

Principles of Constitutional Design

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Therefore, the history of devolution away from one-man rule had three broad results:

1. Power centralized in a single person was replaced by power focused increasingly in an elected assembly.
2. This led to the creation of multiple types of representative models.
3. These multiple representative models developed varying degrees of separation of powers.

Parliamentarism versus Presidentialism?

If the history of the separation of powers led to several models of representative government, what about the presidential system that is supposed to be coterminous with separation of powers? The fundamental difference between parliamentarism and presidentialism is that the latter has a popularly elected executive who is not part of the legislative branch, whereas the former has an executive, usually termed a prime minister, who is selected by the parliament, sits in it, and leads it directly. Britain is usually cited as the exemplary home of parliamentarism, while the United States is usually cited as the exemplary home of presidentialism. The distinction between the two constitutional forms is indeed important, but categorization schemes that rest upon it are failing to account for most of the difference between the two, which is essentially one in the degree of the separation of powers.

Several recurring problems in comparative studies result from this approach. First, a minority of political systems appear to fall into simply one category or the other. This results in the creation of awkward and ambiguous middle categories often labeled “hybrid” or “mixed.” These middle categories hide more than they reveal about constitutional design. Second, by singling out the United States as the paradigm case of presidentialism, researchers fail to see that presidentialism is not the major defining characteristic of the American political system. Invariably, on most empirical measures, the United States is a polar opposite to the British system, so it is reasonable to conclude that presidentialism is the cause of the difference. However, students of American politics will readily note that strong bicameralism, federalism, and an independent court together constitute most of what

the United States has contributed to constitutional design. A separate executive accounts for, at most, one-third of what distinguishes the American political system from the British parliamentary model, and perhaps as little as one-fourth of the difference. The separate executive is only a minor part of what distinguishes the U.S. from the British model.

Moreover, focusing on the president in the American political system is slightly perverse because the American executive is not only among the weaker presidents compared with those in other presidential systems, but he is even weak when compared with virtually all executives, whether president or prime minister. Because of this relative weakness the American president cannot be considered the true focus of American politics, its defining characteristic, or the explanation for the variance in empirical measures between presidential and parliamentary systems. In sum, for all of these reasons, to term the American political system “presidential” is to essentially miss the phenomenon – and that phenomenon is the separation of powers.

A little American history can shed light on this phenomenon, put supposed American presidentialism in perspective, and help explain why the American presidential exemplar is so different from and, on most empirical measures, more extreme than other “presidential systems.” It will also explain why it is useful to consider the British model as the grounding point of any comparative analysis, and other forms as deviations (in a certain sense, also derivations) from this basic parliamentary model.

If we take a look at James Madison’s notes to the federal convention that drew up the U.S. Constitution, we find that he and his supporters presented the Virginia Plan during the first week of deliberations. A modified version of this plan was adopted after some debate, and the rest of the convention was spent in further modification of this adopted plan. The Virginia Plan laid out, to the extent possible in America, a copy of the British parliamentary form in existence at that time. The first branch of the national legislature would be directly elected, with representatives apportioned according to the number of free inhabitants in each state. The first branch would then elect the second branch out of “a proper number of persons nominated by the state legislatures.” The national executive would also be chosen by the national legislature, as would the national judiciary. There was no aristocracy

in America, but the Virginia Plan attempted to use the first branch to identify a natural (nonhereditary) aristocracy and thereby to create the equivalent of a House of Lords through the selection of men of reputation by the first branch in the creation of the second branch. The Revolution had broken ties with monarchy, but the first branch would create a functional equivalent through selection of an executive outside of the legislature. Legislative selection of a high court, with final appeal resting in the legislature, completed the American approximation of the British parliamentary system. The prior existence of the states as polities led to a constitutional innovation that reflected “parliamentary supremacy.” The Virginia Plan also proposed that the national legislature could veto state laws that it viewed as contrary to the national constitution. However, national legislation could in turn be vetoed by a national council of revision composed of the national executive and several members of the national judiciary. Because the executive and judicial branches could be altered by it, they were essentially creatures of the legislature. This makes the hereditary British king, and the judiciary under the king, look more independent from the legislature than the American “copy.” The one parliamentary power that was removed from the American national legislature in the Virginia Plan was the amendment process. The plan proposed that amendments be “recommended by the several [state] Legislatures to be expressly chosen by the people, to consider & decide thereon.”

As the convention debates went on, five major innovations were made in this plan. First, bicameralism was made much stronger than in Britain by having the second branch elected by the state legislatures. Second, the federalism implicit in this move was woven throughout the document to carve out the states as relatively independent polities that, while not sovereign, had more actual power than the national government by retaining competencies in the vast majority of policy areas. One example was the amendment process, which now involved both national and state entities, either conventions or legislatures at both levels. Third, the Supreme Court was removed from legislative control through presidential nomination, senatorial approval only, and the granting of life tenure. Finally, at the very last minute, and almost as an afterthought, the executive was removed from legislative control and given an independent basis in an electoral college that was selected by state electorates.

In every instance the basic British model was altered so as to devolve or separate what were seen in Britain as part of parliamentary powers to other branches and agencies. Thus was the separation-of-powers model derived from the parliamentary model. The various innovations were done piecemeal and for politically pragmatic or utilitarian reasons rather than out of commitment to a principle. Still, the result was the highest level in the separation of powers seen up to that time. That ultimate expression of the separation of powers rested only in part on an independent executive centered around a president.

When we look at the relative weakness of the executive branch in the constitution and the dominance of the legislative branch, we can see both the residual effects of beginning from a British parliamentary model and the final reason why it is a misnomer to characterize the U.S. model as simply “presidential.” Nor has the U.S. Constitution strengthened the presidency since 1789. The strength of the presidency continues to rest, as Neustadt famously pointed out in the 1960s, on the prestige and prominence of a single person who is the only American political agent who can lay claim to a national constituency, and who resides in a “bully pulpit” that permits access and recourse to the people as a whole. Constitutionally speaking, the U.S. president, even with the advent of things like executive orders, remains constitutionally a relatively weak institution.

The easiest way to demonstrate this is to run quickly through the checks and balances of the current political system. The principle balances are three: bicameralism, different constituencies for each of the three national branches, and different terms of office for each. Together these “balances” make it extremely unlikely that national power can fall into the hands of any minority – indeed, it is difficult for any identifiable majority to gain such control. The balances thus in part result from and reinforce the separation of powers. However, a number of constitutional checks counteract the centripetal forces created by the separation of powers. Laying out all of these checks at once proves to be an interesting exercise.

The first check most students will mention is presidential veto, but veto override gives Congress the final word. The president nominates men and women to his cabinet and other major executive posts, but the Senate gives Congress the last word. The same is the case for treaties. The president is commander in chief, but only Congress can declare

war to make this power meaningful, and only Congress can appropriate funds to give the commander in chief a fighting force. In addition, Congress can impeach the president, investigate executive functions and actions, create and abolish executive agents and agencies, and set or alter executive branch salaries. The president can pardon on his own, but he is left out of the amendment process completely. The president cannot affect the sitting of Congress through prorogue or calling sessions. If the electoral college fails to select a president, Congress shall select one. If the president and vice president die, are removed, or are incapacitated, Congress determines who shall be the executive – currently the Speaker of the House. No other elected president in the world has so many legislative checks and restrictions placed upon him. Even most symbolic presidents can prorogue or call the legislature into session.

The Supreme Court is even more constitutionally dependent on Congress. Although judicial review is now generally considered a constitutional check, this is technically incorrect since judicial review is not found in the text of the constitution. The text does allow Congress to impeach the justices, set their salaries, set and alter the size of the court, and alter the court's appellate jurisdiction. This last point is especially important because less than 1 percent of the court's cases come to it through its original jurisdiction in Article III. The rest come to the court through appellate jurisdiction added by Congress. Put another way, while there is no reason for Congress to want to do so, it could take away much of the court's power by reducing its jurisdiction. Thus, as written, the Constitution leaves the levers produced by the Constitutional Convention largely in the hands of Congress. This is perfectly understandable once it is recognized that the Constitutional Convention began by adopting what was essentially a parliamentary system. As the executive and judicial branches were drawn away from Congress into an independent status, the fear of these branches possibly misusing their power, plus the absence of direct elections to control them, led naturally to a system of checks whereby the elected Congress could keep them in line.

The point of this diversion into American history is to underline how inappropriate it is to characterize the American political system as "presidential." It was not designed to put the president in the center,

and the independent executive is only a part of the separation of powers that defines the document's originality that differentiates it from the British model. It seems more than odd to view the U.S. system as an outlier on most empirical measures primarily because it has an independent executive, when its executive was designed to be, and remains, weaker than is found in many "presidential" systems that do not result in outlier status because they lack some combination of bicameralism, federalism, judicial independence, and other separation-of-powers institutions.

Modern constitutional analysis, therefore, requires that we begin with the least separated version of parliamentarism; that we move beyond a simple parliamentary-presidential dichotomy to a separation-of-powers continuum; that we learn to distinguish parliamentary and presidential systems that blend into one another; and that we attempt to develop a Separation of Powers Index that can be more useful in testing empirical propositions about constitutional design. In short, our analysis must be able to deal with political systems that have different degrees of separation of powers that do not permit easy dichotomization, or even categorization.

The Pure Parliamentary Model

We can describe a minimal separation of powers in the following manner.

1. There is an elected unicameral legislative body.
2. The sole executive is selected by this body, resides in it, and presides over it.
3. All other executive personnel (cabinet, etc.) who are to implement and oversee policy are selected by and removable by the legislative body (not the prime minister).
4. This body is the final court of appeal on all judicial matters – there is no separate court of final appeal.
5. There are no limits on the power of this body to deal with any matter.
6. The system is unitary – there is no federalism or local governmental discretion.
7. There is minimal legislative organizational complexity.