit the disagreement for resolution to a body known as the President's Council. The State President may also choose *not* to submit the disagreement to the Council, thereby preventing the bill in question from becoming law. *See* Republic of South Africa Constitution Act of 1983, §§ 32, 78. The State President, to whom this decision is entrusted, is effectively elected by the white majority party, *id.* § 7; HAROLD G. RUDOLPH, *Constitutional Law*, in *ANNUAL SURVEY OF SOUTH AFRICAN LAW* 1983 1, 4 (1985), and is, in fact, the leader of this party. Moreover, the President's Council is so composed that the National Party and the State President can readily ensure that this Council too works the will of the Nationalists—though this party will not necessarily consider it expedient to override opposition in the other Houses. *See* Republic of South Africa Constitution Act § 70. *See* Rudolph, *supra*, at 1-9 (offering comprehensive treatment of these and other features of the 1983 Constitution).

45. Normally the President is chosen by popular election (more precisely, by "electors" selected in each state based on the popular vote for President in that state); only in the event that no candidate wins election by this process does the House of Representatives select the President. *See* U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

46. *Id.* art. I, § 6.

47. *Id.* art. I, §§ 2, 3; *Id.* art. II, § 1.

other party, nor does Congress have any authority to remove the President from office on the basis of a vote of "no confidence."<sup>48</sup> Yet while Congress and the President are so plainly capable of having very different perspectives on public policy, the passage of legislation generally requires the two branches to concur. If the President vetoes a bill passed by Congress, it will not become law unless a two-thirds majority votes to override the veto.<sup>49</sup> This system is *meant* to prevent government action—not all government action, to be sure, but that action which is the product of what Madison called "faction," of segments of the community, even majority segments of the community, acting in a way that is unjust or unwise for the community as a whole.<sup>50</sup>

There have been powerful criticisms of the American system from respected observers of, and participants in, our government. You will hear from one of these critics, Lloyd Cutler, tomorrow. Mr. Cutler can speak for himself, and from a wealth of experience, but let me outline part of his critique in order to pursue my own argument here. Cutler has argued that in our system of divided and mutually resistant authority the President cannot, in his words, "form a government" and enact a legislative program. Though he does not urge that this country adopt a parliamentary system, he has written admiringly of such systems, in which a slim majority can work its will, subject of course to the ultimate test of the voters' approval or disapproval at the next elections. Cutler maintains that on many issues of our day consensus is unattainable; indeed, even when the President's party holds a congressional majority, consensus on the President's proposals is far from automatic. Effective government therefore requires that action should not await the consensus that our system makes so important. In essence, Cutler maintains that the Framers succeeded too well; at least in our day, the system they designed may avoid the dominance of faction only by weakening the government at a time when we need, as perhaps the Framers did not, to have the government in action.<sup>51</sup>

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48. Congress can only remove the President from office by impeachment for "Treason, Bribery, or other high Crimes and Misdemeanors." *Id.* art. II, § 4. No President has ever been removed from office this way.

49. *Id.* art. I, § 7.

50. See THE FEDERALIST NO. 10 (James Madison); GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, AND MARK V. TUSHNET, CONSTITUTIONAL LAW 12-14 (2d ed. 1991).

51. See Cutler, *supra* note 41; LLOYD N. CUTLER, *Political Parties and a Workable Government*, in A WORKABLE GOVERNMENT? THE CONSTITUTION AFTER 200 YEARS 49-58 (Burke Marshall ed., 1987). For similar critiques of the American con-



Whether this critique is correct continues to be debated.<sup>52</sup> I remain agnostic about how much of the weakness of American politics should be attributed to our governmental structure, and how much should be attributed to the genuine complexity of our problems and the failure of our people and our politicians to face them frankly and seriously. Furthermore, as a person whose support for liberal Democrats has been rather out of fashion lately, I think it is good that the Republicans have not been able to write all of the policies of earlier Democratic eras out of the statute books. In short, I believe there is value in inertia, and in the requirement of considerable consensus to overcome it, in the legislative process in this country.

It is surely true, however, that the separation of executive and legislative powers makes governmental action harder; the only debatable issue is how much harder. It is equally clear that governmental action is not *as hard* under the American system as it could be under a consociational system, such as the one proposed by the National Party, that would give extra representation to minority political parties and impose heightened majority requirements as a predicate for the passage of legislation affecting the relations among groups in South Africa.<sup>53</sup> To set barriers to government action as high as this is a risky step indeed, for if it is entirely possible, as Donald Horowitz has argued, that the necessary strong consensus simply will not be achieved.<sup>54</sup> In this light, I think the American system has much to recommend it for South Africa. Certainly it would not give a Parliamentary majority as much power as the British system; it would give considerable effective authority to a President who is backed by a Parliamentary majority—as the first post-apartheid South African President may be—while still offering minority

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stitutional system, as compared to systems of parliamentary democracy, see Charles Hardin, *The Crisis and Its Cure*, reprinted in REFORMING AMERICAN GOVERNMENT, *supra* note 41, at 3-10; C. Douglas Dillon, *The Challenge of Modern Governance*, in REFORMING AMERICAN GOVERNMENT, *supra* note 41, at 24-29.

52. See Don K. Price, *Words of Caution About Structural Change*, in REFORMING AMERICAN GOVERNMENT, *supra* note 41, at 39-49 (arguing against the application of the parliamentary model in the United States—though in favor of a range of less drastic reforms); See also Martin H. Redish and Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 465-74 (1991) (suggesting that alternative forms of governing structures would not protect "popular sovereignty and individual liberty" in the United States as well as the separation of powers model of government).

53. See *supra* notes 25-30, 36 and accompanying text.

54. See *supra* note 30.

parties a distinct capacity to resist policies that they dislike.<sup>55</sup> This does not make this system perfect for either those who share the views of the National Party or those who share the views of the ANC. Nonetheless, it may make it a useful compromise. Furthermore, the details of the American structure need not be your blueprint; it is open to the parties in South Africa, as some Americans urge we should do here at home, to modulate the separation of powers, with a view to enhancing the power of government to act. No doubt you have already begun looking at the various solutions that other countries, from Germany to Namibia, have devised to address these concerns.<sup>56</sup>

3. *The Structure of the Executive Branch*: One of the central doctrinal points of American law governing separation of powers is that our Constitution provides for a "single executive."<sup>57</sup> There is one President, and

55. See HOROWITZ, *A DEMOCRATIC SOUTH AFRICA?*, *supra* note 30, at 205, 214 (endorsing a "separate, directly elected executive" for South Africa in part on the ground that this structure limits the chance that any single group can "capture the state permanently by merely capturing a majority in parliament"). Horowitz also maintains that if the electoral system is properly designed the election of the President can be an "arena for intergroup conciliation." *Id.* at 205.

56. See Lloyd N. Cutler, *Modern European Constitutions and Their Relevance in the American Context*, in *REFORMING AMERICAN GOVERNMENT*, *supra* note 41, at 299-312 (discussing the structures of government that have evolved in the United Kingdom, France and Germany). Namibia's recently adopted Constitution establishes a President who is elected directly by the people, and can only be removed by the legislature by impeachment, a procedure which requires a two-thirds majority in both houses of the legislature. See NAMIBIA CONST. arts. 28, 29. In these respects, Namibia's system closely resembles that of the United States. Namibia ties the President somewhat more closely to Parliament than does the United States, however, for Namibia authorizes the President to dissolve the National Assembly (the popularly elected house of Parliament) "if the Government is unable to govern effectively," and that step must be followed by new elections for both the National Assembly and the President. *Id.* art. 57. Even when the President exercises this power, however, the link between the fate of the executive and legislative branches is not complete, for the second house of Parliament, the National Council, is not subject to dissolution by the President. See *id.* (making no provision for dissolution of the National Council). Nor are the Council's members elected directly by the people, as are the President and the members of the Assembly. *Id.* art. 69. The powers of the National Council are not as great as those of the National Assembly, but they include the ability, in certain circumstances, to block the passage of legislation in the absence of a two-thirds majority in the Assembly. NAMIBIA CONST. arts. 74, 75(5).

57. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599-600 (1984) ("the Convention clearly and consciously chose a single and independent executive over a collegial body subject to legislative direction").

one only, and that person is vested with the "executive Power."<sup>58</sup> This decision, a fundamental choice made by the Framers after considering alternative structures,<sup>59</sup> rests on the belief that vesting power in a single executive will make government both more effective and more accountable than would a more diffuse system of executing the laws.<sup>60</sup> This decision is frankly inconsistent with the National Party proposal. That proposal stated "that the office of head of state and of government should be vested in a collective body known as the Presidency," to "consist of the leaders of the three largest parties" in the lower ("First") house of Parliament, making decisions "by consensus," with the chairmanship of this collective entity and the position of "State President" (if such a position is actually established) changing hands on a rotating basis.<sup>61</sup> Since no one member of the Presidency will be able to control its decisions, this proposal is dangerously likely to impede effective executive action and dissipate executive accountability.<sup>62</sup> It will also deprive South Africa of the symbol of national unity, and source of national leadership, that a single executive can provide—as we have seen in this country, and as you have seen, not least under F.W. de Klerk, in yours.

But American experience by no means counsels that each and every element of the execution and administration of the law must be under the control of a single person. This may seem paradoxical, given what I have just said about the Framers' decision in favor of a single executive. Whether or not it is paradoxical, it is certainly controversial; recent years have seen both court opinions and scholarly commentary focused on explicating just how powerful the President must be.<sup>63</sup> I will

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58. U.S. CONST. art. II, § 1.

59. See Farber & Sherry, *supra* note 2, at 81-86; Strauss, *supra* note 57, at 599-600; Miller, *supra* note 11, at 70.

60. Hamilton sounded both of these themes in THE FEDERALIST NO. 70 (Alexander Hamilton).

61. See NATIONAL PARTY FRAMEWORK, *supra* note 16, at 13.

62. Writing two centuries ago, Alexander Hamilton sharply criticized a system that provided for "a plurality of magistrates [that is, executives] of equal dignity and authority, a scheme, the advocates for which are not likely to form a numerous sect." THE FEDERALIST NO. 70, at 427 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton feared that such a structure would generate "the most bitter dissensions," which "might impede or frustrate the most important measures of the government in the most critical emergencies of the state. And what is still worse, they might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy." *Id.* at 426.

63. See, e.g., Morrison v. Olson, 487 U.S. 654, 685-696 (1988); Bowsher v.

touch on certain parts of this controversy, but I am concerned here not to resolve this issue but to explicate possibilities that American law presents for South Africa. Before I do so, let me just add that South Africans are already investigating related possibilities. The ANC, for example, has called for "an independent electoral commission" to oversee every aspect of elections from the printing of ballot papers to the adoption of regulations for access by parties to the public media and fairness to all political parties by the public media.<sup>64</sup> This proposal would entail a vesting of very substantial executive authority outside the central executive. Both the ANC and the National Party want to create an independent Ombud or Ombudsman.<sup>65</sup> The National Party has proposed greater autonomy as well for the Auditor-General, the Public Service Commission, and the Reserve Bank.<sup>66</sup> Let us look, therefore, at the methods American constitutional law suggests for establishing such quasi-independent executive agencies.

The beginning of wisdom in this sphere is surely the recognition that even if the president is the head of government, almost all of what government does will be done by subordinate officials. The exact extent of the President's power, therefore, depends in large measure on the extent of his or her ability to hire, fire, and control those subordinates.<sup>67</sup>

Limiting the President's power to hire officials is one way of constraining his or her authority. As our constitution is currently read, Congress itself cannot appoint any official who exercises significant executive authority.<sup>68</sup> But Congress has wielded substantial discretion to de-

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Synar, 478 U.S. 714, 721-734 (1986); Richard J. Pierce, Jr., *Morrison v. Olson, Separation of Powers, and the Structure of Government*, 1988 SUP. CT. REV. 1; Miller, *supra* note 11; Strauss, *supra* note 57.

64. ANC PRINCIPLES, *supra* note 16, at 26, ¶ 5.

65. *Id.* at 31, ¶ 14; NATIONAL PARTY FRAMEWORK, *supra* note 16, at 7.

66. *Id.*

67. See Wilson, *supra* note 18, at 129 (maintaining that "the powers to hire and fire largely determine constitutional structures"). I use the term "subordinates" somewhat loosely, since, as Professor Kurland suggested in his comments when this paper was presented, the more the President's power to hire, fire, and direct an official is constricted the less "subordinate" that official is. Cf. *Morrison v. Olson*, 487 U.S. 654, 719-23 (1988) (Scalia, J., dissenting) (distinguishing between "subordination" and mere differences "in station or rank").

68. According to *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,'" who must be appointed in accordance with the appointments clause of the Constitution, U.S. CONST. art. II, § 2, cl. 2. This clause by its terms

cide when appointments can be made. For example, Congress may provide by legislation that holders of an office serve a term longer than that of the President, and thereby can delay or even eliminate the President's chance to fill the office in question.<sup>69</sup> When appointments are made, moreover, the Constitution requires Senatorial advice and consent for all appointments of principal officers. The Constitution also permits Congress to require this procedure for all officers of the United States—a very wide category of officials.<sup>70</sup> Congress has also enacted legislation limiting the President's choice of appointees, by requiring the President to appoint from, or at least consider, lists of nominees prepared by others, or by specifying that those appointed must have particular credentials (such as political party membership).<sup>71</sup> In addition, Congress can decide to vest the appointments of "inferior officers" in the heads of executive departments rather than in the President.<sup>72</sup> Congress can also place the appointment of at least some "inferior officers," including even officials as powerful as independent prosecutors appointed to prosecute government wrongdoing, outside of the executive branch altogether and into the hands of the courts.<sup>73</sup> Finally, the Constitution does not expressly limit Congress' authority to control the appointment of those other government employees who do not wield enough authority to count as "officers of the United States."<sup>74</sup> At the very least, it

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authorizes the President to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint" the most senior of these officials. Lesser, or "inferior," officers can be appointed in the same way, or Congress may choose to alter the process, by vesting these appointments "in the President alone, to the Courts of Law, or in the Heads of Departments"—but Congress' discretion does not extend to making these appointments itself. *Id.*

69. This device was first used within a few years of the nation's founding. In *Marbury v. Madison*, 5 U.S. 137, 162 (1803), Chief Justice Marshall appeared to take for granted that Congress could constitutionally provide for the appointment of justices of the peace to hold office for five-year terms—one year longer than the term of the incoming President).

70. U.S. CONST. art. II, § 2, cl. 2.

71. See *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 111 S. Ct. 2298, 2319 (1991) (White, J., dissenting) (citing instances in which the Supreme Court voiced no objection to statutory requirements that the President consider lists of candidates); see also Miller, *supra* note 11, at 51 (noting that "the independent regulatory commissions . . . almost uniformly . . . [have] political criteria for appointment, with no more than a majority allowed to come from one party").

72. See *supra* note 68 (discussing the appointment of officials).

73. See *Morrison v. Olson*, 487 U.S. 654, 670-77 (1988) (holding that Congress may vest the authority to appoint an independent counsel to a special federal court).

74. The appointments clause speaks explicitly only to the appointment of "offi-

seems clear that Congress can direct that these lesser officials be hired through civil service procedures over which the president's control is restricted.<sup>75</sup>

Similarly, limiting the President's power to fire officials also constrains Presidential authority. Again, our Constitution is currently understood to deny Congress authority to fire executive "officers" except through the rarely used mechanism of formal impeachment.<sup>76</sup> But that does not mean that the President has unchallenged power in this sphere. Where appointment is not vested in the President but in lesser officials—as would be the case for a great many civil service appointments—Congress has long been thought to have authority to regulate the conditions of discharge.<sup>77</sup> Even where the President appoints, his or her freedom to discharge may be constrained. At one time, the Supreme Court seemingly held the view that the President was constitutionally entitled to fire a wide range of officials at will.<sup>78</sup> Subsequent cases, however, including one very recently, have decidedly circumscribed this notion.<sup>79</sup> If the President cannot fire "at will" but only for "cause," presidential power is reduced. If the President cannot treat as "cause" a subordinate's refusal to comply with presidential policy

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cers." See U.S. CONST. art. II, § 2, cl. 2.

75. Indeed, it would seem that Congress can regulate the hiring and firing of "inferior officers," as well as employees below the level of "officer," through the establishment of a civil service system. See generally 5 U.S.C.A. §§ 1201-04 (Supp. 1993) (specifying composition and functions of Merit Systems Protection Board); *id.* §§ 2301, 2302; (setting out "merit system principles" and "prohibited personnel practices" to govern "[f]ederal personnel management"); *United States v. Perkins*, 116 U.S. 483, 485 (1886) (holding that Congress may restrict the removal of inferior officers whose appointment it has vested in the "Heads of Departments"); *Jalil v. Hampton*, 460 F.2d 923, 926 (D.C. Cir.), *cert. denied*, 409 U.S. 887 (1972) (characterizing the civil service laws as limiting presidential appointment authority by prescribing qualifications for appointees, and stating that "it is now generally accepted that these [civil service] laws raise no constitutional questions"); Strauss, *supra* note 57, at 608.

76. See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (deciding "that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment").

77. See *United States v. Perkins*, 116 U.S. 483, 485 (1886) ("when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interests").

78. See *Myers v. United States*, 272 U.S. 52, 176 (1926) (deciding that Congress could not constitutionally deny the President exclusive power to fire any executive officer appointed by the President with the advice and consent of the Senate).

79. See *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

preferences—an undecided question—then the chief executive's power is even further diminished.<sup>80</sup>

The power to hire and fire largely determines the president's power to control the acts of other executive officials, but by no means completely. On the contrary an array of features of the relationships between lesser officials on the one hand, and the President and Congress on the other, will also affect the extent of presidential power.<sup>81</sup> Perhaps the most vivid method of control that a President might have available would be the prerogative to bypass a subordinate official altogether and execute the matter in question directly. But this course of action will be blocked if elements of executive responsibility can be vested in named subordinate offices, so that only the occupant of the particular office can carry out the function at issue. Suppose, for example, that the Attorney General is assigned by statute the responsibility to decide whether to bring a prosecution or not. Can the President take this decision out of the Attorney General's hands in a particular case in which the President is intent on prosecution, but the Attorney General believes none is merited? Peter Strauss argues that the American Constitution would require the president to find an Attorney General who would do his bidding.

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80. For an argument that the power to remove "for cause" *should* be interpreted to allow the removal of policymaking officials when they "fail[] to comply with any valid policy decision made by the President or his agent," see Pierce, *supra* note 63, at 24-35. See also Miller, *supra* note 11, at 44-45, 50-97 (contending that the President must be able "to remove a policy-making official who has refused an order of the President to take an action within the officer's statutory authority").

81. For example, it will make a difference whether the President has a right to be informed of lesser officials' planned actions before they are undertaken; without such an authority, as Peter Strauss argues, the President is less able to coordinate policy and less able to bring political pressure to bear on officials who seek to chart a course with which the President disagrees. See Strauss, *supra* note 57, at 646-47. On this score, the Constitution somewhat obscurely provides that the President "may 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." U.S. CONST. art. II, § 2, cl. 1. See Strauss, *supra* note 57, at 646-47 (providing a broad interpretation of this clause).

So, too, it matters whether the President has the prerogative of communicating with other officials confidentially, or whether instead the legislature can insist on being provided with full accounts of internal executive deliberations. See *id.* at 653-62. The Constitution contains no express grant of an "executive privilege," but the Supreme Court has declared that this "privilege of confidentiality of Presidential communications" is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution"—although it is *not* absolute. *United States v. Nixon*, 418 U.S. 683, 705, 708 (1974).

Although the president might well find such a person, the process of doing so would—and in comparable circumstances actually *did*, during the unraveling of the Watergate scandal—exact a political cost.<sup>82</sup>

By channeling or limiting the President's appointment and removal powers, and by vesting particular duties in specified subordinate officials, legislation in this country has been able to place important elements of executive power to some degree outside the President's control. It deserves mention that legislation on these issues also has often attempted to insure that particular areas of government policy were to some extent beyond partisan control by either political party—in particular by offering members of both the majority and the minority party some input into decision-making. Such nonpartisan policy-making seems to be an aspiration of statutes that divide seats on administrative agencies between the Democratic and Republican parties, although American political parties are so ideologically inclusive that such systems are not in themselves likely to deny the President the chance to select people, from either party, with whose views he or she is largely content.<sup>83</sup> If the South African Constitution that is now being written is to limit executive power, and ensure that minority views are heard in the process of policy-making, such steps may prove helpful. So, for example, a Judicial Service Commission might be required to have representation from each of the major parties, and the President required to pick judges from nominees submitted by the Commission.<sup>84</sup> Such structures could restrain the power of the single executive without the drastic inroads on governmental efficacy that the consociational model risks.

4. *Preserving in practice what you set out on paper*: Benjamin Franklin, already a venerable statesman when he served as a member of the Constitutional Convention, supposedly was asked after the Convention what kind of government the Framers had shaped for the American

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82. See Peter L. Strauss, Letter to the Editors of the Harvard Law Review, May 22, 1992 (copy on file with the author); Strauss, *supra* note 57, at 605 (suggesting that Congress has considerable discretion to "plac[e] ultimate responsibility for decision" on particular matters with subordinate officials rather than with the President). See also Miller, *supra* note 11, at 58-59 (similarly observing that it was "accepted early on that Congress could not only create executive departments but could make action by the agency head a precondition of the effective exercise of the power").

83. I am grateful to Peter Strauss for this point.

84. See NAMIBIA CONST. arts. 82, 85 (providing that the President is to appoint judges "on the recommendation of the Judicial Service Commission"; two of the five members of the Judicial Service Commission are appointed by organizations of the legal profession rather than by the president).



people. He answered, "A republic, if you can keep it."<sup>85</sup> Keeping your republic, or democracy, must be as great a concern for you as it was, and is, for Americans. The record of African states on this score is not good, and South Africa itself has a dreary record of oppression of human rights. Designing a system that will hold up over time is by no means easy.

United States history demonstrates this proposition—if any proof is needed. The Framers of our Constitution are revered as unusually farsighted and wise, but they evidently failed to predict that so fundamental an institution as the political party would become an important feature of the new United States.<sup>86</sup> It was only a few years after the Constitutional Convention when many of them began to form the political party system which has been a critical part of our polity ever since. Similarly, many of the Framers viewed the greatest danger to republican liberty as coming from the legislature.<sup>87</sup> Today, many Americans are convinced that the executive branch has long since overmatched the Congress in the struggle for power. So, too, the Framers apparently anticipated a rather straightforward, and modest, role for the courts.<sup>88</sup> Modern Americans live in a world in which concern about judicial power undermining democratic self-government is a recurrent theme. And, as you have already heard, the Framers anticipated a relatively small central government, carrying out relatively confined functions,<sup>89</sup> but the reality of modern American life is far removed from this. Not only does the federal government do vastly more and the states relative-

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85. See Kurland, *supra* note 8, at 613 and n.51 (citing 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 85 (Max Farrand ed., 1911)).

86. See Kurland, *supra* note 8, at 599; see also James MacGregor Burns, THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA 27 (rev. ed. 1963) (noting that "most Americans in the early 1790s did not want parties").

87. See THE FEDERALIST NO. 48 (James Madison). Other delegates to the Constitutional Convention, however, may have seen the executive branch as the greatest source of peril. See Kurland, *supra* note 8, at 598 (discussing the fears of some at the Constitutional Convention about concentrated power in the executive branch).

88. Kurland, *supra* note 8, at 599. In his defense of the new Constitution's provisions for the judiciary, Hamilton was able both to insist on the courts' power to declare statutes unconstitutional and to characterize the judiciary as the branch "least dangerous to the political rights of the Constitution," and "incontestably . . . beyond comparison the weakest of the three departments of power." THE FEDERALIST NO. 78, at 465-66 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

89. See THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed. 1961) (contrasting the powers of the federal government, which are "few and defined," with the states' "numerous and indefinite" powers).

ly less, but the federal government characteristically acts through administrative agencies in which the functions of law-making, law-enforcing, and law-adjudicating, however separated they may be in the text of the constitution, are actually melded together.

Yet, in the midst of this, the structural provisions of our Constitution remain almost unamended after 200 years. As much as the country and the government have changed, moreover, much of the structure of our polity would be recognizable to the Framers as being their handiwork. Much else would plainly reveal that its ancestry lay in what they had wrought. To a great extent, moreover, this continuity cannot be attributed to judicial enforcement of the provisions of the separation of powers. Until quite recently, the courts rarely adjudicated questions concerning the relative powers of the executive and legislative branches of the federal government.<sup>90</sup> Instead, this continuity has to be attributed to other factors. Among them would be the Framers' insight as constitutional designers, shaping provisions that offered a fairly clear and fairly workable structure, and one in which the political branches of government did have the resources to challenge each other's pretensions as well as the capacity, at least sometimes, to work effectively together.<sup>91</sup> So, too, the country's growing constitutional faith surely helped to encourage Americans to adhere to this structure, or at least to seek the image of adherence.<sup>92</sup> Ironically, the stability of our written Constitution no doubt also owes a great deal to the facility Americans have shown for improvising, on the framework of the constitutional text, structures

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90. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 287 (1980) (commenting that "at least before the tenure of President Nixon, the record demonstrates that an effective functioning of the relationship between the legislative and executive branches has been almost wholly accomplished without the participation of the national judiciary").

91. See *id.* at 275 (arguing that "[e]ach branch—legislative and executive—has tremendous incentives jealously to guard its constitutional boundaries and assigned prerogatives against invasion by the other. If either branch perceives a constitutional violation of this kind, not only will it be encouraged to respond vigorously but each department possesses an impressive arsenal of weapons to demand observance of constitutional dictates by the other"). See *id.* at 275-314 (detailing the "strictures on *ultra vires* executive action").

92. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 132 (1975) (commenting on "the growing sanctity of the Constitution" by the beginning of the nineteenth century and noting that "[f]or most Americans, and, certainly for the legal profession, the Constitution was supreme law but had a moral authority beyond its supremacy as positive law").

and principles of which the Framers themselves scarcely dreamt. For a Constitution to last it must work; but part of its working must be its flexibility—whether intended by the drafters, or insinuated by those who come after them.<sup>93</sup>

How should courts respond to this simultaneous, and almost paradoxical, need for both structural strength and flexibility? Our experience on this score has not been a terribly happy one. Sometimes our Supreme Court has tried to fashion bright-line rules to resolve separation of powers questions, but these rules have more than once had an arbitrary, even illogical, flavor to them.<sup>94</sup> On other occasions the Court has self-

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93. At least some of the flexibility of our constitutional structure seems to have been intended. As Peter Strauss has commented, "[o]ne scanning the Constitution for a sense of the overall structure of the federal government is immediately struck by its silences." Strauss, *supra* note 57, at 597. In particular, the Constitution says scarcely anything about the structure of the executive branch below the Presidency. Strauss concludes that "a determination was made to eschew detailed prescription as a means of underscoring presidential responsibility and preserving congressional flexibility within the constraints of the judgments that had been made." *Id.* at 599. Moreover, he argues, "[t]he imprecision inherent in the definition and separation of the three governmental powers contributes to the tensions among them," and this very tension helps protect the liberty of the people. *Id.* at 603.

Even if such flexibility was not intended, however, our patterns of constitutional interpretation have often found room in the constitutional text for the infusion of modern perspectives. Terrance Sandalow maintains that although the framers "set us on the path" to our present constitutional understandings, "[t]he entirety of [our] history, together with current aspirations that are both shaped by it and shape the meaning derived from it, far more than the intentions of the framers, determine what each generation finds in the Constitution." Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1042, 1050 (1981). "Ultimately," he believes, "the values to which constitutional law gives expression are more nearly those of the present than those of the past." *Id.* at 1039. It is possible to deny the legitimacy of such reinterpretation of the largely unamended language of our Constitution, but very hard to deny that it has often taken place.

94. See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (holding the congressional veto provision in the Immigration and Naturalization Act unconstitutional). In *Chadha*, the Supreme Court insisted on what it saw as the Constitution's limits on Congress' exercise of legislative power. In the process, it appeared to say that Congress is exercising legislative power when its action has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch." *Id.* at 952. As a definition of legislative power, this formulation is clearly ill-formed, since it would encompass a wide variety of actions by courts and executive agencies as well. For critical assessments of this aspect of *Chadha's* definition of legislative power, see Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 794-98; E. Donald Elliott, *INS v. Chadha: The Administrative Consti-*

consciously tried to be flexible, or, as we sometimes say, functional—to avoid bright-line rules in favor of a much more wide-ranging assessment of whether particular structural innovations do, or do not, fit with the broad concerns of the constitutional design. This method avoids rigidity, but perhaps only to approach the other extreme at which, as Justice Scalia has complained in dissent, there are no lines at all.<sup>95</sup>

One might respond by embracing the position of Jesse Choper, from whom you will hear in the next panel. Choper has urged courts to stay out of the business of regulating the constitutional separation of powers between the executive and legislative branches.<sup>96</sup> I do not make that response, however, because I think that judicial monitoring of the separation of powers, awkward and imperfect as it will be, is still likely to help affirm the importance of fidelity to the Constitution's structure, especially in a new nation whose structural design is untested.<sup>97</sup> But if you accept that the desirable structure is one that is both firm and flexible, and if you look to courts to help you achieve and maintain that structure, then you will be vesting in the courts a very challenging role indeed. Rather than simply parsing text, courts concerned with the separation of powers will need some quantity of the expertise of political scientists or even politicians. Just as courts will acquire something of the role of a national conscience as they enforce the Bill of Rights, they will play something of the role of a national political engineer as they monitor the separation of powers.

I do not think, however, that the courts can be relied on to make the government work. They can refine some decisions, overrule certain others, but the stability and success of this government will ultimately depend on the government itself, and the people themselves. That, again, is why structure is important. South Africa faces profound challenges of correcting past injustice, achieving economic development, and embracing a very diverse population in a single nation. The task of shaping a government that can effectively address these problems, both by acting on behalf of the majority and by honoring the concerns of minorities, is

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*tution, the Constitution, and the Legislative Veto*, 1983 S. CT. REV. 125, 134-38.

95. See *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting) (discussing the danger of further congressional interference with the President's power to remove subordinates because "[t]here are now no lines" within which Congress must stay).

96. See Choper, *supra* note 90, at 263 (stating this position, the "Separation Proposal"); *id.* at 260-379 (discussing and defending this proposal).

97. For critical assessments of Choper's proposal, see Redish & Cisar, *supra* note 52, at 492-94; Strauss, *supra* note 57, at 620-21, n.194.

yours. I hope this dip into American experience helps you in your work.