CHAPTER 26

HORIZONTAL STRUCTURING

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I. Introduction

The term 'horizontal structuring' refers to the constitutional system for allocating power among government actors at the same geographic level of organization. The concept is referred to in some systems as 'separation of powers'.[1] Separation of powers is considered normatively desirable for several reasons, including: the idea that dividing power will inhibit government action and therefore tyranny; the idea that different types of government bodies are more or less competent at certain tasks; and the idea that certain allocations of authority will help ensure democratic legitimacy for government policies. Horizontal structuring should be distinguished from vertical structuring, which involves the division of authority between different organizational levels of government,[2] for example federal and state governments. Horizontal structuring, by contrast, involves the division of power between the executive, legislative, and judicial branches of one level of government.

Modern democracies do not all employ the same forms of horizontal structuring. For example, while presidential systems typically involve a sharp distinction between executive and legislative power, parliamentary systems do not. Indeed, constitutional systems range in a spectrum from those with strong separation of powers (eg the United States) to those with greater fusion of powers (eg the United Kingdom), with many falling somewhere in the middle. Some constitutions further subdivide power within a branch of government—for example by creating a bicameral legislature with an upper and lower house, or by creating both a president and a prime minister. This chapter explores the various forms of horizontal structuring employed in modern constitutional democracies, as well as debates about their relative advantages and disadvantages.

II. History

Western political theory usually traces the idea of constitutional separation of powers to the writings of Montesquieu, although it is also acknowledged that related ideas appear in the earlier writings of others.[3] One of the earliest antecedents to modern notions of separation of

[1] See generally M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967).

[2] On which, see Chapter 27 of this volume.

[3] See generally W.B. Gwyn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origin to the Adoption of the United States Constitution* (1965); M.J.C. Vile, *Constitutionalism and the Separation of Powers* (2nd edn, 1998); Sharon Krause, 'The Spirit of Separate Powers in Montesquieu' (2000) 62 *Review of Politics* 231.

powers is the concept of *mixed government*. The mixed government concept posits combining rule by the one (the monarch), the few (the aristocrats), and the many (the people).[4] Aristotle discussed the possibility of combining monarchy, oligarchy, and democracy, and Polybius and Cicero further popularized the idea of mixed government. These later writers suggested that the Roman Republic constituted a successful form of mixed government through its combination of monarchy (through the consuls), aristocracy (the senate), and the people (assemblies), each of which checked and balanced the other.[5] Theories of mixed government were widely discussed by European political theorists in the seventeenth century.

The constitutional struggles between the king and parliament in England in the seventeenth century gave rise to the related, but distinct, idea of a *functional* separation of powers, which is the core of the modern doctrine.[6] Functional separation of powers is the idea of dividing different government functions—for example, the function of generating new legal rules through legislation and the function of applying legislation to the facts of particular cases—among different government actors. This line of thinking was reflected in the writings of John Locke, who distinguished between the legislative and executive functions of government. In his 1689 *Second Treatise on Government*, Locke explained that because human frailty led men to 'grasp at power', it was dangerous 'for the same persons who have the power of making Laws, to have also in their hands the power to execute them.'[7] Locke argued that 'the legislative is the supreme power',[8] and suggested that 'in all moderated Monarchies and well-framed Governments' the 'legislative and executive power are in distinct hands'.[9]

Several statutes passed in the wake of the Glorious Revolution of 1688 reinforced the idea of a distinction between executive and legislative power in England, as well as the notion of judicial independence. The English Bill of Rights Act of 1689 established some of the central principles of Britain's constitutional monarchy by declaring that 'the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal' and that parliamentary consent was required to raise revenue or maintain a standing army. The Act also sought to preserve the independence of Parliament and the courts by providing 'That election of members of Parliament ought to be free', and 'That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.'[10] The 1701 Act of Settlement limited the king's ability to influence parliament, providing 'that no person who has an office or place of profit under the King, or receives a pension from the Crown, shall be capable of serving as a member of the House of Commons.' That Act also strengthened judicial independence by requiring that judges should remain in office during good behavior and could only be removed by parliament.[11]

[4] See Richard Bellamy, 'The Political Form of the Constitution: Separation of Powers, Rights and Representative Democracy' in Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (2005), 257–9.

[5] See Edward Rubin, 'Judicial Review and the Right to Resist' (2009) 97 *Georgetown Law Journal* 61, 68; Scott D. Gerber, 'The Court, the Constitution, and the History of Ideas' (2008) 61 *Vanderbilt Law Review* 1067, 1088–112.

[6] Gordon S. Wood, *The Creation of the American Republic 1776–1787* (2nd edn, 1998), 151; M. Elizabeth Magill, 'The Real Separation in Separation of Powers Law' (2000) 86 *Virginia Law Review* 1127, 1162–3.

[7] John Locke, *Two Treatises of Government* (Ian Shapiro ed, 2003), 164.

[8] Ibid 166.

[9] Ibid 171.

[10] An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (England, 1689), available at <http://www.britannia.com/history/docs/rights.html>.

[11] The Act of Settlement (England, 1701), available at <http://www.guardian.co.uk/uk/2000/dec/06/monarchy>.

It was against this backdrop that Montesquieu wrote his seminal book *The Spirit of the Laws*, published in 1748. Montesquieu explicated his theory of separation of powers through a discussion of the English system,[12] which he praised for being the one nation in the world 'that has for the direct end of its constitution political liberty'.[13] Many commentators have criticized Montesquieu for providing an inaccurate description of the English system, which involved a greater degree of fusion of power in practice than he acknowledged. But it is undoubtedly true that the British system and the developments of the Glorious Revolution provided Montesquieu with much of his inspiration.

Montesquieu's main contribution lay in his extended development of the *functional separation of powers*, though he also wove in earlier notions of *mixed government* and *checks and balances*.[14] Montesquieu described governments as falling into one of several categories: republican (either democratic or aristocratic), monarchical, and despotic. For Montesquieu, the various forms of republican and monarchical government each had their virtues, but despotism—the situation in which 'a single person directs everything by his own will and caprice'—was undesirable.[15] Despotic governments left their subjects in a state of poverty, insecurity, and fear. Stable republican governments and law-abiding monarchies, on the other hand, yielded conditions of liberty and prosperity. A central problem, however, was that these forms of government were not always stable, and without good management could collapse into despotism. Montesquieu believed that since 'Constant experience shows us that every man invested with power is apt to abuse it... [it is] necessary from the very nature of things that power should be a check to power.'[16] Accordingly, he argued that the powers of government should be divided among different persons or bodies, which would act as a check on each other. If powers were concentrated in one person or body, there would be no check on the exercise of power and this results in a swift descent into despotism.

Modern writers typically attribute the tripartite categorization of functional separation of powers into legislative, executive, and judicial power directly to Montesquieu, although the author himself broke things down slightly differently. 'In every government there are three sorts of power', he explained, 'the legislative; the executive in respect to things dependent on the law of nations; and the executive, in regard to matters that depend on the civil law.'[17] The first, the legislative power, consisted of the power to enact or amend laws. The second, the foreign affairs aspect of the executive power, included the power to make war or peace, send and receive ambassadors, establish public security, and protect against invasion. The third, 'the executive in regard to matters that depend on the civil law', consisted of punishing criminals (which he termed simply the 'executive power of the state') and resolving disputes that arise between individuals (which he termed 'the judiciary power').[18] It is worth noting the blurring of executive and judicial functions in Montesquieu's third category, particularly with regard to the function of professional judges (as opposed to lay juries, upon whom Montesquieu focused great praise).[19]

[12] Philip Resnick, 'Montesquieu Revisited, or the Mixed Constitution and the Separation of Powers in Canada' (1987) 20 *Canadian Journal of Political Science* 97, 99ff.

[13] Montesquieu, *The Spirit of Laws* (vol I, 1750), 215.

[14] See Bellamy (n 4), 261–3.

[15] Montesquieu (n 13), 11.

[16] Ibid 214.

[17] Ibid 215.

[18] Ibid 216.

[19] See Lawrence Claus, 'Montesquieu's Mistakes and the True Meaning of Separation' (2005) 25 *Oxford Journal of Legal Studies* 419, 423 (describing 'ongoing ambivalence about whether the professional judges who actually executed the law—applied it to the facts found by juries—were anything other than executive officers').

Montesquieu believed that 'When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty', for in such a system tyrannical laws may be put in place and executed in a tyrannical matter.[20]

As for the judicial power, he advocated that judges in republics must strictly follow 'the letter of the law', an idea that proved particularly influential in France.[21]

Montesquieu's model acknowledged an inevitable overlap in powers and indeed demanded it in certain ways (as, eg, with the executive's veto power over legislation) as the mechanism by which the powers could check each other's actions. Nevertheless, Montesquieu believed that the core of each function should be retained by its designated branch, a somewhat essentialist idea for which he has been criticized.[22]

Even if the actual English system involved a greater fusion of power than Montesquieu might have thought desirable,[23] William Blackstone, directly assimilated Montesquieu's ideas into his influential *Commentaries on the Law of England*. Like Montesquieu, Blackstone tended to mingle the idea of a *functional* separation of powers with the idea of mixed government and its checks and balances. For instance, Blackstone explained, 'It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislature.'[24] Blackstone grounded his observations in the particular English experience of the struggle between king and parliament in the seventeenth century.[25]

Montesquieu's ideas were also particularly influential on the architects of the American[26] and French Revolutions. The French Declaration of the Rights of Man in 1789, for example, stated that 'A society where rights are not secured or the separation of powers established has no constitution at all',[27] and the American Continental Congress called him 'the immortal Montesquieu'.[28]

James Madison, writing in Federalist no 51,[29] explained that separation of powers was 'admitted on all hands to be essential to the preservation of liberty', and was to be achieved by 'contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.' Reflecting the views of the time about which branch would be most powerful, Madison wrote in Federalist no 51 that 'In republican government, the legislative authority necessarily predominates' and he suggested that 'the weakness of the executive may require... that it should be fortified'. Over the centuries, of course, it has become clear that the executive needs little fortification.

[20] Montesquieu (n 13), 216.

[21] Ibid 218; also see John Henry Merryman, 'The French Deviation' (1996) 44 *American Journal of Comparative Law* 109.

[22] Claus (n 19).

[23] See generally R.S. Crane, 'Montesquieu and British Thought' (1941) 49 *Journal of Political Economy* 592.

[24] William Blackstone, *Commentaries on the Laws of England* (vol I, 1st edn, 1765–69), 149.

[25] Ibid 149–50.

[26] See Wood (n 6), 159.

[27] 'Article 16 of the Declaration of the Rights of Man and the Citizen 1789' in S.E. Finer, V. Bogdanor, and B. Rudden, *Comparing Constitutions* (1995), 210.

[28] Wood (n 6), 152.

[29] *The Federalist Papers* are a famous series of essays (numbering 1–85) defending the proposed US Constitution. The complete series is available at <http://www.constitution.org/fed/federa00.htm>.

It is important to recognize that separation of powers was never conceived as involving a perfect and hermetically sealed division of responsibility. For example, Madison, writing in Federalist no 47, anticipated some overlap in authority, noting that serious concerns arose primarily 'where the whole power of one department is exercised by the same hands which possess the whole power of another department'.

Madison urged that the appointment and maintenance in office of officials of each branch be kept as separate as possible, but suggested that:

> the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.... Ambition must be made to counteract ambition.

Madison's ideas about how to protect against the undue influence of different factions of society through governmental structures are also significant, and represent the evolution of ideas of mixed government into a form suitable for a republican nation.[30]

Participants in the French Revolution were also influenced by Montesquieu, but they took quite different lessons from his writings. In France, a main project of the revolution was 'to protect the executive against judicial interference', which had been common in the *ancien régime* in which judges were 'centers of conservative power'.[31] Thus, in revolutionary France, rules were put in place ensuring that judges 'could not issue regulations, question the legality of administrative rules, orders or other executive action, examine the legality of the conduct of public officials or compel reluctant officials to perform their legal duties.'[32] As John Merryman wrote, 'The most powerful consequence of the French doctrine of separation of powers may have been to demean judges and the judicial function.'[33] Following Montesquieu's ideas of the judge as a mechanical applicator of law to facts, there emerged the idea that judges could not 'make rules applicable to future cases', nor could they 'question the validity or alter the meaning of legislation'.[34] As a consequence of these restrictions on the judiciary, there eventually emerged a separate system of administrative tribunals formally located within the executive branch, culminating in the Conseil d'État.

Not all constitutional systems, of course, claim to have been influenced by Montesquieu's model. Referring to Canada's mixed constitution, for example, one scholar explained that 'Canadians are not in the habit of looking to Montesquieu for an understanding of the nature of political institutions in their country', and that his work is generally deemed to have been more influential in France and the United States than Britain or former British colonies, which is undoubtedly true.[35] But in recent years, even Britain has moved towards greater separation of powers, for example with the removal of its highest appellate court from the House of Lords into an independent Supreme Court.[36] Moreover, the basic functional categories of executive, legislative, and judicial power remain analytically useful in examining how different constitutions divide government power. Emergent democracies in the past few decades have adopted a wide variety of structures, some of which draw inspiration from the American, French, or British models, and some of which combine them in new ways.

[30] Bellamy (n 4), 264–6. [31] See Merryman (n 21), 111.
[32] Ibid 111. [33] Ibid 116. [34] Ibid 111. [35] Resnick (n 12).
[36] David Pannick, QC, 'Farewell to the law lords', *The Times*, 30 July 2009.

III. Executive and Legislative Power

1. Presidential versus Parliamentary Systems: The Basic Distinction

Observers divide most constitutional systems into presidential (typified by the United States), parliamentary (typified by the United Kingdom), and semi-presidential (typified by France). In a presidential system, the chief executive (the president) is elected separately from the legislature. In a parliamentary system, the chief executive (the prime minister) and sometimes other executive officials (cabinet ministers) are chosen by—and in some systems may be drawn from—the membership of the legislature. In parliamentary systems, the prime minister typically may be removed during office by a no-confidence vote in the legislature, while in a presidential system the president's tenure in office does not depend on legislative support (absent the rare circumstances of impeachment for misconduct). The most obvious consequence of these differences in structure is that in a presidential system, the president is independent of the legislature, and indeed may be from a different political party than the majority of the legislature. In a parliamentary system, on the other hand, whichever party or coalition of parties controls the legislature also controls the executive branch (sometimes called 'the government'). Presidential systems thus exemplify a relatively high degree of separation between executive and legislative power, while parliamentary systems involve a greater fusion of executive and legislative authority. There are also hybrid systems, sometimes called 'semi-presidential' systems, that fall somewhere in between.

The next sections describe some prominent presidential and parliamentary constitutions, and their key attributes on matters such as: the procedures by which the head of government is selected and removed from office; the powers of the chief executive in proposing or vetoing legislation; the structure of the legislature and its areas of authority. This limited survey of systems is intended simply to highlight some of the key differences in how separation of powers is implemented.

(a) Presidential Systems

i. The United States: The Classic Presidential System

The United States has the quintessential presidential system, with the President and the legislature selected independent of one another. Article II of the US Constitution provides that 'the executive power shall be vested in the President of the United States of America'. The President is elected following a nationwide vote for that office on a fixed schedule through a mechanism known as the Electoral College. Because most states employ a winner-takes-all approach to allocating their electors' votes, it is possible for a candidate who won a majority or plurality of the nationwide popular vote to nevertheless lose in the Electoral College. This has happened in several elections, including the 2000 presidential election, prompting criticism of the Electoral College as antiquated and undemocratic.[37]

The 'legislative powers' of the federal government are vested in the Congress, which consists of the Senate and the House of Representatives.[38] Each house is given certain special responsibilities. Legislation is enacted by vote of a simple majority of each house followed by presentation to the President. The Congress can override a presidential veto by two-thirds

[37] See Akhil Reed Amar, 'Some Thoughts on the Electoral College: Past, Present, and Future' (2007) 33 *Ohio Northern University Law Review* 467.

[38] US Constitution, Art I, s 1.

vote of each house. The President may recommend legislation to the Congress, but the Congress is not obliged to act on his recommendations.[39]

ii. Latin American Countries: Troubled Presidentialism

Presidential systems predominate in Latin America, likely due to the hemispheric influence of the United States.[40] Countries in the region with presidential systems include Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. Indeed, only Belize (a former British colony) and some of the Caribbean nations have parliamentary systems.

Until relatively recently, democracy had a troubled history in Latin America, which some scholars have attributed in part to flaws in the presidential model (combined, of course, with other social, political, and economic factors).[41] There are a variety of different theories for why this might be so, but a dominant one is the idea that when the president does not enjoy the support of a majority of the legislature (which can happen in presidential but not most parliamentary systems), the resulting paralysis can lead to frustration and eventually to constitutional breakdown. Others have noted that the presidential systems that have survived intact for long periods of time have mainly involved two-party systems, while multi-party presidential democracies have proven more prone to deadlock and breakdown.[42]

In addition to the basic fact of presidentialism, many scholars have examined the differences between presidential systems in Latin America and the United States in an attempt to discern any formal legal factors (as opposed to social factors) that might help explain why the US presidential system has remained stable and so many in Latin America have not. Scholars have noted that many Latin American constitutions in the mid to late-twentieth century provided for comparatively greater powers in the office of the presidency and reduced authority in the legislature and courts. For example, 'it was noted that many constitutions permitted the executive branch to introduce bills into congress, and in some countries, only the president could initiate legislation' on certain subjects. Moreover, 'In several nations, promulgation of executive-initiated laws was automatic if congress did not reject the measures.'[43] Many Latin American presidents had the power of 'line-item veto',[44] and greater independent authority to appoint federal and state officials. Finally, many Latin American constitutions included emergency provisions that entitled the executive to declare a state of siege or emergency.[45]

More recently, a greater number of Latin American countries have achieved democratic stability, but have not abandoned the presidential model, casting some doubt on the importance of presidentialism in their previous instability. Of course, only time will tell whether these regimes remain stable in the long run.

[39] US Constitution, Art II, s 3.

[40] Scot Mainwaring, 'Presidentialism in Latin America' (1990) 25 *Latin American Research Review* 157, 159.

[41] See generally Juan J. Linz and Arturo Valenzuela (eds), *The Failure of Presidential Democracy* (1994).

[42] Ibid 168.

[43] Mainwaring (n 40).

[44] The 'line-item veto', also known as the 'partial veto', is the power of an executive to nullify specific provisions of a bill without vetoing the entire legislative act.

[45] Mainwaring (n 40).

iii. Presidentialism in Eastern Europe and the Former Soviet Union: Renewed Promise or Renewed Threat?

Many constitutions adopted in the 1990s in newly independent states of the former Soviet Union follow a presidential model.[46] Indeed, according to one study, of the roughly 25 countries formed out of the former Soviet Union and Eastern Europe, 'only three—Hungary, the new Czech Republic, and Slovakia—have chosen pure parliamentarianism'.[47] While some have used the prevalence of presidentialism in the former Eastern bloc to suggest that presidentialism is alive and well in constitution-making,[48] it is worth noting that most of the former Soviet republics that adopted presidential systems—Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan, for example—rank very low on indices of functioning democracies.[49] Many East European countries that adopted parliamentary or semi-presidential regimes—Poland, Bulgaria, Croatia, and Romania, for example—rank comparatively higher in terms of having at least partially functional democracies.[50] One study suggested a strong division between Eastern Europe and the former Soviet states, suggesting that parliamentarianism has dominated in Eastern Europe, while presidentialism has dominated in the former Soviet republics.[51] Other scholars have argued that more of the former communist constitutions should be classified as 'semi-presidential', an argument discussed below in the section on semi-presidentialism.

iv. South Korea

South Korea is today considered a prominent example of a relatively well-functioning presidential system. After decades of authoritarian presidential regimes exercising emergency powers, South Korea successfully transitioned to become a stable democracy in the late 1980s and early 1990s. The current South Korean Constitution retains a presidential system, but this Sixth Republic constitution successfully broke the historic pattern of dictatorship in part because it 'strengthened the power of the National Assembly and considerably reduced the power of the executive'.[52]

Under the current constitution, the South Korean President is directly elected by popular vote and serves a single, five-year term.[53] There is a unicameral legislature called the National Assembly. The President also appoints a Prime Minister with the consent of the National Assembly. The Prime Minister 'shall assist the President and shall direct the Executive Ministries under order of the President'.[54] Members of the State Council are appointed by the President upon recommendation of the Prime Minister.[55]

[46] Gerald M. Easter, 'Preference for Presidentialism: Postcommunist Regime Change in Russia and the NIS' (1997) 49 *World Politics* 184.

[47] Alfred Stepan and Cindy Skach, 'Presidentialism and Parliamentarianism in Comparative Perspective' in Linz and Valenzuela (n 41), 119, 120.

[48] See Steven G. Calabresi, 'The Virtues of Presidential Government' (2001) 18 *Constitutional Commentary* 51, 52–3.

[49] See Easter (n 46), 190 (listing regime types); Economist Intelligence Unit, Democracy Index 2010, available at <http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf>.

[50] See Economist Intelligence Unit (n 49).

[51] Easter (n 46), 187–9.

[52] Jenny Martinez, 'Inherent Executive Power: A Comparative Perspective' (2006) 115 *Yale Law Journal* 2480, 2502–3 (quoting Andrea Matles Savada and William Shaw (eds), *South Korea: A Country Study* (1992), 201–2, available at <http://countrystudies.us/south-korea>).

[53] Constitution of the Republic of South Korea, Arts 67, 70, available at <http://english.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf>.

[54] Constitution of the Republic of South Korea, Art 86.

[55] Ibid Art 87.

(b) Parliamentary Systems

i. United Kingdom: Westminster Model

The modern British system, sometimes called the Westminster model, is a parliamentary system with a relatively high degree of fusion of executive and legislative power. Indeed, at one point it was said that 'The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers.'[56] England has a bicameral legislature, consisting of the House of Commons and the House of Lords. Members of the House of Commons are popularly elected from single-member districts, while the House of Lords consists of life peers (appointed by the monarch on the recommendation of the Prime Minister), bishops, and elected hereditary peers. Although the House of Commons has a greater role in the legislative process, the House of Lords is considered an important check on the government.[57]

The political party (or coalition of parties) with a majority in the House of Commons selects a Prime Minister. Voters do not vote directly for the Prime Minister, but instead for their particular member of parliament. The Prime Minister and the Cabinet remain members of the legislature, and play a large role in setting the legislative program. The Prime Minister also exercises control over parliament because of his or her power to dissolve parliament and call for new elections.[58] Because the Prime Minister and legislative majority are drawn from the same party, there is less likelihood of deadlock and a greater chance that legislation will pass. It is worth noting, however, that 'While there is in practice a fusion of legislative and executive *powers*, there is in principle a distinction between the two *functions*', and the government cannot change statutory law without passing legislation through a parliament.[59] In other words, the Prime Minister cannot change the laws at his or her discretion; the formal legislative process must be observed.

ii. Constrained Parliamentarianism: The Examples of Germany and South Africa

(1) Germany

Many other countries with parliamentary systems differ somewhat from the Westminster model. The German system has been described, in contrast to the Westminster model, as 'constrained parliamentarianism'.[60] The German Constitution, or Basic Law, formally creates two executive officials, a President and a Federal Chancellor, but the President in practice serves a mostly symbolic, non-partisan role.[61] The Federal Chancellor is appointed and removable by the Bundestag, the lower house of parliament.[62] The 'constrained' part of German parliamentarianism comes in part from the limits on the power of the legislature to remove the Chancellor. The Bundestag cannot remove the Chancellor from office without appointing a successor.[63] This was designed to avoid the instability that had characterized German

[56] R.H.S. Crossman (introd), *The English Constitution* (1963), 65 (quoting Walter Bagehot) (quoted in Eric Barendt, 'Separation of Powers and Constitutional Government' in Bellamy (n 4), 275, 289).

[57] See 'Role and Work of the House of Lords FAQs', available at <http://www.parliament.uk/about/faqs/house-of-lords-faqs/role/>.

[58] Barendt (n 56), 289.

[59] Ibid 291 (citing *Case of Proclamations*, 12 Co Rep 74 (1611)).

[60] Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633, 670.

[61] Thomas Poguntke, 'A Presidentializing Party State? The Federal Republic of Germany' in Thomas Poguntke and Paul Webb (eds), *The Presidentialization of Politics* (2005), 63.

[62] German Basic Law, Arts 63, 67, available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

[63] Ibid Art 67.

government under the Weimar regime. The legislature also cannot ordinarily be dissolved early, except following the failure of a confidence vote and even then only if a new Chancellor has not been elected.[64]

(2) South Africa

South Africa provides a different example of 'constrained parliamentarianism'. The constitution vests legislative power in a bicameral parliament consisting of a National Assembly and a National Council of Provinces.[65] Cabinet members, deputy ministers, or members of the national assembly may introduce bills, though certain types of financial bills must be introduced by the relevant cabinet minister.[66] Despite being termed a 'president', the South African President is actually selected by the parliament rather than by direct election,[67] with the result that the system is best classified as a form of parliamentary system. The President is both head of state and head of government.[68] He or she is selected by the National Assembly from among its members.[69] Unlike some parliamentary systems, however, South Africa constrains the ability of the legislature to remove an executive once in office; the President may be removed only by a two-thirds vote of the National Assembly on grounds of 'a serious violation of the Constitution or the law', 'serious misconduct', or 'inability to perform the functions of office'.[70]

(c) Hybrid or Semi-Presidential Systems

i. France

The French system is a hybrid, with aspects of both presidential and parliamentary models, and is sometimes called a 'semi-presidential' system. Under the 1958 Fifth Republic Constitution, the French President is elected by direct universal suffrage.[71] The President appoints a Prime Minister, who must enjoy the support of a majority of the parliament. Though the President is by far the stronger of the two offices, the President and Prime Minister to some degree share executive power. During periods of 'cohabitation', when the parliamentary majority is from a different party than the President, Prime Ministers have enjoyed greater control over domestic policymaking. To a lesser degree, Prime Ministers have also participated in foreign and defense policy.[72]

The French legislature consists of a bicameral parliament comprised of the National Assembly (elected by direct, universal suffrage), and the Senate (elected through an indirect, electoral college system).[73] The National Assembly represents the entire citizenry and the Senate represents France's territorial units. Power is split unequally between the two houses, with the National Assembly exercising much broader powers than the Senate. Most significantly, only the National Assembly may dissolve the government, either through a vote of no confidence or by refusing to endorse the government's program.[74] Ordinarily, legislation must pass both

[64] German Basic Law, Art 68. Nevertheless a dissolution based on an agreement of all parties was held constitutional by the Federal Constitutional Court.

[65] 1996 South African Constitution, s 42, available at <http://www.info.gov.za/documents/constitution/1996/index.htm>.

[66] Ibid s 73.

[67] See ibid s 86.

[68] Ibid s 83.

[69] Ibid s 86.

[70] Ibid s 89.

[71] David S. Bell, *Presidential Power in Fifth Republic France* (2000), 10.

[72] Andrew Knapp and Vincent Wright, *The Government and Politics of France* (4th edn, 2001), 115–19.

[73] French Constitution, Art 24, available at <http://www.assemblee-nationale.fr/english/8ab.asp>.

[74] Ibid Art 50.

houses in the same terms to become law. However, when the two houses cannot agree, the government can, with few exceptions, grant the National Assembly final say on the issue.[75]

ii. Other Semi-Presidential Systems

Some scholars argue that semi-presidentialism, rather than presidentialism or parliamentarianism, is the most popular model in recent constitutions.[76] Like the French system, these semi-presidential systems combine 'a popularly elected head of state with a head of government who is responsible to a popularly elected legislature.'[77] Cindy Skach argues that the constitutions of Belarus, Croatia, Poland, Romania, Russia, and Ukraine are best characterized as semi-presidential. However, the Russian Constitution defines the role of the President in substantially broader terms than other semi-presidential or even presidential systems. As a result, the Russian system is sometimes referred to as 'superpresidentialism'.[78] Skach notes that, in most of these systems, 'the power to preside over cabinet meetings and to direct national policy, is shared between these two executives', which can be problematic as 'such power sharing precludes a neat division or clear separation of powers, often leading to constitutional ambiguity'.[79] This issue is addressed in more detail in the next section.

(d) Normative Arguments about Parliamentary versus Presidential Systems

Parliamentary, presidential, and semi-presidential systems each have advantages and disadvantages. This section surveys the lively normative debate about whether one type of system is preferable to the other.

Beginning in the 1990s, the troubled history of democracy in Latin America led some political scientists, most notably Juan Linz, to suggest that presidential systems may be inherently unstable compared to parliamentary systems.[80] While it is difficult to untangle causation, these scholars noted that of the 93 countries that became independent between 1945 and 1979, all of those that remained continuously democratic between 1980 and 1989 were parliamentary systems, while none of the non-parliamentary systems remained continuously democratic.[81] Some of these observers hypothesized that when the president and the legislature in a presidential system are from different political parties or are otherwise unwilling to cooperate, the resulting deadlock can lead to frustration and ultimately collapse of the system as one actor seizes power. Linz thought this was particularly likely in presidential systems due to the combination of a propensity for political stalemate and the already inherent concentration of powers in the executive.[82]

Of course, a deadlock between the president and legislature does not inevitably lead to collapse of democracy. The president and the legislature may cooperate and compromise;

[75] Ibid Art 45.

[76] Cindy Skach, 'The 'Newest' Separation of Powers: Semipresidentialism' (2007) 5 *International Journal of Constitutional Law* 93.

[77] Ibid.

[78] Amy J. Weisman, 'Separation of Powers in Post-Communist Government: A Constitutional Case Study of the Russian Federation' (1994) 10 *American University Journal of International Law and Policy* 1365, 1372–3.

[79] Skach (n 76), 96.

[80] See Juan Linz, 'The Perils of Presidentialism' (Winter 1990) 1 *Journal of Democracy* 51, 52; Linz and Valenzuela (n 41), 4; Ackerman (n 60), 646.

[81] Giovanni Sartori, 'Neither Presidentialism nor Parliamentarianism' in Linz and Valenzuela (n 41), 106–7 (cited in Ackerman (n 60), 646).

[82] Linz and Valenzuela (n 41), 69–74.

perhaps achieving a solution that is better than the one that each might have imposed had they been able to act unilaterally. Bruce Ackerman labeled this the Madisonian hope, based on James Madison's optimism that the structure of American government would check faction and lead to good policy. Finally, a third possible outcome of deadlock between the president and the legislature is neither good governance nor outright collapse, but 'endless backbiting, mutual recrimination, and partisan deadlock'.[83]

Ackerman suggested that parliamentary governments will know that the legislation they pass can be undone if they lose the next election. By contrast, in presidential and semi-presidential systems, when the president actually enjoys the support of the legislature—what he described as a system of 'full authority'—the government has the power to entrench its policies into place for a longer period of time. This, he asserted, is because the government knows that even if it loses the legislature at the next election, it may retain the presidency or other offices. But paradoxically, he argued, politicians in this scenario will focus on policies that have large symbolic impact in order to further their chances in the next election rather than policies that will be truly effective in a middle range of time.[84]

Not everyone agrees that presidential systems are less stable. Political scientists Matthew Shugart and John Carey, for example, found 'no justification for the claim of Linz and others that presidentialism is inherently more prone to crises that lead to breakdown', noting numerous breakdowns of parliamentary systems, as well as the fact that in more recent years presidential systems in Latin America and elsewhere have achieved much greater stability. Donald Horowitz 'pointed out that in postcolonial Africa and Asia, the Westminster model of parliamentarism was the "institutional villain" behind a string of failed democracies, resurgent authoritarianisms, and unstable polities'.[85]

Steven Calabresi in his response to Ackerman contended that most of the countries writing constitutions in the 1980s and 1990s chose presidentialism over parliamentarianism. He contended that American-style presidentialism: better embodies democratic principles; promotes stability; provides the executive branch with more democratic legitimacy; allows for more robust judicial review; is more compatible with federalism; and better protects individual liberty.[86]

There seem to be comparatively fewer academic advocates for semi-presidentialism. This structure creates the opportunity for 'warring executives', and power-sharing within the executive can make it less clear to the public who is responsible for government policies. Cindy Skach, for example, suggested that 'even French constitutional scholars' admit that under their system 'it's difficult to know who makes the decisions, and things don't always work out that well'.[87] Semi-presidential systems are particularly problematic when, in a multiparty system, divided minority governments result, in which neither the party of the president nor of the prime minister enjoys a majority in the legislature. Thus, the success of such regimes depends in part on the party structure of a given country.[88]

There are so many variables in the construction of presidential, parliamentary, and semi-presidential systems that it is hard to say in the abstract that one is always superior. The success of parliamentary systems, for example, may depend in part on the mode of election. Electoral systems that employ varieties of proportional representation that allow many different

[83] Ackerman (n 60), 647.
[84] Ibid 650–3.
[85] Easter (n 46), 186.
[86] See Calabresi (n 48), 52–93.
[87] Skach (n 76), 98.
[88] Ibid 105.

political parties to gain seats in parliament often result in unstable coalition governments. In countries that use this sort of system, such as Italy, particular cabinets may remain in power for very short periods of time as coalitions form and collapse. Countries like Germany, on the other hand, that employ modified versions of proportional representation and/or set a minimum threshold of support before a minor party can gain seats, tend to produce more stable governments.[89]

In short, given the large number of successful and unsuccessful examples of both types of systems, it seems less than fruitful to claim that either presidentialism or parliamentarianism is suitable for all nations. Rather, the success of any given system depends on multiple variables including how the constitution implements the model and the history and social and economic qualities of the particular nation.

(e) Judicial Review of Executive Appointments and Removal

Occasionally, conflict between the executive and the legislature over the appointment and removal from office of executive officials has results in constitutional litigation, though constitutional courts have shown a preference for resolution of such conflicts through the political process. For example, at a time when the President and the majority of the national assembly in South Korea were from different parties, the assembly initially failed to vote on the president's choice for prime minister, and the president then installed his chosen candidate as acting prime minister. The constitutional court rejected a challenge brought by members of assembly from the majority party, with various justices noting that the members of the legislature who had brought the suit could have acted in their legislative capacity to resolve the matter through a legislative vote.[90] Similarly, the Russian constitutional court noted, in response to a conflict over then-President Boris Yeltsin's choice for Prime Minister, that the constitutional provision requiring dissolution of the legislature and new elections should the legislature reject a president's choice for prime minister three times was a mechanism for overcoming disagreements between the president and legislature through 'free elections', thus promoting the goal of a 'democratic, rule of law state'.[91]

In some countries, the judiciary may also play a role in resolving disputes involving the attempted impeachment and removal of officials by the legislature. For example, in a case concerning the attempted impeachment of South Korean President Roh Moo-Hyun, the Constitutional Court reinstated the president, finding that his alleged misconduct (eg in commenting favorably on one party in advance of elections, in violation of a constitutional provision prohibiting the president from engaging in electioneering) did not constitute violations of the fundamental constitutional rules sustaining democracy and therefore were not proper grounds for impeachment.[92]

In the United States, the President, Vice-President, and 'all civil officers of the United States', may be removed from office 'on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors'.[93] The House of Representatives has the

[89] Ackerman (n 60), 653–5.

[90] Competence Dispute Between the President of the Republic and Members of the National Assembly, Constitutional Court (Republic of Korea) 29 KCCG 583, 98 HunRa1, 15 July 1998.

[91] Russian Prime Ministerial Appointment Case, Constitutional Court (Russia), Decision 28-P of 11 December 1998.

[92] Impeachment of the President (Roh Moo-Hyun), Constitutional Court (Republic of Korea), Case 16-1KCCR 609 (2004).

[93] US Constitution, Art II, s 4.

power of 'impeachment'—that is, of bringing charges against a federal official,[94] while the Senate is given the power to 'try all impeachments', with a two-thirds vote required for impeachment.[95]

The Supreme Court has held that the propriety of the Senate's impeachment of a federal judge was a non-justiciable political question; while this case involved a judge rather than an executive branch official, the court's reasoning would seem equally applicable to cases involving legislative impeachment of executive officials.[96]

2. Beyond the Presidential versus Parliamentary Debate: Other Issues in the Structuring of Executive and Legislative Power

(a) Subdivision of Legislative Power

It is very common for systems to employ a bicameral, or two-house, legislature. The bicameral legislature has its origins in theories of mixed government, and was classically represented in the British Parliament with its House of Lords (representing the aristocracy) and House of Commons (representing the broader populace). Many have argued that the US Senate was originally conceived of as fulfilling a similar role in relation to the House of Representatives, although the absence of a hereditary aristocracy in the United States altered the underlying calculus.

In contemporary constitutions, federalism has replaced class structure as a justification for bicameralism. It is common for countries with a federal system of government involving a vertical separation of powers to reflect this in their bicameral federal legislatures.[97] Typical in this regard is the German system. The German legislature consists of the Bundestag, which is directly elected, and the Bundesrat, which represents the states (or *Länder*). While the Bundestag is more prominent, the Bundesrat must be involved when legislation is passed that requires the states to take certain actions or that involves revenue shared between the states and the federal government. In the United States, the Senate contains two members from each state, regardless of population, and is thus considered to in part represent the interests of the states. Other countries with bicameral legislatures in which one house is linked to regional subunits include South Africa (with its National Assembly and National Council of Provinces), Mexico (with its Senate and Chamber of Deputies), and India (with its House of the People and Council of States).

Even in some unitary states, such as France (with its National Assembly and Senate), bicameralism is employed, with the two houses designed to serve as checks on each other. In many systems, the members of the upper house are selected by a different mechanism than members of the lower house. Members of the French Senate, for example, are selected indirectly by regional officials and the members of the National Assembly.

At the same time, a great number of countries employ unicameral legislatures. Unicameral legislatures are considered to be more efficient. Both presidential and parliamentary countries may employ unicameral legislatures. Parliamentary systems with unicameral legislatures may be particularly efficient, but they are criticized by commentators for having insufficient checks and balances.

[94] Ibid Art I, s 2. [95] Ibid Art I, s 3.
[96] *Nixon v United States* 506 US 224 (1993). [97] Ackerman (n 60), 673.

(b) Subdivision of Executive Power

There are also a number of debates about the internal structuring of the executive branch, including whether it is desirable to have officials or departments within the executive branch independent of the chief executive—for example an independent attorney general, special independent prosecutors, or independent agencies.

In the United States, the contemporary debate at the federal level has centered around a school of theories concerning the 'unitary executive'—that is, the idea that the US President 'must be able to control the execution of all federal laws' through broad supervisory powers over inferior executive branch officials as well as the discretion to remove those officials from office.[98] As is typical in the United States, part of this debate concerns the original intent of the framers of the Constitution, with some arguing that the idea of the unitary executive is 'just plain myth' and 'a creation of the twentieth century, not the eighteenth',[99] and others asserting that the founding generation intended a strongly unitary executive.[100] Another dimension of the debate concerns the normative desirability of a strongly unitary executive branch.

These debates were spurred to prominence by a series of cases in the late 1980s in which the US Supreme Court held that statutes providing that certain executive branch officials could only be removed for 'good cause' did not violate the constitutional separation of powers.[101] The most notable case involved a statute allowing for the appointment of an 'independent counsel' to 'investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws', which the Court upheld in *Morrison v Olson*.[102] The 'independent counsel' was removable 'only by the personal action of the Attorney General, and only for good cause'.[103] While there was immediate academic controversy about whether the decision was correct, the issue became even more prominent in the late 1990s when independent counsel Kenneth Starr's investigation of President Bill Clinton's involvement in the failed Whitewater Development Corporation expanded into an investigation of Clinton's sexual relationship with White House intern Monica Lewinsky, which in turn led to efforts to impeach the President. This, many believed, fulfilled the fears that an unchecked and unaccountable prosecutor could wreak havoc on the system.[104]

At the same time, below the federal level, many states within the United States in fact insist on the separate election of prosecutors or state attorney generals. For example, as of 2002, 38 out of 50 states provided for separate election of the attorney general.[105]

As noted previously, countries with semi-presidential systems also subdivide executive power, as with the roles of the French President and Prime Minister. Russia, with its President and Chairman of the Government (ie, prime minister), seemingly employs a similar division

[98] Steven G. Calabresi and Saikrishna B. Prakash, 'The President's Power to Execute the Laws' (1994) 104 *Yale Law Journal* 541, 544; see also Steven G. Calabresi and Kevin H. Rhodes, 'The Structural Constitution: Unitary Executive, Plural Judiciary' (1992) 105 *Harvard Law Review* 1153.

[99] Lawrence Lessig and Cass R. Sunstein, 'The President and the Administration' (1994) 94 *Columbia Law Review* 1, 2.

[100] Calabresi and Prakash (n 98), 549.

[101] *Mistretta v United States* 488 US 361, 408–12 (1989); *Morrison v Olson* 487 US 654, 685–93 (1988).

[102] 487 US 654, 660 (1988).

[103] Ibid 686.

[104] Christopher S. Yoo, 'Symposium: Presidential Power in Historical Perspective: Reflections on Calabresi and Yoo's *The Unitary Executive*' (2010) 12 *University of Pennsylvania Journal of Constitutional Law* 241, 242.

[105] G. Alan Tarr, 'Interpreting the Separation of Powers in State Constitutions' (2003) 69 *New York University Annual Survey of American Law* 329, 338.

of executive power.[106] Portugal's 1976 Constitution established a semi-presidential system in the hope that maintaining two centers of executive power (a strong Prime Minister that could counterbalance an equally strong President) would protect against both an excessively strong executive and parliamentary instability.[107] While constitutional revisions in 1982 shifted this original structure more toward pure parliamentarism,[108] Portugal continues to divide executive power between a popularly elected president and a government dependent on the confidence of the legislature.[109] Still other countries have plural executives that defy easy categorization, such as the Swiss system, which employs a seven-member Federal Council.[110]

(c) Boundaries and Overlap between Legislative and Executive Power

i. Legislation versus Administrative Regulation

Because regulation in the contemporary world is so complex, most legal systems recognize that rules of conduct may be promulgated not only by the legislature through statues, but also through the executive branch and/or specialized administrative agencies in the form of regulations.

For example, the French Constitution explicitly recognizes that both the legislature and the executive will engage in lawmaking. The Constitution specifies that rules governing certain areas of law must be enacted through the legislature as statutes (*lois*), including those governing serious crimes, taxation, civil rights and liberties, and nationalization of private companies. In other areas—including protection of the environment, property, contracts, and employment law—the legislature is required to lay down at least the 'basic principles'.[111] Matters falling outside these areas may be regulated by the government through decrees (*règlements*). When the legislature enacts *lois* in areas that fall within the domain of *règlements* (as determined by the Conseil Consitutionnel), the policies may be amended by *règlements* after consultation with the Conseil d'État.[112] The government can also receive permission for a limited time to take measures in areas that are ordinarily covered by legislation through *ordonnances* issued in the Council of Ministers after consultation with the Conseil d'État.

In the United States, the US Supreme Court has held under the 'non-delegation' doctrine that the legislature cannot delegate the entire domain of policymaking to an executive branch agency, but must at least set out 'intelligible principles' to guide the agency's discretion.[113] The 'non-delegation' doctrine is mostly a theoretical constraint, however, since it has not been applied by the Supreme Court since the 1930s.[114] In contemporary times, if the doctrine remains alive at all, it survives as a canon of statutory interpretation.[115]

[106] Gordon B. Smith and Robert S. Sharlet, *Russia and its Constitution: Promise and Political Reality* (2008); Edward W. Walker, 'Politics of Blame and Presidential Powers in Russia's New Constitution' (1994) 3 *East European Constitutional Review* 116, 117.

[107] Eric Solsten (ed), *Porgtugal: A Country Study* (1993), available at <http://countrystudies.us/portugal/76.htm>.

[108] See David Corkill, 'The Political System and the Consolidation of Democracy in Portugal' (1993) 46 *Parliamentary Affairs* 517.

[109] Jose Antonio Cheibub, 'Presidentialism, Parliamentarism, and the Role of Opposition Parties: Making Presidential and Semi-presidential Constitutions Work' (2009) 87 *Texas Law Review* 1375, 1395–6.

[110] Arend Lijphart, *Patterns of Democracy* (1999), 119–20.

[111] See French Constitution, Art 34.

[112] Ibid Art 37.

[113] *Hampton v United States* 276 US 394, 401 (1928).

[114] See Erwin Chemerinsky, *Constitutional Law* (3rd edn, 2006), 327–31.

[115] See Cass R. Sunstein, 'Nondelegation Canons' (2000) 67 *University of Chicago Law Review* 315.

Recall that the British system, or Westminster model, involves a relatively high degree of fusion of executive and legislative power. It is therefore not surprising that:[116]

> In the United Kingdom and in self-governing Dominions and colonies it has long been the custom for the legislature to invest the executive with power to make regulations... the legal content of which it would be difficult to distinguish from legislation.

The amount of discretion given to the executive for promulgating regulations can be substantial. The Australian High Court, for instance, recognized that the separation of powers doctrine formed a part of the Australian Constitution and precluded the legislature from conferring legislative power on the executive. Nonetheless, it construed the phrase 'legislative power' in such a way that 'subordinate regulations, however wide the discretion under which they were made, could not be considered as an exercise of legislative power.' Consequently, the court concluded that 'a grant of regulative authority is not a delegation of [Parliament's] legislative power'—and so there is no separation of powers violation—even when the executive is given the authority 'to prescribe conduct and regulate rights and duties, however untrammeled the discretion'.[117] As a result, there is almost no limit on the extent to which the Australian Parliament may grant lawmaking authority to the executive.

The German Federal Constitutional Court has noted that, as an aspect of separation of powers, 'the legislature is obligated... to make all crucial decisions in fundamental normative areas, especially in those cases where basic rights become subject to governmental regulations.' Nevertheless, the court has allowed relatively broad delegations of authority to the executive branch in regulatory programs. For example, it rejected a challenge to the Atomic Energy Act, which it found was sufficiently precise to satisfy the legislature's constitutional obligation, concluding that it was 'within the legislature's discretion to use either undefined legal terms or precise terminology' and that it was permissible for the legislature to conclude that the executive should have the task of adjusting safety requirements based on current technological developments.[118]

ii. Conflicts between the Executive and the Legislature over Policy

Conflicts between the executive and the legislature over policy are often resolved through the political process, but sometimes courts are called up to intervene and resolve the dispute as a matter of constitutional law. In the case of *Youngstown Sheet & Tube Co v Sawyer*,[119] the US Supreme Court held invalid President Harry Truman's seizure of steel mills as not within his inherent executive authority and contrary to statute. In a famous passage, Justice Jackson, writing in concurrence, explained that presidential actions could be grouped into three categories. In the first, when he acts 'pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.' In the second, when the president acts in 'absence of either a congressional grant or denial of authority', the president must rely on his own independent powers but there is a 'zone of twilight in which he and Congress may have concurrent authority' and the outcome depends on 'imperatives of events' rather than 'abstract theories of law'. Finally, in the third category, when the president 'takes measure incompatible with the

[116] Owen Dixon, 'The Separation of Powers in the Australian Constitution' (2008) 10 *Constitutional Law and Policy Review* 35, 38.

[117] Ibid 39.

[118] *Kalkar I Case*, Federal Constitutional Court (Germany), 48 BVerfGE 89 (1978).

[119] *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 (1952).

expressed or implied will of Congress, his power is at its lowest ebb, for he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.' This framework has proven influential in separation of powers jurisprudence. When the US Supreme Court struck down the military commissions set up to try accused terrorists in *Hamdan v Rumsfeld*, it was because the Court concluded that the commissions set up by the administration of President George W. Bush fell into this third category and contravened legislation that limited the use of military commissions to situations that were consistent with the laws of war, including the Geneva Conventions.[120]

Courts, in general, seem particularly reluctant to interfere with the internal workings of legislatures. The Israeli Supreme Court, for example, has held that 'in general, questions of the day-to-day affairs of the legislature are not institutionally justiciable'[121] that 'only if it is claimed that the violation of rules regarding internal management harms the parliamentary fabric of life and the foundations of the structure of our constitutional system of government is it appropriate to decide the issue in court.'[122]

iii. Power over Foreign Affairs

Countries vary in their allocation of authority over foreign affairs to the executive and legislature. Montesquieu, the reader will recall, viewed foreign affairs powers as being executive in nature, but most modern systems divide these powers between the branches.

It is quite common for constitutions to require legislative approval of at least some, though often not all, international agreements. The French Constitution, for example, gives the president the power to 'negotiate and ratify treaties', but specifies that certain types of treaties 'may be ratified or approved only by virtue of an Act of Parliament', including

> Peace treaties, commercial treaties, treaties or agreements relating to international organization, those that commit the finances of the State, those that modify provisions which are matters for statute, those relating to the status of persons, and those that involve the cession, exchange or addition of territory.[123]

Similarly, the German Constitution requires that 'Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law.'[124] South Korea requires legislative votes for treaties

> pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.[125]

In the United States, the President concludes treaties subject to the advice and consent of two-thirds of the Senate. Although alternative procedures are not mentioned in the Constitution,

[120] 548 US 557 (2006).

[121] Public Committee Against Torture, HCJ 769/02, Supreme Court (Israel) (2005) (citing HCJ 9070/00 *MK Livnat v The Chairman of the Constitution, Law, and Justice Committee*, 55(4) PD 800, 812; HCJ 9056/00 *MK Kleiner v The Chairman of the Knesset*, 55(4) PD 703, 708).

[122] Public Committee Against Torture, HCJ 769/02, Supreme Court (Israel) (2005) (citing HCJ 652/81 *MK Sarid v The Chairman of the Knesset*, 36(2) PD 197; HCJ 73/85 *'Kach' Knesset Faction v The Chairman of the Knesset*, 39(3) PD 141; HCJ 742/84 *Kahane v The Chairman of the Knesset*, 39(4) PD 85).

[123] French Constitution, Arts 52, 53.

[124] German Basic Law, Art 59.

[125] Constitution of the Republic of South Korea, Art 60.

in practice the United States enters into some international agreements by way of bicameral legislation (so-called congressional-executive agreements, which are common in the area of international trade) and the President also has the power to enter into sole executive agreements.[126]

Many systems also require legislative participation in the decision to engage in war. (See Chapter 22.) In this area formal constitutional requirements are not always adhered to in practice, and executives in many countries are prone to use force without *ex ante* legislative authorization. The US Constitution famously gives the Congress the power to declare war,[127] but presidents have not always sought congressional authorization in advance for their military actions. This is true in many other countries as well.[128]

In this regard it is not only the prevailing power sharing among the branches that counts but also a country's troubled history with military dictatorship. For example, the South Korean Constitution requires legislative approval not only for formal declarations of war, but also for any 'dispatch of armed forces to foreign states, or the stationing of alien forces in the territory of the Republic of Korea.'[129] Although the President is commander-in-chief, he operates 'under the conditions as prescribed by the Constitution and Act', and that 'The organization and formation of the Armed Forces' is determined by law.[130]

Many commentators consider some independent executive authority in these areas desirable,[131] for reasons originally expressed by Alexander Hamilton: 'Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.'[132] Others contend that maintaining legislative control over powers of war and peace is essential to democracy, and have argued for various changes to increase the likelihood of legislative involvement.[133]

iv. Executive versus Legislative Control of Emergency Powers

Times of crisis strain the ordinary separation of powers framework. While there is no widely accepted definition of what constitutes an emergency,[134] Mark Tushnet provides a helpful starting point:[135]

> An 'emergency' occurs when there is general agreement that a nation or some part of it faces a sudden and unexpected rise in social costs, accompanied by a great deal of uncertainty about the length of time the high level of cost will persist.... 'Emergency powers' describes the expansion of governmental authority generally and the concomitant alteration in the

[126] See generally Oona Hathaway, 'Treaties End' (2008) 117 *Yale Law Journal* 1238.

[127] US Constitution, Art I, s 8.

[128] See Martinez (n 52), 2492–5.

[129] Constitution of the Republic of South Korea, Art 60(2).

[130] Constitution of the Republic of South Korea, Art 74.

[131] See eg John Yoo, *The Powers of War and Peace: the Constitution and Foreign Affairs* (2005).

[132] Hamilton, *The Federalist*, no 70 (n 29).

[133] See John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (1995); Lori Fisler Damrosch, 'Constitutional Control over War Powers: A Common Core of Accountability in Democratic Societies?' (1995) 50 *University of Miami Law Review* 181.

[134] Note that some constitutions specifically delineate the criteria that must exist for the government to claim a state of emergency. See eg German Basic Law, Art 115a; Constitution of the Republic of South Korea, Art 76. This can be an important constraint on the exercise of emergency powers, particularly when coupled with an effective mechanism for reviewing the government's claim.

[135] Mark Tushnet, 'The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation' (2008) 3 *International Journal of Law in Context* 275, 275–6.

scope of individual liberty, and the transfer of important 'first instance' law-making authority from legislatures to executive officials, in emergencies.

The transfer of power to the executive results from the belief that, when a country is faced with an urgent threat, executive officials are 'better able than legislators to act quickly, in a co-ordinated response, on the basis of adequate information'.[136] But this efficacy comes at a price: the expansion of executive power through the invocation of emergency powers can result in human rights violations[137] or, in the extreme, breed dictatorship.[138] Some support broad, largely unchecked executive authority to assess the threat and adopt appropriate measures to protect national security. Others contend that the need to maintain robust checks and balances on executive power is most important during times of crisis, which 'provide the best test for our cherished values of liberty and freedom'.[139] Mark Tushnet calls this sort of check on the executive's exercise of emergency powers 'political control', and argues that—when effective—this type of control is preferable to 'legal control', which relies on the courts to determine whether a novel government practice violates a fundamental principle of law.[140] In response to Tushnet's contention, Adam Shinar argues that political controls are wholly ineffective in Israel, where a parliamentary system coupled with proportional representation from a party list ensures that 'members of parliament have a strong incentive to comply with party policy even if they object to it on a personal level.'[141] As a result, he contends, government policies and actions in the realm of national security are rarely checked by the Israeli legislature. At the same time, the Israeli Supreme Court has exercised vigorous review of measures including detention of suspected terrorists, interrogation methods, and targeted killings, though its interventions in these areas have drawn criticism as judicial activism.[142]

As this demonstrates, however desirable balancing emergency powers between the legislature and executive might be, formal divisions can readily break down when there is popular support for expansive, executive authority. (For a review of national answers to emergency see Chapter 21.) As in other areas of separation of powers theory, 'the practical effectiveness of formal divisions of power seems to depend a great deal on political context', and 'legislators are often quite willing to cede their powers'.[143] Of course, the courts may also be as a check on emergency powers, as discussed in the next section.

IV. The 'Least Dangerous Branch'? The Judiciary and Separation of Powers

This section addresses the issue of the relationship between the judicial power and the legislative and executive powers. There is wide agreement that judicial independence is desirable—that is, that judges engaged in the process of adjudication must be independent from direct political and financial influence. Judges should not decide cases based on bribes, threats, or

[136] Ibid 275–6.
[137] Ibid 276.
[138] Martinez (n 52), 2506–7.
[139] Adam Shinar, 'Constitutions in Crisis' (2008) 20 *Florida Journal of International Law* 116.
[140] Tushnet (n 135), 277.
[141] Shinar (n 139), 162.
[142] See eg Public Committee Against Torture in Israel, Supreme Court (Israel) (2005); Mersel, 'Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary during the Terror Era' (2005) 28 *NYU Journal of International Law and Politics* 67.
[143] Martinez (n 52), 2510–11.

instructions from other government officials. But countries have chosen widely divergent structures to achieve this goal. Numerous questions arise in this context. What role should the legislature and executive play in the appointment and removal of judges? Should some or all judges be formally placed in their own separate branch of government or is it acceptable for some judges to reside formally within the executive branch? Should some or all judges have the power of judicial review—that is, the power to declare legislative or executive enactments invalid on the basis of constitutional or other higher law principles?

1. Judicial Independence and 'The Judicial Branch'?

While all modern democracies recognize the importance of judicial independence, the segregation of the judiciary into an entirely separate branch of government is not always considered necessary for this. For example, many systems allow for certain types of adjudication to be carried out within the executive branch. In France, administrative tribunals within the executive branch, culminating in the Conseil d'État, review the legality of public actions. The particular idea of separation of powers that was put in place during the French Revolution prohibits ordinary judges from exercising this type of power, and as a consequence these administrative tribunals are not considered courts proper, although they certainly engage in functions that would in most other countries be regarded as adjudication.[144]

Until recently, the highest appellate court in the United Kingdom was the Law Lords, made up of members of the House of Lords, the upper house of the legislature. In 2009, the appellate function was transferred to a new Supreme Court that is no longer formally a part of the legislature. Even under the previous system, however, the Law Lords functioned as an independent group, and lay peers did not participate in the functioning of the House of Lords as an appellate court. Still, the fact that the Law Lords could participate in legislative debates was considered problematic. The British decision to create a new, separate Supreme Court may be seen as an acknowledgement that the previous system was conceptually troublesome, even if it worked relatively well in practice. In addition, the United Kingdom maintains a significant functional separation of judicial powers at other levels of its court system. Judges 'may not sit in the House of Commons and they are protected from summary removal under the Act of Settlement [of] 1701'.[145]

The United States is considered to have a strongly independent federal judiciary. The 'judicial power' of the United States is vested 'in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'[146] The Congress has through legislation established federal trial courts and regional courts of appeal. Federal judges are nominated by the President and confirmed by the Senate in a process that is often contentious and politically charged. Once in office, however, they 'hold their Offices during good Behavior', and their compensation may not be reduced during their time in office.[147] However, federal judges may be removed by impeachment. State judges in many areas of the United States are popularly elected, a practice which some criticize as undermining their independence.

The jurisdiction of the federal courts is constitutionally and statutorily limited to certain types of cases, and there is a long-standing and unresolved debate among legal scholars about whether the Congress can use legislation to strip the federal courts of jurisdiction to hear

[144] See Merryman (n 21), 111.
[145] Barendt (n 56), 291.
[146] US Constitution, Art III, s 1.
[147] Ibid Art III, s 1.

certain types of cases (eg abortion cases).[148] A variety of decisions in the United States define the contours of judicial power and independence. In *Hayburn's Case*, for example, the members of the US Supreme Court rejected a statutory scheme whereby judicial decisions regarding pension benefits were subject to rejection by the Secretary of War. The Court found this executive control over judicial decisions to be 'radically inconsistent with the independence of that judicial power which is vested in the courts'.[149] Nevertheless, in practice a large amount of adjudication is carried out within executive-branch administrative agencies by judges who do not enjoy the life-tenure protections of Article III. For instance, immigration courts, which fall under a department of the executive branch, received 391,829 cases and issued 232,212 decisions in 2009.[150] The Supreme Court has held that this is constitutionally permissible as long as the 'essential attributes' of judicial power are retained in Article III courts.[151]

The South Korean Constitution strongly emphasizes judicial independence. Judges 'shall rule independently according to their conscience and in conformity with the Constitution' and laws.[152] The Chief Justice of the Supreme Court is appointed by the President with the consent of the National Assembly, while other Supreme Court justices are appointed by the President on the recommendation of the Chief Justice and with the consent of the National Assembly. Lower court judges are appointed by the Chief Justice with the consent of the Conference of Supreme Court justices.[153] Justices serve fixed terms, and no judge may be removed except by impeachment or on conviction of a serious crime.[154]

An area deserving of additional study is the effect of lodging adjudicative bodies within the executive branch of government. A recent study of state-level administrative courts in Mexico found that states were roughly split in whether they placed administrative courts formally within the executive branch or formally within the judicial branch of government. Those administrative courts that were lodged in the judicial branch were found to rule against the government in a larger percentage of cases.[155] (See further Chapters 39 and 40.)

2. Judicial Review

The term 'judicial review' describes the power of courts to declare legislation or actions of the executive in violation of the constitution. The practice is often considered important to preserving constitutional structure and individual rights, but is also subject to criticism that it is in tension with democratic principles because it allows judges to countermand the will of elected legislators and executive officials.

The practice was established in the United States in the landmark case of *Marbury v Madison*.[156] Chief Justice Marshall, writing for the Court, explained that 'The government of the United States has been emphatically termed a government of laws, and not of men'.[157] And,

[148] See Richard H. Fallon, Jr, Daniel J. Meltzer, and David L. Shapiro (eds), *Hart & Wechsler's The Federal Courts and the Federal System* (6th edn, 2009), 275–83.

[149] *Hayburn's Case* 2 US 409 (1792).

[150] Executive Office for Immigration Review, *FY 2009 Statistical Yearbook* (March 2010), A1, available at <http://www.justice.gov/eoir/statspub/syb2000main.htm>.

[151] *Commodity Futures Trading Comm'n v Schor* 478 US 851 (quoting *Crowell* 285 US 22, 51 (1932)).

[152] Constitution of the Republic of South Korea, Art 103.

[153] Ibid Art 104.

[154] Ibid Arts 105, 106.

[155] See Ana Elena Fierro and Adriana Garcia, *Design Matters: The Case of Mexican Administrative Courts* (2010).

[156] *Marbury v Madison* 5 US 137 (1803).

[157] Ibid 163.

Marshall explained, 'it is emphatically the province and duty of the judicial department to say what the law is'.[158] A key characteristic of judicial review in the United States is that it is 'decentralized', meaning 'the jurisdiction to engage in constitutional interpretation is not limited to a single court'. Rather, 'it can be exercised by many courts, state and federal'.[159] Argentina, Australia, Canada, India, and Japan employ similar, decentralized systems of judicial review. South Africa's constitution, written in the wake of apartheid, significantly increases the power of the judiciary by instantiating a strong principle of judicial review to ensure protection of individual rights.[160] Judicial review extends even further in India, where the Supreme Court 'may review a constitutional amendment and strike it down if it undermines the basic structure of the Constitution.'[161] This is contrary to judicial review in its more ordinary conception, which presumes a constitutional amendment can override an unpopular court ruling.

Many European countries vest the power to review legislation for constitutionality in specialized bodies. This may be referred to as the 'centralized' model of judicial review.[162] (For details, see Chapter 38.)

Not all modern democracies allow judicial review. The United Kingdom continues to operate on the principle of parliamentary supremacy, and its courts lack the power to invalidate legislation on constitutional grounds. Pursuant to the Human Rights Act of 1998, however, British courts now engage in something that looks very much like judicial review when they apply the European Convention on Human Rights. But formally they are only entitled to declare legislation incompatible with the Convention, with the power to change the law still residing in parliament.

In an interesting recent development, the expanding authority of transnational treaties and courts, such as the European Court of Justice, is partially decentralizing the exercise of judicial review in some European countries with centralized systems. The Court's doctrines of 'direct effect' and supremacy of European Union law permit individuals to invoke provisions of international treaties against contrary provisions of national law in ordinary, domestic courts.[163] The willingness of some national courts to refer cases to the European Court of Justice, follow its jurisprudence, and abide by its decisions is leading these domestic courts to assert more judicial review-like functions, sometimes in the face of direct opposition from other branches of national government. A striking example of this occurred in Britain, where '[national] courts overturned the sacrosanct doctrine of parliamentary sovereignty and issued an injunction blocking the effect of a British law pending judicial review at the European level.'[164]

In Israel, the role of judicial review is still evolving. Due to political struggles, Israel's first Knesset (parliament) did not enact a constitution, instead 'instructing that the constitution be composed in piecemeal fashion of individual chapters, each constituting basic law.'[165] Originally, Basic Laws were not considered superior to other legislation, and the Israeli

[158] Ibid 177.

[159] Vicki C. Jackson and Mark Tushnet (eds), *Comparative Constitutional Law* (2nd edn, 2006), 465.

[160] Pius N. Langa, 'The Separation of Powers in the South African Constitution', *Symposium: A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006), 4.

[161] S.P. Sathe, 'Judicial Activism: the Indian Experience' (2001) 6 *Washington University Journal of Law and Policy* 29, 88.

[162] Louis Favoreu, 'Constitutional Review in Europe' in Louis Henkin and Albert J. Rosenthal (eds), *Constitutionalism and Rights: The Influence of the United States on Constitutions Abroad* (1990).

[163] Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, 291–92.

[164] Anne-Marie Slaughter, 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1103, 1105–6.

[165] Shinar (n 139), 147.

Supreme Court 'did not exercise judicial review over primary legislation'. This changed in 1995, when the Supreme Court 'held that the Basic Laws are normatively superior to Knesset legislation' and asserted its authority to strike down legislation that violated rights protected in the Basic Laws.[166] The Court has since taken a very active role in evaluating and invalidating actions of the Knesset as well as the executive, even in cases that involve security measures—an area previously considered beyond the reach of the courts.[167] However, this has generated a significant backlash against the Court. In response to the Court's activism, the legislature and executive are attempting to weaken the Court, particularly its power of judicial review. Moreover, recent public opinion polls evince a substantial decline in public confidence in the Court.[168] Consequently, the future potency of judicial review in Israel remains uncertain.

3. Jurisdiction and Justiciability

Given the overlap and competing ambition of the branches of government, it is of constitutional relevance how the apex courts handle the emerging conflicts in terms of jurisdiction and justiciability, which are only partly carved out by these supreme courts. Because every court in the United States has the power to declare statutes in violation of the Constitution, procedural rules place relatively stringent limits on the types of cases that federal courts can adjudicate. For instance, courts in the United States can only rule on constitutional challenges within the context of concrete cases or controversies. As the Supreme Court explained, the words 'cases and controversies' in Article III of the US Constitution 'define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.'[169] These 'justiciability' doctrines are considered an aspect of separation of powers.

On the other hand, countries with specialized constitutional courts are likely to have more lenient gate-keeping procedures. In a decentralized system like the United States, procedural rules are often a means to avoid deciding major constitutional issues. In centralized systems such as those common to Europe, constitutional courts exist 'for the express purpose of *deciding* constitutional issues, not evading them.'[170] Consequently, the need to restrict access on procedural grounds is substantially less compelling.

(a) Advisory Opinions

Some constitutional systems allow the judiciary to offer advisory opinions about the constitutionality of measures before they have been enforced, or indeed limit such jurisdiction to abstract questions, as is the case with the French Constitutional Council.[171] In France, historically concerned with 'judicial excess that could only be controlled by rigorously protecting the executive and legislative powers of government from any form of judicial control',[172] this type of review may be the only politically palatable form, since *post hoc* judicial nullification conflicts with the long-standing preference for a restrained judiciary. However, the advisory

[166] Ibid 148.

[167] Ibid 150.

[168] Asher Arian et al, *Auditing Israeli Democracy: Democratic Values in Practice* (2010), available at <http://www.idi.org.il/sites/english/SectionArchive/Documents/Auditing_Israeli_Democracy_2010.pdf>.

[169] *Flast v Cohen* 392 US 83, 95 (1968).

[170] Herman Schwartz, 'The New East European Constitutional Courts' (1992) 13 *Michigan Journal of International Law* 741, 752–3.

[171] See Merryman (n 21), 117.

[172] Ibid 110.

process is initiated solely by legislators, leading some to criticize the process for being overtly political—forcing courts into the role of policy makers and consequently violating separation of powers. As Alec Stone Sweet argued,

> abstract review exists only to the extent that politicians seek to alter legislative outcomes, by having their policy choices ratified or the government's and parliamentary majority's choices watered down or vetoed. If politicians ceased to use referrals as political weapons, abstract review would disappear.[173]

Many countries with specialized constitutional courts similarly favor considering constitutional questions in relatively abstract terms, including Germany, Italy, and Spain.

The US federal courts, by contrast, are not allowed to render advisory opinions but can only decide live disputes involving individual claimants who will be affected by the outcome. The issue first arose in the early days of the country, when then-Secretary of State Thomas Jefferson sent the Supreme Court a list of questions related the meaning of various treaties and laws as they related to American neutrality in the war between England and France.[174] The Supreme Court declined to answer, however, explaining that the

> three departments of the government... being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to.[175]

Closely related is the doctrine of 'standing', which the US Supreme Court has said is 'built on a single basic idea—the idea of separation of powers'.[176] Standing doctrine requires, among other things, that the plaintiff have suffered or be in immediate danger of an individual injury that is traceable to the defendant's conduct and that will be redressed by the court's decision.[177] The Court held, for example, that a 'citizen suit' provision of the Endangered Species Act allowing any person to sue for enforcement of the law was unconstitutional because of separation of powers, finding that citizens' desire to see endangered animals living in the wild was insufficient to give them standing to sue.[178]

Because the United States is a federal system, not all state level courts follow the same standing doctrine as federal courts. The Hawaiian Supreme Court, for example, decided to depart from the federal doctrine and allow citizens to have standing to enforce state environmental laws.[179] That court explained that its basic approach was 'that standing requirements should not be barriers to justice'. The court did note that:

> [the] judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context. For 'prudential rules' of self-governance 'founded in concern about the proper and properly limited role of courts in a democratic society' are always of relevant concern.[180]

[173] Alec Stone Sweet, 'Abstract Constitutional Review and Policy Making in Western Europe' in Donald W. Jackson and C. Neal Tate (eds), *Comparative Judicial Review and Public Policy* (1992).

[174] See Chemerinsky (n 114).

[175] Quoted in Fallon, Jr et al (n 148), 52.

[176] *Allen v Wright* 468 US 737, 752 (1984); *Lujan v Defenders of Wildlife* 504 US 555 (1992).

[177] 468 US 737, 758–9.

[178] 504 US 555.

[179] *Citizens for Protection of North Kohala Coastline* 979 P2d 1120 (Hawaii 1999).

[180] *Life of the Land v Land Use Commission of State of Hawaii* 623 P2d 431 (1981).

Even given these constraints, however, the court found it appropriate to allow the various environmental challenges in those cases. Indeed, many state constitutions in the United States have long allowed state courts to render advisory opinions. The Massachusetts state constitution of 1780, for example, stated that 'Each branch of the legislature, as well as the governor... shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.'[181]

Across different constitutional systems, rules of standing vary from extremely restrictive to nearly unconstrained. In India, for example, the rules of standing are exceptionally liberal, to the point that they 'may be said to have ceased to present any real obstacle to the... litigant'.[182]

(b) The Political Question Doctrine

One of the most confusing doctrines in US law is the so-called 'political question doctrine', which rejects certain issues as beyond the institutional competence or proper authority of courts. The doctrine has its origins in *Marbury v Madison*, the very case that established judicial review, in which Chief Justice John Marshall explained that 'Questions, in their nature political, or which are by the constitution and laws, submitted to the executive can never be made in this court.'[183] Courts in the United States, of course, frequently decide highly politicized questions—such as the constitutional right to abortion, or the outcome of the 2000 presidential election. As the Court has explained, 'The doctrine of which we treat is one of "political questions", not one of "political cases".'[184] So when does the doctrine apply? In *Baker v Carr*, the Court provided a not entirely helpful list of circumstances reflecting the separation of powers concerns that underlie the doctrine:

> prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[185]

At the opposite end of the spectrum, German law specifically rejects the notion of a political question doctrine as a bar to litigation. In dismissing the suggestion that such a doctrine exists in Germany, Professor Kommers wrote, 'All questions arising under the Basic Law are amenable to judicial resolution if properly initiated... includ[ing] the highly politicized field of foreign affairs.'[186] Nonetheless, the substantial deference the German judiciary affords the government in cases that concern foreign affairs might be said to result in a similar doctrine in

[181] Massachusetts Constitution, Part II, Chapter III, Art II. See also eg Rhode Island Constitution, Art X, §3 (requiring 'The judges of the supreme court [to] give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly'); see also Jonathan D. Persky, 'Note, "Ghosts that Slay": A Contemporary Look at State Advisory Opinions' (2005) 37 *Connecticut Law Review* 1155.

[182] Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37 *American Journal of Comparative Law* 495, 498–9.

[183] 5 US 137, 163 (1803).

[184] *Baker v Carr* 369 US 186, 217 (1962).

[185] 369 US 186, 217 (1962).

[186] Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989), 163.

practice, if not in theory.[187] As Thomas Franck argued, the doctrine is simply redefined, focusing 'not [on] *whether* but *how* judges decide'.[188] According to this argument, German courts achieve the same result as their US counterparts (generally deferring to the government's discretion in matters concerning foreign affairs and national security), but through different means.

The recent and contentious issue of targeted killings highlights the continued importance of justiciability doctrines. The legality of this technique was challenged in courts in both the United States and Israel. The Israeli Supreme Court, which explicitly rejected the idea that principles of standing or the political nature of the questions presented by a case should deter it from exercising review,[189] heard the case on its merits and decided that the government's ability to engage in targeted killings was constrained by various legal rules.[190] A quite similar case brought in the United States was dismissed on procedural grounds due to the plaintiff's lack of standing[191] and for violating the political question doctrine.[192]

V. Conclusion

One of the complexities of separation of powers jurisprudence is that the abstract distinctions between executive, legislative and judicial powers will very often be blurred in practice. As Richard Bellamy explains:

> When judges, for example, adjudicate on which rules do or do not apply in particular cases, they also often end up setting precedents that in effect constituted new rules. Similarly, officials frequently have to create rules in the course of implementing a given law that in turn come to take on a life of their own. Legislators, too, are inevitably concerned with how the laws they frame will be interpreted and applied to specific cases. Thus, each branch of government will find itself engaged in all three activities to one degree or another.[193]

As this chapter has shown, modern democracies employ a wide range of strategies to achieve the checks and balances that separation of powers is designed to foster. Measures that some countries deem essential to separation of powers are totally ignored by other countries, which rely on different structures or doctrines to achieve the same basic goals. As in so many areas of comparative constitutional law, there seems to be more than one effective way to do things.

Bibliography

Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 664

Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (2005)

Steven G. Calabresi, 'The Virtues of Presidential Government' (2001) 18 *Constitutional Commentary* 51

[187] See generally Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law apply to Foreign Affairs?* (1992).

[188] Ibid.

[189] Shinar (n 139), 149 (citing *Resler v Minister of Defense*, HCJ 910/86, Isr SC 42(2) 441, 462 (1986)).

[190] See *The Public Committee against Torture in Israel v The Government of Israel*, HCJ 769/02 (2005).

[191] *Al-Aulaqi v Obama* 2010 US Dist LEXIS 129601, 86 (DDC Dec 7, 2010).

[192] Ibid 121.

[193] Bellamy (n 4), 253, 256.

Gerald M. Easter, 'Preference for Presidentialism: Postcommunist Regime Change in Russia and the NIS' (1997) 49 *World Politics* 184

Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law apply to Foreign Affairs?* (1992)

Juan J. Linz and Arturo Valenzuela (eds), *The Failure of Presidential Democracy* (1994)

Scot Mainwaring, 'Presidentialism in Latin America' (1990) 25 *Latin American Research Review* 157

Jenny Martinez, 'Inherent Executive Power: A Comparative Perspective' (2006) 115 *Yale Law Journal* 2480

John Henry Merryman, 'The French Deviation' (1996) 44 *American Journal of Comparative Law* 111

Montesquieu, *The Spirit of Laws* (1750)

Adam Shinar, 'Constitutions in Crisis' (2008) 20 *Florida Journal of International Law* 116

Cindy Skach, 'The "Newest" Separation of Powers: Semipresidentialism' (2007) 5 *International Journal of Constitutional Law* 93

M.J.C. Vile, *Constitutionalism and the Separation of Powers* (2nd edn, 1998)