

# THE FALL AND RISE OF CROWN GOVERNMENT\*

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## ABSTRACT

*At their Constitutional Convention in 1787, the Framers sought to give us a form of divided government that would prevent any one branch from becoming too powerful. In so doing, they rejected a parliamentary form of government and its thin form of separation of powers. But parliamentary governments across the world are freer than presidential ones, and to the extent that America is free, it is in spite of—and not because of—its constitution.*

*The separation of powers, which was meant to prevent the rise of an all-powerful president, has had the opposite effect and insulated the position from accountability. Prime ministers in parliamentary countries are not the head of state. We are more ready to laugh at them, and that is protective of liberty. They are required to meet the House of Commons, and to answer questions with wit and intelligence. They can also be turfed out with a simple vote of non-confidence. In America, the gridlock found under the separation of powers also encourages presidents to act extra-constitutionally and has the further disadvantage of turning bad legislation into the laws of the Medes and the Persians.*

*The interesting question is why America did not follow the example of those unhappy countries that copied its constitution. Plausibly, that was because both parties shared a common understanding about the general goals to be pursued and a willingness to play by the constitution's rules. When that is absent, as seen in the other articles in this symposium, we are permitted to be pessimistic about what comes next.*

## TABLE OF CONTENTS

I. Introduction .....	248
II. The Framers.....	250

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\* Portions of this Article were taken from the Author's book, *The Once and Future King: The Rise of Crown Government in America*. In some instances, traditional attribution and style conventions were not used.

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III. The Anglo-Canadian Alternative.....	252
A. Jack Sprat's Law .....	253
B. Taming the King.....	255
C. Madisonian Infirmities .....	258
D. Irresponsibility .....	262
E. The Common Pool Problem.....	263
F. Micromanaging .....	264
IV. Why Did It Happen?.....	264
A. The Logic of Political Power. ....	265
B. The Regulatory State.....	265
C. The Role of the Media.....	266
V. What Next?.....	267

## I. INTRODUCTION

Over the last 250 years there have been four American constitutions, and each has resulted in a different form of government.<sup>1</sup> We have seen three thus far, and now are on the cusp of a fourth constitution.<sup>2</sup> The first constitution, in the pre-Revolutionary thirteen colonies, was one of Crown government in which royal governors were enormously powerful.<sup>3</sup> This was swept aside by the Revolution, and (after the interregnum of the Articles of Confederation) the Framers at their Convention in Philadelphia in the summer of 1787 produced the second constitution, one designed to correct the flaws of Crown government and the Articles of Confederation.<sup>4</sup> What they proposed was a form of congressional government, with power centered in the Senate and House of Representatives.<sup>5</sup>

The third constitution was one of separation of powers, of power divided between the legislative and executive branches.<sup>6</sup> Its seeds were found in the second constitution and emerged over the next 50 years with the rise of democracy, as the president came to be popularly elected and the office emerged as the modern

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1. F.H. BUCKLEY, THE ONCE AND FUTURE KING: THE RISE OF CROWN GOVERNMENT IN AMERICA 3 (2014) [hereinafter BUCKLEY, THE ONCE AND FUTURE KING].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

executive, commanding, decisive, possessing all the authority of the only person elected by the nation at large and able to resist congressional government.<sup>7</sup>

Contrary to popular belief, this was not what the Framers had intended.<sup>8</sup> It was not even what James Madison had wanted at the Convention, with his Virginia Plan, where the House of Representatives would select the Senators, where both bodies would choose the president, and where the federal government could disallow state laws.<sup>9</sup> On all of these issues he lost, and on the morning of July 17, 1787 he proposed a walk-out from the Convention.<sup>10</sup> If he was the Father of the Constitution, this was one of those cases, not unknown in delivery rooms, where the child bore little resemblance to the father.

We have now entered into a fourth constitution, one of strong presidential government that represents a return to Crown Government.<sup>11</sup> The president has slipped off many of the constraints of the separation of powers.<sup>12</sup> The President makes and unmakes laws without the consent of Congress, spends trillions of government dollars, and the greatest of decisions, whether to commit his country to war, is made by him alone.<sup>13</sup> His ability to reward friends and punish enemies exceeds anything seen in the past.<sup>14</sup> He is rex quondam, rex futurus—the once and future king.<sup>15</sup>

For Americans, the return to one-man rule will appear a betrayal of the Revolution and its promise of republican government.<sup>16</sup> So it seemed to George Mason, who complained at the Philadelphia Convention that a popularly elected president would “degenerate” into an “elective monarchy,”<sup>17</sup> which was worse, he thought, than the real thing.<sup>18</sup> A hereditary king, like George III, lacked the legitimacy conferred by the voters, and therefore had to share power with the

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7. *Id.* at 3–4.

8. *Id.* at 4.

9. *Id.*

10. See F.H. Buckley, *Separated Powers, Fractured Nationalism*, AM. MIND (Mar. 25, 2019) [hereinafter Buckley, *Separated Powers*], <https://americanmind.org/features/post-trump-politics/separated-powers-fractured-nationalism/> [https://perma.cc/KE9D-NV49].

11. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 4.

12. *Id.*

13. *See id.*

14. *Id.*

15. *Id.*

16. *See id.* at 6.

17. *Id.*

18. *Id.*

legislature.<sup>19</sup> An elective president would not be so constrained, and would thus be more dangerous to liberty.<sup>20</sup>

The never-too-much-to-be-praised George Mason was remarkably prescient.<sup>21</sup> In *The Once and Future King*, I found that the unhappy countries which subsequently adopted the American constitution were significantly less free than the countries that embraced the Anglo-Canadian model of parliamentary government.<sup>22</sup> In multiple regressions designed to cleave off the influence of other factors such as experience with independence, a British colonial heritage and membership in a Latin American group of countries, the presidential variable was always significantly associated with a lower ranking on measures of political freedom.<sup>23</sup> I also found that, not coincidentally, presidential governments are more corrupt than parliamentary ones.<sup>24</sup>

The long arc of American constitutional government has bent from the monarchical principle of the colonial period to congressional government and then to the separation of powers, and finally back again toward Crown government and rule by a single person.<sup>25</sup> The question therefore is whether America can escape the loss of freedom seen in virtually every other presidential country.<sup>26</sup>

## II. THE FRAMERS

Few legal theorists understand how America came to adopt its separation of powers. The modern presidential system was an unexpected consequence of the democratization of American politics and not a prominent feature of the Framers' constitution.<sup>27</sup> It was a near-run thing, decided only on day 105 of a 116-day Convention.<sup>28</sup> The delegates debated the selection of the President on 21 different days and took more than 30 votes on the subject.<sup>29</sup> In 16 roll calls they voted on how to select the President.<sup>30</sup> In six of these (once unanimously), they voted for a president appointed by Congress, which would have resembled a parliamentary

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19. *Id.*

20. *Id.*

21. *See id.* at 15.

22. *See id.* at 177.

23. *Id.* at app. B.

24. *Id.* at app. C.

25. *Id.* at 4.

26. *See id.* at 177.

27. *Id.* at 7.

28. *Id.*

29. *Id.*

30. *Id.*

regime.<sup>31</sup> Once they voted 8 to 2 for a president appointed by state legislatures.<sup>32</sup> On one thing they were wholly clear: they did not want a president elected by the people.<sup>33</sup> That question was put to them four times, and lost each time.<sup>34</sup>

The delegates rejected Madison's Virginia Plan, but not to vindicate the principle of separationism.<sup>35</sup> What instead was at issue was the division of power between the states and the federal government, with states' rights supporters from the smaller states and nationalists from the larger ones on opposite sides.<sup>36</sup> States' rights delegates took the first trick, on the membership of the Senate.<sup>37</sup> The states would appoint Senators and each state, irrespective of size, would have two senators.<sup>38</sup> States' rights delegates feared the centralization of power in the federal government, and believed that a Senate so constituted would prevent this from happening.<sup>39</sup> They might have had a point.<sup>40</sup>

As for the presidency, the nationalists, led by Gouverneur Morris, wanted a president chosen by the people, since he would be the only person in America elected by voters across the country and would thus have greater legitimacy to resist encroachments by the states.<sup>41</sup> Once again, however, the states' rights supporters voted this down.<sup>42</sup> What they chose instead was an elaborate system in which state legislatures would determine how presidential electors would be chosen, and in which the electors do not choose the President unless they give him a majority of their votes.<sup>43</sup> This, the Framers thought, would seldom happen, since

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 7–8.

37. *Id.* at 8.

38. *Id.*

39. *Id.*

40. *Id.* The present controversy over the Electoral College, where small states are overrepresented because each has two senators, arises because of the historical accident that small states tend to be more conservative. See Natalie Proulx, *Should the U.S. Get Rid of the Electoral College?*, N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/2019/03/28/learning/should-the-us-get-rid-of-the-electoral-college.html>. As to the possibility that the winner of the popular vote might lose in the Electoral College, something like that happens often in parliamentary countries. See *Canada Election: Trudeau's Liberals Win but Lose Majority*, BBC NEWS (Oct. 22, 2019), <https://www.bbc.com/news/world-us-canada-50134640> [<https://perma.cc/WC2T-QGE7>].

41. See BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 8.

42. *Id.*

43. *Id.*

they did not expect that after George Washington candidates with national appeal would emerge.<sup>44</sup> In that case, where no candidate receives a majority of electoral votes, the election is thrown to the House of Representatives, voting by state.<sup>45</sup> What the Framers expected, then, was that the House would almost always choose the president.<sup>46</sup>

A reader of Madison's notes on the Convention's debates would be surprised at how much the delegates despised democracy.<sup>47</sup> There were few democrats in Philadelphia that summer, but in the end, they won the day.<sup>48</sup>

The rickety machinery they devised for the election of presidents was a sealed car speeding through the first decades of the republic, darkened in obscurity on departure but emerging in sunlight on arrival to transform American politics.<sup>49</sup> Presidential electors came to be chosen by popular vote, not by state legislatures, and the electors became mere ciphers.<sup>50</sup> Presidential candidates with national appeal arose, so that elections were not kicked over to the House of Representatives.<sup>51</sup>

The president became the principal symbol of American democracy and equality, and the most effective counterpoise to state governments.<sup>52</sup> Not only was he democratically elected, but he was the only person so elected by the entire country.<sup>53</sup> With a legitimacy derived from both the Constitution and the democratic process, the president became the spokesman for the welfare of the nation as a whole.<sup>54</sup> He might thus oppose the will of Congress,<sup>55</sup> and, in time, he would learn to rule by ukase upon the rise of Crown government.

### III. THE ANGLO-CANADIAN ALTERNATIVE

There are three models of government in the world. The oldest, once in

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44. *Id.*

45. *Id.*

46. *Id.*

47. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17–22 (Max Farrand ed., rev. ed. 1937).

48. *See id.* at 353–54.

49. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 60.

50. *Id.*

51. *Id.*

52. *Id.* at 61.

53. *Id.*

54. *Id.*

55. *Id.*

decline and now on the rebound, is despotism or dictatorship.<sup>56</sup> The second is presidential government.<sup>57</sup> The third is the Anglo-Canadian model of parliamentary government that originated in Britain and, which the Canadians have shown, can be adopted in a federal country very different from the mother country in geography, social customs, religion, and language.<sup>58</sup>

As in America, the two countries began with a form of Crown government, but with the rise of democracy this gave way to what Walter Bagehot called the “efficient secret” of the British constitution, an all-powerful House of Commons.<sup>59</sup> That was the model that the Canadian parliamentarians adopted when they crafted their constitution, the British North American Act, in 1867.<sup>60</sup> Their example of a peaceful accession to independence with a Westminster system of government came to be

followed by 50 countries with a combined population of more than 2 billion people.<sup>61</sup> And that is no small thing.

The fathers of the Canadian constitution well understood the American model—and wanted something very different.<sup>62</sup> Sir John A. Macdonald, the first prime minister, read Madison’s notes of the Philadelphia Convention and thought the Virginia Plan would serve much better.<sup>63</sup> The result was a Canadian constitution in which the members of Parliament pick the prime minister, who then appoints the senators.<sup>64</sup> There would even be a federal right to disallow provincial legislation, just as Madison had wanted.<sup>65</sup> Call him the Father of the Constitution if you wish, but do make clear which country you are talking about.

#### *A. Jack Sprat’s Law*

In American presidential regimes, the head of government is the head of state, and this has served to empower presidents in ways that Americans scarcely

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56. See MANCUR OLSON, *POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS* 27 (2000).

57. See CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 1–2 (N.Y.: Time Inc. 1963) (1956).

58. See BUCKLEY, *THE ONCE AND FUTURE KING*, *supra* note 1, at 87–88.

59. *Id.* at 9.

60. See *id.* at 87.

61. *Id.* at 184.

62. See John Remington Graham, *Quebec, Canada, and the Glorious Revolution*, 37 *LES CAHIERS DE DROIT* 1015, 1022–23 (1996).

63. See BUCKLEY, *THE ONCE AND FUTURE KING*, *supra* note 1, at 113–14.

64. *Id.* at 114.

65. See *id.*

realize.<sup>66</sup> The two offices are kept apart in the monarchical governments of Britain and Canada, which do not ask their citizens to revere the Prime Minister.<sup>67</sup> Instead, the prime minister might be an embarrassment, a bore, or a figure of fun.<sup>68</sup> One is permitted to laugh at prime ministers, and that serves the cause of liberty.<sup>69</sup>

Bagehot distinguished between what he called the efficient and the dignified parts of the British constitution.<sup>70</sup> The efficient government, where real power resided, was represented by the prime minister and the Cabinet.<sup>71</sup> The dignified government was that of the monarch.<sup>72</sup> What Bagehot described was Jack Sprat's Law applied to the constitution, in which power and ceremony, lean and fat, were cleaved off from each other.<sup>73</sup> That was how, he thought, a republic had "insinuated itself beneath the folds of a Monarchy."<sup>74</sup>

Yet Britain was not a republic either, and Bagehot would not have wished it to become one.<sup>75</sup> The Queen retains a certain residual power that becomes important at times of parliamentary impasse.<sup>76</sup> In addition, the ceremonies serve useful purposes, he thought, and one wouldn't want to get rid of them.<sup>77</sup> Western monarchies are not republics with a bit of fluff thrown in, even if in Canada the fluff is kept to a minimum and picking up the paper one is sometimes surprised to read the doings of a visiting member of the Royal Family in Yellowknife or Regina.

There is a very human desire for ceremony and reverence, and lacking a formal monarch, republics tend to make one of their presidents.<sup>78</sup> In a lecture on "The Profession and Vocation of Politics," Max Weber offered three possible sources of political obligation: custom, constitutional governance and charisma.<sup>79</sup>

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66. *See id.* at 181.

67. *See* F.H. Buckley, *King Obama Our Latest Monarch*, USA TODAY (Apr. 27, 2014), <https://www.usatoday.com/story/opinion/2014/04/27/king-obama-monarch-constitution-column/8312137/>.

68. *See* BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 182.

69. *See id.*

70. WALTER BAGEHOT, THE ENGLISH CONSTITUTION 4 (Sussex Acad. Press, rev. ed. 1997) (1867).

71. *See id.* at 8–9.

72. *See id.* at 9.

73. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 183.

74. *Id.*

75. *Id.*

76. *See id.* at 189.

77. *Id.* at 183.

78. *See id.* at 193.

79. *Id.* at 196.

Custom was the authority of the “eternal past,” which Americans cast off in 1776.<sup>80</sup> Constitutional governance was to take its place, but when the line between political loyalties and the constitution are erased and political enemies are branded as unconstitutional, that no longer serves.<sup>81</sup> What’s left is charismatic governance by the president.<sup>82</sup>

In *The American Presidency*, Clinton Rossiter offered a mythic account of American government, in which the presidents portrayed on Mount Rushmore serve the need for mystery and theatrics in national life.<sup>83</sup> Who, he asked, “are the most satisfying of our folk heroes? With whom is associated a wonderful web of slogans and shrines and heroics? The answer, plainly, is the . . . Presidents I have pointed to most proudly. Each is an authentic folk hero, each a symbol of some virtue or dream especially dear to Americans.”<sup>84</sup> Like Rossiter, one identifies with a president, and is raised up by a successful one and shamed by a lying one.<sup>85</sup> That in turn increases their power and gives Canadians who move to the United States the impression that they have left a republic for a monarchy.<sup>86</sup>

#### B. *Taming the King*

Parliamentary systems have safety valves which presidential systems lack.<sup>87</sup> Presidents are largely immunized from legislative accountability; prime ministers have to face Parliament and respond to questions from the Opposition on a daily basis when Parliament is in session and the prime minister is in the country.<sup>88</sup> These differences advantage presidents who would be dictators, and bring a different kind of leader to power.<sup>89</sup> A president may be a demagogue, unskilled in

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80. *See id.* at 197.

81. *See* Max Weber, *Politics as a Vocation*, in MAX WEBER’S COMPLETE WRITINGS ON ACADEMIC AND POLITICAL VOCATIONS 155, 173 (John Dreijmanis ed., Gordon C. Wells trans., 2008).

82. *See* BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 201; *see also* Weber, *supra* note 81, at 191.

83. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 199.

84. *Id.*; ROSSITER, *supra* note 57, at 110.

85. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 199.

86. *See id.* at 199, 203; *see also* ROSSITER, *supra* note 57, at 102–03.

87. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 12.

88. *Id.* at 12–13.

89. *Id.* at 13.

debate, impatient and vexed when questioned, and cocooned from the public.<sup>90</sup>

A successful prime minister is a very different sort of person.<sup>91</sup> He must be quick on his feet, as well as knowledgeable about all of the issues of the day.<sup>92</sup> He must also be thick-skinned and able to tolerate catcalls, if possible with some show of wit,<sup>93</sup> in both French and English in Canada. What parliamentary systems offer, then, is what Madison called filtration, the way

in which the form of government excludes unfit leaders from office by holding a mirror to their inadequacies.<sup>94</sup>

In America, by contrast, the imperial style wears better.<sup>95</sup> Presidents do not appear before Congress to face the brickbats thrown at prime ministers in parliament.<sup>96</sup> Instead, they appear once a year in the quasi-regal State of the Union Address, where the kinds of abuse to which prime ministers are subjected would shock American sensibilities to the core.<sup>97</sup> When Justice Samuel Alito seemed to mouth the words “not true” in response to Obama’s criticism of the court, he was himself criticized for “flamboyantly insinuating himself into a pure political event, in a highly politicized manner.”<sup>98</sup>

Daily accountability before a House of Commons makes government more transparent and polices abuses.<sup>99</sup> The decisions about the issues to be brought to Parliament lie importantly with the Opposition, which can decide to prolong debate over perceived government weaknesses.<sup>100</sup> In particular, the Opposition’s ability to keep an issue alive as long as it wants makes it politically very difficult for a government to bury a scandal.<sup>101</sup> “No better method,” observed Harold Laski, “has

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90. *Id.*

91. *Id.*

92. *See id.*

93. *Id.*

94. F.H. Buckley, *The Efficient Secret: How America Nearly Adopted a Parliamentary System, and Why It Should Have Done so*, 1 BRIT. J. AM. LEGAL STUD. 349, 363 (2012).

95. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 233.

96. *Id.*

97. *Id.*

98. *Id.*; Glenn Greenwald, *Justice Alito’s Conduct and the Court’s Credibility*, SALON (Jan. 28, 2010), [https://www.salon.com/2010/01/28/alito\\_2/](https://www.salon.com/2010/01/28/alito_2/) [<https://perma.cc/935C-H8X9>].

99. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 217.

100. *Id.*; BAGEHOT, *supra* note 70, at 177–78.

101. *See* BAGEHOT, *supra* note 70, at 178–79; BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 217.

ever been devised for keeping administration up to the mark.”<sup>102</sup>

In one respect, presidents are more circumscribed in their powers than prime ministers. Under the Constitution’s Appointments Clause (Article II, § 2, cl. 2), appointments of ambassadors, Article III judges, and “all other officers of the United States” require the Senate’s “advice and consent.”<sup>103</sup> Presidents have sidestepped this through recess appointments and “czars,” but prime ministers are unquestionably less fettered in their appointments.<sup>104</sup> In Canada, the prime minister appoints ambassadors, federal judges, cabinet members, and even senators without the formal need to consult anyone else.<sup>105</sup>

The ultimate sanction in parliamentary government is the motion of non-confidence, where a prime minister might be turfed out at any time by a majority in the House of Commons.<sup>106</sup> That cannot happen in the United States with the nigh-impossible burden of a two-thirds vote in the Senate to remove the President after impeachment.<sup>107</sup> Whether you like President Donald Trump or loathe him, you are stuck with him during his term of office. If you want to blame anyone, blame Gouverneur Morris. He slipped into the final draft of the Constitution, as a member of the Committee of Unfinished Portions, the requirement of a two-thirds vote.<sup>108</sup> Until then the figure had been a majority.<sup>109</sup> The delegates were tired and wanted to go home.<sup>110</sup> The change was never mentioned in the two weeks that remained of the Convention.<sup>111</sup> But it was as important as anything the delegates discussed.

There is possibly one good thing to be said for the president’s security of tenure. A president’s promises and threats are more credible, especially when he exercises his powers as commander-in-chief.<sup>112</sup> In a parliamentary regime, a war might be abandoned on the fall of a ministry, as happened in 1782 when the

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102. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 217; HAROLD J. LASKI, PARLIAMENTARY GOVERNMENT IN ENGLAND 110 (N.Y.: Viking 1938) (1938).

103. *See* U.S. CONST. art. II, § 2, cl. 2.

104. *See* BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 221.

105. *Id.*

106. *See id.* at 212.

107. U.S. CONST. art. I, § 3, cl. 6.

108. *See* PETER CHARLES HOFFER & N. E. H. HULL, IMPEACHMENT IN AMERICA, 1635–1805, at 96–99 (1984); MICHAEL J. KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 234 (2016).

109. *See* HOFFER & HULL, *supra* note 108, at 95.

110. *See* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 349 (2009).

111. *See* HOFFER & HULL, *supra* note 108, at 99.

112. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 215.

Rockingham Whigs came to power and sought peace with the Americans.<sup>113</sup> Economists refer to this as a credible commitment problem.<sup>114</sup> In negotiating an end to the Viet Nam war, for example, Nixon told the Soviet ambassador, “I want you to understand that the Soviet Union is going to be stuck with me for the next three years . . . and during all that time I will keep in mind what is being done right now.”<sup>115</sup>

Credible commitment theories might provide an argument for the superiority of presidential systems, if one thought that presidential wars were always a good thing.<sup>116</sup> If, on the other hand, one worries about a president’s war power, one might prefer the checks provided by non-confidence motions and question period.<sup>117</sup> Empirical studies report presidential decisions to use military force are more closely correlated with domestic political issues than with the international environment.<sup>118</sup> A “diversionary hypothesis” posits that presidents embark on war to distract attention from unpopular domestic affairs, such as the Clinton sex scandal.<sup>119</sup> Findings that, since the 1950s, presidents are more likely to go to war during periods of high unemployment are also consistent with diversionary explanations of the war power.<sup>120</sup> In sum, presidential promises and threats are superior to prime ministerial ones, but only if one assumes that they are generally benign.

### C. Madisonian Infirmities

While the Constitution bears relatively little of Madison’s imprint, he is

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113. *Id.*

114. *Id.*; see IRFAN NOORUDDIN, COALITION POLITICS AND ECONOMIC DEVELOPMENT: CREDIBILITY AND THE STRENGTH OF WEAK GOVERNMENTS 3 (2011); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 808 (1989).

115. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 215; RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 407 (1978).

116. See BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 215.

117. *See id.* at 13, 212.

118. Gregory D. Hess & Athanasios Orphanides, *War Politics: An Economic Rational-Voter Framework*, 85 AM. ECON. REV. 828, 841–42 (1995); Patrick James & John R. Oneal, *The Influence of Domestic and International Politics on the President’s Use of Force*, 35 J. CONFLICT RESOL. 307, 326–27 (1991); Charles W. Ostrom, Jr. & Brian L. Job, *The President and the Political Use of Force*, 80 AM. POL. SCI. REV. 541, 549 (1986).

119. *See* James & Oneal, *supra* note 118, at 308.

120. *See* WILLIAM G. HOWELL & JON C. PEVEHOUSE, WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS 65–66 (2007); Jong Hee Park, *Structural Change in U.S. Presidents’ Use of Force*, 54 AM. J. POL. SCI. 766, 767 (2010).

identified with the idea of the separation of powers because of his authorship of *The Federalist No. 51*. He may therefore be blamed for the infirmities of separationism and the way in which it has led to Crown government.<sup>121</sup> The separation of powers creates gridlock and inefficiencies in government that invite the president to step in and correct, and in so doing, to augment his powers and independence from oversight by Congress.<sup>122</sup>

There are worse things than inefficiency in government. Supreme Court Justice Louis Brandeis put it bluntly. “The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.”<sup>123</sup> But what if, as we have seen, presidential regimes are more likely than parliamentary ones to install a dictator in power?<sup>124</sup> In that case, the inefficiencies of separationism would be a deadweight loss.<sup>125</sup> Further, they may contribute to the threat of one-man rule by encouraging a president to take charge when the legislature is deadlocked.<sup>126</sup> For example, Obama’s “We Can’t Wait” initiative, launched after the fight over raising the debt ceiling in July 2011 and the downgrade of public debt, sought to sidestep Congress through executive orders.<sup>127</sup> “We can’t wait for an increasingly dysfunctional Congress to do its job,” he announced.<sup>128</sup> “Where they won’t act, I will.”<sup>129</sup>

Getting legislation passed or repealed in America is like waiting for three cherries to line up in a Las Vegas slot machine.<sup>130</sup> Absent a supermajority in Congress to override a Presidential veto, one needs the simultaneous concurrence of the president, Senate, and House.<sup>131</sup> The possibility of deadlock is magnified by the Senate filibuster, which since 1975 has permitted 41 senators to limit debate.<sup>132</sup> Since 1979, no party has controlled all three branches and enjoyed a 60-person

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121. *See generally* THE FEDERALIST NO. 51 (James Madison).

122. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 235.

123. *Id.*; Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting), *abrogated by* Humphrey’s Executor v. United States, 295 U.S. 602 (1935).

124. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 235.

125. *Id.* at 235–36.

126. *Id.*

127. *Id.* at 236.

128. *Id.*

129. *Id.*; Mary Bruce, *Obama Offers Mortgage-Relief Plan: ‘We Can’t Wait’ for Congress*, ABC NEWS (Oct. 24, 2011), <https://abcnews.go.com/blogs/politics/2011/10/obama-offers-mortgage-relief-plan-we-cant-wait-for-congress> [https://perma.cc/EGS8-ENJW].

130. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 238.

131. *Id.*

132. *Id.*

majority in the Senate, but for a nine-month period in 2009.<sup>133</sup> Obviously, the filibuster is strongly anti-democratic.<sup>134</sup> Sadly, it has been defended on the grounds that it enhances the flawed doctrine of separation of powers at the core of the U.S. Constitution.<sup>135</sup>

In a parliamentary system, one needs only one cherry from the one-armed bandit.<sup>136</sup> In Canada, for example, neither the Governor General nor the Senate has a veto power.<sup>137</sup> All that matters is the House of Commons, dominated by the prime minister's party.<sup>138</sup> While his party commands a majority in the House and he enjoys his party's support, the prime minister is immune from the infirmities of divided government.<sup>139</sup>

There is nevertheless a downside to the dominance of the Prime Minister's Office in a parliamentary system.<sup>140</sup> Since bills require the concurrence of different branches of government, they might be vetted more closely in a presidential system.<sup>141</sup> This was Hamilton's argument for the separation of powers in Federalist 73.<sup>142</sup> "The oftener [a] measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest."<sup>143</sup> If the government legislates less under the separation of powers, then, that is no bad thing if good laws survive and bad laws don't.<sup>144</sup> On the other hand, it is harder to repeal a bad law in a presidential system, which raises the question whether pre-enactment screening is more desirable than reversibility.<sup>145</sup>

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133. *Id.*

134. *Id.*

135. *Id.*; see George F. Will, *Why Filibusters Should Be Allowed*, WASH. POST (Mar. 20, 2005), <https://www.washingtonpost.com/wp-dyn/articles/A48499-2005Mar18.html> [https://perma.cc/4GY7-VTRS].

136. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 238. For a model explaining why it is harder to enact legislation in a separation of powers presidential system than in a parliamentary system, see GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 19–37 (2002).

137. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 238.

138. *Id.*

139. *Id.* at 238–39.

140. *Id.* at 239.

141. *Id.*

142. *Id.*

143. *Id.*; THE FEDERALIST NO. 73, at 423 (Alexander Hamilton) (Am. Bar Ass'n ed., 2009).

144. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 239.

145. *Id.*

This question will always give rise to partisan feelings.<sup>146</sup> In the past, conservatives thought that *ex ante* screening was more important.<sup>147</sup> If fewer laws were passed, that was just fine with them.<sup>148</sup> Progressives, on the other hand, lamented the brake that the separation of powers placed on new legislation.<sup>149</sup> They looked back fondly to the first hundred days of the Roosevelt Administration in 1933, when the executive drafted bills which Congress rubber-stamped without debate.<sup>150</sup> That was how government should work, progressives thought.<sup>151</sup> Today, however, after much of their agenda has been adopted, it is the progressives who might prefer separationism's ability to block new laws, and conservatives who might value reversibility.<sup>152</sup>

There are nevertheless two reasons, free from the partisanship of the moment, why reversibility trumps pre-enactment screening.<sup>153</sup> First, and most obviously, bad laws passed without separationist screening can more easily be reversed in a parliamentary system—easier passed, easier mended.<sup>154</sup>

Second, it is easier to identify bad laws with the benefit of hindsight.<sup>155</sup> Bad laws, based on bad ideas, with what are conceded to have bad consequences, are enacted everywhere.<sup>156</sup> In dictatorships, bad laws are often bad from the start.<sup>157</sup> In democratic regimes, however, bad ideas are typically recognized only after the fact.<sup>158</sup> When one Parliament reverses a prior Parliament, it does so with more information than the prior enacting Parliament.<sup>159</sup> It will know better what works and what doesn't.<sup>160</sup>

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146. *Id.*

147. *Id.*; see James Q. Wilson, *Does the Separation of Powers Still Work?*, 86 PUB. INT. 36, 49–50 (1987).

148. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 239.

149. *Id.*

150. *Id.*; see JAMES MACGREGOR BURNS, THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA 157–58 (1963).

151. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 239; see BURNS, *supra* note 150, at 158; E.E. SCHATTSCHEIDER, PARTY GOVERNMENT: AMERICAN GOVERNMENT IN ACTION 1–2 (Transaction Publishers 2004) (1942).

152. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 239; see Wilson, *supra* note 147, at 49–50.

153. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 239.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 239–40.

158. *Id.* at 240.

159. *Id.*

160. *Id.*

Reversibility is particularly important for what might be called “experience laws.”<sup>161</sup> The economist’s “experience goods” are goods whose quality cannot be evaluated until after they are sold.<sup>162</sup> Many a used car looks good on the lot, only to fall apart after three months.<sup>163</sup> Similarly, legislation that looks good on paper sometimes results in unintended consequences that are more costly than the problem it was meant to remedy.<sup>164</sup> The 1965 Immigration Act is a useful example of experience laws since no one at the time seemed able to foresee how it would work out.<sup>165</sup> The bill’s chief sponsor, Senator Edward Kennedy, testified that it would not really change things very much at all.<sup>166</sup> However, it effected a revolution in immigration flows and, over time, profoundly advantaged the Democratic Party.<sup>167</sup>

To some extent, all laws are experience laws, whose effects can only be seen with hindsight.<sup>168</sup> What separationism has given us, then, is a one-way ratchet in which bad ideas are adopted and then turned into the laws of the Medes and the Persians.<sup>169</sup>

#### D. Irresponsibility

To the extent that the separation of powers constrains the president, it also absolves him from responsibility for useful laws that don’t get enacted.<sup>170</sup> The same is true for Congress, which can point its collective finger at the president who vetoes its bills.<sup>171</sup> With both sides blaming the other, no one bears the burden of things that don’t get done, and politicians are encouraged to behave irresponsibly.<sup>172</sup>

In a parliamentary system, by contrast, there is always someone to blame.<sup>173</sup> Even during periods of minority government, the coalition of parties backing the government will bear the political costs of inaction, while the opposition can

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161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*; *The Legacy of the 1965 Immigration Act*, CTR. FOR IMMIGR. STUD. (Sept. 1, 1995), <https://cis.org/Report/Legacy-1965-Immigration-Act> [<https://perma.cc/845L-N6DW>].

167. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 240.

168. *Id.*

169. *Id.*

170. *Id.* at 246.

171. *Id.*

172. *Id.*

173. *Id.* at 247.

campaign on the issue.<sup>174</sup> One cannot duck problems so easily as one can in the United States.<sup>175</sup>

#### *E. The Common Pool Problem*

In his essay on the *Vices of the Political System of the United States*, Madison identified a problem of majoritarian misbehavior and minoritarian oppression.<sup>176</sup> In a small republic, a dominant faction with more than half the votes might oppress a minority.<sup>177</sup> For this reason, he argued, an extended republic that comprised many different factions would better protect liberty.<sup>178</sup> No one faction would command a majority, and each would check the other in the competition for power.<sup>179</sup>

What this ignores is the common pool problem of minoritarian misbehavior and majoritarian oppression, where minorities oppress the majority.<sup>180</sup> That is the story of congressional earmarks, bridges to nowhere, the John Murtha Airport in Johnstown PA, and West Virginia's Robert Byrd Center for this, that and the other thing.<sup>181</sup> It is also the story of the parts of the country left behind that helps explain the Trump victory in 2016.

To reverse the common pool problem, what is needed is a grand coalition, a coalition of the whole of the voters, that will vote for the general welfare of the nation rather than the narrow interest of a local district.<sup>182</sup> Mancur Olson called this a "superencompassing majority,"<sup>183</sup> one that treats minorities as well as and no better than it treats itself and stands in proxy for the nation as a whole.<sup>184</sup> Discovering and empowering such a majority might then be thought the very goal of constitution-making.<sup>185</sup> And it is something one's more likely to see in parliamentary governments, where political parties are stronger, national in scope, and more closely resemble the idealized assembly described by Edmund Burke in his *Address to the Electors of Bristol*, an "assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to

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174. *Id.*; see BAGEHOT, *supra* note 70, at 14.

175. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 247.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *See id.*

181. *Id.*

182. *Id.* at 248.

183. *Id.*; OLSON, *supra* note 56, at 19–23.

184. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 248.

185. *Id.*

guide.”<sup>186</sup>

In the United States, all politics are local, said Tip O’Neill.<sup>187</sup> But in Canada and Britain, all politics are national, and that is a good thing.<sup>188</sup>

#### F. Micromanaging

There is a trade-off between inadequate and excessive specificity in statutory draftsmanship.<sup>189</sup> Too little specificity gives the executive insufficient information about the legislature’s intention and permits a president to make of a law whatever he will.<sup>190</sup> Contrariwise, excessive specificity might prevent the executive from adjusting to new circumstances not foreseen by the legislator on passage.<sup>191</sup> It could also prevent the executive from recognizing exceptions or expanding the scope of a rule where this is warranted.<sup>192</sup>

One would expect a parliamentary regime to be more likely than a presidential one to strike the right balance between terseness and prolixity in statutory draftsmanship.<sup>193</sup> Where the executive and legislative branches are united in a parliamentary government, the competition between branches is absent, as is the incentive to prolixity.<sup>194</sup> Under the separation of powers, however, Congress is in competition with the executive and will seek to rein in its powers through statutes that micromanage.<sup>195</sup> One can test this by comparing the length of statutes in Britain and Canada on the one hand, and the United States on the other.<sup>196</sup> Almost without exception, major pieces of legislation are longer—far longer—in the United States.<sup>197</sup>

### IV. WHY DID IT HAPPEN?

There are three reasons why one might expect today’s executive to be vastly

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186. Edmund Burke, Representative, Parliament, Speech to the Electors of Bristol (Nov. 3, 1774), <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html> [<https://perma.cc/TL92-KKQU>].

187. See generally, TIP O’NEILL, ALL POLITICS IS LOCAL XV (1995).

188. See Buckley, *Separated Powers, Fractured Nationalism*, *supra* note 10.

189. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 253.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 254.

194. *Id.*

195. See *id.*

196. *Id.*

197. *Id.*

more powerful than his eighteenth-century peer in America, Britain, and Canada.<sup>198</sup> The first, suggested by Jean-Jacques Rousseau, is that over time, power tends to localize in a single person.<sup>199</sup> Second, the growth of the regulatory state in the twentieth century shifted power from the legislature to a bureaucracy responsible to the executive.<sup>200</sup> Third, the changed role of the media has made stars of the executive, at the expense of the legislature.<sup>201</sup>

#### A. *The Logic of Political Power*

Following Montesquieu, Rousseau thought liberty better protected in smaller rather than larger states.<sup>202</sup> Montesquieu had identified what he saw as an informational problem: in a large republic, it is difficult to identify the public good, and this permits politicians to prefer wasteful, private goods (such as inefficient Congressional earmarks) to public ones.<sup>203</sup> To this Rousseau added a further large-state pathology: a large state is necessarily one with a too-powerful executive.<sup>204</sup> Large states require strong governments to control their more extensive territory, and more legislators to represent the greater number of people.<sup>205</sup> As the number of legislators increases, however, each member's influence weakens until, as a group, they become ineffectual.<sup>206</sup> As a strong government is needed in a large state, a strong executive will emerge to fill the political void.<sup>207</sup>

#### B. *The Regulatory State*

The rise of the regulatory state has coincided with the expansion of executive power in each of America, Britain, and Canada, and 200 years ago, Hegel explained why this would happen.<sup>208</sup> The legislator's rules cannot be applied like the axioms of geometry, but instead require practical judgment, the ability to sense

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198. *Id.* at 151.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*; CHARLES-LOUIS DE SECONDAT, BARON DE LA BREDE ET DE MONTESQUIEU, *The Spirit of the Laws* VIII.16, in ŒUVRES COMPLÈTES 362 (1952) (1748). For an English version, see CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *The Spirit of Laws* VIII.16, in 38 GREAT BOOKS OF THE WESTERN WORLD 56 (Thomas Nugent trans., 1952) (1748).

204. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 151.

205. *Id.*

206. *Id.*

207. *Id.*; see Jean-Jacques Rousseau, *Of the Social Contract or Principles of Political Right* III.4, in ROUSSEAU: *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 39, 82 (Victor Gourevitch ed. & trans., Cambridge Univ. Press 1997) (1762).

208. See BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 156.

how a rule might properly be applied.<sup>209</sup> The regulator must be allowed a measure of discretion, which the courts and the legislature cannot monitor, and that leaves only the executive, which appoints the regulator.<sup>210</sup>

At the same time, technological changes have vastly increased the scope of rule-making, beyond anything which the legislator can handle.<sup>211</sup> At the dawn of the automobile age, a car's safety features came down to the brake and the horn.<sup>212</sup> Since then, new developments in car technology have increased the number of safety devices by many orders of magnitude.<sup>213</sup> In addition, the new devices such as driving sensors and rear-view cameras come on stream with a celerity the legislator could never hope to match.<sup>214</sup> Because of this, regulators exercise an enormous discretion and ability to

determine public policy, and this has shifted power from the legislative to the executive branch.<sup>215</sup>

### C. The Role of the Media

The third reason for the expansion of executive power is the change the media made in modern politics, particularly with presidents skilled in manipulating the media.<sup>216</sup> The White House is its own news organization, with a video network and distribution system, and need not rely on print journalism or the television networks to get its message out.<sup>217</sup> The fawning reporter is rewarded with access, the hostile journalist frozen out.<sup>218</sup> Even President Trump, reviled though he now might be by the media, emerged from relative obscurity with the assistance of

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209. *Id.* at 154; *see* G.W.F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT § 227 (T.M. Knox trans., Oxford Univ. Press 1952); *see also* Carl K.Y. Shaw, *Hegel's Theory of Modern Bureaucracy*, 86 AM. POL. SCI. REV. 381, 385–87 (1992).

210. *See* BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 155; *see also* HEGEL, *supra* note 209, §§ 289–95.

211. BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 155.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 157, 158.

217. *Id.* at 158.

218. *Id.*; *see, e.g.*, Jason Abbruzzese & Dennis Romero, *CNN Journalist Jim Acosta Banned from White House After Trump Calls Him "Rude, Terrible Person"*, NBC NEWS (Nov. 7, 2018), <https://www.nbcnews.com/news/all/trump-unloads-cnn-journalist-jim-acosta-you-are-rude-terrible-n933571> [<https://perma.cc/QNW6-A9EN>].

television networks that were fascinated by his very strangeness.<sup>219</sup>

#### V. WHAT NEXT?

The American constitution was not made for export, and while America has remained free, this was in spite of and not because of its constitution.<sup>220</sup> What makes America exceptional is that, for more than 200 years, it has remained free while yet presidential.<sup>221</sup> But can one still speak of “American exceptionalism”?

The glue that, in the past, bound the country together and made the constitution work was a common understanding about the country’s goodness and the goals to be pursued and a willingness to play by the constitution’s rules. However, when the two parties have radically different agendas, when one party joins the “resistance” and kisses goodbye to the idea that the winner of the Electoral College is the duly elected president, and when presidents learn how to employ all the powers of their office, we

appear to have entered a new constitutional regime where the terrain looks unfamiliar and all the signposts are turned around. It may yet turn out well, but it’s permitted to be pessimistic.

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219. See Nicholas Confessore & Karen Yourish, *\$2 Billion Worth of Free Media for Donald Trump*, N.Y. TIMES (Mar. 15, 2016), <https://www.nytimes.com/2016/03/16/upshot/measuring-donald-trumps-mammoth-advantage-in-free-media.html>.

220. See BUCKLEY, THE ONCE AND FUTURE KING, *supra* note 1, at 177.

221. See *id.*