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# THE LIMITS OF THE PARLIAMENTARY CRITIQUE OF THE SEPARATION OF POWERS

THOMAS O. SARGENTICH\*

## I. INTRODUCTION

It is commonly asserted that the United States government is ineffective in addressing major social needs.<sup>1</sup> Such criticisms have come from widely varying political perspectives and have focused on a host of problems confronting the nation<sup>2</sup>—including budget deficits, unemployment, homelessness, unequal access to health care, and many more.<sup>3</sup>

One prominent critique holds that the government's asserted ineffectiveness derives from its constitutional *structure*. This critique takes particular aim at the separation of powers between the legislative and executive branches. It contends that the division of

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1. Criticisms of the government's effectiveness are a staple of American life. They are often accompanied by recognition of public disengagement from politics. See FRANCES F. PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 4 (1988) ("Only a little more than half of the eligible population votes in presidential elections, and fewer still vote in off-year elections."); Rhodes Cook, *Turnout Hits 64-Year Low in Presidential Race*, 47 CONG. Q. 135 (1989). Lower-class and working-class people in the United States have a particularly high rate of nonvoting. See generally PIVEN & CLOWARD, *supra* (discussing institutional causes for nonvoting patterns by Americans).

2. The media are full of reports about unrelenting social problems and the government's ineffectiveness in dealing with them. For an example from the late 1980s, see Stanley W. Cloud, *The Can't Do Government*, TIME, Oct. 23, 1989, at 28, 29 ("Abroad and at home, challenges are going unmet. Under the shadow of a massive federal deficit that neither political party is willing to confront, a kind of neurosis of accepted limits has taken hold from one end of Pennsylvania Avenue to the other.").

3. See generally *id.* (mentioning, inter alia, educational deficiencies, the federal budget deficit, the savings and loan industry crisis, health care costs and gaps, and housing problems). Each day's newspapers and radio and television news broadcasts provide vivid examples of persisting societal problems.

authority built into our institutions interferes with efficacious governance.

A leading expression of this structural approach may be called the parliamentary critique of the separation of powers.<sup>4</sup> I will use this term to refer to critics who seek to modify our constitutional structure in the direction of a parliamentary system. In particular, the critics of concern here admire the British system. They are often careful to adjust to American ears by proclaiming the need for "reform," not radical institutional change.<sup>5</sup> Although calls for parliamentary reform have been with us for decades, they have become especially loud in recent years.<sup>6</sup>

The parliamentary critics with whom I will deal tend to admire the strength of the British Prime Minister as compared with what they see as the relative weakness of the United States President.<sup>7</sup> In particular, the British chief executive does not face an independent legislative branch that regularly pursues its own agenda.<sup>8</sup> To

4. I am using the term "parliamentary critique" to encompass various efforts to move the U.S. system of governance closer to a parliamentary-style arrangement. Some critics support dramatic change, such as having a Cabinet choose a Premier who would have the key executive role, and others embrace more limited proposals. This Article, in highlighting both approaches, discusses the basic premises of the parliamentary perspective rather than its detailed proposals. The latter could be a fruitful topic of another article.

5. See Lloyd N. Cutler, *Time for Constitutional Change?*, 59 FOREIGN AFF. 126 (1980-81), reprinted as *To Form a Government*, in REFORMING AMERICAN GOVERNMENT—THE BICENTENNIAL PAPERS OF THE COMMITTEE ON THE CONSTITUTIONAL SYSTEM 11, 16 (Donald L. Robinson ed., 1985) [hereinafter REFORMING AMERICAN GOVERNMENT] ("We are not about to revise our own Constitution so as to incorporate a true parliamentary system."); cf. Donald L. Robinson, *The Renewal of American Constitutionalism*, in SEPARATION OF POWERS—DOES IT STILL WORK? 38, 53 (Robert A. Goldwin & Art Kaufman eds., 1986) [hereinafter SEPARATION OF POWERS] ("Those who say that we ought not to tinker with the system are correct. A constitution is an organic whole. . . . Assuming then that the current derangement is fundamental, we need to consider basic revisions in the constitutional structure.").

6. For a selected list of leading sources on the parliamentary critique, see *infra* note 107.

7. For a typical statement about the strength of the British system by a leading parliamentary proponent, see JAMES L. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 14 (1986). Sundquist states that in the parliamentary system: "Power is unified. Responsibility is clearly fixed. Strong party discipline assures prime ministers and their cabinets that they can act quickly and decisively without fear, normally, of being repudiated by their legislatures." *Id.*

8. See LEOPOLD S. AMERY, THOUGHTS ON THE CONSTITUTION 25 (2d ed. 1953) (noting that the British Prime Minister has "a power far greater than that of the American President" as long as party support remains); W. IVOR JENNINGS, CABINET GOVERNMENT 18 (3d ed. 1959) ("If the Government has a majority, and so long as that majority holds together, the House

be sure, the British Parliament can vote no confidence in the Prime Minister and thereby can force a resignation or a new election.<sup>9</sup> Yet in Britain this is hardly a common occurrence.<sup>10</sup> Moreover, a parliamentary system can be an extremely weak form of government if a prime minister's power depends on a shaky coalition of divergent parties.<sup>11</sup> In modern Britain, however, there has been a rather strong two-party system along with a winner-take-all electoral arrangement that has tended to guarantee that one of the two leading parties—Labour or the Conservatives—will dominate Parliament.<sup>12</sup>

Critics often contrast the separation of powers with what they describe as the unity, effectiveness, and accountability of the parliamentary system.<sup>13</sup> On these grounds they propose amendments

[of Commons] does not control the Government but the Government controls the House.”). These characteristics have been noted by contemporary parliamentary critics. See Cutler, *supra* note 5, at 14 (“In a parliamentary system, it is the duty of each majority member of the legislature to vote for each element of the government’s program, and the government possesses the means to punish members if they do not.”).

9. For background on the British parliamentary system, see AMERY, *supra* note 8; H.R.G. GREAVES, *THE BRITISH CONSTITUTION* (3d ed. 1955); JENNINGS, *supra* note 8; R.M. PUNNETT, *BRITISH GOVERNMENT AND POLITICS* (5th ed. 1987); RICHARD ROSE, *POLITICS IN ENGLAND* (5th ed. 1989).

10. See SUNDQUIST, *supra* note 7, at 14 (“In two-party parliamentary systems, of which Great Britain is the model, votes of nonconfidence are rare, but on occasion the majority has forced a prime minister in which it has in fact lost confidence to resign . . .”); *infra* note 251 and accompanying text.

11. Contemporary Israel provides an example of a parliamentary system that often has been prone to instability. There are others, including Italy and the Third Republic of France. The number of parties and the existence or nonexistence of a system of proportional representation are, of course, major determinants of the stability of a parliamentary system.

12. In recent years, the Social Democratic Party in Britain has scored some electoral success, but its political power—like that of the Liberals—has remained limited. For discussion of the Social Democratic Party, see PATRICIA L. SYKES, *LOSING FROM THE INSIDE: THE COST OF CONFLICT IN THE BRITISH SOCIAL DEMOCRATIC PARTY* (1988). For discussion of the British government’s reliance on a strong party base in Parliament, see PUNNETT, *supra* note 9, at 73 (“A government’s position in Parliament is based to a great extent on the party system and the strength of Parliamentary party discipline.”).

13. For modern critics, see SUNDQUIST, *supra* note 7; Cutler, *supra* note 5, at 16 (advocating that the American system become “closer to the parliamentary concept of ‘forming a government,’ under which the elected majority is able to carry out an overall program and is held accountable for its success or failure”). For earlier descriptions of the parliamentary system, see WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 221 (Fontana 1963) (1867) (“The excellence of the British constitution is that it has achieved this unity; that in it the sovereign power is single, possible, and good.”); HENRY HAZLITT, *A NEW CONSTITUTION NOW* 23 (1974) [hereinafter HAZLITT (1974)] (stating that “the central virtue of the parliamentary

to the U.S. Constitution embodying the spirit of parliamentary-style arrangements.<sup>14</sup> Although changes in party rules and new statutes designed to promote party cohesion also are often recommended,<sup>15</sup> this Article will concentrate specifically on the critique's constitutional dimension.<sup>16</sup>

My objective is to place the parliamentary critique of the separation of powers into critical perspective. First, I will trace the repetitive ways in which parliamentary critics over the years have blamed political problems in the United States on constitutional realities. Second, I will critically assess the view's empirical and normative premises.

I would like to highlight two *caveats* at the outset. First, many variations among different parliamentary systems are not dealt with in this Article. The British model represents only one possible combination of variables. I thus would not want to be misunderstood to be criticizing all possible parliamentary ideas as I examine the reformist vision that has dominated the critique I discuss.

system . . . is the *concentration of responsibility*"). The 1974 edition of Hazlitt's *A New Constitution Now* is a newer version of his 1942 book by the same name. See *infra* note 107.

14. For a partial list of constitutional and nonconstitutional proposals, see the widely noted COMMITTEE ON THE CONSTITUTIONAL SYSTEM, A BICENTENNIAL ANALYSIS OF THE AMERICAN POLITICAL STRUCTURE: REPORT AND RECOMMENDATIONS OF THE COMMITTEE ON THE CONSTITUTIONAL SYSTEM (1987) [hereinafter COMMITTEE RECOMMENDATIONS]. For a discussion of the Committee's work, see Mark P. Petracca et al., *Proposals for Constitutional Reform: An Evaluation of the Committee on the Constitutional System*, 20 PRESIDENTIAL STUD. Q. 503 (1990); James L. Sundquist, *Response to the Petracca-Bailey-Smith Evaluation of the Committee on the Constitutional System*, 20 PRESIDENTIAL STUD. Q. 533 (1990).

15. Recommendations for changes in party rules and statutes are often a response to the condition of "divided government" wherein different political parties control the legislative and executive branches. See generally DIVIDED DEMOCRACY: COOPERATION AND CONFLICT BETWEEN THE PRESIDENT AND CONGRESS (James A. Thurber ed., 1991); Symposium, *The American Constitutional Tradition of Shared and Separated Powers*, 30 WM. & MARY L. REV. 209 (1989) (including articles by Lloyd Cutler, Philip Bobbitt, Erwin Chemerinsky, and James Sundquist); Symposium, *Divided Government and the Politics of Constitutional Reform*, 24 PS POL. SCI. & POL. 634 (1991).

16. Although the perceived problem of lack of party cohesion could be addressed by such measures as changing party rules and statutes relating to campaign finance, underlying structural issues need to be addressed by constitutional amendments—if indeed there is to be a legal as opposed to political response to them. To be sure, there is a close relationship between party-related and constitutional proposals in much of the literature. Yet the two are distinguishable, as one could seek to strengthen parties within our existing constitutional structure.

Second, the critics of concern here have advanced numerous specific proposals for constitutional change, ranging from the dramatic to the more modest. My aim is not to discuss particular constitutional proposals in this Article. Rather, my goal is to back away from the particulars in order to consider general themes that link generations of denunciation of the separation of powers from the parliamentary perspective. As I will suggest, the parliamentary critique reflects a general system of ideas that needs to be looked at with a critical eye.

My discussion will begin with a historical overview of key precursors of modern parliamentary criticism. I will start with the views of British journalist Walter Bagehot,<sup>17</sup> whose work centrally influenced his American admirer, Woodrow Wilson.<sup>18</sup> During the twentieth century, parliamentary arguments have been repeatedly repackaged in widely differing contexts.<sup>19</sup> Each successive wave of argument has shown a large intellectual debt to Bagehot and Wilson.

Understanding the history of parliamentary reformism helps to bring into focus the critique's empirical and normative limitations. For decades, critics have asserted that catastrophe will overwhelm our system if it continues to operate under the Constitution's structure. Yet the sky has not fallen. The empirical case for major change in the separation of powers, although dramatically asserted, has simply not been established.<sup>20</sup>

In addition, I will suggest, the idea that the nation would be able to manage its way out of its political difficulties if its constitutional structure were changed is remarkably reductionist. It disregards key cultural, historical, and political variables that provide the vital context of the British—or for that matter any other—governmental model.<sup>21</sup>

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17. See *infra* text accompanying notes 51-71.

18. See *infra* text accompanying notes 27-50.

19. See *infra* text accompanying notes 106-86.

20. This is certainly not to say that our system is the best of all possible worlds. Nor is it to deny that we could usefully consider particular ways to reform our system within the general constitutional structure. Such reform lies beyond the scope of this Article.

21. See *infra* text accompanying notes 243-54 (discussing the British parliamentary system).

Moreover, the argument for parliamentary reform does not pay sufficient attention to the principle of promoting broad public dialogue in order to secure the legitimacy of constitutional government.<sup>22</sup> In particular, the parliamentary critics dealt with here embrace an extremely constrained view of the relationship between the President and Congress. The critics' push for a stronger and more unified governmental structure supports a managerial vision of the Constitution that fails to appreciate the virtues of checks and balances.<sup>23</sup> At bottom, the parliamentary critique, as it has played out in a good deal of commentary, tends to build up the executive's power at the direct expense of the national legislature. These tendencies need to be clearly borne in mind to the extent that the heritage of parliamentary reformism continues to inform serious proposals for change.

## II. THE HISTORICAL DEVELOPMENT OF THE PARLIAMENTARY CRITIQUE

The parliamentary critique's intellectual lineage can be traced to the mid-nineteenth century in England, the classical parliamentary age.<sup>24</sup> A leading journalist and political commentator during the mid-Victorian period, Walter Bagehot, especially influenced the most prominent nineteenth-century expositor of parliamentary ideas, Woodrow Wilson. Because Wilson has been more influential in American debate, I will discuss his ideas first, and then I will show the linkages between them and Bagehot's views.

### A. *Nineteenth-Century Origins*

#### 1. *Woodrow Wilson*

During the century after the drafting of the U.S. Constitution in 1787, the government's operating arrangements gradually evolved. In this period, key disputes about governmental structures tended to focus on the relations between the federal establishment and the

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22. See *infra* text accompanying notes 280-300 (discussing constitutional principles of the American political system).

23. See *infra* text accompanying notes 262-79 (analyzing the parliamentary critique's managerial ethos).

24. See R.H.S. Crossman, *Introduction to BAGEHOT*, *supra* note 13, at 1 (describing the mid-nineteenth century in Britain as the "period of classical parliamentary government").

states—culminating, of course, in the Civil War.<sup>25</sup> After the Civil War, voices were raised in critique of institutional relationships at the federal level, with particular reference to legislative-executive interaction.<sup>26</sup> In the late 1870s, Woodrow Wilson published a paper criticizing Congress for what he considered to be irresponsible government.<sup>27</sup> He elaborated his views in an article in 1884<sup>28</sup> and a book—perhaps his most famous academic work—in 1885.<sup>29</sup>

Wilson's 1884 article called for amending Article I, section 6, of the Constitution in order to permit members of Congress to serve in the President's Cabinet.<sup>30</sup> In addition, Wilson supported coordi-

25. See JAMES M. BURNS, *THE POWER TO LEAD: THE CRISIS OF THE AMERICAN PRESIDENCY* 204 (1984).

26. See *id.* Boston banker and congressional critic Gamaliel Bradford, who published in journals such as *The Nation*, was a leading advocate of parliamentary reform during the 1870s. He was a direct influence on Woodrow Wilson, who more prominently developed the parliamentary critique. See Gamaliel Bradford, *Cabinet Officers in Congress*, 28 *NATION* 243 (1879); Gamaliel Bradford, *The Causes of Congressional Failure*, 26 *NATION* 414 (1878); Gamaliel Bradford, *Shall the Cabinet Have Seats in Congress?*, 16 *NATION* 233 (1873); Gamaliel Bradford, *Political Responsibility*, 16 *NATION* 176 (1873); Gamaliel Bradford, *The Way Congress Does Business*, 16 *NATION* 145-46 (1873); see also ARTHUR S. LINK, *WILSON: THE ROAD TO THE WHITE HOUSE* 17-18 (1947) (noting that Gamaliel Bradford should be given credit for cabinet government and other ideas set forth by Wilson in his early essays on government).

27. See Woodrow Wilson, *Cabinet Government in the United States*, 7 *INT'L REV.* 146 (1879), reprinted in 1 *THE PAPERS OF WOODROW WILSON* 493 (Arthur S. Link et al. eds., 1966) [hereinafter *WILSON PAPERS*]. Wilson wrote that "[o]ur Government is practically carried on by irresponsible committees." *Id.* at 495. He wanted to give cabinet members "seats in Congress, with the privilege of the initiative in legislation and some part of the unbounded privileges now commanded by the Standing Committees." *Id.* at 498. He believed that these members would be governed by a principle of responsibility that would require them to resign if others in the legislature defeated their plans. *Id.* Wilson recognized that if the President could choose members of Congress, then he would have power "plainly at variance with republican principles." *Id.* at 499. He concluded that establishing the "highest order of responsible government" obligated the President to select the Cabinet from among members of Congress or, alternatively, members of state legislatures already selected by the people. *Id.* Wilson argued that such change "would not be so radical as it might at first appear." *Id.*

28. See Woodrow Wilson, *Committee or Cabinet Government?*, 3 *OVERLAND MONTHLY* 17 (1884), reprinted in 2 *WILSON PAPERS*, *supra* note 27, at 614 [hereinafter *Wilson, Committee*]; see also Woodrow Wilson, *Government by Debate* (an unpublished essay printed on Dec. 4, 1882 that formed the basis of Wilson's 1884 article), in 2 *WILSON PAPERS*, *supra* note 27, at 159.

29. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* (Johns Hopkins Univ. Press 1981) (1885).

30. See Wilson, *Committee*, *supra* note 28, at 627-28. Wilson spoke of the parliamentary system as the "prevailing legislative practice of the world," *id.* at 640, and he argued that



nating the terms of office of members of Congress and the President.<sup>31</sup> Both of these suggestions are classic, often-repeated parliamentary proposals designed to limit the independence of Congress from the executive.

Wilson's 1885 book, *Congressional Government*, expanded on the argument for such proposals. He took for granted that Congress was the most powerful governmental institution in the United States.<sup>32</sup> He contended that Congress was dominated by committees that were unresponsive to the people<sup>33</sup> and that the administration of the laws was being carried out by "semi-independent executive agents."<sup>34</sup>

Wilson contrasted his picture of an unresponsive U.S. government with his rather idealized vision of the British system.<sup>35</sup> To Wilson, the House of Commons was an especially accountable forum for vigorous debates about the day's great issues. "The whole conduct of the government," he opined admiringly, "turns upon what is said in the Commons . . . ."<sup>36</sup> He pointedly distinguished debates in Parliament from debates in Congress, which "have no tithe of this interest, because they have no tithe of such significance and importance."<sup>37</sup> The significance of the House of Commons' debates inhered in the fact that Parliament could vote no confidence in the government and thereby could force it to resign. When legislative debates involve such high stakes, Wilson argued, they are more likely to be conducted seriously.<sup>38</sup>

Wilson's enthusiasm for the British parliamentary system was the flip side of his critique of the separation of powers, which he

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"English precedent and the world's fashion must be followed in the institution of Cabinet Government in the United States." *Id.*

31. *See id.* at 628-29.

32. *See WILSON, supra* note 29, at 23 (describing Congress as the "central and predominant power" of the U.S. government).

33. *See id.* at 70-72. This is not to suggest that Wilson himself was a populist. *See LINK, supra* note 26, at 15 ("Throughout the volume [of *Congressional Government*] one can detect a strong bias against popular democracy and in favor of government by an aristocracy of intelligence and merit.").

34. *WILSON, supra* note 29, at 24.

35. *See id.*

36. *Id.* at 78.

37. *Id.*

38. *See id.* at 78-79.

saw as a prescription for “paralysis in moments of emergency”<sup>39</sup> and stalemate in ordinary times.<sup>40</sup> He noted that under the separation of powers, few if any significant measures could be undertaken by one branch of government without the “consent or cooperation” of another branch.<sup>41</sup> This meant that no single governmental authority in the United States—neither the President nor Congress—is the “supreme, ultimate head”<sup>42</sup> and therefore that “[p]olicy cannot be either prompt or straightforward.”<sup>43</sup>

Wilson was aware that his analysis struck at the heart of the Framers’ design, which he frankly criticized for resting on a “grievous mistake” of parceling out powers and responsibilities to different branches of government.<sup>44</sup> He imagined that if the Framers were to reassemble in the early 1880s, “they would be the first to admit that the only fruit of dividing power had been to make it irresponsible.”<sup>45</sup> He considered that the constitutional structure lacked strength, promptness, and efficiency.<sup>46</sup> He complained that “[n]obody stands sponsor for the policy of the government.”<sup>47</sup>

Wilson’s writing in the 1880s thus reflected a two-part critique. First, he contended that when governmental power is divided under a system of separation of powers, it necessarily becomes ineffective.<sup>48</sup> This presupposed that unified power is required for effective government. The agent of unity in the British parliamentary system is the Prime Minister’s Cabinet, which consists of department heads who also are leaders of the majority party in Parliament. Second, he argued that when power is divided, it becomes irresponsible.<sup>49</sup> This view depended on the notion that the possibility of “turning out” a government can permit the people to

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39. *Id.* at 186.

40. *See id.* (noting the lack of single decisionmaking authority at all times in a system of separation of powers).

41. *Id.*

42. *Id.*

43. *Id.* (stating that policy “when it must serve many masters . . . must either equivocate, or hesitate, or fail altogether”).

44. *Id.* at 187.

45. *Id.*

46. *Id.* at 206.

47. *Id.* at 207.

48. *See id.* at 186.

49. *See id.* at 187-88, 207.

express their views on major issues, which in turn can keep the government more responsible to the people.<sup>50</sup> These arguments about effectiveness and accountability, so central to Wilson's analysis, have remained at the heart of all subsequent parliamentary criticisms of the separation of powers.

## 2. *Walter Bagehot*

Wilson's critique in the 1880s was directly influenced by Bagehot's study of the English Constitution, which was published in England in 1867 and in the United States in 1877.<sup>51</sup> Indeed, Wilson specifically noted his intellectual debt to Bagehot.<sup>52</sup>

Wilson especially admired Bagehot's effort to move beyond a "literary" view of government—the way it appeared in books—toward an understanding of how institutions actually worked.<sup>53</sup> Bagehot's most famous contribution in this regard was to distinguish between what he called the "dignified" and the "efficient" parts of the English Constitution. The "dignified" elements, such as the monarchy and House of Lords, had largely symbolic roles, whereas the "efficient" elements did most of the work of governing.<sup>54</sup>

50. See *id.* at 196-99.

51. BAGEHOT, *supra* note 13. A second edition with a new introduction (included in the Fontana edition) was published in England in 1872; this second edition was published in the United States in 1877. See Crossman, *supra* note 24, at 1 n.1.

52. See 1 RAY S. BAKER, WOODROW WILSON: LIFE AND LETTERS, YOUTH, 1856-1890, at 213-14 (Greenwood Press 1968) (1927) (containing an excerpt of a letter to Ellen Axson, dated Jan. 1, 1884, in which Wilson wrote: "My desire and ambition are to treat the American Constitution as Mr. Bagehot . . . has treated the English Constitution. . . . He brings to the work a fresh and original method . . ."); see also Walter Lippman, *Introduction to WILSON*, *supra* note 29, at 11 (referring to Wilson's letter to Ellen Axson in which he praised Bagehot).

One result of Wilson's indebtedness to Bagehot is that any discussion of both of their ideas, as in this text, is bound to reveal some degree of repetition. I have sought to keep it to a minimum while giving a full flavor of Bagehot's ideas.

53. Compare WILSON, *supra* note 29, at 187 ("The 'literary theory' of checks and balances is simply a consistent account of what our constitution-makers tried to do . . .") with BAGEHOT, *supra* note 13, at 59 (emphasizing the contrast between the living reality and the literary theory surrounding the British constitution).

54. See BAGEHOT, *supra* note 13, at 61 ("The dignified parts of Government are those which bring it force—which attract its motive power. The efficient parts only employ that power."); *id.* at 176 (referring to "a double set of institutions—one dignified and intended to impress the many, the other efficient and intended to govern the many").

For Bagehot, "[t]he efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers."<sup>55</sup> This view was in sharp contrast to the literary theory traceable, among others, to Blackstone, which held that England had an arrangement of checks and balances between the executive and the legislature.<sup>56</sup> In reality, Bagehot contended, power lay in the hands of the Cabinet, which he called "a committee of the legislative body selected to be the executive body."<sup>57</sup> Bagehot also described the Cabinet as a "combining committee—a hyphen which joins, a buckle which fastens" the legislative and executive branches together.<sup>58</sup>

As Wilson was to do later, Bagehot praised the accountable character of executive leadership chosen from the membership of the legislature.<sup>59</sup> Bagehot also took pains to praise the House of Commons, which he saw as the "great scene of debate, the great engine of popular instruction and political controversy."<sup>60</sup> For Bagehot, as for Wilson subsequently, what gave parliamentary debate such im-

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Bagehot's dignified institutions operated in the context of a hierarchical class system. *See id.* at 63 ("The lower orders, the middle orders, are still, when tried by what is the standard of the educated 'ten thousand,' narrow-minded, unintelligent, incurious."). He noted that the dignified elements of government inspire reverence:

That which is mystic in its claims; that which is occult in its mode of action; that which is brilliant to the eye . . . is the sort of thing—the only sort—which yet comes home to the mass of men. So far from the dignified parts of a constitution being necessarily the most useful, they are likely . . . to be the least so; for they are likely to be adjusted to the lowest orders—those likely to care least and judge worst about what is useful.

*Id.* at 64.

55. *Id.* at 65.

56. *See* ASA BRIGGS, *THE MAKING OF MODERN ENGLAND, 1783-1867*, at 89-90 (1959) (noting that Blackstone in the late-18th century praised checks and balances as protections of English liberty). For a modern discussion of the vision of British constitutionalism as embodying checks and balances, *see* M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967).

57. BAGEHOT, *supra* note 13, at 66.

58. *Id.* at 68 (emphasis omitted).

59. *See id.* at 66 (referring to the benefit of "double election" by which the executive is chosen from the elected representatives of the people).

60. *Id.* at 72.

portance was the potential for the legislature to "turn out" a government.<sup>61</sup>

In addition, Bagehot prefigured Wilson's attack on the separation of powers as an essentially weak form of government. Under "presidential government"—Bagehot's term for the system in the United States—the executive can easily be "hampered" by Congress.<sup>62</sup> In contrast, "a strong Cabinet can obtain the concurrence of the legislature in all acts which facilitate its administration."<sup>63</sup> The oneness of the two branches in England meant that the executive "is itself, so to say, the legislature."<sup>64</sup>

Bagehot also attacked the fixed terms of office for officials under the U.S. Constitution.<sup>65</sup> The existence of fixed terms meant that "whether [the government] works well or works ill . . . by law you must keep it."<sup>66</sup> Unlike the situation in a parliamentary system, in the United States there is no option of calling a new election—and that fact was seen by Bagehot to signal a key structural weakness.<sup>67</sup>

Bagehot's assault on the separation of powers included the broad claim that it undermined sovereignty itself: "The splitting of sovereignty into many parts amounts to there being no sovereign."<sup>68</sup> Above all, Bagehot believed that it was necessary to maintain "singleness and unity" in government.<sup>69</sup> The English Constitution was seen to obey a "principle of choosing a single sovereign authority," whereas the U.S. government was seen to follow a "principle of having many sovereign authorities" and to rest on a hope "that their multitude may atone for their inferiority."<sup>70</sup> Bagehot offered the opinion that only American "genius," "moderation," and "re-

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61. *See id.* at 73 ("And debates which have this catastrophe [of a change of government] at the end of them—or may so have it—are sure to be listened to, and sure to sink deep into the national mind.").

62. *See id.* at 75.

63. *Id.*

64. *Id.*

65. *See id.* at 79-80 (criticizing congressional and presidential terms as "rigid, specified, dated").

66. *Id.*

67. *See id.* at 80.

68. *Id.* at 219.

69. *Id.* at 221.

70. *Id.* at 220.

gard for the law" had averted what otherwise would "long ago" have been "a bad end" for the presidential system.<sup>71</sup>

### 3. *Wilson's and Bagehot's Arguments in Historical Context*

The nineteenth-century proponents of the parliamentary critique need to be viewed in their historical contexts. After all, Wilson and Bagehot geared their appraisals to political conditions in their own times. Accordingly, the widespread reliance on their authority by parliamentary critics in the modern period must be questioned as fundamentally ahistorical.

In particular, Wilson wrote in the wake of the Civil War and a succession of relatively weak Presidents.<sup>72</sup> Moreover, Wilson's work did not focus on the experiences of earlier strong Presidents, such as Thomas Jefferson or Andrew Jackson.<sup>73</sup> Furthermore, Wilson wrote during a period in which Congress was dominant and in which there was a lack of centralizing institutions within Congress itself.<sup>74</sup>

Conditions changed on many levels. By the early 1900s, there had been stronger Presidents who provided a larger measure of national leadership under our constitutional system—such as Grover Cleveland, William McKinley, and especially Theodore Roosevelt.<sup>75</sup> In addition, there had emerged powerful legislative leaders in the House of Representatives<sup>76</sup> as well as the Senate.<sup>77</sup>

71. *Id.* Bagehot argued that the U.S. Constitution was outdated, like an old will that was misdrawn and difficult to work with in real life. *See id.* at 218.

72. *See* Robert L. Peabody, *Afterword to Wilson*, *supra* note 29, at 227 (describing Andrew Johnson, Ulysses Grant, Rutherford Hayes, James Garfield, and Chester Arthur as "passive and ineffective" Presidents).

73. *See id.* (criticizing Wilson for failing to analyze the experiences of these strong Presidents).

74. *See id.* at 227-28 (suggesting that Wilson's perception of committee dominance of Congress in the early 1880s was reasonably accurate).

75. *See* BURNS, *supra* note 25, at 204-05.

76. *See id.* at 205.

77. *See* CHARLES TIEFER, *CONGRESSIONAL PRACTICE AND PROCEDURE* 472-73 (1989) ("Only near the end of the nineteenth century and the beginning of the twentieth did Senate party figures gain control."). *See generally* HORACE S. MERRILL & MARION G. MERRILL, *THE REPUBLICAN COMMAND 1897-1913* (1971) (discussing the Republican Party's power and legislative performance); DAVID J. ROTHMAN, *POLITICS AND POWER: THE UNITED STATES SENATE 1869-1901* (1966) (discussing structural changes in the Senate in the post-Civil War period).

In the wake of such developments, Wilson himself fundamentally shifted orientation. In 1908, he published another book that took for granted the existence of a powerful President and did not rhapsodize, as did his earlier work, about parliamentary institutions.<sup>78</sup> Wilson in 1908 stressed that "we have grown more and more inclined . . . to look to the President as the unifying force in our complex system."<sup>79</sup> Having moved away from the British Cabinet and toward the President as the source of unity in government, Wilson returned to the fold of commentators preoccupied above all with U.S. institutions. Wilson's early-twentieth-century appreciation for the special role of the office of the Presidency stayed with him as he shifted from being an academic to being Governor of New Jersey and, finally, President himself.<sup>80</sup>

Bagehot, for his part, has been described by a modern historian of the Victorian age as "the intelligent voice" of the mid-nineteenth century.<sup>81</sup> The mid-century conditions in which he wrote were rapidly overtaken by events.<sup>82</sup> Specifically, Bagehot observed English institutions in 1865 and 1866,<sup>83</sup> which was before the major reforms of 1867 that expanded the electorate to include males in the urban working class.<sup>84</sup> These reforms, in the words of one com-

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78. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1908).

79. *Id.* at 60. In 1908, Wilson wrote of the President:

His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people.

*Id.* at 68. Wilson's approach in 1908 differed sharply from that of the early 1880s, when Wilson was preoccupied by what he saw as Congress' dominance in national politics and the burden of conflict between the legislative and executive branches. *See WILSON, supra* note 29, at 197-202.

80. *See Lippman, supra* note 52, at 15-16.

81. BRIGGS, *supra* note 56, at 514.

82. *See Crossman, supra* note 24, at 1, 17 (observing that Bagehot's study of parliamentary institutions was already outdated when first published in 1867, the year the Disraeli Government brought classic parliamentary government to an end by passing an electoral reform bill).

83. *See BAGEHOT, supra* note 13, at 267 (noting in the 1872 introduction to the second English edition that the body of the book "describes the English Constitution as it stood in the years 1865 and 1866"); *see also Crossman, supra* note 24, at 17 (praising Bagehot's journalistic style in describing "the system as he saw it in 1865").

84. For discussion of the 1867 reforms under the Disraeli government, *see BRIGGS, supra* note 56, at 503-14.

mentator, "ended the classic age of parliamentary government" that furnished the immediate context of Bagehot's study.<sup>85</sup>

In addition, Bagehot's vision of parliamentary government cannot properly be seen in isolation from a set of social attitudes closely associated with his era, class, and educational level.<sup>86</sup> In particular, he enunciated a relatively common Victorian conception of the marginality of the uneducated lower classes. He wrote: "The working classes contribute almost nothing to our corporate public opinion . . . ."<sup>87</sup> Bagehot considered that "their want of influence in Parliament does not impair the coincidence of Parliament with public opinion."<sup>88</sup> For Bagehot, "public opinion" consisted of the views of the educated middle and the upper classes: "Certain persons are by common consent agreed to be wiser than others, and their opinion is, by consent, to rank for much more than its numerical value."<sup>89</sup>

In these attitudes, Bagehot embraced the system of deference by the lower to the higher social orders that was central to mid-Victorian culture.<sup>90</sup> A deferential society, "even though its lowest classes are not intelligent,"<sup>91</sup> was in Bagehot's mind "far more suited to a Cabinet government than any kind of democratic country."<sup>92</sup> That was seen as true because cabinet government allowed the "highest classes"<sup>93</sup> to rule and thereby permitted "political excellence" to flourish.<sup>94</sup>

85. Crossman, *supra* note 24, at 17.

86. Bagehot's social attitudes were not unusual among the mid-Victorian educated middle and upper classes. Realization of this fact helps place in perspective the author's work, which is especially important given that this 19th-century critic is so often cited in 20th-century parliamentary literature.

87. BAGEHOT, *supra* note 13, at 176.

88. *Id.*

89. *Id.* at 171.

90. See generally *id.* at 247-50 (suggesting that the masses should yield to smaller groups of select rulers). For a discussion of the politics of deference, see DAVID C. MOORE, *THE POLITICS OF DEFERENCE: A STUDY OF THE MID-NINETEENTH CENTURY ENGLISH POLITICAL SYSTEM* (1976).

91. BAGEHOT, *supra* note 13, at 250.

92. *Id.*

93. *Id.*

94. *Id.*



Furthermore, Bagehot wrote in a period of relatively weak political parties,<sup>95</sup> especially as compared with the situation in his country in the late-twentieth century. He specifically assumed that parties were "not composed of warm partisans."<sup>96</sup> Indeed, if that had not been so, the result for Bagehot would have been dire: "Parliamentary government would become the worst of governments—a sectarian government."<sup>97</sup> His image of Members of Parliament presupposed their ability to distance themselves from party positions in determining the best course for the nation.<sup>98</sup> In this sense, party government for Bagehot was necessarily "mild."<sup>99</sup>

Bagehot's vision of the relatively independent Member of Parliament plainly predated many changes in the British political system, including the extension of the suffrage, the growing role of government in society, and the emergence of coordinated party machines.<sup>100</sup> Indeed, Bagehot opposed extension of the suffrage in significant measure because he believed that it would lead to what he called "constituency government," which he sharply distinguished from then-current parliamentary practices.<sup>101</sup> Constituency government amounted to "government of immoderate persons far from the scene of action, instead of the government of moderate persons close to the scene of action."<sup>102</sup>

Bagehot's world differed in other fundamental ways from that which later evolved in Britain. He could not and did not foresee the extent to which debate in Parliament would become, in many contexts, a sheer formality.<sup>103</sup> Nor did he anticipate the rising power of the civil service and the Prime Minister.<sup>104</sup> He also did not envision the changing role of the Cabinet. In modern commen-

95. See R.K. WEBER, *MODERN ENGLAND: FROM THE 18TH CENTURY TO THE PRESENT* 154 (2d ed. 1980) (arguing that in the period from 1846 to 1867, party discipline in England was loose).

96. BAGEHOT, *supra* note 13, at 159.

97. *Id.*

98. See *id.* (stating that Members of Parliament "are not eager to press the tenets of their party to impossible conclusions").

99. *Id.* at 161.

100. See Crossman, *supra* note 24, at 35, 39-46.

101. See BAGEHOT, *supra* note 13, at 161; see also Crossman, *supra* note 24, at 40 (noting Bagehot's opposition to constituency government).

102. BAGEHOT, *supra* note 13, at 161.

103. See Crossman, *supra* note 24, at 43.

104. See *id.* at 47-56.

tary, Bagehot's conception of the Cabinet itself has been seen as a "dignified" form masking the real power of the parties, the bureaucracy, and the Prime Minister.<sup>105</sup>

Accordingly, as one reviews Wilson's and Bagehot's parliamentary critiques, one should simultaneously underscore their historical constraints. In this as in so many instances, observations geared originally to particular times and places should be used cautiously by succeeding generations to make claims about new and different realities.

### B. *Twentieth-Century Critics*

During the twentieth century, the role of the United States in domestic and international affairs has expanded greatly, and the President has become increasingly powerful.<sup>106</sup> Despite these well-known developments, there has been striking continuity in parliamentary-style arguments against the separation of powers.<sup>107</sup>

105. R.H.S. Crossman observed:

By the turn of the century, when the party caucuses were firmly entrenched, the efficient secret of the Constitution was no longer the fusion of the executive and the legislature. [Rather, it was] the secret links that connected the Cabinet with the party on the one side and with the civil service on the other.

*Id.* at 39; see *id.* at 51 ("The post-war epoch has seen the final transformation of Cabinet Government into Prime Ministerial Government."); *id.* at 54 ("With the coming of Prime Ministerial government, the Cabinet, in obedience to the law that Bagehot discovered, joins the other dignified elements in the Constitution."). See generally JOHN P. MACKINTOSH, *THE BRITISH CABINET* (3d ed. 1977) (providing a historical account of the Cabinet's role in British government).

106. The tremendous modern growth of presidential power frequently has been emphasized. For a classic expression, see EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984*, at 357-59 (5th rev. ed. 1984).

107. Twentieth-century books calling for parliamentary-style changes include the following, in chronological order: WILLIAM MACDONALD, *A NEW CONSTITUTION FOR A NEW AMERICA* (1921); WILLIAM Y. ELLIOTT, *THE NEED FOR CONSTITUTIONAL REFORM* (1935); HENRY HAZLITT, *A NEW CONSTITUTION NOW* (1942) [hereinafter HAZLITT (1942)]; THOMAS K. FINLETTER, *CAN REPRESENTATIVE GOVERNMENT DO THE JOB?* (1945); GEORGE B. GALLOWAY, *CONGRESS AT THE CROSSROADS* (1946); HAZLITT (1974), *supra* note 13; CHARLES M. HARDIN, *PRESIDENTIAL POWER AND ACCOUNTABILITY: TOWARD A NEW CONSTITUTION* (1974); SUNDQUIST, *supra* note 7.

In addition to books on the subject, a number of useful collections of articles and other materials call for parliamentary-style reform. See, e.g., *Political Economy and Constitutional Reform: Hearings Before the Joint Economic Comm.*, 97th Cong., 2d Sess. (1982) (containing hearings held by Rep. Henry Reuss on parliamentary reform); *REFORMING AMERICAN GOVERNMENT*, *supra* note 5; *SEPARATION OF POWERS*, *supra* note 5.

Constitutional proposals during the twentieth century have ranged across a wide front. In 1921, William MacDonald proposed having the President choose a Premier from among leading members of Congress.<sup>108</sup> The Premier would lead the Cabinet,<sup>109</sup> and the Cabinet, consisting of legislators, would resign office upon a congressional vote signalling no confidence.<sup>110</sup> In 1935, William Yandell Elliott recommended that the President be empowered to dissolve Congress and to call a new election on one occasion during his term.<sup>111</sup> He also urged that the Senate's powers be considerably reduced so that legislative power could be concentrated in the House of Representatives.<sup>112</sup> In 1942, Henry Hazlitt supported a system in which the legislature would choose a Premier, who would be the head of government and would select a Cabinet.<sup>113</sup> Like Elliott, Hazlitt wanted the Senate's powers to be severely curtailed.<sup>114</sup> In 1945, Thomas Finletter urged the creation of a joint executive-legislative cabinet.<sup>115</sup> He also proposed empowering the President to call a new election to resolve conflicts between the Cabinet and Congress.<sup>116</sup> Moreover, he wanted the President and members of Congress to be elected to simultaneous six-year terms.<sup>117</sup>

The basic aims of such proposals should be familiar to readers of Bagehot and Wilson: they seek to make government more effective and more accountable by altering the system of separation of powers. In this part, I will elaborate on these views with reference to three main sources of parliamentary argumentation: Henry Hazlitt, who embraced large-scale parliamentary changes during World War II; Charles Hardin, who advanced parliamentary ideas in response to the Watergate crisis of the early 1970s; and critics during

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108. See MACDONALD, *supra* note 107, at 65-68.

109. *Id.* at 65-66.

110. *Id.* at 65-68.

111. See ELLIOTT, *supra* note 107, at 9-10, 200.

112. See *id.* at 195 (urging a reduction in the size of the Senate and a limitation of its power "to forcing the revision only of laws that do not affect revenues or appropriations").

113. See HAZLITT (1942), *supra* note 107, at 124-30.

114. See *id.* at 176 (recommending that the Senate's role be limited to "delaying, revising, forcing the House to reconsider measures").

115. See FINLETTER, *supra* note 107, at 88-105.

116. *Id.* at 110-16.

117. *Id.* at 110.

the 1980s, who expressed particular concern about national budget deficits. After reviewing these arguments, I will discuss major empirical and normative limits of the parliamentary critique.

### 1. *Henry Hazlitt and World War II*

In 1942, journalist Henry Hazlitt called for sweeping parliamentary reform.<sup>118</sup> In so doing, he specifically emphasized his debt to Bagehot and the early Wilson. In Bagehot, Hazlitt saw "the most penetrating analyst of political constitutions in modern times."<sup>119</sup> In the early Wilson, he found an insightful forebear whose diagnosis of American government he approvingly recounted.<sup>120</sup>

Hazlitt believed with Bagehot and Wilson that the separation of powers was unworkable because it promoted deadlock between the legislative and executive branches.<sup>121</sup> He also believed that it should be possible for an issue to be taken to the country by means of a special election.<sup>122</sup> An example of when this process would have been useful, according to Hazlitt, was the conflict between President Wilson and the Senate on whether to join the League of Nations and the World Court after World War I.<sup>123</sup> Moreover, he suggested that America's decision not to join the League contributed directly to Hitler's rise and thus to World War II.<sup>124</sup> Hazlitt further indicated that America's success in World War II de-

118. HAZLITT (1942), *supra* note 107. I will give parallel citations to the 1942 and 1974 editions of this book when possible. See HAZLITT (1974), *supra* note 13.

119. HAZLITT (1974), *supra* note 13, at 36; HAZLITT (1942), *supra* note 107, at 15.

120. See HAZLITT (1974), *supra* note 13, at 45-48; HAZLITT (1942), *supra* note 107, at 28-32.

121. See HAZLITT (1974), *supra* note 13, at 18-19 ("Thus frequent deadlock between the President and Congress, or between the two houses of Congress is virtually built into our constitutional arrangements."); HAZLITT (1942), *supra* note 107, at ix, 4.

122. See HAZLITT (1974), *supra* note 13, at 22; HAZLITT (1942), *supra* note 107, at 5-8 (opposing fixed terms of office); HAZLITT (1974), *supra* note 13, at 87-88; HAZLITT (1942), *supra* note 107, at 89 (stressing that public sentiment should be measured contemporaneously when the issue is decided).

123. See HAZLITT (1942), *supra* note 107, at 34-35. Hazlitt believed that President Wilson's support of the League of Nations would have prevailed "[i]f Wilson could have dissolved Congress and appealed to the country by an immediate election on the specific issue of the League of Nations." *Id.* at 35.

124. See *id.* ("If America *had* participated in the postwar settlement, however, the whole disaster of Hitlerism and the present war could have been averted.").

pendent on whether there would be wholesale parliamentary reform.<sup>125</sup>

Hazlitt defended his ideas on traditional effectiveness and accountability grounds. When speaking in the former mode, he drew on military analogies. Suppose, he wrote, that "our troops were led by three different generals, any one of whom could countermand the orders of the other."<sup>126</sup> The reference to three generals was meant, of course, to evoke a picture of three quarreling branches of government. For Hazlitt, disabling confusion was inherent in a system of separation of powers.<sup>127</sup> Hazlitt also pointedly contrasted our constitutional system with the unification of power in corporate life.<sup>128</sup>

Hazlitt's accountability argument similarly drew on longstanding premises of the parliamentary critique. He insisted that when power is shared among different actors and things go wrong or problems fester, it is difficult to assign blame.<sup>129</sup> As a result, in Hazlitt's view, people tend to become frustrated with the political process.<sup>130</sup> Hazlitt adopted a tone of urgency in rejecting what he referred to as the "procrastinator's argument" for less than sweeping constitutional change.<sup>131</sup>

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125. See *id.* at 4 (commenting that America needed to change its system of government "to one less rigid and more responsible" in order to undertake the challenges presented by World War II).

126. *Id.* at 7.

127. Hazlitt argued that the damage from the Japanese attack on Pearl Harbor on December 7, 1941 was associated with the failure to unify military authority. See HAZLITT (1974), *supra* note 13, at 148-49; HAZLITT (1942), *supra* note 107, at 279-80. He particularly stressed conflicts between the Navy and Army. See HAZLITT (1974), *supra* note 13, at 149; HAZLITT (1942), *supra* note 107, at 279. For Hazlitt, this example confirmed his thesis that effective government requires concentration of responsibility. See HAZLITT (1974), *supra* note 13, at 149; HAZLITT (1942), *supra* note 107, at 280-82.

128. See HAZLITT (1974), *supra* note 13, at 59; HAZLITT (1942), *supra* note 107, at 49 (arguing that the cabinet system "is the form of government adopted by practically all large American business corporations").

129. See HAZLITT (1942), *supra* note 107, at 140 ("For if we are to have responsible government, if we are to know whom to hold accountable for what is either good or bad, responsibility must be centralized . . .").

130. See HAZLITT (1974), *supra* note 13, at 89; HAZLITT (1942), *supra* note 107, at 91 (asserting that the American public feels frustrated and powerless because of the structure of government).

131. See HAZLITT (1974), *supra* note 13, at 91-93; HAZLITT (1942), *supra* note 107, at 95-96 (quoting a condensation of Jeremy Bentham's satire of the "Procrastinator's Argument," which urges one to "wait a little, this is not the time").

## 2. Charles Hardin and the Watergate Crisis

In a 1974 book,<sup>132</sup> political scientist Charles Hardin strongly embraced parliamentary proposals in response to problems of the early 1970s. He was particularly concerned about the Watergate affair.<sup>133</sup> This affair involved not only a break-in during June 1972 at the Democratic Party headquarters in the Watergate office complex in Washington, D.C., but also efforts by highly placed administration officials to cover up the incident's scope. The Watergate episode—described by Charles Hardin as America's "gravest political crisis since the Civil War"<sup>134</sup>—involved senior members of the executive branch, including the Attorney General, key aides to the President, and ultimately President Nixon himself.<sup>135</sup> A prolonged process of congressional and criminal investigations culminated in the House Judiciary Committee's vote for articles of impeachment<sup>136</sup> and constitutional litigation about an independent prosecutor's subpoena of certain tapes of presidential conversations.<sup>137</sup> After the Supreme Court ruled in *United States v. Nixon*<sup>138</sup> that the prosecutor's subpoena was not defeated by principles of executive privilege, President Nixon turned over materials containing

132. HARDIN, *supra* note 107.

133. See *id.* at 1. For a later critique of the separation of powers, see CHARLES M. HARDIN, CONSTITUTIONAL REFORM IN AMERICA (1989). For a critical review of Hardin's 1989 book, see Douglas Kmiec, *Debating Separation of Powers*, 53 REV. POL. 391 (1991).

134. HARDIN, *supra* note 107, at 1.

135. See generally CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974) (presenting an account of Watergate from the perspective of the reporters who broke the story); JOHN W. DEAN, BLIND AMBITION (1976) (recalling Dean's experiences during Watergate as Counsel to President Nixon); MYRON J. SMITH, WATERGATE: AN ANNOTATED BIBLIOGRAPHY OF SOURCES IN ENGLISH, 1972-1982 (1983).

136. HOUSE JUDICIARY COMM., IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 1305, 93d Cong., 2d Sess. (1974).

137. See *United States v. Nixon*, 418 U.S. 683 (1974). For discussion of the *Nixon* case, see Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30 (1974); Paul J. Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 UCLA L. REV. 76 (1974); William Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 UCLA L. REV. 116 (1974). The executive privilege debate has continued. See, e.g., Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987).

138. 418 U.S. 683.

highly incriminating evidence.<sup>139</sup> This evidence was considered to include a "smoking gun" that directly implicated the President in a cover-up.<sup>140</sup> Shortly thereafter, Nixon became the first U.S. President to resign from office.<sup>141</sup>

To Charles Hardin, these events revealed a major weakness of the separation of powers. To be sure, one might well reach the opposite conclusion if one were to see Watergate as having demonstrated the system's ability to survive a crisis. Hardin believed, however, that a parliamentary system could have handled Watergate better. Under a parliamentary model, there could have been a vote of no confidence in the head of government.<sup>142</sup> This possibility, he believed, could have allowed the nation to avoid the painful prolongation of the crisis. In our system, by contrast, the President can be removed only by impeachment.<sup>143</sup>

Since Hardin wanted the executive's survival to depend on majority support from Congress,<sup>144</sup> he argued that the President should resign whenever such support disappeared.<sup>145</sup> He also pro-

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139. See LEON JAWORSKI, *THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE* 198-208 (1976). Leon Jaworski was the Watergate Special Prosecutor from November 1973 to October 1974. See *id.* at 293.

140. *Id.* at 206 ("But the finishing blow was soon to come; the tapes would do [President Nixon] in.").

141. President Nixon was the second President to be the subject of serious impeachment proceedings. The first, Andrew Johnson, was impeached in 1867 by the House of Representatives and escaped conviction by the Senate by one vote. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 291-93 (2d ed. 1988).

142. See HARDIN, *supra* note 107, at 193 ("Party government would help the country cope with crises by enabling . . . the removal of politically inadequate leaders . . ."); *id.* at 192 (discussing the problem of a politically disabled President: "The proposal that the president's congressional party should be able to replace him would take care of this difficulty. Its wisdom is justified by recent British history.").

143. See *id.* at 6-7 (contending that impeachment is inadequate "because it concerns legal criminality rather than political responsibility").

144. Hardin emphasized the need for majority support for the President in the House of Representatives. See *id.* at 7 ("For an essential assumption would be that a president needs a majority in the House of Representatives to govern.").

145. See *id.* Hardin expressed a qualification to his enthusiasm for strengthened majority government with respect to "issues with a disparate local impact." See *id.* at 169-70. According to Hardin, race was this kind of issue. See *id.* A major party taking a position on race at odds with that of a region of the country could not compete for majority support there, whatever the party's attractiveness on other issues. See *id.* Hardin's concern about regional issues, however, did not prompt him to question his basic support for centralized, parliamentary-style government. See *id.* at 170-71.

posed that the President, Senators, and members of the House of Representatives be elected to concurrent four-year terms.<sup>146</sup> In a special twist, he argued that approximately 150 at-large members should be added to the present 435 members of the House.<sup>147</sup> These 150 members would be divided among the two major parties after a presidential election in order to assure that the party electing the President would have a working majority in the House.<sup>148</sup>

Hardin also sought to foster the institution of an opposition party.<sup>149</sup> To achieve this end, he proposed giving a seat in the House to the defeated presidential candidate of the two major parties.<sup>150</sup> The defeated candidate would be awarded membership on House committees, access to the House floor for debate, funds for an office, and an official residence.<sup>151</sup> At the same time, Hardin proposed reducing the Senate's power by eliminating its ability to hold up treaties or presidential appointments.<sup>152</sup> Also, under Hardin's scheme, if the Senate rejected a bill and it was adopted twice by the House, it would be deemed to have been passed by Congress and would go to the President as proposed legislation.<sup>153</sup>

Hardin maintained that there was no need for a constitutional amendment spelling out either the President's power to dissolve Congress or Congress' power to throw out the administration.<sup>154</sup> He expected that the practice of legislative votes of confidence would "naturally evolve" in a setting reformed along the lines he otherwise urged.<sup>155</sup> If a President ever lost majority support, "he w[ould] be incapacitated and," Hardin asserted, "it would be logical for him to resign."<sup>156</sup> Ultimately, Hardin believed, no-confi-

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146. *See id.* at 183.

147. *See id.*

148. *See id.* at 183-84; *id.* at 187 (describing as his key goal: "the party capturing the presidency will also control Congress").

149. *See id.* at 184-85.

150. *See id.*

151. *See id.*

152. *See id.* at 184.

153. *See id.*

154. *See id.* at 7.

155. *Id.*

156. *Id.* Hardin's reliance on "logic" seems odd given his otherwise keenly honed sense of realism about political activity.



dence votes could be expected to become "the normal way that one government ends and another is chosen."<sup>157</sup>

### 3. *Parliamentary Critics of the 1980s*

In recent years, parliamentary proponents have proliferated. They include former executive branch officials,<sup>158</sup> scholars,<sup>159</sup> and many others.<sup>160</sup> Although they differ in their particular arguments, they continue to advance key aspects of the basic critique advanced by their forebears. A leading source of contemporary ideas has been the privately organized Committee on the Constitutional System,<sup>161</sup> which received wide attention for a 1987 report urging a package of parliamentary reforms.<sup>162</sup>

Contemporary critics take aim both at the separation of powers *and* at what they regard as an unduly incohesive party system. They deplore what is commonly called "divided government," namely, the control by one major party of Congress or at least one House, and the simultaneous control of the Presidency by the other major party.<sup>163</sup> In six of ten presidential elections from 1956 to 1992—in 1956, 1968, 1972, 1980, 1984, and 1988—voters "divided" the government in this way by electing a Republican Presi-

157. *Id.*

158. See, e.g., Cutler, *supra* note 5; Lloyd N. Cutler, *Some Reflections About Divided Government*, 18 PRES. STUD. Q. 485 (1988). Lloyd Cutler, a lawyer in Washington, D.C., was Counsel to the President at the end of the Carter administration.

159. See, e.g., BURNS, *supra* note 25; REFORMING AMERICAN GOVERNMENT, *supra* note 5; SUNDQUIST, *supra* note 7.

160. See generally REFORMING AMERICAN GOVERNMENT, *supra* note 5 (compiling papers by members of Congress, members of the executive branch, governors, party officials, members of academia, journalists, and lawyers, as well as labor, business, and financial leaders).

161. See COMMITTEE RECOMMENDATIONS, *supra* note 14.

162. See *id.*; see also REFORMING AMERICAN GOVERNMENT, *supra* note 5, at 68-71. For media response to the Committee on the Constitutional System, see Richard Lacayo, *Is It Broke? Should We Fix It?*, TIME, July 6, 1987, at 54; Ruth Marcus, *Constitution in Need of a 200-Year Tune-up?*, WASH. POST, Jan. 15, 1987, at A19; Stuart Taylor, Jr., *Citing Chronic Deadlock, Panel Urges Altering Political Structure*, N.Y. TIMES, Jan. 11, 1987, §1, at 1. The Committee was not entirely a united front at the time it published its proposals. See Taylor, *supra*, §1, at 1 ("Senator Kassebaum [a member of the Committee] said that . . . fundamental structural changes in the Constitution were not warranted.").

163. See, e.g., SUNDQUIST, *supra* note 7, at 75-76.

dent and, at the same time, a Democratic Congress or at least House of Representatives.<sup>164</sup>

It is important to underscore that concerns about divided government and the party system are not confined to partisans of the parliamentary critique. Moreover, concerns about divided government deserve and have received attention in their own right.<sup>165</sup> My emphasis here is on the way in which such concerns have been used to buttress the basic program of parliamentary reformism. At bottom, the would-be reformers argue that the stalemate said to attend divided government is made vastly worse by the separation of powers.<sup>166</sup>

For example, Douglas Dillon, co-chair of the Committee on the Constitutional System, argued that divided government in a system of separated powers leads to a condition of "stalemate whenever important and difficult issues are involved."<sup>167</sup> Lloyd Cutler, another Committee co-chair, stressed that the President faces difficulties in making agreements with foreign nations because of the possibility of serious congressional opposition.<sup>168</sup> More generally, he decried the lack of ability in the United States to "form a government" that will promote unity between the legislative and exec-

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164. See *id.* at 77-78. From 1832 to 1992, national elections created a condition of divided government in 62 of 160 years, or about 40% of the time. MORRIS P. FIORINA, *DIVIDED GOVERNMENT* 6 (1992). From 1957 to 1992, 13 of the 20 presidential and mid-term elections produced divided government. *Id.* In the 1992 national election, voters elected a Democratic President and a Democratic Congress.

165. See, e.g., FIORINA, *supra* note 164; GARY C. JACOBSEN, *THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT* (1990); DAVID MAYHEW, *DIVIDED WE GOVERN* (1991); *THE POLITICS OF DIVIDED GOVERNMENT* (Gary W. Cox & Samuel Kernell eds., 1991); see also sources cited *supra* note 15.

166. See SUNDQUIST, *supra* note 7, at 75 ("When government is divided, then, the normal and healthy partisan confrontation that occurs during debates in every democratic legislature spills over into confrontation between the branches of the government, which may render it immobile."); see also James L. Sundquist, *A Government Divided Against Itself*, *CHRON. HIGHER EDUC.*, June 24, 1992, at B1.

167. C. Douglas Dillon, *The Challenge of Modern Governance*, in *REFORMING AMERICAN GOVERNMENT*, *supra* note 5, at 24, 26. Douglas Dillon served as Secretary of the Treasury in the Kennedy administration. *REFORMING AMERICAN GOVERNMENT*, *supra* note 5, at 24.

168. See Cutler, *supra* note 5, at 12-13 (discussing the requirement of two-thirds Senate approval for treaty ratification). Of course, Presidents often have made executive agreements with foreign governments and thereby have avoided the constitutional requirements that apply to treaties. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

utive branches in the manner of parliamentary systems.<sup>169</sup> James Sundquist, a member of the Committee's Board of Directors, also embraced the basic parliamentary critique of the separation of powers.<sup>170</sup> He argued that the problem of the federal budget deficit has been exacerbated by a structural tendency toward endless bickering between the President and Congress.<sup>171</sup> For these various critics, such bickering has been a regular feature of modern Presidencies, including those of Presidents Ford, Carter, Reagan, and Bush.<sup>172</sup> To be sure, critics have acknowledged that President Reagan achieved striking changes in national policy during his early years in office.<sup>173</sup> They have insisted, however, that this was a short-lived period and that the customary pattern is one of institutional deadlock.<sup>174</sup>

Recent parliamentary critics have continued to refer admiringly to earlier authors, including Woodrow Wilson,<sup>175</sup> Henry Hazlitt,<sup>176</sup> and Charles Hardin.<sup>177</sup> Also, many of the specific constitutional proposals made earlier have continued to be advanced.<sup>178</sup> Although the variety of such proposals continues to be impressive, attention often has centered on three sets of ideas.

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169. See Cutler, *supra* note 5, at 12-13.

170. See SUNDQUIST, *supra* note 7, at 75-78; James L. Sundquist, *Needed: A Political Theory for the New Era of Coalition Government in the United States*, 103 Pol. Sci. Q. 613 (1988-1989).

171. See SUNDQUIST, *supra* note 7, at 78 ("[T]he government's impotence was reflected most dramatically in its incapacity to cope with gigantic and unprecedented budget deficits.").

172. See *id.* at 77-78; Cutler, *supra* note 5, at 12-13 (discussing President Carter's difficulties with Congress over the SALT II Treaty).

173. SUNDQUIST, *supra* note 7, at 78.

174. See *id.* at 106 ("After the initial year [of the Reagan administration], the dismantling of governmental agencies and programs came to a halt. The president could lead the Congress no further in the direction he had set for it . . .").

175. See *id.* at 69 (referring to Wilson as "still among the most trenchant and pertinent" critics); Cutler, *supra* note 5, at 15.

176. See, e.g., SUNDQUIST, *supra* note 7, at 71.

177. See, e.g., *id.* at 72.

178. The reform repertoire is not exhausted by the proposals listed in the text. See also *id.* at 206-38 (discussing other alterations in checks and balances, including, inter alia, giving the President an item veto power, restructuring the war power to free the President from Congressional constraint, and limiting the Senate's power to block treaties). Again, my goal is not to discuss specific proposals—which do vary in their particular orientations—but rather is to discuss the historical background and general limits of the parliamentary perspective.

First, there have been recurrent proposals to lengthen the terms of office of members of the House of Representatives.<sup>179</sup> One goal of such a step is to shelter officeholders from the pressures of constituents and ongoing campaigning for reelection.<sup>180</sup> The objective of greatest concern to critics of the separation of powers is to *coordinate* the election cycles of Representatives with that of the President. As argued by earlier generations of parliamentary advocates, the coordination of terms of office could allow the President's coat-tails to bring into the legislature a more supportive and like-minded set of officials.<sup>181</sup>

Second, there have been renewed proposals to permit the calling of a special national election at some point during a President's or legislator's term of office.<sup>182</sup> Even if the power to call such an election were never exercised, its existence, it is said, would have a deterrent effect on deadlock in government.<sup>183</sup>

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179. See COMMITTEE RECOMMENDATIONS, *supra* note 14, at 10-11 (advocating a system with concurrent four-year terms for Representatives and the President as well as eight-year terms for Senators); REFORMING AMERICAN GOVERNMENT, *supra* note 5, at 175-77 (giving the draft language and pros and cons of a constitutional amendment extending terms of office); SUNDQUIST, *supra* note 7, at 105-34 (presenting advantages of lengthening the terms of office of Representatives to four years). For other discussion about altering terms of office, see HARDIN, *supra* note 107, at 183 (proposing same-day election and four-year terms for the President, Senators, and Representatives); HAZLITT (1974), *supra* note 13, at 28-29 (proposing four-year terms for Representatives and elections for one-fourth of the House every year).

180. SUNDQUIST, *supra* note 7, at 111-16.

181. See *id.* at 134.

182. See *id.* at 135-64 (discussing a special election mechanism). The details of the assignment of power to call a special elections are, of course, critical. A common suggestion is to vest that power in the President and in majorities of either House of Congress, although other possibilities exist. See REFORMING AMERICAN GOVERNMENT, *supra* note 5, at 254-57 (providing draft language and analysis of a proposed constitutional amendment for holding special elections); Cutler, *supra* note 5, at 14 (proposing that the President should have power to call a new congressional election and that a majority or perhaps two-thirds of both Houses should have power to call a presidential election). In 1974, Rep. Henry Reuss introduced a legislative proposal for a vote of no confidence by Congress followed by special elections for the President, Vice President, and members of Congress. H.R.J. Res. 1111, 93d Cong., 2d Sess. (1974), reprinted in *Symposium on the Reuss Resolution: A Vote of No Confidence in the President*, 43 GEO. WASH. L. REV. 327, 331-32 (1975).

183. See COMMITTEE RECOMMENDATIONS, *supra* note 14, at 16 (urging that serious consideration be given to a mechanism of calling a new election when deadlock in government occurs).

Third, there have been repeated proposals to allow members of Congress to sit in the President's Cabinet.<sup>184</sup> Such a proposal is designed directly to lessen the independence of the legislature from the President.<sup>185</sup>

In defending such suggestions, contemporary reformers have retained the classic critique of the separation of powers as dogged by indecision and unaccountability.<sup>186</sup> The reformers have been every bit as assured of the urgent need for change as were earlier analysts such as Henry Hazlitt during World War II or Charles Hardin during Watergate.

### III. THE EMPIRICAL AND NORMATIVE PREMISES OF THE PARLIAMENTARY CRITIQUE

As we have seen, parliamentary reformism rests on core premises advanced by Wilson more than one hundred years ago and, before him, by Bagehot.<sup>187</sup> This is true despite dramatic differences in the underlying political conditions at the various times that calls for parliamentary reform have been made.

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184. See, e.g., REFORMING AMERICAN GOVERNMENT, *supra* note 5, at 182-85 (offering draft language and analysis of a proposed amendment allowing for members of Congress to serve in the executive branch). Additional proposals have called for Cabinet members to answer questions on the floor of the Congress. See H.R. Res. 155, 102d Cong., 1st Sess. (1991) (proposing a monthly two-hour question period of a Cabinet member by the House); 137 CONG. REC. E1816-17 (daily ed. May 16, 1991) (statement of Rep. Gejdenson) (referring to earlier proposals by Rep. Pendleton during the Civil War, Rep. Kefauver in 1943, and Sen. Mondale in the 1970s that called for a congressional question period for Cabinet members); see also Thomas K. Finletter, *Cabinet Members on the Floor of Congress*, in CAN REPRESENTATIVE GOVERNMENT DO THE JOB (1945), reprinted in REFORMING AMERICAN GOVERNMENT, *supra* note 5, at 143 (responding favorably to the Kefauver plan).

185. See COMMITTEE RECOMMENDATIONS, *supra* note 14, at 11-12 (noting that it would not be obligatory to appoint legislators to the Cabinet but such ties "would prevent stale-mates"); SUNDQUIST, *supra* note 7, at 167-77 (analyzing proposals seeking to strengthen the collaboration between the legislative and executive branches). Woodrow Wilson suggested that the President should choose Cabinet members from among elected legislators in order to achieve responsible government. Wilson, *supra* note 27, at 499, reprinted in REFORMING AMERICAN GOVERNMENT, *supra* note 5, at 131, 131.

186. See Cutler, *supra* note 5, at 15 ("Our separation of executive and legislative power fractions power and prevents accountability."); Robinson, *supra* note 5, at 62 (contending that "a simpler, more integrated system would be both more effective and more accountable" than the separation of powers).

187. See *supra* text accompanying notes 27-71.

In this part, I will turn from the task of describing and clarifying key commitments of the parliamentary critique to the task of assessing the reform program's general premises. These premises are found in the critique's broad arguments for constitutional change, and they are not to be confused with specific claims at lower levels of generality that attend specific proposals. For instance, the idea of coordinating terms of office implicates many issues in addition to the general premises underlying this and other parliamentary-style suggestions.

My focus will remain on the critique's general premises because if they raise serious questions, as I suggest they do, then the nature of the debate that has been carried on should change. In my view, the debate needs to focus much more than it has on fundamental empirical and normative issues. It is understandable, to be sure, that proponents enmeshed in a certain world view would seek to focus on the technical aspects of changing a decried constitutional structure. Yet we need to look more closely at the basic grounds on which parliamentary reformers have denounced the separation of powers. In my view, a closer look will reveal that the critique's conceptual foundation is quite problematical.

I will first turn to the central empirical foundation of the parliamentary critique. I then will explore its normative underpinnings.

#### *A. The Empirical Foundation of the Parliamentary Critique*

The key empirical premise of the parliamentary critique is that the U.S. constitutional system is inevitably prone to prolonged and debilitating stalemate. There are substantial reasons for questioning this broad-scale assertion.

To begin, the critique's empirical argument assumes that whenever there is conflict between the legislative and executive branches, such conflict is a symptom of constitutional tendencies toward stalemate.<sup>188</sup> The possibilities that controversy could be constructive or that fruitful negotiation could occur after some degree of impasse lie outside the parliamentarians' frame of refer-

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188. See, e.g., SUNDQUIST, *supra* note 7, at 74 (noting that relations "between the executive and legislative branches degenerate, as they often do, into conflict and stalemate"); Cutler, *supra* note 5, at 12 ("The separation of powers between the legislative and executive branches . . . has become a structure that almost guarantees stalemate today.").

ence. Moreover, the idea that different approaches might usefully be joined together after a process of negotiation between the branches seems to remain beyond their purview. Instead of constructive possibilities, what parliamentary critics regularly see is confusion, paralysis, and weakness.<sup>189</sup>

Such a simplifying vision has considerable difficulty dealing with the subtleties of particular political conflicts. Take Henry Hazlitt: he expressed his concerns about the course of World War II in terms of a fear of deadlock between the executive and legislative branches.<sup>190</sup> Take Charles Hardin: he conveyed his alarm about Watergate in terms of a critique of structural tensions in our system of government.<sup>191</sup> Take contemporary critics: they often express their intense frustration with national budget deficits in terms of their laments about the separation of powers.<sup>192</sup> Yet we know that World War II, Watergate, and contemporary budget realities are very different topics. Is it not evident that a critique that treats them so similarly risks overlooking important complexities and alternative explanations lying outside a preconceived frame of reference?

To elaborate, consider the World War II, Watergate, and deficit examples along with two others prominently noted in the parliamentary literature: the Senate's failure to approve the League of Nations treaty after World War I and Franklin Roosevelt's 1937 Court-packing plan.

Let us start with the League of Nations experience. Assuredly, it was an instance in which the President's policy was thwarted by the Senate. Does that show structural "stalemate" in some general sense, as Hazlitt claimed it did?<sup>193</sup> Of course, the defeat would not have occurred if the Senate did not have the power to stop a treaty

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189. See, e.g., WILSON, *supra* note 29, at 186 ("[I]t is impossible to deny that this division of authority and concealment of responsibility are calculated to subject the government to a very distressing paralysis in moments of emergency."); Donald Robinson, *Introduction to Part 3: Reducing the Risk of Divided Government*, in REFORMING AMERICAN GOVERNMENT, *supra* note 5, at 127, 127 ("A broad consensus agrees that there are serious problems confronting the nation, and agrees, too, that enlightened, coherent public policy could help to alleviate them, but on the way to adopting these programs, the system falls into deadlock.").

190. See HAZLITT (1942), *supra* note 107, at 13-14.

191. See HARDIN, *supra* note 107, at 1-8.

192. See, e.g., SUNDQUIST, *supra* note 7, at 6-7, 78.

193. See *supra* note 123 and accompanying text.

by refusing to give it a two-thirds vote of support.<sup>194</sup> What does that prove? One needs to ask about the range of factors that actually prompted the treaty's disapproval. Consider, for example, the personalities of key political actors, public concern after World War I about continuing foreign obligations of the United States, and President Wilson's overall strategy for dealing with the Senate.<sup>195</sup> Ultimately, President Wilson lost the treaty when he refused to negotiate with the Senate about the reservations it proposed for the treaty.<sup>196</sup> By contrast, to cite a modern example, President Carter succeeded in obtaining ratification of the controversial Panama Canal Treaties through compromises on reservations.<sup>197</sup>

In view of the complex texture of the political processes involved in the Versailles Treaty debate, it seems remarkably overstated to claim that failure to approve the agreement resulted from our governmental structure. The structure was a necessary but by no means sufficient condition for the outcome. Moreover, to focus on the result of a particular treaty process is to overlook the larger

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194. The Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2.

195. See ROBERT C. BYRD, *THE SENATE, 1789-1989*, at 426-27 (1989) (reviewing the period, including the intense and important clash between President Wilson and Senator Lodge); ALEXANDER L. GEORGE & JULIETTE L. GEORGE, *WOODROW WILSON AND COLONEL HOUSE: A PERSONALITY STUDY* 268-315 (1964) (detailing circumstances surrounding the defeat of the Versailles Treaty and suggesting that Wilson's anxieties played an important role in the defeat).

196. See RAYMOND J. SONTAG, *A BROKEN WORLD, 1919-1939*, at 17 (1972) (describing Wilson as manifesting "unbending stubbornness"); see also WALTER C. LANGSAM, *THE WORLD SINCE 1914*, at 748-49 (3d ed. 1936) (describing the split in the Senate over ratification of the Versailles Treaty). The Senate voted on the Versailles Treaty on November 19, 1919, when under orders from President Wilson most Democrat Senators voted against the treaty with the reservations attached to it. See SONTAG, *supra*, at 18. The treaty did not win a majority. *Id.* Negotiations continued during the winter, and on March 19, 1920, a majority did vote for the treaty with the reservations. *Id.* The final tally was seven short of the necessary two-thirds vote. *Id.*

197. See THOMAS M. FRANCK & EDWARD WEISBAND, *FOREIGN POLICY BY CONGRESS* 274-86 (1979) (discussing the roles of President Carter and the Senate in ratifying the Panama Canal Treaties).



value of having the Senate participate, whatever the consequence in a specific case.<sup>198</sup>

Consider also Hazlitt's point about World War II. Hazlitt suggested that the failure of the United States to ratify the League of Nations treaty led directly to Hitler's rise to power and eventually to war.<sup>199</sup> What about the role played by Germany in the causation of World War II? Surely, multiple factors led to serious destabilization in that country after World War I.<sup>200</sup> These observations seem so plain that one has to wonder whether Hazlitt's concern about World War II should be viewed primarily as an argumentative device for focusing attention on his structural argument.<sup>201</sup> In any event, the United States helped to win World War II with the constitutional structure that Hazlitt so vehemently attacked.

Now consider Franklin Roosevelt's Court-packing plan, in which he proposed expanding the size of the Supreme Court in order to allow for the appointment of new Justices who could be expected to approve New Deal policies.<sup>202</sup> Hazlitt saw this plan's failure as

198. See Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511 (1989) (providing a summary of the roles of the Senate and the House of Representatives in the treaty-making process).

199. See *supra* note 124 and accompanying text.

200. A particularly divisive issue in post-World War I Germany involved the burden of reparations payments demanded by the victorious allies. In May 1921, the damages were fixed at \$31.5 billion, to be paid in annual installments of close to \$500 million. See FELIX GILBERT, *THE END OF THE EUROPEAN ERA, 1890 TO THE PRESENT* 206 (3d ed. 1984). As Gilbert noted: "All the German political parties were convinced that their country could not pay this sum." *Id.* For discussion of post-War social unrest in Germany, see *id.* at 204-09.

201. See HAZLITT (1942), *supra* note 107, at 4. Hazlitt expressed the following concerns: America finds itself in a struggle for survival against the most powerful military despotism that the world has ever known. The length and cost of this struggle—perhaps its very outcome—may depend upon whether or not we find soon enough the initiative to change our system of government to one less rigid and more responsible.

*Id.*

202. President Roosevelt sought the authority to appoint one new member of the Supreme Court for each sitting Justice over age 70—up to six new members—at a time when many Justices were elderly and had been voting to strike down New Deal programs. See SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 711, 75th Cong., 1st Sess. (1937), reprinted in PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER, CASES AND MATERIALS* 277, 277-79 (1988); Franklin D. Roosevelt, *The Coming Crisis in Recovery and What Can Be Done About It*, Radio Address from Washington, D.C. (Mar. 9, 1937), in SHANE & BRUFF, *supra*, at 274, 274-76. For discus-

another confirmation of structural weakness in the U.S. government.<sup>203</sup> His notion was that the President advanced a relatively extreme proposal, Congress balked, and the President carried on in other areas while dropping the Court-packing package.<sup>204</sup> Hazlitt asserted that in a parliamentary system, the Court proposal would "almost certainly" not have been made.<sup>205</sup> If it had been made and if a majority in Congress had been against it—as ultimately was the case in 1937—the President would have had to resign and face a special election.<sup>206</sup>

As interesting as this speculation is, the Court-packing plan seems to reveal the opposite of Hazlitt's suggestion: it appears to illustrate the potential *dangers* of a parliamentary arrangement. The plan is precisely the sort of extreme administration program that could well not be stopped in a system such as Britain's. The reason is that Parliament generally rubberstamps the administration's policies, assuming that the government has a majority in the legislature. Arthur Schlesinger, Jr., has made this argument in claiming that the lesson of 1937 was not that the Court-packing plan's unpopularity should have sent the President packing, but rather that defeat of such a plan in the first place would be unlikely in a parliamentary system.<sup>207</sup> So viewed, the example pointedly confirms the importance of separation of powers and checks and balances.<sup>208</sup>

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sion of the Roosevelt Court-packing plan, see generally JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938); ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1938); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court Packing" Plan*, 1966 SUP. CT. REV. 347; Alpheus T. Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 YALE L.J. 791 (1952).

203. See HAZLITT (1974), *supra* note 13, at 86-88; HAZLITT (1942), *supra* note 107, at 87-88.

204. HAZLITT (1974), *supra* note 13, at 87-88; HAZLITT (1942), *supra* note 107, at 87-88.

205. HAZLITT (1974), *supra* note 13, at 86; HAZLITT (1942), *supra* note 107, at 87.

206. See HAZLITT (1974), *supra* note 13, at 86; HAZLITT (1942), *supra* note 107, at 87.

207. See Arthur M. Schlesinger, Jr., *Leave the Constitution Alone*, WALL ST. J., Dec. 24, 1982, at 4, reprinted in REFORMING AMERICAN GOVERNMENT, *supra* note 5, at 50, 54 ("The court bill couldn't have failed if we had had a parliamentary system in 1937.").

208. See *id.* at 54 (asserting that the "Constitution has worked pretty well" as "[i]t allowed Franklin Roosevelt, for example, to enact the New Deal but blocked him when he tried to pack the Supreme Court").

The example of Watergate has been cited by Hardin as another instance of the inherent weakness of the separation of powers.<sup>209</sup> The idea was that the extended period of investigation and oversight by the Senate, the House of Representatives, and the judiciary seriously weakened the governmental system.<sup>210</sup> Parliamentary reformers like Hardin would have preferred the option of a vote of no confidence and a special election to save the nation from the prolonged agonies of a burdened chief executive.<sup>211</sup>

A key difficulty with Hardin's story is its presupposition that, in Britain for instance, a special election would have been called. Although that is theoretically possible, the notion takes for granted that Watergate-like events would come to light in the first instance. That is problematical, however, given the British system's tendency to shy away from the kind of intense and independent investigations of government that were critical in uncovering the Watergate affair.<sup>212</sup> At a minimum, a majority in Parliament would have strong incentives not to embarrass the executive unduly.<sup>213</sup> After all, a new election could lead to loss of the majority's control of Parliament and the government. Moreover, a new election would require Members of Parliament to defend against electoral challenges. The Members could be expected to suppose that they have better things to do with their time. Ultimately, one has to ask whether Watergate shows that the U.S. constitutional system failed or, in the alternative, that the system worked by allowing disclosure of wrongdoing at the top of government.

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209. See HARDIN, *supra* note 107, at 142 ("In the summer of Watergate, 1973, public morale in America was low. . . . On the daily television the White House 'horrors' and those of the Committee to Reelect the President replaced the artificial traumas of the soap operas, but without the promise of a happy ending.").

210. See *id.* at 157 ("Public disillusionment with politics was profound in 1973.").

211. See *id.* at 145 ("What the public could decide is whether the Nixon administration was worthy of its confidence . . .").

212. One should also mention the special role of the federal judiciary. For discussion of the point about the British legislature, see Schlesinger, *supra* note 207, at 52. Cf. MARTIN BAILEY, *OILGATE: THE SANCTIONS SCANDAL* (1979) (revealing how United Nations sanctions against exports to what was then known as Rhodesia were broken during the 1960s and 1970s by British companies, and noting that there was a shroud of governmental secrecy surrounding the matter.) The book's title, "Oilgate," was meant to conjure up images of a British Watergate that the British government never carefully investigated. Anthony Sampson, *Introduction* to BAILEY, *supra*, at 7.

213. See Schlesinger, *supra* note 207, at 52.

Finally, consider the often-cited example of continuing national budget deficits.<sup>214</sup> For contemporary parliamentary critics, the separation of powers and divided government have worked together to create what might be called a situation of hyper-stalemate in addressing the deficits.<sup>215</sup> The underlying empirical assessment is traditional: it is that the U.S. constitutional system is prone to deadlock and weakness.

Yet numerous factors appear to account for the nation's budgetary situation that have little to do as such with the legislative-executive separation of powers. Of clear importance in the creation of large deficits were numerous policy decisions during the 1980s that simultaneously reduced income taxes, funded social programs, and supported a large defense build-up.<sup>216</sup> *Conscious policymaking*, not structural inevitabilities, generated massive deficits.<sup>217</sup>

One might respond by urging that the persistence of the deficits requires a separate explanation and that the best one is structural stalemate between the legislative and executive branches. This explanation also is extremely problematical. The fact is that national policymakers and commentators have vigorously disagreed about

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214. See SUNDQUIST, *supra* note 7, at 78 ("As the revenue shortfall reached \$200 billion annually, the president and spokesmen for both parties in both houses of the Congress separately warned the nation of impending disaster, but together they could not muster the will to act."). For discussion of budget reform, see James A. Thurber & Samantha L. Durst, *Delay, Deadlock, and Deficits: Evaluating Proposals for Congressional Budget Reform*, in *FEDERAL BUDGET AND FINANCIAL MANAGEMENT REFORM* 53, 53 (Thomas D. Lynch ed., 1991) ("Since the passage of the [Congressional] Budget and Impoundment Control Act of 1974 (P.L. 93-344), delay, deadlock, deficits, and ever increasing debt have been a regular feature of congressional budgeting.").

215. See Dillon, *supra* note 167, at 27 (characterizing stalemate as stemming from "the inability of our system to clearly place the responsibility for action in any one place"); cf. James Q. Wilson, *Does the Separation of Powers Still Work?*, *PUB. INTEREST*, Winter 1987, at 36, 44-45 (contending that "there is no evidence at all that the deficit is a consequence of the separation of powers").

216. For discussion of deficit politics during the 1980s, see generally IRENE S. RUBIN, *THE POLITICS OF PUBLIC BUDGETING* (2d ed. 1993); JOSEPH WHITE & AARON B. WILDAVSKY, *THE DEFICIT AND THE PUBLIC INTEREST* (1989); AARON WILDAVSKY, *THE NEW POLITICS OF THE BUDGETARY PROCESS* (1988).

217. The asserted structural problems existed in the 1970s as well as the 1980s, although the deficits were much greater in the 1980s. See, e.g., SUNDQUIST, *supra* note 7, at 77 (asserting that "by the end of Nixon's first term relations between the branches had degenerated into open warfare").

what to do about the deficits.<sup>218</sup> Some critics have argued that the issue in general has been overblown.<sup>219</sup> Others have supported a variety of steps without coming to common ground about which ones to take.<sup>220</sup> Substantive policy controversies of such magnitude cannot be explained away in terms of constitutional structure.<sup>221</sup>

When one backs away from the various specific examples that have been said to illustrate the failure of the separation of powers, the simplistic character of a single-minded structural explanation comes into sharp focus. History and politics are more complex than any uncausal constitutional explanation will admit. In particular, deep disagreements about the substance of policy—what people are attempting to do—are at the core of periods of confusion or conflict. It bears mention in this regard that the United States is not alone today in the manifest frustration of its people with its political process. Indeed, a number of established democracies in the contemporary period—notably including parliamentary democracies—show signs of tension between their leaders and their citizens and evidence of political disengagement, division, and doubt.<sup>222</sup>

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218. Thurber & Durst, *supra* note 214, at 54 ("Some reformers call for procedural changes, others for changes in the basic budgetary power of the president and Congress, and still others for major tax and spending policy change as a way to solve the problem of deficits, delay, and deadlock in the congressional budget process.").

219. See ROBERT EISNER, *HOW REAL IS THE FEDERAL DEFICIT?* (1986) (arguing that the national budget deficit is a less serious problem than often supposed); ROBERT ORTNER, *VOODOO DEFICITS* (1990).

220. See PAUL R. KRUGMAN, *THE AGE OF DIMINISHED EXPECTATIONS* 63-64 (1990). Krugman argues that there have been at least four main positions on the deficit: 1) Democrats who think it is a problem and requires tax increases to be cured; 2) Democrats who think it is not much of a problem and that new spending is desirable; 3) Republicans who think it is a problem, albeit not as big as the Democrats think it is, and should be cured by cutting spending; and 4) Republicans who believe it is not a problem, although they support spending cuts anyway. *Id.*

221. The difficulties of addressing national budget deficits have been heightened because the overwhelming proportion of federal spending is on national defense, social insurance programs, and interest on the debt, with about 20% left over for everything else, such as "AIDS research, education, drug enforcement, antipoverty programs, foreign aid, and the cost of actually running the government." *Id.* at 74.

222. See E.J. Dionne Jr., *Grumpy Days Are Here Again*, WASH. POST, July 12, 1992, at C1 (discussing a "trend found throughout the world's democracies toward voter grumpiness, alienation, disaffection and anger"). Factors cited as reasons for the current "Democratic Distemper" include the decline of national economies and tendencies toward fragmentation in terms of race, ethnicity, gender, and culture, as well as ongoing ideological debates in the

Furthermore, significant and controversial policies have continued to be adopted in modern legislation in the United States. The 1970s, a period of divided government, was a time of major growth in domestic programs through legislation.<sup>223</sup> The 1980s also saw much dramatic legislative activity.<sup>224</sup> These facts directly undercut the stalemate thesis. They may even suggest that the existence of power in competing branches of government could promote the proliferation of policymaking, for each institution may be able to initiate action that the other might not have initiated.<sup>225</sup> However that may be, as an empirical matter the case against the separation of powers must be strenuously questioned.

One is left with the thought that the parliamentarians' claims may be less descriptive than normative in character. After all, the ultimate idea is that our government *should* be less divided and less conflict ridden. I will now turn to the critique's normative underpinnings.

### *B. The Normative Foundation of the Parliamentary Critique*

The normative foundation of the parliamentary critique has three main aspects: a set of general standards for assessing the sep-

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confusing post-Cold War era. *Id.* At a minimum, these observations should direct our attention to a host of political and historical developments that cannot be encapsulated by any simplistic structural critique of American government.

223. The early 1970s have been called a "public interest era" in which numerous new federal programs were created. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1278 (1986); see also LARRY N. GERSTON ET AL., *THE DEREGULATED SOCIETY* 32-34 (1988) (characterizing the late 1960s and early 1970s as an era involving a broad push for social regulation); David Vogel, *The "New" Social Regulation in Historical and Comparative Perspective*, in *REGULATION IN PERSPECTIVE* 155 (Thomas K. McGraw ed., 1981) (analyzing the federal government's efforts to regulate businesses in the areas of environmental and consumer protection during the 1960s and 1970s).

224. Some of this activity was in the form of deregulatory legislation. See generally GERSTON ET AL., *supra* note 223 (discussing the history of regulation and deregulation with reference to the airline and auto industries, financial services, and worker safety). Major tax legislation included the Tax Reform Act of 1986. 26 U.S.C. §§ 1-9602 (1988).

For discussion of divided government in the post-World War II period, see generally MAYHEW, *supra* note 165. In this significant book, Mayhew offers an extended argument for the thesis that "important laws have materialized at a rate largely unrelated to conditions of party control." *Id.* at 4. In sum, the divided government-causes-stalemate argument, Mayhew contends, is not borne out by the facts. See generally *id.*

225. See James W. Ceaser, *In Defense of Separation of Powers*, in *SEPARATION OF POWERS*, *supra* note 5, at 168, 184.

aration of powers; a particular picture of parliamentary institutions; and a certain view of constitutional values in the United States. I will discuss each of these matters in turn.

### 1. *General Standards for Assessing the Separation of Powers*

At the outset, one needs directly to confront the parliamentary critique's key arguments about the alleged ineffectiveness and unaccountability of the separation of powers. Both contentions, I will suggest, are plagued by a striking degree of vagueness and, in the end, emptiness.

#### a. *The Effectiveness Argument*

Everyone wants the government to be effective. Yet eventually one has to confront the fundamental question evaded by the parliamentary critique: effective for what ends? Effectiveness, after all, is concerned with the efficacy by which given goals are advanced.<sup>226</sup> If I said that I was "effective" today in writing a letter, I would mean that I accomplished my letter writing. To state that I was "effective," however, is to declare nothing about whether writing a letter was the best use of my time. It also does not establish a substantive basis on which to judge the finished product. Such an evasion of substance is magnified when one speaks of an entire institution or set of institutions—indeed, an entire government—as being "effective" or "ineffective." Again, the real question is: effective for what ends?

The parliamentary critique's tendency to avoid specific substantive baselines is deep seated. The critique asserts that *whatever* one wants the U.S. government to do, it cannot do it effectively. This approach may well have been chosen to appeal to a wide range of frustrated citizens. As one parliamentary proponent has noted with frankness: "To support constitutional reform, one must be prepared to gamble."<sup>227</sup> Notably, one must gamble that the policies one deems acceptable will be implemented within the constitutional structure so earnestly sought.

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226. As a matter of definition, to be "effective" is, *inter alia*, to be "capable of bringing about an effect" or "able to accomplish a purpose." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 724 (Philip B. Gove et al. eds., 8th ed. 1986).

227. SUNDQUIST, *supra* note 7, at 12.

Something terribly important is missing in a critique that regularly avoids the substance of political debate. From the viewpoint of people who, for example, opposed President Reagan's regulatory policies, there were significant virtues in the system of checks and balances that gave Congress the power to slow down or redirect the administration's efforts.<sup>228</sup> Moreover, this virtue of checks and balances is not limited to one partisan perspective, for the basic point also applies to those who have opposed the policies of Democratic Presidents.

The existence of two different approaches to the sequence of implementing parliamentary ideas further highlights the effectiveness argument's emptiness. The first approach would simultaneously pursue constitutional *and* party-related reforms. The second would advance party-related reforms first and only thereafter would pursue constitutional change. On the former view, the constitutional system needs to be altered immediately. On the latter view, the nature of political debate in the United States, as carried out by the two major parties, needs to be transformed first, and thereafter one should consider readjusting the major institutions of government.

The latter view has been described by James MacGregor Burns, who has called for revitalizing the major parties as the initial step in strengthening the government as a whole.<sup>229</sup> In particular, he has sought a reinvigorated Democratic party that would capture the energies of the left in domestic politics in order to match the Republican party that has moved to the right in recent years.<sup>230</sup> From this perspective, the existence of definite and discrete party programs is an important precondition to effective governmental reform.<sup>231</sup>

The key point here is that the effectiveness argument, cast as it is at such a high level of generality, does not address or resolve the basic choice that Burns notes. Once again, the argument reveals

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228. Cf. SUSAN J. TOLCHIN & MARTIN TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* 28 (1983) (noting Congress' use of its oversight power during the first Reagan administration).

229. See BURNS, *supra* note 25, at 201-02.

230. See *id.* at 233-34.

231. See *id.* at 235-36.



itself as a remarkably empty vessel that is ready to be given highly divergent meanings in particular contexts.

*b. The Accountability Argument*

The second major argument of the parliamentary critique—that the separation of powers is an unaccountable system of government—also confronts serious problems.<sup>232</sup> The contention rests on the premise that accountability requires unity in government so that the people will know whom to hold responsible for success or failure. Yet is the public so simple minded as to be unable to assign responsibility for policy when *both* the executive and the legislative branches have an active hand in shaping policy? Joint responsibility is still responsibility. To assume that one branch needs to have overriding influence on policy in order for officials to be accountable is to bootstrap a premise about cohesive government onto the separate notion of political accountability.

Moreover, it is doubtful whether the substitution of a major check on government resulting from a special election, in place of the multiple and ongoing checks now asserted by different power centers on each other, would actually result in a net gain for accountability.<sup>233</sup> After all, ongoing checks and balances between the legislative and executive branches are themselves a source of political accountability. The parliamentary critique seeks directly to undermine this source.

In addition, one must question the notion that accountability will be especially enhanced by providing for the possibility of a special election.<sup>234</sup> In general, elections do provide a mechanism for holding officials accountable to the people. Yet parliamentary crit-

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232. See *supra* notes 49-50 and accompanying text (discussing premises of the accountability argument); *supra* note 13 (describing unity, effectiveness, and accountability of the parliamentary system as viewed by parliamentary critics); see also MACDONALD, *supra* note 107, at 25 (referring to the parliamentary system of government as the "system of responsible government").

233. See Ceaser, *supra* note 225, at 182-83 (noting that parliamentarians "rely on an electoral check, rather than on institutional checks, to guarantee against abuses of power").

234. See HARDIN, *supra* note 107, at 193 (preferring flexibility in calling elections in order to help a country in times of crises); SUNDQUIST, *supra* note 7, at 140-61 (proposing a system of special elections as a modification of the impeachment process and as designed for emergencies); see also *supra* note 182 (discussing proposals for special elections in the United States).

ics have something more specific in mind when they assail the separation of powers for being relatively less accountable than a parliamentary system. For the critics, a system that creates the possibility of a special election will allow an issue to be taken to the country so that a new, specifically tailored mandate can guide a new administration, thereby rendering it more accountable to the people.

As a practical matter, the idea of taking an issue to the country to overcome governmental deadlock raises numerous questions. If there is governmental conflict, why is it not also likely for there to be deep division in the country? Moreover, can one expect an election campaign to stay focused on a particular issue or cluster of issues? In a heterogeneous society such as the United States, debate in a campaign leading up to a special election could quickly include discussion of many divergent issues. The underlying image of a great national forum for resolving some particular question in a special election might or might not turn out to bear any resemblance to reality.

Even assuming the existence of an unproblematical mandate resulting from a special election, how does the parliamentary critique deal with the likelihood of changing attitudes and conditions after such an election? On the logic of the parliamentary position, an electoral mandate apparently lasts in undiminished form until the next election. What if the political climate significantly changes and some different matters come to the fore, yet another special or a regular election is not held?<sup>235</sup>

Furthermore, the parliamentary critique's emphasis on the use of a special election to seek a national mandate to which the government is to be held accountable depends on the idea of a relatively unitary perspective adopted by the nation's voting majority.<sup>236</sup> How comfortably does the notion of a sweeping national

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235. An example of a policy change contrary to any presumed "mandate" of a presidential election was President Bush's acknowledgment in June 1990 of the need for new revenues, despite his 1988 campaign pledge against any new taxes ("Read my lips: no new taxes."). See *Bush's Sudden Shift on Taxes Gets Budget Talks Moving*, 48 CONG. Q. 2029 (1990).

236. See SUNDQUIST, *supra* note 7, at 106 ("[P]oliticians await the new mandate from the people that the presidential election is expected to confer."). One parliamentary proponent, Charles Hardin, believes in party government as a means of allowing a "national commu-

mandate on some overriding issue fit with the normative concerns of modern pluralistic politics?<sup>237</sup>

One voice that is especially attentive to the diversity of American political life is that of feminist theory.<sup>238</sup> Such theory is concerned that a dominant or unitary national attitude will likely mean, in present historical circumstances, a male attitude. For feminist scholars, a major goal is to preserve a sense of competing social visions in order to take account of alternative experiences and viewpoints.<sup>239</sup> Whatever one thinks of the feminist critique in particular, it underscores an important general lesson. For those who feel and are marginalized, the idea of a single national will, to be somehow revealed in a special election, is likely to be threatening. It deemphasizes—many would say silences—those in a minor-

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nity" to emerge. HARDIN, *supra* note 107, at 11 (noting that the aim of party government is "to create political conditions to enable the national community that exists in the hearts of the people to emerge"). Hardin, however, is critical of placing emphasis on a direct mandate from the people as a basis for governmental legitimacy. *Id.* at 167-69 ("For [the mandate] theory places an impossible burden on the people, subjects government to a regimen of popular control that cannot be fulfilled, and invites attempts to impose an excess of participatory democracy on the operations of government.")

237. See Ceaser, *supra* note 225, at 184 ("The American people have learned to live comfortably with the idea that at any time there may be no general will or mandate in the nation on policy matters."). For the pluralist view of American politics, see generally ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908); ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* (1982); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* (2d ed. 1971); GRAHAM K. WILSON, *INTEREST GROUPS IN THE UNITED STATES* (1981). For criticisms of the pluralist conception of politics, see, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM* (2d ed. 1979); ROBERT P. WOLFF, *THE POVERTY OF LIBERALISM* (1968).

238. A range of views is necessarily included in any reference to feminist theory. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); Marie Ashe, *Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

239. See, e.g., Williams, *supra* note 238. For a defense of diversity in the context of modern debates about the revival of republican ideals in liberal democratic thought, see Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1714 (1988) (arguing for normative pluralism in which politics is "the interaction of groups that are more than simple aggregations of individual preferences, but less than components of a single common good").

ity who have competing orientations.<sup>240</sup> This point is reinforced by the fact that different groups and individuals do have diverse conceptions of the good life. To assume without doubt that a system of political interaction culminates in some unitary expression of national will to which the government must be "accountable" is to fail to grapple with the underlying societal complexity.<sup>241</sup>

In fact, it seems admirable to have a governmental structure that fosters an ongoing struggle among diverse views and does not promote the lasting domination of one particular orientation. A different approach might initially lead to stronger government. If so, it would purchase strength at the expense of democratic debate. Moreover, in the long run a supposedly "strong" government as imagined by parliamentary critics might well be weakened by a tendency to disregard the diversity of Americans' views.

In important ways, the accountability argument is closely related to the effectiveness argument. Both call for a more centralized governmental structure able to pursue policies with less need for negotiation between Congress and the executive. Unsurprisingly, the problems with the two arguments are closely related. Both speak in vague generalities, and both evade substantive differences and choices in our political community.

## 2. *A Picture of Parliamentary Institutions*

A parliamentary critic might respond by suggesting that since we are talking about alternative constitutional systems, it is necessary only to establish that another structure has salient advantages over our own. Let us present a general picture of the British system, a proponent might urge, to understand its comparative superiority.

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240. See Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 855 (1990) ("[F]eminists insist that no one community is legitimately privileged to speak for all others. Thus, feminist methods . . . seek to identify perspectives not represented in the dominant culture from which reason should proceed."). See generally sources cited *supra* note 238 (listing works on feminist theory).

241. In so arguing, I do not endorse an optimistic rendering of pluralist theory that assumes that groups can interact freely and that the outcome of political bargaining is therefore legitimate on process grounds. Such a theory makes innumerable assumptions about access to the political process, bargaining power, and participation that are impossible to conform to reality.

A key problem with this response is that it tends to rely on a caricatured version of the parliamentary system. In the first place, the parliamentary critique often overlooks that the British example is only one of innumerable modern parliamentary systems and that others differ in basic respects.<sup>242</sup> It may be unsurprising that parliamentary proponents of constitutional change in the United States do not dwell on the intricacies of comparative constitutionalism, but the burden of their argument should lead them to consider main variations on parliamentary themes.

Moreover, in concentrating on the British experience, parliamentary critics often fail to take account of the important ways in which that nation's political system depends upon its unique history and culture. British commentators are not hesitant to point out such relationships. As H.R.G. Greaves noted in his classic study, the British Constitution cannot be understood "without reference to the chief characteristics of society."<sup>243</sup> Such factors as the British class system and the relative ethnic homogeneity of much of the country's people—without denying the significance of nationality differences among England, Scotland, Wales, and North-

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242. For a comparison of democratic governments, see AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* (1984). For works comparing parliamentary governments, see *MODERN PARLIAMENTS* (Gerhard Loewenberg ed., 1971); *PARLIAMENTS AND PARLIAMENTARIANS IN DEMOCRATIC POLITICS* (Ezra N. Suleiman ed., 1986); *REPRESENTATIVES OF THE PEOPLE?* (Vernon Bogdanor ed., 1985).

Studies of developing democracies offer further discussions of politics in parliamentary systems. See, e.g., *POLITICS IN DEVELOPING COUNTRIES: COMPARING EXPERIENCES WITH DEMOCRACY* (Larry Diamond et al. eds., 1990). Professor Juan Linz in particular has written in favor of parliamentary systems for developing democracies. See Juan J. Linz, *Democracy: Presidential or Parliamentary. Does It Make a Difference?* (May 14-16, 1989) (unpublished paper, on file with author); Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51 (1990) (containing an excerpt of Linz's unpublished paper). Professor Linz's discussions take us beyond the specific topic of the parliamentary critique of the separation of powers. For a reaction to Professor Linz's advocacy of parliamentary systems, see Donald L. Horowitz, *Comparing Democratic Systems*, 1 J. DEMOCRACY 73 (1990). Professor Horowitz summarizes his arguments against Professor Linz as follows:

[T]hey are based on a regionally skewed and highly selected sample of comparative experience, principally from Latin America, . . . they rest on a mechanistic, even caricatured, view of the presidency . . . [and] ignor[e] the functions that a separately elected president can perform for a divided society.

*Id.* at 74.

243. GREAVES, *supra* note 9, at 11.

ern Ireland—should be contrasted to conditions in the United States.<sup>244</sup>

In response, parliamentary proponents might well protest that they do not wish to transplant British institutions wholesale into this country. Yet even limited borrowing of basic ideas of another country's political structure risks overlooking that those ideas emerged in a distinct habitat. As James Ceaser has noted, the British parliamentary system functions as it does not just because it is parliamentary but because it is British.<sup>245</sup>

Furthermore, admiration for British institutions should not blind us to the fact that they have been sharply criticized in that country. Many critics have argued that such institutions give unwarranted power to the administration of the moment.<sup>246</sup> To be sure, if one dislikes the policies of a particular government, one might be expected to question the system.<sup>247</sup> The point remains

244. My point is a comparative one. Looked at on its own terms, British society reveals significant elements of heterogeneity. See PUNNETT, *supra* note 9, at 13-17 (challenging the idea of British homogeneity in a discussion of nationalism, ethnicity, and religion); ROSE, *supra* note 9, at 51-65 (discussing immigration and nationality issues in the United Kingdom).

245. Ceaser, *supra* note 225, at 172 ("The system that operates in Britain, however, functions as it does less because it is parliamentary than because it is British.").

246. See John Keane, *Reform of the Rump*, NEW STATESMAN & Soc'y, Dec. 16, 1988, at 29, 30 ("The trend towards a government-managed parliament is most evident in Britain, where the executive has virtually unfettered control over parliamentary proceedings and the initiation and progress of major legislation, and strictly controls the supply of information to parliament.").

247. Criticism of the undue power of the modern Prime Minister came to prominence during the period of Margaret Thatcher's government from May 1979 to November 1990. See MICHAEL FOLEY, *THE SILENCE OF CONSTITUTIONS* 105 (1989) (stating that the Thatcher government gave "cause for concern over the scale of central power and the extent to which it has been used not only to emasculate centers of organized opposition in the community, but also to accommodate ever greater reserves of authority with which to control public resources and information"); Michael Doherty, *Prime-Ministerial Power and Ministerial Responsibility in the Thatcher Era*, 41 PARLIAMENTARY AFF. 49, 56 (1988) ("From the evidence to date, it seems that Mrs [sic] Thatcher favors a restricted role for the Cabinet; her expressions of contempt for many of her Cabinet colleagues also suggest this."); Shirley Williams, *The New Authoritarianism*, 60 POL. Q. 4, 4 (1989) ("The doctrine of parliamentary sovereignty has become the doctrine of the executive in Parliament . . ."); David S. Broder, *Queen Maggie I: Is Thatcher Destroying Britain's Democracy?*, WASH. POST, July 23, 1989, at D1 (quoting a Conservative Member of Parliament about Thatcher: "She has no notion of checks and balances. And in our system, once in power, a prime minister is nearly absolute, at least until public opinion says she has gone too far."). See generally GEOFFREY

that, as a general matter, British Prime Ministers have remarkable power.<sup>248</sup>

The source of contemporary concerns about the British executive's dominance is the same as the British system's singular strength: a majority in Parliament basically guarantees passage of the Prime Minister's program. As Sir Ivor Jennings observed in a leading study of the British Cabinet, "The Opposition will, almost certainly, be defeated in the House of Commons because it is a minority."<sup>249</sup>

These points have not received sufficient recognition by parliamentary proponents in the United States. The justification for characterizing parliamentary government as accountable is that, in theory, the executive in a parliamentary system can be voted out of office by the legislature.<sup>250</sup> A key problem with this image is that, at least in modern Britain, the legislature generally does not use the vote of no confidence as a serious or active check on the executive.<sup>251</sup>

SMITH & NELSON W. POLSBY, *BRITISH GOVERNMENT AND ITS DISCONTENTS* 87-168 (1981) (analyzing contemporary British politics).

248. See GREAVES, *supra* note 9, at 96-97 (commenting that the Prime Minister's formal powers "resemble closely those of an autocrat. . . . The Government is the master of the country and he is the master of the Government. . . . His party, having a majority in that House [of Commons], determines the action of Parliament, and he controls his party."); see also Don K. Price, *The Parliamentary and Presidential Systems*, 3 PUB. ADMIN. REV. 317, 320 (1943) (quoting Mr. Lloyd George, speaking in 1931: "Parliament has really no control over the Executive; it is a pure fiction.").

249. JENNINGS, *supra* note 8, at 15-16. For other statements emphasizing the strength of the majority party in Parliament, see ANTHONY H. BIRCH, *THE BRITISH SYSTEM OF GOVERNMENT* 175 (1986) ("The real dichotomy in British politics is between the government and the Opposition, not between the government and Parliament."); *id.* at 195 ("Ever since the development of effective party discipline in the 1860s, the great majority of government Bills have been enacted without substantial change."); ROSE, *supra* note 9, at 109-10 (stating that "[t]he pressure to follow the party line is strongest when a party is in government" and that a different result would be "the worst outcome politically: the governing party would lose office"); cf. BIRCH, *supra*, at 195-97 (recognizing that the Cabinet has more power than Parliament in the legislative process but disagreeing with commentators who have concluded that Parliament "acts as little more than a rubber stamp in the legislative process").

250. See BIRCH, *supra* note 249, at 35 (describing the consequence of the 1832 Reform Act as placing choice of government in the hands of the House of Commons: "When a ministry was defeated in the Commons on an issue of confidence, the Prime Minister felt obliged to resign or ask for a dissolution.").

251. See PUNNETT, *supra* note 9, at 35-36 ("In modern constitutional terms, the dissolution principle is based on the responsibility of the Monarch's Ministers to Parliament, but with the rarity of Government defeats on motions of confidence in the Commons today . . .

In fact, one of the most important trends in British political institutions during the present century has been the sharp growth of prime ministerial power.<sup>252</sup> This development has been associated with a marked drop in the Cabinet's power and the rise of a powerful civil service with a penchant for secrecy.<sup>253</sup> Notably absent from this picture is a legislature with incentives closely to review or openly to question governmental policy. This absence is not surprising. In the parliamentary system, if there is a loss of confidence in the executive, the government will resign and new elections will be held. An election obviously generates doubt about the future of

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the power to request a dissolution has become a practical political weapon in the hands of the Prime Minister."); ROSE, *supra* note 9, at 109 ("[W]hen ministers served at the pleasure of the monarch of the day and took their directions from the King, the Parliament could be an independent check upon government.").

Votes of no confidence have been relatively rare in modern Britain. R.M. Punnett noted: "In 1979 James Callaghan lost the initiative when the Labour Government was defeated in a vote of confidence in the Commons and was obliged to seek a dissolution." PUNNETT, *supra* note 9, at 34. In 1940, a change of power took place when Winston Churchill replaced Neville Chamberlain without a vote of no confidence and a new election; rather, there was a loss of parliamentary support and the formation of a new cabinet. See MACKINTOSH, *supra* note 105, at 435 (observing that Chamberlain "suffered not defeat but a slump in support" from the Conservative Party); Samuel H. Beer, *The British Experience*, 43 GEO. WASH. L. REV. 365, 367 (1975), reprinted in REFORMING AMERICAN GOVERNMENT, *supra* note 5, at 215, 217 (describing the scene in Parliament at the time of the change of power from Chamberlain to Churchill). For a list of changes of government in Britain from 1835 to 1957, see JENNINGS, *supra* note 8, at 533. One commentator, who became a Member of Parliament, observed: "And these are the only two ways a Prime Minister can be removed, provided he has a majority and retains his health. One is a Cabinet coup, the other is overthrow at a back-bench meeting of his Party. Both are so unlikely as to be almost impossible." MACKINTOSH, *supra* note 105, at 434-35.

252. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 465 (1989) ("While the parliamentary model formally assumes legislative omnipotence, in practice it produces an almost unassailable dominance of the executive over the legislature."); Crossman, *supra* note 24, at 51 ("The post-war epoch has seen the final transformation of Cabinet Government into Prime Ministerial Government."). But see ROSE, *supra* note 9, at 100-02 ("While there is no denying that the Prime Minister is the single most important person in government, it does not follow that the Prime Minister is all-important or the cause of everything that is done in Whitehall."). Of course, there are limits to the Prime Minister's strength and power. See JOHN P. MACKINTOSH, *THE GOVERNMENT AND POLITICS OF BRITAIN* 73-89 (3d rev. ed. 1974) (describing limits such as those deriving from breakdown in party loyalty and bad relations with Cabinet members); PUNNETT, *supra* note 9, at 245-46 (emphasizing that the Prime Minister, in order to stay in office, must obtain the approval or at the least the consent of ministers and the party's support).

253. See Crossman, *supra* note 24, at 51-53. For discussion of the British bureaucracy's habits of secrecy, see PETER KELLNER & LORD CROWTHER-HUNT, *THE CIVIL SERVANTS: AN INQUIRY INTO BRITAIN'S RULING CLASS* 264-83 (1980).



each Member of Parliament. Such a prospect does create strong pressures—apart from those of the party system itself—for the majority to support the Prime Minister.<sup>254</sup>

A satirical reflection of the absurdity of imagining that Members of Parliament today are free to vote their consciences, as Bagehot supposed them to be, is offered in *Yes Prime Minister*, a set of fictional "diaries" by the Right Honorable James Hacker.<sup>255</sup> This book captures a sense of the strong party loyalties of British politicians. In a relevant passage, Hacker has come face to face with one Professor Marriott, whose ideas about local government reform initially had appealed to Hacker. Marriott has written a sequel to his original article, and Hacker has asked him what the party's role would be in the revised scheme. The voice is Hacker's.

Marriott beamed. "Well, that's the marvellous thing, you see. The party organizations would be completely bypassed. MPs would become genuinely independent."

I was aghast. . . .

Humphrey [the Cabinet Secretary] smiled at me. "So if MPs weren't dependent on the party machine they could vote against their own government party and get away with it," he explained.

"Exactly," said the Professor again. . . . "It's the end of the party machine. The end of the power of the whips."

I couldn't begin to grasp how such a system could possibly work. "So . . . how would the government get its unpopular legislation through if it couldn't twist a few arms? How would it command a majority?"

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254. See JENNINGS, *supra* note 8, at 18 ("Self-interest dictates support [of the party] even when reason suggests opposition."); MACKINTOSH, *supra* note 252, at 125 ("The main function of MPs is to support their leaders, to attack the other side and to score the maximum points with the electorate in preparation for the next general election."); ROSE, *supra* note 9, at 113 ("Rarely is an issue regarded as so important that an MP would want to risk the survival of his party in office by voting against it . . ."); see also KEANE, *supra* note 246, at 30 ("[Parliament] is viewed increasingly as a rubber stamp of decisions reached elsewhere.").

255. See YES PRIME MINISTER: THE DIARIES OF THE RIGHT HON. JAMES HACKER (Jonathan Lynn & Antony Jay eds., Salem House Publishers 1988) (1986) [hereinafter YES PRIME MINISTER]. These fictional "diaries" were the basis of a popular television program in Great Britain, which has been replayed on public television in the United States. The "diaries" followed an earlier volume, THE COMPLETE YES MINISTER: THE DIARIES OF A CABINET MINISTER BY THE RIGHT HON. JAMES HACKER MP (Jonathan Lynn & Antony Jay eds., Salem House Publishers 1987) (1984), which was also the basis of a television program.

Marriott's answer was all too clear. "That's the whole *point*. It couldn't! A government couldn't *command* a majority! It would have to deserve it. . . . And MPs would only favor it if the voters did too. Parliament would be genuinely democratic again."

I couldn't believe my ears. Who in their right mind could possibly come to the Prime Minister with such a dangerous proposal? Only some damn-fool academic. As far as I was concerned the good professor could return to the ivory tower from whence he came—and pronto!<sup>256</sup>

The serious point here is fundamental: one must not overplay the idea that the British Parliament is a serious check on the Prime Minister.

### 3. *A View of Constitutional Values in the United States*

Parliamentary critics might respond that the separation of powers could have been well suited for an agrarian and isolated nation, but it is not suitable today.<sup>257</sup> This view conjures up an image of a constitutional straightjacket that unduly confines a world power as it seeks to address serious issues domestically and internationally. From this perspective, the constitutional framework is said to need a transfusion of energy from another model.<sup>258</sup>

The central assumption underlying the straightjacket and transfusion images is that Americans are stuck with a rigid and unbending system. That assumption is wide of the mark. The institutions of United States government have evolved dramatically since the nation's founding, as shown by the tremendous growth in the power of the President<sup>259</sup> and the emergence of so-called "independ-

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256. YES PRIME MINISTER, *supra* note 255, at 383-84.

257. See, e.g., Lloyd Cutler, Remarks at the American Enterprise Institute's Public Policy Forum (Nov. 25, 1980), in CONSTITUTIONAL CONTROVERSIES 5, 5 (Robert A. Goldwin et al. eds., 1987) ("The separation of powers is an anachronism, and one in need of some revision.").

258. See *id.* ("Along with Woodrow Wilson, I believe we do need to do a better job of forming a government in the parliamentary sense.").

259. For discussions of presidential power, see CORWIN, *supra* note 106; THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED (1985); RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER (1980); SCHLESINGER, *supra* note 252. For a listing of sources on the presidency, see EVOLUTION OF THE MODERN PRESIDENCY: A BIBLIOGRAPHICAL SURVEY (Fred I. Greenstein et al. eds., 1977).

dent" agencies.<sup>260</sup> In other, not entirely consistent ways, the constitutional structure has hardly been static.<sup>261</sup> However superficially appealing it may be to blame present problems on the decisions of our forbears, a thesis about the dead hand of 1787 is unduly strained.

In any event, one must consider the broader implications of a frontal assault on the separation of powers as outdated, ineffective, and unaccountable. The assault calls into question core aspects of the Constitution, and it offers in their place a vision of firm and unified governmental management. What does this approach sacrifice?

Ultimately, a number of fundamental values are threatened. At the most basic level, the argument overlooks the importance of deliberation, dialogue, and debate involving the institutions of U.S. government and the public. I will develop this theme in two parts: first, by elaborating what I will call the parliamentary critique's managerial ethos; and second, by contrasting that ethos with the principle of dialogue underlying checks and balances.

*a. The Parliamentary Critique's Managerial Ethos*

The parliamentary critique's leading image of government is of an efficient machine of centralized decisionmaking that sets its goals clearly, accomplishes them smoothly, and does not engage in wrangling about ends or means. This is a highly abstract vision of the job of government as one of instrumental management.

Given the parliamentary literature's tendency to focus on management values, it is unsurprising that often it explicitly or implicitly idealizes corporate structures of governance.<sup>262</sup> In fact, the

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260. For discussion of the growth of independent agencies, see Susan B. Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223; Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238; Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257; Paul R. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779.

261. Consider, for instance, the dramatic growth in the power of federal agencies during the 20th century. See generally CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* (1990); Rabin, *supra* note 223 (providing historical discussion of the growth of federal agencies).

262. See, e.g., HAZLITT (1974), *supra* note 13, at 59; HAZLITT (1942), *supra* note 107, at 49 (analogizing the cabinet form of government to the structure "adopted by practically all large American business corporations"); see also WILSON, *supra* note 29, at 186-87 (stating

literature reflects admiration for hierarchical forms of decision-making in general.<sup>263</sup> After all, if decisions are seen to move up a chain of command with someone at the top able to say, "This is it," there should be less room for the difficulties that attend a process of broad debate about proposed policy.<sup>264</sup>

This managerial ethos inevitably highlights the executive virtues at the expense of open deliberation and ongoing participation in the political process. It also directly attacks checks and balances. Even though bargaining can be expected to continue within the executive branch, the critique would have it tamed in the relations between the executive and the legislature.

Take, for instance, Lloyd Cutler's summation of the relative efficiency of our system of separation of powers as compared with that of parliamentary systems.<sup>265</sup> He has contrasted the "success rates" of the two forms of government.<sup>266</sup> He defined success as the executive's ability to get its program through the legislature.<sup>267</sup> Under this definition, he has written, the constitutional system in the

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that "in any business, whether of government or of mere merchandising, *somebody must be trusted*").

263. See, e.g., JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 428 (1981) ("In charge of it all [the executive] is a single individual—the president—with the capacity to say 'This is it' and command his subordinates to fall in line with his decision."); James L. Sundquist, *The Crisis of Competence in Our National Government*, 95 POL. SCI. Q. 183, 197 (1980) ("[T]he executive branch is well organized to prepare a comprehensive and internally consistent governmental program. With its hierarchical structure, it can represent divergent views at the lower levels but blend and reconcile them at higher levels, with a point of decision at the top.").

264. Consider Woodrow Wilson's criticism of the constitutional system for its lack of a single center of power. See WILSON, *supra* note 29, at 186 ("There is no one supreme, ultimate head . . . which can decide at once and with conclusive authority . . . . In times of sudden exigency [this lack] might prove fatal . . . ."). Consider also Henry Hazlitt's admiring invocation of the hierarchical models of military and corporate planning, juxtaposed against the separation of powers in order to show the latter's comparative weaknesses. See HAZLITT (1942), *supra* note 107, at 7 (comparing the separation of powers to a military campaign in which three generals can countermand each other's orders but "no one of whom [has] final authority"); *supra* note 262 (noting Hazlitt's reference to American corporations).

265. See Lloyd N. Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25, 32 (1985); see also James Q. Wilson, Remarks at the American Enterprise Institute's Public Policy Forum (Nov. 25, 1980), in CONSTITUTIONAL CONTROVERSIES, *supra* note 257, at 8, 8. ("To Mr. Cutler good policy or good government is the product or act of a single will: It is an act of management, of allocation, of balance.").

266. See Cutler, *supra* note 265, at 31-32.

267. *Id.* at 32 (measuring efficiency "by the ability of elected leaders to legislate their party's program").

United States "is only four-fifths as efficient" as parliamentary government when both the Presidency and Congress are controlled by the same party.<sup>268</sup> When there is "divided government," he has stated, the United States system is "only two-thirds as efficient" as parliamentary regimes.<sup>269</sup> He has proclaimed that parliamentary regimes are "very close to one hundred percent" efficient.<sup>270</sup> The reason for parliamentary success in this comparison is that the executive generally can count on the legislature's support for whatever it proposes, assuming that the executive's party has a working legislative majority.<sup>271</sup>

Cutler's characterization of the relative success of the two systems is striking for a number of reasons. To speak of success without considering the content of governmental policy is to confirm the parliamentary critique's basic tendency to avoid substantive discussion of concrete public issues.<sup>272</sup> Note also that in the end *the President's success* becomes the definition of success in general. It matters not at all what the Congress proposes. The underlying notion is that the government's manager—the President in our system, the Prime Minister in the British system—needs to be able to manage. This view removes from consideration the possibility that another branch of government might have something usefully different to say about public policy.

To be sure, managerialism is not a foreign set of ideas in the context of American policymaking. Its image of "getting the job done" efficiently is central to modern debates about the legitimacy of the administrative process.<sup>273</sup> Managerialism also is at the root of a number of important developments in administrative law, especially including the evolution of centralized executive oversight

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268. *Id.*

269. *Id.*

270. *Id.*

271. See *supra* notes 248-49 and accompanying text (discussing the strength of the Prime Minister when his or her party has a majority in Parliament).

272. See *supra* text accompanying notes 226-31 (discussing the parliamentary critique's effectiveness argument).

273. See Thomas O. Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 410-419 (discussing the instrumentalist notion that "the legitimacy of the administrative process turns on its ability to realize valued public ends in an effective and efficient manner").

of agency rulemaking.<sup>274</sup> Yet managerialism is only an aspect of a number of competing visions of public administration, and it captures only a few of the broader normative ideas associated with contemporary ideals of administration.<sup>275</sup> Moreover, it is one thing to speak of administration in managerial terms, but it is quite another to speak of the interactions between the executive *and* the legislative branches in terms of such a vision. Managerialists may be frustrated because Congress does not speak their language, but that is precisely the point: Congress speaks the language not of managers but of the democratic process, messy though it is.

The parliamentary critique's managerial ethos has profound implications in the modern age of expanded presidential power. Since the New Deal and World War II, it has been widely recognized that the President has become the initiating institution of U.S. government.<sup>276</sup> The Presidency's centrality has reached such a level that the holder of that office is often seen in popular terms as the embodiment of national unity.<sup>277</sup> In this context, a critique that further exalts the President by calling for the dominance of

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274. For discussion of centralized executive review of agency rulemaking, see generally Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979); Lloyd N. Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 TUL. L. REV. 830 (1982); Peter M. Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235 (1981); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986).

275. See, e.g., Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419 (1987) (analyzing the delegation debate in terms of three competing ideals of the administrative process—the rule of law ideal, the public purposes ideal, and the democratic process ideal); Sargentich, *supra* note 273 (discussing competing ideals of the administrative process).

276. See, e.g., CORWIN, *supra* note 106, at 358-59; LOWI, *supra* note 259, at xi. Lowi wrote: The accumulated changes in national government since the 1930s have brought the United States into an entirely new constitutional epoch. The two most important changes are the development of a large professional bureaucracy and the enlargement of the presidency. . . . Woodrow Wilson characterized the regime of the 1880s as *congressional government*. The regime of the 1980s can be characterized as *presidential government*."

*Id.*

277. High popular expectations, combined with practical limits on the President's powers, have been seen by some to account for recurring weaknesses in the position of Presidents. See, e.g., NEUSTADT, *supra* note 259, at 202 (noting that modern Presidents have duties and expectations in excess of their "assured capacity" to carry through on desired policies).

managerial values risks seriously unbalancing the relations between the two political branches.

One therefore should not be misled into thinking that parliamentary critics seek to advance the interests of the Parliament or the legislature. This misunderstanding might be understandable given the literature's rhetoric praising Bagehot's model of government,<sup>278</sup> under which independent Members of Parliament thoughtfully voted their consciences on the great issues of the day.<sup>279</sup> The modern critique in the United States, however, is a managerially oriented, presidentially focused approach that exalts hierarchical control of policymaking by the executive. Again, this set of commitments may have a good deal of force when one is considering the executive branch by itself. When used as the prism through which to view the interaction of the executive and legislative branches, however, the vision seriously undermines the role of checks and balances in general and Congress in particular.

*b. The Principle of Dialogue Underlying the Constitution's Structure*

In turning now to the principle of dialogue underlying the Constitution's structure, it is important first to note a basic distinction. The Constitution's structural theory rests on two closely related but nevertheless separate principles: separation of powers *and* checks and balances.<sup>280</sup> The first principle requires that the branches of government be identifiably discrete. The second assumes that the branches are separate and then concentrates on promoting the checking of each by the others.<sup>281</sup> The task of separation summons forth a "formalist" analysis; it requires formal definitions of some sort to provide the baseline for analysis. The task of checking and balancing is most closely associated with a "functionalist" approach; it requires an awareness of the need to

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278. See *supra* text accompanying note 119 (noting Henry Hazlitt's praise of Bagehot).

279. See *supra* text accompanying notes 95-98.

280. See Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 434-38 (1987).

281. See *id.* at 435.

balance the roles and functions of different institutions in determining their appropriate relations.<sup>282</sup>

In recent years, there has been a revival of interest among courts, lawyers, and legal scholars in the doctrine and theory of the separation of powers and checks and balances.<sup>283</sup> It is unsurprising that attention has focused on the methodological tension between formalism and functionalism in particular cases.<sup>284</sup> Yet the literature also has concentrated on the substantive values served by the larger doctrine as a whole. Such discussions often have emphasized the singular importance of the political dialogue and interaction fostered by the Constitution's structure.<sup>285</sup>

The fundamental idea is that through the separation of powers and checks and balances, different voices—those of the President, the Senate, and the House of Representatives—can be expected to contribute to public debate about the ends and means of national policy. The notions are familiar: the President speaks as the nationally elected voice of the people generally; the Senate represents the states; and the House represents particular constituencies that often have highly local concerns. More generally, the President speaks for the nation, and members of Congress—while being concerned with matters of national import—speak especially for dif-

282. For discussion of formalism and functionalism in separation of powers analysis, see Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

283. See, e.g., LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (3d rev. ed. 1991); Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083 (1987); David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19; Daniel J. Gifford, *The Separation of Powers Doctrine and the Regulatory Agencies After Bowsher v. Synar*, 55 GEO. WASH. L. REV. 441 (1987); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988); Sargentich, *supra* note 280; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). See generally MODERN CONSTITUTIONAL THEORY: A READER 178-239 (John H. Garvey & T. Alexander Aleinikoff eds., 2d ed. 1991) (collecting readings on the separation of powers); Symposium, *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277 (1987).

284. See, e.g., Keith Werhan, *Toward an Eclectic Approach to Separation of Powers: Morrison v. Olson Examined*, 16 HASTINGS CONST. L.Q. 393, 425-34 (1989).

285. See, e.g., Strauss, *supra* note 282 (arguing against a rigid understanding of government below the level of the actors named in the Constitution—Congress, President, and Supreme Court—and in favor of a checks and balances perspective that focuses on the ongoing interactions among the three branches).



ferent constituent parts of the nation. This constitutional structure guarantees that diverse perspectives will contribute to dialogue about public policy.<sup>286</sup> Such a system is in direct tension with the top-down imperatives of the managerial ethos of parliamentarism.<sup>287</sup>

Certain *caveats* are important here. First, the Constitution's structure cannot be assumed to guarantee an optimally broad dialogue among different groups in the polity. To the contrary, there are major constraints on the scope of political debate, especially including the relative powerlessness of certain groups. Much more should be done in my view to broaden political dialogue in order to include unrepresented voices. Second, separation of powers and checks and balances are designed to moderate the tendencies of a full-blown democratic regime, which could be swayed by momentary impulses of an aroused public. To that extent, the idea of dialogue in the context of the Constitution's structure needs to be distinguished from pure democratic rule.<sup>288</sup> Third, other countries have evolved their own systems for achieving dialogue; my comments are directed specifically at the system in the United States.

286. See, e.g., Philip C. Bobbitt, *The Committee on the Constitutional System Proposals: Coherence and Dominance*, 30 WM. & MARY L. REV. 403, 406 (1989) (noting that the government's legitimacy under the Constitution depends on there being "three different dimensions of constituency"); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 489-90 (1987) (contending that more political voices are expressed in a division of powers system); see also *supra* text accompanying notes 236-41 (discussing the accountability argument's tendency to downplay divergent views about public issues).

287. None of the text's discussion of public deliberation is meant to deny that the dialogue has self-interested dimensions. In recent years, a large body of literature has discussed the fact that groups and individuals pursue their self-interest through the legislative process. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretations: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

288. The desire to check pure democratic rule is reflected in various constitutional provisions, including the original provision for the indirect election of Senators. Until the passage of the 17th Amendment in 1913, Senators were chosen by state legislatures. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1. Major checks on pure democratic rule remain in the bicameralism requirement, *id.* art. I, § 1, the President's veto power, *id.* § 7, and the practice of judicial review of legislative and executive actions.

Nevertheless, fundamental values are at stake. Foremost among them are the ideas of expanded access to power and broad dialogue in the context of our constitutional and political system. The possibilities of expanded access and dialogue follow directly from the fact that the constitutional structure is more decentralized, less unified, and thus less managerially neat than many parliamentarians would prefer. Because different institutions share power, individuals and groups may have a greater chance of winning the ear of some powerful official in their efforts to achieve representation. The significance of this fact is highlighted by taking the perspective of those who might not otherwise gain a political hearing, for instance because they do not have majority support and are not likely to achieve it in the future.<sup>289</sup>

Expansion of political access and dialogue is an intelligent response to the social diversity of the United States. Having multiple pathways to power can assist in channelling social conflict in an internally riven social context.<sup>290</sup> Indeed, since our nation is so diversified, it is unsurprising that people are often reluctant to embrace the idea of unity in government.<sup>291</sup>

The Constitution's structure also is reassuring on the level of day-to-day partisanship, as noted earlier. For those who oppose the policies of a given administration, the value of checks on the executive is obvious.<sup>292</sup> Vigorous dialogue about policymaking fostered by checks and balances also serves a number of affirmative pur-

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289. Cf. HARDIN, *supra* note 107, at 141 (contending that people "can also have a sense of ongoing participation in government if they are members of an effective and reasonably steadfast majority—or of a minority with a good chance of becoming a majority").

290. See Erwin Chemerinsky, *The Question's Not Clear, But Party Government Is Not the Answer*, 30 WM. & MARY L. REV. 411, 415 (1989) ("No group wins or loses all the time. As a result, no group need feel completely disenfranchised and better off working to overthrow the system of government. This stability is probably the most notable and desirable feature of the American system . . ."); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 621-22 (1989) (discussing the value of the diffusion of power in the American constitutional system in terms of its contribution to liberty and stability in the polity).

291. See DON K. PRICE, AMERICA'S UNWRITTEN CONSTITUTION 139 (1983), *excerpted as Words of Caution About Structural Change*, in REFORMING AMERICAN GOVERNMENT, *supra* note 5, at 39, 43 ("Especially in a larger federal system, with a diverse population, it is inevitable that the electorate will want to draw back from the idea of a tightly unified system . . .").

292. For arguments in the British context, see sources cited *supra* note 247.

poses. In particular, it can promote better decisions by encouraging fuller consideration of significant alternatives.<sup>293</sup>

In addition, separation of powers and checks and balances can help to prevent the dominance of particular factions or special interests.<sup>294</sup> A major theme of discussions of the U.S. government has been that factions frequently gain more power than their numbers warrant.<sup>295</sup> The overriding question has been how to control or limit the negative effects of special interests. Increasingly, commentators have noted that a healthy system of checks and balances, fostering debate about the impacts of governmental action as well as about competing public values, can help to ameliorate the problem of faction.<sup>296</sup> This notion does not have to be cast only in terms of having certain selfish interests check other selfish interests.<sup>297</sup> More generally, the contest among competing public visions, resting on larger commitments to the general good, can play out openly in a scheme of active checks and balances.<sup>298</sup> To be

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293. See Ceaser, *supra* note 225, at 186 ("[I]t may well be that the information relevant to making decisions can best become known under a system of multiple checks and diverse points of entry that allows the effects of any proposed policy to be gauged in an intensely political process.").

294. For a classic definition of "faction," see THE FEDERALIST No. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961) ("A number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.").

295. For criticism of interest group liberalism, see Lowi, *supra* 237, at 58-63; *id.* at 62 ("Interest group liberal solutions to the problem of power provide the system with stability by spreading a *sense* of representation at the expense of genuine flexibility, at the expense of democratic forms, and ultimately at the expense of legitimacy."). For discussion of interest groups in American politics, see INTEREST GROUP POLITICS (Allan J. Cigler & Burdett A. Loomis eds., 3d ed. 1991). For an illuminating discussion of policy subsystems involving interested individuals and groups, congressional committees or subcommittees, and federal agencies or units within agencies, see James A. Thurber, *Dynamics of Policy Subsystems in American Politics*, in INTEREST GROUP POLITICS, *supra*, at 319.

296. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 44 (1985) ("The system of checks and balances within the federal structure was intended to operate as a check against self-interested representation and factional tyranny in the event that national officials failed to fulfill their responsibilities.").

297. Checks and balances are often defended in terms of selfish interests checking selfish interests. See THE FEDERALIST No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) ("Ambition must be made to counteract ambition.").

298. See Sunstein, *supra* note 296, at 47 ("The federalists . . . achieved a kind of synthesis of republicanism and the emerging principles of pluralism. Politics rightly consisted of deliberation and discussion about the public good."). For a critique of "civic virtue" theory,

sure, a focus on the amelioration of factional dominance should not lead one to a romanticized image of American political debate. Yet the point remains that the program of promoting checks and balances can have a moderating impact on factional control of government.

One might say in response that the broader the dialogue, the harder it will be to make any decision that sticks. One can understand the impulses for clarity that inform such a response. A system of separation of powers and checks and balances does carry with it a considerable potential for messiness and untidiness. Whatever else one might say about the Supreme Court's opinion in *INS v. Chadha*,<sup>299</sup> the Court put well the basic point relevant here: "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government" as envisioned in the United States Constitution.<sup>300</sup>

Without meaning at all to suggest that the Constitution's system is ideal, one can say that it advances significant values and that these values are not sufficiently acknowledged by the parliamentary critique. After all, unity and effectiveness can exist in an autocratic system that is hostile to the norms of open dialogue. If we see broadened political debate in the United States as an impor-

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particularly including the works of Professor Sunstein, see Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988). Fitts emphasizes political science studies of parties as vehicles for structuring dialogue about public affairs. See *id.* at 1603-12. He also criticizes the diffusion of power within Congress as a factor enhancing the influence of special interest groups. See *id.* at 1628-30.

299. 462 U.S. 919 (1983).

300. *Id.* at 944. *Chadha* raised the question of the constitutionality of legislative veto devices, by which Congress, or a portion of it, adopts resolutions that are not presented to the President and that purport to have the force and effect of law. The Court held that such resolutions are legislative actions for purposes of Article I and therefore need to conform to the Constitution's requirements of bicameral passage and presentment to the President for approval or veto. See *id.* at 944-51. The Court's emphasis on the need to follow a plenary legislative process reinforces the importance of broad-based dialogue in the enunciation of legislative policy. See Sunstein, *supra* note 296, at 53. The Supreme Court has noted:

That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.

Bowsher v. Synar, 478 U.S. 714, 722 (1986).

tant public aim, then we should expect—and embrace—some trade-offs in terms of managerial neatness.

#### IV. CONCLUSION

For decades, parliamentary critics of the separation of powers have reproduced the same basic analysis of the structure of government in the United States. In the 1880s, Woodrow Wilson argued that the division between the legislature and the executive was a guarantee of ineffectual government.<sup>301</sup> In the early 1920s, William MacDonald expressed similar concerns when claiming, rather inconsistently, that our governmental structure was the source of the public's "feeling of indifference" toward political affairs as well as of "the thinly disguised talk of revolution."<sup>302</sup> During World War II, Henry Hazlitt worried about the nation's ability to win the war given the constraints of the separation of powers.<sup>303</sup> At the end of World War II, Thomas Finletter feared that the United States could not lead the western alliance during peace time unless "radical improvements" were made in the federal constitutional structure.<sup>304</sup> During the Watergate period, Charles Hardin expressed grave concerns about the future of our government in the absence of parliamentary-style changes.<sup>305</sup> During the 1980s, other parliamentary critics attributed growing national budget deficits to weaknesses in our constitutional structure.<sup>306</sup>

No doubt, tomorrow will bring other issues to prominence along with renewed attacks on the separation of powers. Yet it seems clear that no single answer can be an all-purpose response to each major challenge to our government. A one-size-fits-all approach is inappropriate given the complexity of modern society and politics.

In the end, when one looks beyond the details of parliamentary proposals to their underlying premises, one finds serious empirical

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301. See generally WILSON, *supra* note 29; *supra* notes 39-50 and accompanying text.

302. MACDONALD, *supra* note 107, at 29-30. MacDonald did not reconcile the apparent tension between a stance of indifference and one of revolution.

303. See *supra* notes 125-31 and accompanying text.

304. FINLETTER, *supra* note 107, at 1-9 (suggesting that America's post-World War II domestic and foreign interests could not be adequately realized through the constitutional governmental process).

305. See *supra* notes 132-41 and accompanying text.

306. See *supra* notes 214-15 and accompanying text.

and normative limits. As an empirical matter, notwithstanding predictions to the contrary, the constitutional system has neither collapsed nor proven unable to adopt innovative policies. Moreover, periods of supposed political stalemate in our history can be accounted for by a number of explanations other than one solely dealing with structural features of our constitutional arrangement. Furthermore, the managerial ethos of parliamentary reformism is in direct tension with important values associated with the dialogue that attends our system of checks and balances. The term "parliamentary reform" should not be allowed to cloud the fact that the critics advance a highly pro-executive position that would seek a strong government primarily by undercutting the independence of Congress.

The main limits of the parliamentary critique should be kept in mind as we continue to examine ways to make our government more responsive to the needs of individuals and the community. On the one hand, we should be quite wary of calls for change in the direction of a parliamentary system. On the other hand, we should be alert to the importance of a relatively open and deliberative political system that not only upholds the ideals of separation of powers and checks and balances, but also pursues reasonably efficacious responses to particular problems. It has been said that "'we live in the description of a place and not in the place itself.'"<sup>307</sup> This is as true of our vision of political possibilities as of anything else. We ultimately are responsible for developing and defending the images—the descriptions—that resonate with public values we embrace.

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307. Robert N. Bellah, *American Civil Religion in the 1970's*, *ANGLICAN THEO. REV. SUPP. SERIES*, July 1973, at 8, 9 (quoting Wallace Stevens).