

Court,¹⁸ or the Court's procedures and customs.¹⁹ *Storm Center* offers the alternative of a readable, reliable, up-to-date, general book on the High Court. College and law school professors take note.

I regret the necessity of adding one unpleasant fact: the binding of my hardcover copy was exceedingly flimsy. *Caveat emptor.*

SEPARATION OF POWERS—DOES IT STILL WORK?

Edited by Robert A. Goldwin¹ and Art Kaufman.² Washington, D.C.: American Enterprise Institute for Policy Research. 1986. Pp. xi, 193. Cloth, \$21.50; paper, \$11.00.

*Frank J. Sorauf*³

I confess that I would have abandoned this volume somewhere in midstream had I not committed myself to review it. As it turned out, that would have been a mistake. I would have missed the final essay, a gem by James Ceaser, which rebuts much of the formalism and reformism of the previous essays.

The problems begin with the title. Most of the eight essays in the book do not really answer the question it poses: does the separation of powers still work? Rather, we have here a poorly joined debate about whether the American political system suffers from deadlock and whether, since the deadlock results from the separation of powers, constitutional changes are necessary. It is an argument that has been floating around for some time but that has been given a new immediacy and audience—or funding—by the Bicentennial. The real subject is perceived policy-making deadlock and political fragmentation in American government. A systematic analysis of the separation of powers in contemporary American policymaking is nowhere in sight.

By now the protagonists are familiar. Lloyd N. Cutler, Washington lawyer and member of the Carter administration, opens the volume with an adaptation of an academic lecture that had appeared in *Foreign Affairs* in 1980. Noting the difficulty of assembling congressional majorities behind coherent programs (which, it

18. E. WITT, *A DIFFERENT JUSTICE: REAGAN AND THE SUPREME COURT* (1986).

19. J. SCHMIDHAUSER, *JUDGES AND JUSTICES* (1979).

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turns out, are programs of the president), he argues that the opponents of presidential programs

would probably be unable to get together on any overall program of their own or to obtain the congressional votes to carry it out. As a result the stalemate continues, and because we do not form a government, we have no overall program at all. We cannot fairly hold the president accountable for the success or failure of his program, because he lacks the constitutional power to put that program into effect.

In short, we do not have a parliamentary system. We have instead something called separation of powers, and it must, therefore, be deficient, if only because it precludes the institutions that permit strong action behind coherent policies.

Two other protagonists—Donald Robinson and Charles Hardin—join Cutler with essays of their own. Their nouns may differ (“impotence” rather than deadlock, for instance) and their examples may differ, but the argument is essentially the same. Robinson writes of the failure of the Congress:

The creaking operation of the budget process shows that Congress has come about as far as it can come. It can never again assume leadership of the American government. Modern conditions forbid it. Political opposition or plain incompetence may cause the president to slip from the driver's seat, but 535 members of Congress cannot take his place.

For his part, Hardin pitches quickly into the solutions.

Simpler remedies, such as the single six-year term for presidents, will not do. I suggest a change that consciously replaces the separation of powers between the president and the Congress with a separation between the government and the opposition. . . . The presidential loser would be given a seat in the House of Representatives, there to become the leader of the opposition. If they became disenchanted with their losing candidate, the members of the opposition party might remove him; but (as in the Bonn constitution) they would be required to replace him. With this one move the people . . . would, in their palpable experience as the electorate, create both the government and the opposition.

Robinson's remedies, though somewhat different, are no less draconian; they involve a unicameral Congress, the calling of new elections by a two-thirds vote of the Congress, appointment of members of Congress to administrative offices, a council of notables to choose a chief of state. Cutler is more tentative, often hedging his recommendations with the conditional “could,” but they are in the same spirit of reconstructing American government in some variant of British parliamentary institutions.

The remaining five essays are a very diverse lot. The ultimate test of a collection like this is coherence; on a scale of ten, this volume merits only a two or a three. William Gwyn provides a learned and thoughtful survey of institutional arrangements in democracies, the gist of which is that the distinction between systems with and

without a separation of powers is not as clear as we assume; one can find separation in parliamentary systems. Ann Stuart Anderson and L. Peter Schultz provide essays on the separation that seem to be heavily influenced by the analytical style of Leo Strauss and his students at the University of Chicago. They reflect the deductive methods and the emphasis on textual meaning and original intention that marks the Straussian constitutional analysis. This is how Anderson writes about “checks” in the separation:

They are intended first to maintain the separation of the elected branches of the government and second to enable the executive, by means of his constitutional powers, to moderate the law-making process to produce more sound and decent legislation. Ultimately, checks are to *prevent* deadlock. The political branches—legislative and executive—are given the constitutional means to resist encroachments so that, once these means are exhausted, governing will and can go on. If there were no constitutionally legitimate means of self-defense, the elected branches would be likely to resort to nonconstitutional means at such times, which would destroy the Constitution and with it our form of government.

This kind of argument does not move me. Those readers more sympathetic to it than I am will, I imagine, find the Anderson and Schultz essays useful.

The remaining essays are by Ceaser and James Q. Wilson. To them falls the task of rebutting what Ceaser calls the “zero-based constitution makers.” Wilson’s piece meets the issue obliquely, focusing on the relationship between political parties and the separation. He cogently rebuts the reformers of a generation ago—those who wanted to transcend the divisions and deadlock of the separation with disciplined parties capable of governing. He exposes the inadequacies of that school, with clearheaded analysis and a sophisticated grasp of congressional politics.

It is Ceaser who responds most directly to the current generation of constitutional Anglophiles. His essay is a compelling mix of passion, scorn, wit, and insight. A few examples will suffice. On the reformers:

Self-proclaimed “children of the Enlightenment,” they judge political life not from the somber perspective of what can go wrong but from the sunny perspective of what can be improved.

On the importance of specific institutional arrangements:

... one of the most striking facts about liberal democracies is the diversity of their institutional forms. This diversity should make it clear that in discussing the differences among the mechanical systems of liberal democracies, we are not dealing with a first-order question.

On the relativity of policymaking under the American constitution:

For the almost 200 years during which the government has operated under the

Constitution, there have been a number of policy-making systems, ranging from the dominant congressional model of the nineteenth century to the strong presidential model of most of the postwar period.

But Ceaser offers more than criticism and counterargument. He explains, far better than the reformers, the sources of the political deadlock and fragmentation that they seek to cure. The problem is not the separation, he argues, but a combination of a new populism, resurgent legislative power, judicial activism, and the politics of entitlements.

Space does not permit a full summary of Ceaser's argument. But one more point seems so central to the whole issue that it begs for mention.

Modern political science has extended the study of regimes beyond their formal mechanisms to such other factors as informal structures (for example, parties and interest groups), social structure (for example, class and ethnic composition), and political culture (for example, animating principles and attitudes about the political world). It is to these other factors, no less than to the formal mechanisms, that we must look to understand how any system works.

This is the kind of analysis that is missing in the Cutler-Robinson-Hardin argument. Without such an analysis, one cannot understand the differences between the policy-making politics of the 1880s and those of the 1980s.

In our time the policy-making institutions of American government have been profoundly affected by a whole raft of changes in the American electorate and American politics. One need only mention the explosion of groups and their lobbying, the decline of political parties, the spread of the participatory ethos, the greater importance of issues and ideology, the advent of a media-based plebiscitary democracy, the transformation of campaigning and campaign finance, and the introduction of new issues (equality, lifestyle, and the environment, for instance) onto the political agenda. Needless to say, policymaking in the Congress and the executive branch isn't what it used to be.

All of this, of course, presumes that there really is a problem in the first place. As Ceaser points out, the charge of deadlock often masks disappointment about specific political events. Those who do not share a critic's agenda may feel quite differently about the "deadlock." The deadlock thesis also reflects a preference for coherent, systematic, and positive government action rather than the messy compromises and half-measures that mark much of American policymaking—a preference for the ability, as Cutler puts it, "to formulate and carry out an overall program." Plainly, there are political choices here that merge with the lofty constitutional questions.

There are still many Americans who think that disorderly compromises and incremental changes are not all bad. Policy that responds, however incoherently and eccentrically, to the welter of groups and interests in our society may be preferable to coherent programs that, as Mrs. Thatcher has demonstrated, can be extremely divisive. In addition, some of us still think that the checks on executive power in the American separation may not be all that bad either. The Iran-Contra episode was only the last of many proofs over the past 25 years that American presidents can commit serious sins of both omission and commission. If we have learned anything we *must* have learned that.

Those things said, however, a mindless complacency about the performance of the policy-making institutions is no more defensible than the wool-gathering of the reformers. Robinson's prime example—the inability to address the budget deficit effectively—is one that most of us would fully concede. But a solution, or at least a positive course of action, would exist if President Reagan would compromise on cutting defense spending and/or raising taxes. Despite the separation of powers and the different partisan control of the two branches, a little old-fashioned compromise and leadership would do the job. Behind the President's intransigence, of course, stands an electorate that is unenthusiastic about sacrifice, not greatly concerned about the deficit, and not at all censorious toward a president who won't provide leadership on such matters. The American political system is enormously responsive, and by and large we get the policies we want and deserve. No constitutional change or revision will save us from ourselves.

Perhaps a broader range of intellectual styles and points of view would have improved this collection. There is a certain clubbiness evident in the project. Of the ten persons involved in it (two editors and eight authors), at least five had or have organizational ties to the American Enterprise Institute. Moreover, a significant number of them have had ties of one sort or another to Chicago-style political science. It is a kind of political science very much in vogue in Reagan's Washington, but it remains a relatively minor current in academe. I mention the point because the selection of participants shapes both the definition of the problem and some of the approaches to it. More specifically, the AEI and Chicago links appear to explain the shortage of essays by informed scholars of contemporary national policymaking.

At the risk of sounding like a hopeless Scrooge, let me also record my doubts about the wisdom of participation by funding agencies in scholarly projects. This book was funded in part by the

National Endowment for the Humanities. One of the eight essayists, L. Peter Schultz, is described as "working for the National Endowment for the Humanities." The Endowment, its staff, and its grantees (and their editors) should, I think, be more careful to observe the proprieties and to avoid the appearance of backscratching in matters such as this.

In short, this volume offers less than it should. It has its strengths—the essays of Ceaser, Gwyn, and Wilson—but it all adds up to less than the sum of the parts. The best advice I could give a reader interested in the kind of institutional reform propounded here would be to take a look at James Sundquist's *Constitutional Reform and Effective Government*, published in 1986 by the Brookings Institution. It, too, suffers from some degree of institutional formalism and a neglect of extrainstitutional political processes, but it is far more knowing about the realities of policymaking and institutional life. In the battle of the Washington think tanks, score this round for Brookings.

THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT. By Charles Whalen¹ and Barbara Whalen.² Cabin John, Md.: Seven Locks Press. 1985. Pp. xx, 289. \$16.95.

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For years lawyers and historians have needed a good history of the Civil Rights Act of 1964, which is probably the most important civil rights statute ever enacted by Congress. Scholars have chronicled the enactment of the less significant Civil Rights Acts of 1957,⁴ 1960,⁵ and 1968,⁶ and the Voting Rights Act of 1965.⁷ But the gi-

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4. See J. ANDERSON, EISENHOWER, BROWNELL AND THE CONGRESS (1964); R. BURK, THE EISENHOWER ADMINISTRATION AND BLACK CIVIL RIGHTS 204-26 (1984); S. LAWSON, BLACK BALLOTS 140-202 (1976).

5. See M. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER 53-69 (1987); D. BERMAN, A BILL BECOMES A LAW (2d ed. 1966); S. LAWSON, *supra* note 4, at 220-49.

6. See M. BELKNAP, *supra* note 5, at 205-28; J. HARVIE, BLACK CIVIL RIGHTS DURING THE JOHNSON ADMINISTRATION 36-57 (1973); S. LAWSON, IN PURSUIT OF POWER 43-88 (1985).

7. See D. GARROW, PROTEST AT SELMA 31-132 (1978); S. LAWSON, *supra* note 4, at 307-25.